NORTH CAROLINA REPORTS

VOLUME 203

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NORTH CAROLINA REPORTS
VOL. 203

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1932
FALL TERM, 1932

REPORTED BY
ROBERT C. STRONG

RALEIGH
BYNUM PRINTING COMPANY
STATE PRINTERS
1933

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Rule 46 of the Supreme Court is as follows:

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

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5 " "	"	40	"
6 " "	"	41	"
7 " "	"	42	"
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Busbee Law	"	44	"
" Eq.	"	45	"
1 Jones Law	"	46	"
2 " "	"	47	"
3 " "	"	48	"
4 " "	"	49	"
5 " "	"	50	"
6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
1 " Eq.	"	54	"
2 " "	"	55	"
3 " "	"	56	"
4 " "	"	57	"
5 " "	"	58	"
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Phillips Law	"	61	"
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The opinions published in the first six volumes of the reports were written by the "Court of Conference" and the Supreme Court prior to 1819.

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

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1932.
FALL 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:

ROBERT C. STRONG.

CLERK OF THE SUPREME COURT:

EDWARD MURRAY.

LIBRARIAN:

JOHN A. LIVINGSTONE.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

Name	*District*	*Address*
WALTER L. SMALL	First	Elizabeth City.
M. V. BARNHILL	Second	Rocky Mount.
G. E. MIDYETTE	Third	Jackson.
F. A. DANIELS	Fourth	Goldsboro.
J. PAUL FRIZZELLE	Fifth	Snow Hill.
HENRY A. GRADY	Sixth	Clinton.
W. C. HARRIS	Seventh	Raleigh.
E. H. CRANMER	Eighth	Southport.
N. A. SINCLAIR	Ninth	Fayetteville.
W. A. DEVIN	Tenth	Oxford.

SPECIAL JUDGES

CLAYTON MOORE	Williamston.
G. V. COWPER	Kinston.

WESTERN DIVISION

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

SPECIAL JUDGE

FRANK S. HILL	Murphy.

EMERGENCY JUDGE

THOS. J. SHAW	Greensboro.

*Deceased. Succeeded by Felix E. Alley, Sr., Waynesville, January 28, 1933.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
HERBERT R. LEARY	First	Edenton.
DONNELL GILLIAM	Second	Tarboro.
R. H. PARKER	Third	Henderson.
CLAWSON L. WILLIAMS	Fourth	Sanford.
D. M. CLARK	Fifth	Greenville.
JAMES A. POWERS	Sixth	Kinston.
J. C. LITTLE	Seventh	Raleigh.
WOODUS KELLUM	Eighth	Wilmington.
T. A. MCNEILL	Ninth	Lumberton.
W. B. UMSTEAD*	Tenth	Durham.

WESTERN DIVISION

CARLYLE HIGGINS	Eleventh	Sparta.
H. L. KOONTZ	Twelfth	Greensboro.
F. D. PHILLIPS	Thirteenth	Rockingham.
JOHN G. CARPENTER	Fourteenth	Gastonia.
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J. W. PLESS, JR.	Eighteenth	Marion.
Z. V. NETTLES	Nineteenth	Asheville.
JOHN M. QUEEN	Twentieth	Waynesville.

*Resigned. Succeeded by Leo Carr, Burlington, February 15, 1933.

LICENSED ATTORNEYS

FALL TERM, 1932.

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

ADAMS, FRANKLIN LEVERNE.....Rowland.
ADAMS, WILLIAM JACKSON, JR.....Carthage.
ALLEN, ARCH TURNER, JR.....Raleigh.
ALLISON, ANDREW VANGROL.....Statesville.
ALLSBROOK, WILLIAM BERNARD.....Scotland Neck.
ARBUCKLE, HOWARD BELL, JR.....Davidson.
BAILEY, KINCHEN TURNER.....Kenly.
BEST, WILLIAM HINTON, JR.....Goldsboro.
BLANKENSHIP, MERCER JEFFERSON.....Charlotte.
BOLIEK, LEO ERNEST.....Hickory.
BOST, EUGENE THOMPSON, JR.....Concord.
BOSWELL, CASWELL ANDERSON.....Wilson.
BULLUCK, ELMORE CARSON.....Rocky Mount.
BUTLER, EDWIN ELLIOTTE.....Clinton.
CAMERON, (MISS) JOHNSIE GLENN.....Rockingham.
CAMPBELL, FRANK BAINBRIDGE.....Chapel Hill.
CANNON, JOSEPH ARCHIBALD, JR.....Concord.
CARR, FREDERICK LOUIS, JR.....Wilson.
CARRUTHERS, JOSEPH TINNIE, JR.....Greensboro.
CHAMBERLAIN, RICHARD MITCHELL.....Winston-Salem.
COLE, ARTHUR VANCE.....Durham.
CRUSE, BERNARD WILLIAM.....Kannapolis.
DARDEN, WILBUR MATTINGLY.....Plymouth.
DODGE, JAMES PHILANDER.....Raleigh.
DOUGLASS, JOSEPH CAMPBELL.....Raleigh.
EASON, HUBERT.....Gatesville.
FARMER, WILLIAM IVEY.....Raleigh.
FARRIS, RAY SIMPSON.....Charlotte.
FEIMSTER, MARSHALL YOUNT.....Newton.
FINCH, FOSTER DAVIS.....Zebulon.
FLOYD, FRANCIS WAYLAND.....Fairmont.
FLYTHE, ARTHUR PRESTON.....Jackson.
GAMBILL, SIDNEY BRANSCOME.....Crumpler.
GAMBILL, ZEB VANCE.....West Jefferson.
GRAHAM, ROBERT LEE, JR.....Charlotte.
GREEN, WILLIAM OLIVE.....Wilmington.
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HEAFNER, BRUCE FRANKLIN.....Crouse.
HEGE, (MISS) RUTH.....Winston-Salem.
HILL, THOMAS FULLER.....Durham.
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HOVIS, ROBERT ALEXANDER.....Charlotte.
HOWLAND, WILLIAM FRANKLIN, JR.....Henderson.
HUNTLEY, LESLIE JOHN, JR.....Wadesboro.
HUSKINS, JOHN FRANK.....Barnsville.
JENKINS, DOUGLAS CARLTON.....Mullins, S. C.
JOHNSON, WILLIAM WESLEY.....Varina.
JOHNSTON, WALTER EUGENE, JR.....Winston-Salem.

KIRKPATRICK, THOMAS LEROY, JR.....Charlotte.
KNIGHT, ALTON JEROME.....Durham.
LANGSTON, WILLIAM DORTCH.....Goldsboro.
LASSITER, WILLIAM CARROLL.....Smithfield.
LITTLE, JAMES MILLARD, JR.....Winston-Salem.
LLEWELLYN, ROBERT JAMES.....Stoneville.
LYON, HOMER LEGRAND, JR.....Whiteville.
MCCLUER, FRANK WILSON, JR.....Aberdeen.
MCCLURE, RALPH STROH.....Charlotte.
MCCONNELL, JOSEPH HOWARD.....Davidson.
MCCOTTER, DEWITT CLINTON, JR.....New Bern.
MASON, JOHN LOFTON.....Brasstown.
MAY, HUBERT ELWOOD.....Castalia.
MEDFORD, WILLIAM CLINTON.....Rainbow Springs.
MERRELL, HERMAN STROUPE.....Fairview.
METZ, JUNIUS DAVIS.....Chapel Hill.
OWEN, JOHN FLETCHER.....Raleigh.
PARKER, WILLIAM CAREY.....Raleigh.
PATE, CECIL PEARCE.....Charlotte.
PEARCE, FRED DAY.....Wake Forest.
PHILLIPS, ATHEL PAUL.....Oval.
RAMSEY, MACK ENGLISH.....Marshall.
RANDOLPH, ERNEST ANDREW.....Raleigh.
RAY, HORACE TRUMAN.....Faison.
REYNOLDS, RUFUS WILEY.....Hemp.
RHODES, WILLIAM KENDRICK, JR.....Wilmington.
RIDDLE, EUGENE NEESE.....Roper.
RISNER, EMZY EATON.....Southern Pines.
ROBBINS, HENRY HAYWOOD, JR.....Durham.
SEMBOWER, JOHN HENRY.....Charlotte.
SHERROD, WILLIAM JERRY.....Greensboro.
SIMON, WILLIAM ALEXANDER, JR.....Wilmington.
SKARREN, CHARLES LAMBERT, JR.....Beaufort.
SNIPES, ROBERT GLENN.....Asheville.
SPRUILL, FRANK PARKER, JR.....Rocky Mount.
STONE, WILLIAM FRANCIS.....Stoneville.
STRANGE, WILLIAM CLATTIS.....Henderson.
STUBBS, ALLSTON JULIUS.....Durham.
STUHL, GEORGE ZACHARIAH.....Durham.
SWANN, EDGAR LOCKE.....Weaverville.
TAYLOR, JONAH COLLINS.....Louisburg.
THORNTON, THOMAS SPRUILL.....Durham.
WALTERS, JOHN DANIEL.....Oxford.
WEBB, JAMES ELSIE.....Ellerbe.
WHEDBEE, CHARLES HARRY.....Greenville.
WILLOUGHBY, JOHN HENRY.....Ahoskie.
WINSTEAD, SAMUEL GARLAND.....Roxboro.
WOODSON, HORATIO NELSON.....Salisbury.
YARBOROUGH, WILLIAM HENRY, JR.....Louisburg.
YOUNG, MRS. HAZEL FETNER.....Dunn.

COMITY APPLICANTS.

LEE, LAURENCE FREDRICK.....New Mexico.
WHALEY, RUTH WHITEHEAD.....New York.

SUPERIOR COURTS, SPRING TERM, 1933

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

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

Spring Term, 1933—Judge Barnhill.

Pasquotank—Jan. 9†; Feb. 13†; Feb. 20* (A); Mar. 20†; May 8† (A) (2); June 5*; June 12† (2).

Beaufort—Jan. 16*; Feb. 20† (2); April 3†; May 8†; May 15*.

Currituck—Mar. 6; May 1†.

Camden—Mar. 13.

Gates—Mar. 27.

Chowan—April 10.

Perquimans—April 17.

Tyrrell—April 24.

Hyde—May 22.

Dare—May 29.

SECOND JUDICIAL DISTRICT

Spring Term, 1933—Judge Parker.

Washington—Jan. 9 (2); April 17†.

Edgecombe—Jan. 23; Mar. 6; April 3† (2); June 5 (2).

Nash—Jan. 30; Feb. 20† (2); Mar. 13; April 24† (2); May 29.

Wilson—Feb. 6*; Feb. 13†; May 15*; May 22†; June 26†.

Martin—Mar. 20 (2); April 17† (A) (2); June 19.

THIRD JUDICIAL DISTRICT

Spring Term, 1933—Judge Daniels.

Vance—Jan. 9*; Mar. 6*; Mar. 13†; June 19*; June 26†.

Warren—Jan. 16 (2); May 22 (2).

Halifax—Jan. 30 (2); Mar. 20† (2); May 1*; June 5; June 12†.

Bertie—Feb. 13; May 8 (2).

Hertford—Feb. 27*; April 17‡ (2).

Northampton—April 3 (2).

FOURTH JUDICIAL DISTRICT

Spring Term, 1933—Judge Frizzelle.

Harnett—Jan. 9*; Feb. 6† (2); April 3† (A) (2); May 8†; May 22*; June 12† (2).

Chatham—Jan. 16; Mar. 6†; Mar. 20†; May 15.

Wayne—Jan. 23; Jan. 30†; Mar. 6† (A) (2); April 10; April 17†; May 29; June 5†.

Lee—Jan. 30† (A) (2); Mar. 27 (2).

Johnston—Feb. 20† (2); Mar. 6* (A); Mar. 13; April 24† (2); June 26*.

FIFTH JUDICIAL DISTRICT

Spring Term, 1933—Judge Grady.

Craven—Jan. 9*; Jan. 30† (3); April 10‡; May 15†; June 5*.

Pitt—Jan. 16†; Jan. 23; Feb. 20†; Mar. 20 (2); April 17 (2); May 8 (A); May 22† (2).

Greene—Feb. 27 (2); June 26.

Carteret—Mar. 13; June 12 (2).

Jones—April 3.

Pamlico—May 1 (2).

SIXTH JUDICIAL DISTRICT

Spring Term, 1933—Judge Harris.

Duplin—Jan. 9† (2) Jan. 30*; Mar. 27† (2); May 29; June 5†.

Lenoir—Jan. 23*; Feb. 20† (2); April 10; May 15† (2); June 12† (2); June 26*.

Sampson—Feb. 6 (2); Mar. 13† (2); May 1 (2).

Onslow—Mar. 6; April 17† (2).

SEVENTH JUDICIAL DISTRICT

Spring Term, 1933—Judge Cranmer.

Wake — Jan. 9*; Jan. 30†; Feb. 6*; Feb. 13†; Mar. 6*; Mar. 13† (2); Mar. 27† (2); April 10*; April 17† (2); May 1†; May 8*; May 22† (2); June 5*; June 12† (2).

Franklin—Jan. 16 (2); Feb. 20† (2); May 15.

EIGHTH JUDICIAL DISTRICT

Spring Term, 1933—Judge Sinclair.

Brunswick — Jan. 9†; April 10; June 19†.

New Hanover—Jan. 16*; Feb. 6† (2); Mar. 6† (2); Mar. 20*; April 17† (2); May 15*; May 29† (2); June 12*.

Pender—Jan. 23; Mar. 27† (2); May 22.

Columbus—Jan. 30; Feb. 20† (2); May 1 (2); June 26*.

NINTH JUDICIAL DISTRICT

Spring Term, 1933—Judge Devin.

Bladen—Jan. 9; Mar. 13*; May 1†.

Cumberland—Jan. 16*; Feb. 13† (2); Mar. 6* (A); Mar. 27† (2); May 8† (2); June 5*.

Hoke—Jan. 23; April 24.

Robeson—Jan. 30* (2); Feb. 27† (2); April 10†; April 17*; May 22† (2); June 12†; June 19*.

TENTH JUDICIAL DISTRICT

Spring Term, 1933—Judge Small.

Durham—Jan. 9† (3); Feb. 20*; Feb. 27† (A); Mar. 6† (2); Mar. 20† (A); Mar. 27*; April 24† (A); May 1† (2); May 22*; May 29† (A) (3); June 26*.

Person—Jan. 23 (A); Jan. 30†; April 24.

Alamance—Jan. 30† (A); Feb. 27*; April 3†; May 15* (A); May 29† (2).

Granville—Feb. 6 (2); Apr. 10 (2).

Orange—Mar. 20; May 15†; June 12; June 19.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Spring Term, 1933—Judge Sink.

Forsyth—Jan. 9 (2); Feb. 13† (2); Feb. 27 (A) (2); Mar. 13† (2); Mar. 27*; May 22* (2); June 5† (2); June 26† (A).

Surry—Jan. 16† (A) (2); Feb. 6; Feb. 13 (A); Mar. 20† (A) (2); April 24 (2); June 26† (A) (2).

Rockingham—Jan. 23*; Feb. 27† (2); May 15; June 19† (2).

Caswell—April 3; May 8† (A).

Ashe—April 10 (2).

Alleghany—May 8.

TWELFTH JUDICIAL DISTRICT

Spring Term, 1933—Judge Stack.

Guilford—Jan. 9† (2); Jan. 23*; Feb. 6† (2); Feb. 20† (A) (2); Mar. 6* (2); Mar. 20† (2); April 3† (A) (2); April 17† (2); May 1*; May 15† (2); June 5† (2); June 19*.

Davidson — Jan. 30*; Feb. 20† (2); April 3† (A) (2); May 8*; May 29†; June 26*.

Stokes—April 3*; April 10†.

THIRTEENTH JUDICIAL DISTRICT

Spring Term, 1933—Judge Harding.

Richmond—Jan. 9*; Feb. 6† (A); Mar. 20†; April 10*; May 29† (A); June 19†.

Anson—Jan. 16*; Mar. 6†; April 17 (2); June 12.

Moore—Jan. 23*; Feb. 13†; Mar. 27† (A) (2); May 22*; May 29†.

Union—Jan. 30; Feb. 20† (2); Mar. 27†; May 8†.

Stanly—Feb. 6†; April 3; May 15†.

Scotland—Mar. 13†; May 1; June 5.

FOURTEENTH JUDICIAL DISTRICT

Spring Term, 1933—Judge Oglesby.

Mecklenburg—Jan. 9*; Feb. 6† (3); Feb. 27*; Mar. 6† (2); April 3† (2); May 1† (2); May 15*; May 22† (2); June 12*; June 19†.

Gaston—Jan. 16*; Jan. 23† (2); Mar. 13* (A); Mar. 20† (2); April 24*; May 22† (A) (2); June 5*.

FIFTEENTH JUDICIAL DISTRICT

Spring Term, 1933—Judge Warlick.

Cabarrus—Jan. 9 (2); Feb. 27†; April 24 (2).

Montgomery—Jan. 23*; April 10† (2).

Iredell—Jan. 30 (2); Mar. 13†; May 22 (2).

Rowan—Feb. 13 (2); Mar. 6†; May 8 (2).

Randolph—Mar. 20† (2); April 3*.

SIXTEENTH JUDICIAL DISTRICT

Spring Term, 1933—Judge Finley.

Cleveland—Jan. 9; Mar. 27 (2).

Catawba—Jan. 16† (2); Feb. 6 (2); May 8† (2).

Lincoln—Jan. 23 (A); Jan. 30†.

Burke—Feb. 20; Mar. 13† (2); June 5 (3).

Caldwell—Feb. 27 (2); May 22† (2).

Watauga—April 10 (2).

SEVENTEENTH JUDICIAL DISTRICT

Spring Term, 1933—Judge Schenck.

Alexander—Feb. 20.

Yadkin—Feb. 27*; May 15† (2).

Wilkes—Mar. 6 (2); June 5† (2).

Davie—Mar. 20; May 22† (A).

Mitchell—April 10 (2).

Avery—April 24*; May 1†.

EIGHTEENTH JUDICIAL DISTRICT

Spring Term, 1933—Judge McElroy.

McDowell—Jan. 9*; Feb. 20† (2); June 12 (3).

Henderson—Jan. 16 (2); Mar. 6 (2); May 1† (2); May 29† (2).

Yancey—Jan. 30†; Mar. 20 (2).

Rutherford—Feb. 6† (2); May 15 (2).

Transylvania—April 3 (2).

Polk—April 17 (2).

NINETEENTH JUDICIAL DISTRICT

Spring Term, 1933—Judge Alley.

Buncombe—Jan. 9† (2); Jan. 23; Jan. 30; Feb. 6† (2); Feb. 20; Mar. 6† (2); Mar. 20; April 3† (2); April 17; May 1† (2); May 15; May 29; June 5† (2); June 19 (2).

Madison—Feb. 27; Mar. 27; April 24; May 22.

TWENTIETH JUDICIAL DISTRICT

Spring Term, 1933—Judge Clement.

Graham—Jan. 3† (A) (2); Mar. 20 (2); June 5† (2).

Haywood—Jan. 9† (2); Feb. 6 (2); May 8† (2).

Cherokee—Jan. 23† (2); April 3 (2); June 19† (2).

Jackson—Feb. 20 (2); May 22† (2).

Swain—Mar. 6 (2).

Macon—April 17 (2).

Clay—May 1; May 8 (A).

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*Criminal cases.
†Civil cases.
‡Jail and civil cases.
(A) Emergency Judge to be assigned.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

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

EASTERN DISTRICT

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

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

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

Fayetteville, third Monday in March and September. ELSIE CAMERON THOMPSON, Deputy Clerk.

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

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

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

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

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

OFFICERS

W. H. FISHER, United States District Attorney, Wilmington.
B. H. CRUMPLER, Assistant United States District Attorney, Clinton.
E. C. GEDDIE, United States Marshal, Raleigh.
S. A. ASHE, Clerk United States District Court, Raleigh.

MIDDLE DISTRICT

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

Greensboro, first Monday in June and December. R. L. BLAYLOCK, Clerk; MYRTLE COBB, Chief Deputy; DELLA BUTT, Deputy; CORA SHAW, Deputy.

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

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

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

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

OFFICERS

E. L. GAVIN, United States District Attorney, Greensboro.
T. C. CARTER, Assistant United States Attorney, Greensboro.
A. E. TILLEY, Assistant United States Attorney, Greensboro.
G. H. MORTON, Assistant United States Attorney, Greensboro.
J. J. JENKINS, United States Marshal, Greensboro.
R. L. BLAYLOCK, Clerk United States District Court, Greensboro.

WESTERN DISTRICT

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

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

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

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

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

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

OFFICERS

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

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1932

BERRY-FORTUNE CONSTRUCTION COMPANY v. F. P. BACON.

(Filed 15 June, 1932.)

Contracts F c—Where plaintiff fails to establish contract sued on a nonsuit is proper.

Where the plaintiff seeks to recover on a contract alleged to have been executed between a third party and the defendant for the plaintiff's benefit, but the evidence fails to establish the alleged contract, a motion as of nonsuit is properly granted, and in this case it would seem that the defendant's plea of *res judicata* on the ground that the matter had been determined in an action brought in another state is also well founded.

APPEAL by plaintiff from *Sink, J.*, at September-October Term, 1931, of POLK.

Civil action to recover on contract between defendant and the Tryon Development Company, alleged to have been made for the benefit of the plaintiff.

On 21 April, 1926, the plaintiff entered into a contract with the Tryon Development Company to rebuild a large dam at Lake Lanier. It is alleged that the defendant agreed with the Tryon Development Company to furnish it "an amount sufficient to construct the dam at Lake Lanier." The balance due the plaintiff on its contract at the time of the completion of the work was $26,096.09. A mechanic's lien was filed by plaintiff and $17,311.19 realized therefrom, leaving a balance as of 15 August, 1927, of $8,784.90 due and unpaid.

In October, 1927, the plaintiff instituted a suit against the defendant in Spartanburg County, S. C., to recover this unpaid balance, alleging an original promise on the part of the defendant to pay the same. This action terminated in favor of the defendant.

The plaintiff now brings the present suit alleging that the contract between defendant and the Tryon Development Company to furnish the latter "an amount sufficient to construct the dam at Lake Lanier" was made for its benefit, and that plaintiff is entitled to recover thereon.

The defendant pleads *res judicata* and the statute of frauds.

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

Self, Bagby, Aiken & Patrick for plaintiff.

Massenburg & McCown, J. Hertz Brown and Shipman & Arledge for defendant.

STACY, C. J. Plaintiff seeks to enforce a derivative right, but its evidence falls short of proving the basic contract as alleged between defendant and the Tryon Development Company. *Gorreil v. Water Co.*, 124 N. C., 328, 32 S. E., 720; 6 R. C. L., 886. For this reason, the judgment of nonsuit is correct.

But going further, it would seem that the defendant's plea of *res judicata* is also well founded. *Distributing Co. v. Carraway*, 196 N. C., 58, 144 S. E., 535.

Affirmed.

LON POWERS v. CITY OF ASHEVILLE ET AL.

(Filed 15 June, 1932.)

1. Municipal Corporations D a—Plaintiff failed to show clear legal right to reinstatement on police force, and mandamus was properly denied.

Where, under a private law authorizing the governing body of a city to curtail expenses and effect economies as they deem necessary and expressly repealing anything to the contrary in the existing charter, the governing body dismisses an officer who had been employed on the police force for several years solely on the grounds of economy, although several officers his junior in service had been retained: *Held*, there being nothing in the act requiring the application of the rule of seniority in effecting the economies, the officer has failed to show a clear legal right entitling him to mandamus for reinstatement, and a charter provision that officers holding the position for twelve months shall be deemed to hold under classified service and should be subject to lay off only as provided for therein does not affect this result.

2. Mandamus A b—Mandamus lies only to enforce a clear legal right.

Mandamus lies only to enforce a clear legal right, and where the application therefor fails to establish such right, the writ is properly refused.

APPEAL by plaintiff from *Sink, J.*, at March Term, 1932, of BUNCOMBE.

Application for writ of mandamus to compel plaintiff's reinstatement as a member of the police force of the city of Asheville and to recover pay for time lost.

Writ denied on following finding of facts by the court:

In order to reduce operating expenses and to keep within the budget for police operation, and for reasons of economy, the plaintiff who had been a member of the police force of the city of Asheville for seven years, along with others, was, on 2 November, 1931, laid off duty, not on account of any charges preferred, but in good faith on the part of the defendants to effect economies, and was given a check for the full amount of his salary up to and including 15 November, which check he duly accepted and cashed. At least two others were retained in the service who had not been members of the force for as long a period as the plaintiff, nor even as long as twelve months.

Plaintiff says his discharge was unlawful, and bases his right to a mandamus on Article X, sec. 63, of the city charter, chapter 121, Private Laws 1931, which provides that any chief or head of the police service and all employees of said service, who shall have been such officer or employee for a term of twelve months, shall, without test, certification or reappointment, "be deemed to hold and occupy such office or position as an officer or employee of the classified service of the city as the case may be and shall only be subject to lay-off, suspension or removal therefrom as provided in this act."

By chapter 125, Private Laws 1931, the governing authorities of the city of Asheville are authorized to curtail expenses and to effect such reductions in any department as may be deemed necessary "anything in the charter of said city to the contrary notwithstanding."

From an order denying the writ, plaintiff appeals, assigning error.

James S. Howell and Sale, Pennell & Pennell for plaintiff.

J. G. Merrimon and DeVere C. Lentz for defendants.

STACY, C. J. The action of the city authorities in effecting such economies as they deemed necessary, and in the manner selected, is fully warranted by chapter 125, Private Laws 1931, if not by chapter 121. 5 R. C. L., 614.

But the plaintiff contends that in reducing the number of employees in "the classified service," seniority ought to be observed, and, in the absence of charges preferred, those longest in the service should be retained over their juniors. Notes, 1 Ann. Cas., 292; Ann. Cas. 1913B, 1012.

This practice may prevail under other statutes (5 R. C. L., 614) and in the Federal Civil Service (*U. S. v. Wickersham,* 201 U. S., 394), but we find no provision in the charter of the city of Asheville which entitles the plaintiff, as a matter of right, to require the defendants to observe the rule of seniority in effecting economies or reducing forces as authorized by chapter 125, *supra.*

Without undertaking a minute analysis of the statutory provisions pertinent to the case, it is sufficient to say that the application for writ of mandamus was properly denied for want of a clear showing on the part of the plaintiff to demand it. *Braddy v. Winston-Salem,* 201 N. C., 301, 159 S. E., 310; *Hayes v. Benton,* 193 N. C., 379, 137 S. E., 169. Mandamus lies only to enforce a clear legal right. *Barham v. Sawyer,* 201 N. C., 498; *Cody v. Barrett,* 200 N. C., 43, 156 S. E., 146; *Umstead v. Board of Elections,* 192 N. C., 139, 134 S. E., 409; *Person v. Doughton,* 186 N. C., 723, 120 S. E., 481.

Affirmed.

STATE v. BEN POSEY.

(Filed 15 June, 1932.)

Homicide G d—Evidence held competent on question of premeditation and deliberation.

In a prosecution for murder evidence that the defendant, his father, and another, all armed, went to the house of the deceased, and that the father told the deceased's wife that they were and had been hunting "them men" is held competent on the issue of premeditation and deliberation, the defendant being present and acquiescing therein, and there being other evidence that a feud existed between the families of the deceased and the defendant and that other threats had been made, and further, upon a verdict of the jury of guilty of second degree murder the admission of the evidence, if error, would not be prejudicial.

APPEAL by defendant from *Harding, J.,* at October-November Term, 1931, of SWAIN.

Criminal prosecution tried upon indictment charging the defendant with the murder of one Jud Pilkey.

Verdict: Guilty of murder in the second degree.

Judgment: Imprisonment in the State's prison at hard labor for a term of 20 years.

Defendant appeals, assigning errors.

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

Alley & Alley and Edwards & Leatherwood for defendant.

STACY, C. J. The evidence on behalf of the State tends to show that around noon, 11 July, 1931, the defendant, Ben Posey, ambushed himself near the Pilkey Creek road in Swain County and shot and killed Jud Pilkey as the latter came along with his brother on a wagon. They had been hauling logs from the woods to the railroad station and were returning home in the heat of the day when they stopped at the hill to let the horses cool. "I sat down on the bank by the side of the road," Andy Pilkey testifying, "and my brother was still on the wagon. We heard something Pop, pop, right over us, and my brother looked up and said: 'Lord have mercy, there he is,' and I looked up and saw Ben Posey with his gun presented on my brother." The deceased fired his shot gun in the direction of the defendant and ran down the road. The defendant returned the fire with a rifle shot which hit the deceased on the left side of his head, pretty close to the forehead, and killed him.

The defendant says that when he saw the deceased and his brother resting in the road, he went around up on the bank in order to keep from meeting or coming in contact with them, and there stepped on a bush which broke with a loud noise and attracted the attention of the deceased and his brother, and that he only returned the fire in self-defense.

A feud had existed between the Pilkeys and the Poseys and members of both families had armed themselves in anticipation of an open engagement at any time.

In fact, about eleven days prior to the homicide the defendant, his father, and another, all armed, went to the home of the deceased and called for him. He was away at the time. Mrs. Pilkey asked them not to come into the house; whereupon the father, in the presence of the defendant, said: "We are hunting for them men and their weapons. We have been hunting for them all day and we mean to have them." (Objection; exception.)

The defendant's principal exception is to the admission of this evidence. The exception is without merit. The father of the defendant was not speaking for himself alone. The others were present acquiescing and "consenting unto the wrong." Only two days before the defendant had

met Mrs. Pilkey in the road and asked her where her husband was. On receiving no reply, he remarked: "I am going to kill the s—o—b when I see him." Furthermore, this evidence was offered on the question of premeditation and deliberation, to show threats, and as the defendant was acquitted of the capital offense, its admission, if erroneous, in no event could be held for reversible error.

The jury was fully justified in returning a verdict of murder in the second degree.

No error.

HUSKE HARDWARE HOUSE v. MRS. ELLA T. PERCIVAL AND G. E. BETTS.

(Filed 15 June, 1932.)

Laborers' and Materialmen's Liens B c—Letter in this case held not sufficient to constitute statutory notice to owner by materialman.

A letter to the owner setting forth the amount of the account for materials furnished the contractor and stating that other items were being purchased on the account, and offering to furnish an itemized statement upon request is not a sufficient notice upon which to base a materialman's lien, C. S., 2438, 2439, 2440, 2441, the statute requiring that an itemized statement be furnished the owner unless the contract is entire, in which case such particularity is not essential.

CLARKSON, J., dissents.

CIVIL ACTION, before *Midyette, J.*, at Spring Term, 1932, of CUMBERLAND.

On or about 1 July, 1929, the defendant, Betts, a contractor, entered into an agreement with his codefendant, Mrs. Ella T. Percival, agreeing to build a dwelling-house upon a certain lot of land owned by Mrs. Percival. The plaintiff began furnishing certain material to the contractor on 1 July, 1929, continuing through 19 November, 1929, which said materials were duly used in the construction of the building. The contract price was $4,350. On 23 November, 1929, the plaintiff wrote a letter to the owner, Mrs. Percival, as follows: "This letter is to notify you that we have furnished and are furnishing goods to Mr. G. E. Betts, contractor, for the use in the construction of the building for you on Russell Street, in this city. The bill now amounts to $636.06, and he is still purchasing a few items on the account. We shall be glad to furnish you with itemized statement covering the account. We thus notify you in compliance with the laws of this State which make it incumbent upon us to thus advise you and requires you to see that our bill is paid before any payments are made to the contractor." There

was evidence tending to show that, at the time the letter was written by the plaintiff and received by the defendant, Mrs. Percival, she had in her hands approximately $1,100 due the contractor. It was alleged that on 5 February, 1930, the plaintiff filed a notice and claim of lien in the office of the clerk of the Superior Court of Cumberland County. The summons was issued on 4 April, 1930, and served on 6 April, 1930.

The following issue was submitted to the jury: "Did the plaintiff, in due time, and before settlement by defendant owner with the defendant contractor, notify the defendant, Mrs. Ella T. Percival, of the amount due and unpaid it by said contractor, according to law, as alleged in the complaint?"

The trial judge instructed the jury to answer said issue "No."

From judgment upon the verdict the plaintiff appealed.

Cook & Cook for plaintiff.

Dye & Clark for defendant, Ella T. Percival.

BROGDEN, J. Was the letter of 23 November, 1929, sufficient "notice" to the owner to support a lien upon her land?

A lien upon a building is a creature of statute, and the right thereto is based upon notice to the owner before settlement is made. The nature of the notice contemplated by the pertinent statutes is described in *Construction Co. v. Journal,* 198 N. C., 273, 151 S. E., 631. The Court, after referring to certain decisions upon the subject, declared: "These decisions, in substance, require that the notice or itemized statement must be filed in detail, specifying the materials furnished or labor performed and the time thereof. Such notice or itemized statement must show substantial compliance with the statute. However, if it is an entire contract for a gross sum the particularity otherwise required is not essential." Manifestly, C. S., sections 2438, 2439, 2440, 2441, and 2442 must be construed together.

The plaintiff relies upon *Bain v. Lamb,* 167 N. C., 304, 83 S. E., 466, and *Hardware Co. v. Burtner,* 199 N. C., 743, 155 S. E., 733. In the *Bain case, supra,* the acknowledgment of the receipt of a letter expressly promising to pay the amount of the claim filed, was held to constitute a waiver of the failure to submit an itemized statement. Moreover, in the *Burtner case, supra,* the original record discloses that an itemized statement was furnished the owner by the materialmen. Consequently, the Court is of the opinion that the ruling of the trial judge was correct.

Affirmed.

CLARKSON, J., dissents.

STATE v. THOMAS MYRICK.

(Filed 15 June, 1932.)

Criminal Law I k—Verdict of guilty of disorderly conduct but not of drunkenness will not support conviction for drunken and disorderly conduct.

Where in a prosecution under 3 C. S., 4457(a), making it a misdemeanor for "any person to be drunk and disorderly in any public place. . . ." the jury returns a verdict of guilty of disorderly conduct but not guilty of being intoxicated: *Held,* the statute contemplates a pronouncement against a person who is both drunk and disorderly, and the defendant is entitled to be discharged.

APPEAL by defendant from *Moore, J.,* at December Term, 1931, of BURKE.

Criminal prosecution tried upon a magistrate's warrant charging the defendant with being drunk and disorderly on a public road in violation of 3 C. S., 4457(a).

Verdict: "Guilty of disorderly conduct on a public road, but not guilty of being intoxicated."

Judgment: "That the defendant pay a fine of $50 and the costs and be confined in the common jail of Burke County for 30 days and give a bond with sureties in the sum of $250 to keep the peace."

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. The defendant is indicted under 3 C. S., 4457(a), which makes it a misdemeanor for "any person to be drunk and disorderly in any public place or on any public road or street," and provides that upon conviction the accused shall be fined not exceeding $50 or imprisoned not exceeding 30 days in the discretion of the court.

It is conceded by the Attorney-General that the case should be remanded for proper judgment, the sentence being excessive under the statute (*S. v. Taylor,* 124 N. C., 803, 32 S. E., 548), unless the verdict amounts to an acquittal.

The case is not like *S. v. Barbee,* 197 N. C., 248, 148 S. E., 249, or *S. v. Shew,* 194 N. C., 690, 140 S. E., 621, where the verdict was defective or insufficient and a *venire de novo* was ordered, for here the jury specifically finds the defendant not guilty of being drunk, and it would seem that the statute only contemplates a pronouncement against

a person who is both drunk and disorderly in a public place, road or street. Drunkenness may be a species of disorderliness, but disorderliness is not necessarily drunkenness. We are, therefore, constrained to hold that on the record, as presented, the defendant is entitled to be discharged. *S. v. Mull,* 193 N. C., 668, 137 S. E., 866.

We are not called upon to say whether the defendant could be held for an indictable nuisance or other offense forbidden by the general law of the State. *S. v. Sherrard,* 117 N. C., 716, 23 S. E., 157.

Nor are we presently under the necessity of deciding when, as a matter of law, a person may be said to be drunk. In other days, Dean Mordecai was wont to give his students the following definition:

Not drunk is he who from the floor
Can rise again or drink once more:
But drunk is he who prostrate lies
And cannot either drink or rise!

But the word, we apprehend, is used in the statute in a freer or more liberal sense. *S. v. McNinch,* 87 N. C., 567; *S. v. McDaniel,* 115 Ore., 187, 237 Pac., 373; Law Notes, September, 1931, page 112.

Reversed.

STATE v. WILL RECTOR.

(Filed 15 June, 1932.)

Criminal Law L a—Defendant failed to prosecute appeal and it is dismissed.

Where the defendant, convicted of a capital offense, is given leave to appeal *in forma pauperis* but nothing is done to perfect the appeal and the case is not docketed within the time required or motion for *certiorari* made, the appeal will be docketed and dismissed on motion of the Attorney-General, no error appearing upon the face of the record.

MOTION by State to docket and dismiss appeal.

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

STACY, C. J. At the August Term, 1931, Burke Superior Court, the defendant herein, Will Rector, was tried upon an indictment charging him with rape, which resulted in a conviction and sentence of death. From the judgment thus entered, the prisoner gave notice of appeal

to the Supreme Court, and was allowed 60 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 30 days thereafter to prepare and file exceptions or counter case, but nothing has been done towards perfecting the appeal.

The case was not docketed here until 12 May, 1932, and there was no application for writ of *certiorari* at the next succeeding term of the Supreme Court commencing after the rendition of the judgment in the Superior Court, the term to which the appeal should have been brought. *S. v. Harris,* 199 N. C., 377, 154 S. E., 628; *S. v. Farmer,* 188 N. C., 243, 124 S. E., 562. Nor was the Attorney-General notified of the appeal, and stay of execution, as required by C. S., 4654; albeit the clerk of the Superior Court, whose duty it was to act in the matter, signed the order authorizing an appeal *in forma pauperis.* In extenuation, however, perhaps it should be said that ordinarily appeals in such cases are perfected by counsel employed or assigned.

The prisoner having failed to prosecute his appeal, or to comply with the rules governing such procedure, the motion of the Attorney-General to docket and dismiss must be allowed. *S. v. Massey,* 199 N. C., 601, 155 S. E., 255; *S. v. Taylor,* 194 N. C., 738, 140 S. E., 728.

No error appears on the face of the record. *S. v. Edney,* 202 N. C., 706.

Appeal dismissed.

BETHLEHEM STEEL AND IRON COMPANY, INCORPORATED, v. JERRY LINER-JUNALUSKA SUPPLY COMPANY.

(Filed 15 June, 1932.)

Bills and Notes H c—Evidence held to establish prima facie ownership of note by plaintiff.

Where the plaintiff in an action on a note introduces evidence that the note was negotiable, duly endorsed by the payee and held by the plaintiff, the evidence is sufficient to establish prima facie ownership of the note by the plaintiff, and the defendant's demurrer to the evidence is properly overruled.

APPEAL by defendant from *Sink, J.,* at February Term, 1932, of BUNCOMBE.

Civil action to recover on defendant's promissory note of $1,200, given to Chandlee Steel and Iron Company, endorsed by said payee and delivered to the plaintiff for value.

From a verdict and judgment in favor of the plaintiff in the General County Court of Buncombe County, the defendant appealed to the Superior Court where the judgment of the county court was affirmed.

Defendant appeals, assigning errors.

Bourne, Parker, Arledge & DuBose for plaintiff.
Joseph W. Little for defendant.

STACY, C. J. The only question presented by the appeal is the sufficiency of the evidence to establish plaintiff's ownership of the note in suit, which was admittedly executed by the defendant and delivered to Chandlee Steel and Iron Company, the payee named therein. The evidence shows that the note is negotiable, duly endorsed by the payee, and held by the plaintiff. This made out a prima facie case. *Bank v. Rochamora,* 193 N. C., 1, 136 S. E., 259; *Clark v. Laurel Park Estates,* 196 N. C., 624, 146 S. E., 584.

Moreover, if it be conceded that plaintiff took the note in question after maturity, no equities are pleaded, hence the only question is one of fact, the plaintiff's alleged ownership of the note. The demurrer to the evidence was properly overruled.

Affirmed.

STATE v. MRS. JOHN TURPIN AND FRANK SHERRILL.

(Filed 15 June, 1932.)

Criminal Law G c—Evidence of reputation of defendant's garage for selling liquor held incompetent as hearsay evidence.

In a prosecution for violation of the prohibition laws evidence that the defendant's garage had the reputation of selling liquor is incompetent as hearsay evidence.

APPEAL by defendant, Mrs. John Turpin, from *Harding, J.,* at July-August Term, 1931, of SWAIN.

Criminal prosecution tried upon indictment charging the defendant, and another, with violations of the prohibition laws.

Lee Birchfield, a character witness for Mrs. Turpin, was asked on cross-examination the following question:

"Q. What is the reputation of the defendant's home in regard to selling liquor? (Objection; overruled; exception.) A. That is the repu-

tation of that filling station, it has been liquor. I don't know I could buy whiskey there for sure, but I have got some reports on the filling station."

From an adverse verdict and judgment of six months in jail, the defendant appeals, assigning errors.

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

I. C. Crawford and Edwards & Leatherwood for defendant.

STACY, C. J. The evidence respecting the reputation of defendant's garage for selling liquor was hearsay and should have been excluded. *S. v. Springs,* 184 N. C., 768, 114 S. E., 851; *S. v. Mills,* 184 N. C., 694, 114 S. E., 314. The identical question was before the Court in the two cases just cited. Further discussion would only call for a repetition of what was said in these cases.

New trial.

THE HARRIS CLAY COMPANY v. CAROLINA CHINA CLAY COMPANY ET AL.

(Filed 15 June, 1932.)

Venue A c—Cause of action in this case held transitory, and motion for change of venue as a matter of right was properly denied.

An action for damages caused by the pollution of a stream resulting in forcing the plaintiff to shut down his clay mining plant lower down along the stream is transitory, and where the plaintiff brings suit in the county in which its principal office is located, the defendant's motion for a change of venue to the county wherein the land is situate, made as a matter of right, is properly refused. C. S., 463.

APPEAL by defendants from *Moore, J.,* at Chambers, Asheville, 21 January, 1932. From JACKSON.

Civil action to recover damages for breach of contract and for tort.

On 23 February, 1924, the plaintiff, a Jackson County corporation, leased from the individual defendants certain mining rights in lands located in Mitchell County.

Immediately following, the plaintiff took possession of said lands, installed equipment and started the operation of its mining plant.

It is alleged that sometime thereafter, the defendants erected a similar plant about two miles above plaintiff's location, and has so polluted the waters of Big Bear Creek as to force the plaintiff to shut down its plant.

This action for damages was instituted in Jackson County, the county of plaintiff's principal place of business, on 20 November, 1931. In apt time, the defendants lodged a motion for change of venue to Mitchell County as a matter of right. Motion overruled, and defendants appeal.

E. P. Stillwell, Alley & Alley, McBee & McBee, Dan K. Moore and Edwards & Leatherwood for plaintiff.

Berry & Green, C. C. Buchanan, Morgan & Gardner and Carter & Carter for defendants.

STACY, C. J. The case turns on whether the action is local or transitory in its nature. If local, the defendants are entitled to have the cause moved to Mitchell County for trial as a matter of right. C. S., 463. If transitory, the motion for change of venue was properly overruled. *Causey v. Morris,* 195 N. C., 532, 142 S. E., 783.

The action is for the recovery of damages and appears to be a transitory one. It sounds in neither ejectment nor replevin; nor is it an action for injury to real property, such as contemplated by the statute above cited. *Eames v. Armstrong,* 136 N. C., 392, 48 S. E., 769; McIntosh, N. C. Practice & Procedure, 258.

Affirmed.

STATE v. WALLACE B. DAVIS, LUKE LEA AND LUKE LEA, JR.

(Filed 15 June, 1932.)

1. **Criminal Law L e—Refusal of motion for continuance is not subject to review in absence of manifest abuse of discretion.**

   A motion for a continuance is addressed to the sound discretion of the trial court, and his refusal to grant the motion is not subject to review in the absence of manifest abuse, and such abuse was not made to appear in this case.

2. **Criminal Law L d—Where exceptions are not discussed in briefs they are deemed abandoned.**

   Exceptions which are not brought forward and discussed by the appellant in his brief are deemed abandoned under Rule of Practice in the Supreme Court, 28.

3. **Criminal Law D a—County in which agreement was made or any overt act done in furtherance thereof has jurisdiction of conspiracy.**

   An indictment for conspiracy may be laid in the county where the unlawful agreement was entered into or in which any overt act was done by any of the conspirators in furtherance of their common design.

4. Same—Where jurisdiction of court is not ousted on face of indictment plea in abatement to jurisdiction is bad.

Where the jurisdiction of the court is not ousted on the face of the indictment the position that the court does not have jurisdiction is not available on a plea in abatement, C. S., 4625, it being a matter of proof upon the trial with the presumption in favor of jurisdiction and the burden upon the defendant.

5. Criminal Law L e—Motion for change of venue is addressed to discretion of court and his order is not reviewable in absence of abuse.

A motion for change of venue in a criminal action on the ground of local prejudice and for the purpose of securing a fair trial, C. S., 471, is a matter resting within the sound legal discretion of the trial judge and not subject to review on appeal in the absence of gross abuse of this discretion.

6. Courts A f—Where special session has been duly called and trial judge holds valid commission plea to jurisdiction is bad.

Where a criminal action is tried at a special term of the court duly called and the trial judge holds a valid commission from the Governor a plea to the jurisdiction of the court is properly refused.

7. Criminal Law I c—Appearance of outside counsel for prosecution is a matter under supervision of the trial court.

In this case the appearance of counsel for the prosecution other than the solicitor of the district is *held* a matter in the control and sound discretion of the trial court, it appearing that the solicitor remained in control of the trial, and it not appearing that the solicitor did not request or welcome the assistance of other counsel.

8. Indictment C a—An indictment will not be quashed for mere informality or refinement.

An indictment will not be quashed for mere informality or refinement, C. S., 4623, and where the indictment contains sufficient matter to enable the court to proceed to judgment a motion to quash for duplicity or indefiniteness is properly refused, and a motion to quash for redundancy or inartificiality is addressed to the sound discretion of the trial court.

9. Conspiracy B a—It is not necessary that defendant be capable of committing the crime in order to convict him of conspiracy to commit it.

A conspiracy is an agreement to do an unlwful thing or to do a lawful thing in an unlawful way or by unlawful means, this being the crime and not its execution, and it is not necessary that all of the conspirators be physically able to carry the conspiracy into execution if one or more of them is able to do so, and it is not necessary for an indictment charging a conspiracy to violate the provisions of N. C. Code, 224(e), to allege that all of the defendants were officers or employees of the bank, although the statute applies only to misapplication, embezzlement, etc., by officers, employees, agents or directors of a bank with intent to injure or defraud it, the indictment being sufficient if it alleges that some of the defendants were officers or employees of the bank and that the other defendants conspired with them to do the unlawful act.

10. Conspiracy B b—Declaration of conspirator made in furtherance of common design is competent against co-conspirators.

Upon a showing of the existence of a conspiracy, or facts from which a conspiracy may be inferred, the acts and declarations of each conspirator done or uttered in furtherance of the common design are admissible in evidence against them all.

11. Criminal Law G s—Authenticity of letters may be proven by circumstantial evidence.

Where letters, typewritten or otherwise, are competent as evidence upon the trial their authenticity may be proven by circumstantial evidence.

12. Criminal Law L e—The burden is upon appellant to show error.

The burden of showing error on appeal is on the appellant, as the presumption is against him.

13. Same—In this case held: fatal error was not made to appear in the admission of evidence outside bill of particulars.

Although the State is restricted in its proof to the items set down in a bill of particulars, where, in a trial for misapplication of funds pursuant to an unlawful conspiracy, extending over a considerable period of time the defendants' motion for a bill of particulars is "partially denied" and evidence is admitted regarding items not included in the bill of particulars, but upon request of defendants' counsel the trial court instructs the jury to consider this evidence only as circumstances bearing out the particular items included in the bill, it will be deemed that there was an understanding, acquiesced in by all, that the solicitor should furnish the defendants a list of the items upon which he expected to press for conviction but was not to be confined to this list in the introduction of evidence, and the admission of such evidence will not be held as fatal error upon the defendants' exceptions, the defendants having failed to overcome the presumption against error.

14. Conspiracy B b—Criminal conspiracy may be shown by circumstantial evidence.

The criminal offense of unlawful conspiracy may be shown by circumstantial evidence.

15. Same—Evidence of criminal conspiracy held sufficient in this case.

Where there is evidence that four or five men, some of them high officials of a bank, have acted in concert and have obtained wide access to the assets of the bank contrary to the ordinary rules of prudence and in violation of the banking laws of the State, and that their acts caused loss to the bank, the evidence is sufficient to be submitted to the jury on a charge of conspiracy to violate the provisions of N. C. Code, 224(e), and misapplication pursuant to the conspiracy, and to overrule the defendants' demurrer to the evidence, C. S., 4643, the question of intent to injure the bank being for the jury under conflicting evidence, and the fact that some of the funds were returned to the bank without immediate loss to it not affecting the character of the act at its inception.

16. Criminal Law D a—Where evidence shows that overt act in furtherance of conspiracy was done in this State our courts have jurisdiction.

Where the evidence discloses that overt acts in furtherance of a criminal conspiracy were done in this State the Superior Court of the county in which such overt acts were done has jurisdiction of the crime and all the conspirators thereto, and the contention of some of the defendants that the action should be dismissed because the evidence showed that they were nonresidents and that they did not participate in any activity in this State cannot be maintained.

17. Criminal Law L e—In this case exceptions relating to one count need not be considered, conviction on other counts being upheld.

Where a conviction on several counts in an indictment is upheld on appeal, the defendants' exceptions relating to another count need not be considered when the sentence on such count runs concurrently with and does not exceed the sentence upon the counts upon which the conviction is sustained.

18. Banks and Banking I c—On charge of misapplication of funds of bank pursuant to conspiracy proof of any item is sufficient for conviction.

Upon a charge of misapplication of funds of a bank pursuant to a conspiracy, proof of misapplication of any item charged is sufficient to support a conviction.

19. Criminal Law I e—Exceptions to remarks of counsel should be taken before verdict.

Exceptions to the remarks of counsel should be taken before verdict.

20. Criminal Law I g—Misstatement of contentions must be called to court's attention in apt time.

Exceptions to the statement of the contentions of a party in the judge's charge to the jury will not be considered when the alleged misstatements were not called to the court's attention in apt time to afford an opportunity to correct them, if erroneous, and the charge in this case *is held* not to contain reversible error.

21. Criminal Law L d—The record and brief on appeal should be narrowed to matters of substance and moment.

It is required that an appellant should show with conciseness in the record and his brief the material exceptions necessary to be considered in the decision of the case, C. S., 643, and all exceptions taken upon counts upon which no conviction was had should be eliminated, and the record and brief should be narrowed to matters of substance and moment by the elimination of immaterial exceptions taken upon the trial through abundance of precaution.

APPEAL by defendants from *Barnhill, J.*, at July-August Special Criminal Term, 1931, of BUNCOMBE.

Criminal prosecution tried upon the following indictments:

FIRST COUNT BILL NO. 553.

In this count the defendants are charged with conspiracy, in that, it is alleged they feloniously agreed, conspired and confederated among themselves and with J. Charles Bradford and others, Wallace B. Davis being an officer, director and employee of the Central Bank and Trust Company, to cheat, defraud or injure the said Central Bank and Trust Company and to misapply its moneys, funds and credits to the amount of $300,000 on or about 8 October, 1930, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

(There was a verdict of not guilty as to all the defendants on the second and third counts in said bill, while the fourth count was not submitted to the jury (because included in the fifth), and the verdict on the sixth count was set aside. All of these counts are of the same tenor as the first, except they differ in amounts and dates, and cover the period from 10 May to 23 October, 1930.)

FIFTH COUNT BILL NO. 553.

In this count the defendants are charged with conspiracy, in that, it is alleged they feloniously agreed, conspired and confederated among themselves and with J. Charles Bradford and others, Wallace B. Davis being an officer, director and employee of the Central Bank and Trust Company, to cheat, defraud or injure the said Central Bank and Trust Company, and to misapply its moneys, funds and credits to the amount of $100,000 on or about 8 October, 1930, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

SEVENTH COUNT BILL NO. 554.

In this count (single count bill), the defendants and J. Charles Bradford—Wallace B. Davis and J. Charles Bradford being officers and directors of the Central Bank and Trust Company—are charged, pursuant to a criminal conspiracy, with the fraudulent and felonious misapplication of more than a million dollars of the funds, credits and property of the said Central Bank and Trust Company on or about 19 November, 1930, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

STATEMENT OF THE CASE.

Preliminarily, it may be stated that, at the times material to the charges laid in the indictments, Wallace B. Davis and J. Charles Bradford were president and cashier respectively, as well as directors, of the

Central Bank and Trust Company, a banking corporation chartered under the laws of this State with its principal place of business at Asheville, N. C. The said Davis was also president of the Central Securities Company of Asheville, a company affiliated with the bank. The defendants, Luke Lea, Luke Lea, Jr., and E. P. Charlet, were residents of Nashville, Tenn., and interested, as officers, agents, employees, or otherwise, in a number of business enterprises in that State, including banks, newspapers, brokerage and insurance firms.

The Central Bank and Trust Company was in need of money. It was the thought of Luke Lea, expressed as early as 5 May, 1930, in a letter to Wallace B. Davis, that the "North Carolina situation" could be taken care of by the merger of a number of banks and increasing the original capital assets from time to time by the "Holding Company purchasing the increased capitalization of the Central Bank in North Carolina so as to acquire other attractive banking situations." The details of the proposed organization are not disclosed by the record, but it does appear that transactions of considerable magnitude were contemplated. On 16 May, Lea again wrote Davis, thanking him for booklet containing the "Banking Law of North Carolina" and enclosed two consolidated statements of "the North Carolina banks," evidently those under consideration for the merger.

Davis confided to W. D. Harris, manager of the bond department of the Central Bank and vice-president of the Central Securities Company, that "he hoped to work out some matters in coöperation with Col. Lea." His statement was, that he thought it would be to the advantage of both himself and Lea to coöperate on certain matters in New York, and hoped their plans would be successful. That he, Davis, was interested in commercial banking and would follow that; that Col. Lea was interested in newspaper publishing and would follow that; and that Mr. Caldwell (meaning Rogers Caldwell) would run the investment banking side of their enterprise.

A number of firms, in which the Leas were interested, opened accounts with the Central Bank and Trust Company and obtained banking accommodations, as did the Leas personally. Later, all became heavily indebted to the bank.

On 2 September, Lea wrote Davis that Rogers Caldwell would handle certain bonds, and by October, 1930, the general plan of the defendants had broadened out so as to include various interests in Kentucky. By this time, Luke Lea, Jr., is writing to Davis and suggesting that they could buy controlling interest in a bank in Kentucky for $60,000, pay a 300% cash dividend, sell a good part of nearly one million in bonds owned by the bank and substitute "our issues instead."

The character of the transactions carried on by the defendants is disclosed by the following excerpt from a letter written by Luke Lea, Jr., under date of 10 October, 1930, to J. C. Bradford, cashier of the Central Bank and Trust Company:

"We have the $100,000 cashier checks Mr. Davis sent Colonel Lea. These cashier checks have the following endorsements on the back: $25,000—Tennessee Hermitage, $45,000—Commerce Union, $30,000—Commerce Union. This, according to our figures, would leave an overdraft on Tuesday night of $70,000.

"Wednesday, 1 October, we deposited $76,000 to your account which leaves us a balance of $6,100. Friday, 3 October, we deposited $50,000 of cashier checks which left us overdrawn $44,000 and gave cashier checks to E. A. Lindsey, trustee, for $50,000, which makes us overdrawn $94,000 on 2 October. On 3 October, we transferred $50,000 by wire to New York and on Saturday, 4 October, gave a check for $20,000 on Central Bank and Trust Company, and payable to Central Bank and Trust Company and checked $10,000 direct on Central Bank and Trust Company, making a total of $30,000 which would leave us overdrawn $74,000. Deposited check on New York for $50,615.86, which leaves us overdrawn $125,515.86.

"On 9 October, we drew a draft on you for $80,000, making a total overdraft of $204,515.86, less deposit today of $60,500, total overdraft $144,015.86. This does not include any cashier checks except those I have outlined above, nor does it include any certificates of deposit, except the $80,000 which you originally sent us.

"Therefore, I am enclosing you deposit slip for $25,000, which you sent me as it does not check with our records. If you will send me statement of the Commercial Appeal's account, I will immediately work this out, as I deposited $90,000 to their credit today.

"We have to account to you for additional certificates of deposit of $100,000."

In all, the record discloses that the Leas and the companies in which they were interested borrowed from the Central Bank and Trust Company a total of $875,000; that, in the short period from 15 September to 1 November approximately $780,000 in certificates of deposit were issued and handled by the defendants; and that during the period covered by the evidence, from May to November, more than a million dollars in cashier's checks and drafts were issued and handled by the defendants. In addition, the Leas had in their possession bonds of the Central Securities Company and the Universal Mortgage Company, which they obtained from the Central Bank and Trust Company without paying for them, and a part of which they were able to use for credit purposes. During all this time, the cash reserve of the Central Bank

and Trust Company was not only deficient, prohibiting such loans under the law, but the evidence tends to show that the bank was then insolvent. Luke Lea's personal account was overdrawn much of the time, at one time as much as $90,000. The Central Bank and Trust Company closed its doors 11 November, 1930.

MOTIONS, OBJECTIONS AND RULINGS PRIOR TO TRIAL.

Prior to entering upon the trial of the cause, the defendants asked for a continuance, principally upon the ground of the sudden illness of L. E. Gwinn, one of defense counsel, which, it is alleged, resulted in defendants' unpreparedness to go to trial. Overruled; exception.

The motions for continuance having been denied, the nonresident defendants filed pleas in abatement on the grounds that there was no evidence before the grand jury except hearsay evidence; and that said defendants were neither actually nor constructively present within the State of North Carolina at the time or times of the commission of the several offenses set out in the indictment. Overruled; exception.

The defendants then lodged a motion for change of venue, alleging that a fair and impartial trial could not be had at that term of court in Buncombe County. Overruled; exception.

Objection was thereupon entered to the jurisdiction of the court, it being alleged that no warrant of law existed for the calling of said Special Term. Overruled; exception.

Objection was next interposed to the appearance of counsel for the prosecution other than the solicitor of the district. Overruled; exception. Thomas L. Johnson of Asheville and L. P. McLendon of Durham appeared with the solicitor in the trial of the cause. They were employed at the instance of the Banking Department of the State, and through authority of the Governor, to aid in the prosecution of the defendants.

Finally, the defendants moved to quash the indictments on the grounds of uncertainty and duplicity, and for the further reason, it was not alleged that the nonresident defendants were officers, agents or employees of the Central Bank and Trust Company. Overruled; exception.

EVIDENCE ON THE FIRST COUNT.

In support of the first count in the indictment, the evidence tends to show that on 8 October, 1930, certificates of deposit, six in number aggregating $300,000, and all payable to the Bank of Tennessee, were issued by the Central Bank and Trust Company and delivered to the defendant, Wallace B. Davis, on instructions from him. As the Bank of Tennessee had no account with the Central Bank and Trust Company, C. J. Hawkins, assistant cashier, who issued them, could not

understand the charge against the Bank of Tennessee, but upon inquiry, his first instructions were confirmed. No money, checks or bills of exchange were received for these certificates of deposit—"just used the debit ticket in paying for them." Hawkins was instructed by Davis to carry these certificates of deposit to the office of Luke Lea in Nashville, Tenn., which he did. "I delivered the bonds and these certificates of deposit to Mr. Charlet, who is in the office there. I got a receipt for the bonds; that is all."

On 13 October, these same certificates were returned to the Central Bank and Trust Company unendorsed by the payee and apparently unused. "Mr. Bradford told me," William McCants testifying, "to run these items through the records as having been returned to the bank and supposedly having been brought by Mr. Charlet." They were canceled 14 October.

On 23 October, certificates of deposit in the same denominations and amounts, all payable to the Bank of Tennessee, were issued by J. E Reister, assistant cashier, on instructions from J. Charles Bradford, the cashier. They were all dated 8 October, on instructions from Bradford. For these certificates of deposit, a cash item against the Bank of Tennessee went into the window of C. J. Hawkins, and on 3 November he was instructed to charge the certificates to stocks and bonds. In the meantime, Hawkins spoke to Davis and Bradford about the matter a number of times. Davis referred to a telephone conversation, and Bradford said at one time that he was expecting to receive something from Tennessee through the mail. These certificates of deposit, aggregating $300,000, were placed with the Fourth and First National Bank of Tennessee, secured by bonds ostensibly purchased from Caldwell and Company under a "repurchase-sales agreement."

In the meantime, 22 October, on instructions from the defendant Davis, who was then in New York, the witness Harris called a meeting of the executive committee of the Central Securities Company and had a resolution passed authorizing the sale of certain bonds to Col. Luke Lea or to one of his companies. Shortly thereafter, E. P. Charlet appeared in Asheville, on Sunday, and caused the witness Taylor to sign a false set of minutes, in which it was made to appear that said bonds might be purchased by the substitution or exchange of other bonds.

EVIDENCE TOUCHING THE FIFTH COUNT.

On 8 October, 1930, ten cashier's checks of $10,000 each, aggregating $100,000, were issued by the Central Bank and Trust Company, without receiving therefor anything of value at the time. These were carried in the cage of the head bookkeeper (Mr. Blackwell) as a "debit ticket"

or cash item until their return. "Q. Mr. McCants, do you know where those cashier's checks had been between the date of issue and the date Mr. Bradford handed them to you? A. Nothing except that receipt from Charlet." Apparently these checks were originally issued in blank. When returned "Ourselves" had been inserted as payee in some and "Luke Lea" in others. One bore the endorsement, "Pay to order of *Memphis Commercial Appeal,* Luke Lea; Luke Lea, Jr., attorney in fact"; another, "Pay to order of Memphis Commercial Appeal, Inc., National Investment Trust, Inc., E. P. Charlet, treasurer." At the same time an additional item of $100,000 in New York drafts was being carried in the cage of the head bookkeeper as a cash item, the subject of the sixth count in the bill of indictment. Some of these cashier's checks were returned unused, others were charged to the personal account of Luke Lea, at that time overdrawn, though through error perhaps. "The accounts were very much confused. It was difficult to find out what the true balance and the true overdrafts were." On 11 October, Luke Lea, Jr., wrote the defendant Davis that he was using three of these cashier's checks, and the record shows that four were actually paid, one on 13 October, one on 14 October, and two on 15 October. The others were returned without being used.

EVIDENCE RESPECTING THE SEVENTH COUNT.

On 23 October, M. R. Blackwell, acting for the Central Bank and Trust Company, at the direction of its cashier, J. Charles Bradford, took $305,000 tax anticipation notes of the city of Asheville, going in great haste by airplane, and delivered them to Col. Lea in Nashville, Tenn. While out of the possession of the bank, no entry was made as to their disposition, until 19 November, the day the bank closed, when the defendant Davis signed a memorandum directing that the books of the bank be balanced by charging the account of "stocks and bonds" with the sum of $55,000. When the bank closed $45,000 of these notes remained unaccounted for, and they were not in the possession of the Central Bank and Trust Company.

The record contains a mass of evidence relative to other items covered by this count, but the above will suffice from the view we take of the case.

OBJECTIONS TO EVIDENCE.

Numerous objections were interposed to the introduction of evidence, the principal ones being (1) to statements of alleged coconspirators not made in furtherance of the common design, (2) to certain letters, on the ground that their genuineness had not been established, and (3) to items not enumerated in the bill of particulars.

DEMURRER TO EVIDENCE.

At the close of the State's evidence, the defendants, and each of them, entered a demurrer and moved for judgment as in case of nonsuit. Overruled; exception.

The defendants rested their case without offering any evidence.

EXCEPTIONS TO REMARKS OF COUNSEL.

The entire argument of counsel for the State appears in the record. This is prefaced with the observation: "Except as otherwise expressly shown, exceptions to arguments were made after verdict." The arguments are interspersed with numerous objections, but without differentiation as to exceptions taken before and after verdict.

OBJECTIONS TO THE CHARGE.

The charge is replete with exceptions ranging from substance to form.

VERDICT ON FIRST COUNT.

Guilty as to Wallace B. Davis, Luke Lea and Luke Lea, Jr. Not guilty as to E. P. Charlet.

JUDGMENT ON FIRST COUNT.

Wallace B. Davis: Imprisonment in the State's prison for a term of not less than 2 nor more than 3 years.

Luke Lea: Imprisonment in the State's prison for a term of not less than 3 nor more than 5 years.

Luke Lea, Jr.: Imprisonment in the State's prison for a term of not less than one nor more than 3 years. Judgment to be suspended upon the payment of a fine of $10,000.

VERDICT ON FIFTH COUNT.

Guilty as to Wallace B. Davis, Luke Lea and Luke Lea, Jr. Not guilty as to E. P. Charlet.

JUDGMENT ON FIFTH COUNT.

Wallace B. Davis: Imprisonment in the State's prison for a term of not less than 2 nor more than 3 years, to begin at expiration of sentence imposed on first count.

Luke Lea: Imprisonment in the State's prison for a term of not less than 3 nor more than 5 years, to begin at expiration of sentence imposed on first count.

Luke Lea, Jr.: Imprisonment in the State's prison for a term of not less than one nor more than 3 years, to begin at expiration of sentence imposed on first count. Judgment to be suspended upon payment to Buncombe County of $5,000 "to be applied to the payment of the costs of this term of court."

VERDICT ON SEVENTH COUNT.

Guilty as to Wallace B. Davis, Luke Lea and Luke Lea, Jr. Not guilty as to E. P. Charlet. J. Charles Bradford was not on trial.

JUDGMENT ON SEVENTH COUNT.

Wallace B. Davis: Imprisonment in the State's prison of not less than 4 nor more than 6 years. "Sentence to run concurrently with those heretofore imposed."

Luke Lea: Imprisonment in the State's prison for a term of not less than 6 nor more than 10 years. "Sentence to run concurrently with sentences heretofore imposed."

Luke Lea, Jr.: Imprisonment in the State's prison for a term of not less than 2 nor more than 4 years. "Sentence to run concurrently with sentences pronounced on the first and fifth counts." Judgment to be suspended upon the payment of a fine of $5,000 and the payment of an additional sum of $5,000 to Buncombe County "to be applied to the costs of this term of the court."

Defendants appeal, assigning errors.

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

R. R. Williams for defendant, Wallace B. Davis.

Albert L. Cox and L. E. Gwinn for defendants, Luke Lea and Luke Lea, Jr.

STACY, C. J., after stating the case: Going directly to the exceptions, and considering them in the order above set out, we may say that the refusal of the trial court to grant the defendants' request for a continuance on account of the illness of counsel, was a matter resting in his sound discretion and is not subject to review on appeal, except in case of manifest abuse. *In re Bank,* 202 N. C., 251; *S. v. Rhodes,* 202 N. C., 101; *S. v. Sauls,* 190 N. C., 810, 130 S. E., 848. No abuse of discretion has been made to appear on the present record. *S. v. Riley,* 188 N. C., 72, 123 S. E., 303. True, the right of confrontation carries with it the right of a fair opportunity to present one's defense. *S. v. Ross,* 193

N. C., 25, 136 S. E., 193; *S. v. Hardy,* 189 N. C., 799, 128 S. E., 152. But the defendants seem to have been abundantly represented by other counsel.

Assignments based on defendants' exceptions to the rulings of the court on their pleas in abatement, so far as they relate to the action of the grand jury, do not appear to have been brought forward and discussed in appellants' brief. They are, therefore, deemed to be abandoned. *Piner v. Richter,* 202 N. C., 573; *Cole v. Boyd,* 175 N. C., 555, 95 S. E., 778; *Gray v. Cartwright,* 174 N. C., 49, 93 S. E., 432. "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; *In re Beard,* 202 N. C., 661. The relation between appellants' brief and the record in this respect has not been discovered even after a voyage of exploration, which we do not ordinarily make without guides. *Cecil v. Lumber Co.,* 197 N. C., 81, 147 S. E., 735. The defendants may have concluded that these exceptions, in so far as they challenge the action of the grand jury, are without merit in view of what was said in *S. v. Levy,* 200 N. C., 586, 158 S. E., 94.

With respect to the venue of the offenses, it is sufficient to say that the indictments properly bring the case within the jurisdiction of the Superior Court of Buncombe County. *U. S. v. Wells,* 192 Fed., 870. "If the conspiracy be entered into within the jurisdiction of the trial court, the indictment will lie there, though the overt act is shown to have been committed in another jurisdiction, or even in a foreign country." *Hyde v. Shine,* 199 U. S., 62.

It is generally held that the venue in an indictment for conspiracy may be laid in the county where the agreement was entered into, or in any county in which an overt act was done by any of the conspirators in furtherance of their common design. For example, where a conspiracy is formed at sea, the venue may be laid in any county in which an overt act is committed by one of the conspirators on land. *People v. Mather,* 4 Wendell, 229, 21 Am. Dec., 122. The fact that the operations take place in different states, as the necessities of the conspirators may require, does not affect the jurisdiction of the state in which any or all of them reside, since "otherwise the offense would be committed with impunity." *Bloomer v. State,* 48 Md., 521.

Furthermore, this position is not available to the defendants on their pleas in abatement, the jurisdiction of the court not being ousted on the face of the indictments. C. S., 4625. "If the defendant wishes to rely upon the fact that the offense was committed outside the State, he cannot move to quash or in arrest, but must prove the fact in defense under his plea of not guilty." *S. v. Long,* 143 N. C., 671, 57 S. E., 349.

Jurisdiction would be ousted upon showing that the offense was committed out of the State. *S. v. Buchanan,* 130 N. C., 660, 41 S. E., 107. But the presumption is in favor of jurisdiction, and the burden is on the defendants. *S. v. Barrington,* 141 N. C., 820, 53 S. E., 663; *S. v. Mitchell,* 83 N. C., 674.

The motion for change of venue on the ground of local prejudice and to secure a fair trial, was also a matter resting in the sound discretion of the trial court. C. S., 471; *Stroud v. U. S.,* 251 U. S., 15. The defendants have no just cause to complain at the action of the judge in this respect, for he did yield to their request to the extent of ordering a jury from another county. C. S., 473; *S. v. Kincaid,* 183 N. C., 709, 110 S. E., 612.

The plea to the jurisdiction of the court was likewise properly overruled. The special term had been duly called and the judge held a valid commission from the Governor. This was sufficient for him. *S. v. Watson,* 75 N. C., 136; *S. v. Lewis,* 107 N. C., 967, 12 S. E., 457; *S. v. Turner,* 119 N. C., 841, 25 S. E., 810; *S. v. Wood,* 175 N. C., 809, 95 S. E., 1050. Besides, the assignment of error based on this exception does not seem to be discussed in appellants' brief. Doubtless after reading the authorities, it was decided to abandon the exception.

The appearance of counsel for the prosecution, other than the solicitor of the district, was a matter which the trial court necessarily had under its supervision. The solicitor at no time relinquished control of the case, nor does it appear that the assistance of other counsel was not requested or welcomed by him. But without regard to situations, different from the one now in hand, we hold that on the present record, the matter was in the control and sound discretion of the presiding judge. (This assignment of error, No. 7 in the record, is erroneously designated "Sixth" in appellants' brief. We are then referred to the brief in another case for the argument on the point, but we are not able to find the argument in that brief.)

The defendants' final objection before going to trial was motion to quash the indictments on the grounds of uncertainty, duplicity and failure to aver that the nonresident defendants were officers, agents or employees of the Central Bank and Trust Company. Motions of this kind are not favored. *S. v. Knotts,* 168 N. C., 173, 83 S. E., 972. "The courts usually refuse to quash on the application of the defendant where the indictment is for a serious offense, unless upon the plainest and clearest grounds; but will drive the party to a demurrer, or motion in arrest of judgment, or writ of error," as the case may require, or as the defendant may be advised. *S. v. Colbert,* 75 N. C., 368; Chitty's Crim. Law, 300.

The statute, C. S., 4623, provides against quashal for mere informality or refinement, and judgments are no longer stayed or reversed for nonessential or minor defects. C. S., 4625; *S. v. Beal,* 199 N. C., 278, 154 S. E., 604. The modern tendency is against technical objections which do not affect the merits of the case. *S. v. Hardee,* 192 N. C., 533, 135 S. E., 345; *Rudd v. Casualty Co.,* 202 N. C., 779. If the bill or proceeding contain sufficient matter to enable the court to proceed to judgment, the motion to quash for redundancy or inartificiality in statement is addressed to the sound discretion of the court. *S. v. Knotts, supra.* There was no error in refusing to quash the indictments on the grounds of duplicity and indefiniteness. *S. v. Beal, supra.*

The failure to aver that the nonresident defendants were officers, agents or employees of the Central Bank and Trust Company, if such be essential, would properly arise on demurrer or motion in arrest of judgment. *S. v. Mitchem,* 188 N. C., 608, 125 S. E., 190. But it is not conceded that such averment is necessary to the charge of conspiracy. A person may be held liable as a conspirator, even though he be incapable of committing the crime which is the object of the conspiracy, if it appear that one or more of his coconspirators has the capacity to commit the offense. *S. v. Switzer,* 187 N. C., 88, 121 S. E., 43; *S. v. Dowell,* 106 N. C., 722, 11 S. E., 525; *S. v. Jones,* 83 N. C., 605; 5 R. C. L., 1063.

True, the statute, N. C. Code, 224(e), provides that: "Whoever being an officer, employee, agent or director of a bank, with intent to defraud or injure the bank, . . . embezzles, abstracts, or misapplies any of the money, funds, credit, or property of such bank . . . shall be guilty of a felony," etc. But on a charge of conspiracy to violate this statute, the position of the nonresidents would seem to be untenable. The gist of a conspiracy is the unlawful concurrence of two or more persons in a wicked scheme—the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means. *S. v. Ritter,* 197 N. C., 113, 147 S. E., 733. Indeed, the conspiracy is the crime and not its execution. *S. v. Wrenn,* 198 N. C., 260, 151 S. E., 261. Compare *Hyde v. U. S.,* 225 U. S., 347. "As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed." *S. v. Knotts, supra.*

There is a distinction between the offense to be committed and the conspiracy to commit the offense. *S. v. Brady,* 107 N. C., 822, 12 S. E., 325. In the one, the *corpus delicti* is the act itself. In the other, it is the conspiracy to do the act. Note, 14 Ann. Cas., 156.

In *People v. McKane,* 143 N. Y., 455, 38 N. E., 950, the defendant was tried separately and convicted of an offense under the New York

Penal Code similar in its essential features to the offense of conspiracy, upon allegation and proof that the defendant, who was not an election official, had conspired with certain election officers to commit the offense, the Court, in affirming the conviction, said: "The fact that he may, for some reason, be incapable of committing the same offense himself is not material so long as it can be traced to him as the moving cause by instigating others to do what he could not do himself. This was the rule of the common law, and it has been applied to offenses like this under special statutes."

The general rule is, that an indictment for conspiracy will lie if one or more of the conspirators be capable of committing the offense which is the object of the conspiracy, albeit some of the conspirators, standing alone, may be incapable of its commission. *Gallagher v. People,* 211 Ill., 158, 71 N. E., 842; *S. v. Huegin,* 110 Wis., 189, 85 N. W., 1046, 62 L. R. A., 700.

Little need be said about the objections to statements of alleged co-conspirators not made in furtherance of the common purpose. The rule is well established that upon showing the existence of a conspiracy, or facts from which it may be inferred, the acts and declarations of each conspirator, done or uttered in furtherance of the illegal design, are admissible in evidence against all. *S. v. Turner, supra; People v. Cory,* 148 Pac. (Cal.), 532. "Every one who enters into a common purpose or design is equally deemed in law a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any of the others, in furtherance of such common design." *S. v. Jackson,* 82 N. C., 565. Indeed, when a conspiracy is established, everything said, done or written by any one of the conspirators, in execution or furtherance of the common purpose, is deemed to have been said, done, or written by each and all of them, and may be proved against any or all. 5 R. C. L., 1089.

But declarations of one of the alleged conspirators, not made in furtherance of the common design, would not be competent against the others. *S. v. Ritter, supra; S. v. Dean,* 35 N. C., 63. We do not find that the rulings on evidence in any way violated these principles.

Complaint is also made to the rulings of the court in admitting certain letters, the authenticity of which is challenged. That the authorship and genuineness of letters, typewritten or other, may be proved by circumstantial evidence, is fully established by the decisions. *Hedgepeth v. Coleman,* 183 N. C., 309, 111 S. E., 517 (anonymous typewritten communication). The action of the court in admitting the letters in question was well within the rules of evidence.

The most serious assignments, thus far considered, are those directed against the introduction of testimony concerning items not mentioned in the bill of particulars. It is the holding with us that when the solicitor files a bill of particulars, either at the request of the defendant or on order of the court, the State is restricted in its proof "to the items therein set down." *S. v. Wadford,* 194 N. C., 336, 139 S. E., 608. The function of a bill of particulars is (1) to inform the defense of the specific occurrences intended to be investigated on the trial, and (2) to limit the course of the evidence to the particular scope of inquiry. *Gruber v. Ewbanks,* 199 N. C., 335, 154 S. E., 318; *S. v. Brady, supra.* That the judge was inattentive to this rule is pressed with vigor and stressfully contended for by the defendants. It could be wished that the record were clearer or that the ambiguity on this point might have been clarified when the case on appeal was settled.

However, there are several reasons why we cannot hold that the defendants have successfully handled the laboring oar on these exceptions: It is suggested by the Attorney-General that the items mentioned by the witnesses were but prodigal, included in totals, and necessarily had to be mentioned in order to eliminate them. And further that said items could, in no event, have had any appreciable effect upon the result.

The defendants filed two separate requests in writing for a bill of particulars. At the end of each request, this notation appears: "Motion partially denied." The solicitor thereupon furnished "a list of the amounts of money, property and credits of the Central Bank and Trust Company alleged to have been abstracted, embezzled and misapplied by the defendants."

From the testimony of the bookkeeper, N. H. Payne, a witness for the State, the following may be taken as typical of the record:

"Witness: My attention has been directed to a particular item. It is a total on the cash book that includes a cashier's check payable to the *Memphis Commercial Appeal* in the sum of $50,000.

"Q. On the same date please state if included in the total of your cash book is another cashier's check payable to Luke Lea in the sum of $50,000? (Objection; overruled; exception.) A. Yes sir.

"The defendants move the court to instruct the jury that the foregoing cannot be considered as evidence of guilt against the defendants in the case in which they are being tried.

"The court: Evidence about any transaction not included in the bill of particulars—you cannot return a verdict of guilty from whatever you may find, from this particular instance, but you may consider them as circumstances bearing out the particular counts included in the bill of particulars."

The meaning of this portion of the record is not altogether clear, but considering it in the light of the court's rulings, the requests of the defendants for limitation of the effect of the evidence, and the further fact that in the seventh count the defendants are charged with misapplications, pursuant to an unlawful conspiracy extending over a considerable period of time, it seems reasonable to conclude the understanding on all hands at the trial, acquiesced in by all, was that the solicitor should furnish the defendants a list of the items upon which he expected to press for conviction, but in undertaking to establish the alleged conspiracies, this list was not to be regarded as controlling in the introduction of the State's evidence. This interpretation accords with the "partial denial" of defendants' motions for bill of particulars, with the requests and rulings limiting the effect of the evidence, and harmonizes the record with the decisions. We, therefore, conclude, without impinging upon the rule announced in *Wadford's case,* that fatal error has not been made to appear in these exceptions. The burden is on appellants to show error, and they must make it appear plainly, as the presumption is against them. *Poindexter v. R. R.,* 201 N. C., 833, 160 S. E., 767; *In re Ross,* 182 N. C., 477, 109 S. E., 365.

The defendants put their greatest trust in the demurrers interposed under C. S., 4643, at the close of the State's evidence. They were content to rest their defense upon the protection which silence affords them; and it is conceded that if the prosecution has failed to prove its case, or if the gravamen of the offense has been made to rest only in the field of speculation, no crime has been established and the defendants are entitled to be discharged. *S. v. Johnson,* 199 N. C., 429, 154 S. E., 730; *S. v. Swinson,* 196 N. C., 100, 144 S. E., 555; *S. v. Montague,* 195 N. C., 20, 141 S. E., 285; *S. v. Brackville,* 106 N. C., 701, 11 S. E., 284. But if there be any evidence sufficient to prove the fact in issue, or to sustain the allegations of the indictment, the case is one for the jury. *S. v. Carlson,* 171 N. C., 818, 89 S. E., 30.

While terribly simple and quite elementary, it may not be amiss to observe that conspiracies, like other crimes involving fraud and deceit, may be proved by circumstantial evidence. *S. v. Martin,* 191 N. C., 404, 132 S. E., 16. Direct proof of the charges is not essential, for such is rarely obtainable, but they may be, and generally are, established by a number of indefinite acts, each of which standing alone, might have little weight but taken collectively, they point unerringly to the existence of a conspiracy. *S. v. Wrenn, supra.* When resorted to by adroit and crafty persons, the presence of a common design often becomes exceedingly difficult to detect. Indeed, the more skillful and cunning the accused, the less plainly defined are the badges which usually denote their

real purpose. Under such conditions, the results accomplished, the divergence of those results from the course which would ordinarily be expected, the situation of the parties and their antecedent relations to each other, together with the surrounding circumstances, and the inferences legitimately deducible therefrom, furnish, in the absence of direct proof, and often in the teeth of positive testimony to the contrary, ample ground for concluding that a conspiracy exists. 5 R. C. L., 1088.

If four men should meet upon a desert, all coming from different points of the compass, and each carrying upon his shoulder a plank, which exactly fitted and dovetailed with the others so as to form a perfect square, it would be difficult to believe they had not previously been together. At least it would be some evidence tending to support the inference.

So in the instant case, when it is shown that four or five men, moving together, are given wide access to the assets and credits of a bank, in derogation of the ordinary rules of prudence, and in violation of the banking laws of the State, it affords more than a scintilla of proof that they were not acting in concord by accident. *S. v. Shipman,* 202 N. C., 518.

But it is said their purpose was to aid the bank rather than to injure it, and more or less plausible explanations are suggested in their behalf. On the other hand the evidence is susceptible of a different interpretation, and the jury has so decided after having heard fully the contentions of both sides. It is in evidence that the defendants had in mind a gigantic scheme for taking care of the "North Carolina situation." Their method of operation is graphically described by Luke Lea, Jr., in a letter to the defendant Davis under date of 2 September, 1930, in which he suggests that they can purchase controlling interest in a Kentucky bank for $60,000, pay a 300% cash dividend, take the bonds of that bank and substitute "our issues instead."

And so the prosecution contends that the same method of procedure was pursued in connection with the assets and credits of the Central Bank and Trust Company. They say that while ostensibly bona fide purchases of stocks and bonds may appear to have been made from Caldwell and Company, the real and ultimate purpose of the defendants was to take the certificates of deposits, cashier's checks and other assets of the Central Bank and Trust Company, and to substitute therefor "our issues." The fact that the original issue of $300,000 certificates of deposit, the subject of the first count, was returned without immediate loss to the bank, and certificates of like denominations and amounts were later issued and dated back to correspond with the first, does not perforce affect the quality of the act in its inception, nor does it ex-

culpate the defendants from all intentional wrong. That the credit of the bank was unlawfully used, and to its hurt, and that the defendants conspired so to use it, is a permissible inference from all the evidence on the record.

Just here, however, the defendants, Luke Lea and Luke Lea, Jr., stressfully contend that whatever inculpatory inferences may be permissible from the State's evidence as against them, the same evidence, with equal clearness, excludes any suggestion of participation or activity on their part within the State of North Carolina. All that they did was done in the State of Tennessee. Hence, upon this showing, they contend that the jurisdiction of the court was ousted and the case should have been dismissed as to them. *S. v. Buchanan, supra.*

A criminal conspiracy may be formed in one jurisdiction and executed in another, in which event, under the common-law procedure, prosecution may be had in either jurisdiction. *U. S. v. Wells, supra;* 5 R. C. L., 1076. Wherever the conspirators enter into the illegal agreement, there the offense is perpetrated, and they may be immediately prosecuted. *Thompson v. State,* 106 Ala., 67. But if, after forming the illegal confederation, they go into another jurisdiction to execute their plans and there commit an overt act, they may be prosecuted in the latter jurisdiction without any evidence of an express renewal of their agreement, for the law considers wherever they act, there they renew, or perhaps, to speak more properly, there they continue their agreement, and this agreement is renewed or continued as to all whenever any one of them does an act in furtherance of their common design. *Qui facit per alium facit per se. People v. Mather, supra.* In this connection, it was remarked in *Price v. Henkel,* 216 U. S., 493, that one might be a party to the formation of a conspiracy within a jurisdiction without being himself physically present therein.

It is well settled that a prosecution for criminal conspiracy may be had in any jurisdiction where an overt act is committed by any one of the conspirators in furtherance of the common design, though the other conspirators may never have been present therein. *Hyde v. U. S.,* 225 U. S., 347, Ann. Cas., 1914A, 614, and note; *S. v. Turner, supra.*

In the instant case, the evidence tends to show that overt acts in furtherance of the alleged conspiracy were committed by Davis and Bradford, two of the alleged conspirators, in Buncombe County, this State, thus giving to the Superior Court of that county jurisdiction of the alleged offenses.

That the cashier's checks, the subject of the fifth count, were issued when the bank was insolvent and without presently receiving therefor anything of value, is not seriously questioned. But it is contended no

ultimate harm came to the bank and therefore this count should be dismissed. Men of reasonable minds might easily draw different conclusions from the evidence, hence the fact in issue was one for the jury.

The *modus operandi,* or method pursued by the defendants in carrying on their many business transactions, is more or less clouded in mystery. One of their own counsel, in criticising the State's evidence, said it was "clear as mud." But the State's case is only a picture of what was found in the bank after the crash. The State did not make the picture. If the indicia of wrongdoing be unjust to the defendants, which could easily have been explained, it is unfortunate that this was not done. The defendants had the right to remain silent, but this also involved the risk of an adverse verdict, where the evidence is sufficient to go to the jury. *S. v. Tucker,* 190 N. C., 708, 130 S. E., 720. The evidence was amply sufficient to go to the jury on the first and fifth counts as to all of the defendants.

With respect to the seventh count, it is unnecessary to consider the exceptions directed thereto *seriatim,* for, as to each of the defendants, the sentence on this count is made to run concurrently with the sentences imposed on the first and fifth counts, and in no instance does the sentence imposed on the seventh count exceed the sentences on the first and fifth counts. So, even if error were committed with respect to the seventh count, which has not been made to appear, it could avail the defendants nothing, for this would not affect the validity of the trial on the other counts. *S. v. Beal, supra.*

On this seventh count the State was not required to prove all of the misapplications alleged. Proof of any one, which clearly appears from the evidence above set out, suffices to support a conviction. *People v. Cory,* 148 Pac. (Cal.), 532.

Touching the exceptions to the remarks of counsel, it is sufficient to say that those entered after verdict were not seasonably taken. *S. v. Tyson,* 133 N. C., 692, 45 S. E., 838. And we have been unable to determine, with the aid of appellants' brief or otherwise, which exceptions were taken in apt time. Nevertheless, they have all been examined and none discovered of sufficient merit to warrant extended consideration in a written opinion.

Practically the entire charge of the court has been made the subject of exception, but a careful perusal of it leaves us with the impression that the defendants have no just cause to complain either at its content or form. A detailed consideration of the exceptions would only call for a repetition of familiar principles. Many of the assignments are directed to instructions on the second, third and sixth counts, upon which no verdict was had or allowed to stand against the defendants. They are, therefore, necessarily excluded from consideration on appeal. *Plemmons*

v. Murphy, 176 N. C., 671, 97 S. E., 648; *Cobb v. R. R.,* 175 N. C., 130, 95 S. E., 92; *Warehouse Co. v. Chemical Co.,* 176 N. C., 509, 97 S. E., 472. Others are taken to the statement of contentions, but as the judge was not given an opportunity to correct them, if erroneous, by having them called to his attention at the time, they are likewise ineffectual on appeal. *Mfg. Co. v. Building Co.,* 177 N. C., 103, 97 S. E., 718; *S. v. Little,* 174 N. C., 800, 94 S. E., 1; *S. v. Foster,* 172 N. C., 960, 90 S. E., 785; *S. v. Sloan,* 199 N. C., 598.

Taken as a whole, the charge is in substantial accord with the decisions on the subjects presented by the exceptions.

The instant record falls short of complying with the rules established for the preparation of cases on appeal. It is unnecessarily voluminous, 1,221 pages, and contains much that might have been omitted. *Sigman v. R. R.,* 135 N. C., 181, 47 S. E., 420. Clarity and succinctness are not its virtues. The defendants were convicted on three counts and acquitted on four, yet many of the exceptions are directed to the counts on which no conviction was had. A reformation of the record might well have been ordered. We are invited to consider 300 exceptions and assignments of error. In *Pretzfelder v. Ins. Co.,* 123 N. C., 164, 31 S. E., 470, *Clark, J.,* said: "Certainly it can never be necessary to attempt to convince an appellate court that 64 fatal errors, each justifying a new trial (and none other should be presented here), have been committed below." And in *Tilghman v. R. R.,* 171 N. C., 652, 89 S. E., 71, *Allen, J.,* remarked: "It is not to be expected that we should discuss all of the assignments of error, ninety-four in number, and it is not conceivable that a judge commissioned to hold the courts of the State should have committed so many errors in the trial of an action to recover damages for negligence." If 94 exceptions be regarded as too many in a negligence case and 64 as excessive in an action to recover on a contract of insurance, what shall be said of 300 in a prosecution for conspiracy and misapplication? Obviously they cannot be treated separately in an opinion without extending it to a "burdensome and intolerable length." *Willis v. New Bern,* 191 N. C., 507.

It is quite natural that in the progress of a long *nisi prius* trial, many exceptions should be taken out of the abundance of precaution, but when counsel come to prepare the statement of case on appeal, conciseness is a requirement of the statute, C. S., 643, and both record and briefs should be narrowed to matters of substance and moment. All exceptions found to be trivial or untenable should be sifted out and abandoned, to the end that the questions seriously debated may be clearly presented and the attention of the Court focused on them. *Baker v. Clayton,* 202 N. C., 741. "Never run rabbits while chasing the fox," is a rule of the sportsman equally worthy of observance in the trial of causes as on the

hunt. The original brief of the defendant contains 284 pages, and in addition, a supplemental brief of 35 pages has been filed in the cause.

As the privilege was extended to counsel from another state to argue the case, and mitigating circumstances have been made to appear on behalf of resident counsel, we are disposed to look upon these matters with an indulgent eye, but in so doing, the labors of the Court have been increased manifold.

No error.

STATE v. WALLACE B. DAVIS, LUKE LEA AND LUKE LEA, JR.

(Filed 29 June, 1932.)

Criminal Law L h—Petition to reconsider decision is available only in exceptional cases to correct patent error or prevent clear injustice.

A summary motion to reconsider an opinion filed in a case before it is certified down to the Superior Court is not available in ordinary cases and will be allowed only for the purpose of correcting some patent error or to prevent a clear miscarriage of justice, and the motion is not available as a substitute for a rehearing, and a petition to reconsider which is but a reargument of the case and a criticism of the decision will be dismissed, the Court having been fully advertent to the questions presented by all of the assignments of error at the time of rendering the decision, and its failure to specifically mention some of the assignments in the opinion does not deprive the appellant of any rights thereunder, such exceptions being necessarily overruled, but each of them being considered in the determination of the case.

APPEAL by defendants from *Barnhill, J.*, at July-August Special Criminal Term, 1931, of BUNCOMBE.

Petition to review the record and to reconsider the opinion filed herein 15 June, 1932, *ante*, 13.

Albert L. Cox, R. R. Williams and L. E. Gwinn for petitioners and Clyde R. Hoey also of counsel.

STACY, C. J. This is a summary motion made under authority of *S. v. Ice Co.*, 166 N. C., 403, 81 S. E., 956, to reconsider the opinion filed in this case before it is certified down, and to order a reargument or to reverse the decision.

Counsel have misconceived the scope and purpose of the decision in the *Ice Company case*. It was not there intended to authorize such a motion as a substitute for a rehearing, or an appeal from this Court to itself, but only to correct some patent error, or to prevent a clear miscarriage of justice. *Teeter v. Express Co.*, 172 N. C., 620, 90 S. E., 927.

True, if by inadvertence the opinion of the Court should close with the entry "affirmed" when it was clearly intended to be "reversed," or *vice versa,* or in case of a mistake of like character, the Court, on motion, will correct the judgment to correspond with the opinion. *Bernhardt v. Brown,* 118 N. C., 701, 24 S. E., 527. Entries have been changed from "reversed" to "affirmed," from "new trial" to "remanded," and other modifications ordered so as to make the judgments correspond with what the Court actually decided. *Cook v. Moore,* 100 N. C., 294, 6 S. E., 795; *Summerlin v. Cowles,* 107 N. C., 459, 12 S. E., 234; *Solomon v. Bates,* 118 N. C., 321, 24 S. E., 746. In most if not all of these cases, it was held that the Court might proceed *ex mero motu,* but in *Durham v. Cotton Mills,* 144 N. C., 705, 57 S. E., 465, it was suggested, as the better practice, to do so only after notice to the party to be affected by the correction, especially if the change be material. *Summerlin v. Cowles, supra.*

This summary method of procedure is not available in ordinary cases, but only in rare and exceptional instances, just as a motion for new trial on the ground of newly discovered evidence made in the Superior Court at the next succeeding term following affirmance of judgment on appeal (*Allen v. Gooding,* 174 N. C., 271, 93 S. E., 740, *S. v. Casey,* 201 N. C., 620, 161 S. E., 81), would prove fruitless in the ordinary case, and may not be extended to permit a defendant, who has offered no evidence, to change his mind after losing, and thus seek to retrieve his supposed error by opportunity of another hearing. Both counsel and litigants are presumed to have been properly advised in preparing for trial, and it is only in the unusual case that this presumption will be overthrown. No court wishes to close the door against possible error occurring during the ordinary course of procedure, but the means employed to accomplish this end are safeguards against fallibility, and are not to be resorted to in every case. *Cook v. Moore, supra.*

If this shorthand method of reëxamining our opinions were permitted on debatable questions of law, it would be most unfair to the opposite side, for the motion is lodged without notice to opposing counsel and without certificate of error save from counsel representing the movants. *Ruffin v. Harrison,* 91 N. C., 398.

The present petition is but a reargument of the case and a criticism of the decision. The Court was fully advertent to the questions presented by the many assignments of error at the time the case was decided. Exceptions not specifically mentioned in the opinion were necessarily overruled, and the defendants have lost no rights by our failure to discuss them or to animadvert thereon.

The defendants themselves could hardly have thought that 300 fatal errors were committed on the trial, and we were left to select the more important exceptions for consideration in the opinion. But all the assignments of error were considered. None was overlooked.

If slight inaccuracies as to dates of letters appear in the statement of the case, they are not regarded as material, and, in no event, could they have changed the result.

Petition dismissed.

E. P. ANDERSON ET AL., TRUSTEES, AND LAKE JUNALUSKA METHODIST ASSEMBLY, INCORPORATED, v. THE TOWN OF WAYNESVILLE, THE TOWN OF HAZELWOOD, AND ENGLAND WALTON AND COMPANY, A CORPORATION.

(Filed 15 June, 1932.)

1. Appeal and Error F a—Only exceptive assignments of error will be considered on appeal.

An assignment of error to the trial court's failure to find additional facts is without merit when not based upon an exception taken during the trial, it being required that the appellant request such additional findings and except to the court's refusal of the request.

2. Municipal Corporations E f—Where municipal sewage causes irreparable injury and exigencies do not prevent abatement, injunction may lie.

Where there is evidence that an incorporated town emptied raw sewage into a stream which resulted in polluting a lake upon which another town had been located, rendering the lake unfit for bathing by causing its waters to carry a high bacterial count dangerous to health and to give off objectionable odors, and causing depreciation of values of business and residential property in the lower town by reason of such odors, and that the lower town, besides having a few permanent residents, entertained several thousand summer visitors and was used as a health resort and as headquarters of a religious denomination, and that the sewage disposal of the upper town was defeating the objects for which the lower town was incorporated: *Held*, the evidence tends to show irreparable damage from a civil wrong causing annoyance in the enjoyment of the legal rights of the residents and visitors of the lower town to the use and privileges of the water of the lake without interference with their health and comfort, and where the exigencies of the upper town do not preclude the abatement of the nuisance, an injunction may be issued in the suit of the lower town upon a sustaining verdict of a jury, and the right to abatement may not be defeated by a demand that permanent damages be assessed.

3. Same—In this case held: plaintiffs were not barred by laches from asserting their right to abatement of nuisance from sewage.

Where, before the erection of a dam for a lake, a town located farther up along the stream contracts in writing to satisfactorily dispose of its

sewage, which it failed to do although a bond issue for this purpose was authorized by popular vote, and fourteen years thereafter the sewage from the upper town began to cause appreciable damage to the town located at the lake, and thereupon the parties sought to establish a sanitary district, and upon failure of their efforts to do so, brought suit for the abatement of the nuisance three years after appreciable damage from the sewage: *Held*, the lower town was not barred by laches from asserting its right to abatement, the evidence tending to disprove acquiescence in the trespass, and the upper town not having acquired title by prescriptive use.

4. Equity B a—Laches will not defeat right to abatement of nuisance until right to maintain nuisance has been acquired by prescription.

Ordinarily, an action will not be barred by laches unless the legal right has been lost by delay, and injury to land caused by the maintenance of a nuisance gives rise to successive causes of actions, and the right to abatement thereof will not be defeated unless the nuisance has been maintained long enough to effect a change of title by prescription.

5. Eminent Domain A b—Power of eminent domain does not extend to condemnation for maintenance of private nuisance.

The power of eminent domain does not extend to condemnation of property for unlawful purposes, such as the creation of private nuisances, which in proper instances are subject to equitable restraint.

6. Actions C b—Action for prior damages may be joined with suit for injunction.

The right to recover damages for prior injury is not essentially inconsistent with injunctive relief to prevent future injury.

7. Municipal Corporations E f—Sewer system in this case held not of such exigent nature as to prevent relief by abatement.

A municipal system which discharges raw and untreated sewage into waters used by a multitude of people, causing irreparable damage, *is held* not of such exigent nature as to deny relief by abatement.

8. Injunctions D a—Whether plaintiff came to nuisance held important on the question of issuing preliminary mandatory injunction.

The granting of preliminary mandatory injunctions is within jurisdiction of courts of equity, but they are usually granted with caution, their purpose being to restrain the defendant from permitting his previous act to operate, or to restore conditions existing before the commission of a wrong, or to preserve the *status quo*, until a final determination, and *Held*, whether the plaintiff "came to the nuisance" has an important bearing upon the question of whether a preliminary mandatory injunction should issue in a suit for abatement, although the right to permanent abatement would not be denied for this reason.

9. Injunctions E a—Absolute order for abatement of alleged nuisance without a finding by a jury held erroneous.

An absolute order for the abatement of an alleged nuisance without a finding by the jury that such nuisance existed is error, the question of the existence of the nuisance being the principal matter in dispute with the burden of proof on the plaintiff.

ANDERSON *v.* WAYNESVILLE.

APPEAL by defendants from *Harwood, Special Judge,* at Chambers, 16 May, 1931. From HAYWOOD. Error and remanded.

This is an action to recover damages for a nuisance alleged to have been caused by the defendants' discharge of raw and untreated sewage and tannery refuse into Richland Creek from which it is carried into Lake Junaluska, the property of the plaintiffs. The plaintiffs seek also a mandatory injunction to abate the nuisance and a prohibitory injunction to prevent its recurrence.

Upon consideration of the pleadings, affidavits, oral testimony, and other evidence the court found the following facts:

1. That the properties known as the Southern Assembly Grounds are owned and possessed by the plaintiffs herein, for the uses and purposes of the Methodist Episcopal Church, South.

2. That said properties consist of a lake, formed by means of a concrete dam across Richland Creek, built at a cost of $110,000, being a depth of from two to three feet to a depth of about forty feet, and covering an area of some two hundred and fifty acres of land; a tract of land divided into about twenty-four hundred building lots; averaging 60 x 150 feet; a nine-hole golf course; a commodious and capacious auditorium, with a seating capacity of thirty-five hundred; an office building, housing the several administrative offices of the plaintiffs; a drug store and photograph shop; a boat house, containing a tea room, gift shop and barber shop; one hotel known as the Terrace Hotel, containing one hundred and thirty-five rooms, neatly and comfortably furnished; a bath house and piers; a postoffice building; a fully equipped children's playground; sites for two camps for boys and girls completely equipped and annually conducted as follows: Camp Junaluska and Camp Cheonda, all of which has a value of $800,000.

3. That the plaintiffs, since said project commenced, have sold for residential and other purposes, approximately five hundred lots, upon part of which there have been built and constructed one hundred and fifty privately owned homes, and ten hotels and boarding houses within the boundaries of plaintiffs' properties.

4. That the Southern Assembly was chartered and organized for the purpose of establishing and maintaining in Haywood County, North Carolina, a municipality of the Methodist Episcopal Church, assemblies, conferences, conventions, public worship, missionary and Sunday school work, orphan homes, manual trades, training and other operations auxiliary and incidental thereto; and also a religious resort for health, rest, recreation, Christian work and fellowship, to the end that those who from time to time might desire to secure an enlargement of vision concerning the needs of the world and the relations of the church thereto;

to learn by study and discussion the details of the policies by which such needs are to be met, and the most efficient methods of church work; to obtain inspirational and spiritual illumination for righteous and upright living, to the end that those availing themselves of the privileges and advantages so offered, might return to their respective congregations and callings better prepared spiritually and intellectually to aid the work and objects of the church in its moral life as well as in its functional activities.

5. That the Southern Assembly, the predecessor in title of the plaintiffs herein, was duly incorporated under chapter 419 of the Public Laws of 1909, and the plaintiffs have succeeded to all of the rights, privileges, immunities, advantages and properties formerly owned by the said Southern Assembly.

6. That one of the primary and principal objects, purposes and inducements of the plaintiffs, and their predecessors, in the selection of the site of their plant was the attractive climate, the scenic beauties of said location, and the fact that Richland Creek runs through said properties, which creek has its source only six or eight miles away from said plant in the Balsam Mountains, at an altitude of some five thousand feet, furnishing to said plant and its surroundings water of unusual clearness, purity and beauty.

7. That the lake grounds and properties of the plaintiffs have an all-year-round permanent population of twenty-one adults and seven children; but each season since said plant was constructed and developed, prior to the institution of this action, there have been at Lake Junaluska each year students, teachers, ministers and visitors to the number of about 10,000 each year.

8. That the town of Waynesville is a municipal corporation, duly incorporated, organized and existing under and by virtue of chapter 31 of the Private Laws of the State of North Carolina of 1871, as amended by chapter 127 of the Private Laws of 1885, and other subsequent amendments. That said town of Waynesville is a growing town, with a population of some 2,500 to 3,500 permanent residents, and being a resort town during the several seasons of the year has and entertains a large number of visitors amounting in the aggregate to some 10,000 people annually, the said town being situated about two miles above Lake Junaluska.

9. That the town of Hazelwood is a municipal corporation, duly chartered, organized and existing by chapter 91 of the Private Laws of 1905. That the said town of Hazelwood is a growing town and has a population of from 1,500 to 2,000 permanent residents, and is situated about three miles above Lake Junaluska.

10. That about the year 1901 the town of Waynesville established a sewerage system for the use of its inhabitants, extending the outfalls of said system into Richland Creek, and thereafter, to wit, sometime after the year 1921 greatly enlarged said system for the use of its inhabitants, and from the time said system was established up until the present time the sewage from said town in its raw state empties and runs into Richland Creek above the plaintiffs' lake and properties, and the said town of Waynesville threatens and purposes to continue to empty, discharge, and run its sewage into said Richland Creek without providing septic tanks, disposal plants or any other methods approved and in general use for treating and purifying the same.

11. That in the year 1914 the town of Hazelwood constructed a sewerage system and since the construction thereof has discharged its sewage in a raw state into Richland Creek above the plaintiffs' lake and properties, and the said sewage passes through a populous part of the adjoining town of Waynesville for a distance of about one and one-half miles. No complaint has ever been made by the inhabitants of Waynesville or by the inhabitants residing near said Richland Creek with reference to the sewage discharged into said creek by the town of Hazelwood. No objectionable odors arise from Richland Creek as it passes Waynesville. No bacterial count of the water between Hazelwood and Waynesville has been made, but it is admitted that said creek is polluted to a certain extent by the sewage so discharged by the town of Hazelwood. No case of infectious disease by persons residing on said creek has ever been brought to the attention of the authorities of the town of Hazelwood. That Richland Creek, after it leaves the town of Hazelwood passes through the town of Waynesville, is about two and one-half feet deep and about twenty feet wide, and runs over a rocky bottom composed of varying sized stones which have been washed down from the upper reaches of the watershed. And the said town of Hazelwood threatens and purposes to continue to empty, discharge, and run its said sewage into said Richland Creek without providing septic tanks, disposal plants or any other methods approved and in general use for treating and purifying the same.

12. That the aforesaid raw and untreated sewage from the said towns of Waynesville and Hazelwood, combining, concurring, uniting and mixing in the waters of said Richland Creek, run and flow into Lake Junaluska, thereby greatly polluting, contaminating and corrupting the waters of said creek and lake, causing the same to become filled and impregnated with divers noxious, poisonous, and unwholesome smells, fumes, vapors, odors, and stenches, and by reason thereof an offensive, harmful and dangerous nuisance has been created and remains in said

Lake Junaluska, and by reason thereof some people who have heretofore been in the habit of visiting Lake Junaluska and availing themselves of the advantages there offered have avowed their purpose to no longer visit said lake on account of the aforesaid unwholesome and dangerous conditions.

13. That the waters of Lake Junaluska are not injurious to health except when used for bathing purposes, or to persons taking the same into his or her system; but on the hearing evidence of medical experts was offered tending to show that several persons residing and visiting at said lake during the year 1930 developed skin diseases, which was attributed by their attending physician to bathing in the waters of said lake, and on the hearing there was evidence of medical experts offered tending to show, that the aforesaid conditions in said lake greatly menace and endanger the health of the people residing at and in the vicinity of said lake, and there is great danger that said condition will cause the spread of disease, and particularly typhoid fever.

14. That neither the plaintiffs nor their predecessors in title have ever installed a sewerage system for their own use and the use of the people residing at Lake Junaluska, but have installed a system of septic tanks by and with the consent and approval of the State Board of Health; and the court finds as a fact that the waters of Lake Junaluska are seriously contaminated and polluted by reason of the emptying of sewage and other waste matter therein, to which persons not parties to this action contribute in some degree.

15. That where the waters of Richland Creek flow into Lake Junaluska a total bacterial count of 10,000 in one one-hundredth of a cubic centimeter is found, showing a high degree of pollution at this point. That a test of water taken from the center of the lake shows a total bacterial count of 600 colon bacilli in one one-tenth cubic centimeter. That water taken from a point near one of the septic tanks of the plaintiffs is located on said lake shows a bacterial count of 700 colon bacilli in one one-tenth cubic centimeters. That a later test taken on 11 May, 1931, of a sample of water taken at a point about four feet below the surface of the lake in the immediate vicinity of the public bathing beach, after a bacteriological analysis shows the presence of colon bacilli in one one-hundredth of a cubic centimeter and a total bacterial count of 800.

16. That prior to the year 1927 no offensive odors, fumes or smells were ever observed arising from said lake, but thereafter, to wit, since the summer of 1927, at all seasons of the year, and especially during the summer season, and more especially in very hot weather, the odors, smells and stenches arising from the waters of said lake are constant and are of an extremely offensive character.

17. That by reason of said offensive harmful and dangerous nuisance, the aforesaid noxious, poisonous, offensive and unwholesome smells, fumes, vapors, odors and stenches continuously ascend, and go into the homes, dwellings and business houses of the people aforesaid, thereby greatly impairing the use and quiet and peaceable possession and enjoyment of said property, and also thereby rendering said homes, hotels and boarding houses uninhabitable, and greatly menacing, impairing, injuring and destroying the health of the people residing in said homes and buildings.

18. That the condition of the waters of said lake is such that the representatives of the State Board of Health have advised, and one of such representatives testified in this cause, that if said lake was to be continued to be used for bathing purposes it would become the duty of and it would be necessary for the State Board of Health to prohibit the use of said lake for bathing purposes.

19. That beginning in the year 1912, the Southern Assembly, plaintiffs' predecessor in title, commenced the construction of a concrete dam across Richland Creek approximately forty feet high, near the present station of the Southern Railway Company at Lake Junaluska, and completed the same during the year 1913, at a cost of $110,000.

20. That prior to the creation of the aforesaid nuisance the waters of said lake were pure, clear and wholesome; that by reason of the nuisance aforesaid the said waters have now become highly discolored and have a foul and unsightly appearance, and a loathsome and distasteful quality, a greenish and greasy appearing scum having formed thereon, which when disturbed permits to arise therefrom a mist and steam of offensive smell and odor.

21. The court finds that the necessary effect of the nuisance so created, if permitted to continue, will be to seriously impair the properties, and ultimately to totally destroy the objects, aims, purposes and projects of the plaintiffs, and to cause them and persons interested in said projects to suffer great and irreparable loss and damage.

22. The court further finds that if the nuisance so created by the defendants, as aforesaid, is permitted to continue, it will necessarily give rise to a multiplicity of vexatious actions and a series of litigations.

Upon these findings the court adjudged that the town of Waynesville and the town of Hazelwood within twelve months from the signing of the decree fully, entirely, and completely abate and remove the nuisance; that they thereafter be enjoined from emptying sewage into or otherwise polluting and contaminating the waters of Richland Creek above the property of the plaintiffs; and that upon the installation by the defendants of a sewerage system by and beyond Lake Junaluska the

plaintiffs shall have the right or option to connect therewith without expense to the defendants and upon payment to them of such reasonable charge as may be agreed upon by the parties or their successors.

The town of Waynesville and the town of Hazelwood excepted and appealed. As to England Walton and Company the cause was continued by consent.

T. D. Bryson and Alley & Alley for plaintiffs.
Morgan, Stamey & Ward for both appellants.
Joe E. Johnson for town of Hazelwood.

ADAMS, J. Conceding the practice that findings of fact by the trial court, if supported by evidence, are not likely to be questioned on appeal, the defendants say they "will spend no time in debating the correctness of the facts"; but they suggest error in the court's failure to find the facts with respect to some of their contentions.

This assignment of error is without merit. The record contains no entry of a request for the finding of additional facts and necessarily no exception to the action of the court in this respect. The request must have been made and refused and an assignment of error must have been based upon an exception taken during the trial. *McLeod v. Gooch,* 162 N. C., 122; *School v. Peirce,* 163 N. C., 424.

The appellants argue that upon the facts as developed the relief to be given the plaintiffs, if any, must be restricted to the recovery of pecuniary damages in a court of law. They contend, first, that the individual plaintiffs sustain toward the corporate plaintiff a relation similar to that of a board of directors and that the corporation has suffered no damage that cannot be compensated in money. This view is inconsistent with the facts. The plaintiffs have produced evidence that the defendants have perpetrated a civil wrong which annoys in the enjoyment of their legal rights those whom the plaintiffs represent—not only those whose permanent home, though comparatively few in number, is at the lake, but several thousands of people who spend the summer there and who are entitled to the use and privilege of the water without interference with their health and comfort.

It is urged, in the second place, that the plaintiffs have been negligent in the assertion of their rights and that their laches restricts them to compensation in money. We do not concur in this conclusion. Let us concede that the lake was built in 1913 and that until the present action was instituted the plaintiffs took no legal action. Before the dam at the lake was begun the town of Waynesville contracted in writing to connect its sewerage system with the upper edge of the lake, or otherwise satisfactorily to arrange the Waynesville sewerage. In 1913 the town was

authorized by popular vote to issue $20,000 dollars for the purpose of complying with its contract, but the bonds have never been issued. The deleterious effect of the sewage on the waters of the lake became appreciable in 1927 and thereafter the parties in several conferences tried to adjust their differences by establishing a sanitary district. It was not until these efforts had failed that the plaintiffs brought this suit.

As we understand, the courts generally enforce the rule that a plaintiff does not lose his remedy by mere laches unless by delay his legal rights also are lost and the defendant acquires by prescription a right to commit the nuisance. The evidence tends to disprove acquiescence in the admitted trespass. The injury resulting from a nuisance or a trespass upon real property is continuous in its nature and gives successive causes of action as successive injuries are perpetrated. Continuous injuries caused by the maintenance of a nuisance are barred only by the running of the statute against the recurrent trespasses; and mere inaction on the part of the plaintiff will not defeat his right unless it has continued long enough to effect a change of title. *Galway v. Metropolitan R. Co.*, 13 L. R. A. (N. Y.), 788; 1 Ames, Equity Jurisdiction Cases, 600; *Northern Pac. R. Co. v. Boyd,* 228 U. S., 482, 57 L. Ed., 931. In *Southern Pacific Company v. Bogert,* 250 U. S., 483, 63 L. Ed., 1099, the Supreme Court of the United States said this in reference to the doctrine of laches: "More than twenty-two years had thus elapsed since the wrong complained of was committed. But the essence of laches is not merely lapse of time. It is essential that there be also acquiescence in the alleged wrong, or lack of diligence in seeking a remedy." The claim that the plaintiffs by reason of laches can recover nothing more than pecuniary compensation is in our opinion altogether untenable.

For these and other reasons the defendants have acquired no prescriptive right to pollute the waters of the lake. The negotiations between the parties are inconsistent with the notion of adverse user for the required period. 20 R. C. L., 499.

The appellants next contend that the object of the action is the recovery of damages, that they requested an assessment of permanent damages, and that in consequence the plaintiffs' right to call for an abatement of the nuisance is lost. To sustain this proposition they cite *Rhodes v. Durham,* 165 N. C., 679 and *Wagner v. Conover,* 200 N. C., 82. These cases are not decisive of the question. In like manner with several others they apply to an award of damages for injury to land, in which the measure of damages is the impaired value of the property. Such injury is compensable in money. In the former case the Court expressed the determinative proposition as follows: "Our decisions are also in support of the proposition that where the injuries are by reason

of structures or conditions permanent in their nature, and their existence and maintenance is guaranteed or protected by the power of eminent domain or because the interest of the public therein is of such an exigent nature *that the right of abatement* at the instance of an individual is of necessity denied, it is open to either plaintiff or defendant to demand that permanent damages be awarded."

The power of eminent domain does not imply the power to condemn property for unlawful purposes, such as the creation of private nuisances. Such an undertaking is subject in proper cases to equitable restraint. Joyce on Nuisances, 273, sec. 284.

It will be observed that the relief prayed for includes damages, and mandatory and preventive injunctions. A right to recover damages for injury done prior to the beginning of an action is not essentially inconsistent with a subsequent injunction. "A nuisance may be abated in the same action in which damages are recovered." Hale on Torts, 446.

A system of drainage which discharges raw and untreated sewage into water used by a multitude of people even for a limited period cannot be regarded of such an exigent nature as to deny relief by abatement when irreparable damage is done. The plaintiffs, therefore, have not lost their right to insist upon an abatement of the alleged nuisance.

The appellants present a more serious question in their exception to that part of the decree which orders a permanent mandatory injunction without a finding by a jury that the discharge of sewage into the creek pollutes the waters of the lake so as to create a nuisance.

The grant of a preliminary mandatory injunction is, of course, within the prerogative jurisdiction of courts of equity. The injunction is generally framed so as to restrain the defendant from permitting his previous act to operate, or to restore conditions that existed before the wrong complained of was committed. It is sometimes issued to preserve the *status quo* until, upon the final hearing, the court may grant full relief; but it is usually granted with caution. Bispham's Principles of Equity, 558. Instances of its application may be found in *Telephone Company v. Telephone Company,* 159 N. C., 9, in which a severed telephone connection was restored pending further proceedings; in *Keys v. Alligood,* 178 N. C., 16, in which the defendants who had disregarded an order of court were required to restore a ditch bank to its previous place; and in *Woolen Mills v. Land Company,* 183 N. C., 511, in which the defendants who ignored orders made by a board of commissioners undertook by force to accomplish an object which they could not attain by law.

In each of these cases the defendant proceeded knowingly in breach of a contract or wilfully in disregard of an order of court. But in the

case before us at least one of the defendants emptied sewage into the creek before the lake was built and apparently not to evade an anticipated order or judgment. The defendants say that the plaintiffs "came to the nuisance" if a nuisance exists. If so, the plaintiffs would not for this reason be denied relief by abatement, but the fact would have an important bearing on the question whether a preliminary mandatory injunction should be issued. *U. S. v. Luce,* 141 Fed., 410.

However, in this case such an injunction was not issued, and, it seems, was not applied for. Instead, the court embraced in its decree an order, absolute in its terms, that the defendants within twelve months should "fully, entirely, and completely abate and remove the aforesaid dangerous nuisance," thereby adjudging without the aid of a jury the existence of a nuisance, which was the principal matter in dispute. In this there is error. It is incumbent upon the plaintiffs to establish both a right to be protected and an infringement of their right. *Vickers v. Durham,* 132 N. C., 880; *Durham v. Cotton Mills,* 141 N. C., 615; *Little v. Lenoir,* 151 N. C., 415.

There is error. The cause is remanded for further proceedings in accordance with this opinion.

Error and remanded.

STATE v. WALLACE B. DAVIS.

(Filed 15 June, 1932.)

1. Indictment A b—Grand jury held properly constituted in this case and motion to quash indictment was properly refused.

Chapter 321, sec. 1, Public-Local Laws of 1919, providing that grand juries for Buncombe County should be drawn in July and January of each year for the fall and spring terms of that county and that no other grand juries should be drawn, is in full force and effect, C. S., 8106 (1919), not repealing the local statute either expressly or by implication, and a motion, aptly made, to quash indictments on the ground that the grand jury was not properly constituted, in that the indictment was returned by the grand jury at terms of court subsequent to the term at which it was drawn, is properly refused.

2. Statutes C b—Repeal of statutes by implication is not favored.

The repeal of a statute by implication is not favored by the law, and a later statute will not be construed as repealing a former statute unless the repugnancy between them is irreconcilable.

3. Indictment A d—Motion to quash on ground that there was no evidence at hearing before grand jury held properly denied.

It is not error for the trial judge to permit the foreman of the grand jury, at his request, to indicate by a cross-mark against the name of the

witness endorsed on the indictment that the witness had been sworn and examined before the grand jury, and where the indictment as returned and entered upon the records shows that there was evidence at the hearing by the grand jury, and the defendant offers no evidence to the contrary, his motion to quash on the grounds that there was no evidence presented in the hearing before the grand jury is properly denied.

4. Indictment C b — Motion to quash indictment for duplicity held properly denied in this case.

In a prosecution for making and publishing false reports of the condition of a bank in violation of N. C. Code, 1931, sec. 224(e), an indictment which charges the offenses in the language of the statute is not bad for duplicity, and where it charges the offense in a plain, intelligent and explicit manner it is sufficient. C. S., 4623.

5. Criminal Law L d—Exceptions relating to count on which defendant was acquitted are improperly included in the record on appeal.

Where the defendant has been acquitted on one count in the bill of indictment, exceptions relating thereto are improperly included in the case on appeal, and will not be considered except in so far as they relate to the count upon which the defendant was convicted.

6. Banks and Banking I d—Proof that item of bank statement was false and published with knowledge and unlawful intent is sufficient.

In a prosecution of an officer of a bank for publishing a false report of the bank's condition in violation of N. C. Code, 1931, sec. 224(e), a variance between the allegations and proof as to some of the items of the report will not be fatal when there is no variance with respect to all the items, it being sufficient for conviction if the report as published was false in any particular as alleged in the indictment and was published with knowledge of such falsity and with a wrongful or unlawful intent, and *held further*, there was no error in the trial on the count relating to the publishing of such false report and the conviction of the defendant on that count is upheld on appeal.

7. Same—Bank officer verifying report must do so upon his own knowledge and not upon statements of other employees.

The verification of a report of the condition of a bank made by certain officers or directors to the Corporation Commission in response to an official call is required to be made upon the knowledge of those signing the report and not merely upon the statements by other employees of the bank, and in a prosecution for publishing a false report in a newspaper a defendant bank official who had verified the report may not escape criminal liability upon the grounds that he was busily engaged with other matters of the bank's business at the time of signing it and relied upon the assertions made to him by other employees as to its correctness, and signed it without knowledge of its falsity.

BROGDEN, J., dissenting. CLARKSON, J., concurring.

APPEAL by defendant from *Barnhill, J.*, at April Special Term, 1931, of BUNCOMBE. No error.

The defendant, Wallace B. Davis, the president, and J. A. Sinclair and C. N. Brown, directors of the Central Bank and Trust Company, of Asheville, N. C., were tried at April Special Term, 1931, of the Superior Court of Buncombe County, on indictment for violations of the banking laws of this State. The indictments were returned at March Term, 1931, and April Term, 1931, of said court, respectively. Each indictment contains two counts, which are substantially identical, respectively, in words and in legal effect. The indictments were consolidated by order of the trial court. The defendants were tried on their plea of "not guilty," to the consolidated indictment.

In the first count in the consolidated indictment, it is charged that defendants "being officers and/or directors of the Central Bank and Trust Company, a banking corporation organized and existing under the banking laws of the State of North Carolina, with its banking house at Asheville, N. C., and at said date receiving deposits of money, with force and arms at and in said county and State, with intent to defraud or injure said bank and with the intent and purpose to deceive the Corporation Commission of North Carolina, its examiners and agents appointed to examine the affairs of said bank, and other corporations and persons dealing with said bank, with respect to the true financial condition of said bank, on or about 18 October, 1930, unlawfully, wilfully, knowingly, fraudulently and feloniously, in response to an official call from said Corporation Commission of North Carolina, for a report of the condition of said bank as of 24 September, 1930, did make (and knowingly permit to be made) a false report to said Corporation Commission of North Carolina, with respect to the financial condition of the aforesaid bank, and did knowingly, falsely, fraudulently and feloniously report to said Corporation Commission of North Carolina that the overdrafts of said bank on 24 September, 1930, amounted to $71,704.92, when in truth and in fact the said overdrafts on said date amounted to $181,840.68, and did also on said date falsely, knowingly, fraudulently and feloniously report to the said Corporation Commission of North Carolina that the deposits due public officials on said 24 September, 1930, were $5,432,039.69, when in truth and in fact the deposits due public officials on said 24 September, 1930, were $7,294,352.98; and did further on said date knowingly, falsely, fraudulently and feloniously report to the said Corporation Commission of North Carolina that the amount due from approved depository banks on the said 24 September, 1930, was $2,325,382.99, when in truth and in fact the correct amount due from approved depository banks on said date was $153,684.10, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State."

In the second count in the consolidated indictment, it is charged that the said defendants, "being officers and/or directors of the Central Bank and Trust Company, a banking corporation organized under the laws of the State of North Carolina, with its banking house at Asheville, N. C., and on said date receiving deposits of money, with force and arms at and in the said county and State, with intent to defraud or injure said bank and with the intent and purpose to deceive the Corporation Commission of North Carolina, its examiners and agents appointed to examine the affairs of said bank and other persons and corporations dealing with said bank, on or about 18 October, 1930, unlawfully, wilfully, knowingly, fraudulently and feloniously did make, utter and publish (and knowingly permit to be made, uttered and published) in the *Asheville Times,* a newspaper published in the aforesaid county of Buncombe, a false report and statement with respect to the financial condition of the aforesaid bank as of 24 September, 1930, which said false statement so published as aforesaid was to the effect that the overdrafts in said bank on the said 24 September, 1930, amounted to $71,704.92, when in truth and in fact said overdrafts on the said date amounted to $181,840.68; that the deposits due public officials on 24 September, 1930, were $5,432,039.69, when in truth and in fact deposits due public officials on said date were $7,294,352.90; that the amount due said bank from approved depository banks on the said 24 September, 1930, was $2,325,382.99, when in truth and in fact the correct amount due on said date from approved depository banks was $153,684.10, and (that the amount of deposits subject to check, for which the said bank was liable was $5,382,672.77, when in truth and in fact said amount was $2,037,909.89), contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State."

Certain items with respect to which it was charged in the indictment that the reports made to the Corporation Commission, and published in the *Asheville Times,* respectively, were false and fraudulent were eliminated from the consideration of the jury, as the result of rulings made by the court, on motions of defendants, during the progress of the trial.

The verdict returned by the jury was as follows:

"Not guilty, as to defendants, J. A. Sinclair and C. N. Brown; not guilty as to defendant, Wallace B. Davis, on the first count, but guilty on the second count."

The record shows that on the return of the verdict, questions were addressed to the jury by the court and answered as follows:

"Q. That is, guilty of unlawfully making, uttering and publishing a false report and statement with respect to the financial condition of the bank, with the intent as specified and charged in the second count? A. Yes, sir.

Q. Is this your verdict? A. Yes, sir.

Q. So say you all? A. Yes, sir."

The verdict was thereupon recorded as returned by the jury.

From judgment that the defendant, Wallace B. Davis, be confined in the State's prison for a term of not less than five or more than seven years, the said defendant appealed to the Supreme Court.

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

R. R. Williams, A. Hall Johnston and Geo. M. Pritchard for defendant.

CONNOR, J. The defendant, Wallace B. Davis, before pleading to the indictments which were thereafter consolidated by order of the court, as authorized by statute (C. S., 4622), challenged their legal sufficiency by motions to quash. These motions were made in apt time (*S. v. Barkley,* 198 N. C., 349, 151 S. E., 733, and *S. v. Paramore,* 146 N. C., 604, 60 S. E., 502), and properly presented to the court defendant's contention that the indictments were not legally sufficient (1) because neither of the indictments was returned by a duly constituted grand jury; (2) because no evidence was presented to the grand jury at the hearing of the bills of indictment which were returned as "true bills"; and (3) because the counts in both indictments were bad for duplicity. The motions to quash were denied, and defendant duly excepted. On his appeal to this Court, defendant contends that there was error in the denial of his motions to quash the indictments. These contentions cannot be sustained.

The question presented by defendant's first motion to quash is whether the grand jury which was duly drawn, sworn, and empaneled at the January Term, 1931, of the Superior Court of Buncombe County, was a duly constituted grand jury at the March Term, 1931, and at the April Term, 1931, of said court. The indictments show on their face that they were returned by the grand jury at these terms, respectively. It was admitted that no grand jury was drawn, sworn or empaneled at either of said terms, and that both the indictments were returned at said terms by the grand jury which was drawn, sworn and empaneled at January Term, 1931.

It is provided by section 1 of chapter 321 of the Public-Local Laws of North Carolina, 1919, that "the grand juries drawn in the Superior

Court for the county of Buncombe in July and January of each and every year hereafter shall be and constitute the grand jury for each and every term of the Superior Courts where a grand jury is authorized by the law for the fall and spring terms held in said county, and no other grand jury shall be drawn during said fall and spring terms." This public-local statute, applicable by its terms only to Buncombe County, was ratified on 4 March, 1919, and became effective from and after its ratification. The statute has not been repealed or modified, and is now in full force and effect. The contention that the statute was repealed by section 8106 of the Consolidated Statutes of North Carolina, 1919, cannot be sustained. The language of said section does not show expressly or by necessary implication, that it was the intention of the General Assembly to repeal the statute. It shows the contrary. Repeals by implication are not favored by the law, and it is the policy of the courts to avoid such construction unless repugnancy between a subsequent statute and one of prior date be irreconcilable. *Lumber Co. v. Welch,* 197 N. C., 249, 148 S. E., 250.

There was no error in the action of the court in permitting the foreman of the grand jury, at his request, after the return of the indictment at April Term, 1931, to indicate by a cross-mark against the name of the witness endorsed on the indictment that said witness had been sworn and examined before the grand jury. *S. v. Avant,* 202 N. C., 680. The indictment as returned and entered upon the records of the court showed that there was evidence at the hearing of the bill by the grand jury, upon which the bill was returned as a "true bill." Defendant offered no evidence to the contrary, nor did he contend that the witness whose testimony was received by the grand jury as evidence was disqualified. *S. v. Sultan,* 142 N. C., 569, 54 S. E., 841; *S. v. Levy,* 200 N. C., 586, 158 S. E., 94.

The crime charged in the second count of the consolidated indictment upon which the defendant was convicted, is defined by statute. N. C. Code, 1931, sec. 224(e). The language of these counts is the language of the statute. For this reason the indictments are not bad for duplicity. *S. v. Leeper,* 146 N. C., 655, 61 S. E., 585. The charge against the defendant which he was required to answer by plea, was stated in a plain, intelligible and explicit manner. This was sufficient under the statute. C. S., 4623.

The issue between the State and the defendant involving the guilt or innocence of the defendant of the crimes charged in the indictment, was properly raised by defendant's plea of "not guilty," after his motions to quash, and his motions addressed to the discretion of the court, had been denied. This issue was submitted to the jury upon evidence which

tended to sustain the contention of the State that defendant is guilty on both counts contained in the consolidated indictment. The jury acquitted the defendant of the charge made in the first count, and convicted him of the charge made in the second count. Exceptions by the defendant to the admission of evidence and to instructions of the court to the jury, pertinent only to the trial on the first count, were improperly included in the case on appeal, and have not been considered on this appeal except in so far as they are directed to matters which have some relevancy to the trial of the charge contained in the second count. These exceptions, when thus considered, and the exceptions which are directly pertinent to matters involved in the trial of the charge contained in the second count, are overruled. It is needless to discuss them. We find no error in the trial for which the defendant is entitled to a reversal of the judgment, or to a new trial. There was evidence, competent and admitted without objection, tending to show that the defendant, with a wrongful and unlawful intent, published and permitted to be published in the *Asheville Times* a false and fraudulent statement of the financial condition of the Central Bank and Trust Company, of which he was president. This under the law of this State is a felony. Conceding but not deciding that there was a variance between the allegations in the indictment and the proof, with respect to some of the items as alleged in the second count of the indictment, such variance was not fatal, for the reason that there was no variance between the allegations in the indictment and the proof with respect to all the items. The court correctly instructed the jury that if they should find beyond a reasonable doubt that the statement of the financial condition of the bank as published in the *Asheville Times* by the defendants, was to their knowledge false in any particular as alleged in the indictment, and was published with a wrongful and unlawful intent, as the court had instructed the jury, they should return a verdict of guilty on the second count; otherwise, not guilty.

The defendant as a witness in his own behalf testified as follows, with respect to the reports made by him to the Corporation Commission and published in the *Asheville Times:*

"That is my signature on the report referred to in this trial as Exhibit P-86. The first time I ever saw that report was on the morning of 17 October, 1930. I saw it and heard it read in the directors' room in the bank. I went from my office to the bank not knowing that the report was coming up at that time. I went in and sat down. I noticed that they were reading the report. I was called out to answer a telephone call. When I returned, the report had been read, and turned over to the secretary of the committee. That is the first time I ever

saw the report. I hardly read the report at all. I just barely said good morning to the gentlemen in the room when I entered. I was called out, and did not know that Dr. Sinclair and Mr. Brown had signed the report. I never at any time discussed the report with either of them. Neither was present when I signed the report. The next time I saw the report was on the morning of 18 October. Mr. McCants brought it to me on the morning of the 18th and apologized for bringing it to me. He said Mr. Bradford, the cashier, was not available, and that they had to get the report published in the *Asheville Times,* as the Corporation Commission had wired from Raleigh, jacking us up for not filing and publishing the report. I said to Mr. McCants, 'Give it to me, and let me sign it.' I signed the report and handed it back to him. I did not read one item of the report. I was busy. I relied on Mr. McCants, the auditor of the bank."

Attached to the report as published in the *Asheville Times* is an affidavit signed by the defendant, in which he says under oath, that the report is true to the best of his knowledge and belief.

The defendant's testimony, as a witness in his own behalf, shows at least that he did not know whether the report which he verified by his oath was true or not; that all that he knew was that an employee of the bank stated to him that it was a true report of the financial condition of the bank as of 24 September, 1930, as shown by its records. The statute requires that reports made by a bank to the Corporation Commission of its financial condition, in response to official calls, shall be verified by the oath of its president, vice-president, cashier, secretary or treasurer, and in addition thereto by the oaths of two directors, and that summaries of such reports, so verified, shall be published in a newspaper published in the place where the bank is located. Section 64, chap. 4, Public Laws of North Carolina, 1921, as amended. N. C. Code of 1931, sec. 222(b). The statute clearly contemplates that the officer of the bank who verifies the report shall do so upon his own knowledge, and not merely upon a statement made to him by an employee of the bank, that the report is true according to the records of the bank made by other employees. In the instant case, there was evidence tending to show that the records of the bank were false, not only to the knowledge of the defendant, but also because of his express directions to employees of the bank to that effect.

There was no error in the trial of this action, resulting in the conviction of the defendant on the second count. He does not complain, of course, that the jury acquitted him on the first count. The judgment is supported by the verdict of guilty on the second count and is affirmed.

No error.

BROGDEN, J., dissenting: C. S., 222(b) requires the proper officers of a bank to file a report with the Corporation Commission on a form prescribed by the Commission, showing "under appropriate heads the resources, assets and liabilities of such bank" and "in a form prescribed by said Corporation Commission a summary of such report shall be published in a newspaper." Thus, it is to be observed that the statute does not require two reports, one for the Corporation Commission and the other for a newspaper, but only one report. The "summary" to be published in a newspaper is the same report that is made to the Corporation Commission. Obviously a false statement or report cannot be published in a newspaper unless and until a false statement or report has been made.

The defendant was indicted upon two counts, one for making a false statement or report with intent to deceive the Corporation Commission and other corporations and persons dealing with the bank, the other for publishing in a newspaper in Asheville a false report for the purpose of deceiving the identical parties named in the first count. The jury said by its verdict that the defendant was not guilty upon the first count but guilty upon the second count. In other words, the verdict declared that the defendant had not made a false report to the Corporation Commission, but that when the "summary" of said report had been published in a newspaper, he was guilty of a felony. To state the proposition baldly, the publication of a true report lands the defendant in the penitentiary for a substantial period of time.

The verdict was wholly at variance and expressly contrary to the following instruction of the trial judge: "If you should find the defendant not guilty as to the making of said report, in the way and manner charged in the bill of indictment, then, they would not be guilty of publishing or permitting it to be published for they would have no knowledge of its falsity." That is to say, the judge expressly and unequivocally charged the jury that if the defendant should be found not guilty on the first count, he would therefore not be guilty on the second count. It is true that in subsequent instructions to the jury a different and contrary charge was given. Which of the conflicting and antagonistic instructions did the jury follow in its deliberations? If they followed the first instruction above quoted, it was the duty of the trial judge to discharge the defendant upon the rendition of the verdict of not guilty on the first count. If they followed subsequent instructions, the verdict can be upheld. However, this position does not help the State for the reason that this Court has held in an unbroken line of decisions that a jury is not required to steer a boat through the troubled

waters of conflicting and contrary instructions, or to lapse into the language of theology: "to separate the sheep from the goats."

The case has been thoroughly debated and considered, and it would serve no useful purpose to draw out the discussion, but I am still wondering how it comes about that a citizen can be sent to the penitentiary for causing to be published in a newspaper in Asheville a false report that was never made or become a felon for publishing in a newspaper a report which a jury has found by its verdict to be true, after a long and tedious trial.

CLARKSON, J., concurring: I concur in the able opinion of *Mr. Justice Connor.* In answer to the material part of the dissenting opinion of *Mr. Justice Brogden,* I may say that this matter has recently been discussed by the Supreme Court of the United States by *Mr. Justice Holmes* in *Dunn v. U. S.,* 52 Sup. Ct., 189. In that opinion *Mr. Holmes* declared that "Consistency in the verdict is not necessary. Each count is an indictment, he said, in regard as if it were a separate indictment. If separate indictments had been presented against the defendant for possession, for sale, and for maintenance of a nuisance and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as *res judicata.* Where the offenses are separately charged in the counts of a single indictment, it was said, the same rule must hold, nor can it be inferred that the jury was not convinced of the defendant's guilt, because it reached different verdicts on different counts. That the verdict may have been the result of compromise or a mistake on the part of the jury, said *Mr. Holmes,* was possible. But, he held, nevertheless, that verdicts cannot be upset by speculation or conjecture, or inquiry into matters of the character described." United States Law Review, April, 1932, p. 215; *S. v. Sisk,* 185 N. C., 696.

L. S. BLADES, JR., v. GURNEY P. HOOD, COMMISSIONER OF BANKS, ON RELATION OF SAVINGS BANK AND TRUST COMPANY OF ELIZABETH CITY, AND W. O. CRUMP, LIQUIDATING AGENT.

(Filed 15 June, 1932.)

1. Receivers A a—Equity has original power to appoint and instruct receivers.

Courts of equity have original power to appoint receivers for insolvent corporations, and to instruct the receivers in the performance of their duties, and the custody of the receiver is the custody of the law.

2. Banks and Banking H c—Commissioner of Banks is statutory receiver and may be allowed to exercise certain powers not stated in statute.

The Commissioner of Banks, as successor to the Corporation Commission in the liquidation of insolvent banks, is a statutory receiver, and chapter 215, Public Laws of 1931, provides that C. S., 1208, relating to receivers shall apply to the liquidation of insolvent banks when not inconsistent with section 218(c), and upon the insolvency of a bank the Commissioner of Banks is given possession and the right to possession of all property, rights, etc., with certain enumerated powers together with such incidental powers as are necessary to a sale of the insolvent bank's assets, 3 C. S., secs. 218(c), (e), but the functions of the Commissioner of Banks are not limited to the provisions of section 218(c), and the courts of equity have inherent power to permit the Commissioner of Banks to exercise the functions of a chancery receiver in matters which are not inconsistent with his statutory duties.

3. Same—Courts of equity may allow Commissioner of Banks to pledge bank's assets for loan from Reconstruction Finance Corporation.

The effort of the Federal Congress to aid closed banks in time of financial stringency has given rise to an emergency not foreseen when our State banking laws were revised, and a court of equity has inherent power to permit the Commissioner of Banks to pledge the assets of an insolvent bank to secure a loan from the Federal Reconstruction Finance Corporation, but the right to so borrow money and pledge the assets is not absolute, but must be determined by the court upon inquiry into all the facts, including those relating to the condition of the bank and the terms imposed for the proposed loan in the court's administration of justice among those having a pecuniary interest in the affairs of the bank, the court retaining control and supervision of the Commissioner with respect to all matters involved in the loan.

APPEAL by defendants from *Small, J.,* at Chambers in Elizabeth City, 3 May, 1932. From PASQUOTANK. Reversed and remanded.

This is an action to enjoin the defendants from borrowing money from the Reconstruction Finance Corporation and pledging assets for the purpose of hastening the payment of dividends to the creditors and depositors of the Savings Bank and Trust Company of Elizabeth City.

The plaintiff alleges that prior to 19 December, 1930, the Savings Bank and Trust Company was an active banking institution organized and existing under the laws of North Carolina; that he owns fifteen shares of the capital stock, each of the par value of fifteen hundred dollars; that on the date above given the bank was closed and taken over by the Corporation Commission for the purpose of liquidation; that it has since been in process of liquidation and is now in the possession and under the control of the Commissioner of Banks, successor to the Corporation Commission, who intends and threatens to borrow $350,000 from the Reconstruction Finance Corporation and

to pledge all or a large part of the assets of the bank as security for the loan; that there is no authority in law to procure the loan or to pledge the assets; and that if the defendants accomplish their purpose the plaintiff and other stockholders will be irreparably damaged.

The defendants filed an answer admitting their purpose to borrow the money and to pledge the assets of the bank and asserting that this course is an appropriate and needful part of their duties in the administration of their trust. They allege that they have complied with the requirements of the Act of Congress, and that the loan of the proposed amount or of such amount as the corporation will lend, instead of injuring the plaintiff and other stockholders, will afford relief to those whose money and investments are now in assets which cannot immediately be liquidated.

The trial court enjoined the defendants from borrowing the money and from pledging the assets of the bank, and the defendants excepted and appealed.

Worth & Horner for plaintiff.
Thompson & Wilson and Connor & Hill for defendants.

ADAMS, J. On 22 January, 1932, the Congress of the United States approved "An act to provide emergency financing facilities for financial institutions, to aid in financing agriculture, commerce and industry, and for other purposes." The act created a body corporate under the name of "Reconstruction Finance Corporation," upon which it conferred power to make loans to banks, including loans secured by the assets of any bank that is closed or in process of liquidation, and to aid in such liquidation upon application of the receiver or liquidating agent. All loans must be adequately secured, and the corporation may take over or provide for the administration and liquidation of any collateral accepted by it as security for loans.

The right of the corporation to lend money to those who are in charge of a closed bank is not in controversy; the contested point is whether the defendants have the legal right to borrow money from the corporation and to secure payment by pledging the assets of the bank.

Persons, companies and corporations transacting the business of banking within this State pursuant to its laws were formerly under the supervision of the Corporation Commission. It was the duty of this Commission through the Chief State Bank Examiner and other agents to enforce and execute all State laws relating to banks; and to this end it was empowered to promulgate appropriate rules, regulations, and instructions. It was authorized to take possession of the business and property of

any bank that disregarded prescribed statutory requirements, and in such case, or in the event of insolvency, to apply to the courts for the appointment of a receiver whenever the interests of creditors, depositors, or stockholders called for such appointment. Under the direction and orders of the court the receiver took over the assets, made collections, disposed of or compounded doubtful debts, sold real and personal property, paid dividends, and when necessary enforced the personal liability of stockholders. The bank remained under the supervision of the Corporation Commission, but the receiver was subject to the orders of the court. Pub. Laws 1921, chap. 4, secs. 16, 17.

There are numerous cases in which courts of competent jurisdiction apply equitable remedies which have for their object the prevention, rather than the redress, of injuries. One of the familiar cases is that of an insolvent corporation, the title to whose property rests in the receiver, when appointed, for the purpose of executing the trust. *Pants Co. v. Ins. Co.,* 159 N. C., 78. The receiver is an officer of the court and is amenable to its instruction in the performance of his duties; and the custody of the receiver is the custody of the law. *Simmons v. Allison,* 118 N. C., 761; *Pelletier v. Lumber Co.,* 123 N. C., 596; *Greenlief v. Land Co.,* 146 N. C., 505. Courts of equity have original power to appoint receivers and to make such orders and decrees with respect to the discharge of their trust as justice and equity may require. *Skinner v. Maxwell,* 66 N. C., 45; *Lasley v. Scales,* 179 N. C., 578.

It was presumably upon this theory that the Legislature provided in the Public Laws of 1921, chapter 4, section 19, "That article ten, chapter twenty-two, of the Consolidated Statutes relating to receivers (C. S., 1208), when not inconsistent with this act, shall apply to receivers appointed hereunder"—*i. e.* the receivers referred to in chapter 4, section 17 of the act of 1921.

At the session of 1927 the General Assembly amended section 17 of the act of 1921 by providing that whenever a bank became insolvent the Corporation Commission should take charge of the business and assets for the purpose of liquidation. The provision for the appointment of a receiver was repealed. Pub. Laws 1927, chap. 113. But section 19, *supra,* which retains Article 10, chapter 22, was neither repealed nor materially modified.

In 1930 all the powers vested in the Corporation Commission with respect to banks were transferred to the Commissioner of Banks, and former laws relating to banks and banking were conformably amended. Pub. Laws 1931, chap. 243. No provision is made for the appointment of a receiver, but section 19, above cited, Laws 1921, chap. 4, 3 C. S., sec. 218(e), was stricken out and reënacted in the following words: "Article

ten, chapter twenty-two of the Consolidated Statutes relating to receivers, when not inconsistent with the provisions of section 218(c), shall apply to the liquidation of insolvent banks." Pub. Laws 1931, chap. 215.

Section 218(c), prescribes certain rules by which the liquidation of insolvent banks is to be effected. The Commissioner of Banks shall take possession of the bank, its assets and its business, and shall retain possession until the bank is authorized to resume business, or until its affairs are liquidated, or until the surrender of possession is ordered by a judge of the Superior Court under the provisions of this section. Any bank may place its assets and business under the control of the Commissioner of Banks for liquidation, but no bank shall make any general assignment for the benefit of its creditors save by turning over its assets to the Commissioner.

After he takes possession of a bank the Commissioner must file with the clerk of the Superior Court a notice of his action and his reason therefor, and this notice shall be equivalent to a summons and complaint against the bank in an action in the Superior Court. His possession of the bank shall operate as a bar to any attachment or other legal proceeding against the bank or its assets; no lien on its assets shall be acquired; and every transfer or assignment thereafter made by the bank shall be void. Any bank deeming itself to be aggrieved may apply for an injunction, and the judge may dismiss the application or enjoin further proceedings. Permission to resume business may be allowed by the Commissioner on approved conditions.

The Commissioner is given the possession and the right to the possession of all the property, rights, and privileges of the bank for liquidation and sale, together with such incidental powers as are necessary to a sale. He must give bond, file an inventory, notify claimants, accept or reject claims, file reports, provide for unpaid and unclaimed deposits, and finally make a full settlement of his trust.

Subsection 7 of section 218(c) in part provides: "Upon taking possession of the assets and business of any bank by the Commissioner of Banks, the Commissioner of Banks, or the duly appointed agent, is authorized to collect all moneys due such bank, and to do such other acts as are necessary to conserve its assets and property, and shall proceed to liquidate the affairs thereof, as hereinafter provided. The Commissioner of Banks, or the duly appointed agent, shall collect all debts due and claims belonging to such bank, by suit, if necessary; and, by motion in the pending action, and upon authority of an order of the presiding or resident judge of the district may sell, compromise or compound any bad or doubtful debt or claim, and may upon such order, sell the real

and personal property of such bank on such terms as the order may provide or direct, except that, where the sale is made under power contained in any mortgage or lien bond or other paper wherein the title is retained for sale and the terms of sale set out, sale may be made under said authority. Upon the motion made, the bank or any person interested may be heard, but the judge hearing the motion shall enter such order as in his discretion will best serve the parties interested."

From the foregoing synopsis of section 218(c) the plaintiff deduces the conclusion that the Commissioner of Banks is not an officer of any court; that his duties are imposed and his powers are prescribed by the Legislature; that he exercises functions independently of the courts and is subject to judicial supervision only in the few instances set forth in this section. It is contended that the powers enumerated in subsection 7 do not include the right to borrow money or to pledge the assets of the bank.

It may be granted that there is authority in support of the plaintiff's position if the functions of the Commissioner of Banks are restricted to the provisions of section 218(c). In an opinion delivered on 26 April, 1932, the Supreme Court of Utah considered the question whether under the laws of that State the Commissioner of Banks was authorized to borrow money from the Reconstruction Finance Corporation and to mortgage or pledge the assets of the bank as security for the loan. *Riches v. Hadlock, et al.*, ...Pac. (2nd), ... The decision of the Court is favorable to the argument made by the plaintiff in the case before us; but while the powers conferred upon the Commissioner of Banks in the two states are in several respects impressively similar there is a marked divergence with respect to an important fact. The laws of Utah provided in express terms that no receiver should be appointed by any court, and in its opinion the Supreme Court of Utah observed: "By the statute referred to it is clear that as to banks and banking institutions the Legislature in such case took from the courts or attempted to do so, their time-honored equity or chancery prerogatives in the appointment of receivers and in directing and controlling them as officers of the court." Also it was remarked that the commissioner's custody of the property was not, as is the custody of a receiver appointed by the court, the custody of the court.

In enacting the banking laws of North Carolina the General Assembly declined to interfere with the "chancery prerogatives" of the courts and retained Article 10, chapter 22, C. S., 1208, relating to the appointment of receivers, making it applicable to the liquidation of insolvent banks when not inconsistent with the provisions of section 218(c). Code, 1931, sec. 218(e).

Under our laws the Commissioner of Banks exercises functions formerly exercised by a receiver appointed by a court of equity. In a case recently decided his predecessor, the Corporation Commission, was held to be a statutory receiver. *In re Trust Co.*, 198 N. C., 783. We do not conceive it to have been the intention of the Legislature to take from courts of equity their inherent power to permit the Commissioner of Banks to exercise the functions of a chancery receiver in matters which are not inconsistent with his statutory duties. The present is a case calling for the exercise of equitable jurisdiction. An emergency has arisen which was not foreseen or in the contemplation of the General Assembly when our banking laws were revised. The emergency has its origin in an effort of the Federal Congress to aid closed banks in a time of financial stringency; and we are unable to perceive any adequate reason for denying the defendants an opportunity to apply to the proper court for the proffered relief. The right to borrow money and to pledge the assets is not absolute; it must be determined by a court of equity in its administration of justice among those who have a pecuniary interest in the affairs of the bank. The court may inquire into all the facts, including those relating to the condition of the bank and the terms imposed by the corporation for the proposed loan, retaining the control and supervision of the Commissioner with respect to all matters involved in the loan as in like manner with any other chancery receiver. The whole matter may be inquired of in the pending action and upon such amendments to the pleadings, if any, as may be necessary or expedient. The judgment of the Superior Court is reversed and the cause is remanded.

Reversed and remanded.

HENRY B. PRIDGEN AND UNITED STATES FIDELITY AND GUARANTY COMPANY v. ATLANTIC COAST LINE RAILROAD COMPANY AND CAROLINA DELIVERY SERVICE COMPANY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 15 June, 1932.)

1. Master and Servant F a—Insurer is subrogated in amount of award in recovery against tort-feasor and employee is entitled to excess.

An insurance carrier who has paid and is continuing to pay the award to an employee under the provisions of the Workmen's Compensation Act is entitled to be subrogated to the rights of the employee against the *tort-feasor* whose negligence caused the injury to the extent of the amount paid under the award, and an action against such *tort-feasor* is maintained primarily for the benefit of the insurance carrier and the

amount of the recovery should be applied first to the reimbursement of the insurance carrier and the excess, if any, should be paid the injured employee.

2. Same—Tort-feasor by answering complaint adopted theory of recovery alleged in action by employee and insurance carrier.

Where an action is brought against a *tort-feasor* in the name of an injured employee and the insurance carrier who had paid and was continuing to pay the award under the Compensation Act, and the complaint alleges in effect that recovery is sought by the insurance carrier for its own benefit only to the amount of the award, and by the employee for the excess, if any, and the defendant *tort-feasor* does not demur to the complaint but calls upon the insurance carrier to disclose the amount it has paid: *Held*, the defendant is deemed to acquiesce in and adopt the theory of liability set up in the complaint.

3. Trial C a—Consolidation of actions held not error in this case.

The consolidation of an action by an employee to recover for personal injuries sustained in a collision between the truck he was driving and the defendant's railroad train with an action by the employer for damages to the truck *is held* not error, the two cases having arisen from the same injury and practically the same defenses having been interposed.

4. Railroads D b—Evidence of negligence of railroad company held sufficient in this action for damages from collision at crossing.

Where the evidence tends to show that a railroad company backed cars over a crossing at night without a light thereon, or a flagman at the crossing, and that the cars were moving at a speed in excess of that allowed by the town ordinance and struck and injured the plaintiff, and that no warning by signal or bell was given, it is sufficient to be submitted to the jury on the issue of the railroad company's negligence, although the plaintiff could have seen the approaching cars in ample time to have avoided the injury had it been light.

5. Trial C a—Exceptions to remarks of counsel held untenable in this case.

In an action against a *tort-feasor* to recover damages sustained by an employee who had been compensated therefor under the provisions of the Compensation Act, an exception to remarks of plaintiff's counsel that the employee would receive all amounts recovered over the amount of the award paid by the insurance carrier will not be sustained when such remarks were made in answer to remarks of the defendant's counsel that the insurance carrier was the party really interested and was the one pushing the suit.

6. Appeal and Error K c—Petition for new trial for newly discovered evidence is refused in this case.

Newly discovered evidence on appeal is not sufficient for the granting of a petition for a new trial when such evidence tends only to establish a contradiction by a witness of his own testimony given upon the trial and there is other testimony to the same effect from other witnesses.

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

CIVIL ACTION, before *Small, J.*, at June Term, 1931, of LENOIR.

In the Pridgen case it was alleged that Pridgen, a young man in the employ of the Carolina Delivery Service Company, was seriously and permanently injured on 21 December, 1929, resulting from a collision between a truck driven by him and the train of defendant railroad. It was further alleged that the injury occurred in the city of Kinston where the track of defendant crossed at grade Vernon Avenue in said city. It was further alleged that the injury occurred at 6:30 o'clock in the morning when it was dark, and that the defendant backed a train over said crossing without a watchman or light upon the train or box car, and at a rate of speed in excess of five miles per hour in violation of an ordinance of the city of Kinston. In the ninth paragraph of the complaint the coplaintiff, United States Fidelity and Guaranty Company, alleges that it insured the Carolina Delivery Service Company, the employer of Pridgen, "against liability for compensation to its employees, and as insurance carrier of said employee under the provisions of said Compensation Act has paid the plaintiff Pridgen, and is now paying the plaintiff Pridgen, compensation for loss of services in compliance with said act. That by virtue of said act, and especially section 11 thereof, said United States Fidelity and Guaranty Company has become subrogated to the right of recovery of the plaintiff Pridgen against the defendant for damages, as hereinbefore alleged, until said United States Fidelity and Guaranty Company shall be repaid whatever amount, together with attorney fees and costs, to be fixed by the Compensation Commission as provided by said act, as it shall have paid out on account of injuries sustained by said Pridgen—and said Pridgen is entitled to whatever amount he may recover in this action over and above what is to be paid said United States Fidelity and Guaranty Company."

The defendant filed an answer denying any and all acts of negligence and pleading contributory negligence.

Answering the allegations of the complaint with reference to the rights of the United States Fidelity and Guaranty Company, the defendant says: "It has not sufficient knowledge or information to form a belief except as alleged by the plaintiff, and the defendant calls upon the plaintiffs to make due proof of the relation of the plaintiff, United States Fidelity and Guaranty Company, to the plaintiff, Henry Pridgen, in respect to the matters complained of in this action; and further, to disclose to the court the amount that it is now paying the plaintiff, Henry Pridgen, in compensation for loss of services and the total amount of compensation which it is legally required to pay." In the second action the Carolina Delivery Service Company alleged that it owned

the truck in which the plaintiff, Pridgen, was riding at the time of the injury, and that said truck was totally destroyed by the negligence of defendant, and prayed damages in the sum of $1,150. The defendant filed an answer denying all allegations of negligence.

The cases were consolidated at the trial, and issues of negligence, contributory negligence and damages were submitted in the two cases. The jury awarded Pridgen the sum of $13,083.33, and also awarded the Delivery Service Company the sum of $300 for damage to the truck.

In the Pridgen case it was adjudged: "It further appearing to the court that the plaintiff, United States Fidelity and Guaranty Company, has made payment to the plaintiff, Henry B. Pridgen, pursuant to the aforesaid award of the Industrial Commission; and, it further appearing to the court that under the provisions of section 11 of the Workmen's Compensation Act the plaintiff, United States Fidelity and Guaranty Company, insurance carrier for the said employer of the plaintiff, Henry Pridgen, is subrogated to the rights of said plaintiff and his employer, Carolina Delivery Service Company, to the extent of such amount as it shall have paid or will pay under the said award of the Industrial Commission of North Carolina, to the plaintiff, Henry B. Pridgen, including the amount of any hospital bill, medical or other expenses, as set out in said award and as provided by the aforesaid Workmen's Compensation Act. It is, therefore, ordered and adjudged that the interest of the plaintiffs, United States Fidelity and Guaranty Company and Henry B. Pridgen, as between themselves in and to this judgment shall be as follows: That said United States Fidelity and Guaranty Company shall be entitled, out of the proceeds of this judgment when collected, first to be reimbursed for any and all sums and amounts which it may have paid out to the said Henry B. Pridgen, or for his benefit, under and pursuant to any award of the Industrial Commission, including the final award in said case, plus such amounts as are paid by it for reasonable expenses and attorneys' fees, when approved by the Commission, and the said Henry B. Pridgen shall be entitled to the balance of said judgment, when collected."

The evidence tended to show that on 21 December, 1929, the plaintiff was working for the Carolina Delivery Service Company and engaged in hauling by truck moving picture films from Beaufort to Raleigh. The tracks of defendant cross Vernon Avenue in Kinston at grade. On each side of Vernon Avenue, but not on the right of way of defendant, are certain factory and other buildings. The plaintiff, Pridgen, driving the truck and traveling eastwardly, approached said crossing. He said: "I slowed down to a standstill and looked both ways to my right and left, and then I just did creep on until I was struck by the train. . . . I

did not see the train until after I was struck. I did not hear any bell ring nor any whistle blow. I did listen and I looked. . . . I think it was a box car that struck me. There was no light on the box car. It was a shifting train. My lights on the truck were burning. I did not observe any watchman at all at the crossing, and there was no watchman there. No one at all gave me any warning of the shifting train. I did not see any light on the train or in the hands of any one before or after I was injured." Pridgen further testified that in his opinion the train was moving over the crossing between fifteen and twenty miles an hour. He further testified that it was dark at the time he approached the crossing. A witness for plaintiff, Pridgen, testified that the first track at the crossing, traveling east, is a sidetrack, and that it is about 55 feet from the center of the side track to the center of the main line track. He said: "If you should look north when you get in the open space between the first side track and the main line track you could observe a train all right and be able to stop if you had good brakes if traveling at a reasonable rate of speed before you reached the main line track. I think you could observe a train at that point between the first side track and the main line track at least a mile up the track looking north." The plaintiff was injured on the main line track. There was other testimony from witness for plaintiff that it is about 50 or 60 feet from the first side track to the main line track. Another witness for plaintiff testified that "after you approached this crossing going east, when you are within ten feet of the first side track, you can see 200 feet to the north up the main line, and on the right you can see all the way down about a quarter of a mile."

The defendant offered evidence tending to show that it was guilty of no negligence, and that the real cause of the injury was the contributory negligence and recklessness of the plaintiff, Pridgen.

From the judgment rendered the defendant appealed.

Whitaker & Allen, B. G. Watkins and Wallace & White for plaintiffs.
Rouse & Rouse for defendant.

BROGDEN, J. Several questions of law are presented by this appeal, to wit:

1. Can an injured employee, after receiving an award for such injury from the Industrial Commission, and an insurance carrier paying such award, maintain an action for damages against an alleged *tort-feasor?*

2. Were the cases properly consolidated?

3. Should the actions have been nonsuited?

4. Did the trial judge commit error in permitting counsel for plaintiff to argue to the jury that the plaintiff, Pridgen, would receive nothing unless the verdict awarded damages in excess of the amount paid by the insurance carrier?

The first question must be answered in the affirmative. *Brown v. R. R.*, 202 N. C., 256; *Phifer v. Berry*, 202 N. C., 388. In the *Brown case, supra,* the Court said: "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." That is to say, the injured employee has no cause of action for the identical amount awarded and paid to him by the employer or insurance carrier, but if the damages exceed the identical amount so paid, the injured employee, or his personal representative in the event of death, is entitled to receive the excess. Moreover, in the case at bar in the ninth paragraph of the complaint the carrier alleged that it was only entitled to recover the amount actually paid by virtue of the award, and that any excess should be paid to the plaintiff, Pridgen. In effect, such allegation declares that the carrier is bringing the suit for its own benefit for the amount expended by it under the award and for the benefit of Pridgen for the excess. The defendant does not demur to the complaint or to said allegation, but calls upon the plaintiff in the action "to disclose to the court the amount that it is now paying the plaintiff, Henry Pridgen, in compensation for loss of services and the total amount of compensation which it is legally required to pay." Consequently, the defendant acquiesced in and adopted the theory of liability set up in the complaint.

The second question is also answered in the affirmative. Both cases grew out of the same injury and practically the same defenses were interposed. The general subject of consolidation is discussed by McIntosh North Carolina Practice and Procedure, pp. 536 and 539. In illustrating the application of the principle of consolidation, the author says: "When two or more plaintiffs brought different actions against a rail-

road for damages growing out of the same negligent act, the actions were consolidated for convenience of trial," etc.

The third question must be answered in the negative. The defendant insists that the evidence of the plaintiff discloses beyond question that when the plaintiff reached the side track he had an unobstructed vision of more than a mile, and that notwithstanding such unobstructed vision, he moved on across the track for more than fifty feet to the main line track where the injury occurred. If nothing else appeared, the position of defendant would be sound and the plaintiffs ought to go out of court by virtue of application of the principles announced in *Eller v. R. R.*, 200 N. C., 527, 157 S. E., 800, and the line of cases of which that case is typical. But something else does appear. There is evidence that the defendant was backing cars over the crossing in the night time without a light thereon or a watchman or flagman to give warning. Moreover there was evidence that the train was being operated at a speed in excess of that prescribed by a valid ordinance of the city of Kinston, and that no signal by bell or whistle was given by the approaching train. It has been held in many cases in this State that it is a negligent act to back a train over a crossing "without a light if it was dark, or without a flagman if it was not." *Parker v. R. R.*, 181 N. C., 95, 106 S. E., 755.

The fourth issue must be answered in the negative. The record by which appellate courts are bound shows the following: "During the course of argument . . . by counsel for defendant, counsel . . . argued that the plaintiff, Pridgen, was not the real interested party; that Pridgen was paid by the insurance company under the Workmen's Compensation Act, and that the insurance company was the real interested party and the one pushing this suit. The above argument by counsel for defendant was made without objection of counsel for plaintiff. That thereafter in response to argument by counsel for defendant, . . . counsel for Pridgen, over the objection and exception of counsel for defendant, read to the jury sections 30 and 41 of the Workmen's Compensation Act, and stated to the jury that under the law that the insurance company would not be interested to a greater extent than a maximum sum of $6,000, . . . and that the insurance company could only be subrogated to a maximum of said amount, . . . and that anything recovered over $6,000 would not go to the insurance company, and that anything recovered over and above the amount paid by the insurance company under the law was the property of plaintiff, Pridgen. Counsel argued that plaintiff, Pridgen, was an interested party and an actual party, and was entitled to recover anything in excess of what the insurance company paid Pridgen, and receive nothing if nothing

in excess of what the insurance company had paid was recovered." It is manifest that counsel for all parties were debating before the jury the distribution of the proceeds of the recovery if damages were awarded, and the argument of counsel for plaintiff was in the nature of a reply to an argument proffered by the defendant. Consequently the defendant has no just ground for complaint.

There are certain other exceptions which have not been overlooked, but they do not warrant an upset of the judgment.

The defendant files a petition for a new trial for newly discovered evidence. In substance the newly discovered evidence is contained in the affidavit of G. W. Bray. This man was a witness for the plaintiff at the trial and testified unequivocally that the plaintiff Pridgen "worked for the Service Company at the same time I was. I know his reputation and it is good. . . . I know that the company employed Mr. Pridgen through me." In an affidavit filed 28 February, 1932, Bray swore "that at no time was Henry B. Pridgen so employed and he was never paid any sum whatsoever by this affiant or the company for services." It is obvious that the witness Bray in substance declares that his sworn testimony at the trial was false. The standards prescribed for determining whether the proposed newly discovered evidence will warrant a new trial are contained in *Brown v. Sheets,* 197 N. C., 268, 148 S. E., 233. The proposed evidence tends only to contradict or impeach or discredit a former witness at the trial, and hence such evidence does not meet the test prescribed by law. If the alleged false testimony was the only evidence of the employment or the sole evidence supporting the cause of action, a different question would be presented. See *McCoy v. Justice,* 199 N. C., 602, 155 S. E., 452.

No error.

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

STATE v. R. H. STANSELL.

(Filed 15 June, 1932.)

1. Homicide C a—Mere violation of safety statute through want of due care is not culpable negligence when not likely to result in death.

The breach of a statute enacted for the safety of the public is negligence *per se,* but culpable negligence implies more than a lack of precaution or the exercise of ordinary care, and in a prosecution for manslaughter an observance must be made between the intentional violation

of a safety statute and negligent failure to observe its provisions, a person intentionally violating such statute resulting in death to another being guilty of manslaughter at least, or if he violates such statute with reckless disregard of the consequences or with heedless indifference to the rights of others, when injury to others might have been foreseen as a probable result, such violation would constitute culpable negligence, but where the statute is violated merely from want of due care and the violation under the circumstances is not likely to result in death or bodily harm, such violation would not constitute culpable negligence.

2. Same—Instruction in this case as to culpable negligence held erroneous.

Where the driver of an automobile exceeds the speed limit or drives on the wrong side of the road, not intentionally or recklessly, but merely through failure to exercise due care, and thereby proximately causes the death of another, he would not be culpably negligent unless in the light of the attendant circumstances his negligence was likely to result in death or bodily harm, and where in a prosecution for manslaughter there is evidence of violation of statutes regulating such matters, N. C. Code, 2617, 2618, and that the violation proximately caused the death of another, an instruction which is susceptible of the construction that the mere violation of the statutes would be sufficient for conviction if such violation proximately caused death, is erroneous, and a new trial will be awarded on appeal, but if the defendant was driving while intoxicated or recklessly, N. C. Code, 2621(44), (45), (46), such violation in itself would constitute culpable negligence.

APPEAL by defendant from *Stack, J.*, at November-December Term, 1931, of BUNCOMBE.

The defendant was indicted for the murder of Ann Smith, her death resulting from the collision of automobiles on a highway, but he was prosecuted only on a charge of manslaughter. He was convicted of manslaughter and from the judgment pronounced he appealed upon assigned error.

The State's evidence tended to establish the following circumstances. The collision occurred a mile or more from Asheville on the highway between Asheville and Hendersonville. Earle Campbell, Joe McCormick, Miss Plemmons, and Mrs. Smith were in a Plymouth coupe, which had only one seat. McCormick was driving, the deceased at his side, Campbell at her right with the Plemmons girl in his lap. At 10:30 at night they left Asheville going in the direction of Hendersonville—"Just driving around." Their speed was between thirty and thirty-five miles an hour and they were on the right side of the road. They heard the defendant's car, an Oldsmobile, coming from the direction of Hendersonville traveling at the rate of fifty or sixty miles an hour. McCormick turned to the right, the right front wheel of the coupe being off the pavement. The defendant's car struck the coupe at or near the left

door, turned it over, and stopped thirty-five steps away. The door flew open, Campbell and the Plemmons girl fell out, and McCormick and the deceased were thrown out. The deceased lived twenty or thirty minutes after the collision.

The paved part of the road is twenty feet in width with a black line in the middle. A wheel of the defendant's car broke down and there was a "scratched mark on the pavement" on the defendant's left side of the black mark.

For the defendant there was evidence tending to show that the facts were as follows. He was returning from Greenville, S. C., to Asheville with his wife and baby. The lights of the coupe were apparently on his side of the road and his car was on the right side of the line. The cars came together; one of the front wheels of the defendant's car came off, the brakes were knocked loose, and the car made a quick swerve to the left, causing the "scratch" on the road. He was not driving more than thirty-five miles an hour; the coupe was running "quite fast." He pulled as far to the right as he could without going into the ditch, and after the impact was unable to stop his car because the brakes had been broken.

There was evidence that McCormick "acted like a man that was drunk," and that he and Campbell had been convicted of a breach of the liquor law; also that the defendant did not seem to be normal.

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

Charles B. MacRae, Johnston & Horner and Robert R. Reynolds for defendant.

ADAMS, J. The common-law definition of involuntary manslaughter includes unintentional homicide resulting from the performance of an unlawful act, from the performance of a lawful act done in a culpably negligent manner, and from the negligent failure to perform a legal duty. *S. v. Satterfield,* 198 N. C., 682. The definition is material in its bearing upon the criminal responsibility of a person who kills another in the breach of a statute intended and designed to prevent the infliction of personal injury, as may be seen by reference to some of the more recent decisions.

The case of *S. v. Tankersley,* 172 N. C., 955, presented the question of liability for involuntary manslaughter at common law—unintentional homicide following a negligent omission of duty. In that case it was said that in order to hold one a criminal there must be a higher degree of negligence than is required to establish negligent default on a mere

civil issue, and that in order to a conviction of involuntary manslaughter, attributable to a negligent omission of duty, when engaged in a lawful act, it must be shown that a homicide was not improbable under all the facts existent at the time and which should reasonably have an influence and effect on the conduct of the person charged.

The law of involuntary manslaughter has been applied to cases in which injury or death resulted from the collision of motor vehicles operated in violation of a statute designed to secure personal safety. One of the first is *S. v. McIver,* 175 N. C., 761. It is there held 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, and that while the negligence must be something more than is required in a civil action the question of liability should be submitted to a jury in a criminal prosecution if the negligent act was likely to produce death or great bodily harm.

In *S. v. Gray,* 180 N. C., 697, it is said: "The principle is generally stated in the textbooks that 'if one person causes the death of another by an act which is in violation of law, it will be manslaughter, although not shown to be wilful or intentional' (McClain Cr. L., Vol. 1, sec. 347), or that when life has been taken in the perpetration of any wrongful or unlawful act, the slayer will be deemed guilty of one of the grades of culpable homicide, notwithstanding the fact that death was unintentional and collateral to the act done (13 R. C. L., 843); but on closer examination of the authority, it will be seen that the responsibility for a death is sometimes made to depend on whether the unlawful act is *malum in se* or *malum prohibitum,* a distinction noted and discussed in *S. v. Horton,* 139 N. C., 588. It is, however, practically agreed, without regard to this distinction, that if the act is a violation of a statute intended and designed to prevent injury to the person, and is in itself dangerous, and death ensues, the person violating the statute is guilty of manslaughter at least, and under some circumstances of murder. The principle is recognized in *S. v. Horton, supra,* and in *S. v. Turnage,* 138 N. C., 569; *S. v. Limerick,* 146 N. C., 650, and *S. v. Trollinger,* 162 N. C., 620, and has been directly applied to deaths caused by running automobiles at an unlawful speed. In 2 R. C. L., 1212, the author cites several authorities in support of the text that one who wilfully or negligently drives an automobile on a public street at a prohibited rate of speed, or in a manner expressly forbidden by statute, and thereby causes the death of another, may be guilty of homicide; and this is true, although the person who is recklessly driving the machine uses, as soon as he sees a pedestrian in danger, every effort to

avoid injuring him, provided that the operator's prior recklessness was responsible for his inability to control the car and prevent the accident which resulted in the death of the pedestrian."

The case is cited in *S. v. Rountree,* 181 N. C., 535, in which it is remarked that culpable negligence under the criminal law is such recklessness or carelessness, resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others; also that if one is engaged in an unlawful and dangerous act, which is itself in violation of a statute designed to prevent injury to the person, and death ensues, the actor will be guilty of manslaughter at least. The principle is restated in several subsequent decisions. *S. v. Jessup,* 183 N. C., 771; *S. v. Sudderth,* 184 N. C., 753; *S. v. Crutchfield,* 187 N. C., 607; *S. v. Leonard,* 195 N. C., 242; *S. v. Palmer,* 197 N. C., 135.

The difficulty of attaining perfection in defining "culpable negligence" is apparent, but it is agreed that the words necessarily imply something more than a lack of precaution or the exercise of ordinary care. An instruction to the jury merely in the words of the latter proposition is not sufficient; it should explain wherein the distinction consists. Ordinary negligence is based on the theory that a person charged with negligent conduct should have known the probable consequences of his act; culpable negligence rests on the assumption that he knew the probable consequences but was intentionally, recklessly, or wantonly indifferent to the results. With respect to the breach of a statute enacted in the interest of public safety a basic concept may involve the distinction between the intentional violation of the statute and the negligent failure to observe its provisions. If a person driving a motor vehicle upon a highway intentionally violates the provisions of statutes regulating the operation of motor vehicles upon the public highways of the State and thereby proximately causes personal injury or death he is deemed to be criminally culpable and in the one case is guilty of assault and battery and in the other manslaughter. If he acts in violation of a positive statute and his violation is the direct cause of the injury or death, the intent may be implied, although it is ultimately a matter for the jury to determine under instructions given by the court. Such person would likewise be criminally culpable if he operated a motor vehicle upon a public highway in violation of the statutes and such violation disclosed a reckless disregard of consequences or a heedless indifference to the rights and safety of others and reasonable foresight that injury would probably result. *S. v. Agnew,* 202 N. C., 755. But if he did not violate any of these statutory provisions intentionally or recklessly but failed to observe them merely through a want of ordinary care he would not

be held to culpable negligence unless the prohibited act was in itself dangerous—*i. e.* likely under the circumstances to result in death or bodily harm. *S. v. McIver, supra; S. v. Gray, supra.* The instruction in reference to driving at excessive speed which was approved in *S. v. Gash,* 177 N. C., 595, must be considered in connection with evidence tending to show intent and recklessness.

The statute provides that when one motor vehicle shall meet another on the public highway the driver of each of them shall reasonably turn to the right of the center of the highway so as to pass without interference; that in no event shall the speed exceed forty-five miles an hour; that it shall be unlawful for any person while under the influence of intoxicating liquor to drive any vehicle upon the highways of the State, or for any person to drive a motor vehicle upon the highways recklessly or at a rate of speed greater than is reasonable and proper. N. C. Code, 1931, secs. 2617, 2618, 2621(44), 2621(46). A violation of these provisions is a misdemeanor. Section 2599.

After referring to evidence tending to show the defendant's violation of these sections the court gave the following instruction to which the defendant excepted: "The charge is that he was violating one or more of these provisions of the law of North Carolina that were passed for the benefit and protection of the traveling public. To violate any of them is made criminal, and therefore it is culpable or criminal negligence for anyone to violate any of those laws of the highway. Now, in this case if you find from the evidence beyond a reasonable doubt that the defendant was violating either or any of these provisions of law that I have called to your attention at the time of the collision and that such violation of law on his part caused the collision and thereby caused the death of Mrs. Smith, then he would be guilty of manslaughter at least."

The collision occurred on a public highway. If the defendant at that time, in violation of law, was operating his car recklessly, as recklessness is defined at common law or by statute, Laws 1927, chap. 148, sec. 3, Code, 1931, sec. 2621(45), or was operating his car while under the influence of intoxicating liquor, and ran into the other car and thereby proximately caused the death of one of the occupants, he was guilty of manslaughter at least. But if he exceeded the speed limit, or drove on the wrong side of the marked line, not intentionally or recklessly, but merely through a failure to exercise due care and thereby proximately caused the death he would not be culpably negligent unless in the light of the attendant circumstances his negligent act was likely to result in death or bodily harm. This, as we read the record, is one of the positions taken by the defendant and there are phases of the evidence which tend to support his theory. The court, it is true, informed the jury that the

act must be "more than an ordinary matter of neglect, more than an ordinary tort"; but without further explanation the charge was open to the construction that a slightly negligent act might be deemed culpable in the discretion of the jury, or that negligence simpliciter met the test of criminal responsibility. We are of opinion that the defendant is entitled to a

New trial.

IN THE MATTER OF DOROTHY JEAN SHELTON.

(Filed 15 June, 1932.)

1. **Adoption A a—Where mother of minor child is not a party to adoption proceedings order of adoption is void as to her.**

   An order of adoption of a minor child when the mother of the child is not a party to the proceeding is void as to such mother notwithstanding the amendment to C. S., 185 by chap. 171, Public Laws of 1927.

2. **Parent and Child A c—In this case held: mother of illegitimate child was entitled to its custody as against respondents.**

   The parents of a child have a natural right to its custody and control, but this right is not absolute and is subject to modification where the interests of the child clearly requires it, but the mother of an illegitimate child, if a suitable person, is entitled to the custody of the child even though there be others more suitable, and where, in a *habeas corpus* proceeding brought by the mother of an illegitimate child for its custody, the court finds that such mother is a person of good character and has since married, but that her husband was not the father of the child, and that the mother and her husband are willing and able to take care of the child, and that the order of adoption secured by the respondents was void as to the mother because she was not a party to the proceedings, and there is no finding that the mother had forfeited her rights by abandoning the child or was not a suitable person for its custody: *Held*, an order granting the custody of the child to the respondents is error and will be reversed on appeal, the finding of the court that it was to the best interests of the child that it remain with the respondents not being controlling in view of the other findings.

APPEAL by Effa Burnette, petitioner, from *Stack, J.*, at January Term, 1932, of HAYWOOD. Reversed.

This is a proceeding on the return to a writ of *habeas corpus* issued upon the petition of Effa Burnette.

The petitioner is the mother of Dorothy Jean Shelton, who is now about three years of age. She was born in the city of Asheville, N. C., on 28 February, 1929. At the date of her birth, her mother, the petitioner, was not married. Soon after her birth, the petitioner with her infant child went to the home of the respondents, E. P. Haynes and

his wife, Amy Haynes, in the town of Canton, N. C., where she and the said child remained until the child was about six months of age. During this time, the petitioner by her services in the home of respondents, earned her board and lodging for herself and child. At the end of six months, the petitioner left the home of the respondents and returned to the city of Asheville, where she has since resided. She left her infant child in the custody of respondents, because at that time she had no home into which she could take the child. From time to time she visited the child in the home of the respondents, and at all times has manifested her interest and affection for her. On 12 September, 1931, the petitioner was married to Harold Burnette, in the city of Asheville, and now resides in said city with her husband. Both she and her husband, who is not the father of Dorothy Jean Shelton, are able and willing to provide a suitable home for the child, where she will be under the care and in the custody of her mother, the petitioner.

The respondents have refused to surrender the child to the petitioner, contending that they have the right to her custody under and by virtue of an order of adoption, made by the clerk of the Superior Court of Haywood County, on 4 June, 1929, in a proceeding instituted before said clerk by the respondents for the adoption by them of said child. The petitioner, the mother of said child, was not a party to said proceeding, and alleges in her petition that for that reason the order under which the respondents claim the right to the custody of Dorothy Jean Shelton, is void.

The respondents in their answer to the petition, admit that the petitioner was not a party to the proceedings in which the order of adoption under which they claim the right to the custody of the child, was made, but allege that said proceeding was instituted at the request and said order was made with the consent of the petitioner. They allege that relying upon said order, they have had the care and custody of said child, and that both the respondents are now greatly attached to her, and desire to retain her in their custody, that they may fully perform their duty to said child.

After hearing the evidence offered by both the petitioner and the respondents, the court rendered judgment as follows:

"This cause coming on to be heard before his Honor, A. M. Stack, judge presiding, and holding said term of court, and the same being heard upon the petition filed by Effa Burnette for the possession of Dorothy Jean Shelton, under a writ of *habeas corpus* issued in said cause, and upon the answer filed by the respondents, E. P. Haynes and Amy Haynes, and after hearing the petition and answer, and all the evidence offered by both the petitioner and the respondents, the court finds the following facts, to wit:

"That in the month of February, 1929, petitioner gave birth to an illegitimate child, the same being the child in question, in the Mission Hospital in the city of Asheville; that thereafter, the said mother and child were brought to the home of respondents in the town of Canton, when the child was about a month old; that petitioner gave her name at said time as Mrs. Shelton, but later it was ascertained that her true name was Effa Metcalf; that said Effa Metcalf remained in the home of said respondents most of the time until August, 1929, when she went away and left the child in the care, control and custody of the respondents; and that since said date, the said Effa Metcalf, now Mrs. Effa Burnette, has not contributed anything to the support and maintenance of said child, except a few clothes and some presents.

"That on 12 September, 1931, the said Effa Metcalf married Harold Burnette who is not the father of said child; that she and her said husband are now residing in West Asheville; that her said husband has regular employment with Allport Storage Company, and makes approximately $25.00 per week; that the petitioner has employment, and is making $12.50 per week; that the said petitioner and her husband have no property except about $50.00 in money. The court finds as a fact that the said Effa Burnette is a woman of good character at this time, and also that her said husband is a man of good character, and that both said parties are regular church attendants.

"The court further finds as a fact that the said E. P. Haynes and his wife, Amy Haynes, are people of excellent character; that they live in the town of Canton, N. C., and are worth approximately the sum of four to five thousand dollars; that they have a good home and live near good schools and churches. The court finds as a fact that for almost three years the said respondents have taken care of, provided for, looked after and rendered everything necessary to the comfort, health and happiness of the said Dorothy Jean Shelton.

"The court further finds as a fact that the said Mr. and Mrs. E. P. Haynes have been married about 25 years, and have no children of their own; that they are very fond of said child, and love it as if it were their own, and the court finds as a fact that they are well qualified both morally and financially to have the permanent care, tuition and control of the said Dorothy Jean Shelton.

"The court further finds as a fact that the said E. P. Haynes and his wife, Amy Haynes, instituted a proceeding in the Superior Court of Haywood County on 4 June, 1929, for the adoption of said child, but the said mother of said child was not made a party to said proceeding; the court finds as a fact that said mother was not made a party to said proceeding because she did not want her identity known, and did not

want her parents to know that she had given birth to an illegitimate child, but that she did have knowledge that said proceedings was brought, and that the child had been adopted by an order of the clerk of the Superior Court of Haywood County, on 4 June, 1929.

"The court finds that said proceeding was void and not binding on the petitioner, she not being made a party to the same, although she had actual notice of same and made no objection at the time.

"The court further finds as a fact that the mother of said child, and her husband, have not contributed anything to the support and maintenance of said child; that the mother of said child, the petitioner, left the said child in the care and control of the respondents when the child was about six months of age; the court further finds that said child was sick a great deal of the time for the first two years of its life, and that the respondents took the best of care of said child.

"The court finds as a fact that it is to the best interest of said child that it remain in the home of the respondents and that the respondents are better prepared to care for, educate and maintain said child.

"It is therefore ordered, adjudged and decreed by the court that said child remain in the custody and management of said respondents, until the further orders of this court, and that the mother of said child be permitted to visit said child in the home of said E. P. Haynes without being molested."

From this judgment, the petitioner, Effa Burnette, appealed to the Supreme Court.

Jones & Ward for petitioner.
Grover C. Davis for respondents.

CONNOR, J. The law in this State recognizes the natural right of parents to the custody and control of their child or children during infancy. Thus in *Brickell v. Hines,* 179 N. C., 254, 102 S. E., 309, *Hoke, J.,* says: "It has been held in several recent decisions, where the question was directly considered, that parents have prima facie the right to the custody and control of their infant children, and that the same being a natural and substantive right, may not be lightly denied, or interfered with by action of the courts. It is further held in these and other cases that this right of the parents is not universal and absolute, but that the same may be modified and disregarded when it is made to appear that the welfare of the child clearly requires it. *In re Warren,* 178 N. C., 43, 100 S. E., 76; *In re Means,* 176 N. C., 307, 97 S. E., 39; *Atkinson v. Downing,* 175 N. C., 244, 95 S. E., 987, the last case citing among others *In re Fain,* 172 N. C., 790, 90 S. E., 928;

In re Mary Jane Jones, 153 N. C., 312, 69 S. E., 217; *Newsome v. Bunch,* 144 N. C., 15, 56 S. E., 501; *In re Alderman,* 157 N. C., 507, 73 S. E., 126; *In re Turner,* 151 N. C., 474, 66 S. E., 431; *In re Samuel Parker,* 144 N. C., 170, 56 S. E., 878. It is also the accepted position, as pertinent to the facts of this record, that, when an infant child has been duly adopted, pursuant to legislative provision and before a court having jurisdiction of the cause and the parties, this right of the natural parent, under the regulations usually prevailing in such cases, as to the care, custody and control of the child, is thereby transferred to the adopting parents, and the force and effect of the proceedings and decree will follow the parties on a change of domicile and control the personal relationship existent between them. The right of the adopting parents, however, is usually no greater than that of the natural, and as said in *Downing's case,* 'Here, too, the welfare of the child is entitled to full consideration, and on special facts, may become controlling in the disposition of its custody.' " In that case judgment awarding the custody of her illegitimate child to the mother, who had married since its birth, and was found by the court to be a suitable person to have its custody and control, was affirmed, although the respondent had adopted the child pursuant to an order entered in a proceeding to which the mother was a party. The court found that it was to the best interest of the infant child that she be placed in the custody of her natural parents, and that her future welfare will be thereby materially promoted.

In the instant case, the court found that the order of adoption under which respondents claim the right to the custody of the infant child of the petitioner, is void, for the reason that petitioner was not a party to the proceeding in which the order was made. *Truelove v. Parker,* 191 N. C., 430, 123 S. E., 295. Notwithstanding the amendment to C. S., 185, by chapter 171, Public Laws 1927, the order is void as to the petitioner, the mother of the child. In view of this finding to which there was no exception, the respondents have no legal right to the custody of the child, and in the absence of a finding by the court that the petitioner had wilfully abandoned her child, the petitioner has not forfeited her legal right to such custody. For this reason, the finding by the court that it is to the best interest of the child that she remain in the home of the respondents, and in their custody, is not controlling. As there was no finding of fact that the petitioner is not a suitable person to have the custody and control of her child, she has not forfeited her natural and legal right to such custody and control. It is well settled as the law of this State that the mother of an illegitimate child, if a suitable person, is entitled to the care and custody of the child, even though there be others who are more suitable. *Ashby v. Page,* 106

N. C., 328, 11 S. E., 283. As it appears from the findings of fact made by the court that the petitioner has not been deprived of her legal right to the custody of her child by a valid order of adoption by the respondents, and has not forfeited such right by a wilful abandonment of the child, and is a suitable person to have its care and custody, there is error in the judgment awarding the custody of the child to the respondents.

To the end that judgment may be entered awarding the custody of the child to the petitioner, the judgment is

Reversed.

GEO. P. STREET AND INTERSTATE BOND COMPANY v. W. GORDON MCCABE AND WIFE, FRANCES S. MCCABE; HENRIETTA C. BRYAN, AND PEOPLES STATE BANK OF SOUTH CAROLINA, COMMITTEE OR GUARDIAN OF THE ESTATE OF HENRIETTA C. BRYAN.

(Filed 15 June, 1932.)

1. Pleadings E a—Allowance of amendment to complaint by changing name of plaintiff held not error under the facts of this case.

While it is not permissible for the trial judge, over the defendant's objection, to allow another party who is a stranger to the action and who is solely interested as plaintiff therein to be substituted for the one originally bringing the action so as to substantially change the character or nature of the action, where it appears that the action was brought in the name of the president of a company and that he had paid the money for the tax certificate sued on, and that the certificate had been issued to the company as trustee of the president, and that the action was instituted in the name of the president through inadvertence or mistake, the trial judge has the power to allow the substitution of the company as the party plaintiff under the provisions of C. S., 547, the character or nature of the action not being substantially changed thereby.

2. Taxation H d—Contentions of plaintiff in regard to interest on tax certificate and apportionment of costs are not sustained.

Where the court has properly allowed an amendment to the complaint in an action on a tax sale certificate, the amended action is a continuation of the original action, and where the original action was commenced before the expiration of eighteen months after the date of the first certificate of sale, the contentions of the defendant that the plaintiff, under the statute then in force, was not entitled to more than six per cent on the certificate after the expiration of the eighteen months because of failure to bring action within that time cannot be sustained, and, furthermore, the clause relating to interest has been superseded by chapter 260, section 3, Public Laws of 1931, and *held further*, the costs and attorney's fee will not be apportioned.

3. Appeal and Error E h—Where contention is not supported by finding of court or jury or record evidence it will not be considered.

In this case the contention of the appellant in regard to the legal tender of delinquent taxes within the time agreed upon with the tax collector was not supported by a finding of the court or jury, and no evidence thereof appeared from the record, and the appellant's contention in this respect is not considered on appeal.

4. Taxation H a—Alleged irregularities in sale of land for taxes held not fatal in this case.

The statutory requirements in selling land for taxes should be observed, but all irregularities are not fatal, and in this case the alleged irregularities as to the advertisement and sale are held not to entitle the appellant to judgment invalidating the sale in view of the statutes enacted to cure immaterial irregularities, N. C. Code, 8020, 8021, and the changed mode of procedure in the sale of land for taxes.

APPEAL by defendants from *Sink, J.*, at November Term, 1931, of HENDERSON.

Action to foreclose a tax certificate. On 8 November, 1929, a summons in the cause was issued in the name of George P. Street, as plaintiff against W. Gordon McCabe and his wife, and a complaint was filed in which the plaintiff Street alleged that J. W. Bayne, tax collector, had sold the land in question on 25 June, 1928, for the nonpayment of taxes for 1927 and that the county had become the purchaser and had transferred to him the certificate of sale. McCabe and wife filed an answer. The county had in fact assigned the certificate of sale to the Empire Trust Company, trustee, and the trustee had assigned it to the Interstate Bond Company. The Bond Company was made a party plaintiff at the June Term, 1931, of the Superior Court. Henrietta Bryan held a lien upon the land and on 15 June, 1931, an order was made for service of summons upon her and her guardian. On 15 June, 1931, an amended complaint was filed by Street and the Interstate Bond Company as plaintiffs against McCabe and wife and Henrietta C. Bryan and her guardian, in which it was alleged that the land in controversy had been sold on 25 June, 1928, for taxes for the year 1927, and that the tax collector had issued a certificate of sale to the Empire Trust Company, trustee, and that said trustee had assigned the certificate to the Interstate Bond Company, one of the plaintiffs; also that Street was the president of the Interstate Bond Company. The plaintiffs demanded judgment for $1,766.18, with interest and penalties.

George P. Street is a citizen and resident of Atlanta, Georgia; the Interstate Bond Company is a corporation, having its principal office in Atlanta; the defendants are citizens and residents of Charleston, South Carolina.

W. Gordon McCabe listed for 1927 three tracts of improved mountain land and a vacant lot at Highland Lake valued at $93,150.

The defendant filed an answer to the amended complaint and at the trial the jury returned the following verdict:

1. Was the land described in the complaint advertised and sold for nonpayment of 1927 taxes in the manner provided by law for the same, as alleged in the complaint? Answer: Yes.

2. Is the plaintiff, the Interstate Bond Company, the owner and holder of the tax sale certificate described and referred to in the complaint, as therein alleged? Answer: Yes.

3. What amount is the plaintiff entitled to recover on account of said tax sale certificate? Answer: $1,766.18 with interest provided by law.

4. Is the said amount a first and prior lien on the lands described in the complaint, as therein alleged? Answer: Yes.

Judgment for plaintiff and appeal by defendants on assigned error.

Eubank & Weeks for plaintiffs.
W. C. Meekins for defendants.

ADAMS, J. The action was brought on 8 November, 1929, in the name of George P. Street, who claimed to be the assignee and holder of the certificate of sale. It was afterwards discovered that the certificate had been issued to the Empire Trust Company, trustee, and that the Trust Company had assigned it to the Interstate Bond Company, who was made a party plaintiff at the June Term, 1931, of the Superior Court. At the close of the plaintiffs' evidence the action was dismissed as to George P. Street; and the defendants contend that as he had no interest in the controversy and could not maintain the action the Interstate Bond Company cannot proceed to judgment by ingrafting in the original suit a new and independent cause of action.

Whenever objection is made the court has no authority to convert a pending action which cannot be maintained into a new and independent action by admitting a party who is solely interested as plaintiff. It is not permissible, except by consent, to change the character of the action by the substitution of one that is entirely different. *Merrill v. Merrill,* 92 N. C., 657; *Clendenin v. Turner,* 96 N. C., 416; *Hall v. R. R.,* 146 N. C., 345; *Bennett v. R. R.,* 159 N. C., 345; *Reynolds v. Cotton Mills,* 177 N. C., 412; *Jones v. Vanstory,* 200 N. C., 582.

We have no disposition to impair or interfere with this settled principle. But as a rule amendments which are not in conflict with it are liberally allowed pursuant to statutes by which the power is broadly conferred. *Lefler v. Lane,* 170 N. C., 181. It is provided that the judge

or court may in furtherance of justice amend any pleading, process, or proceeding by adding or striking out the name of any party; by correcting a mistake in the name of the party, or a mistake made in any other respect; by inserting other material allegations; and by conforming the pleadings to the facts proved if the amendment does not substantially change the claim or the defense. C. S., 547.

With these facts in mind we are essentially concerned with the relation that existed between George P. Street and the Interstate Bond Company at the beginning of the action and at the time the Bond Company was made a party plaintiff. Was this company a disinterested stranger to the litigation between Street and the defendants, and admitted as a plaintiff to set up and prosecute a new cause of action? The plaintiffs say it was not.

The tax collector testified that he sold the land to the Empire Trust Company, trustee for George P. Street. There is evidence that Street paid the money for the certificate, and in the Bond Company's application to be made a plaintiff he is represented to be the company's president. Street, the Empire Trust Company, and the Bond Company were interested in the same subject-matter and in the achievement of a common purpose. It is said also that some of the certificates owned by the Bond Company were held by Street and that the institution of the action in his name and not in the name of the company was an inadvertence or mistake. In reference to these things there are no express findings of fact; but the order making the Bond Company a party to the action is based upon its petition, and the allegations therein set forth may be accepted as an implied finding of fact to this effect.

In the two complaints the causes of action are identical—the foreclosure of a certificate of sale; and to hold under the circumstances that because a mistake was made in naming the plaintiff the admission of the Bond Company as a party changed the character of the pending action and required its dismissal would amount to such a literal and strict construction as would impede and not promote the "furtherance of justice." Relief against "a mistake in the name of a party" is one of the special objects of the statute. C. S., 547.

The statute in effect at the time of the sale provided that the certificate of sale should bear interest at the rate of 20% for a period of twelve months from the date of sale and thereafter at the rate of 10% until payment was made or final judgment was rendered, but that the holder of a certificate other than a county, municipal corporation, or other political subdivision should receive only six per cent after the expiration of eighteen months if the action was not instituted within eighteen months from the date of the first certificate. Pub. Laws 1927,

chap. 221, sec. 4, subsec. 8037. It is contended by the defendants that the Bond Company's cause of action accrued in June, 1931, when the amended complaint was filed, and more than eighteen months after the sale. We have already indicated that the amended complaint made no substantial departure from the demand originally stated but, with a change in the name of the purchaser and an addition to the description of land, in effect restated the identical cause alleged in the first complaint. Furthermore, the clause referred to has been superseded by the provisions of chapter 260, sec. 3, of the Public Laws of 1931.

The substance of one complaint is that of the other, and we see no adequate reason to apportioning the costs or the attorney's fee.

The defendants offered evidence that in the early part of the summer of 1928 the tax collector told McCabe that if he would pay the taxes for 1927 on or before 15 August, 1928, he would incur neither "penalty nor prejudice," and that on that day McCabe tendered payment of the amount assessed but was informed that the certificate had been assigned. The tax collector denied that the tender had been made. There is no finding by the court or the jury and we have discovered no evidence that a legal tender of payment was made within the time prescribed.

It is said that the sale was irregular. In selling land for taxes officers should observe the statutory requirements; but all irregularities are not fatal. Under the former law when strict compliance with all salient provisions was demanded it was not easy to make a sale by which title to real estate was conveyed. A large proportion of the taxes was never collected, and a more liberal system of sales became a necessity. Provision was made for certificates of sale by which the holder acquired "the right of lien" as in case of a mortgage. The relief given him was in the nature of an action to foreclose and the relief given the owner was the right of redemption. Statutes were enacted to cure immaterial irregularities, including any irregularity or informality in the manner or order in which any real estate may be offered for sale and any irregularity in any proceeding or requirement of the law. N. C. Code, 1927, secs. 8020, 8021. These provisions and the changed mode of procedure in the sale of land for taxes lead us to the conclusion that the alleged irregularities as to the advertisement and sale do not entitle the defendants to a judgment invalidating the procedure.

The exceptions relating to the motion for nonsuit, the description of the land in the sales list, and the verification of the complaint are without substantial merit. We find

No error.

HORNE-WILSON, INCORPORATED (FORMERLY MOTT SOUTHERN COMPANY), v. WIGGINS BROTHERS, INCORPORATED, G. T. CARSWELL, TRUSTEE, T. D. KELLY, AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

(Filed 15 June, 1932.)

1. **Assignments A a—Statutory lien of laborer or materialman is assignable.**

   The statutory lien of a laborer or materialman under the provisions of C. S., 2440, is assignable as in case of ordinary business contracts, C. S., 446, and where the debt has been assigned it establishes the relation of debtor and creditor between the owner of the building and the assignee of the debt, and the assignment of the debt carries with it the security therefor, and the assignee may enforce the statutory lien in an action brought in his own name.

2. **Mortgages H l—Complaint not alleging that notice of lien was given trustee prior to disbursement does not state cause against him.**

   In an action to enforce the statutory lien of a materialman on property which had been sold under a deed of trust executed prior to the date on which the materialman had begun furnishing material, the complaint states no cause of action against the trustee in the deed of trust when there is no allegation that notice of the claim of lien had been given the trustee prior to the disbursement of the proceeds of the sale.

3. **Laborer's and Materialmen's lien D a—Laborer's lien relates back to commencement of work and is superior to liens created thereafter.**

   The notice given the owner of a building for material furnished therefor and labor done thereon is alone sufficient for the creation of the statutory lien, and when the lien has been perfected under the statutory provisions the lien relates back to the time of the beginning of the furnishing the material or doing the work upon the building, and is superior to the lien or a mortgage executed thereafter.

4. **Laborers' and Materialmen's Liens D c—Independent action on lien will lie to reach surplus after foreclosure of prior mortgage.**

   The assignee of a valid laborer's or materialman's lien on property which has been sold under a superior lien of a deed of trust thereon may in his own name bring an independent action to reach the surplus proceeds brought by the sale under the mortgage.

CIVIL ACTION, before *Finley, J.*, at February Term, 1932, of MECKLENBURG.

The plaintiff alleged that T. D. Kelly was the owner of certain real estate, and that on 24 October, 1928, he executed and delivered to G. T. Carswell, trustee, a certain deed of trust securing a note for $3,000, payable to Wiggins Brothers. Thereafter the said Kelly, owner of said lands, duly made a contract with H. B. Carrigan to furnish certain labor and materials for improvements upon said property for the fixed sum of

$1,400. Carrigan began work and furnishing materials on 24 November, 1928. The last work and materials were furnished and performed during the month of January, 1929. After Carrigan had begun work and furnishing materials to the project, to wit, 26 December, 1928, Kelly, the owner, executed and delivered a second deed of trust to said Carswell, trustee, to secure a note of $1,250 due Wiggins Brothers. Thereafter, in June, 1929, Carswell, trustee, sold the property under the first deed of trust and T. J. Wiggins became the purchaser thereof for the sum of $4,520. After paying the expenses of sale and the note secured by the first deed of trust, it is alleged that there remained in the hands of the trustee, Carswell, the sum of $1,384.20. It was further alleged that the said trustee, after requiring an indemnity bond executed by the Fidelity and Deposit Company of Maryland, paid the said Wiggins Brothers the surplus of $1,384.20. It was further alleged that the defendant, Wiggins Brothers, at the time of obtaining the said sum of $1,384.20 to be credited upon the second deed of trust, represented to the trustee that the said second deed of trust was "prior and superior to the claim of plaintiff, and that the said deed of trust had been executed and duly filed prior to the doing of the work or the furnishing of materials mentioned in the aforesaid judgment and complaint." The plaintiff instituted an action entitled Mott Southern Company and H. B. Carrigan *v.* T. D. Kelly to recover the sum of $1,400 for labor and materials furnished upon the property of said Kelly, and thereafter on 20 September, 1929, a judgment was duly entered by the clerk of the Superior Court of Mecklenburg County decreeing that the plaintiffs had a lien upon the property of said Kelly for the sum of $1,400 "effective on and from 28 November, 1928." The judgment of the clerk was attached as an exhibit to the complaint. Thereafter on 7 January, 1932, the plaintiff by motion and order duly made the Fidelity and Deposit Company of Maryland a party to this suit.

The defendants demurred to the complaint upon the ground that as it appeared that materials and labor for the project had been furnished by Carrigan "that the alleged claim of lien is personal to said H. B. Carrigan and is statutory and is not the subject of assignment, and that said plaintiff has not legal capacity to institute said action." The defendant further demurred upon the ground of misjoinder of parties and causes of action asserting that the Fidelity and Deposit Company of Maryland was an unnecessary and improper party, and also upon the ground that the cause of action attempted to be set up against said Deposit Company of Maryland was not connected with any cause of action alleged against the other defendants.

At the hearing, the plaintiff took a voluntary nonsuit as to the Fidelity and Deposit Company of Maryland, and thereupon the trial judge overruled the demurrers of the other defendants, from which judgment said defendants appealed to the Supreme Court.

C. H. Gover and William T. Covington, Jr., for plaintiff.

H. L. Taylor and J. W. Shannonhouse for defendants, other than T. D. Kelly.

BROGDEN, J. 1. Can the assignee of a valid claim of a laborer and materialman file, perfect and enforce a lien upon the land upon which said labor and material was performed and furnished?

2. Does the complaint state a cause of action against the trustee in the deed of trust and the purchaser at the sale thereunder?

C. S., 2440, provides that any laborer or materialman may furnish to the owner "an itemized statement of amount owing to such laborer . . . and any person may furnish to such owner . . . an itemized statement of the amount due him for materials furnished for such purposes. Upon the delivery of such notice to such owner or his agent the person giving such notice is entitled to all the liens and benefits conferred by law," etc. C. S., 2441, provides that all sums due to a laborer or materialman, "as shown in the itemized statement rendered to the owner, shall be a lien on the building . . . without any lien being filed before a justice of the peace or the Superior Court."

In the case at bar the complaint and the exhibit declares that Carrigan, the materialman had an entire contract for the fixed sum of $1,400 for work and labor, and that "said claim was duly assigned to the plaintiff." The demurrer, of course, admits this allegation, but challenges the legal sufficiency of the assignment upon the ground that only Carrigan, the materialman, could perfect the lien upon the premises, as the lien was personal to the laborer or materialman and could not be perfected or enforced by his assignee.

The general trend and policy of the law, as interpreted and pronounced in this State, has recognized and sanctioned the assignments of all ordinary business contracts. The legislative sanction for such assignments is contained in C. S., 446. Commenting upon said statute, McIntosh, North Carolina Practice & Procedure, p. 199, says: "As a general rule, all ordinary business contracts are assignable, and actions for the breach may be in the name of the assignee, unless such assignment is prohibited by law, or would be in contravention of some principle of public policy, or the performance of the contract involved the element of personal skill or credit. The general test of assignability has been given, as to whether the claim would survive to or against the personal

representative of the decedent." *Casket Co. v. Wheeler,* 182 N. C., 459, 109 S. E., 378. Manifestly, the contract between Carrigan and Kelly or the valid claim that Carrigan held against Kelly for labor and material was assignable, and by virtue thereof, the relationship of debtor and creditor was established between the plaintiff and Kelly. The recent decisions of this Court interpret a lien for labor and material as a sort of statutory security for the payment of a debt. Thus in *Trust Co. v. Porter,* 191 N. C., 672, 132 S. E., 806, the Court said: "The general rule is that the assignment of a debt carries with it the security." That case was dealing with rights of the assignee of the claims of laborers and materialmen to recover upon a surety bond. The Court said: "Undoubtedly, the laborers, had they not assigned their claims, would have been entitled to maintain an action on said bond, and we think it must be held, in keeping with the general trend of authorities on the subject, that the claims of laborers and materialmen may be assigned without losing the protection of the bond given and intended for their benefit." In like manner a statutory lien is designed and intended for the benefit of laborers and materialmen, and hence it is hardly conceivable that the law would penalize the right of assignment by withdrawing the security and protection set up and established for the payment of the debt so assigned.

The defendants rely upon *Zachary v. Perry,* 130 N. C., 289, 41 S. E., 533. The Court said: "Only Robinson, the original contractor, could file the notice of lien, and then only after he had completed the work and completed his contract, and within the time provided by law. But he abandoned his contract, and therefore himself could file no lien." In arriving at the meaning of the *Zachary case* it must be observed that it involved transactions occurring prior to the enactment of the statute authorizing the filing of liens upon the property of a married woman. The point in the case is that the acceptance of the order by the *feme covert* did not bind her land, and hence no lien could be asserted or enforced. Consequently, as the married woman had contracted no valid debt, the lien was not available. Moreover, the intimation that the lien was wholly and exclusively personal to the contractor, was not pertinent to the proposition of law upon which the decision rested.

The decision in *Trust Co. v. Porter, supra,* to the effect that a lien is security for a debt, and that the assignment thereof carries the security with it, is supported by the overwhelming weight of authority in other jurisdictions, notably: Minnesota, Michigan, South Dakota, New Jersey and Massachusetts. See *Kinney v. Duluth Ore Co.,* 60 N. W., 23; *Sanduskey Grain Co. v. Borden Condensed Milk Co.,* 183 N. W., 218; *Hill v. Alliance Building Co.,* 60 N. W., 752; *West Jersey Homopathic*

Hospital v. Gibbs, 143 Atl., 316; *Wiley v. Connelly,* 60 N. E., 784. The contrary view is asserted by the Nebraska Court in *Noll v. Kennedy,* 56 N. W., 722, and *West v. Detroit Fidelity & Surety Co.,* 225 N. W., 673. It is to be observed, however, that in Nebraska the statute requires the claimant to file his claim in the office of the register of deeds and until and unless this is done the "right to a lien is lost." Our statute confers the lien immediately upon the filing of notice of claim with the owner. Hence the difference in statutory regulation perhaps explains the divergence of judicial ruling.

Manifestly, no cause of action is stated in the complaint against Carswell, trustee. There is no allegation in the complaint that notice was given to him before the fund was disbursed. *Norman v. Hallsey,* 132 N. C., 6, 43 S. E., 473; *Harris v. Cheshire,* 189 N. C., 219, 126 S. E., 593. However, a cause of action is stated against the defendant, Wiggins Brothers, Incorporated. Carrigan began furnishing labor and material before the second deed of trust was registered. Therefore, when his assignee, in apt time, duly filed a lien, as the court says, the "lien relates back to the time the work was commenced or the materials were furnished and does not impair or affect encumbrances existing prior to that time, but only those subsequently created." *Burr v. Maultsby,* 99 N. C., 263; *McAdams v. Trust Co.,* 167 N. C., 494, 83 S. E., 623; *Harris v. Cheshire,* 189 N. C., 219, 126 S. E., 593. Consequently the plaintiff under approved principles of procedure was entitled to bring an independent action in the Superior Court to reach the surplus proceeds arising from the sale of property under power contained in the first deed of trust. *Skinner v. Coward,* 197 N. C., 466, 149 S. E., 682.

The other questions raised by the demurrer are not sustained, and the judgment as rendered is

Affirmed.

MATTIE MILLARD PREVETTE v. VIOLA B. PREVETTE ET AL.

(Filed 29 June, 1932.)

1. Executors and Administrators E b—Doctrine of advancements arises only in administration of estates of intestates.

Where the deceased leaves a will disposing of his estate the doctrine of advancements to his child or children has no application. C. S., 1654(2).

2. Wills F a—Where specific bequests are made charge on land devisees take subject thereto if personalty is insufficient.

Where a will directs that each of the testator's children should receive a certain sum in money upon attaining the age of twenty-one, and that

if the personal property should be insufficient to pay each child the stated sum that it should be made up in the division of the real estate: *Held*, the devisees take the land subject to the charge of the specific bequests in case the personalty is insufficient to pay each legatee the sum stated.

3. Same: Executors and Administrators E b—Notes executed by devisee to executrix held not a lien on land devised as against transferee.

A promissory note given by a son to the executrix of his father for money borrowed from the estate long after the death of the testator are not advancements, but are binding upon the son, nothing else appearing, as his personal obligations to the estate, but such notes, although reciting that they should be regarded as advancements and should be accounted for out of the devisee's interest in the estate, do not constitute a lien on the land devised as against the devisee's transferee in the absence of registration.

4. Same—Contract of devisees for payment of item out of estate did not impose personal liability on them therefor.

Where, after the death of the testator, all of the beneficiaries under the will enter into a written agreement that a certain sum should be set aside for a tombstone and to pay funeral expenses of their mother, the testator's wife: *Held*, the agreement does not amount to an express promise by the beneficiaries to pay the sum if the estate was not sufficient therefor, and in the absence of such express agreement the beneficiaries would not be personally liable therefor, and the agreement does not constitute a lien on the lands of one of the devisees in the hands of his transferee.

5. Wills F c—Transferee of devisee held to have acquired title subject only to testator's debts and specific bequests made a charge thereon.

Where a devisee conveys his interest under the will to his wife the wife takes such lands subject to the debts of the testator and subject to the payment of certain specific bequests made a charge upon the land by the will in case the personalty was insufficient therefor, but the lands in the wife's hands is not subject, in the absence of registration, to personal notes given by her transferor to the testator's executrix nor for a contract between the devisees for the payment of a certain item out of the estate when the devisees incurred no personal liability therefor.

6. Costs B b—Plaintiff in partition proceedings denying right of lien on property in favor of other tenants held not liable for entire costs.

Where a transferee of a devisee asserts her right to hold the lands devised in severalty instead of as a tenant in common with other devisees, and successfully resists the claim of the other devisees that her land be charged with personal notes executed by her transferor to the executrix of the estate: *Held*, an order taxing the entire costs in the Superior Court against the transferee is erroneous.

CIVIL ACTION, before *Clement, J.*, at October Term, 1931, of WILKES.

Iredell T. Prevette died on 21 December, 1898, leaving a last will and testament. He also left him surviving a widow, Mrs. Alice A. Prevette, who is named executrix in the will, and who died on 24 June,

1928. Iredell T. Prevette left eleven children, all of said children surviving their mother, Alice A. Prevette, but Roscoe Prevette has since died leaving him surviving a widow and one son.

The will of Iredell T. Prevette devised several hundred acres of land and bequeathed his personal property to his wife, Alice A. Prevette, and to his eleven children as tenants in common. Item 10 of his will is as follows: "It is my will and desire and I so direct, that in the event that my personal estate is not sufficient to pay each of my children five hundred dollars, as each becomes 21 years old, then I direct that such child as may fail to receive the five hundred dollars, out of said personal estate, that the same be made up to said child in the division of the real estate."

Buell L. Prevette was a son of Iredell Prevette, who married the plaintiff, Mattie Millard Prevette, about 1909. On 27 July, 1915, Buell L. Prevette, then about twenty-seven years of age, conveyed to the plaintiff, his wife, by deed "all of my right, title and interest in the estate of my father, Iredell T. Prevette." This deed was recorded on 21 August, 1915. Not more than three months thereafter Buell L. Prevette was adjudged a bankrupt.

On 19 August, 1910, Buell L. Prevette borrowed $100 from his mother, Alice A. Prevette, executrix of Iredell T. Prevette, and executed a promissory note therefor. On 21 August, 1913, Buell L. Prevette executed and delivered to his mother, Mrs. Alice A. Prevette, executrix of Iredell T. Prevette, a promissory note for the sum of $700, containing the following clause: "If not paid by me, the amount shall be considered as an advancement to me and shall be accounted for by me out of my interest in my father's estate." Buell L. Prevette did not list in his bankruptcy schedules the land which he had theretofore conveyed to his wife, nor did he list either of the notes aforesaid. The only evidence bearing upon the proof of the notes in the bankruptcy proceeding was the testimony of said Buell L. Prevette, as follows: "The bankruptcy was advertised and my mother knew it. She was in Hickory and I told her." Buell L. Prevette was duly discharged in bankruptcy on 25 January, 1916.

On 12 August, 1929, the plaintiff, Mattie Millard Prevette, instituted against all the other heirs at law of Iredell T. Prevette except her husband, Buell L. Prevette, a proceeding to partition the land of Iredell Prevette, and alleging that she and the defendants were tenants in common of said land, and that by virtue of the deed from her husband she was entitled to a one-eleventh undivided interest in said property and desired to hold her share in severalty. The defendants filed an answer denying that the plaintiff was entitled to one-eleventh of said

land, alleging that her deed was invalid and that the notes of $100 and $700, given by Buell L. Prevette, constituted advancements to be accounted for in the division of the estate, and that all the heirs at law of Alice A. Prevette, after her death, had signed a paper-writing setting apart $1,250 to pay the funeral expenses of said Alice A. Prevette, and that certain of defendants had not received $500 specified in the will of Iredell T. Prevette. The defendants further requested that Buell L. Prevette, the husband of plaintiff, be made a party defendant, and that the interest of the plaintiff in said land should be specifically charged with the $100 note, the $700 note, and her part of the burial expenses aforesaid.

There was an order of reference and to the report of the referee exceptions were duly filed both to the findings of fact and conclusions of law. Subsequently the question came on for hearing before the judge of the Superior Court at the October Term, 1931, who modified the report of the referee by certain findings of fact and certain conclusions of law. He found that certain sums of money had been advanced to the children of the deceased, including the $100 note and the $700 note to Buell L. Prevette. He further found that all of the defendants except Buell L. Prevette, husband of plaintiff, had brought in all the notes representing funds they had borrowed from the estate after the death of their father "and presented the same in hotch pot" as required by law, and that the plaintiff and her husband had failed and refused "to bring into hotch pot the $100 note and the $700 note," etc. The judge concluded, as a matter of law: (a) That since Buell L. Prevette failed to list the real estate conveyed to the plaintiff, his wife, in the bankruptcy proceeding and had failed to list the $100 note or the $700 note that said bankruptcy did not relieve him of accounting for said notes. (b) That Mrs. Pearl Duncan, Mrs. Mattie Eudaily and Miss Annie T. Prevette had not received in full the $500 payments specified in Item 10 of the will of Iredell T. Prevette. (c) That when the petitioner, Mattie Millard Prevette, had accounted to said estate for the note of her husband for $100, dated 19 August, 1910, with interest thereon until paid, and to Miss Viola B. Prevette for $700 with interest from 21 August, 1913, subject to all payments upon the same, . . . and after the burial fund of $1,250 has been paid . . . and the legacies to Mrs. Duncan, Mrs. Eudaily and Annie T. Prevette . . . she is entitled to one-eleventh of the real estate described in the petition to this action to be partitioned to her and held in severalty by her.

The court being of the opinion that the petitioner's "refusal to account for said notes has made it necessary for this proceeding to be brought into Superior Court . . . that plaintiff should be taxed with all the costs of the Superior Court," and that the costs before the clerk of

this court and the partition hereinbefore provided for, should be based equally between all the legatees of said will.

From the judgment rendered all parties appealed.

The defendants appealed upon the following ground:

1. Because the judge failed to dismiss the proceedings because plaintiff refused to permit the notes for $100 and $700 to be brought into hotch pot.

2. For that the court failed to find that the deed from Buell L. Prevette to the plaintiff was fraudulent and constituted a cloud upon the title of the defendants.

C. L. Whitener and E. B. Cline for plaintiff.
Charles G. Gilreath for defendants.

BROGDEN, J. The doctrine of advancements arises under our statute in the administration of estates of intestates. C. S., 1654, Rule 2; Mordecai's Law Lectures, Vol. 2, page 1346. Iredell T. Prevette did not die intestate, but left a will which provided in Item 10 that each of his children was to have $500 from his personal estate upon arriving at the age of 21 years, and if such personal estate was not sufficient to pay said amounts "that the same be made up to said children in the division of the real estate." It was found as a fact by the trial judge, and there is evidence to support such finding, that Pearl Duncan, Mattie Eudaily and Annie T. Prevette, children of testator, have not received the sums of money specified in the will. Consequently, the real estate devised by the intestate remains liable for such portion of said sums as the personal estate shall be insufficient to discharge.

The $100 note and the $700 note, executed by Buell L. Prevette, represented funds borrowed from the executrix long after the death of the testator. These sums are not advancements as contemplated by law. The $700 note contains a recital that the amount thereof "shall be considered as an advancement to me and shall be accounted for by me out of my interest in my father's estate." This note was signed by Buell L. Prevette, and, of course, is binding upon him, nothing else appearing, but the mere recital in the note would not constitute a lien upon land owned by the plaintiff, his wife, in the absence of registration of the instrument, even assuming that said instrument is eligible to registration. The plaintiff, together with the other heirs at law of Iredell T. Prevette, signed a contract on 27 June, 1928, agreeing "to set aside the sum of $1,250 for the purpose of paying all burial expenses and placing a monument to the grave of his wife, Alice A. Prevette, deceased." The wording of this agreement does not amount to an express promise to pay so as to impose a personal liability upon the makers. Apparently,

it was an agreement by the heirs at law, including the plaintiff, that $1,250 belonging to the estate, might be used for the purpose specified, but there is no provision that if the estate does not have such sum that the parties signing the agreement would be personally liable for payment thereof. At all events the agreement would not constitute a lien upon plaintiff's land. In the last analysis the plaintiff owns a one-eleventh interest in the real estate of Iredell T. Prevette, subject, of course, to the payment of his debts and such other sums of money as may be necessary to pay in full the $500 to each child specified in Item 10 of the will. The land of the plaintiff is not burdened with the payment of the $100 note or the $700 note, nor of any part of the sum of $1,250 "set aside for burial expenses" of the wife of the testator. Nor is the plaintiff upon the facts in this case, to be penalized with the entire cost of the Superior Court because she asserts her right under the law as a tenant in common to hold her share of the land in severalty and for failure or refusal to account for the notes of her husband heretofore referred to.

The defendants by the exceptions filed by them in this record challenge the judgment rendered chiefly upon the ground that failure of plaintiff to account for her husband's notes aforesaid debar her from any interest in the land, and that her deed was fraudulent as it was executed and delivered within four months of the time of filing of a petition in bankruptcy by her husband, the grantor. The merit of these exceptions has been determined by the discussion of the principles of law involved in plaintiff's appeal.

Plaintiff's appeal, reversed.

Defendant's appeal, affirmed.

J. COLEMAN QUEEN, DECEASED, ROXANNA HENSON QUEEN, DECEASED WIDOW OF J. COLEMAN QUEEN, AND W. N. HENSON, ADMINISTRATOR OF THE ESTATE OF ROXANNA HENSON QUEEN, v. THE CHAMPION FIBRE COMPANY, EMPLOYER, AND THE GLOBE INDEMNITY COMPANY, CARRIER.

(Filed 29 June, 1932.)

Master and Servant F g—Upon death of claimant soon after award is made to her as sole dependent, her administrator is entitled to balance thereof.

Where compensation under the Workmen's Compensation Act is awarded the widow of the deceased employee as his sole dependent, and the widow dies within a few months after the award is made: *Held*, under a liberal interpretation of the relevant provisions of the Compensation Act the administrator of the widow is entitled to the balance of the award.

QUEEN *v.* FIBRE CO.

APPEAL by defendants from *Stack, J.*, at January Term, 1932, of HAYWOOD. Affirmed.

The judgment of the court below is as follows:

"This cause coming on to be heard and being heard at this the January Term, 1932, of Haywood Superior Court, before his Honor, A. M. Stack, judge presiding, upon the appeal of the Champion Fibre Company and the Globe Indemnity Company from the judgment rendered by the North Carolina Industrial Commission, the court finds the following facts:

That J. Coleman Queen was an employee of the Champion Fibre Company at Canton, N. C., and that he lost his life as an employee of the Champion Fibre Company while in the discharge of his duties as such employee. That thereafter Roxanna Henson Queen, his widow, was found by the Commission his sole dependent and was awarded compensation at the rate of $13.41 per week for a period of 350 weeks.

The court further finds as a fact, from the record and the admission of the parties, that the said J. Coleman Queen left surviving him his widow, Roxanna Henson Queen and several children, that the award and allowance was made to Roxanna Henson Queen. The court further finds as a fact that soon after the award, to wit: on 6 March, 1931, Roxanna Henson Queen, widow as aforesaid, died intestate in Haywood County, North Carolina.

The court further finds as a fact that W. M. Henson is the duly named and appointed administrator of the estate of Roxanna Henson Queen, deceased, and as such administrator has been made a party hereto in proper form.

The court further finds that on 10 July, 1931, this matter came on to be heard before the Hon. T. A. Wilson, one of the members of the North Carolina Industrial Commission, and that after hearing all the evidence in said case the said T. A. Wilson, Commissioner, found the facts and rendered judgment to the effect that W. M. Henson, administrator of Roxanna Henson Queen, deceased, was entitled to recover of the Champion Fibre Company and the Globe Indemnity Company, carrier, the weekly payments of $13.41 per week for the remainder of said period of 350 weeks.

The court further finds as a fact that on appeal from the said T. A. Wilson, Commissioner, said cause was heard before the North Carolina Industrial Commission, as a whole, and that on 29 October, 1931, the Industrial Commission rendered judgment adopting the findings of fact and conclusions of law as set forth in the opinion of the Hon. T. A. Wilson, Commissioner, and from the hearing before the full Commission, the defendants, Champion Fibre Company and Globe Indemnity Com-

pany appealed to this court, and after hearing the same and argument of counsel the court hereby adopts the findings of fact and conclusions of law as set forth in the opinion rendered by T. A. Wilson, Commissioner under date of 10 July, 1931, and further adopts the findings of fact and conclusions of law as set forth in the full Commission's report bearing date 29 October, 1931, and judgment is hereby rendered against the Champion Fibre Company and Globe Indemnity Company for the unpaid compensation under the agreement and judgment heretofore approved and rendered in this cause.

It is further considered, ordered and adjudged by the court, that the Champion Fibre Company and the Globe Indemnity Company pay the costs incurred on this appeal."

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

Jones & Ward for plaintiff.
Heazel, Shuford & Hartshorn for defendants.

CLARKSON, J. The question involved in this cause: Where an employee has lost his life in the course of his employment and thereafter an award has been made by the Industrial Commission to his widow, as his sole dependent, and within a few months after the award is made his widow died intestate, is her administrator entitled to the benefits of the award as made to her? We think so.

In construing the many statutes on this subject the decisions of the different states are conflicting. It seems that there is no straight line on the subject. In this State the following statutes have some bearing:

Section 40 of the Compensation Act reads as follows (chap. 120, Laws of 1929): "If the deceased employee leaves no dependents, the employer shall pay to the personal representative of the deceased, the commuted amount provided for under section 38 of this act, less the burial expenses which shall be deducted therefrom."

Section 40 above, of the original act was amended by the 1931 General Assembly by striking out all of said section and adding in lieu thereof, the following (chap. 274, sec. 5): "If the deceased employee leaves no dependents, the employer shall pay to the next of kin, as herein defined, the commuted amount provided for under section 38 of this act for whole dependents; but if the deceased left no next of kin, as herein defined then one-half of said commuted amount shall be paid to the Industrial Commission to be held and disbursed by it in the manner hereinafter provided; one-half of said commuted amount shall be retained by the Industrial Commission and the other one-half paid to the personal representative of the deceased, to be by him distributed to the next

of kin as defined in the statutes of distribution; but if there be no next of kin as defined in the statutes of distribution, then the personal representative shall pay the same to the Industrial Commission after payment of costs of administration," etc.

Section 38 of the original act, provides: ". . . that the employer shall pay . . . in one of the methods hereinafter provided, to the dependents of the employee wholly dependent upon his earnings for support, at the time of the accident, a weekly payment equal to sixty per centum of his average weekly wages, but not more than eighteen dollars nor less than seven dollars a week for a period of three hundred fifty weeks from the date of the injury," etc.

The insurance carrier received a premium to cover the liability in question. J. Coleman Queen, lost his life in the performance of duty and at the time an employee of the Champion Fibre Company. He left a widow, Roxanna Henson Queen, wholly dependent. The Industrial Commission fixed the award that she should be paid. The widow died a few months after the award had been made to her. Plaintiff administrator of Roxanna Henson Queen, claims the balance of the award. Giving a liberal construction to the act, we think the administrator is entitled to it. We can see no reason why the Globe Indemnity Company, defendant, the insurer, is interested in the matter. With knowledge of the law it took the premium to carry the liability. Suppose the widow died an hour after her husband, would it have been conscionable, for the insurance carrier that had received the premium, to pay no compensation? We think not. The carrier is not hurt in this particular situation, now presented. We do not pass upon the question that might arise in cases where there are several dependents and there is death among them after the award is made. The judgment below is

Affirmed.

MRS. CANCEL W. BROWN, WIDOW OF CANCEL W. BROWN, DECEASED EMPLOYEE, v. ASHEVILLE ICE COMPANY, EMPLOYER, AND MARYLAND CASUALTY COMPANY, INSURANCE CARRIER.

(Filed 29 June, 1932.)

1. Master and Servant F i—Findings of fact of Industrial Commission upon competent evidence are conclusive.

Where the Industrial Commission finds as a fact that the death of an employee was not caused by an accident arising out of and in the course of his employment, and there is competent evidence to support such finding it is conclusive on the courts upon appeal, and the conclusiveness of such finding is not affected by the fact that the award stated that the claimant had failed to sustain the burden of making out his case.

2. Master and Servant F b—Hearsay evidence is incompetent to establish fact of accident to employee.

The fact of an injury to an employee may be proven by circumstantial evidence, but mere hearsay evidence is incompetent to prove such fact, and the Industrial Commission may not consider incompetent testimony of declarations of a deceased employee in passing upon the question.

CIVIL ACTION, before *Sink, J.*, at January Term, 1932, of BUNCOMBE.

Cancel W. Brown died 21 May, 1931. He had been working for the Asheville Ice Company for about twelve months prior to his death and was engaged in driving a delivery truck for delivering ice. On Friday, 15 May, when he came home he complained that his back was hurting. He went to work the next day and when he quit work Saturday night he complained that his head was hurting. He was very restless Saturday night, and when he got up Sunday morning he did not want anything to eat and still complained of pain. At times he was unconscious. A physician was called Sunday morning. The deceased had no fever at that time. His wife testified that her husband, the deceased, told her Monday morning that he got hurt on Friday, but that he did not tell her anything about how he got hurt. On Saturday there was a breaking out on his body and several physicians were called to treat him. There was no evidence of any break or abrasion on his body. There was evidence that he was delivering ice in blocks of one hundred pounds each and that he would place a block upon his back and slide it down into the ice box at the dairy. A witness testified that on the day of his injury the deceased told him that "he was laying ice down in the box or had started to do so, and that he slipped or that the ice slipped, and that in order to catch it was caught in a strain and hurt his back." Another witness testified that the deceased said: "I slipped out at Baird's Dairy when I put ice in the box." On Saturday afternoon the deceased said he thought he had measles, as there was a breaking out upon his body. Another witness testified that deceased said that "the ice slipped and pulled him back and threw him in a strain." Several physicians testified, but they had no definite opinion as to the cause of the death.

The hearing Commissioner, among other findings, found as a fact that "the deceased did not suffer an injury by accident while employed by the Asheville Ice Company, causing his death." The conclusions of law are as follows: "The attending physicians are some three or four in number that attended the deceased in his last illness. They were unable, on the witness stand, to say what caused the death of the deceased. They all agreed that some kind of infection was probably the cause of it. There is some hearsay evidence in the record to the effect that the claimant, while putting a block of ice in the refrigerator of one of the customers

of the Asheville Ice Company, hurt himself. On the day of the alleged accident, however, the deceased complained to his employer that he was feeling badly. He was broken out with a rash of some kind that three or four fellows thought was probably the measles and one doctor diagnosed the trouble as measles. During the time that the deceased was complaining about the measles and feeling bad he made no mention to his employer about any accident he might have suffered. From the evidence in the record the Commission is certainly not able to say that the deceased suffered any injury by accident which caused his death. From this evidence we are unable to say more than the attending physicians have said and they all have testified that they did not know what caused the death of the deceased and all agreed that it was some kind of infection. None of the attending physicians found any evidence of trauma on the body of the deceased. The Commissioner does not believe that the burden placed upon the claimant to make out a case has been sustained. Compensation must, therefore, be denied, and it is so ordered. Concerning the costs in this matter, let each side pay its own."

There was an appeal to the full Commission which adopted the findings of fact and conclusions of law of the hearing Commissioner, and thereupon the plaintiff appealed to the Superior Court.

The judgment of the Superior Court contains the following clauses: "And it appearing to the court that the Industrial Commission made further findings that the cause of the death of said Cancel W. Brown is unknown, and that he did not suffer an injury by accident while employed by the Asheville Ice Company, causing his death, and it appearing that these findings are all negative and are dependent upon and include the conclusions that the plaintiff has not sustained the burden placed upon her to make out a case, and that the evidence is insufficient, and the court being of the opinion that these findings set out in the opinion of the Industrial Commission . . . are mixed questions of law and fact, involving the question of the sufficiency of the evidence and are, therefore, not binding upon this court upon appeal; and the court being of the opinion, after considering all the evidence, that the same is sufficient to make out a prima facie case for the plaintiff. . . . It is . . . decreed that the award heretofore made be, and it hereby is, set aside, and that this cause be and the same hereby is remanded to the North Carolina Industrial Commission, and it is ordered that said Commission shall reconsider this cause and make an award herein conformably with this judgment."

From the foregoing judgment the defendant appealed.

Thomas A. Jones, Jr., and Heazel, Shuford & Hartshorn for plaintiff.
Uhlman S. Alexander and W. C. Ginter for defendant.

BROGDEN, J. The Industrial Commission found as a fact that "the deceased did not suffer an injury by accident while employed by the Asheville Ice Company, causing his death." There was competent evidence to support such finding, and consequently the appellate court was thereby concluded. It is true that the hearing Commissioner stated that he did "not believe that the burden placed upon the claimant to make out a case has been sustained. Compensation must, therefore, be denied and it is so ordered." The full Commission adopted the findings of fact and conclusions of law contained in the opinion of the hearing Commissioner and further declared: "Upon the finding that the death of deceased was not the result of an injury by accident arising out of and in the course of employment, the claimant's compensation is denied and the case dismissed." The expression used by the hearing Commissioner referring to burden of proof or prima facie case has no determinative bearing. When the Commission finds the essential facts the award, as a matter of law, must abide such finding. Obviously, if all the testimony offered by a claimant, tending to show an injury sustained in the course of his employment, was hearsay and incompetent, no finding based upon such testimony could be upheld. The fact of an accident, of course, may be established by circumstantial evidence, but in the present case the only evidence of injury to the back of deceased was his declaration made to various parties who testified at the hearing. Manifestly, such evidence was wholly incompetent. If the deceased did not suffer an injury by accident causing his death, his dependents are not entitled to recover. Such was the finding of the Commission, supported by competent evidence, and, therefore, the trial judge was without power to decree "that said Commission shall reconsider this cause and make an award herein conformably with this judgment."

Reversed.

BANK OF FRENCH BROAD v. CATAWBA CONSTRUCTION COMPANY, JOHN N. BOHANNON, CITY OF HICKORY, AND SAMUEL E. FINLEY.

(Filed 29 June, 1932.)

1. Evidence C a—Burden is on plaintiff to establish his case.

The burden is on the plaintiff to offer evidence in support of all essential and material elements of its cause of action.

2. Assignments C a—Action on assignment by third person, the assignee not being a party, held properly nonsuited in this case.

Where a contractor assigns all moneys to become due under his contract for certain municipal construction to a bank to secure loans made

to him, and directs that out of the funds the bank should first repay itself and then pay another bank the balance to the extent of the contractor's loans from such other bank, and the governing body of the city, upon the request of the contractor, orders the city manager to forward all checks due the contractor to the assignee bank for deposit to the credit of the contractor: *Held*, the acceptance of the assignment by the city did not constitute an unconditional promise to pay the assignee the total contract price, and upon default by the contractor and the completion of the work by another an action on the assignment by the second bank is properly nonsuited, it not appearing that the assignee bank had failed to receive an amount sufficient to repay itself and the plaintiff bank, and the assignee bank not being a party to the action.

CIVIL ACTION, before *MacRae, Special Judge,* at December Term, 1931, of CATAWBA.

On or about 6 September, 1927, the city of Hickory awarded a paving contract to the Catawba Construction Company. John N. Bohannon was the president of the company and owned a large majority of the stock. The National Surety Company executed a surety bond for the faithful performance of the contract, but neither the contract nor the bond appears in the record. On 12 October, the Catawba Construction Company made an agreement with the Wachovia Bank and Trust Company, reciting the contract, and that the Construction Company "in order to carry out said contract has applied to the party of the second part (Wachovia Bank and Trust Company) for loans to be made from time to time as said work progresses." Said agreement further provides "in order to secure the payment of said loan it is agreed that all moneys due the party of the first part (Construction Company) by the city of Hickory, upon the monthly estimates for work done and completed, shall be paid to the party of the second part, and out of the moneys so paid the party of the second part is hereby authorized and directed to first repay itself any and all moneys due it for money borrowed by the party of the first part, and then to pay to the Bank of French Broad at Marshall, North Carolina, each month the sum of $1,000 on the notes of the party of the first part executed to said Bank of French Broad until the sum of $9,500 shall be paid, with interest. After paying the money due the party of the second part on account of any loan and the $1,000 authorized to be paid to the Bank of French Broad, the balance of said fund from said estimate shall be left on deposit to the credit of the party of the first part, to be used by it as it sees fit. . . . In order to secure the said Wachovia Bank and Trust Company for any loans made or to be made the party of the first part does hereby transfer, assign and set over to the party of the second part all its right, title and interest in the money due or that may become due under said contract by the city of Hickory and hereby directs the city of Hickory to

pay any and all moneys due or to become due under said contract to said Wachovia Bank and Trust Company to be distributed as above provided."

On 15 October, 1927, the city council of the city of Hickory passed the following resolution: "Catawba Construction Company, the contractor of paving work in progress in the city, having so requested, it is . . . ordered that the city manager forward all checks on estimates due to Catawba Construction Company, to the Wachovia Bank and Trust Company, of Asheville, for deposit to the account of the Catawba Construction Company."

An attorney for the Wachovia Bank and Trust Company appeared at the meeting of the city council and notified the members of the assignment by the Construction Company to the Wachovia Bank and Trust Company. The witness testified: "I drew a resolution, in which the city of Hickory was to ratify and accept this contract, and agree to make the payments as provided therein, and, as I recall, I carried that resolution to Hickory when I appeared before the city council, and asked them to pass that resolution, and I think I left one or two copies of that resolution, they did not pass the resolution as I had it prepared, but passed the one which you have in your pleadings."

Thereafter checks issued up to 1 April, 1928, were made payable to the Catawba Construction Company but forwarded to the Wachovia Bank and Trust Company. In April, 1928, the Catawba Construction Company assigned the contract to the defendant, Samuel E. Finley. The Construction Company apparently defaulted prior to 3 May, 1928, because on that date the Construction Company acknowledged the receipt of a resolution passed by the city council, notifying said Construction Company that it had defaulted. The evidence tended to show that in April, 1928, the city of Hickory was owing for paving work a sum in excess of $60,000.

The plaintiff Bank of French Broad instituted the present action against the Catawba Construction Company and John N. Bohannon, city of Hickory and Samuel E. Finley, alleging that "the said construction program had been completed and that the defendant, city of Hickory, has, notwithstanding its knowledge of the claims and rights of this plaintiff, made full settlement with the said Samuel E. Finley, and that the said Samuel E. Finley has failed and refused, and still fails and refuses to make settlement with his codefendant, Catawba Construction Company, and John N. Bohannon, and that on 6 April, 1928, the city of Hickory wilfully, wrongfully and unlawfully ceased payment of the estimate on account of street paving contract with defendant, Construction Company, and . . . wrongfully and unlawfully refused to pay

certain moneys accruing under said contract and owing to defendant, Catawba Construction Company, . . . and wrongfully and unlawfully refused to make further remittances to the Wachovia Bank and Trust Company under and in accordance with the contract and assignment," etc.

At the conclusion of plaintiff's evidence a judgment of nonsuit was entered, from which judgment plaintiff appealed.

Louis A. Whitener, Guy Weaver and Manly, Hendren & Womble for plaintiff.

Self, Bagby, Aiken & Patrick and R. H. Shuford for defendant.

BROGDEN, J. The law imposed upon the plaintiff the burden of offering evidence to support all the essential and material elements of its cause of action. In substance the evidence tended to show that the Construction Company assigned all payments due and to become due to the Wachovia Bank and Trust Company by virtue of a written contract between the Construction Company and said bank. The Wachovia Bank and Trust Company was directed in the assignment of the contract "to first repay itself any and all moneys due it for money borrowed . . . and to pay to the Bank of French Broad each month the sum of $1,000 on the notes of the party of the first part (Construction Company) executed to said bank."

There was further evidence offered by the plaintiff that for some reason the city of Hickory declared the contract of the Construction Company in default. It was admitted in the answer that the work had been completed and paid for, but it does not appear who completed the work. There is evidence that in May, 1928, there was an amount of approximately $65,000 due somebody by the city of Hickory, and that this amount was not paid to the Wachovia Bank and Trust Company under the assignment agreement. The Wachovia Bank and Trust Company, the assignee, is not a party to the suit, and it appears that on 16 April, the Construction Company owed the Wachovia Bank and Trust Company between $21,000 and $22,000. It appears that checks issued by the city of Hickory totaling approximately $63,000, were issued for "deposit in the Wachovia Bank and Trust Company, Asheville, North Carolina, to the account of Catawba Construction Company." Whether said amounts were sufficient to pay all sums due by the Construction Company to the Wachovia Bank and Trust Company and the plaintiff during the periods when said payments were being made does not appear. Indeed, the evidence is confusing in several particulars. For instance, there is much evidence offered by the plaintiff relating to some sort of suit between the parties in the Federal Court.

In the last analysis, the case was tried upon the theory that the resolution adopted by the city council on 15 October, 1927, in which it was "ordered that the city manager forward all checks on estimates due to Catawba Construction Company to the Wachovia Bank and Trust Company of Asheville for deposit to the account of the Catawba Construction Company," imposed upon the city of Hickory the duty and obligation of paymaster to the plaintiff by virtue of the application of the principle announced in *Bank v. McCanless,* 199 N. C., 360, 154 S. E., 621. This position, however, is not sustained by that case. The acceptance of the assignment by the city of Hickory did not constitute an unconditional promise "to pay the assignee all funds coming into the hands of the contractor." See, also, *Trust Co. v. Construction Co.,* 191 N. C., 664, 132 S. E., 804; *Snelson v. Hill,* 196 N. C., 494, 146 S. E., 135; *Trust Co. v. Construction Co.,* 200 N. C., 304, 156 S. E., 491.

Affirmed.

STATE OF NORTH CAROLINA ON RELATION OF VELMA BANE, SYBIL NICHOLSON, Z. A. NICHOLSON, JR., CLIFTON NICHOLSON, AWA NICHOLSON, GEORGE NICHOLSON, PHILLIS NICHOLSON, AND PRESTON NICHOLSON, ALL MINORS, AND REPRESENTED IN THIS ACTION BY THEIR NEXT FRIEND, W. P. BANE, v. BELVA NICHOLSON, AND MARYLAND CASUALTY COMPANY.

(Filed 29 June, 1932.)

Guardian and Ward H b—Guardianship bond is liable for loss caused by deposit as permanent investment in savings account without security.

Where a guardian deposits the entire estate of his ward in the savings department of a bank at 6 per cent interest, and such deposit is not made pending investment of the funds or for current use, but is made as a permanent investment without requiring the bank to give security therefor: *Held,* the deposit in legal contemplation is a loan to the bank without security and the guardian and his bond are liable for the loss occasioned by the insolvency of the bank a number of months after the deposit was made although the guardian acted in good faith in making such investment. C. S., 2308.

APPEAL by defendants from *Clement, J.,* at January Term, 1932, of HENDERSON. No error.

This was an action brought by plaintiffs against defendants to recover for breach of guardian bond. The bond was made by Belva Nicholson and the Maryland Casualty Company, her surety. The penalty of the bond was $16,802.

The plaintiffs contend that defendant Belva Nicholson, guardian, instead of lending this money on real estate or on bonds, or on some proper

loan, and taking security for it, the guardian loaned the money to the Citizens National Bank of Hendersonville, N. C., agreed to leave it in this bank for no definite time, but made a loan to the bank, made arrangements with the bank to take the guardianship funds and pay them 6% interest; that the guardian took no security for it and, therefore, was making a loan of the wards' money to some one, to wit, the bank, and that no security was taken for it, and that was a violation of the law. On the contrary, the defendants contend that the guardian acted in good faith; that, it was not a loan; that it was a deposit, and the mere fact that the bank agreed to pay 6% did not make it a loan, but that it was a deposit, and contend the guardian acted in good faith and if a loss did occur, the guardian would not be liable.

The court below charged the jury that "It is the opinion of the court and it so charges you, that this in substance was a loan to the bank, and the fact that the guardian did not take any security would be a breach of the guardian's duty, and that the guardian and bondsman would be liable."

The issues submitted to the jury were:

(1) Did the defendant, Belva Nicholson, breach the guardian bond sued on in this action, as alleged in the complaint? The court charged the jury: "If you believe the evidence, and are satisfied by the greater weight of the evidence of this fact, you will answer this issue, Yes. The court instructs you upon all the evidence in this case, if believed by you, and found by you to be true, that you will answer the first issue, Yes.

(2) What damage, if any, are the relators entitled to recover of the defendants? The court instructs you upon all the evidence in this case, if believed by you, and found by you to be true, you will answer the second issue $6,775.38, with interest thereon at 6% from 20 November, 1930."

The jury answered the issues according to the court's instructions. The court rendered judgment on the verdict. Defendants made numerous exceptions and assignments of error and appealed to the Supreme Court.

Shipman & Arledge and Carter & Carter for plaintiffs.
Merrimon, Adams & Adams for defendants.

CLARKSON, J. The question involved: Is it a breach of a guardian's bond for the guardian to place the entire trust fund, in the amount of $8,401.01, on permanent (savings account) deposit in a commercial bank, without security, under an agreement that the bank would pay six per cent interest thereon, said arrangement being allowed to stand until the failure of the bank, more than nine months after the deposit; the guardian so acting voluntarily, in the utmost good faith, and with

the express approval of her bondsman, but with the result of the loss of the greater part of the fund in consequence of the insolvency of the bank? We think so.

C. S., 2308 is as follows: "Guardians shall have power to lend any portion of the estate of their wards upon bond with sufficient security, to be repaid with interest annually, and all the bonds, notes or other obligations which he shall take as guardian shall bear compound interest, for which he must account, and he may assign the same to the ward on settlement with him." A guardian will be held liable for any loss resulting from a loan made without taking any security, however solvent the debtor may have been when the loan was made. *Collins v. Gooch,* 97 N. C., 186; *Cobb v. Fountain,* 187 N. C., 335; *Roebuck v. Surety Co.,* 200 N. C., 196; *Bank v. Corporation Commission,* 201 N. C., 381.

In 12 R. C. L., at p. 1133, part sec. 30, we find: "The deposit of funds in an incorporated bank of good reputation temporarily, while they are awaiting investment or needed for current use, is proper; but a deposit in bank for a fixed period of time has been held to be a loan without security and to render the guardian responsible for any loss." The case of *Pierce v. Pierce,* 197 N. C., 348, is distinguishable. In the judgment of the court below we find

No error.

ADA STORY HUNT, ADMINISTRATRIX OF E. W. HUNT, v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 29 June, 1932.)

1. Death B d—Evidence that death resulted from negligence of defendant held sufficient to be submitted to the jury.

Where there is evidence that a mail crane used to take bags of mail aboard train without its stopping had been allowed to become in a state of disrepair, causing a mail clerk to fall therefrom while performing his duties, and there is evidence that the clerk's health was good theretofore but that subsequently he was not able to work and that he died several months thereafter, and declarations of the clerk made after the accident that his fall had injured his back are admitted in evidence: *Held,* in an action against the railroad company owning the mail crane, the evidence is sufficient to be submitted to the jury although there was evidence contra that the clerk died of pellagra and that his back was not injured in the fall.

2. Appeal and Error F a—Where ruling of court is not assigned as error the question will not be considered on appeal.

The refusal of the court to strike out evidence admitted on the trial will not be considered on appeal where the refusal to grant the motion to strike out has not been assigned as error by the appellant.

HUNT *v.* R. R.

CIVIL ACTION, before *Harris, J.*, at October Term, 1931, of VANCE.

The plaintiff alleged and offered evidence tending to show that E. W. Hunt was employed by the United States Government to carry mail from the post office at Greystone, North Carolina, to a mail crane owned and operated by the defendant. The mail crane is operated by two levers. A person desiring to operate the crane stood on a platform and took hold of the lever arm and raised it up. The two arms are connected so that when you raise one you pull the other one down. A witness said: "You hitch the mail on the top one and pull it down and hook the sack on the bottom one." The platform is about five feet from the ground and is made of casting and is about 8½ by 14 inches. The platform had no railing and was fastened to a wooden base by bolts. On 30 July, 1929, the deceased took the mail and carried it to this crane for the purpose of placing it there so that the mail train of defendant could take the mail sack from the crane without stopping the train. A witness testified: "When you step on the platform it would tilt toward the track, and when you pulled the arm down it would tilt more. . . . On 30 July, 1929, it was in exactly the same condition it had been in for several months. I had been using it off and on during that time. . . . Anybody that got up on it could notice the tilting—that it leaned a little bit." Another witness said: "The platform had been in a rickety condition for sometime. The bolts were loose in the platform and it was cracked. The platform was cracked or broken. . . . Anybody could see it would tilt if he got on it. . . . The platform was broken and bolts loose and shackly too." The evidence tended to show that the plaintiff fell from the platform upon the track below. When he was brought home immediately after falling the deceased said to his wife: "This has got me. I will never get over it. I am going to die." When asked what he was talking about, he said: "he fell, that he was hanging the mail on the crane and hooked it at the top, and the platform tilted, the lever jerked out of his hand, and he fell across the railroad irons kinder sideways and hurt his back, and he could not walk."

There was evidence that prior to the injury plaintiff was a steady worker and in good health, and that after the injury he was never able to work or to walk. He died on 16 December, 1929. There was evidence offered by the defendant tending to show that there was no injury to plaintiff's back and that he died of pellagra.

At the close of all the evidence a motion for nonsuit was sustained and the plaintiff appealed.

Charles B. Aycock, M. C. Pearce and Thos. W. Ruffin for plaintiff.

Murray Allen for defendant.

BROGDEN, J. There was evidence tending to show: (1) that the plaintiff in the discharge of contractual duties fell from the platform of defendant while thereupon for the purpose of attaching a mail sack to the crane provided for such purpose; (2) that the platform was defective in that the bolts were loose causing it to tilt, and that such defective condition had existed for a substantial period of time; (3) that the fall from the platform occasioned injury to the plaintiff; (4) that prior to the fall plaintiff was in good health, and subsequent thereto was never able to walk or work.

The only evidence tending to show that the plaintiff fell from the platform was his declaration when he was carried home. He lived several months after the declaration. There was uncontradicted evidence to the effect that his back was not injured. His declaration was admitted presumably upon the theory that it was a dying declaration. While the record shows that there was a motion to strike out the declaration and such motion was overruled, there is no assignment of error for such ruling, and, therefore, the same is not considered. See *Howard v. Wright,* 173 N. C., 339, 91 S. E., 1032.

The evidence, viewed with that liberality which the law requires upon motions of nonsuit, was sufficient to be submitted to the jury, and as a new trial will result, it is deemed inadvisable to discuss the various questions debated in the briefs.

Reversed.

A. M. KENAN v. DUPLIN MOTOR COMPANY AND OSBORNE LUMBER COMPANY, AND GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION.

(Filed 29 June, 1932.)

1. Master and Servant F e—Policy of insurance carrier will be construed in favor of injured employee when the policy is ambiguous.

Where the policy contract of an insurance carrier issued in accordance with the provisions of the Workmen's Compensation Act is ambiguous the doubt will be resolved in favor of those insured thereunder, having regard to the ascertainment of the intent of the parties as gathered from the instrument as a whole.

2. Master and Servant F i—Findings of fact of Industrial Commission are conclusive when supported by competent evidence.

The findings of fact by the Industrial Commission in a hearing before it are conclusive on the courts when supported by any competent evidence.

3. Master and Servant F e—Policy held to cover injury to employee while engaged in job incidental to regular business of employer.

Under the provisions of a policy of an insurance carrier insuring salesmen, drivers, and helpers and all other employees of a motor sales company wherever engaged, whether working at certain places defined or elsewhere in connection with or in relation to such work or places: *Held*, evidence that an employee was engaged at the time of the accident in the incidental business of his employer in unloading logs from a truck, and was working under the orders of his employer as a part of his duties is sufficient to sustain a finding of the Industrial Commission that the policy contract covered the injury.

APPEAL by General Accident Fire and Life Assurance Corporation, from *Devin, J.*, at August Civil Term, 1931, of DUPLIN. Affirmed.

This is an action brought by plaintiff under the North Carolina Workmen's Compensation Act in which he seeks compensation for an "injury by accident arising out of and in the course of the employment." N. C. Code of 1931 (Michie), sec. 8081(f).

The defendant, appellant insurance carrier, denies that the injury was so sustained. The hearing Commissioner and the full Commission sustained plaintiff's contention, and compensation was awarded him, and on appeal by the carrier to the Superior Court the award was sustained. The insurance carrier excepted and assigned error and appealed to the Supreme Court.

Murray Allen for A. M. Kenan plaintiff and Duplin Motor Company.

Clyde A. Douglass for General Accident Fire and Life Assurance Corporation.

CLARKSON, J. The Duplin Motor Company's liability policy contains the following classifications of operation: "1. (a) Automobile salesmen; (b) *All other employees;* 2. Clerical office employees; 3. (a) *Drivers and drivers' helpers (if not in 1) wherever engaged;* (b) Chauffeurs and chauffeurs' helpers (if not included in 1) wherever engaged." Also "(6) This agreement shall apply to such injuries so sustained by reason of the business operations described in said declarations which, for the purpose of this insurance shall include all operations necessary, incident or appurtenant thereto, or connected therewith, *whether such operations are conducted at the work places defined and described in said declarations or elsewhere in connection with, or in relation to, such work places.*" (Italics ours.)

There are two questions involved in this case: (1) As to whether the policy written by General Accident Fire and Life Assurance Corporation to cover compensation liability of Duplin Motor Company covers the particular type of work plaintiff was engaged in on 11 February,

1930; (2) As to whether plaintiff was a regular employee of the Duplin Motor Company.

The Commission found: "That the plaintiff was a regular employee of the Duplin Motor Company, earning an average of twenty dollars per week. That plaintiff was injured by accident arising out of and in the course of his regular employment by the Duplin Motor Company on 11 February, 1930, while unloading logs; that plaintiff's work was truck chauffeur; that defendant Motor Company was not engaged in logging and lumber business but hauling logs was incident and appurtenant to the regular business of the Duplin Motor Company, as described in the insurance policy issued by the General Accident Fire and Life Assurance Corporation to the Duplin Motor Company, 1 July, 1929." The policy uses the broad language "all other employees," etc.

"If the clause in question is ambiguously worded, so that there is any uncertainty as to its right interpretation, or if for any reason there is doubt in our minds concerning its true meaning, we should construe it rather against the defendant, who was its author, than against the plaintiffs, and any such doubt should be resolved in favor of the latter, giving, of course, legal effect to the intention, if it can be ascertained, although it may have been imperfectly or obscurely expressed." *Walker, J.*, in *Bray v. Ins. Co.*, 139 N. C., at p. 393; *Allgood v. Ins. Co.*, 186 N. C., at pp. 420-21.

It is well settled that if there is any competent evidence to support the findings of fact of the Industrial Commission, although this Court may disagree with such findings, this Court will sustain the findings of fact made by the Commission. We think there was evidence to sustain the findings of the Commission. The judgment of the court below is

Affirmed.

J. A. MINNIS, ADMINISTRATOR OF C. E. SHARPE, DECEASED, v. W. E. SHARPE, J. L. SCOTT, JOHN M. FIX, J. C. STALEY, MRS. MAUD G. HOLT, EXECUTRIX OF KIRK HOLT, DECEASED, JAMES N. WILLIAMSON, JR., S. G. MOORE AND C. V. SHARPE.

(Filed 29 June, 1932.)

1. Corporations C c—In absence of evidence of causal connection between negligence of director and damage, a nonsuit is proper.

In an action against the directors of a corporation to recover the loss sustained by the plaintiff by reason of the directors' negligence in the performance of their duties, a motion as of nonsuit by one of the directors should be allowed where there is no evidence of a causal connection between his negligence and the damage to the plaintiff, such damage being sustained after the movant had ceased to be a director.

2. Appeal and Error I a—Petition to rehear is allowed in this case.

Where an examination of the evidence set out in the case on appeal sustains the petitioner's contention that the Court inadvertently overlooked in deciding the case the contentions presented by his petition, his petition to rehear will be allowed.

THE above entitled action was tried before *Devin, J.,* and a jury at April Term, 1931, of ALAMANCE.

The defendants appealed from the judgment of the Superior Court to the Supreme Court. Upon the hearing of their appeal, the judgment of the Superior Court was affirmed in accordance with the opinion filed in the Supreme Court on 24 February, 1932. See 202 N. C., 300, 162 S. E., 606.

On 31 March, 1932, the defendant, James N. Williamson, Jr., filed in the Supreme Court his petition for a rehearing of his appeal from the judgment of the Superior Court. Rule 44, Rules of Practice in the Supreme Court. 200 N. C., 838. A rehearing was ordered on 9 May, 1932, and has been had since that date.

It appears from the uncontradicted evidence at the trial of this action in the Superior Court, that the loss sustained by plaintiff's intestate by reason of the negligence of the directors of the Alamance Insurance and Real Estate Company occurred after 27 November, 1927, and that the defendant, James N. Williamson, Jr., was not a director of the said company, either *de jure* or *de facto* on or after said date. He was not reëlected as a director in the annual meeting of the stockholders of the company in January, 1927.

The defendant, James N. Williamson, Jr., excepted to the refusal of the trial court to allow his motion for judgment as of nonsuit at the close of all the evidence and on his appeal to the Supreme Court assigned such refusal as error. This assignment of error was not sustained at the hearing of the appeal by the Supreme Court. In his petition for a rehearing of his appeal, the defendant suggests that the Supreme Court was inadvertent to his contention that there was no evidence at the trial in the Superior Court tending to show a causal connection between any negligence on his part as a director of the Alamance Insurance and Real Estate Company and the loss sustained by plaintiff's intestate.

Cooper A. Hall and Shuping & Hampton for plaintiff.
Brooks, Parker, Smith & Wharton for defendant.

CONNOR, J. In the absence of evidence tending to show a causal connection between the negligence of the defendant, James N. Williamson, Jr., while serving as a director of the Alamance Insurance and Real

Estate Company, and the loss sustained by plaintiff's intestate by reason of the negligence of the directors of said company, after the defendant had ceased to be a director, it was error to refuse defendant's motion for judgment as of nonsuit at the close of all the evidence. *Burke v. Coach Co.*, 198 N. C., 8, 150 S. E., 636, *Whitaker v. Car Co.*, 197 N. C., 83, 147 S. E., 729, *Peters v. Tea Co.*, 194 N. C., 172, 138 S. E., 595, *Gillis v. Transit Corporation*, 193 N. C., 346, 137 S. E., 153, *Ledbetter v. English*, 166 N. C., 125, 181 S. E., 1066.

An examination of the evidence set out in the case on appeal sustains the petitioner's contention that the court inadvertently overlooked his contention presented by his petition for a rehearing.

The judgment of the Superior Court against the defendant, James N. Williamson, Jr., is reversed.

Petition allowed.

B. G. THOMPSON v. L. F. HERRING AND MRS. ELMETTA HERRING.

(Filed 29 June, 1932.)

Abatement and Revival B b—Actions and parties held not the same and plea in abatement in second action was bad.

An action by the maker to recover for the wrongful sale of certain cotton hypothecated as collateral for a note will not support a plea in abatement in an action instituted by the payee against the maker and guarantor to recover on the note and the letter of hypothecation, the parties not being the same and the causes of action being different.

APPEAL by defendants from *Cowper, Special Judge*, at March Term, 1932, of WAYNE.

Civil action to recover on promissory note and letter of hypothecation.

On 14 January, 1931, L. F. Herring instituted an action in Greene County against B. G. Thompson to recover damages for wrongful sale of certain cotton hypothecated as collateral to Herring's note. Summons was served 16 January, and complaint filed 20 January.

On 15 January, 1931, B. G. Thompson instituted this action in Wayne County against L. F. Herring and Mrs. Elmetta Herring to recover on promissory note and letter of hypothecation. Duly verified complaint was filed with issuance of summons and both served on defendants 17 January.

Plea in abatement is filed by the defendants on the ground that the same subject-matter is involved in the action instituted in Greene County by L. F. Herring against B. G. Thompson.

From the overruling of the plea in abatement, the defendants appeal, assigning errors.

Dickinson & Freeman for plaintiff.

J. Faison Thomson, Walter G. Shepard and Hugh Brown Campbell for defendants.

STACY, C. J., after stating the case: The plea in abatement was properly overruled. *Brown v. Polk,* 201 N. C., 375, 160 S. E., 357. The parties are not the same and the causes of action are different in the two suits. A final judgment in the action brought in Greene County by L. F. Herring against B. G. Thompson would not support a plea of *res judicata* in the present action instituted in Wayne County. This is one of the tests of identity. *Bank v. Broadhurst,* 197 N. C., 365, 148 S. E., 452.

Affirmed.

CLEMENT RICHARDSON v. CULLEN SATTERWHITE.

(Filed 29 June, 1932.)

1. Evidence F d—Letter containing admission by attorney acting within scope of authority held competent against client.

An attorney employed to check over the accounts of his client in order to ascertain its correctness acts within his implied authority, at least, as an agent in writing a letter to the creditor the day following his examination and investigation of the books, admitting the correctness of a certain item and denying the correctness of others, and the letter is admissible against the client in an action in which the item admitted to be correct by the attorney is disputed.

2. Same—Admission of attorney employed to check account stands upon the same footing as admissions of any other authorized agent.

Where an attorney writes a letter in the course of his employment acknowledging for his client the correctness of a certain item as it appeared upon the creditor's books, the letter is competent upon the trial as an admission of an agent on the question of the correctness of the item, but it does not have the effect of a solemn admission *in judicio* but stands upon the same footing as an admission of any other authorized agent.

3. Account Stated A a—Lapse of time before objecting to account held not to render it an account stated.

In this case there was a long delay by the debtor giving a note secured by mortgage on lands in settlement of an account in disputing the validity of the note and mortgage for want of consideration upon the contention

that the note was given for land never conveyed: *Held,* the lapse of time and the giving of note did not bar the maker from establishing by his evidence his matter in defense.

4. Cancellation of Instruments A b—Fact that son of mortgagee bid in property and sold it to cousin held not evidence of fraud.

The fact that one member of a family conveys land to another or borrows money from another member is not evidence of fraud or bad faith in the transactions.

5. Principal and Agent C c—Knowledge of agent will not be imputed to principal where agent is acting for own benefit.

Where a member of a loan committee of a bank passes favorably upon a loan for the payment of the purchase price of lands, and he has an interest in the transaction and works for his individual pecuniary benefit his knowledge of fraud or of outstanding equities against the land will not be imputed to the bank, but if the committeeman was acting for the benefit of some other person and not for his own benefit, such knowledge would be imputed to the bank.

CIVIL ACTION, before *Moore, Special Judge,* at Fall Term, 1931, of FRANKLIN. N. B. Finch and the Citizens Bank of Spring Hope were made parties to the suit.

On 5 March, 1924, the defendant, Cullen Satterwhite, and his wife executed and delivered a mortgage to N. B. Finch, trading as N. B. Finch and Company, upon a tract of land in Franklin County, to secure a note in the sum of $4,011.73. Satterwhite is a colored man more than 70 years of age, and alleged that he was illiterate. On 20 February, 1928, the said land was sold and purchased by F. D. Finch for the sum of $2,500. On 27 April, 1928, F. D. Finch and wife conveyed the land to the plaintiff, Clement Richardson. On the same date, to wit, 27 April, 1928, Clement Richardson and wife borrowed from the Citizens Bank of Spring Hope the sum of $3,500 and executed a promissory note to said bank and secured the same by deed of trust upon the property to O. B. Moss, trustee, which deed of trust was duly recorded on 16 May, 1928.

The defendant, Satterwhite, remained in possession of the land, and on 24 November, 1928, the plaintiff instituted the present action against the defendant Satterwhite, to recover possession of the land. Satterwhite filed an answer alleging in substance that he had been dealing with N. B. Finch, a general merchant, for many years; that he was illiterate and did not understand the nature of business transactions, and that when he executed and delivered the mortgage on 5 March, 1924, to secure the note for $4,011.73 he was not indebted to N. B. Finch and Company in any amount whatever. He further alleged that N. B. Finch, the mortgagee, was president of the Citizens Bank of Spring Hope at the

time of the sale of said land, and at the time the plaintiff, Richardson, purchased from F. D. Finch and executed the said $3,500 note. He further alleged that F. D. Finch, the purchaser of the land at the mortgage sale, was the son of N. B. Finch; that the plaintiff was a nephew of said Finch, and that by reason of the further fact that the said N. B. Finch was a member of the loan committee of said bank which loaned to the plaintiff the sum of $3,500, that the bank was charged with notice of the failure of consideration of the mortgage given by the defendant on 5 March, 1924, and hence that the bank was not an innocent holder of said $3,500 note.

The evidence for the plaintiff tended to show that the defendant, Satterwhite, had been dealing with N. B. Finch, trading as N. B. Finch and Company, for many years, and that he had executed to said Finch from time to time various liens and deeds of trust upon said land to secure the payment of advances made to him, and that the defendant made no complaint about the correctness of the account until the land was first advertised for sale in November, 1926.

The defendant, Satterwhite, offered evidence tending to show that the defendant, N. B. Finch, offered to loan him $4,000 to buy an additional tract of land, and that he executed a mortgage for that amount, but that the seller of the land declined to make a deed, and he then made demand upon N. B. Finch to return the papers to him. This was never done.

The following issues were submitted to the jury:

1. "Was the defendant indebted to N. B. Finch and Company on account of the indebtedness recited in the mortgage deed referred to in the pleadings and at the time of the attempted foreclosure of said mortgage deed, and, if so, in what amount?"

2. "Was the plaintiff purchaser for value of the lands in question and without notice of the equities of the defendant, as alleged in the answer?"

3. "Did the Citizens Bank of Spring Hope, N. C., take its deed of trust upon said lands for value and without notice of the equities of the defendant, as alleged in the answer?"

The jury answered the first issue "Nothing"; the second issue "No," and the third issue "No."

Upon the verdict judgment was entered decreeing that the plaintiff is not the owner nor entitled to the possession of the land described in the complaint. It was further ordered that the mortgage deed from Cullen Satterwhite and wife to W. B. Finch and Company, dated 25 March, 1924, be adjudged to be "void and of no effect," and the clerk of the Superior Court of Franklin County is directed to cancel the same upon the records of said county," etc.

Hobart Brantley and White & Malone for plaintiff.
W. L. Lumpkin and Yarborough & Yarborough for defendant.

BROGDEN, J. On 20 August, 1925, the defendant, Satterwhite, went to the place of business of N. B. Finch and Company, mortgagee, for the purpose of examining the status of the account. The defendant narrated the transaction as follows: "Mr. Ruffin was my lawyer before he died. He went down there and went over these accounts. He came by my house and got me. He came somewhere close about ten o'clock. I don't know what time, but . . . I got back home that night. He came up here and checked up everything. When Mr. Ruffin checked up everything I got up here about eleven o'clock and Mr. Ruffin had me gone away from here about two hours by sun. He and I went down there that day, and when we were coming back he said: "Satterwhite, they have got you in debt." . . . He said something was mighty wrong, and Mr. Finch told me himself that something was mighty wrong about my account. . . . When I got down there I went over the books with Mr. Roebuck. I can read figures, but I can't read writing. . . . We were going over all the accounts. . . . I didn't get a dollar of money."

On the next day, to wit, 21 August, 1925, William H. Ruffin, now deceased, and an eminent lawyer, wrote a letter to N. B. Finch and Company. The letter begins as follows: Louisburg, North Carolina, 21 August, 1925. Messrs. N. B. Finch and Company, Spring Hope, N. C. Gentlemen: *In re:* C. C. Satterwhite note adjustment. Mr. Lassiter and I, with Cullen's assistance, finished up our investigation of your books late yesterday evening, and checking over my work this morning I find that the only items now in question between us are checks made to your order as follows: 1913: 17 February, $5.00; 22 February, $5.00; 22 March, paid through Henry Satterwhite, $5.00; 6 September, $2.25; 9 September, $5.00. 1915: 29 May, $10.00; 12 June, $10.00. 1916: 29 May, $5.60. 1917: 13 January, $6.39. 1919: 21 April, $10.00; 28 April, $5.00; 19 April, $4.00; 16 May, $10.00; 8 July, $8.80; 26 September, $31.68; 2 December, $6.60. These checks total $130.32. He contends, as you know, that these were payments on account and not merely checks cashed for his accommodation. Possibly your cash account for these dates might throw some light on this question. . . . I could not always check up on your renewal notes, but from the best information I could get the last note, dated 5 March, 1924, for $4,011.73, is correct, and we raise no further question about the same. . . . I am advising Cullen to make every effort to pay this down out of the 1925 crops to $3,000 or less, and if he will do this I believe I can rein-

state his land bank loan and get him the amount appraised which is, as I recollect, $3,776.51. If you will make this adjustment with him at once it will encourage him to make stronger efforts to pay you and get this matter settled. I found Mr. Lassiter a most agreeable gentleman, quite competent and very courteous and obliging in checking over this matter with me under adverse circumstances. Very truly yours, Wm. H. Ruffin."

The plaintiff offered the foregoing letter in evidence, but the same was excluded by the trial judge. Consequently, the legal question arising is: Was the letter competent?

Wigmore, Vol. 2 (Second Edition), section 1078, states the general rule applicable to the facts as follows: "He who sets another person to do an act in his stead as agent is chargeable by such acts as are done under that authority, and so too, properly enough, is affected by admissions made by the agent in the course of exercising that authority. This question, frequently enough a difficult one, depends upon the doctrine of agency applied to the circumstances of the case, and not upon any rule of evidence." To like effect is the declaration of this Court in *Bank v. McEwen,* 160 N. C., 414, 76 S. E., 222. "Where the relation of attorney and client exists the law of principal and agent is generally applicable, and a client is bound according to the ordinary rules of agency by the acts of his attorney within the scope of his authority." See, also, *West v. Grocery Co.,* 138 N. C., 165, 50 S. E., 565; *Bank v. Miles Company,* 177 N. C., 284, 98 S. E., 769; *Bizzell v. Equipment Co.,* 182 N. C., 98, 108 S. E., 439, and *Myers v. Kirk,* 192 N. C., 700, 135 S. E., 788. Manifestly, if Satterwhite had examined the books of account of N. B. Finch and Company and had written a letter of like tenor, it could not be doubted that such letter was admissible in evidence. Consequently, if Mr. Ruffin was employed by the defendant to adjust the account and in the process of adjustment he made an examination of the books and immediately wrote a letter setting forth additional credits that should be allowed to his client, and undertaking to arrive at the amount which his investigation disclosed to be due, there is no sound reason or principle of law which would render the letter incompetent and inadmissible as evidence in the trial. The defendant testified that Mr. Ruffin was employed to examine and check the account. Hence it is apparent from the testimony of the defendant that the letter was written with the implied authority of defendant, at least, and certainly within the scope of the employment.

No case has been cited from this State discussing the admissibility of letters written by attorneys within the scope of the employment. The question, however, has been considered by courts in other jurisdictions,

and such letters have been generally held to be admissible. The following cases are in point: *McNamara v. Douglas,* 61 Atl., 368; *James v. Boston Electric Ry. Co.,* 87 N. E., 474; *Burraston v. First Nat'l. Bank,* 62 Pac., 425; *Loomis v. N. Y., N. H. & H. Ry. Co.,* 34 N. E. 82; *In re Rhinehardt's Estate,* 160 N. Y. S., 828. The principle is tersely stated in the headnote of the *McNamara case, supra,* as follows: "Where, in an action on a note given for plumbers' services, defendant claimed that she had been induced to give the note by fraud and duress, and that the work and materials furnished were of no value, it was error for the court to exclude a letter written by defendant's attorney in response to a bill for the work, in which the attorney requested an itemized bill of the materials used in the job, and stated that the defendant would pay the bill as soon as satisfied of its correctness; such letter being prima facie within the attorney's authority." The opinion of the Court says: "This letter was improperly excluded. It tended to show that up to the time of its date the defendant made no claim of fraud, or that the work and materials furnished were of no value. Had it been admitted, the defendant would have been at liberty to show, if she could, that her attorney, in writing it, went beyond his authority. Prima facie it was within it."

While the letter in the case at bar, is admissible in evidence, it of course does not conclusively bind the defendant or give it the effect of a solemn admission in judicio. It would merely stand upon the same footing as the declaration of any other authorized agent.

The plaintiff contends that the giving of the note and mortgage by the defendant and the lapse of time before there was any challenge of the correctness of the amount due, constitutes an account stated. This contention is not sustained. The case of *Gooch v. Vaughan,* 92 N. C., 610, is directly in point. The Court says: "The account rendered, and the long delay in objecting to it on account of suggested errors therein, do not necessarily conclude Gooch. The strong presumption is that he examined and accepted it as correct, and he is bound by it, and it ought not to be disturbed, unless he shall allege and prove some substantial error, mistake, omission, or fraud, vitiating it. This he has the right to do, if he can, and in case of success, to have the just correction made. The burden is on him to prove such allegation." *Davis v. Stephenson,* 149 N. C., 113, 62 S. E., 900.

Plaintiff contends that there was no evidence that the Citizens Bank of Spring Hope was not an innocent holder of the $3,500 note executed and delivered to it by the plaintiff. The plaintiff requested the court in apt time to instruct the jury to answer the second issue "Yes." The evidence bearing upon the execution of the $3,500 note is substantially

as follows: N. B. Finch, the mortgagee, was president of the bank and a member of the loan committee. He sold the land to his son, F. D. Finch. The son, F. D. Finch, conveyed the land to the plaintiff, who is a nephew of the mortgagee. Obviously, the fact that one member of a family conveys land to another or borrows money from another is no evidence of fraud or bad faith, for there is no law which forbids kinsmen to deal with each other, and no court has ever held that such dealing in itself was a badge of fraud or bad faith. N. B. Finch, mortgagee and president of the bank, as a member of the loan committee, approved the loan for $3,500, and testified that the money was "paid over to me" on the amount his son, F. D. Finch, owed him. The trial judge instructed the jury that if N. B. Finch "negotiated this loan for his own benefit, that is, if he negotiated this loan in the bank for his own benefit, then such knowledge as he had would not be imputed to the bank, but if for some other person, and not for his own benefit, then it would be imputed to the bank; that is if it was his transaction and not for some other person, then the bank would not be charged with the knowledge in dealing for himself, but if he had knowledge of these equities, and the transaction was for someone else, then this knowledge would be imputed to the bank." This instruction is in accordance with accepted principles of law announced in *Bank v. Wells,* 187 N. C., 515, 122 S. E., 14; *Bank v. Howard,* 188 N. C., 543, 125 S. E., 123; *Trust Co. v. Anagnos,* 196 N. C., 327, 145 S. E., 924.

New trial.

GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. CENTRAL BANK AND TRUST COMPANY v. BOARD OF FINANCIAL CONTROL AND COUNTY OF BUNCOMBE, AND GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. CENTRAL BANK AND TRUST COMPANY v. BOARD OF FINANCIAL CONTROL AND CITY OF ASHEVILLE.

(Filed 29 June, 1932.)

1. Banks and Banking H c—Commissioner of Banks is entitled to possession of all assets of insolvent bank taken over by him.

The Commissioner of Banks taking over the assets of an insolvent bank as successor to the Corporation Commission, is entitled to the possession of all the assets of such insolvent bank for the purposes of liquidation.

2. Banks and Banking C d: Pledges A a—Where bonds given to secure deposit are placed in safety deposit box the delivery is sufficient for pledge.

Where a bank delivers certain of its bonds and securities to a municipal depositor in order to secure deposits, made from time to time, and the

bonds and securities are delivered to the depositor by the bank's authorized officers or employees and placed in a safety deposit box in the bank by such depositor in the presence of the bank officers or employees, the depositor having an individual key and the bank a master key and the simultaneous use of both keys being necessary to open the safety deposit box: *Held*, after the placing of such securities in the depositor's safety deposit box they could not be removed therefrom by the bank or its officials, and the delivery to the depositor was unconditional and sufficient to constitute a valid pledge.

3. Same—Fraudulent Conveyances A c—Where pledgee has no knowledge of debtor's insolvency the pledge may not be set aside for fraud.

Where a city and county deposit public funds in a bank and take from the bank as security for the deposit certain bonds, notes, etc., and there is evidence that the city and county, relying on the pledged security, made large deposits in the bank and drew thereon and that their checks were honored until a few days before the bank closed its doors, and there is no evidence tending to show that the city or county knew of or had reasonable grounds to believe that the bank was insolvent at the time the securities were pledged: *Held*, the evidence is insufficient to support a finding by the trial judge that the pledge of the securities by the bank constituted an unlawful preference and was a fraud on other creditors of the bank, and his judgment that the Commissioner of Banks was entitled to recover the pledged assets will be reversed, and the fact that the bank was insolvent at the time and that its officials knew or should have known of its insolvency would not affect this result, and the fact of continued deposits by the county and city is not evidence of fraud on their part.

4. Banks and Banking C d—Bank has authority to pledge assets to secure deposits by cities and counties.

A bank has power to pledge its notes, bonds and securities to secure deposits by a city or county, and where the power has been properly exercised and is not fraudulent as to other depositors and creditors the pledge is valid and will be upheld as against the Commissioner of Banks taking over its assets upon its later insolvency.

APPEAL by defendants from *Sink, J.*, at January Term, 1932, of BUNCOMBE. Reversed in both appeals.

The above entitled actions were begun in the Superior Court of Buncombe County on 23 July, 1931.

In each of said actions, the plaintiff alleges that he is the owner and is entitled to the possession of certain notes, bonds and securities, which are described in his complaint in said action, and which are now in the possession of the defendants therein. He prays judgment in each action that he recover of the defendants the notes, bonds and securities described in the complaint therein.

The defendants in each action deny that the plaintiff is the owner and is entitled to the possession of the notes, bonds, and securities de-

scribed in the complaint therein, and allege that they are the owners and are entitled to the said notes, bonds and securities. They pray judgment that the plaintiff recover nothing of the defendants in said action, and that defendants go without day and recover of the plaintiff their costs.

When the actions were called for trial at the January Term, 1932, of the Superior Court of Buncombe County, they were consolidated, by consent, for purposes of trial. A trial by jury was expressly waived, and it was agreed that the judge should hear the evidence, find the facts therefrom, and on the facts found by him, render judgment in each of said actions. The actions were thereupon tried in accordance with this agreement.

On the facts found by the judge, and in accordance with his conclusions of law, it was ordered, considered and adjudged by the court that the plaintiff is the owner and is entitled to the possession of the notes, bonds and securities described in the complaint in each of said actions, and that he recover of the defendants therein the said notes, bonds and securities, together with his costs in said actions.

From the judgment in each of said actions, the defendants therein appealed to the Supreme Court, assigning errors in the findings of fact and in the conclusions of law on which said judgment was rendered.

Johnson, Smathers & Rollins, Thos. D. Johnson and Alfred S. Barnard for plaintiff.

Jones & Ward, C. K. Hughes and Merrimon, Adams & Adams for defendants.

CONNOR, J. The Central Bank and Trust Company is a corporation organized under the laws of the State of North Carolina. For many years prior to the date on which the said corporation closed its doors, and ceased to do business, because of its insolvency, to wit, 19 November, 1930, it was engaged in a general banking business, as authorized by the laws of this State, in the city of Asheville, in the county of Buncombe, and State of North Carolina. While it was engaged in such business, the said corporation was under the general supervision of the Corporation Commission of North Carolina, and was subject to examination, from time to time, by said Commission, with respect to the conduct of its business. After the Central Bank and Trust Company admitted its insolvency, and for that reason suspended business on 19 November, 1930, the Corporation Commission took charge of its affairs, and proceeded to liquidate its assets, as authorized by chapter 113, Public Laws of North Carolina, 1927. Since the amendment of said statute by chapter 385, Public Laws of North Carolina, 1931, the title

to all the assets of the Central Bank and Trust Company has vested in the plaintiff, Gurney P. Hood, Commissioner of Banks, as the statutory successor of the Corporation Commission. The plaintiff is now entitled to the possession of all the assets of the Central Bank and Trust Company for purposes of liquidation and distribution among the depositors and other creditors of said corporation.

The notes, bonds and securities, which are the subject-matter of the above entitled actions, were deposited from time to time, prior to 19 November, 1930, in safety deposit boxes in the vault of said company. Prior to said deposits, the said notes, bonds and securities were owned by the Central Bank and Trust Company and constituted a part of its general assets. They were deposited in said safety deposit boxes, pursuant to agreements in writing entered into by and between the Central Bank and Trust Company, and the county of Buncombe and the city of Asheville, on 2 February, 1928, and 1 August, 1929, respectively, as security for deposits of money made from time to time, by the said county and city with the Central Bank and Trust Company. After the Central Bank and Trust Company suspended business, because of its insolvency, on 19 November, 1930, and after its affairs had been taken in charge by the Corporation Commission of North Carolina, officials of the county of Buncombe and of the city of Asheville, with the consent of the liquidating agent of the said Corporation Commission, removed from the safety deposit boxes assigned to said county and to said city, respectively, the notes, bonds and securities, described in the complaints in these actions, and subsequently delivered the same to the defendant Board of Financial Control, which now holds said notes, bonds and securities, for collection, under and pursuant to the provisions of chapter 253, Public-Local Laws of North Carolina, 1931. The Central Bank and Trust Company, at the time it suspended business, because of its insolvency, had on deposit to the credit of the county of Buncombe and to the city of Asheville, respectively, large sums of money, which have not been paid, and which are now due by the Central Bank and Trust Company to said county and to the said city.

On the facts found by him in each of the above entitled actions, the judge concluded, as matters of law:

"1. That there was not such unconditional delivery of said collaterals as to constitute a valid pledge;

2. That the attempt to pledge said collaterals, under the circumstances disclosed by the evidence, constituted an unlawful preference;

3. That the attempted pledge of said collaterals, under the circumstances disclosed by the evidence, was a fraud upon the other creditors of the Central Bank and Trust Company."

There is no evidence on the record in this appeal to support the findings of fact on which the judge concluded as a matter of law that there was not such an unconditional delivery of the notes, bonds and securities which were deposited in the safety deposit boxes in the vault of the Central Bank and Trust Company, and which were in said boxes when said company suspended business, because of its insolvency, as to constitute a valid pledge of said notes, bonds and securities, to the county of Buncombe and to the city of Asheville, respectively, as security for their deposits with the Central Bank and Trust Company, at the date of its admitted insolvency.

All the evidence is to the effect that said notes, bonds and securities were segregated, from time to time, from other assets of the Central Bank and Trust Company, by one of its officers or employees, acting in its behalf, and after the specific approval of officials of the county or of the city, as the case might be, were deposited in safety deposit boxes assigned by the company to the county or to the city, respectively, in the presence of such officials. After notes, bonds and securities had been deposited in said safety deposit boxes, they could not be removed therefrom by the company, or by any of its officers or employees; they could be removed only by officials of the county or of the city, as the case might be, who had been specifically designated by the governing body of the county or of the city for that purpose. The safety deposit boxes were so constructed that each box could be opened only by the simultaneous use of the master key, which was retained by the company, and the individual key, which was at all times in the possession of the county or of the city. The procedure for the opening of the safety deposit boxes which were assigned to the county and to the city, was identical with that by which other customers of the company, who rented safety deposit boxes from it, opened their boxes, and thereby had access to their contents.

In *Morgan v. Bank,* 190 N. C., 209, 129 S. E., 585, it is said:

"The decided weight of authority is to the effect that the relationship between a bank and its customer, resulting from the rental by the former to the latter of a safety deposit box, with respect to the contents of said box, placed therein for safe-keeping, is that of bailor and bailee, the bailment being for hire or mutual benefit. *Trustees v. Banking Co.,* 182 N. C., 298, 109 S. E., 6, 17 A. L. R., 1205; the fact that the safety deposit box can be unlocked and opened, and access had to its contents only by the joint action of the customer, who has possession of the individual key, and of the bank, which has possession of the master key, does not affect the character of the relationship. The ownership of the property deposited in the safety deposit box remains in the customer;

under the contract it must be kept in the place designated and agreed upon by the parties, to which access can be had only by their joint action. The place in which the property shall be kept is not to be determined solely by the bank."

In the instant case all the evidence shows that there was a delivery of the notes, bonds and securities described in the complaints in these actions, after they had been segregated from other assets of the Central Bank and Trust Company, and after they had been endorsed in blank by said company, to officials of the county of Buncombe and of the city of Asheville, and that after such delivery the said notes, bonds and securities were deposited in safety deposit boxes in the vault of the Central Bank and Trust Company in the presence of one of the officials or employees of the company, and in the presence of officials of the county or of the city. Neither the county nor the city forfeited its rights to said notes, bonds and securities, by reason of such deposit. They remained in said safety deposit boxes at all times after they were deposited therein, until they were removed therefrom by officials of the county and of the city, after the Central Bank and Trust Company suspended business because of its insolvency. Nothing else appearing, the defendants are now the owners and entitled to the possession of said notes, bonds and securities. *Bundy v. Credit Co.*, 202 N. C., 604, 163 S. E., 676.

The contentions of the defendants on their appeal to this Court that there was no evidence at the trial of these actions to support the findings of fact on which the judge concluded as matters of law that the pledge of the notes, bonds and securities, which are the subject-matter of these actions, to the county of Buncombe and to the city of Asheville, constituted an unlawful preference, and was a fraud on other creditors of the Central Bank and Trust Company, are sustained.

It may be conceded that there was evidence tending to show that the Central Bank and Trust Company was insolvent, within the statutory definition of that term (C. S., 216(a), at the dates on which the notes, bonds and securities were pledged, and that there was also evidence tending to show that officials of said company knew of its insolvency at said dates. This evidence alone is not sufficient to support the findings of fact on which the judge concluded as matters of law that the pledges were made in order to give the county of Buncombe and the city of Asheville an unlawful preference, or that the pledges were frauds on other creditors of the company. All the evidence shows that both the county of Buncombe and the city of Asheville, relying upon the pledges, maintained large deposits with the Central Bank and Trust Company, which enabled the said company to continue in business, and meet the

demands of other depositors and creditors. There was no evidence which showed or tended to show that the governing body of the county of Buncombe, or the governing body of the city of Asheville knew or had reasonable grounds to believe that the said company was insolvent, at the dates on which the said governing bodies accepted the notes, bonds and securities as security for their deposits with the Central Bank and Trust Company, or at the dates when they made such deposits with said company. All the evidence shows that every check drawn on the Central Bank and Trust Company by the county of Buncombe or by the city of Asheville was paid upon presentation, until a few days before the Central Bank and Trust Company suspended business. The continued deposits of money derived from the collection of taxes, and from the sale of tax anticipation notes, issued by the said county and the said city, under statutory authority, was no evidence of fraud on the part of said county or of said city. In the absence of knowledge on the part of the governing body of the county of Buncombe, or of the governing body of the city of Asheville, that the Central Bank and Trust Company was insolvent, at the dates said governing bodies accepted the pledge of the notes, bonds and securities deposited in the safety deposit boxes, there was no fraud on the part of said county or of said city which rendered such pledges void.

There was no contention by the plaintiff in these actions that the Central Bank and Trust Company was without power to pledge notes, bonds and securities owned by said company, and constituting part of its general assets, as security for deposits of money made with said company, from time to time, by the county of Buncombe or by the city of Asheville. This power is conceded. *Trust Co. v. Rose,* 192 N. C., 673, 135 S. E., 795. It was expressly conferred by statute (chapter 480, Public-Local Laws of North Carolina, 1927), and was recognized by the General Assembly of this State in the enactment of chapter 253, Public-Local Laws of North Carolina, 1931. The contention of the plaintiff is that the power was not exercised with respect to the notes, bonds and securities which are the subject-matter of these actions; or if so, that it was exercised fraudulently, and with the purpose that the county of Buncombe and the city of Asheville should have an unlawful preference over other creditors of the Central Bank and Trust Company.

As neither of these contentions can be sustained upon the facts disclosed by all the evidence, the judgment in each action must be

Reversed.

INVESTMENT SECURITIES COMPANY v. GEORGE A. GASH AND NANNIE L. GASH.

(Filed 29 June, 1932.)

1. Subrogation A b—Lender of money used to pay off prior valid mortgage held entitled to subrogation upon invalidity of second mortgage.

Where money is borrowed and used for the purpose of paying off a prior mortgage on lands, and the money so borrowed is secured by a mortgage on the same lands which is executed and registered on the same day that the first mortgage is paid, and the lender holds the first mortgage as additional security, and the second mortgage is invalid because of defective acknowledgment: *Held*, the second mortgage is considered as merely an assignment of the first, valid mortgage, or the first mortgage itself in a different form, and the lender of the money so used is entitled upon default to foreclose under an equitable lien based on the valid first mortgage, and is entitled to have the cancellation of the first mortgage stricken from the records.

2. Pleadings E a—In this case trustee could be made a party by amendment.

Where money is borrowed to pay off a prior mortgage and the lender takes another mortgage to secure the money so borrowed which is later declared invalid for improper acknowledgment, and the lender brings action to foreclose under the first mortgage under the doctrine of equitable subrogation: *Held*, the trustee can be made a party by amendment if it should be necessary. C. S., 547.

APPEAL by plaintiff from *Sink, J.*, at March Term, 1932, of BUNCOMBE. Reversed.

This is an action for the possession of certain property brought by plaintiff against the defendant before Weaver, J., in the General County Court of Buncombe County.

The judgment of that court is as follows:

"This cause coming on to be heard and being heard at the regular October Term, 1931, of the General County Court of Buncombe County, N. C., before his Honor, Guy Weaver, judge presiding, and a jury duly empaneled, and the jury having answered the issues as appear of record, and as follows:

'(1) Was the acknowledgment and privy examination of Nannie L. Gash, on the deed of trust, dated 12 June, 1925, to George H. Wright, trustee for Ruffner Campbell, attorney, taken according to law? Answer: No.

(2) Did Ruffner Campbell, attorney, pay off or cause to be paid off the indebtedness due under the Baumgardner deed of trust, as alleged in the reply? Answer: Yes.'

And from the finding of the jury under the second issue, and upon the admissions in the pleadings, the court being of the opinion that the plaintiff is rightly in possession of. and the holder of the first deed of trust executed by the defendants on 27 September, 1921, to James J. Britt, trustee, said deed of trust being called the Baumgardner deed of trust, and that said plaintiff in equity and substance is subrogated to all of the rights of the original beneficiary named therein, and that said plaintiff is entitled to the foreclosure of the property set out in the complaint under said deed of trust;

And the court being further of the opinion that under the finding of the jury and the admissions of record that the plaintiff is entitled to have stricken from the records of the register of deeds and purported cancellation of said deed of trust;

And the court being further of the opinion that the plaintiff under the law, admissions and evidence, is entitled to have a receiver appointed pending the foreclosure hereafter decreed.

Now therefore, it is hereby ordered and adjudged:

(1) That A. C. Avery be, and he hereby is, appointed commissioner to foreclose the property described in the complaint under the deed of trust, dated 27 September, 1921, from George A. Gash and Nannie L. Gash, to James J. Britt, trustee, securing a note to Hattie L. Baumgardner in the amount of twenty-five hundred dollars ($2,500).

(2) That the said A. C. Avery be, and he hereby is, authorized and directed to proceed to sell the same to the highest bidder for cash, after first advertising the property once a week for four successive weeks, and as otherwise provided by law.

It is further ordered and adjudged, that J. Frazier Glenn, Sr., be, and he is hereby appointed receiver, to take charge of the property pending the foreclosure and sale above decreed, and the defendants, George A. Gash and Nannie L. Gash, are ordered to deliver immediate possession to the said receiver, and the said George A. Gash and Nannie L. Gash, and all other parties, are hereby enjoined from interfering with the possession of said receiver.

It is further ordered and adjudged, that the commissioner, A. C. Avery, immediately, upon the sale of the property, report the same to this court and file herein with the clerk a copy of said report, which shall be notice to all the parties that a hearing for confirmation of said sale be held ten days thereafter.

It is further ordered and adjudged, that George A. Diggs, register of deeds for Buncombe County, North Carolina, be and he hereby is authorized and directed to strike from the records by running a line

therethrough, and marking void, the purported cancellation of the deed of trust from George A. Gash and wife, Nannie L. Gash, to James J. Britt, trustee for Hattie L. Baumgardner, as entered in the records of the register of deeds in Book No. 142, page 127, entered by James J. Britt, trustee, by O. K. Bennett, agent and attorney in fact.

This the 14th day of October, 1931.

GUY WEAVER, *Judge Presiding.*"

The defendants made numerous exceptions and assignments of error and appealed to the Superior Court. The Superior Court sustained the exceptions and assignments of error and rendered the following judgment: "It is therefore considered, ordered and adjudged that the judgment of the General County Court be and the same is hereby reversed." The plaintiff made numerous exceptions and assignments of error and appealed to the Supreme Court.

J. Frazier Glenn, Jr., and Braxton Miller for plaintiff.

O. K. Bennett for defendants.

CLARKSON, J. This was an action in ejectment instituted by the plaintiff appellant against the defendants, and tried in the General County Court of Buncombe County, N. C., at October Term, 1931. The description of the property is not in question. The plaintiff claimed title under a trustee's deed, dated 6 January, 1931, from George H. Wright, trustee, which was had under the foreclosure of a deed of trust dated 12 January, 1925, executed by the defendants to George H. Wright, trustee, securing to Ruffner Campbell, attorney, one note in the amount of $3,500 due two years after date.

The defense relied on in the answer was that the private acknowledgment of the defendant, Nannie L. Gash, wife of the defendant George A. Gash, in the deed of trust, was taken, if at all, over the telephone and was invalid. Plaintiff replied, denying and demanding strict proof that the private examination of the defendant, Nannie L. Gash, had not been taken, and setting up as a further defense to the matter alleged in the further answer, that, in substance, the proceeds secured under the Campbell deed of trust were procured and used for the purpose of paying off a prior deed of trust, dated 27 September, 1921, executed by the defendant appellees to James J. Britt, trustee, securing one promissory note in the amount of $2,500, payable to Hattie L. Baumgardner, or order, and due one year after date. That the proceeds from the Campbell deed of trust were used directly by Ruffner Campbell, attorney, at the request of the defendants to pay off the indebtedness under the Baumgardner deed of trust on the same day that the loan was made,

and that at the time the said Ruffner Campbell, attorney, took possession of the Baumgardner deed of trust and the note secured thereby endorsed in blank, plaintiff contends that he held same for the protection of the second mortgage, the Campbell deed of trust, and that in effect and in equity, the Campbell deed of trust was but a continuance of the old loan known as the Baumgardner deed of trust, and prayed for an equitable lien based on the Baumgardner deed of trust and foreclosure by a commissioner.

The question involved: Where the owner of land executes a new mortgage to a person who pays off, and holds as additional protection, a prior first mortgage, the transaction taking place on the same day, and the new mortgage being invalid by reason of an improper acknowledgment, which is perfect and valid on its face, in equity, is not the invalid second mortgage considered as merely an assignment of the old valid mortgage, or the old mortgage itself under a different form, so that a purchaser under the same would take good title, or, at least, be entitled to a right to foreclose under an equitable lien based on the valid first mortgage? We think so.

The principle involved in this cause is thus stated in 25 R. C. L., pp. 1338-9, as follows: "So it has been held that the execution by the owner of land of a new mortgage to persons who pay off prior mortgages upon their being released, such execution and release taking place on the same day, operates in equity as an assignment of the old mortgages in consideration of the money advanced by the second mortgagees, and is not the creation of a new encumbrance, but changing the form of the old. Therefore, if after the execution of the first mortgage, but before executing the second, the mortgagor married, and the second mortgage was not signed by his wife, neither he nor his grantor, after his wife's death, can claim and hold the property free of the second mortgage, on the ground that the property became homestead property on the mortgagor's marriage, and not subject to be encumbered by such second mortgage. The last mortgagees would be, in equity, assignees of the debts they paid, and be subrogated to the rights of their assignors; for in equity the substance of the transaction would be an assignment of the old mortgages in consideration of the money advanced." Tiffany on Real Property, p. 1248-9; *Hyman v. Devereux,* 63 N. C., 624, at p. 627; *Wilkes v. Miller,* 156 N. C., at p. 431; *Grantham v. Nunn,* 187 N. C., 394.

Ruffner Campbell testified, in part: "I have never received any payments on principal of the note executed by Mr. Gash to me in June or July, 1925; I did receive several interest payments. The deed of trust executed in June of 1925, to George Wright, trustee, securing this in-

debtedness to me, was delivered to me by Mr. Gash. I relied on Mr. Gash to see to and properly execute it, and of course, relied on the certificate of the notary public, an officer of the State of North Carolina. The notation on the back of plaintiff's 'Exhibit 2' being the Baumgardner deed of trust, is in my handwriting; I made that notation on or about the time the deed of trust was taken. (Mr. Miller.) We particularly offer in evidence the following words, for the purpose of corroboration only, written on the back of plaintiff's 'Exhibit 2,' being the Baumgardner deed of trust—'Held for protection.' I have delivered this note—Baumgardner note—and deed of trust to Investment Securities Company."

The power of attorney by James J. Britt to O. K. Bennett, trustee, long years after, 2 September, 1931, to cancel the deed of trust made to him as trustee for Harriett Baumgardner, dated 27 September, 1921, and the cancellation by O. K. Bennett is inoperative.

This principle contended for by plaintiff is settled in its favor by the case of *Edwards v. Turner,* 202 N. C., 628. On the evidence as a whole, the judgment of the county court is sustained. The question of making the trustee a party (*Alexander v. Bank,* 201 N. C., 449), under the facts and circumstances of this cause, can be now allowed by amendment if it be found necessary. C. S., 547. The judgment below is

Reversed.

DAVID A. McLEOD v. DR. V. M. HICKS.

(Filed 29 June, 1932.)

1. Evidence K b—Layman may testify to fact of incision in eyeball.

A layman or nonexpert witness may testify to the fact and location of an incision or wound in the exterior of the body, including the eyeball.

2. Physicians and Surgeons C b—Where operation is performed in proper manner with required skill damages may not be recovered therefor.

Where an incision for the removal of a cataract is made at the proper place and in the proper manner with the required skill and care according to all the expert testimony relating thereto, a patient later losing his eye after such operation may not recover damage resulting from the operation thus properly performed.

3. Same—Where loss of eye is result of disease not aided or augmented by operation surgeon is not liable therefor.

Where a patient loses an eye as the result of disease and there is no evidence that an operation thereon for cataract aided, increased or accelerated the course of the disease the patient may not recover of the surgeon performing the operation for the loss of the eye.

4. Evidence K b—Whether delicate operation was performed in correct manner with required skill is exclusively a matter of expert testimony.

Whether an operation for the removal of a cataract was performed in the correct manner by a proper incision at the correct place and with the skill required by law is exclusively a matter of expert testimony.

5. Physicians and Surgeons C b—Where there is no evidence that alleged improper incision caused injury nonsuit is proper.

Where a patient brings action for the loss of his eye after an operation thereon for cataract, and the evidence discloses that the defendant surgeon possessed the required skill and care, but the patient seeks to recover on the ground that in performing the operation the surgeon negligently inflicted an incision in the eyeball, but offers no evidence that such incision caused the loss of the eye, and there is evidence that the operation had been properly and skillfully done and that the loss of the eye resulted from other causes, the surgeon's motion as of nonsuit is properly allowed.

6. Evidence F b—Declarations and exclamations of defendant held not to constitute admission of liability.

Certain declarations and exclamations made by the defendant in this case are held not to constitute an admission of liability.

CIVIL ACTION, before *Small, J.*, at December Term, 1931, of WAKE.

The plaintiff instituted this action against the defendant to recover damages for negligence in performing a cataract operation. The evidence for plaintiff tended to show that he had been suffering with a cataract on his left eye for more than twenty years and had been treated by the late Dr. Lewis. The defendant became associated with Dr. Lewis and examined the plaintiff during the year 1922. On 4 September, 1926, the plaintiff decided to undergo a cataract operation. This operation was performed in two stages. The first stage operation was performed by the defendant on or about 4 September, 1926. There is no question but that plaintiff received proper treatment at this time. He testified that thereafter he could count the spokes in an automobile across the street and could distinguish faces of his friends, and see the straps on the slippers of his wife. On 27 September, 1926, the plaintiff returned to the hospital in order for the defendant to perform the final cataract operation. The operation was performed on said date by the defendant assisted by Dr. Wilkins. The narrative given by the plaintiff is as follows: "They prepared the left eye for the operation . . . and I could feel the sting of the instrument. Suddenly I felt a sharp pain which I remember was very painful and I drew up and the doctor said: 'Oh, isn't that a pity?' and he made a kinder little noise and something made a sound on the floor." Plaintiff testified that after the operation he was returned to his room in the hospital and suffered great pain, and that he remained in

the hospital about nine days. Four or five days after he returned from the hospital he requested his wife to lift the bandage from his eye "and found a gash in the eyeball just off to the edge of the sight. I mean the colored part of the eye. I saw that myself. The gash was just off the colored part of the eye, the upper part. It looked to me that the opening was about the size of the end of the wooden part of an ordinary match. . . . It was on the white part." The wife of plaintiff testified that she saw a gash in the eye "just above the dark part . . . about an eighth of an inch or a quarter of an inch. . . . There was something running out of that gash. He wore a kinder black patch over the top. I had to take that off and there was cotton packed underneath that. I could see on that something that seemed to be kinder gummy, sticky, jelly form. . . . It was whitish looking." Two sons of plaintiff also testified that they saw the gash which they described as being "a quarter of an inch from the blue part of the eye, . . . and there seemed to be some kind of substance running out of it—a white mucous, jelly like substance." Two friends of plaintiff also testified as to the gash or cut in the white part of the eye. Plaintiff continued to visit the defendant for treatment until February, 1927. He testified that the defendant told him from time to time that the eye was "hemorrhaging itself to death." In February, 1927, plaintiff testified that he asked the defendant: "Doctor, tell me if you didn't puncture that eyeball?" Thereupon the defendant turned away from him, walked to the window, looked out, turned back and said: "I did, I'm sorry." The plaintiff's eye was removed about three years after the operation.

The defendant and Dr. Wilkins, who assisted in the operation, testified that the incision was made in the plaintiff's eye at the cornea scleral junction and not in the white part of the eye. The defendant testified: "I cut a little flap of the conjunctiva at that time. The conjunctiva is the membrane that covers the white part of the eye that goes on back and is reflected under the lid. It is comparatively thin. . . . mucous membrane. . . . It might appear as a cut . . . in the white part of the eye." All the physicians and surgeons who examined the eye after the operation, testified that the method of operation described by the defendant was the proper method of performing a cataract operation, and that the scar was at the cornea scleral junction, and that there was no cut, gash or incision in the white part of plaintiff's eye. They further testified that a cataract could not be removed from the cut described by the plaintiff in the white of his eye, for the reason that such incision would not be large enough, and that it would be impossible to remove a cataract from such a cut. Some of the physicians testified in response to hypothetical questions that a cut in

the white part of the eye of the nature described by the plaintiff would not have been a proper operation for a cataract.

At the conclusion of all the evidence the trial judge sustained a motion of nonsuit and the plaintiff appealed.

Dupree & Strickland, L. Bruce Gunter and John W. Hinsdale for plaintiff.

Oscar Leach and Jones & Brassfield for defendant.

BROGDEN, J. There is much technical testimony in the record involving the complicated structure of the human eye and its functions. The law of the case is simple and well settled. The legal duty imposed by law upon physicians and surgeons has been declared in detail in the cases of *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356; *Smith v. McClung,* 201 N. C., 648. It is to be further noted that *res ipsa loquitur* does not apply to the facts in this case. *Spring v. Doll,* 197 N. C., 240, 148 S. E., 251; *Smith v. McClung,* 201 N. C., 648.

There are certain facts which are uncontroverted, which may be stated as follows:

1. The plaintiff had a cataract in his left eye which had been in existence more than twenty years.

2. The preliminary or first stage operation for the removal thereof was properly done.

3. The cataract was actually removed on or about 27 September, 1926.

4. The defendant possessed the degree of learning, skill and surgical ability required by law.

5. A proper incision, at a proper place, and with the exercise of proper technique for the removal of the cataract had actually been made in the eye.

6. Plaintiff suffered pain after the operation and finally lost the eye entirely by removal about three years thereafter.

The plaintiff, notwithstanding the fact that all the evidence disclosed that the defendant possessed the requisite degree of skill and ability, contends that the defendant did not actually apply such skill in performing the operation for the reason that an incision was made in the white part of the eye penetrating the posterior chamber, thereby causing the loss of the vitreous humor therein and the consequent destruction of the eye. The defendant, upon the other hand, by the uncontroverted testimony of experts, shows that an incision was properly made at the cornea scleral junction, and that when the cataract was removed it was discovered that the eye was practically destroyed by disease, and particularly that the vitreous humor had greatly deteriorated.

Upon these contentions the first question to arise is: Was there an incision in the white of the eye, a quarter, an eighth or a sixteenth of an inch above the colored portion? The plaintiff, who is a layman, and certain members of his family and friends, who are also laymen, testified that there was such an incision in the white of his eye. All the medical experts, who examined the eye, testified that there was no such incision in the white of his eye, but that the incision was in the cornea scleral junction. It is urged by the defendant that the determination of whether there was a cut in the white of the eye is exclusively a technical question involving exclusive questions of science, and that, therefore, lay testimony would not be competent or permitted to be given determinative weight. This contention cannot be sustained for the reason that it cannot be said as a matter of law that a layman cannot testify as to the location of a knife incision or wound upon the exterior of the body, or that such testimony should not be entitled to the same weight as that of an expert witness. Therefore, in passing upon a judgment of nonsuit, it must be assumed that there was a cut or incision in the white portion of the eye.

The uncontroverted testimony also discloses that there was a cut or incision in the cornea scleral junction through which the cataract was actually removed. The plaintiff is not entitled to recover for any injury or damage occasioned by the incision in the cornea scleral junction for the reason that all of the expert testimony is to the effect that said incision was properly made in the exercise of the requisite degree of skill, and that in fact the cataract could not have been removed in any other way or manner; that is to say, the evidence fails to disclose any negligence whatever traceable to the incision made by the defendant at the cornea scleral junction. But the plaintiff asserts that the destruction of his eye was the proximate result of the cut, gash or incision in the white part thereof. He proceeds upon the theory that the incision or gash in the white part penetrated to the posterior chamber of the eye, severing the membranes therein and causing the escape of the vitreous, which oozed and exuded through said incision as testified to by himself and his lay witnesses. The defendant combats this theory upon the ground that the jelly like fluid exuding from the incision testified to by plaintiff was the ordinary result of the conjunctival incision. Moreover, there was testimony that if the posterior chamber of the eye had been penetrated, the vitreous humor would have escaped immediately.

In the final analysis the plaintiff sues to recover damage for the loss of his eye, which he asserts was proximately caused and brought about by the negligence of the defendant in performing the operation complained of.

The evidence discloses three and only three possible causes for the loss of the eye.

The first is, that the eye was destroyed by the ravages of disease, long existent and progressive in nature, and that the operation merely disclosed the deterioration already accomplished. Obviously, in the absence of evidence that the operation aided, increased or accelerated the course and movement of natural causes, the defendant would not be liable in damages.

The second is, that the operation performed by making an incision at the cornea scleral junction and removing the cataract was negligently done resulting in total loss of the eye and consequent damage.

But all the testimony is to the effect that the cataract was actually removed and the testimony of all the experts discloses clearly and unequivocally that said cataract was properly removed, by a proper incision at the cornea scleral junction, in the exercise of that technique and skill required by law. Manifestly the proper skill and technique required and employed for such a delicate operation is exclusively a question of surgical science and care, and hence to be ultimately determined by expert testimony. Moreover, there is no evidence that the cornea scleral junction incision or the removal of the cataract was negligently made or performed.

The third cause for the loss of the eye and the one relied upon by the plaintiff is that the cut or gash in the white portion of the eye was the proximate cause of the injury. In support of this position, he calls attention to the testimony tending to show that after the preliminary operation, his vision improved so that he could see the spokes in an automobile wheel and the straps upon the shoes of his wife.

But did the injury result from disease? Did it result from the cornea scleral junction incision, or did it result from the cut in the white portion? Assuming that the cut in the white was negligently made, there is no evidence that such incision caused the loss of the eye, and without such evidence the plaintiff is not entitled to recover.

The plaintiff relies upon certain exclamations or declarations made by the defendant at the time of the operation and later at a conference in his office. The defendant denies the making of such exclamations or declarations, but assuming they were made, they do not constitute an admission of liability.

Affirmed.

R. A. HAMILTON v. SOUTHERN RAILWAY COMPANY AND SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 29 June, 1932.)

1. Torts B b — Solvent tort-feasor and sureties on supersedeas bonds held not entitled to stay of execution upon insolvency of one tort-feasor.

Where two joint *tort-feasors* appeal from judgment rendered against them in the Superior Court and give supersedeas bonds executed by two surety companies respectively, and pending the appeal one of the defendants becomes insolvent, and the judgment appealed from is affirmed by the Supreme Court and writ of *certiorari* to the Supreme Court of the United States is denied, and the judge of the Superior Court, upon receipt of the certificate of the opinion of the Supreme Court, renders judgment against the sureties on the bonds and orders execution to issue against the defendants and their sureties in accordance with C. S., 659: *Held*, neither the solvent defendant nor either of the sureties is entitled to a stay of execution upon payment of one-half of the judgment into court by the solvent defendant, the solvent defendant being entitled to a transfer of the judgment to a trustee for its benefit upon the payment of the full amount thereof, C. S., 618, and the sureties being bound by the judgment on their bonds.

2. Supersedeas B a—Sureties on supersedeas bonds of joint tort-feasors held not entitled to stay of execution as against judgment creditor.

Where judgment against two joint *tort-feasors* is affirmed by the Supreme Court and judgment against the sureties on their respective supersedeas bonds is rendered in the Superior Court upon certification of the opinion of the Supreme Court, and execution against the defendants and their sureties is ordered: *Held*, neither of the sureties is entitled to a stay of execution on the ground that one of the defendants had become insolvent and placed in receivership pending the appeal, the sureties being bound by the judgment and liable to the amount of their respective bonds, C. S., 650, and the surety on the insolvent defendant's bond cannot raise the question as against the judgment creditor of its liability to the solvent defendant upon payment of the full amount of the judgment by the solvent defendant and the transfer of the judgment to a trustee for its benefit.

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

APPEAL by plaintiff from *Small, J.*, at December Term, 1931, of WAKE. Reversed.

This was an action for actionable negligence, tried at Second November Term, 1929, Wake County Superior Court. All the issues submitted to the jury were answered in favor of plaintiff, and judgment rendered as follows: "Ordered, adjudged and decreed, that the plaintiff, R. A. Hamilton, recover of the defendants, Southern Railway Company and Seaboard Air Line Railway Company the sum of thirty-three thousand eight hundred and seventy-five dollars ($33,875), with interest

from 25 November, 1929, until paid, and the cost of this action to be taxed by the clerk."

The defendants appealed to the Supreme Court and this Court found no error in the judgment of the court below. *Hamilton v. R. R.*, 200 N. C., 543 (filed 1 April, 1931).

(1) The Seaboard Air Line Railway Company on appeal from the Superior Court to the Supreme Court of North Carolina, gave supersedeas bond with the National Surety Company, as surety in the sum of $36,000. The provision is as follows: "Now, if the said defendants, or either of them, shall pay to the said plaintiff the amount directed to be paid by said judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages and costs which shall be awarded against the said appellants upon said appeal, this obligation to be null and void; otherwise to be and remain in full force and effect."

(2) The Southern Railway Company, on appeal to the Supreme Court of North Carolina, gave supersedeas bond with the United States Fidelity and Guaranty Company, as surety in the sum of $36,000. The provision is as follows: "Now if the said Southern Railway Company shall pay the amount it is directed to pay by the said judgment, if affirmed or appeal dismissed, or that part of the said judgment that may be affirmed, and all damages, which may be awarded against the appellant upon said appeal, then this obligation to be void; otherwise to remain and be in full force and virtue in law." A petition for writ of *certiorari* to the Supreme Court of the United States was denied on 19 October, 1931.

After judgment was rendered against the Seaboard Air Line Railway Company, on appeal by it to the Supreme Court of North Carolina, and before decision was rendered, it became insolvent and receivers were appointed for it on 23 December, 1930, in the United States District Court for the Eastern District of Virginia.

The Southern Railway Company paid into court one-half of the amount of the judgment rendered. The Southern Railway, after setting forth certain alleged equitable rights in reference to (1) contribution between joint *tort-feasors* (2) because appointment of receiver for Seaboard Air Line Railway Company, plaintiff, may not now issue execution and levy upon the property of Seaboard Air Line Railway Company, etc.

The petitioner, Southern Railway Company, prays that this Court direct that the one-half of said judgment tendered by this petitioner be received, that parties to this action and clerk of Superior Court of Wake County and the sheriff of Wake County be directed and ordered

to refrain and desist from causing to issue any execution or from issuing any execution against the Southern Railway Company or against the sureties on either of the supersedeas bonds given by the Southern Railway Company and to refrain and desist from levying upon any of the property of the Southern Railway Company or any of the property of the sureties on either of the supersedeas bonds given by the Southern for a period of ninety days and thereafter unless and until the plaintiff shall show to this Court that execution against the National Surety Company, surety on the Seaboard's supersedeas bond, has been returned unsatisfied and that the plaintiff has made reasonable effort to locate property of said National Surety Company to satisfy said judgment and that plaintiff has made reasonable effort to collect from the receivers of the Seaboard Air Line Railway Company the balance of said judgment.

The judgment of the court below, in part, is as follows:

"That a stay of execution against Southern Railway Company and United States Fidelity and Guaranty Company for a reasonable period of time will not prejudice plaintiff or endanger his rights under the judgment heretofore signed against Southern Railway Company, Seaboard Air Line Railway Company, National Surety Company, and United States Fidelity and Guaranty Company and that the ultimate collection of the judgment in full with interest and costs, is adequately secured.

Now therefore, the court, in its discretion, in order to prevent gross inequity and inequality, here and now, orders:

1. That each and every party to this action, the clerk of the Superior Court of Wake County, the sheriff of Wake County, and all other persons, firms and corporations, be and they are hereby ordered and directed to refrain and desist from causing to issue or from issuing any execution under this judgment against the Southern Railway Company or against the United States Fidelity and Guaranty Company until 20 May, 1932. The said persons aforementioned are further ordered and directed to refrain and desist from levying, pursuant to judgment heretofore signed in this cause, upon any of the property of the Southern Railway Company or any of the property of the United States Fidelity and Guaranty Company until 20 May, 1932.

2. The right of the plaintiff to cause to be issued execution or executions against the defendant, Seaboard Air Line Railway Company, and/or the defendant National Surety Company, and to have same levied upon the property and assets of said defendants, Seaboard Air Line Railway Company and National Surety Company, or either of them, shall be in nowise prejudiced by this order." Plaintiff excepted to the judgment as signed and appealed to the Supreme Court.

Clyde A. Douglass and Robt. N. Simms for plaintiff.
S. Brown Shepherd for National Surety Company.
Murray Allen for Seaboard Air Line Railway Company.
Smith & Joyner for Southern Railway Company.
P. H. Busbee for Fidelity and Guaranty Company.

CLARKSON, J. The questions involved on this appeal are: (1) As to whether or not the Southern Railway Company was entitled to an order staying execution against it. (2) As to whether or not the United States Fidelity and Guaranty Co., surety upon the supersedeas bond of said Southern Railway Company, was entitled to an order staying issuance of execution against it. (3) As to whether or not the National Surety Company, surety upon the supersedeas bond of Seaboard Air Line Railway Company, was entitled to a stay of execution against it. All the questions must be answered in the negative.

C. S., 659, is as follows: "In civil cases, at the first term of the Superior Court after a certificate of the determination of an appeal is received, if the judgment is affirmed the court below shall direct the execution thereof to proceed, and if the judgment is modified, shall direct its modification and performance. If a new trial is ordered the cause stands in its regular order on the docket for trial at such first term after the receipt of the certificate from the Supreme Court."

In the judgment entered by Judge Small on 18 December, 1931, in conformity with the opinion and judgment of the Supreme Court, the Court declared: "Now, therefore, in conformity with the opinion and judgment of the Supreme Court of North Carolina, it is ordered and adjudged that the judgment heretofore entered herein at the Second November Term, 1929, of this court is affirmed, and that execution issue thereon." And then, after entering judgment against the sureties in accordance with law, the court concludes the judgment, just before its date, with the language "let execution proceed hereon."

In view of the statute, under the facts and circumstances of this case, this was the only judgment the court below could have entered, and having entered it on 18 December, 1931, the court below, in accordance with the statute, was without power or authority to enter the order which it undertook to enter on 19 December, 1931, staying execution against the Southern Railway Company and its surety, the United States Fidelity and Guaranty Company.

It goes without saying that the National Surety Company is bound by the judgment against it and should pay its proportionate part of the judgment and fulfil the obligation of its bond. C. S., 650, *Murray v Bass,* 184 N. C., 318. The judgment signed by Small, J., in conformity with the opinion of the Supreme Court was against the Southern and

Seaboard Air Line Railway Companies, and their sureties. All are bound to plaintiff and the joint defendants, *tort-feasors,* must contribute.

C. S., 618 provides that when payment is made by one of several joint *tort-feasors,* then transfer is to be made to a trustee for payor, etc.

We can see no reason for holding up the collection of plaintiff's judgment while the defendants, joint *tort-feasors,* litigate between themselves. By paying the whole judgment, the Southern Railway Company, under C. S., 618, can lose no right it has against the Seaboard Air Line Railway Company, or its surety, the National Surety Company. The surety, the National Surety Company, is a party to the judgment and bound thereby and cannot now raise the question of its liability to the defendant Southern Railway Company, when it pays said judgment in full and requires the transfer of said judgment of plaintiff to a trustee by virtue of the provision of C. S., 618. The judgment below is

Reversed.

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

R. A. HAMILTON v. SOUTHERN RAILWAY COMPANY AND SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 29 June, 1932.)

(For digest see *Hamilton v. R. R., ante,* 136.)

APPEAL by National Surety Company from *Small, J.,* at December Term, 1931, of WAKE. Reversed.

Clyde A. Douglass and R. N. Simms for plaintiff.
S. Brown Shepherd for National Surety Company.

CLARKSON, J. For the reasons given in the opinion in *Hamilton v. R. R., ante,* 136, the judgment of the court below is

Reversed.

R. A. HAMILTON v. SOUTHERN RAILWAY COMPANY AND SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 29 June, 1932.)

(For digest see *Hamilton v. R. R., ante,* 136.)

APPEAL by defendant, Seaboard Air Line Railway Company from *Small, J.,* at December Term, 1931, of WAKE.

Clyde A. Douglass and R. N. Simms for plaintiff.
Murray Allen for Seaboard Air Line Railway Company.

CLARKSON, J. For the reasons given in the opinion in *Hamilton v. R. R., ante,* 136, the judgment of the court below is
Reversed.

J. M. OLDHAM AND WIFE, MARY A. OLDHAM, J. LEAK SPENCER, A. BURWELL, LEE A. FOLGER, G. G. GALLOWAY AND WIFE, CARRIE MARSHALL GALLOWAY, W. J. BROWN, ADOLPH M. YOUNG AND WIFE, NANCY YOUNG, E. C. SWEENEY AND WIFE, L. W. SWEENEY, C. W. JOHNSTON, J. A. C. WADSWORTH, M. L. CANNON, EDWIN L. JONES AND WIFE, ANNABELLE LAMBETH JONES, STERLING GRAYDON, H. A. LONDON, WM. H. PORCHER AND WIFE, ACTON LATTA PORCHER, FRANK O. SHERRILL AND WIFE, RUTH J. SHERRILL, F. M. REDD AND CHARLOTTE CONSOLIDATED CONSTRUCTION COMPANY, A CORPORATION, IN BEHALF OF THEMSELVES AND ALL OTHER PERSONS OWNING LOTS IN THE SUBDIVISION OF DILWORTH, HEREINAFTER REFERRED TO, WHO MAY COME IN AND MAKE THEMSELVES PARTIES PLAINTIFF IN THIS ACTION, v. T. S. MCPHEETERS AND JOHN CROSLAND.

(Filed 29 June, 1932.)

Deeds and Conveyances C g—Refusal of injunction against violation of restrictive covenants is upheld in this case.

An order denying a motion for injunction against the violation of restrictive covenants in a deed by the grantee's successor in title, based upon findings that the nature of the development had so substantially changed as to render the enforcement of the restriction inequitable, is affirmed in this case.

APPEAL by plaintiffs from *Cowper, Special Judge,* at October Special Term, 1931, of MECKLENBURG. Affirmed.

This is an action brought by plaintiffs against the defendants in which "plaintiffs pray that the defendants, and each of them, their servants, agents and representatives, be perpetually enjoined from erecting or maintaining upon the defendant's said property any filling station, stores, buildings or structures other than those permitted by the deed conveying said property. . . . And that they be perpetually enjoined and restrained from violating in any particular the conditions and restrictions mentioned in this complaint, and for such other and further relief as the plaintiff may be entitled to in the premises."

A jury trial was waived by the parties and it was agreed that his Honor, Judge G. V. Cowper, should hear the cause and decide the issues

and questions of fact as well as law. After finding the facts, the court below held: "That by the changes hereinbefore enumerated which have taken place in the vicinity of the defendant's property since the restrictions were placed on same, his property and the property in the vicinity thereof has undergone radical and fundamental change of character as to render it wholly unfit and unsuitable for use for residence purposes, and that if the said property were now restricted to residential use it would be a great hardship on the defendants and of no material benefit to the plaintiffs, and that it would be against equity to enforce the restriction complained of and to issue the injunction prayed by the plaintiffs in this case. Now, therefore, the court having found the facts and the law to be as set out above, it is, upon motion of the attorneys for defendants, considered, ordered and adjudged that the relief demanded by the plaintiffs be and the same is hereby denied."

The plaintiffs made numerous exceptions and assignments of error and appealed to the Supreme Court.

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

Whitlock, Dockery & Shaw for defendants.

PER CURIAM. This is the same lot with the *same restrictions* which was passed upon in *Higgins v. Hough,* 195 N. C., 652. That case was heard before Harding, J. After setting out the various violations of the restrictions, the court further found: "The court further finds as a fact that the character of the community has been changed by the expansion of the city and the spread of industry and other causes resulting in a substantial subversion or fundamental change in the essential character of the property herein referred to. That changed conditions resulting from the natural growth of the city bringing industry, traffic and apartment houses, clubs, mosques, and churches into such close proximity to the restricted area or property herein described as to render it undesirable for the purpose to which it is restricted. That violations of the restrictions have been so general as to indicate and in fact do indicate the purpose and intention on the part of the residents of the community to abandon the general scheme or purpose in this immediate section. . . . The court further finds as a fact that it is inequitable and unjust to require the enforcement of the restrictions and that it is detrimental and injurious to the market value of the property, and if said restrictions are permitted to continue that it will retard the advancement and upbuilding of the property for the purpose for which it can be best used."

On appeal to this Court, the judgment was affirmed. The facts in the above action were agreed upon, but the plaintiffs were not parties to the action and therefore not bound by same.

The defendants contend that "This is an appeal by the plaintiffs from a judgment in the lower court denying a mandatory injunction to require the defendants to tear down and remove four stores from the lot on account of an alleged violation of the building restrictions. . . . The defendants in this case are the successors in title of the defendant in the *Higgins case, supra.* They were not parties to that case, but acquired their title after it was decided, and built their stores in reliance upon that decision."

From a careful review of the record and able briefs of plaintiffs in this action, we see no prejudicial or reversible error in the judgment of the court below. The judgment of the court below is

Affirmed.

A. J. MAXWELL, BAXTER DURHAM, CHARLES M. JOHNSON, JOHN P. STEDMAN, K. O. BURGWIN, W. G. GAITHER, E. B. HORNER, H. E. RUFTY, AND J. W. WINBORNE, AS MEMBERS OF THE LOCAL GOVERNMENT COMMISSION, AND WILSON COUNTY, v. BRANCH BANKING AND TRUST COMPANY.

(Filed 29 June, 1932.)

Taxation A a—Proposed issue of refunding bonds held valid in this case.

Judgment that proposed bond issue of county for purpose of refunding bonds issued prior to 1 July, 1931, would be valid is sustained in this case.

APPEAL by defendant from *Frizzelle, J.,* 26 May, 1932. From WILSON. Affirmed.

The following judgment was rendered by the court below:

"The above entitled civil action was heard before the Honorable J. Paul Frizzelle, judge holding the courts of the Second Judicial District, at Snow Hill, on 26 May, 1932, out of term and prior to the expiration of the return day by consent of plaintiffs and defendant, and was heard upon the complaint, exhibits and answer. The plaintiffs moved for judgment as prayed for in the complaint. The defendant moved for judgment dismissing the action.

After hearing argument and after consideration, the court being of the opinion: (a) That the assumption of the county of Wilson of the

payment of bonds heretofore issued by various school districts in Wilson County, for the purpose of erecting and equipping school buildings necessary for the six months' school term required by the Constitution of North Carolina, was not in violation of section 7 of Article VII of the Constitution, nor in violation of any other provision of the Constitution or statutes of the State. (b) That the contract of sale of the bonds is not in violation of section 19 of the Local Government Act of 1931, and that the said sale was a sale at par. (c) That the sale of bonds of the county of Wilson for the purpose of refunding or paying interest on bonds lawfully issued prior to 1 July, 1931, which interest accrued after 1 July, 1931, is not in violation of the Local Government Act or any other act of the General Assembly. (d) That the assignment by the county of Wilson of the payments due under the contract between the North Carolina State Highway Commission and the county of Wilson, to secure the payment of the bonds authorized to be issued, is a valid, legal and irrevocable assignment of such payments due under said contract. (e) That the bonds authorized to be issued are valid, legal obligations of the county of Wilson, and all constitutional and statutory requirements relating to the issuance and sale of said bonds have been complied with. And the court being further of the opinion that the plaintiffs herein may maintain an action for specific performance by the defendant of the contract of sale and purchase of the said bonds; It is therefore, ordered, decreed and adjudged that the defendant comply with its contract of sale, accept the said bonds and pay the agreed purchase price. The costs of this action will be taxed against the defendant.

J. PAUL FRIZZELLE,

Judge holding the courts of the Second Judicial District."

Snow Hill, N. C., 26 May, 1932.

From the judgment as rendered, the defendant excepted, assigned error and appealed to the Supreme Court.

Attorney-General Brummitt and Connor & Hill for plaintiff.

Finch, Rand & Finch for defendants.

CLARKSON, J. We have examined the record and briefs of the parties with care. Interpreting the record in this case, with reference to the pertinent decisions, we think the judgment of the court below is correct.

Affirmed.

N. W. BOYETTE ET AL. v. A. S. BARNES, EXECUTOR OF ALICE COLE, DECEASED, AND THE METHODIST ORPHANAGE OF RALEIGH, NORTH CAROLINA.

(Filed 29 June, 1932.)

Appeal and Error L c—Where rights under a will have been adjudicated the decision becomes rule of property and is conclusive.

Where the rights of a devisee under a will have been determined in a former appeal to the Supreme Court, the decision becomes a rule of property and is determinative of the rights of the parties, and in a later action brought by those claiming under the parties to the former action the former judgment is conclusive.

CIVIL ACTION, before *Cowper, Special Judge,* at January Special Term, 1932, of JOHNSTON. Judgment was rendered upon "an agreed statement of facts."

William G. Yelvington died in 1907, leaving a last will and testament. At the time of his death he was the owner in fee simple of the lands in controversy. He left a wife, Mary J. Yelvington, and one daughter, Alice Yelvington, who married W. W. Cole. In items 4 and 7 of the will of William G. Yelvington he devised the land in controversy to his wife, Mary J. Yelvington, during her natural life and then to his daughter, Alice. Item 7 is as follows: "I give and devise all the remainder of my real estate wherever situate, to my wife Mary J. Yelvington during her natural life, then to my daughter Alice and her children, if any, but if my daughter Alice die leaving no living issue then to the heirs at law of my wife Mary J. Yelvington in fee." Mary J. Yelvington died in 1920, and the plaintiffs are her brothers and sisters, and the children of a deceased sister who died intestate. Alice Yelvington Cole died on 15 May, 1931, leaving a last will and testament in which she devised in item 7 thereof all of her real estate to the defendant, Methodist Orphanage at Raleigh, North Carolina. The plaintiffs claiming to be the heirs at law of Mary J. Yelvington under the will of William G. Yelvington, instituted an action against the Orphanage, alleging that they were the owners in fee of the land described in the complaint. The defendant, Orphanage, claimed the land under the will of Alice Yelvington Cole.

The trial judge decreed that the defendant Orphanage was the owner of all the land in controversy in fee and entitled to the immediate possession thereof, from which judgment the plaintiff appealed.

Abell & Shepherd and Geo. K. Freeman for plaintiffs.
Biggs & Broughton for defendants.

PER CURIAM. The will of W. G. Yelvington was construed by this Court in an opinion filed 29 September, 1920, in the case of *Cole v. Thornton,* 180 N. C., 90. In disposing of the question the Court said: "This being the correct rule of construction, and it being kept in mind that the life tenant, Mary J. Yelvington, is dead, and that no children have ever been born to the daughter Alice, the devise would read 'to my daughter Alice in fee, but if she die leaving no living issue, then to the heirs at law of my wife, Mary J. Yelvington,' and, if so, if children are born, she has the fee, and if there are no children, she would still be the owner in fee as the only heir of Mary J. Yelvington, and, in either event, can convey in fee."

The original record in *Cole v. Thornton, supra,* discloses that it was contended that W. G. Yelvington did not intend to convey to his daughter Alice a fee simple but only a life estate, "or at most an estate in common with her children, if any, which would make her present estate contingent upon her dying without leaving living issue." Consequently, it is clear that the identical proposition now in controversy was expressly adjudicated in the case of *Cole v. Thornton, supra.* If the construction of the will of William G. Yelvington were an open question, there might be a sharp division of opinion upon the merits of the controversy, but the former opinion of the Court in *Cole v. Thornton* has become a rule of property and determinative of the rights of the parties.

Affirmed.

HENRY SIMONS, ADMINISTRATOR OF BETTIE A. SIMONS, DECEASED, v. SOUTHERN HOME INSURANCE COMPANY, NORTH CAROLINA JOINT STOCK LAND BANK OF DURHAM, AND THE RECEIVER OF THE FIRST NATIONAL TRUST COMPANY, TRUSTEE.

(Filed 29 June, 1932.)

Insurance P b—Demurrer to complaint in this action on insurance policy held properly sustained.

Where in an action on an insurance policy the policy is not attached to the complaint and there is no allegation tending to show the relationship of the plaintiffs to the cause of action or that they are the real parties in interest, and the action is for reformation of the policy and for slander: *Held,* the defendant's demurrer on the ground of misjoinder of parties and causes is properly sustained.

CIVIL ACTION, before *Sinclair, J.,* at November Term, 1931, of PITT.

Plaintiff alleged that the defendant, Southern Home Insurance Company, "issued its fire insurance contract upon one of the buildings of

plaintiff. . . for the sum of $400, and that said policy by mutual mistake named the North Carolina Joint Stock Land Bank of Durham, North Carolina, beneficiary in the policy, whereas it was intended that the Atlantic Joint Stock Land Bank of Raleigh should have been named beneficiary in said policy as the plaintiffs were indebted to said bank in Raleigh and not to the bank in Durham. . . . That a pack barn was burned on 29 August, 1930, and that the defendant company had refused to settle the claim."

It was further alleged that the agents of defendant Insurance Company had wrongfully attempted to settle the claim without the knowledge of plaintiffs, and that said agents of defendant "have otherwise tried to injure and slander the plaintiffs and their good names and reputation in the community where they live and elsewhere by circulating slanderous reports," etc. It is further alleged that the plaintiffs have been damaged in the sum of $100 "on account of expense and trouble that the plaintiffs have had to go to and expend on account of said breach . . . all on account of the carelessness and the common and dishonest business methods and conduct of the defendants," etc.

The defendants demurred to the complaint upon the following grounds:

1. That there was a defect of parties plaintiffs in that the Atlantic Joint Stock Land Bank of Raleigh should have been made a party to the action, and that the plaintiff administrator was not the real party in interest.

2. That there was a misjoinder of causes of action.

3. That the complaint does not set out a cause of action.

The demurrer was sustained and the plaintiff appealed.

P. R. Hines for plaintiff.

Charles P. Gaylor and Kenneth C. Royall for defendants.

PER CURIAM. No copy of the insurance policy was attached to the complaint, and there is no allegation tending to show the relationship of the plaintiffs to the cause of action or that they are the real parties in interest. The plaintiff, Henry Simons, sues as administrator of Bettie A. Simons. It does not appear that he was ever qualified as administrator or what connection Bettie A. Simons had with the case. Moreover, causes of action to reform an insurance contract and recover thereon is joined with allegations of slander and careless business methods.

An inspection of the complaint warrants the judgment sustaining the demurrer.

Affirmed.

ANNIE CARROLL GARRISS, ADMINISTRATRIX OF JOHNNIE CARROLL, AND ANNIE CARROLL GARRISS, DEPENDENT MOTHER OF JOHNNIE CARROLL, DECEASED, v. HINES BROTHERS LUMBER COMPANY AND PHILLIP LANIER.

(Filed 29 June, 1932.)

1. Master and Servant F i—Findings of fact by Industrial Commission upon conflicting evidence are conclusive.

The findings of fact by the Industrial Commission in a hearing before it are conclusive on appeal when supported by any competent evidence.

2. Appeal and Error K c—New trial will not be granted in the Supreme Court for newly discovered evidence that is merely corroborative.

A petition for a new trial for newly discovered evidence will not be granted where the evidence is merely corroborative of plaintiff's witnesses and contradictory of defendant's testimony.

CIVIL ACTION, before *Sinclair, J.*, at December Term, 1931, of GREENE.

The plaintiff applied to the Industrial Commission for an award for the death of her son, who was killed on 22 August, 1929, while riding on a truck from a logging camp in Greene County to the city of Kinston. At the hearing the Commission found "as a fact that the death of deceased, Johnnie Carroll, was not the result of an accident which arose out of and in the course of his employment." Thereupon compensation was denied. An appeal was taken by the plaintiff to the full Commission and the following order entered: "Upon the evidence the full Commission affirms the findings of fact and award of Chairman Allen and adopts them as the finding of fact and award of the full Commission."

The plaintiff appealed to the Superior Court, and it was decreed "that the judgment, findings and conclusion of the North Carolina Industrial Commission be, and the same are hereby in all respects confirmed."

From the judgment so entered the plaintiff appealed.

P. R. Hines for plaintiff.

Dawson & Jones for defendants.

PER CURIAM. The evidence was conflicting. The law has established the Industrial Commission as a tribunal to find the facts in compensation cases. This Court has consistently held in accordance with the statute that, if there is any competent evidence to support the findings of fact made by the Commission, such findings are binding upon the appellate courts. Consequently the judgment is affirmed.

In May, 1932, the plaintiff filed a petition for a new trial for newly discovered evidence. An examination of the proposed evidence, however, discloses that it corroborates certain witnesses for the plaintiff and contradicts certain other testimony. Hence the petition for a new trial does not meet the tests prescribed by law in such cases. *Pridgen v. R. R., ante,* 62.

Petition for new trial, denied.

Judgment of the Superior Court, affirmed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1932

LILLINGTON STONE COMPANY v. A. J. MAXWELL, COMMISSIONER.

(Filed 14 September, 1932.)

Taxation B b—Digging gravel is not mining within meaning of statute allowing reimbursement of tax on gasoline used for mining.

Digging gravel from a pit for commercial purposes is not mining within the meaning of chapter 145, Public Laws of 1931, as amended by chapter 304, and one paying the tax on gasoline used in digging gravel is not entitled to reimbursement of the tax under the provisions of the statute, gravel not being regarded as a mineral under the mining laws.

CLARKSON, J., concurring in result.

APPEAL by defendant from *Devin, J.*, at March Term, 1932, of WAKE.

Civil action for refund of tax on gasoline alleged to have been purchased by plaintiff and used exclusively in mining gravel, heard upon demurrer.

The complaint alleges:

1. That the plaintiff is engaged in the business of operating mining machinery consisting principally of hoists, pumps and excavators used exclusively for mining gravel from veins and pockets deposited below the surface of the earth and extending downward from a few feet to a depth of thirty or forty feet.

2. That plaintiff is entitled to a refund of $1,138.70 taxes paid by it on gasoline used in such operation under the following provisions of chapter 145, Public Laws 1931, as amended by chapter 304, same session:

"Any person, association, firm or corporation who shall buy in quantities of ten gallons or more at any one time any motor fuel, as defined in this act, for the purpose of and the same is actually used in the operation of . . . (2½) mining machinery consisting principally of air compressors, hoists, pumps, and excavators used exclusively for mining purposes, . . . on which motor fuels the tax or taxes imposed by this act shall have been paid, shall be reimbursed and repaid the amount of such tax or taxes," upon proper application being made therefor.

3. That plaintiff has complied with the conditions precedent to its right to recover the taxes in question from the defendant, Commissioner of Revenue.

Demurrer interposed upon the ground that the complaint does not state facts sufficient to constitute a cause of action, in that, the operation alleged constitutes no more than the excavation of gravel from a pit which defendant contends is not mining within the meaning of the statute.

From a judgment overruling the demurrer, the defendant appeals.

Neill McK. Salmon for plaintiff.

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

STACY, C. J. Is digging gravel from a pit for commercial purposes mining within the meaning of chapter 145, Public Laws 1931? We think not.

True the term "mining" has accommodated itself to a variety of situations. Annotation 17, A. L. R., 156. Originally it conveyed the idea of extracting minerals from beneath the surface of the earth by means of tunneling and shafting. *Rock House Ford Land Co. v. Raleigh Brick and Tile Co.*, 83 W. Va., 20, 97 S. E., 684, 17 A. L. R., 144. But in later times it has assumed a broader signification, and is not now confined in its meaning to the method of excavation. *Nephi Plaster and Mfg. Co. v. Juab County*, 33 Utah, 114, 93 Pac., 53, 14 L. R. A. (N. S.), 1043; Note, Ann. Cas., 1912A, 1302.

It is limited in its meaning, however, to the extraction of minerals from the earth, and while commercial gravel belongs to the mineral kingdom in that it is inorganic and formed by nature alone, it is not regarded as a mineral under the mining laws. 40 C. J., 738.

Speaking to the subject in *U. S. v. Aitken,* 25 Philippine, 7, the Court said: "It is true that commercial gravel belongs to the mineral kingdom in that it is inorganic and that it is formed by nature alone. But there is an important distinction between it and any of the so-called minerals as recognized by the authorities. Practically speaking, all the definitions of the word 'mineral' agree that such a substance must always have a definite chemical composition by which it can be easily recognized, in whatever part of the earth it may be found. There can be no such uniformity in the chemical content of gravel deposits, for the reason that this depends entirely upon the character of the mineral deposits which have contributed to their formation. And upon the character, quantity, and proximity of the minerals to the gravel deposit, their susceptibility to erosion, the violence with which the erosion is accompanied, the duration of the eroding process, as well as various other facts, depends the size of the pebbles and the quality of the deposit as commercial gravel. There is nothing constant in the character of commercial gravel by which to indentify it as a mineral, except that it consists of broken fragments of rock mingled with finer material, such as sand and clay. Nothing definite can be said of its chemical composition as can be said of the minerals. Commercial gravel is simply a jumbled mass of fragments of various minerals (rocks). Science, at least, cannot accept as a distinct subdivision of the mineral kingdom any substance whose character and attributes are so composite and fluctuating. It is true that beds of sandstone and limestone may possibly owe their origin in some instances to deposits of ordinary gravel. (Barringer and Adams on The Law of Mines and Mining in the United States; Enc. Brit. 11th ed., Title 'Gravel.') But commercial gravel has not yet reached that stage. So far as scientific classification goes, then, commercial gravel cannot be considered as a mineral." In this view of the case, the demurrer should have been sustained.

Reversed.

CLARKSON, J., concurring in the result: The caption of the act, chapter 145, Public Laws 1931, is as follows: "An act to amend chapter two, Public Laws of one thousand nine hundred and twenty-one, and acts amendatory thereof and additional thereto, relating to the State highway system and public roads of the State, and to provide for the maintenance thereof."

Section 24, subsection 15, of said act, is as follows: "Any person, association, firm or corporation who shall buy in quantity of ten gallons or more at any one time any motor fuels as defined in this act for the purpose of, and the same is actually used in the operation of (1) farm

tractor used principally for agricultural purposes, (2) motor boat used principally for fishing purposes (see amendment below), and/or (3) manufacturing processes in which such motor fuel is used as an ingredient, solvent or vehicle in the process, on which motor fuels the tax or taxes imposed by this act shall have been paid, shall be reimbursed and repaid the amount of such tax or taxes paid under this act upon the following conditions and in the following manner," etc.

Said act was amended, chapter 304, part section 1, by inserting between the words "fishing purposes" and the word "and" in line 6 of above subsection, the following: "Mining machinery, consisting principally of air compressors, hoists, pumps, and excavators used exclusively for mining purposes."

It is a matter of common knowledge that this amendment was passed to cover the type of mining done in the western part of the State, and to take care of the mining of feldspar, mica, etc. I do not think it was the intention of the General Assembly to cover digging gravel, which this controversy is about.

MRS. MARY H. TUTTLE v. J. W. BELL AND MARVIN G. PORTER.

(Filed 14 September, 1932.)

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

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

2. **Highways B k—Nonsuit in guest's action is proper when evidence shows that injury was proximately caused by negligence of third person.**

   Where, in an action by a guest in an automobile to recover damages from the owner thereof, the evidence tends to show that the accident in suit occurred when the defendant's car was a little beyond the middle of the intersection of two streets and that the accident was proximately caused by the negligence of the driver of another car in greatly exceeding the speed limit at the intersection and hitting the defendant's car from the right, and that the defendant's car was being driven at a moderate speed, *is held* insufficient to be submitted to the jury, and evidence that the one driving the defendant's car with his permission slowed down immediately before the impact and that the driver of the other car attempted to avoid the collision by bearing to the right is insufficient to alter this result.

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

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

4. Appeal and Error J e—Exclusion of evidence will not be held for reversible error when evidence is insufficient to overrule nonsuit.

The exclusion of evidence which, if competent, would not be sufficient to take the case to the jury when considered with the other evidence in the case, will not be held for error.

APPEAL by plaintiff from *Sinclair, J.*, at January Term, 1932, of PASQUOTANK. Affirmed.

The following judgment was rendered in the court below: "This cause coming on to be heard, and being heard by the court and a jury, and the defendant Marvin G. Porter, having moved, when plaintiff rested her case, for judgment as of nonsuit, and the same having been overruled, and the said Marvin G. Porter at the conclusion of all the testimony, having again moved for judgment as of nonsuit, and the court being of the opinion that the said defendant, Marvin G. Porter, is entitled thereto, it is—Ordered, decreed and adjudged that judgment of nonsuit against the plaintiff, and in favor of the said Marvin G. Porter be, and the same is hereby, entered and judgment given in favor of said Marvin G. Porter, and against the said Mary H. Tuttle, and the surety on her prosecution bond, G. F. Horner, for his costs in this action, to be taxed by the clerk. Judgment is hereby entered accordingly. A judgment by default and inquiry having been heretofore entered in this cause against defendant, J. W. Bell, for want of an answer to the duly verified and filed complaint, the court proceeded to submit the inquiry to the jury who made answer thereto as follows: Issue: What damage, if any, is plaintiff entitled to recover? Answer: $30,000. It is further considered and adjudged that plaintiff recover against defendant, J. W. Bell, $30,000, and the costs of this action to be taxed by the clerk of this court."

To the foregoing judgment of nonsuit as to the defendant Marvin G. Porter, the plaintiff excepted, assigned error and appealed to the Supreme Court.

Ehringhaus & Hall for plaintiff.
Hughes, Little & Seawell and Worth & Horner for defendant.

CLARKSON, J. The questions presented on this appeal: (1) Was there sufficient evidence of actionable negligence as to defendant Porter? (2) Did the court err in excluding certain testimony offered by plaintiff

as a witness in her own behalf? Both questions must be answered in the negative.

This automobile collision was before this Court in the case of *Jackson v. Bell,* 201 N. C., 336. In that case this Court said: "Without detailing the evidence it is sufficient to say that it falls short of making out a case against the defendant Porter. At least, the appellant, who is required to handle the laboring oar, has failed to overcome the presumption against error. *Bailey v. McKay,* 198 N. C., 638, 152 S. E., 893."

Plaintiff contends that in this action there is sufficient evidence of actionable negligence. From a careful review of the evidence we cannot so hold.

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 on the part of plaintiff was to the effect that defendant, Marvin G. Porter, was the owner of a Pontiac roadster which had the top down, and it had a rumble seat. It was about 12 feet long. It was being driven by Beverly Woolard, with Porter's permission. Woolard was at the wheel, Verdie Heath was next to Woolard and Grover Jones was next to her, all on the front seat. Plaintiff was sitting in the rumble seat on the right-hand side and the defendant was sitting beside her on the left-hand side. On Sunday evening, about five o'clock, 25 May, 1930, the plaintiff, Mary H. Tuttle was walking down the street in Elizabeth City, N. C., with Verdie Heath and they were asked to go riding, in defendant Porter's car, which they did, and were riding around for pleasure. Church Street runs east and west and Selden Street runs north and south and crosses Church Street at right angles, Selden and Church streets at the intersection are about 38 feet from curb to curb. The car, driven by Woolard, was traveling south on Selden Street to Church Street. Plaintiff testified: "The automobile collision we are inquiring into occurred a *little beyond the center of Church Street,* at its intersection with Selden Street. . . . When Woolard drove into Church Street the defendant, Porter, *told me to look at that fool and pointed his finger at the oncoming Bell car.* I turned around and looked and saw him *coming at a terrific rate of speed down Church Street,* he was coming on his right side of Church

Street. When I looked the car in which I was riding sort of slowed down. *He was going slow, anyway,* and he slowed down and the car hit us. I don't remember our car coming to a complete stop. The right-hand side of the car in which I was riding was struck by the Bell car. That was the side I was sitting on. . . . Bell's car was bearing to the right at the time he struck us. . . . We were in the intersection when Porter said 'Look at that fool.' Just when he spoke these words and when we were in the intersection was when I noticed the car in which I was riding slowing down. . . . It was not going fast to start with, it was going about 20 miles an hour, and that is not a fast rate of speed. That is slow driving. . . . I first saw the Bell car when we were about in the center of the street, when Marvin told me to look at that fool. Prior to that I had not seen it. . . . What I could have seen if I had been looking is more than I know, because I did not have any idea. We had gotten about in the middle of Church Street, as near as I remember, when we saw the Bell car coming. *Beverly Woolard was driving slowly.* I felt a slackening of our car just for an instant. When it slackened we were hit. We were hit almost instantly. . . . The Bell car was a Ford roadster and the top was down and I would say it was coming *at least forty miles an hour.* . . . I went across on the southeast side of Church Street and Selden Street and looked at those telephone poles. I saw a scar on the telephone poles, but what made it—*I could imagine that our car did it in the wreck.* I don't know."

From a careful review of the evidence, we think the sole proximate cause of plaintiff's injury was the Bell car, runninig at least 40 miles an hour, striking the Porter car. The plaintiff's evidence in a "nut shell" was that "Beverly Woolard was driving slowly." The "fool," as the driver of the Bell car was termed, according to plaintiff's testimony, was "coming at a terrific rate of speed down Church Street . . . At least 40 miles an hour."

"Mere scintilla of evidence, or evidence arising only on suspicion, conjecture, guess, surmise or speculation, is insufficient to take a case to the jury." *Shuford v. Brown,* 201 N. C., at p. 25.

From the view we take of this case, the evidence excluded and for which exceptions and assignments of error were made, if competent, would be insufficient with the other evidence in this case to take the case to the jury. For the reasons given, the judgment of the court below is

Affirmed.

STATE v. S. W. BRIGGS AND COLUMBIAN PEANUT COMPANY.

(Filed 14 September, 1932.)

1. **Penalties A a—Statute in this case held to impose penalty recoverable solely by civil action.**

The provisions of chapter 449, section 5, Public Laws of 1891, "that no other person than said weighers shall weigh cotton or peanuts sold in said town or township under penalty of $10.00" the penalty to be paid by the buyer and applied to the school fund upon conviction before any justice of the peace, construed with C. S., 447, does not create a criminal offense, and a penalty alone can be imposed and enforced in a civil action and the use of the word "conviction" in the act does not alter this result.

2. **Statutes B c—Criminal statutes should be strictly construed.**

Criminal statutes should be strictly construed, and in case of substantial doubt that construction should be adopted which is the least severe.

APPEAL by defendants from *Frizzelle, J.*, and a jury, at January Term, 1932, of EDGECOMBE. Reversed.

This is a criminal action instituted in the recorder's court of Edgecombe County and by appeal tried in the Superior Court of Edgecombe County, at the January Term, 1932, before his Honor, J. Paul Frizzelle, judge presiding, in which the defendants were charged with buying 2,000 bags of peanuts in the town of Tarboro, and weighing the same, contrary to the provisions of chapter 449, Public Laws of 1891. The defendants were found guilty, and the following judgment rendered by the court below:

"Upon the verdict of the jury finding both defendants guilty of the violation of said act, the court entered judgment against each of said defendants wherein each was required to pay a fine of ten dollars and the cost of the action, said fine being the fine stipulated in the act in question."

The defendants made numerous exceptions and assignments of error and appealed to the Supreme Court.

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

Henry C. Bourne for defendants.

CLARKSON, J. The defendants excepted and assigned error to the following instruction given by the court below: "The court instructs you, gentlemen, that if you believe the evidence in this case and find the facts to be as testified, you would render a verdict of guilty as against both

the defendants, otherwise you would render a verdict of not guilty." We think the assignment of error should be sustained.

The statute, section 5, chapter 449, Public Laws of 1891, under which the defendants were tried, convicted and judgment rendered reads as follows: "That no other person than said weighers shall weigh cotton or peanuts sold in said town or township, under a penalty of $10.00 for each and every offense, said penalty to be paid by the buyer and applied to the school fund of said county, upon connection (conviction), of the offender before any justice of the peace of said county."

The defendants contend that said act, under which these defendants were indicted, tried and convicted, does not prescribe and set out a criminal act triable in the criminal courts of the State, but in specific words prescribes a penalty. We think defendants' contention correct and there was error in the charge of the court below.

In *S. v. Snuggs,* 85 N. C., at p. 543, speaking to the subject, we find: "The statute not only creates the offense but fixes the penalty that attaches to it, and prescribes the method of enforcing it, and the rule of law is that wherever a statute does this, no other remedy exists than the one expressly given, and no other method of enforcement can be pursued than the one prescribed. The mention of a particular mode of proceeding excludes that by indictment, and no other penalty than the one denounced can be inflicted. 1 Russell on Crimes, 49; *S. v. Loftin,* 2 Dev. & Bat., 31." *Nance v. Fertilizer Co.,* 200 N. C., at p. 707.

In suits on penalties, the law is as follows: C. S., 447. "Where a penalty is imposed by any law, and it is not provided to what person the penalty is given, it may be recovered, for his own use, by any one who sues for it. When a penalty is allowed by statute, and it is not prescribed in whose name suit therefor may be commenced, suit must be brought in the name of the State."

We think that in construing the statute under which defendants were indicted, with C. S., 447, *supra,* a penalty alone can be imposed and enforced in a civil action. The word "conviction" in the statute does not change the specific language that a penalty is imposed and how the fund is applied. Then again, the humanities of the law require criminal statutes to be strictly construed.

"And in case of a substantial doubt as to what the Legislature really meant, that construction should be adopted which is the least severe." Black on Interpretation of Laws (2d ed.), pp. 455-6. The judgment of the court below is

Reversed.

GEORGE W. BRAY, CLAIMANT, v. W. H. WEATHERLY AND COMPANY, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, INSURER.

(Filed 14 September, 1932.)

1. Master and Servant F b—Ordinarily, injury to employee while going to or returning from work does not arise in course of employment.

As a general rule an injury suffered by an employee while going to or returning from his work does not arise out of and in the course of his employment, and where in a hearing under the Workmen's Compensation Act the admitted facts are that the employee was employed solely as a truck driver, and that he went to his employer's residence each morning to get the truck he was employed to drive in order to take it to his employer's store, and that he was injured in an accident occurring while on his way from his home to the employer's residence for the truck: *Held*, the injury was not from an accident arising out of and in the course of his employment, and compensation was properly denied by the Industrial Commission, and the fact that the employee passed the store on his way from his home to the employer's residence is immaterial, his duties at the store not commencing until he had returned there with the truck. N. C. Code, 1931, sec. 8081(i), subsec. (f).

2. Master and Servant A b—Relation of master and servant is usually suspended when servant leaves place of employment.

The relation of employer and employee is usually suspended when the employee leaves the place of his actual employment and is resumed when he puts himself in a position when he can again do the work at the place where it is to be performed.

APPEAL by plaintiff from *Daniels, J.*, at March Term, 1932, of PASQUOTANK. Affirmed.

This is a proceeding begun before the North Carolina Industrial Commission and heard on appeal to the Superior Court from an order of the full Commission made on 21 September, 1931, affirming an order of T. A. Wilson, commissioner, denying compensation.

The plaintiff was a truck driver in the employ of W. H. Weatherly and Company, who were engaged in the wholesale grocery business in Elizabeth City. His home was on East Cypress Street in the northern part of the city, and the truck was kept at night in a garage at Weatherly's residence on Riverside Avenue, in the southern part of the city. The store is on Water Street, between these two places, and in going to the garage the plaintiff usually passed the store. It was his custom to ride to the garage on his bicycle; to "report at Mr. Weatherly's," that is, "just to go and get the truck"; to drive it to the store about 7 o'clock in the morning and at the close of the day's work to take it back to the garage, going home on the bicycle, which meanwhile had been left at Weatherly's. He testified: "I report at Mr. Weatherly's

every morning and get the truck and then go back to the store. The truck is kept at the residence. I suppose it is nearly a mile from the store."

In the early morning of 25 March, 1931, the plaintiff started from home to the garage on his bicycle. He had passed the store without stopping there, but had not arrived at the garage, when an automobile coming from an intersecting street struck the bicycle and injured the plaintiff, who was thereby disabled for two weeks. He could have gone to the garage without passing the store. He brought this proceeding for compensation under the Workmen's Compensation Act against the employer and the Liberty Mutual Insurance Company, carrier, and compensation was denied. On appeal to the Superior Court the judgment of the full Commission was affirmed. The plaintiff then appealed to the Supreme Court.

Thompson & Wilson for plaintiff.
Smith & Joyner and John H. Anderson, Jr., for defendants.

ADAMS, J. The statement of facts is derived from the admission of the parties and the testimony of the plaintiff, the only witness examined at the hearing. The determinative facts are therefore admitted. The plaintiff was employed to drive a truck. His services in this capacity indicated his sole relation to the business of his employer. His "reporting" at Weatherly's garage he explained to be the mere act of going there and getting the truck. He stored his bicycle at the garage and drove the truck to the store; when the day's work was done he returned the truck to the garage and rode home on his two-wheeled vehicle. The fact that he passed the store in the morning is insignificant; his service imposed no duty there until he had arrived with the truck. In fact, two equally accessible ways were open to him in going from his home to the garage.

As used in the Workmen's Compensation Act "injury and personal injury" mean injury by accident arising out of and in the course of the employment. Code, 1931, section 8081(i), subsection (f). We have held that as a general rule an injury suffered by an employee while going to or returning from his employer's premises where he is to begin his work does not arise out of and in the course of his employment. *Wilkie v. Stancil,* 196 N. C., 794; *Conrad v. Foundry Co.,* 198 N. C., 723; *Harden v. Furniture Co.,* 199 N. C., 733; *Davis v. Veneer Co.,* 200 N. C., 263; *Hunt v. State,* 201 N. C., 707. The facts are not within any exception to the general rule. *Dependents of Phifer v. Dairy,* 200 N. C., 65.

The relation of employer and employee is usually suspended when the servant leaves the place of his actual employment and is resumed when he puts himself in a position when he can again do the work at the place where it is to be performed. *Ibid.* At the time of his injury the plaintiff was on his way to the garage where he was to resume his accustomed duties, but he had not reached the premises or begun the service; hence, under the authorities cited he is not entitled to compensation. The distinction between actual and prospective service may be seen by comparing *Baker v. State,* 200 N. C., 232 with *Hunt v. State,* which is herein cited. Judgment

Affirmed.

STATE EX REL. MRS. J. R. QUINTON, NATURAL GUARDIAN AND NEXT FRIEND OF JOHN MORRIS QUINTON, MINOR, v. J. B. CAIN, CLERK SUPERIOR COURT BUNCOMBE COUNTY, NORTH CAROLINA, FIDELITY AND CASUALTY COMPANY, NEW YORK, CENTURY INDEMNITY COMPANY, HARTFORD, CONNECTICUT, G. N. HENSON, LIQUIDATING AGENT OF CENTRAL BANK AND TRUST COMPANY, GURNEY P. HOOD, COMMISSIONER OF BANKS FOR NORTH CAROLINA, AND CENTRAL BANK AND TRUST COMPANY, A CORPORATION.

(Filed 14 September, 1932.)

Guardian and Ward H a: Clerks of Court B a—Clerk need not require corporation licensed by Insurance Commissioner to give guardianship bond.

Under the provisions of C. S., 6376, 6377, a corporation licensed by the Insurance Commissioner and having charter authority to act as guardian, may be appointed guardian without giving the statutory bond usually required, C. S., 2161, 2162, and where the clerk of the Superior Court pays to a bank so licensed and having charter authority to act as guardian, money belonging to the estate of a minor and does not require the bank to give guardianship bond, neither the clerk nor the sureties on his official bond are liable for failure to require the bond, although the ward's estate suffered loss by reason of the bank's failure to keep the funds separate from its regular deposits, the bank later becoming insolvent.

APPEAL by plaintiff from *Sink, J.,* at February Term, 1932, of BUNCOMBE. Affirmed.

The agreed statement of facts between the parties to this controversy is as follows:

"The plaintiff and defendants agree that the following constitute the facts in the above entitled cause and that no evidence need be offered by either party to said controversy to establish same:

(1) That the plaintiff is a resident of Buncombe County, North Carolina, and is the mother of John Morris Quinton, who is a minor, 15 years of age, said minor residing with his mother, the plaintiff in this case.

(2) That J. B. Cain is clerk of the Superior Court of Buncombe County, North Carolina, and has been such officer since the first Monday in December, 1926, and that his term of office lasted four years from and after said date.

(3) That J. R. Quinton, husband of plaintiff, died 31 January, 1930, in Buncombe County, North Carolina, leaving a life insurance policy in the sum of $1,000, payable to the above minor, John Morris Quinton.

(4) That J. B. Cain, clerk of Superior Court of Buncombe County, North Carolina, on 6 December, 1926, entered into a bond in the sum of $10,000 with the defendant, Fidelity and Casualty Company of New York, as surety, a copy of said bond being attached to complaint and marked 'A' and same is made a part of these agreed facts.

(5) That on 13 December, 1929, J. B. Cain, clerk of the Superior Court of Buncombe County, North Carolina, entered into an additional bond in the sum of $10,000, with the Century Indemnity Company of Hartford, Connecticut, as surety, a copy of said bond being attached to the complaint and marked 'B' and made a part of these agreed facts.

(6) That on 15 February, 1930, the sum of $1,000, the proceeds of the life insurance policy on the life of John R. Quinton, deceased, was turned over to J. B. Cain in his official capacity as clerk of the Superior Court of Buncombe County, North Carolina, and the same was received by him by virtue of the color of his office, said sum being the property of the above named minor, John Morris Quinton.

(7) That about 15 February, 1930, the said sum of $1,000, was turned over by J. B. Cain, clerk of the Superior Court of Buncombe County, North Carolina, to the defendant, Central Bank and Trust Company, of Asheville, North Carolina, as guardian for John Morris Quinton, minor, and no guardian bond was required of or given by said Central Bank and Trust Company, but it was allowed to take and handle said funds of said minor without giving bond.

(8) That the charter of Central Bank and Trust Company authorized it to do a fiduciary trust business and an indemnity and surety business and was so licensed by the Insurance Commissioner.

(9) That since said sum of $1,000 was turned over by J. B. Cain to the Central Bank and Trust Company, there has been paid out by it, as guardian for said minor, the sum of $400.

(10) That said Central Bank and Trust Company, failed on 19 November, 1930, and since said date has been in charge of the liquidating agent, who is attempting to wind up its affairs.

(11) That demands have been made upon the Central Bank and Trust Company, as guardian and upon the defendant, J. B. Cain, clerk of the Superior Court of Buncombe County, North Carolina, by the plaintiff in this case, for the payment of the moneys and interest due said minor on account of the $1,000, but same has not been paid.

(12) That there is now due to said minor, John Morris Quinton, the principal sum of $600 together with such interest as is provided by the statute in respect to guardians and wards."

This case was instituted in the General County Court of Buncombe County, North Carolina, and heard before his Honor, Guy Weaver, judge of said court, who rendered the following judgment: "It is therefore ordered, adjudged and decreed that the plaintiff have and recover judgment against the defendant, J. B. Cain, clerk of the Superior Court of Buncombe County, North Carolina, and Fidelity and Casualty Company of New York, in the sum of $10,000, and against J. B. Cain, clerk of the Superior Court of Buncombe County, North Carolina, and the Century Indemnity Company of Hartford, Connecticut, in the sum of $10,000, each and both of said bonds and each and both of said defendants, surety companies and their principal, the defendant, J. B. Cain, clerk, to be discharged upon payment to the plaintiff of the sum of $600 principal and the further sum of $108 as interest on said principal, or a total of $708, together with interest on said sum of $708 at the rate of 6 per cent from this date until paid. That the defendants pay the cost of this action."

The defendants excepted and assigned error to the above judgment and appealed to the Superior Court, and the following judgment was rendered:

"The above entitled cause coming on to be heard upon the appeal of the defendants from a judgment of the Buncombe County General Court, before his Honor, H. Hoyle Sink, judge presiding, and holding the courts of the Nineteenth Judicial District, and after hearing the appeal, the court being of the opinion that the plaintiff is not entitled to recover of the defendant: It is therefore ordered and adjudged that this case be remanded to the Buncombe County General Court for a new trial, and thereupon enter judgment that the plaintiff have and recover nothing of the defendants."

From the above judgment the plaintiff excepted, assigned error and appealed to the Supreme Court.

Welch Galloway for plaintiff.

John H. Cathey and Lucile McInturff for defendant J. B. Cain, clerk and Fidelity and Casualty Company.

Sale, Pennell & Pennell for Century Indemnity Company.

Johnson, Smathers & Rollins for G. N. Henson, liquidating agent and Gurney P. Hood, Commissioner of Banks and Central Bank and Trust Company.

CLARKSON, J. The plaintiff contends that she is entitled to recover of the defendant J. B. Cain, clerk of the Superior Court of Buncombe County, North Carolina, and the sureties on his official bond, for breach of duty, in turning over to the Central Bank and Trust Company, a corporation, as guardian, the funds in his hands of John Morris Quinton, minor, and not requiring said bank as guardian to give bond. We cannot so hold.

This brings us to consider the statutes on the subject:

C. S., 2161, is as follows: "No guardian appointed for an infant, idiot, lunatic, insane person or inebriate, shall be permitted to receive property of the infant, idiot, lunatic, insane person or inebriate until he shall have given sufficient security, approved by a judge, or the court, to account for and apply same under the direction of the court."

C. S., 2162, in part, is as follows: "Every guardian of the estate, before letters of appointment are issued to him, must give a bond payable to the State, with two or more sufficient sureties, to be acknowledged before and approved by the clerk of the Superior Court and to be jointly and severally bound. The penalty in such bond must be double, at least, the value of all personal property and the rents and profits issuing from the real estate of the infant, . . . The bond must be conditioned that such guardian shall faithfully execute the trust reposed in him as such, and obey all lawful orders of the clerk or judge touching the guardianship of the estate committed to him," etc.

As to giving bond in a surety company, see C. S., 339. As to giving mortgage in lieu of bond, see C. S., 346. If these were the only statutes on the subject plaintiff's contention would be correct. We have another statute dealing with this subject—C. S., 6376, which is as follows: "Any corporation licensed by the insurance commissioner, where such powers or privileges are granted it in its charter, may be guardian, trustee, assignee, receiver, executor or administrator in this State without giving any bond; and the clerks of the Superior Courts or other officers charged with the duty, or clothed with the power of making such appointments, are authorized to appoint such corporation to any such office, whether the corporation is a resident of this State or not."

C. S., 6377, provides how such corporation is licensed to do business. C. S., 6378, provides that the Insurance Commissioner shall make examination as to solvency. C. S., 6379, the certificate of Insurance Commissioner as to solvency equivalent to justification. C. S., 6380, provides that Insurance Commissioner notify clerk of Superior Court of license and revocation.

The agreed facts bearing on the subject, are as follows: "That about 15 February, 1930, the said sum of $1,000 was turned over by J. B. Cain, clerk of the Superior Court of Buncombe County, North Carolina, to the defendant, Central Bank and Trust Company, of Asheville, N. C., as guardian for John Morris Quinton, minor, and no guardian bond was required of or given by said Central Bank and Trust Company, but it was allowed to take and handle said funds of said minor without giving bond. That the charter of Central Bank and Trust Company, authorized it to do a fiduciary business and an indemnity and surety business and was so licensed by the Insurance Commissioner."

C. S., 6376, seems to be a special privilege allowed certain banks when its charter permits it to act as guardian. Whatever may be the criticism of C. S., 6376, *et seq.*, it is a legislative matter and not for this Court. The law-making branch of the government has passed the act, and if constitutional it is the duty of this Court to uphold same, no attack is made on its constitutionality. If the Central Bank and Trust Company, intermingled this guardian fund with other funds of the bank, it and its surety would be liable to plaintiff.

In *Roebuck v. Surety Co.*, 200 N. C., at p. 202, the following is stated as the law: "The bank, as guardian, in not investing the funds of its ward, but intermingling it with other funds of its bank, was faithless to the trust reposed in it; and its bondsman, the defendant, must suffer the loss for such faithlessness." *Bank v. Corporation Commission*, 201 N. C., 381; *Bane v. Nicholson, ante*, 104. For the reasons given, the judgment of the court below is

Affirmed.

BESSIE W. GOLDSTEIN v. ATLANTIC COAST LINE RAILROAD COMPANY AND HARRY GOLDSTEIN.

(Filed 14 September, 1932.)

1. Railroads D b—Railroad held not required to maintain watchman or signals at crossing in this case.

Where the evidence discloses that no regular trains were operated over a railroad track at a grade crossing or regular shifting done at this point, that the highway was straight and there were no obstructions at

the crossing: *Held,* the evidence is insufficient as a matter of law to require the railroad company to maintain a watchman or signaling device before the crossing.

2. Same—Plaintiff has burden of proving violation of city ordinance relating to crossing when relied on by him in negligence action.

Where the plaintiff in an action to recover damages sustained in a collision at a railroad crossing relies on the violation by the railroad of a city ordinance prohibiting the blocking of a crossing in the city by a railroad company for more than three minutes at a time, the plaintiff has the burden of proving that the crossing in question was inside the city limits and that the railroad car into which the automobile collided had been blocking the crossing for more than three minutes, and where the plaintiff's evidence is not of sufficient probative force to be submitted to the jury on these questions a nonsuit is proper.

3. Customs and Usages A a: B a—Evidence held insufficient to establish custom or that plaintiff relied thereon.

Evidence in this case held insufficient to establish a custom of a railroad company to keep a watchman at a certain crossing, and there being no evidence that the plaintiff relied on such alleged custom in using the crossing, the exclusion of testimony of such custom was proper.

CLARKSON, J., dissents.

CIVIL ACTION, before *Barnhill, J.,* at October Term, 1931, of NEW HANOVER.

On 28 May, 1930, the plaintiff was a passenger in an automobile owned and operated by her husband, the defendant, Harry Goldstein. They were returning to Wilmington from Wrightsville at about eight o'clock at night. The road was straight and the car was traveling about twenty-five or thirty miles an hour. The tracks of defendant railroad crossed the Wilmington to Wrightsville highway at grade. At or near the junction of the county line and city limits of Wilmington the said defendant maintains a belt line and was engaged in shifting cars at or about the crossing. A gondola car blocked the crossing and the defendant, Harry Goldstein drove the automobile into said gondola car, inflicting injuries upon his wife, the plaintiff. There was neither watchman nor light at the crossing. The plaintiff introduced in evidence two ordinances of the city of Wilmington. The first ordinance required the defendant, Railroad Company, to ring the bell of the engine whenever the engine was moving across any street or highway within the limits of the city. The other ordinance made it unlawful for "any railroad company, its agents or employees to stop, place or leave standing for a period exceeding three minutes, at any one time, any engine or locomotive, or car of any description, across or along any street within the city limits in such a manner as to prevent the free passage of pedestrians, carts, drays or other vehicles along such street. In all cases where engine, car or cars are placed and left across any street

or portion thereof, an opening or space, of not less than twenty-five feet at or near the center of the street, shall be kept clear for travel."

The home of the Evans family was about fifteen feet from the crossing. Mr. Evans testified that he was in his house assisting one of his children in preparing lessons. He said: "The train come up and made some noise, and my smallest child, a knee-high baby, got up and went to the window and said: 'You hear the ding dong,' and I was still teaching the child his lesson, and I will say four or five minutes after the kid went to the window I heard the crash. . . . I could not say if it was standing still or moving from the time I heard the bell. It was across the crossing for four or five minutes, it seemed right up to my window. The train must have been blocking the highway for four or five minutes, because the cars were across the road. I heard the train when it backed up there and stopped and I heard the train bell ring and I heard her blow. . . . I could not say the train was moving at the time I heard the whistle and bell; I didn't see it. . . . I do not know just when the train went on the sidetrack from the belt line, but I would say it had been there four or five minutes. I imagine the train was coupling like they usually do from the time I first heard it blow until I saw the accident. It was also switching, I suppose." This witness testified that after he heard the crash he opened the door and ran out barefooted.

Mrs. Lula Evans, wife of J. W. Evans, said: "I was sitting in the kitchen around the table with my husband learning the children their lessons. I heard the train as it came upon the spur track and stopped. I heard it stop. I afterwards heard the crash. It was about five or six minutes after I heard the train stop. . . . I heard the train come up. I imagine it had stopped five or six or seven minutes before I heard the crash. How long it stood still I cannot say. I don't have a clock or watch in the room, but it was some time. I was in the house. . . . This gondola car had been across the crossing for five or six or seven minutes before Mr. Goldstein hit it. I imagine it was on there. It was standing there some time. As to swearing it was standing on the crossing, I could not tell you until after I heard it crash. It was found on the crossing. I never saw it on the crossing until I went out."

At the conclusion of the evidence of plaintiff, the trial judge sustained the motion of nonsuit as to the defendant, Atlantic Coast Line Railroad Company, from which judgment the plaintiff appealed.

Newman & Sinclair, John A. Stevens and Bryan & Campbell for plaintiff.

Thomas W. Davis and Carr, Poisson & James for Atlantic Coast Line Railroad Company.

BROGDEN, J. The plaintiff bases her right to recovery upon the following elements of negligence:

1. That the railroad company failed to provide a watchman or signaling device at the crossing.

2. That the company, in violation of the ordinance of the city of Wilmington, permitted a gondola car to remain over the crossing more than three minutes.

There was some contention about the failure of the railroad company to maintain a stop sign at the crossing, but there is no specific allegation in the complaint alleging the absence of a stop sign as an element of negligence. The evidence disclosed that no regular train was operated at this point and that no shifting was done at regular intervals. The highway was straight and there is no evidence of such obstruction as to require, as a matter of law, the maintenance of watchmen or signaling devices. Upon this aspect the case falls within the line designated and marked out in *Eller v. R. R.*, 200 N. C., 527, 157 S. E., 800. See, also, *Batchelor v. R. R.*, 196 N. C., 84, 144 S. E., 542.

The effectiveness of the contention that the railroad company was violating the ordinance of the city of Wilmington must be determined by the answer to two preliminary questions.

1. Did the accident happen within the corporate limits of the city of Wilmington?

2. Was there any competent evidence that the flat car or gondola car had remained across the highway more than three minutes?

The only evidence relating to the *locus* of the collision is the testimony of City Engineer Maffitt, who said: "Mr. Sinclair understood me to say the accident took place inside of the city. I said: 'I do not see how it could have taken place inside of the city because the evidence showed the accident occurred on the opposite side of the city.'" The burden was upon the plaintiff to offer evidence tending to show that the collision took place within the city limits, and therefore subject to the restrictions contained in the ordinance. It is obvious that the evidence relied upon fails to show that the accident happened within the city limits. Indeed, it tends to show the contrary. The ordinance by express language applies to "any street within the city," etc. However, if it be conceded that the ordinance applied to a portion of a street within the city and that the point of collision was partially within the city limits, then in such event the law imposed upon the plaintiff the burden of offering evidence that the crossing had been blocked more than three minutes. The only witnesses offering testimony as to the length of time the crossing had been blocked, were in the house with the doors closed until the crash. They do not undertake to say, as a matter of fact, how long the crossing had been blocked, but they do give certain

conclusions which they drew from the noise and operation of the train in the vicinity. This is not sufficient to meet the burden cast by the law upon the complaining party.

The plaintiff excepts to the exclusion of certain evidence to the effect that it was a custom of the railroad company to place a watchman at the crossing when it was blocked. The exclusion of the testimony was proper. The evidence of custom was insufficient in character and probative quality; notwithstanding even if it be conceded that there was competent evidence of custom, there is no evidence that the driver of the car or the plaintiff either knew of or relied upon its existence. *Penland v. Ingle,* 138 N. C., 456, 50 S. E., 850; *Crown Co. v. Jones,* 196 N. C., 208, 145 S. E., 5; *McLellan v. R. R.,* 155 N. C., 1, 70 S. E., 1066.

Affirmed.

CLARKSON, J., dissents.

COUNTY OF BUNCOMBE v. BEVERLY HILLS, INCORPORATED.

(Filed 14 September, 1932.)

Taxation C d—Review and reassessment of value of property in this case held valid.

Where the value of lands listed by the taxpayer has been increased, and the taxpayer duly files complaint before the board of county commissioners sitting as a board of equalization and review, and the matter of reassessment is referred to the county tax supervisor who makes a reduction of the tax value, and his reassessment is approved by the county commissioners at a regular meeting a little after the date prescribed by statute for action thereon: *Held,* although the statutory procedure should be followed, the approval of the reassessment is not void in this case, the taxpayer having acted in good faith without laches, and, the county commissioners having ratified the reduced assessment, the county may not take advantage of its failure to act within the statutory time, and the taxpayer is entitled to the benefit of the reduced assessment.

APPEAL by defendant from *Sink, J.,* at March Term, 1932, of BUNCOMBE. Reversed.

Don. C. Young and Clinton K. Hughes for plaintiff.
George W. Craig and Heazel, Shuford & Hartshorn for defendant.

CLARKSON, J. This is an action brought by plaintiff against defendant to foreclose a certificate of tax sale on defendant's property for default in the payment of 1927 taxes assessed against its property.

The defendant, in answer, says: "That all of its property was listed in the name of Beverly Hills, Incorporated, and that the assessments as set forth for the lots described in said complaint are not true according to the values and exemptions as allowed this defendant, which credits and exemptions this defendant specifically pleads."

By consent the matter was referred to Alvin S. Kartus, referee, who found the facts and on the facts so found based his conclusions of law.

All the evidence is to the effect that defendant at the time provided by the statute in 1927, through its secretary and treasurer, listed its property on the basis of acreage. Subsequent thereto, but within the time prescribed by law, a new and different listing for the same year was made by the "board of list takers and assessors." The land was listed and assessed by them on the basis of a lot development, and each respective assessment placed opposite each lot listed. Defendant made application for reassessment, as required by law (see chapter 71, Act of 1927, sections 50, 71, 108, and 109). The board of county commissioners, on 11 July, 1927, met and sat as a board of equalization and review, for the purpose of equalizing tax values of property within the county. The minutes of said meeting were filed, among others, the complaint of Beverly Hills, Incorporated, against its assessment for the said year and its request for a reassessment. The said board of county commissioners, sitting as a board of equalization and review, at said meeting passed the following resolution: "On motion duly made and seconded, it was decided that the board of county commissioners should make a careful examination of the complaint so entered, in order that the true value of the said property might be determined, and that a report of same should be made at the earliest convenient date."

It is contended by defendant that thereafter the assessment was reduced to $175,000. The plaintiff contends that if this was done it was not done in strict compliance with the statute. The defendant contends that the statute under all the undisputed evidence was substantially complied with or the continuance "for careful examination" a waiver, and the amount finally assessed ($175,000) was the amount it should pay tax on, and the amount by the list takers and assessors was "excessive" and exorbitant "valuation."

After setting forth the material facts found by him, the referee set forth his conclusions of law, as follows:

"(2) That the defendant regularly and properly filed with the board of equalization and review its complaint against the said assessed valuation of its property pursuant to and in accordance with provisions of chapter 71 . . . Public Laws of 1927.

(3) That the action of the board of equalization and review, in referring said complaint to the county tax supervisor, was proper and legal; that the acts of the said tax supervisor in reviewing defendant's assessment and recommending change thereof, were proper and legal, and that when the said board of county commissioners ratified said act of the said tax supervisor in reducing said assessment to $175,000, the same became binding upon the plaintiff as if it had, itself, done these acts and the valuation thus placed upon the defendant's property became the true and proper assessed valuation of same, notwithstanding the fact that said ratification was consummated at a regular meeting of the board of county commissioners and subsequent to the first Monday in August, 1927, the time by which the board of county commissioners is directed by chapter 71, section 50, Public Laws of 1927, to conclude all its work involving tax equalization matters.

(4) The referee, therefore, concludes as a matter of law, that the true assessed valuation of the defendant's property for the year 1927 was $175,000."

The plaintiff excepted and assigned error to the material findings of fact by the referee and the conclusions of law found by him as above set forth, and appealed to the Superior Court. The court below ruled: "The conclusions of law of the referee are all approved and affirmed with the exception of the conclusions of law contained in paragraphs 3 and 4 of the conclusions of law set out in the referee's report, which paragraphs 3 and 4 of the conclusions of law are excepted to by the plaintiff, and the court overrules and rejects the conclusions of law contained in said paragraphs 3 and 4 of the referee's conclusions of law for that the court is of the opinion and so holds that what took place at the meeting of the board of county commissioners when said ratification is alleged to have been made did not constitute a ratification by the board of county commissioners as such, or as a board of equalization and review of the acts and recommendations and agreement of said tax supervisor in regard to reducing the assessed valuation of said property to $175,000."

Defendant excepted and assigned error to the ruling of the court below and appealed to the Supreme Court. All the evidence shows that the application by defendant for reduction of the tax assessment was filed according to law and the entire transactions in the matter thereafter was done in good faith, no fraud or collusion. That defendant filed its complaint as to excessive and exorbitant assessment with plaintiff at the time and in the manner and method required by law, and that through its officer and agent it followed up its complaint with due diligence. The chairman of the county commissioners gave defendant's officer and

agent every assurance that the assessment would be reduced in accordance with the tax supervisor's finding in the matter, and the evidence is uncontradicted that in a meeting of plaintiff's board the reduced assessment was agreed to and the chairman of plaintiff's board in all matters corroborated defendant's contention, and no member of plaintiff's board denied the facts as found by the referee. Although time limits in matters of this kind are fixed by statute and should usually be complied with, it cannot be taken advantage of where defendant, as in this case, has been guilty of no laches, and the plaintiff is directed to perform its duty in the time limit. Plaintiff cannot take advantage of its failure in this respect. The spirit of the act in controversy never intended, under the facts in this case, to confiscate in part defendant's property by an exorbitant and excessive tax, when it used due diligence and relied on plaintiff's chairman, whose act was afterwards ratified by plaintiff corporation. The provisions of the statute relied on by plaintiff is not like the "law of the Medes and Persians, which altereth not." The judgment of the court below is

Reversed.

GORDON S. EAVES, BY HIS NEXT FRIEND, G. E. EAVES, v. T. C. COXE AND BILLY COXE.

(Filed 21 September, 1932.)

1. **Jury B b—After granting motion for removal for convenience of witnesses court may not order that jury be drawn from another county.**

   Where the court grants defendant's motion for removal of the action from the county of the plaintiff's residence to the county in which the personal injury occurred for the convenience of witnesses, C. S., 470, the answer not having been filed and no issues having been joined, the court has no further discretionary power and may not enter a further order that the jury be drawn from another county.

2. **Parent and Child A a—Evidence that car other than one in question was family car held incompetent on issue of father's liability.**

   In an action against a father to recover damages for a personal injury alleged to have been caused by the negligence of his son while driving a family car, testimony tending to show that another car owned by the father other than the one in question was a family car has no probative force and is irrelevant to the issue.

3. **Highways B n — Evidence that road was dusty and driver's vision obscured thereby held competent in pedestrian's action for damages.**

   In an action to recover damages for a personal injury sustained by the plaintiff, a minor, when he was struck by an automobile driven by the

defendant, evidence of the dusty condition of the highway at the place and time of the injury and that the vision of the driver was much obscured thereby is competent, and its exclusion is reversible error.

4. Appeal and Error J e—Exclusion of competent testimony is not cured by admission of testimony of other witnesses to same effect.

Where the trial judge excludes competent testimony of a witness the admission, without objection, of testimony of other witnesses to the same effect does not cure the error, the excepting party having the right to have the jury pass upon the weight and credibility of the testimony of the particular witness. The distinction is noted where the same witness is later allowed to testify to the same import as the excluded testimony.

ADAMS, J., not sitting.

CIVIL ACTION, before *Finley, J.*, at September Term, 1931, of ANSON.

This action was instituted in the Superior Court of Mecklenburg County on 7 August, 1930.

The plaintiff is a minor and through his father as next friend, alleged and offered evidence tending to show that on or about 1 March, 1923, the plaintiff, who was five years of age, was run over and injured by the defendant, Billy Coxe, who was negligently and recklessly driving an automobile owned by his father, T. C. Coxe. The injury occurred at about 6:30 in the afternoon. The defendant, T. C. Coxe, lived in Wadesboro, and at the time of the injury owned two automobiles. One was a Buick sedan, which was admitted to be a family car. On 4 December, 1922, the defendant, T. C. Coxe, purchased a Buick roadster. The testimony tended to show that this Buick roadster was used by the defendant, T. C. Coxe, in the prosecution of his business and was not a family car. The defendant, Billy Coxe, son of the defendant, T. C. Coxe, was a student at the University of North Carolina. He came home to spend the Easter holidays in March, 1923, and it was while he was at home from school that he took his father's roadster to the depot to meet a friend. Upon the return from the depot he struck the plaintiff.

There was evidence tending to show that the road was very dusty, and that the plaintiff was crossing the street and could not be seen in the exercise of reasonable care until he was within two feet of the automobile. The defendant, T. C. Coxe, testified that he used the Buick roadster for his own business, and that he was out of town on the day of the accident and did not know that his son was using the car until his return. He also testified that he had never authorized his son or any other member of the family to use the roadster. He further testified: "The family was prohibited from driving it without my knowledge and consent. They understood that they were restrained from using it.

. . . I know he didn't drive it with my permission unless he was with me. He possibly might have carried me to the train and come back by himself. I do not recall." The defendant, Billy Coxe, testified: "I came home on 28 March, 1923. My father was not at home when I got it. He had gone to Strother, South Carolina. I had a Ford sedan at that time and my father had a Buick car. I used the Buick car the night this accident occurred. My father did not give me permission to use it and did not permit me to use it. I just went in the garage and got it. I didn't say anything to anybody about getting it. My mother had gone to Charlotte that day to see my aunt. I didn't use the Ford because this was a new looking car, and naturally I wanted to take it. I was down town to get a girl at that time."

There was testimony on behalf of plaintiff tending to show that the defendant, Billy Coxe, had driven the Buick roadster prior to the date of the injury, and also that he had been seen driving it during the Christmas holidays of 1923, subsequent to the date of the injury.

Issues were submitted to the jury as to whether the plaintiff was injured by the negligence of Billy Coxe and by the negligence of the father, T. C. Coxe. The jury answered the issue of negligence against the defendant, Billy Coxe, but in favor of defendant, T. C. Coxe. Judgment for $5,000 upon the verdict was entered against the defendant, Billy Coxe, from which judgment both parties appealed. The plaintiff appealed by virtue of the fact that the jury answered the issue of negligence in favor of defendant, T. C. Coxe, the owner of the car, and the defendant, Billy Coxe, appealed from the judgment against him.

G. T. Carswell and Joe W. Ervin for plaintiff.
Fred J. Coxe and McLendon & Covington for defendants.

BROGDEN, J. After the injury the plaintiff and his family moved to Mecklenburg County, and this action was instituted in the Superior Court of said county on 7 August, 1930. The defendants lived in Anson County, where the injury occurred and cause of action arose. In apt time the defendants made a motion before Judge Harwood to remove the cause for trial to Anson County upon the ground of convenience of witnesses. At the hearing upon the motion for removal it was ordered that the cause be removed from the Superior Court of Mecklenburg County to the Superior Court of Anson County for trial as provided by C. S., 474. It was further ordered "that eighteen men duly qualified to act as jurors be drawn from Union County, from which the jury to try this case shall be selected, the said jury to be drawn from the jury box of said county of Union as provided by law in such cases."

The defendants were given thirty days thereafter in which to file an answer. Thereafter, at the September Term, 1931, of the Superior Court of Anson County the plaintiff moved "that a jury be ordered from Union County for the trial of this cause in accordance with the order of Judge Harwood." The trial judge denied the motion and the plaintiff excepted. Thereupon the cause was regularly tried in Anson County by a jury duly drawn in said county.

The question of law presented upon this aspect of the case is: Was Judge Finley, the trial judge in Anson County, bound by the order of Judge Harwood theretofore made in removing the case from Mecklenburg County? C. S., 470, authorizes a judge "to change the place of trial . . . when the convenience of witnesses and the ends of justice would be promoted by the change." When the motion for removal was made before Judge Harwood in Mecklenburg County the cause was not at issue, as the time for answering had not expired, and, therefore, the sole and exclusive question before the judge was the preliminary motion of removal. The statute authorized the judge to "change the place of trial" in the exercise of his sound discretion, but when the "place of trial" was changed, the statutory power of the judge was thereby exhausted and he was not authorized to exercise further control over the trial of the cause in the county to which it was removed. McIntosh, North Carolina Practice and Procedure, page 284. See, also, *Bisanar v. Suttlemyre,* 193 N. C., 711, 138 S. E., 1; *Turnage v. Dunn,* 196 N. C., 105, 144 S. E., 521.

The plaintiff's appeal is based upon an adverse verdict as to the negligence of T. C. Coxe. Exception was taken to the exclusion of evidence tending to show that the defendant, Billy Coxe, had driven other cars owned by the defendant, T. C. Coxe, prior to the injury. T. C. Coxe admitted that the other car owned by him was a family car, and his defense was based entirely upon the proposition that the Buick roadster, which his son was driving at the time of the injury, was not a family car. Manifestly, the use of a car admitted to be a family car, would have no probative value in establishing the fact that another car not being used at the time was also a family car. Certain exceptions were taken to the charge. An examination of the charge discloses that the trial judge instructed the jury correctly upon the use of the Buick roadster by Billy Coxe as such use related to the liability of his father, T. C. Coxe. Indeed, upon this aspect of the case almost the exact language of *Wallace v. Squires,* 186 N. C., 339, 119 S. E., 569, was used with reference to the liability of defendant, T. C. Coxe.

The defendant, Billy Coxe, excepted to the exclusion of testimony with reference to the dusty condition of the road at the time of the injury.

A witness for defendant was asked: "State in your opinion, on that particular night, in the condition the road was, the dust, could you have seen a child in front of the car standing still?" He was further asked: "What were the conditions along there?" The witness would have answered: "Mighty bad, couldn't hardly see at all for the dust." Again he was asked: "Could you tell from where you were at the depot anything about the dust in front of the Eaves house before you left the depot?" The witness would have answered: "It was awful dusty. I had to stop to let it settle down before I could go on. It was awful dusty there in front of the Eaves house. The road was not paved there and as well as I remember it had been ploughed up recently and there was about two inches of dust." A motion was made to strike out the foregoing testimony as to the condition of the road. The motion was allowed and the testimony was stricken out, and the defendant excepted. Manifestly the evidence descriptive of the physical condition of the road at the time of the injury was competent. The plaintiff however, earnestly insists that other witnesses, both for the plaintiff and the defendants, testified with respect to the dusty condition of the road without objection, and that, therefore, the defendant had the benefit of such testimony. Consequently the question of law is: If competent testimony of a witness is excluded by the trial judge, does the fact that similar testimony from other witnesses is admitted in evidence, render the ruling harmless?

It is clear that this Court will not grant a new trial for excluding competent testimony of a witness when it appears that the same witness gave substantially the same testimony without objection in other portions of the examination. *Baynes v. Harris,* 160 N. C., 307, 76 S. E., 230. There is an expression in *Davis v. Thornburg,* 149 N. C., 233, 62 S. E., 1088, as follows: "Such question was undeniably proper, but we think the plaintiff received the full benefit of such evidence in the subsequent uncontradicted testimony which proved that his mare was an animal of gentle quality." Apparently this excerpt supports the contention of plaintiff, but an examination of the original record discloses that the "subsequent uncontradicted testimony" referred to came from the same witness and not from other witnesses. See, also, *Burns v. R. R.,* 125 N. C., 304, 34 S. E., 495, and *Ledford v. Lumber Co.,* 183 N. C., 614, 112 S. E., 421, dealing with the admission of improper evidence. Obviously if a party offers the competent testimony of a given number of witnesses, but the court excludes the testimony of one, even though the testimony of the others is admitted without objection, notwithstanding the offering party is entitled to the credibility and weight of testimony of the excluded witness. Otherwise the total weight and credibility of the testimony would be reduced for the reason that a jury might have

believed the testimony of witness whose evidence was excluded and for one reason or another might not believe the testimony of the witnesses whose testimony was received without objection. Hence it cannot be said as a matter of law that the exclusion of such testimony was harmless error.

This conclusion is supported by decisions in other jurisdictions, notably: *Mohrenstecher v. Westervelt,* 87 Fed., 157; *Bibbins v. City of Chicago,* 61 N. E., 1030; *Chicago Union Traction Co. v. Miller,* 72 N. E., 25; *McDonough v. Williams,* 112 S. W., 164; *Moss v. Wells,* 249 S. W., 411; *Jenson v. Sorensen,* 233 N. W., 717.

Plaintiff's appeal: Affirmed.

Defendants' appeal: New trial.

ADAMS, J., not sitting.

C. W. WELLONS v. C. L. WARREN, A. D. FOWLKES, W. J. MAYO, AND N. B. DAWSON.

(Filed 21 September, 1932.)

1. Bills and Notes C d—Definition of holder in due course.

A holder in due course is one who holds a negotiable instrument, complete and regular upon its face, before maturity without notice of previous dishonor, and who acquired it in good faith for value without notice of any infirmity in the instrument or defect in the title of his endorser. C. S., 3033.

2. Appeal and Error L c—Where new trial is granted on one exception contentions relating to another can be presented at later trial.

Where, in an action on a note, the defendant sets up the defense that the plaintiff acquired the note as agent and could not maintain the action, and the defendant contends that nevertheless, under the statutes, he could maintain the action in his own name, C. S., 2976, 3015, 3032, 446, and seeks to present his contention by an exception to the refusal of the trial judge to direct a verdict on one of the issues: *Held,* although the court's refusal to direct a verdict on the issue was not erroneous under the evidence, a new trial being granted for error in another part of the charge, the defendant will have opportunity to present his contentions upon the subsequent trial.

3. Bills and Notes C e—Purchaser from holder in due course takes note free from equities when not a party to fraud or illegality.

A purchaser of a negotiable note from a holder in due course takes the note free from equities which would prevent recovery by the payee if he was not a party to the fraud or illegality affecting the note, although he had notice of such equities at the time of his purchase. C. S., 3039.

4. Trial E g—Where charge is conflicting on material point a new trial will be awarded.

Where the charge of the trial court is erroneous on a material point the error will not be held harmless because in another part of the charge the law is correctly stated or the error minimized, the charge tending to confuse the jury.

APPEAL by plaintiff from *Frizzelle, J.*, at April Term, 1932, of EDGECOMBE. New trial.

This is an action to recover of the maker and the endorsers $1,800 and interest, the amount alleged to be due on three promissory notes. The first is as follows:

"$600. Conetoe, N. C., 4 December, 1926.

One year after date, I promise to pay to the order of A. D. Fowlkes, W. J. Mayo and N. B. Dawson, trustees, six hundred and no/100 dollars, with interest from date at six per cent per annum, payable annually. Value received. C. L. Warren."

The other two of the same tenor are dated 4 December, 1925, one payable two years after date and the other three years after date. The note executed on 4 December, 1926, is one of a series of notes which had been renewed, the renewal accounting for the later date. Neither note indicates for whom or in whose behalf the trustees were acting, but each one was endorsed by N. B. Dawson, trustee, W. J. Mayo, trustee, and A. D. Fowlkes, trustee.

The original notes, including the one for which the renewal note was given, were negotiated and transferred by endorsement to the First National Bank of Tarboro in January, 1926. The plaintiff testified that he purchased the notes for value at a sale made by the bank on 29 September, 1928, and that he was the holder and owner of them at the time of the trial. The defendants denied the plaintiff's title, alleging that he had purchased the notes as agent of another person.

Upon the issue submitted, the jury found that the plaintiff is not the owner in due course of the notes sued on, and upon the verdict judgment was given for the defendants. The plaintiff excepted and appealed.

H. H. Phillips for plaintiffs.
George M. Fountain and C. H. Leggett for defendants.

ADAMS, J. In the Negotiable Instruments Law a holder in due course is one who has taken the instrument under the following conditions: "(1) That the instrument is complete and regular upon its face; (2) that he became the holder of it before it was overdue and without notice

that it has been previously dishonored, if such was the fact; (3) that he took it for good faith and value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." C. S., 3033. It is admitted that the notes in suit are negotiable.

The trial court instructed the jury that according to all the evidence, if believed, the First National Bank of Tarboro was a holder of the notes in due course. This position, it seems, is not questioned. The plaintiff's testimony is that he purchased the notes from the bank on 29 September, 1928, and paid value for them. To bar recovery the defendants interposed these defenses: (1) the execution of the notes was fraudulently procured; (2) the plaintiff, if in reality the purchaser, took the notes subject to the defendant's equities; (3) the plaintiff acquired possession of the notes as an agent.

In response to the defendants' contention that the plaintiff acquired the notes as agent and therefore cannot maintain the action, the plaintiff insists that by virtue of section 2976, 3015, and 3032 of the Consolidated Statutes, the holder of a negotiable instrument—*i. e.*, the payee, endorsee, or bearer—may sue thereon in his own name, that payment to him discharges the instrument, and that in consequence he may prosecute the present action without regard to the question whether he holds the notes in his own right or as agent for another. It has been held, notwithstanding these sections, that the holder of a note "for collection" is not the real party in interest. C. S., 446; *Bank v. Exum,* 163 N. C., 199; *Bank v. Rochamora,* 193 N. C., 1. In the oral argument the appellant insisted that these cases are not controlling here because there is no evidence that the plaintiff received the notes for collection. The point, if presented at all, is embraced in the requested instruction (which was not given) that if the jury believed all the evidence they should answer the first issue in the affirmative. We cannot hold that the court erroneously declined to give the instruction; but as a new trial is given the plaintiff will have an opportunity definitely to present his conception of the law on the controverted question.

The graver exceptions are addressed to the second ground of defense—whether the plaintiff holds the notes subject to the alleged equities of the defendants.

The Negotiable Instruments Law contains the following section: "In the hands of any holder other than a holder in due course a negotiable instrument is subject to the same defenses as if it were nonnegotiable. But a holder who derives his title through a holder in due course and who is not himself a party to any fraud or illegality affecting the instrument has all the rights of such former holder in respect of all parties prior to the latter." C. S., 3039.

The latter clause makes clear reference (1) to a holder in due course, and (2) to a holder who derived his title from a holder in due course and (3) who was not a party to any fraud or illegality affecting the instrument. In *Pierce v. Carlton,* 184 N. C., 175, the Court approved the principle that as a rule one who acquires title from a holder in due course may recover though he himself may have had notice of the infirmity when he acquired the instrument from such holder—the specific question being, not whether he had notice of any infirmity at that time, but whether he had been a party to any fraud or illegality affecting the instrument. A holder in due course may transfer a complete title to a third person although the latter when he takes the paper has knowledge of facts which would defeat recovery by the payee. *Ivagon Coffee Co. v. Rogers,* 105 Va., 51, 52 S. E., 843.

With respect to the question whether the plaintiff holds the notes subject to the alleged equities the court gave certain instructions, to which the appellant recorded exceptions which in our opinion are meritorious. The charge is clearly susceptible of the construction that if the plaintiff acquired title to the notes through a holder in due course, the fact that, when he purchased the notes, he had knowledge of the defendants' contention that there was a defect in the title of the trustees, his knowledge of such infirmity would not be available as a defense or make the plaintiff a holder other than a holder in due course "unless the jury should find from the evidence that he did in fact have knowledge of the infirmities in the notes and defect in the title of the trustees *at the time the notes were originally executed and negotiated.*"

To this instruction several objections are interposed. Whether the plaintiff had knowledge of the alleged infirmity at the time the notes were executed was a question left to the determination of the jury when there was no evidence to this effect; and knowledge of such infirmity would not necessarily imply that the plaintiff was a party to any fraud or illegality affecting the instrument. It is true that in another part of the charge the court remarked that there was no evidence tending to fix the plaintiff with knowledge of "facts or circumstances surrounding the execution of the notes and the delivery thereof to the trustees"; but the subsequent submission of the question to the jury tended to confusion of the facts and misconception of the law.

If the First National Bank of Tarboro was a holder in due course and the plaintiff derived his title from the bank and was not a party to any fraud or illegality affecting the notes, prima facie he would be entitled to judgment, leaving for determination the further questions whether the plaintiff acquired the notes as the agent of Bridgers and, if so, whether he may not maintain the action in his own name.

New trial.

TIDEWATER BROKERAGE COMPANY v. SOUTHERN TRUST COMPANY AND CLARKE PEANUT COMPANY.

(Filed 21 September, 1932.)

1. **Mortgages H n—Where clerk orders resale he may order allowance to trustee, and where he has approved accounting such order is presumed.**

   Where the trustee in a deed of trust has foreclosed the instrument under the power of sale contained therein, and an advance bid has been made and a resale ordered by the clerk in accordance with the provisions of C. S., 2591, the clerk may order an allowance to the trustee for conducting the sale, and where the trustee has filed an accounting showing the distribution of the proceeds of the sale including a commission in a certain per cent retained by the trustee, the presumption is that the clerk has approved the commission so retained, in this case the per cent specified in the deed of trust.

2. **Same—Clerk's order allowing commissions to trustee is not subject to collateral attack.**

   Where the clerk of the court has expressly or presumptively approved the commissions to be allowed the trustee for making the resale of the mortgaged premises under the statutory power given him, the procedure to question the reasonableness of the amount is by exception and appeal to the judge from whose decision an appeal will lie to the Supreme Court, and the matter may not be attacked collaterally, the allowance made by the clerk being final in the absence of exception and appeal.

APPEAL by defendant, Southern Trust Company, from *Frizzelle, J.*, at April Term, 1932, of WASHINGTON. Reversed.

On 30 May, 1927, the defendant, Southern Trust Company, as trustee, duly foreclosed a deed of trust executed by its codefendant, Clarke Peanut Company, by selling the land conveyed thereby under the power of sale contained in the deed of trust, as ordered by the clerk of the Superior Court of Washington County. The said trustee collected from the purchaser at said sale the amount of his bid, to wit, $35,000, and upon the confirmation of the sale, conveyed the land described in the deed of trust to the purchaser. The sale was made by the trustee pursuant to the order of the clerk of the Superior Court, for a resale of the land upon a raised bid made pursuant to the provisions of C. S., 2591. The trustee thereafter filed with the clerk of the Superior Court a statement of his final account, showing its receipts and disbursements. This statement was duly recorded by the clerk in his office. It appears from this statement that the defendant, Southern Trust Company, as trustee, retained as its commissions for foreclosing the deed of trust, the sum of $1,750—5 per cent of the sum received by it for the land,

as it was expressly authorized to do by a provision in the deed of trust. There was no contention that the sum received by the trustee was not properly disbursed.

On 8 October, 1928, the plaintiff, Tidewater Brokerage Company, recovered a judgment against the defendant, Clarke Peanut Company, for the sum of $212.65, with interest and costs; this judgment was duly docketed in the office of the clerk of the Superior Court of Washington County. The judgment has not been paid.

This action was begun on 15 May, 1930, to recover of the defendant, Southern Trust Company, the amount now due on said judgment, upon the allegation that the amount retained by said company as commissions for foreclosing the deed of trust executed by its codefendant, Clarke Peanut Company, was excessive, and therefore unlawful, and that plaintiff, for that reason, is entitled to recover of the said company the amount due on its judgment against the defendant, Clarke Peanut Company.

The court was of opinion that the amount retained by the defendant, Southern Trust Company, as commissions for foreclosing the deed of trust, was excessive, and therefore unlawful, in the sum of $298.82.

From judgment that plaintiff recover of the defendant, Southern Trust Company, to be applied on its judgment against the defendant, Clarke Peanut Company, the sum of $298.82, the defendant, Southern Trust Company, appealed to the Supreme Court.

Zeb Vance Norman for plaintiff.
Worth & Horner for defendant.

CONNOR, J. Where land conveyed by a mortgage or deed of trust has been sold by the mortgagee or trustee, for the purpose of foreclosure, under the power of sale contained in the mortgage or deed of trust, pursuant to an order of the clerk of the Superior Court of the county in which the land is situate, under the provisions of C. S., 2591, the clerk has the power to make all such orders as may be just and necessary to safeguard the interests of all parties. By virtue of this statutory authority, the clerk has the power to make an allowance to the mortgagee or trustee for his services in making the sale, to be retained by him from the proceeds of the sale. From an order making such allowance, a party interested in the land or in the proceeds of the sale, may appeal to the judge, who upon such appeal may affirm, reverse or modify the order of the clerk; in the absence of such appeal, the order of the clerk is final and conclusive. *In re Jernigan,* 200 N. C., 636, 156 S. E., 96; *In re Hollowell,* 194 N. C., 222, 139 S. E., 169.

In the foreclosure involved in the instant case, there was no formal order of the clerk of the Superior Court, making an allowance to the trustee; but in the absence of any objection to the amount retained by the trustee as its commissions, as shown by the statement of its final account, which was recorded by the clerk, it will be presumed that the clerk approved the amount retained. There was no objection by any party interested in the land or in the proceeds of the sale, and therefore no appeal to the judge.

The final account of the trustee cannot be attacked collaterally, as the plaintiff has sought to do in the instant case. The judge was without power, upon the facts found by him, to render judgment in this action, and for that reason the judgment is

Reversed.

HERSHEY CORPORATION v. ATLANTIC COAST LINE RAILROAD COMPANY; ATLANTIC AND YADKIN RAILROAD COMPANY, AND NORFOLK AND SOUTHERN RAILROAD COMPANY.

(Filed 21 September, 1932.)

1. **Process B a: B d—Statutory provisions relating to service of process on corporations must be strictly followed.**

   For a valid service of summons on a corporation operating and doing business in this State, foreign or domestic, the provisions of C. S., 483 must be strictly followed, and a separate copy of the summons must be served on and left with the agent for each corporate defendant.

2. **Judgments K b—Held: excusable neglect was shown by defendant in that process had not been properly served on it.**

   Where, on a motion to set aside a judgment by default, the trial court finds upon supporting evidence that two railroad companies, defendants in the action, maintained a common agent upon whom service of summons might be made under C. S., 483, and that the sheriff served the process upon the agent by leaving one copy of the summons and complaint without informing the agent that the service was for both companies, leaving the clear inference that it was for one only: *Held*, the court's order setting aside the judgment by default against the corporation that had not been properly served with summons on the ground of excusable neglect was not error, the motion having been made in apt time and a meritorious defense also being found as a fact upon supporting evidence. C. S., 600.

APPEAL by plaintiff from *Grady, J.*, at July Term, 1932, of LEE. Affirmed.

This is an action for actionable negligence brought by plaintiff against defendant corporations, for damage to a certain lot of sugar

while *in transitu*. A judgment by default and inquiry was rendered in the above entitled cause against the Atlantic and Yadkin Railroad Company, on 28 September, 1931. On 20 July, 1932, a motion was made by the said defendant to set aside the judgment by default and inquiry on the ground of excusable neglect and alleging it had a good and meritorious defense to the action. At July Term, 1932, the following order was rendered:

"This cause coming on to be heard at July Term, 1932, of Lee County Superior Court, before Hon. Henry A. Grady, judge presiding, upon motion of defendant, Atlantic and Yadkin Railroad Company, to set aside the judgment by default and inquiry heretofore entered in said cause against the said Atlantic and Yadkin Railroad Company upon the ground of excusable neglect, and the court being of the opinion and finding that the facts as set out in the motion and the accompanying affidavits are true and constitute excusable neglect; It is thereupon ordered that said motion to set aside said judgment by default and inquiry be and it is hereby granted and allowed, and said defendant, Atlantic and Yadkin Railway Company, is hereby allowed to file its answer at this term of the court."

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

T. J. McPherson and K. R. Hoyle for plaintiff.

Frank P. Hobgood for defendant Atlantic and Yadkin Railroad Company.

CLARKSON, J. The summons against the defendant corporations was dated 12 December, 1930.

C. S., 483, in part, is as follows: "The summons shall be served by delivering a copy thereof in the following cases: (1) If the action is against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent thereof. Any person receiving or collecting money in this State for a corporation of this or any other State or government is a local agent for the purpose of this section," etc. This requirement as to the mode of service on corporations must be strictly observed. *Hatch v. R. R.*, 183 N. C., 617.

The court below (and there are facts to sustain same) found: "The court being of the opinion and finding that the facts as set out in the motion and the accompanying affidavits are true and constitute excusable neglect; It is thereupon ordered that said motion to set aside judgment by default and inquiry be and it is hereby granted and allowed, and said defendant, Atlantic and Yadkin Railway Company, is hereby allowed to file its answer at this term of the court."

F. B. VanSant was the local agent of both defendants. His affidavit is as follows: "That about 10:30 o'clock on the night of 22 December, 1930, during a mild snowstorm, A. R. Rives, sheriff of Lee County, called at deponent's residence in the town of Sanford, at which time deponent was partially undressed preparatory to retiring for the night; that said A. R. Rives, with whom deponent is well acquainted and on friendly relations, told deponent that he had a paper to serve on him for the 'Coast Line'; that said Rives then handed deponent one set of papers containing a summons and a complaint in the above entitled cause. No mention was made by said Rives of the Atlantic and Yadkin Railway Company, and, since only one set of papers was handed to deponent, he understood that service was being made upon him solely for the Atlantic Coast Line Railroad Company, and that, if service was to be made upon the Atlantic and Yadkin Railway Company, it would be made upon some other agent. Deponent noted upon the papers the time at which they were served upon him and the following morning mailed them to officials of the Atlantic Coast Line Railroad Company."

A. R. Rives, the sheriff of the county, testified, in part: "I left only one copy of the summons and complaint with Mr. VanSant, and have no recollection of telling him for which company it was intended. It was snowing slightly that night when we arrived at Mr. VanSant's house."

There is other evidence of excusable neglect not necessary to be set out.

C. S., 600, in part, is as follows: "The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding," etc.

The plaintiff omitted to prepare a copy of the summons and instruct the sheriff to deliver same to the agent of the Atlantic and Yadkin Railroad Company, a corporation (as required by the statute) as was done for the Atlantic Coast Line Railroad Company. This omission was a primary cause of the agent's not knowing of the action being brought against the Atlantic and Yadkin Railroad Company, and naturally threw him off his guard. The statute requiring a delivery of a copy of the summons must be strictly observed—it was no doubt passed to prevent the very thing that took place in this transaction. We think, on the facts as found by the court below, there was excusable neglect on the part of the Atlantic and Yadkin Railroad Company. The evidence in the record—found to be true—was to the effect that the Atlantic and Yadkin Railroad Company had a meritorious defense. For the reasons given, the judgment of the court below is

Affirmed.

GEORGE W. HARDISON, EMPLOYEE, v. W. H. HAMPTON AND SON, EMPLOYER, AND EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, OF LONDON, ENGLAND, CARRIER.

(Filed 21 September, 1932.)

Master and Servant F c—Where employer files claim within statutory time the claim will not be barred under sec. 8081(ff).

There is no provision in the North Carolina Workmen's Compensation Act requiring an injured employee to file a claim for compensation with the Industrial Commission, but he is required to notify his employer only, and the employer is required by the statute to report the accident and claim to the Commission, which is sufficient under the statute and gives the Commission jurisdiction, and the Commission must approve a settlement between the parties or, if no agreement is reached, must pass upon the claim in a hearing before it, and where the claim has been thus reported by the employer to the Commission on the form provided by it and within the statutory time, the employee's right to compensation is not barred although more than one year elapses from the date of the accident to the date a hearing is requested by the employee upon disagreement of the parties.

APPEAL by defendants from *Frizzelle, J.*, at April Term, 1932, of WASHINGTON. Affirmed.

On 27 March, 1930, George W. Hardison was an employee of W. H. Hampton and Son. Both the employee and the employer were residents of the town of Plymouth, Washington County, North Carolina, and were subject to the provisions of the North Carolina Workmen's Compensation Act. The Employers' Liability Assurance Corporation, Limited, of London, England, was the insurance carrier of the employer. On said day, George W. Hardison was injured by an accident which arose out of and in the course of his employment. The injury resulted in a hernia, and upon the facts found by the North Carolina Industrial Commission was compensable under the provisions of the North Carolina Workmen's Compensation Act.

At the hearing before the Commission it was contended on behalf of the employer and the insurance carrier that the employee's right to compensation for his injury was forever barred for the reason that no claim for compensation was filed with the Commission within one year from the date of the accident. N. C. Code of 1931, 8081(ff), sec. 24, chap. 120, Public Laws 1929.

The employee was injured on 27 March, 1930. He gave notice in writing to his employer of the accident and resulting injury on 28 March, 1930. He advised his employer in said notice that at its date he did not consider his injury serious, but was advised that the injury might

terminate in a permanent rupture. This notice was in compliance with section 22, chapter 120, Public Laws 1929. On 25 August, 1930, the employer advised the carrier of the claim of the employee for compensation, and thereafter at the request of the carrier reported the accident and claim for compensation to the North Carolina Industrial Commission on form No. 19, as prescribed by the Commission. This report was acknowledged by the Commission and filed on 9 September, 1930. Negotiations were entered into by and between the carrier and the employee for a settlement of the claim, and on 12 November, 1930, in response to a letter received by it from the Commission, the carrier informed the Commission that no settlement had been agreed upon, and advised the Commission that in view of the attitude of the employee, and of the information which it had of the matter, it saw nothing to do but to have a hearing in order that the Commission might decide what compensation the employee was entitled to. No hearing was ordered by the Commission, until a request was made by the employee. More than a year elapsed from the date of the accident to the date of the request of the employee for a hearing.

At the hearing, the Commission was of the opinion that the right of the employee to compensation for his injury was not barred, and thereupon made an award of compensation to the employee. From this award the employer and the carrier appealed to the judge of the Superior Court of Washington County. At the hearing of this appeal, the award of the Commission was approved and affirmed, and the employer and the carrier appealed to the Supreme Court.

Ruark & Ruark and Zeb Vance Norman for employee.
Albion Dunn for employer and carrier.

CONNOR, J. There is no provision in the North Carolina Workmen's Compensation Act requiring an injured employee to file a claim for compensation for his injury with the North Carolina Industrial Commission. The injured employee is required by section 22 of the act to give notice to his employer of the accident which resulted in his injury. Thereafter, the employer is required to report the accident and claim of the employee for compensation to the Commission on form 19, as prescribed by the Commission. No settlement of the claim can be made by the employer and the employee without the approval of the Commission. Section 18. If they fail to reach an agreement in regard to the compensation to which the injured employee is entitled, then either party may make application to the Commission for a hearing in regard to the matters at issue, and for a ruling thereon. Section 57. When the em-

ployer has filed with the Commission a report of the accident and claim of the injured employee, the Commission has jurisdiction of the matter, and the claim is filed with the Commission within the meaning of section 24.

In the instant case, the claim of the injured employee was filed with the Industrial Commission within one year after the accident, and for that reason the employee was not barred of his right to compensation. There is no error in the judgment. It is

Affirmed.

HELEN EDWARDS, WIDOW OF ALBERT EDWARDS, v. T. A. LOVING COMPANY; AMERICAN CASUALTY COMPANY, AND THE FIDELITY AND CASUALTY COMPANY, OF NEW YORK.

(Filed 21 September, 1932.)

Master and Servant F b—Accident occurring while employee is riding to work in conveyance furnished by employer under the contract is compensable.

Where an employee is killed in an accident occurring while he was riding to work in a conveyance furnished by the employer under the contract of employment, his death is compensable under the provisions of the Workmen's Compensation Act as an injury arising out of and in the course of the employment.

APPEAL by defendant, American Casualty Company, from *Frizzelle, J.*, at May Term, 1932, of WILSON. Affirmed.

Connor & Hill for T. A. Loving Company.
W. S. Wilkinson for American Casualty Company.

CLARKSON, J. The questions involved in this appeal are: (1) Was the American Casualty Company the insurance carrier of the compensation risk of T. A. Loving Company on its Lillington, N. C., project? We think so. (2) Was Albert Edwards an employee of T. A. Loving Company on its Lillington project at the time of the occurrence of the accident which resulted in his death? We think so.

The Industrial Commissioner, J. Dewey Dorsett, found the facts, and there is evidence in the record to sustain them, and upon the findings of facts based his conclusions of law; and on appeal to the full Commission the findings of fact and conclusions of law were sustained. An appeal was taken to the Superior Court and the court below rendered the following judgment: "Now, therefore, the court hereby adopts the

findings of fact and the opinion of the full Commission herein and finds as a fact that such facts as were found by the Commission were founded upon and supported by the evidence adduced herein and it is further ordered, adjudged and decreed that the action by the said North Carolina Industrial Commission and the opinion of the full Commission rendered herein, be and the same are hereby in all respects affirmed." From the judgment an appeal was taken to the Supreme Court.

The evidence was to the effect, and so found: That Albert Edwards was upon a conveyance to go to his place of work, which was provided by his employer for the sole use of his employees and which the employees were required or entitled to use by virtue of the contract of employment. He was injured while riding to his work in a conveyance owned and operated by his employer for the purpose of transporting the employees to the place of work.

The principle of law is well stated, and numerous authorities cited, in *Dependents of Phifer v. Dairy,* 200 N. C., at pp. 66 and 67, as follows: "While there is diversity of opinion on the question, the weight of authority sustains the conclusion that if an employer furnishes transportation for his employees as an incident of the employment, or as a part of the contract of employment, an injury suffered by the employee while going to or returning from the place of employment in the vehicle furnished by the employer and under his control arises out of and in the course of the employment." For the reason given, the judgment of the court below is

Affirmed.

J. M. GAINEY v. J. C. GAINEY ET AL.

(Filed 21 September, 1932.)

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

Where the plaintiff's claim for a crop lien for labor done in its production is denied in the Superior Court on the ground that the claim of lien was not sufficiently specific in regard to the wages to be paid and the time and amount of work, etc., C. S., 2469, and on appeal to the Supreme Court it is not made to appear that there was error in the ruling, the judgment will be affirmed, the burden of showing error being on the appellant.

APPEAL by plaintiff from *Cowper, Special Judge,* at April Term, 1932, of HARNETT.

Civil action for debt and to enforce laborer's lien on crops.

The plaintiff alleges that he worked for his brother, J. C. Gainey, during the year 1931 as a farm laborer; that they cultivated 37 acres

of cotton, 5 acres of corn and one acre in other crops on the lands of Jesse B. Lee and Mrs. Martha Lee in Harnett County; that his brother is indebted to him in the sum of $195.00 for work done and labor performed on said crops from 1 January, 1931, to 15 August, 1931; that the plaintiff filed lien with G. F. Owen, a justice of the peace, on 17 October, 1931; that the crops in question have been taken by the landlord, Jesse B. Lee. Wherefore, plaintiff asks judgment for his debt, and for a lien upon said crops.

Judgment by confession against J. C. Gainey for the amount of plaintiff's claim; action dismissed as to Jesse B. Lee and claim for lien denied.

Plaintiff appeals, assigning error.

James Best for plaintiff.
Clifford & Williams for defendant, Jesse B. Lee.

STACY, C. J. The plaintiff recovered in the justice's court, but, on appeal to the Superior Court, his claim for lien was denied and the action dismissed as to the landlord, Jesse B. Lee. His Honor was of opinion that, under the decision in *Cook v. Cobb,* 101 N. C., 68, 7 S. E., 700, the plaintiff's claim, or notice of lien, was not made out in sufficient detail, "specifying the . . . labor performed, and the time thereof," the wages he was to receive, how and when payable, etc. And further, it was not made to appear that said purported notice of claim was filed "in the office of the nearest justice of peace" as required by C. S., 2469.

We cannot say there was error in the ruling. *Hdw. House v. Percival, ante,* 6; *Construction Co. v. Journal,* 198 N. C., 273, 151 S. E., 631. At least it has not been made to appear, and the burden is on appellant to show error. *King v. Elliott,* 197 N. C., 93, 147 S. E., 701, is not in conflict with *Cook v. Cobb, supra,* nor with our present holding.

Affirmed.

SAVANNAH RIGGAN, ADMINISTRATRIX, v. C. H. HARRISON ET AL.

(Filed 21 September, 1932.)

1. Appeal and Error E a—The issues upon which a case is tried are a necessary part of the record proper.

The pleadings on which a case is tried, the issues, and the judgment appealed from are necessary parts of the record, Rule 19, sec. 1, and where the record does not contain these necessary parts the appeal will be dismissed.

2. Appeal and Error G b—Exceptions not discussed in brief are abandoned.

Exceptions which are not brought forward and discussed in appellant's brief are deemed abandoned. Rule 28.

3. Appeal and Error F g—Affidavit for appeal in forma pauperis must contain averment that counsel has advised that there is error.

The affidavit for appeal *in forma pauperis* must contain an averment that appellant is advised by counsel that there is error of law in the decision appealed from, C. S., 649, and the matter is jurisdictional and may not be cured by consent of counsel.

APPEAL by plaintiff from *Cowper, Special Judge,* at April Term, 1932, of HARNETT.

Civil action to recover damages for an alleged wrongful death, occasioned by an automobile accident.

It appears from the charge of the court that the usual issues of negligence, contributory negligence and damages were submitted to the jury, and it was stated on the argument that the first two issues were answered in the affirmative. The judgment recites they were answered in favor of the defendants.

The plaintiff appeals, assigning errors.

Young & Young for plaintiff.
Thos. W. Ruffin for defendants.

STACY, C. J. We have examined the seven assignments of error appearing on the record and find none of sufficient merit to warrant a new trial.

But for other reasons, the appeal must be dismissed.

1. Rule 19, sec. 1, provides that "the pleadings on which the case is tried, the issues, and the judgment appealed from shall be a part of the transcript in all cases." The issues upon which the case was tried are not in the record. It is the uniform practice to dismiss the appeal for failure to send up necessary parts of the record proper. *Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126; *Waters v. Waters, ibid.,* 667, 155 S. E., 564.

2. None of the assignments of error is brought forward and discussed in appellant's brief. They are, therefore, deemed to be abandoned. *S. v. Lea, ante,* 13. "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; *In re Beard,* 202 N. C., 661, 163 S. E., 748.

3. The appeal is *in forma pauperis,* and the affidavit is defective in that it does not contain the averment as required by C. S., 649, that appellant "is advised by counsel learned in the law that there is error of law in the decision of the Superior Court in said action." This is a jurisdictional matter. *Honeycutt v. Watkins,* 151 N. C., 652, 65 S. E., 762.

Following the entry of appeal is the notation: "Appeal *in forma pauperis* by consent." This, of course, is unavailing. 7 R. C. L., 1039.

Appeal dismissed.

MRS. NETTIE J. RANSOM AND MARTHA E. RANSOM v. EASTERN COTTON OIL COMPANY.

(Filed 21 September, 1932.)

Agriculture D b—Where landlord becomes responsible for supplies for crop and conforms to C. S., 2485 he has superior lien on crop.

Where a landlord makes arrangements with a bank to lend the tenant money for the purpose of making a crop, and which is used for that purpose, and the landlord signs the note therefor and receives from the tenant the latter's note as security, and the bank charges a commission which it deducts from the amount of the loan, but there is no evidence that the landlord received any interest or commission in lieu thereof, and the landlord pays the bank the amount of the loan at maturity: *Held,* the landlord acquires a lien on the crops for advancements which is superior to all other liens, and he may recover the amount thereof from a third person who acquired possession of the crops from the tenant under a crop lien if the value of the crops is sufficient therefor. C. S., 2355, 2485.

APPEAL by defendant from *Grady, J.,* at March Term, 1932, of HALIFAX. No error.

The plaintiffs, Mrs. Nettie J. Ransom and her daughter, Martha E. Ransom, are the owners of certain farm lands situate in Northampton County, North Carolina. These lands were leased by the plaintiffs for the year 1930, to W. P. Boone, who cultivated the same. On or about 19 February, 1930, the said W. P. Boone requested the plaintiffs to advance to him, in money, the sum of $1,500, to enable him to cultivate the said lands, and to harvest the crops grown thereon by him. Arrangements were made by the plaintiffs and the said W. P. Boone, by which the Bank of Littleton loaned to W. P. Boone the sum of $1,500, with Mrs. Nettie J. Ransom as surety. This loan was evidenced by a note for the sum of $1,500, payable to the Bank of Littleton, and signed by

Mrs. Nettie J. Ransom. This note was secured by a note for a like amount, payable to Mrs. Martha E. Ransom and signed by W. P. Boone. Both notes were signed on the same day, and were due on 1 December, 1930. Upon the delivery of both these notes to the Bank of Littleton, the said bank thereafter paid to W. P. Boone the sum of $1,350, retaining as commissions the sum of $150.00. At the maturity of the note payable to the Bank of Littleton, and signed by her, the plaintiff, Mrs. Nettie J. Ransom, paid the same. W. P. Boone paid to Mrs. Ransom, on 1 December, 1930, the sum of $30.09, and on 10 June, 1931, the sum of $225.36. Both these sums have been duly credited on the note payable to Mrs. Ransom, and signed by W. P. Boone. No other payments have been made on said note.

W. P. Boone delivered to the defendant, Eastern Cotton Oil Company, crops grown by him on the lands of the plaintiffs during the year 1930, of the value of $2,500. The said crops were delivered to the defendant by virtue of a crop lien executed by W. P. Boone to secure advances made by the defendant to him. This crop lien was duly recorded on 10 March, 1930.

On the foregoing facts shown by all the evidence, and found by the jury, there was judgment that plaintiffs recover of the defendant the sum of $1,500, with interest from 1 December, 1930, less the sum of $30.09 paid on 1 December, 1930, and the sum of $225.26, paid on 10 June, 1930, and the costs of the action. From this judgment, the defendant appealed to the Supreme Court.

George C. Green for plaintiffs.
Ballard S. Gay for defendant.

CONNOR, J. On the facts shown by all the evidence at the trial of this action, plaintiffs had a statutory lien on all the crops grown on their lands by W. P. Boone, during the year 1930, for the amount advanced by them to enable the said W. P. Boone to cultivate the said land (C. S., 2355), unless the plaintiffs failed to conform to the provisions of C. S., 2485, with respect to commissions charged in lieu of interest for such advances. There was no evidence tending to show that plaintiffs charged or received from their tenant, W. P. Boone, any sums as commissions on the advancement made to him by them. There was therefore no error in the refusal of the trial court to allow defendant's motion for judgment as of nonsuit, and in the instructions of the court to the jury. It was held in *Powell v. Perry,* 127 N. C., 22, 37 S. E., 276, that where a landlord either pays or becomes responsible for supplies to enable the tenant to make a crop, such supplies are advances for which the landlord

has a lien on the crops. This lien is superior to all other liens and as against a third party who had acquired possession of the crops the landlord is entitled to recover the amount due for the advancements, provided the value of the crops exceeds the amount due. The judgment is offirmed.

No error.

STATE OF NORTH CAROLINA EX REL. TRANSPORTATION ADVISORY COMMISSION v. J. W. CANADY ET AL.

(Filed 21 September, 1932.)

Appeal and Error K c—Petition to rehear this case is denied.

Where a petition to rehear a case is based upon the insufficiency of the evidence of defendant's title to the lands in controversy, and the matter has been considered on the appeal and it appears from the admissions of the parties, the manner of trial, and the evidence that the petition should be dismissed it will be so ordered.

PETITION by plaintiff to rehear this case, reported in 202 N. C., 840.

I. M. Bailey, John D. Warlick and Nere E. Day for petitioner.
I. C. Wright for respondents.

STACY, C. J. The point presently mooted is the sufficiency of the evidence to show title in the defendants to the *locus in quo*. We were not inadvertent to this assignment on the original hearing, albeit the argument was confined principally to whether the oyster bed in question was covered by navigable or nonnavigable waters.

Considering the manner in which the case was tried, the admissions and other matters appearing of record, we are of opinion that the petition to rehear should be dismissed.

In the original petition, filed by the petitioner herein, the property was described by metes and bounds, alleged to be owned by J. W. Canady, and to contain 12.34 acres, more or less. On the hearing it was admitted, as appears from the charge and the judgment, "that 12.34 is the acreage of the land covered by water described in the petition." It was also in evidence that the defendant, and those under whom he claims, had been in possession of the oyster garden in question for forty or forty-five years.

Petition dismissed.

A. L. BOYKIN AND A. E. BOYKIN, TRADING AND DOING BUSINESS AS A. L. BOYKIN AND SON, *v.* GEORGE W. LOGAN AND WIFE, MAUDE E. LOGAN; W. J. KENNEDY, JR., TRUSTEE; AND NORTH CAROLINA MUTUAL LIFE INSURANCE COMPANY, A CORPORATION.

(Filed 21 September, 1932.)

1. Laborers' and Materialmen's Liens D b—Priority of liens of materialmen under direct contract with owner are fixed by date of filing notice.

Liens of materialmen and laborers are statutory, and by the clear provisions of the statute the liens of parties furnishing labor and material under direct contract with the owner have priority in accordance with the time of filing notice of lien with the justice of the peace or clerk, C. S., 2471, 2473, and where there are several parties furnishing material under direct contract with the owner and each has complied with the requirements of the statutes, C. S., 2469, 2470, 2474, the priorities between them will be determined in accordance with the date of filing notice of lien, and the fact that one materialman started furnishing labor and material before the others does not affect this priority, nor is he entitled to insist upon payment of all liens pro rata. The right of pro rata payment on liens of subcontractors is distinguished on the basis of the statutory provisions, C. S., 2442, no notice of lien being required to be filed with the justice of the peace or clerk in the case of subcontractors, notice to the owner being sufficient under the statute. Const., Art. XIV, sec. 4.

2. Laborers' and Materialmen's Liens A a — Relation of debtor and creditor is necessary for creation of lien of laborer or materialman.

In order for the creation of a lien of a laborer or materialman the relationship of debtor and creditor must exist between him and the owner, but this relationship may be created either by express or implied contract.

APPEAL by plaintiffs from *Midyette, J.*, at February Term, 1932, of DURHAM. Affirmed.

The material facts are as follows: Plaintiffs made, direct with the owners, an entire and indivisible contract for the furnishing of certain materials and doing all of the labor required to complete the erection of a theater building upon the property of the defendants, Logans, in the city of Durham, North Carolina, and entered upon and performed their contract, expending $9,249.75, under the terms of the contract. Within six months time, fixed by statute, after the completion of the contract, plaintiffs filed notice of lien with the clerk of the Superior Court of Durham County, North Carolina, and brought action to enforce the lien, as prescribed by statute. During the performance by plaintiffs of their contract, and while the work was in progress, certain other persons furnished certain labor and materials used in the building, under direct contract with the owners thereof. The various claimants filed their liens in the office of the clerk of the Superior Court of Durham

County, North Carolina, alleging a direct contract with Logan and wife, and complied with the statutory requirements in perfecting their claims of liens. There were no subcontractors. Notices of the numerous claims of liens were filed by these other persons prior to the notice filed by plaintiffs. Those who furnished labor and materials claim priority for their liens solely because of this filing, and notwithstanding the fact that they began furnishing such labor and materials *after the work had been begun by plaintiffs and while it was in progress.*

The action was referred to Judge P. C. Graham, as referee, by order of Judge Devin. The referee filed his report setting forth his findings of fact and conclusions of law. Exceptions were duly filed by plaintiffs to said report of the referee. Upon the hearing of the report and exceptions, an order of rereference was made to find certain additional facts. The referee filed, pursuant to said order, his supplemental report. The plaintiffs filed exceptions to the report and supplemental report. Thereupon the matter was heard by Judge Midyette, who entered judgment, which in part is as follows:

"This cause coming on to be heard at the February Term of the Superior Court of Durham County after due notice to all parties hereto, and being heard upon the report of the referee and exceptions filed herein: And after hearing argument of counsel for both sides and after examining the pleadings and reading the briefs filed herein, it is now, therefore, ordered, considered and adjudged and decreed that the report and supplemental report of the referee herein and his findings of fact and conclusions of law as therein set out be and the same are hereby in all respects approved, ratified and confirmed. It is further ordered and adjudged that the lien of Borden Brick and Tile Company in the sum of $5,577.27 be and is declared a first lien upon the property described in the lien claim known as the Regal Theater belonging to the defendant, Geo. W. Logan and wife."

Then is set forth in the judgment 21 other liens, according to the priority in which they were filed in the office of the clerk of the Superior Court of Durham County, North Carolina. In reference to plaintiff's lien, is the following: "Adjudged that A. L. Boykin and A. E. Boykin, trading as A. L. Boykin and Company are entitled to an eighteenth lien upon the said property in the amount of $9,249.75. . . . And this cause is retained for further orders. G. E. Midyette, Judge Presiding."

The plaintiffs duly excepted and assigned error to the judgment as signed.

Williams & Williams and Manning & Manning for plaintiffs.

Morehead & Murdock, R. H. Sykes and Elledge & Wells for various defendants.

CLARKSON, J. The sole question presented by this appeal is whether furnishers of material and labor who have contracts directly with the owners of the property and file their claims as liens in the office of the clerk of the court shall be paid according to the priority of filing as prescribed by C. S., 2471, or shall be prorated among the claimants. We think they should be paid according to the priority of filing, as prescribed by C. S., 2471, and not prorated among the claimants.

To determine this controversy, we must examine the Constitution and statutes relative to the subject:

The Constitution of North Carolina, Art. XIV, sec. 4, is as follows: "The General Assembly shall provide by proper legislation, for giving to mechanics and laborers an adequate lien on the subject-matter of their labor."

C. S., 2433: "Every building built, rebuilt, repaired or improved, together with the necessary lots on which such building is situated, and every lot, farm or vessel, or any kind of property, real or personal, not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same, or material furnished."

In *Wilkie v. Bray,* 71 N. C., p. 205, it is held: "In order to create a lien in favor of a person who builds a house upon the land of another, the circumstances must be such as to first create the relation of debtor and creditor; and then it is for the debt that he has a lien." *Lester v. Houston,* 101 N. C., 605; *Boone v. Chatfield,* 118 N. C., 916; *Porter v. Case,* 187 N. C., at p. 634; *Honeycutt v. Kenilworth Development Co.,* 199 N. C., 373.

The relationship of debtor and creditor may be created either by express or implied contract.

In reference to the various parties claiming liens:

C. S., 2469, was complied with—the claim of lien was filed "in the office of the Superior Court clerk," etc. C. S., 2470, was complied with—the notice was regularly filed "at any time within six months after the completion of the labor or the final furnishing of the material." C. S., 2474, in reference to bringing action to enforce lien "within six months from the date of filing the notice" was complied with. C. S., 952, "Each clerk shall keep the following books, which shall be open to the inspection of the public during regular office hours. Subsec. 23: Lien docket, which shall contain a record of all notices of liens filed in his office, properly indexed, showing the names of the lienor and the lience," was complied with. *West v. Jackson,* 198 N. C., 693; C. S., 3561.

The sections which call for our construction are (1) 2471, as follows: "*The liens created and established by this chapter shall be paid and settled according to the priority of the notice of the lien filed with the*

justice of the peace or the clerk." And (2) C. S., 2473, as follows: "Nothing in this chapter shall be construed to affect the rights of any person to whom any debt may be due for any work done *for which priority of claim is filed with the proper officer.*"

In *Commissioners v. Henderson,* 163 N. C., at p. 119, we find the following: "Where the language of a statute is free from ambiguity and conveys a definite and sensible meaning, the courts should not hesitate to give it a liberal interpretation merely because they may question the wisdom or expediency of the enactment. In such a case, these are not pertinent inquiries for the judicial tribunal. If there be any unwisdom or injustice in the law, it is for the Legislature to remedy it. For the courts, the only rule is *ita lex scripta est.*" *Whitford v. Ins. Co.,* 163 N. C., 223.

There is no ambiguity in the language of the statute and we must construe it according to the clear and unmistakable language. An action similar to the present one was tried in the District Court of the United States for the Western District of North Carolina: *In the matter of Fleetwood of Hendersonville Hotel Corporation, bankrupt* (filed 23 February, 1932). The learned and able U. S. District Judge, *E. Yates Webb,* in rendering the opinion, said: "The Court concludes, as a matter of law, that the conclusions of law of the special master, contained in his report to this Court on pages 26 and 27, wherein he holds that the lienors above named, except J. E. Moss Iron Works, shall share on a pro rata basis, are overruled and set aside; *it being the opinion of the Court that the lien first filed under the statutory law of North Carolina is prior to other subsequently filed liens.*" (Italics ours.)

Under an analogous statute in *Hall v. Hickley and others,* 32 Wis., p. 362, that Court said, at p. 366: "For the purpose of establishing priority of right as between the different lien creditors, or those performing the labor and furnishing the materials, this Court has held, in the cases above referred to, that the lien is created or fixed by the filing of the petition. If the view thus taken was correct and is adhered to, it is necessarily decisive of the question of priority here presented, and also indicates that there is no jurisdiction in equity to foreclose the lien in a case like this. . . . (p. 370) Wherever it is a race of diligence among creditors, the maxim, *qui prior est in tempore potior est in jure,* applies, and he who takes the first step, or first perfects the proceeding requisite in law to establish his right, thereby acquires priority; and those who come after in pursuit of the same remedy, must take it subject to the right so acquired."

In *McAdams v. Trust Co.,* 167 N. C., at p. 496, it is said: "Construing our statute on liens of mechanics and laborers, this Court held

in *Burr v. Maultsby,* 99 N. C., 263, that the lien relates back to the time the work was commenced or the materials were furnished, and does not impair or affect encumbrances existing prior to that time but only those subsequently created." *Porter v. Case,* 187 N. C., at p. 636; *Harris v. Cheshire,* 189 N. C., 219; *King v. Elliott,* 197 N. C., at p. 97.

In the case of *Manufacturing Co. v. Andrews (Anderson),* 165 N. C., at page 294, the following language is found: "The section relied on by the Morganton Manufacturing Company . . . purports to deal with 'the liens created and established by this chapter.' It is true but it says also that they shall be paid according to the priority of the notice of the lien filed with the justice or the clerk, and as the provisions in favor of the subcontractors are segregated, giving the means of acquiring the lien and of enforcing it, and have no reference to filing a lien with a justice or a clerk, except when it says that it is not necessary to do so, we are of the opinion that the two sections are not in conflict, and that section 2035 (Pell's Rev. of 1908), C. S., 2471, relates to liens required to be filed with the proper officers, and does not affect the provisions as to subcontractors, who acquire a lien by notice to the owner." *Foundry Co. v. Southern Aluminum Co.,* 172 N. C., at p. 704; *White v. Riddle,* 198 N. C., 511.

In *Mfg. Co. v. Andrews (Anderson), supra,* the Court had before it a controversy between certain subcontractors as to which of them had priority, and it held that under the statute giving liens to subcontractors all subcontractors should be paid pro rata. C. S., 2442. "No notice by the subcontractor need be filed before a justice of the peace or clerk as is required of contractors, but notice to owner creates the lien." *Porter v. Case, supra,* at p. 639; *Construction Co. v. Journal,* 198 N. C., 273; C. S., 2437, 2438.

The present action concerns parties who dealt directly with the owners in furnishing labor and material. The present holding may seem to be an injustice, as contended by plaintiffs, but the lien law is statutory and we must follow it. We think the present holding has been long recognized by the profession. We cannot engraft on a statute of clear language and meaning any equitable principle. We must construe and not make the law, any change is for the law-making power. A person may owe various creditors, but none have a lien on his real property, but if one sues and dockets his judgment in the clerk's office, this diligent creditor acquires a first lien. C. S., 614. The matter is statutory. For the reasons given, the judgment of the court below must be

Affirmed.

PAUL C. HUMPHREY v. BOARD OF TRUSTEES OF I. O. O. F. HOME OF GOLDSBORO, NORTH CAROLINA.

(Filed 21 September, 1932.)

1. **Wills E h—Trust estate in this case held not void for failure of its purpose.**

   A trust fund created by will for the purpose of educating through high school a girl inmate of an orphan asylum to be chosen by the board of trustees from time to time does not fall into the residuary clause for failure of the purpose of the trust on the ground that the State educated orphan children through high school without charge under the provisions of N. C. Code, 5604, 5446; since the statutes make the payment for the education of the children in orphan asylums permissive only and only for a six months term, and the fact that the State is performing part of this duty does not relieve the trustees, it being their duty to select a girl and pay for her tuition and books, etc.

2. **Same: Trusts A a—Terms of will in this case held sufficiently definite to create charitable trust.**

   The clearly expressed provisions of a will leaving in trust certain personal property to the trustees of an orphan home and directing that the income shall be used to educate one of its orphan girls through high school as the money so derived may become available, is sufficiently definite to establish a charitable trust.

3. **Same—Trust estate is not forfeited by failure of trustees to follow directions, the remedy being by statutory action against trustees.**

   The trustees of a charitable trust who violate the provisions of the trust are subject to the procedure prescribed by statute, and where the trust is created by will the trust estate is not forfeited in favor of a residuary legatee solely upon the ground that the moneys derived have been diverted to other uses than the testator intended. N. C. Code, 4033, 4034.

APPEAL by plaintiff from *Harris, J.*, at ..... Term, 1932, of WAYNE. Affirmed.

The material facts: Bertral Conrad Humphrey made and executed a last will and testament on 20 May, 1926. She died on 29 September, 1927. The will and testament have been duly probated. Items 9 and 10 are as follows:

"9. I give to the board of trustees, I. O. O. F. of the State Orphans Home, Goldsboro, North Carolina, all stocks that I may own at the time of my death in Consolidated Gas Company, of New York, and American Tobacco Company, and I direct that they use the dividends and income only therefrom for the education, through high school of one of the white girl inmates of said home, and such girl to be selected by them from time to time as funds are available for such purpose.

10. All the rest, residue and remainder of my property, real and personal, which I may own or be in any way entitled to at the time of my death, I give and bequeath to my husband, Paul C. Humphrey."

The material parts of the complaint are as follows: "That the plaintiff is a resident of Wayne County, North Carolina; and that the defendant is a body corporate with its principal office in Goldsboro, Wayne County, North Carolina. That the plaintiff is informed and believes and upon such information and belief alleges that at the time of the death of Bertral Conrad Humphrey and also prior thereto, and also at all times since said death, the education through high school of all the inmates of defendant's orphanage was provided for by the State of North Carolina and paid for from taxes levied against the property and citizens of North Carolina; and that at such times the defendant incurred (and is now incurring) no expense in connection with the education through high school of any of its inmates; and that, therefore, the purpose contemplated in Item 9 of said will completely fails and the property referred to therein passes to the plaintiff as residuary legatee in said will. . . . That, furthermore, the plaintiff is informed and believes and upon such information and belief alleges that the defendant, by reason of the facts set forth in the preceding paragraph of this complaint, and further by reason of its election so to do, has not applied the income from said property to the education through high school of any girl inmate of its Orphan Home, but has applied said funds to other unrelated purposes; and that, by reason of this fact, if any trust ever existed in said will the same has been terminated; and that, therefore, the property referred to in Item 9 of said will passes to the plaintiff as residuary legatee. That on the ..... day of November, 1928, the defendants herein received the stocks of American Tobacco Company referred to in paragraph three of the complaint, said stocks consisting of thirty shares (old stock). . . . That, furthermore, the plaintiff is informed and believes that within a few months after the defendant received said stock of American Tobacco Company, the defendant, in direct violation of the terms of said will, sold said stock for a large amount of money, and placed the proceeds therefrom in the general endowment fund of the defendant; that by reason of this violation of the express terms of the will the defendant loses such right, if any, as it might have had to said property and that the same passed to the plaintiff as residuary legatee under said will. That the plaintiff is informed and believes and upon such information and belief alleges that by the sale of said property the defendant received at least the sum of $5,000; and that, if the defendant is permitted to retain said sum, it will be unjustly enriched at the expense of the plaintiff; and that, therefore, the de-

fendant is indebted to the plaintiff in the sum of $5,000, with interest from the ..... day of November, 1928."

The defendant demurred: "That the complaint upon its face does not state a cause of action against the defendant and in favor of the plaintiff," etc.

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

Kenneth C. Royall and Andrew C. McIntosh for plaintiff.
W. F. Evans and Dickinson & Freeman for defendant.

CLARKSON, J. It is contended by plaintiff that the entire trust is void and that plaintiff, the residuary legatee, is entitled to the fund. We cannot so hold.

Plaintiff contends that the purpose of the trust cannot be carried out "for the education through high school of one of the white girl inmates of said home," etc., on account of the provisions of the statute.

The pertinent statutes are as follows: "Children living in and cared for and supported by any institution established or incorporated for the purpose of rearing and caring for orphan children shall be considered legal residents of said district in which the institution is located, and a part or all of said orphan children shall be permitted to attend the public school or schools of said district, and the extra expenses of teaching said children for six months in the public school or schools of said district may be borne as follows: Three-fourths of the extra expense for a term of six months of every year, as a result of the attendance of said children, may be paid out of the State equalizing fund and one-fourth out of the county fund, unless otherwise provided. Provided further, that the provisions of this section shall be permissive only, and shall not be mandatory." (C. S., 5604) (1919 chap. 301, sec. 1; 1927 chap. 163, sec. 1). N. C. Code, 1931 (Michie), sec. 5446. By Public Laws 1927, chap. 163, the provision for payment from an "equalizing fund" replaced a provision for payment from the State "public school fund." The last sentence making the section permissive and not mandatory was also added at this time.

The will of Bertral Conrad Humphrey shows that it was her purpose to provide for the education of one of the white girl inmates of the Odd Fellows' Orphans' Home at Goldsboro, N. C., and this intent is expressed in terms sufficiently certain that it can be sustained as a charitable trust. *Candler v. Board of Education,* 181 N. C., 444. The plaintiff does not question the clear meaning of the will, in this respect, but only maintains that it cannot be carried out. He bases his attack

entirely upon the statutes above mentioned, which provide: that three-fourths of the extra expense of teaching orphan children be paid out of the State equalization fund and one-fourth by the county, under which the board of education of Wayne County charges no tuition for children of the Odd Fellows' Home for a six months' term.

When the will of this good woman was executed, 20 May, 1926, the above statute provided that "expense of teaching said children for six months in the public school or schools of said district *shall be borne as follows,*" etc. Under chapter 163, Public Laws 1927, this has been changed *"may be borne as follows."* Further, the following is in said act of 1927 "Provided further, that the provisions of this section shall be *permissive only,* and *shall not be mandatory."* (Italics ours.) See N. C. Code (Michie), sec. 4035(a), 4035(c); *Whitsett v. Clapp,* 200 N. C., 647.

The contention of plaintiff is too narrow, the intention of the testatrix should be liberally construed to effectuate the purpose. The purpose is clear "I direct that they use the dividends and income only therefrom for the education, through high school of one of the white girl inmates of said home, and such girl to be selected by them from time to time as funds are available for such purpose. . . . All the rest, residue and remainder of my property, real and personal, which I may own or be in any way entitled to at the time of my death, I give and bequeath to my husband, Paul C. Humphrey."

The fact that another agency may be doing in part what defendant trustees are directed to do, does not relieve the trustees. The duty is placed on the trustees of defendant, not on the State of North Carolina. The fact that the State is performing this duty does not relieve defendant of a positive direction. It is clearly their duty to select the girl and pay for her tuition for a high school education and her books, etc. Then again, the statute, *supra,* only provides for six months—now usually the high school term is for nine months. Suppose the State should fail to provide the education under the statute, the duty being *permissive?* Is it possible that a narrow construction should be so placed on testatrix's intention, whereby, the special kindly object of her bounty, these girl inmates of the defendant orphanage, would be deprived of a high school education? We cannot in construing the will take such chances.

As to the other contention of plaintiff—all these matters are largely in the discretion of the trustees. *Washington v. Emery,* 57 N. C., 32; 57 A. L. R., 1119. The statute provides that it is the duty of defendant trustees to file account with the clerk of the Superior Court. N. C. Code, 1931 (Michie), sec. 4033. If the above section is not complied with, we find in section 4034 the following: "If the preceding section

be not complied with, or there is reason to believe that the property has been mismanaged through negligence or fraud, it shall be the duty of the clerk of the Superior Court to give notice thereof to the Attorney-General or solicitor who represents the State in the Superior Court for that county; and it shall be his duty to bring an action in the name of the State against the grantees, executors, or trustees of the charitable fund, calling on them to render a full and minute account of their proceedings in relation to the administration of the fund and the execution of the trust. The Attorney-General or solicitor may also, at the suggestion of two reputable citizens, commence an action as aforesaid; and, in either case, the court may make such order and decree as shall seem best calculated to enforce the performance of the trust."

The above statute provides a remedy, and if defendants have been derelict in their duty the statute is applicable. The pleading of plaintiff in regard to the violations under the terms of the will it seems that the above statutes are applicable under the facts and circumstances of the case. For the reasons given, the judgment of the court below is

Affirmed.

M. P. HUBBARD AND COMPANY, INCORPORATED, v. W. H. HORNE, NORTH CAROLINA BANK AND TRUST COMPANY, AND PLANTERS NATIONAL BANK AND TRUST COMPANY, TRUSTEE.

(Filed 21 September, 1932.)

1. Reformation of Instruments A a—Instrument may be reformed for mutual mistake or mistake induced by fraud.

The doctrine of reformation of a written instrument is usually applied only for mutual mistake of all the parties, or mistake of one induced by the fraud of the other, and extends in its application to the draftsman of the instrument, a mistake usually being one concerning the contents or legal effect of the instrument, and while a mistake of law *simpliciter* is not ground for reformation, if the mistake of law is induced or accompanied by inequitable conduct of the other party, equity will usually grant the relief, and while all varieties of fraud cannot be included in a single formular, the term is broad enough to include any act, omission or concealment in breach of equitable duty.

2. Evidence J d—In action for reformation of instrument parol evidence is admissible to establish mutual mistake or fraud.

In an action for reformation of an instrument parol evidence is admissible to establish mutual mistake or mistake on one side induced by fraud, this being an exception to the parol evidence rule.

3. Trial D a—Where evidence is conflicting nonsuit is properly denied.

In a suit on a crop lien and chattel mortgage a motion for judgment as of nonsuit on a cross-bill for reformation of the instrument will be denied when the evidence thereon raises inferences favorable to both parties, and in this case the evidence of mutual mistake or of mistake on one side induced by fraud on the other is held sufficient to be submitted to the jury.

4. Trial E c—Conflicting instructions as to quantum of proof will be held for reversible error.

The quantum of proof required for the reformation of a written instrument is clear, strong and convincing proof, and where the elements of this equitable relief are embodied in two issues a charge correctly stating the quantum of proof on one issue, but upon the other charging that there must be a preponderance of the evidence, will be held for reversible error. the instructions tending to confuse the jury as to the rule applicable.

5. Appeal and Error J c—Prejudicial error in regard to one issue held not rendered harmless by answer to another issue.

Where the elements for the equitable relief of reformation are submitted to the jury in two distinct issues, an error in the charge in respect to the quantum of proof on one issue will not be held harmless because the quantum of proof necessary was correctly stated in the charge on the other issue, since, if the issues were synonymous, the Court cannot say which of the conflicting instructions the jury followed, and if the issues were not synonymous, error relating to one of them would be material and prejudicial.

APPEAL by plaintiff from *Cranmer, J.*, at February Term, 1932, of NASH. New trial.

This is a controversy between the parties as to the priority of liens executed by the defendant Horne. The following verdict reveals the nature of the action:

1. Did defendant Horne execute and deliver to defendant bank a crop lien and chattel mortgage securing $15,000 which was filed for registration on 6 February, 1930? Answer: Yes.

2. Did the register of deeds of Edgecombe County inadvertently fail to index said instrument until 21 November, 1930? Answer: Yes.

3. Did plaintiff in April, 1930, and in July, 1930, agree with defendant Horne to advance him fertilizer for year 1930 upon crop liens and chattel mortgage to be subject to defendant bank's prior lien of $15,000 as alleged in the answer? Answer: Yes.

4. Was a provision subjecting plaintiff's liens to the lien of defendant bank omitted by mutual mistake of Horne and plaintiff's agent as to proper registration of the bank's paper, or by such mistake on part of Horne accompanied by fraudulent concealment on part of plaintiff's agent as alleged in answer? Answer: Yes.

5. What amount is due defendant bank upon its crop lien for agricultural advances? Answer: $9,962.92.

6. What amount is due defendant bank upon chattel mortgage upon implements and livestock? Answer: $6,900.17.

7. What amount is due plaintiff upon its agricultural lien for advances? Answer: $6,779.08.

8. What amount is due plaintiff upon its chattel mortgage? Answer: $4,923.90 with interest from 15 April, 1930.

9. What was value of the livestock seized and sold by plaintiff? Answer: $1,285.42.

10. What is amount of net proceeds of crop held by Planters National Bank and Trust Company as stakeholder? Answer: $9,832.22.

By consent the court answered all the issues except the third and fourth, which were submitted to the jury.

In the answers filed by Horne and the North Carolina Bank and Trust Company it is alleged that Horne, being indebted to the corporate plaintiff, made an agreement with it in 1930 that the plaintiff would furnish him fertilizers of the value of $6,764.20 and accept his note for $11,848.12, which included the bill for fertilizers and the amount of an antecedent indebtedness, to be secured by a second crop lien and chattel mortgage on the property described in the plaintiff's first exhibit, subject to a prior agricultural lien and chattel mortgage on the same property in favor of the North Carolina Bank and Trust Company, of Rocky Mount, in the sum of $15,000. It is alleged that the plaintiff's agent and attorney prepared the lien and chattel mortgage for signature by Horne and that he inserted a covenant that the property therein described was free from encumbrance, and did not provide that the lien should be subject to the prior lien of the North Carolina Bank and Trust Company; that upon Horne's objection the plaintiff's agent replied that he had omitted this provision because the registration of the papers would disclose the priority; that the defendants were convinced by the certificate of registration written on the paper held by the North Carolina Bank and Trust Company that the instrument had been legally registered but ascertained in the fall of 1930 that it had not been duly indexed; that the plaintiff's agent did not say anything to raise a doubt or question in the mind of the defendants as to the regularity of the registration, and that Horne understood from his remarks that the registration made the bank's paper a first lien; that Horne relied upon this statement and affixed his signature to the plaintiff's lien believing that it was subject to the prior lien of the bank; that Horne executed and delivered to the plaintiff another lien on his crops drafted by the plaintiff's agent which contained no provision that it was subject

to the lien held by the bank, although Horne understood that this paper was to be subordinate to the lien of the bank in like manner with the first.

It is further alleged that the provision making the plaintiff's liens subject to the lien of the bank was omitted by the draftsman, either through a mistake of fact as to the proper registration of the bank's paper, common to both parties, or through a mistake of fact in the mind of Horne and the inequitable conduct of the plaintiff's agent or the draftsman in not disclosing the mistake.

Judgment for defendants and appeal by plaintiff upon assigned error.

Cooley & Bone and James W. Grissom for plaintiff.
Donnel Gilliam, G. M. Fountain and Battle & Winslow for defendants.

ADAMS, J. The defendants W. H. Horne and the North Carolina Bank and Trust Company denied the plaintiff's alleged priority of liens and filed a cross-bill praying reformation of the instruments under which the plaintiff claims. It is not questioned that courts of equity have jurisdiction to correct written instruments which have been erroneously framed so that they shall express the real meaning and intention of the parties; but the plaintiff denies that the evidence is sufficient to justify the reformation of his papers. This position calls for an inspection of the record in the light of principles administered in courts of equitable jurisdiction.

The doctrine of reformation is usually applied to cases in which there has been mutual mistake of the parties or mistake by one of the parties and fraud by the other. This equity extends to the draftsman who writes the agreement. *Sills v. Ford,* 171 N. C., 733.

The phrase "mutual mistake" means a mistake common to all the parties to a written instrument and usually relates to a mistake concerning its contents or its legal effect. Eaton on Equity, sec. 315; 2 Story's Equity Jurisprudence (14th ed.), sec. 978. Pomeroy defines "mistake" as a mental condition, conception, or conviction of the understanding which influences the will and leads to some outward physical manifestation. It is distinguished from fraud by the absence of knowledge and intention. He classifies mistakes as those of fact and those of law, suggesting that it is sometimes difficult to ascertain whether in a particular instance the mistake is purely one of law or one of law and fact in combination. 2 Pomeroy's Equity Jurisprudence, sec. 839 *et seq.* A mistake of law simpliciter, "pure and simple," is not adequate ground for reformation; but if a mistake of law is induced or accompanied by inequitable conduct of the other party equity will interpose its aid and

administer relief. *Ibid.*, secs. 842, 845. No single formula includes all varieties of fraud, but the general term is broad enough to include any act, omission, or concealment in breach of an equitable duty; for in equity many acts are deemed fraudulent which in law are not generally so considered.

Of course mistake or fraud may be established by parol evidence on the familiar principle that mistake, fraud, surprise, and accident furnish exceptions to the general rule that parol evidence is not admissible to vary the terms of a written instrument. *Lee v. Brotherhood,* 191 N. C., 359; *Gray v. Mewborn,* 196 N. C., 770.

Tested by these principles the evidence offered by the defendants as ground for reformation was appropriately submitted to the jury. It tends to show that before the contract in question was made Horne told the president of Hubbard and Company that he had given the bank a crop lien for $15,000 to which the plaintiff's lien must be subordinate; that before signing the papers he noticed the omission of this provision and mentioned the fact to the plaintiff's agent; that the agent knew that the lien previously given to the bank had not been legally registered and lulled Horne into a sense of security by saying that the question of priority would be determined by the registration of the respective liens; that Horne learned of the defective registration in the fall of 1930; and that he would not have executed the plaintiff's papers had he been informed of all the facts.

Unquestionably there is evidence in support of the plaintiff's contention that Horne signed the papers with knowledge of all the circumstances; but as a legal proposition we are concerned only with the obvious fact that different inferences may reasonably be drawn from the testimony—inferences favorable to the plaintiff and others favorable to the defendants. In these circumstances the plaintiff's motion to dismiss the cross-bill as in case of nonsuit was properly denied. *Warehouse Co. v. Ozment,* 132 N. C., 839; *King v. Hobbs,* 139 N. C., 170; *Bank v. Redwine,* 171 N. C., 559; *Hunter v. Sherron,* 176 N. C., 226.

We are of opinion, however, that in his instructions the trial judge made an error which was prejudicial to the plaintiff. Only the third and fourth issues were submitted to the jury, and these were intended to embrace the elements which enter into the doctrine of reformation. It is a settled principle that all the essential elements must be proved by evidence which is clear, strong, and convincing. A bare preponderance of evidence is not enough. *Ely v. Early,* 94 N. C., 1; *King v. Hobbs, supra; Cedar Works v. Lumber Co.,* 168 N. C., 391; *Lloyd v. Speight,* 195 N. C., 179. Whether the evidence is of this character is a matter to be determined by the jury. *Archer v. McClure,* 166 N. C., 140; *Sills v. Ford, supra.*

The elements of equitable relief, instead of being embodied in a single issue, were separated into parts and submitted in two distinct issues. Let us concede that with reference to the fourth issue the court correctly stated the quantum of proof: was it correctly stated in reference to the third? As to the latter the court gave this instruction: "If the defendants have satisfied you by the greater weight of the evidence that there was such an agreement, then it would be your duty to answer the first (third) issue yes." The plaintiff excepted for the assigned reason that the proof must have been, as on the fourth issue, clear, cogent, and convincing.

The defendants say that the error, if any, was harmless, that the third issue is formal and was intended merely to give the background of the case, and, indeed, that it may be disregarded because all essential elements are contained in the fourth issue. If the third issue had been omitted this argument would have been more persuasive. The "agreement" in the third issue and the "provision" in the fourth are not necessarily synonymous. If they are, the instructions on the two issues are inconsistent. Which of them did the jury follow? If they are not synonymous, the fourth issue cannot be treated as a mere illumination of the third. The agreement must have been established as a necessary element of relief before a "provision" based upon the agreement could be made a part of the written instrument.

For error in the charge the plaintiff is entitled to a new trial on the third and fourth issues only, the others having been answered by consent. *Benton v. Collins,* 125 N. C., 83; *Lumber Company v. Branch,* 158 N. C., 251.

New trial.

STATE v. ELIZABETH HARRELL.

(Filed 21 September, 1932.)

1. Municipal Corporations H d—Ordinance relating to dogs held valid exercise of police power.

An ordinance of a city providing that a certain species of dog, or dogs of vicious tendencies shall be muzzled by the owners or kept upon the premises or not permitted to run at large within the corporate limits falls within the police powers of the city regarding the safety and health of its citizens, and is a valid abrogation of the rights of the owners in property of this character.

2. Municipal Corporations H e—Evidence of violation of city ordinance held sufficient to overrule motion of nonsuit.

Evidence tending to show that a certain dog was owned by the defendant and that it had attacked and bitten several persons to the knowledge

of the owner, including an attack upon the child of the prosecutrix, is sufficient to resist a motion as of nonsuit in an action under an ordinance of a city prohibiting vicious dogs to run at large within the city limits without being muzzled.

3. Criminal Law I h: L e—Weight of evidence in criminal action is for jury and on appeal only matters of law or legal inference may be reviewed.

The competency, admissibility and sufficiency of the evidence in a criminal action is for the court, the weight, effect and credibility is for the jury, and on appeal the Supreme Court can review only matters of law or legal inference. Constitution, Art. IV, sec. 8.

4. Criminal Law L d—Where charge does not appear in record it is presumed correct.

When the charge of the judge of the Superior Court is not made to appear in the record on appeal the presumption is that the court correctly charged the law arising on the evidence.

APPEAL by defendant from *Grady, J.*, and a jury, at March Term, 1932, of VANCE. No error.

Upon the following warrant, the defendant was tried in the city of Henderson Municipal Court: "That at and in said county, and in the city of Henderson (or within one mile thereof), on or about 22 June, 1931, Miss Elizabeth Harrell did unlawfully and wilfully allow a vicious and dangerous dog to run at large, said vicious and dangerous dog did attack Margaret Brinkley on Harrell Street in the city of Henderson. And did unlawfully and wilfully, suffer and permit a vicious and dangerous dog known to the said Elizabeth Harrell to be of vicious and dangerous tendency to be at large within the city of Henderson without being muzzled, in violation of the ordinance of the city of Henderson, and against the form of the statute in such cases made and provided, and contrary to law and against the peace and dignity of the State."

The record discloses: "Warrant returned 25 June, 1931, executed, and the following proceedings had: defendant appearing in person and pleading not guilty. After hearing the evidence, and it appearing to the court that the defendant is guilty, it is considered and adjudged by the court that defendant, Elizabeth Harrell, pay a fine of $5.00 and the costs of this action, viz.: $12.50. Notice of appeal was duly given. Appeal bond fixed at $25.00 for her appearance at the next term of Vance Superior Court to answer said charge. This 25 June, 1931. Irvine B. Watkins, Mayor."

The defendant was tried before the Hon. Henry A. Grady, judge, and a jury, at the March Term, 1932, of the Superior Court of Vance County, upon an appeal from the mayor's court of the city of Henderson. The defendant was charged with a violation of ordinances of the

city of Henderson in respect to vicious and dangerous dogs. The jury returned a verdict of guilty. The sentence of the court was: "Judgment suspended upon payment of costs." The defendant made several exceptions and assignments of error and appealed to the Supreme Court—the material ones will be considered in the opinion.

The evidence was to the effect that Margaret Brinkley, a young girl about 16 years of age, lived in the city of Henderson, N. C., across the street from defendant. That on 22 June, 1931, she started across the street. "After I got on the curbing *a dog came from Miss Harrell's yard,* and was barking and carrying on so, it almost scared me to death. The dog that ran out of her yard on that day *was a white dog with some brown spots,* I think. It was a middle size dog. The dog did not bite me. I tried to get back to my porch. Mr. Capps was on the porch across the street, and hollered to the dog and waved his cane and frightened the dog. The dog went on down the street. . . . At different times I have seen at least twelve dogs in her yard. I don't know what kind of dogs they were."

J. D. Capps testified, in part: "I hollered at the dog and he went away. I do not think the dog had on a muzzle. *I have seen this dog at Miss Harrell's,* but have not seen him since that day."

Helen Wells, testified, in part: "A. I could not say to be exact, but I would say 10, 12 or maybe 15 dogs. *I know that Miss Harrell's dogs bit me and bit my little boy.* The dog that bit me was a white dog, and looked like it was part bull dog. When the dog bit me I was right by Central School, on my way home. I could not say what day or month it was, but it was in warm weather; it was last summer. The dog only stuck his teeth in me one time, but tore my uniform and hose off of me. Two dogs jumped on me, and as well as I can remember, the white dog had a long tail and the bull dog had a short tail. The bull dog had brown spots. *I saw one of Miss Harrell's dogs bite my little boy right in front of Mrs. Brinkley's house.* That dog was not muzzled and the dogs that attacked me were not muzzled. Shag and one of the same dogs that attacked me attacked my child. Shag is just an ordinary black, shaggy dog. My boy was bit before I was." It is admitted that the matter testified to by this witness were brought up in a former trial wherein the defendant was prosecuted under the same ordinance, and that there was a conviction and no appeal.

E. T. Shepherd, testified, in part: "As we were going to Mr. Brinkley's *this white and brown dog* ran across the street, and I ran up on the porch. Miss Brinkley said it was the same dog that ran after her. . . . The dog was loose in the street without a muzzle. . . . The dog came from Miss Harrell's yard."

Mayor Irvine B. Watkins, testified, in part: "Miss Harrell has talked to me so many times about this matter I could not give her exact language. *In these conversations she has admitted that the dog that attacked Miss Brinkley was the same one that attacked Mrs. Wells and her child.* At first she denied the ownership of the white dog, and then said she had owned him six months, and had taken him to a doctor in Raleigh, and that now she had disposed of him. I asked her what right she had to dispose of him, and she disposed of him after he bit this child. *That was the white dog.*"

The defendant testified, her testimony was negative, in regard to what she told Mayor Watkins. "I do not think I told Mayor Watkins that it was the same dog that bit Mrs. Wells and her child." The record discloses that the defendant's general reputation is good.

Britt Grissom testified, in part: "I did live on Harrell Street, one house between Miss Harrell's house and mine. . . . Q. Tell what you know about two dogs of Miss Harrell's and your children in May or June of last year? A. I was at breakfast one morning, and my children were playing in the yard. Two dogs came over and tried to attack them. *One was a white dog with one or two brown spots,* and another dog. The children ran up in the porch and I ran out in the yard and ran them off. I went back to finish eating my breakfast and the dogs started back again. The children were screaming, and I would have shot the dog but there was someone in front and I was afraid I would shoot them instead of the dog. I had some conversation with Miss Harrell about the dogs before Miss Brinkley was attacked. *I saw the white dog with the spots on the street practically every day.* They ran at large up until we had the hearing in the magistrate's court. *The dogs were not muzzled when they ran at large.*"

H. B. Harris, testified, in part: "*I saw the dog that ran after Miss Brinkley; it was a dog that Miss Harrell claimed, one that was called her dog. The dog that bit the Wells child was the same dog that ran after the Brinkley girl.* I did not see the dog that bit Mrs. Wells. *I saw this same dog on the street three or four times after the Wells child was bit.* When I saw the dog he was in Miss Harrell's yard, or on the sidewalk not far from the house. *He did not have a muzzle on.*"

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

H. B. Harrell, Jr., for defendant.

CLARKSON, J. At the close of the State's evidence and at the close of all the evidence, the defendant made motions for judgment of nonsuit.

C. S., 4643. The court below overruled these motions, and in this we can see no error. These were the only material exceptions and assignments of error.

The defendant was tried and convicted on the following two ordinances of the city of Henderson, N. C.:

"Chapter 7—Dogs: Sec. 68. If the owner of any vicious or dangerous dog shall allow the same to run at large, he shall pay a penalty of fifty dollars.

Section 69. That it shall be unlawful for any person to suffer or permit a bulldog, bull-terrier or other dog of known or vicious tendencies, to be at large within the city without being muzzled. In addition to the penalty provided by the ordinance for violation of this ordinance, it shall be the duty of the police to seize and impound any such dog found at large without a muzzle, and unless it be claimed and impounding fee of one dollar be paid within three days for the policeman making such seizure, such dog shall be killed."

In *S. v. Abernethy,* 190 N. C., at p. 771, we find: "It is provided by C. S., 4174, that if any person shall violate an ordinance of a city or town, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days. It is this statute which makes the violation of the present ordinance a misdemeanor, and not the ordinance itself. *S. v. Taylor,* 133 N. C., 755."

The brief of the defendant says: "Both of the foregoing sections were introduced in evidence by the State in this action, and said sections were admitted to be valid town ordinances by the defendant through her counsel."

The U. S. Supreme Court, in *Sentell v. New Orleans & C. R. Co.,* 166 U. S., sec. 701, at p. 1170-1, has this to say about dogs: While the higher breeds rank among the noblest representatives of the animal kingdom, and are justly esteemed for their intelligence, sagacity, fidelity, watchfulness, affection and above all, for their natural companionship, with man, others are afflicted with such serious infirmities of temper as to be little better than a public nuisance. All are more or less subject to attacks of hydrophobic madness. . . . Acting upon the principle that there is but a qualified property in them, and that, while private interests require that the valuable one shall be protected, public interests demand that the worthless shall be exterminated, they have, from time immemorial, been considered as holding their lives at the will of the legislature, and properly falling within the police powers of the several states." *Bugai v. Rickert,* 242 N. W. Rep. (Mich.), 774. 19 R. C. L., p. 822, sec. 126; 8 A. L. R., p. 74; *Mowery v. Salisbury,* 82 N. C., 175;

S. v. Clifton, 152 N. C., 800, cited and annotated in 28 L. R. A. (N. S.), p. 673; see *S. v. Smith,* 156 N. C., 628.

In Vol. 3 (2d ed.), sec. 1004, McQuillan on Municipal Corporations, is found, the law in regard to the Regulation of Dogs, as follows: "To safeguard and promote the public health, safety and convenience municipal power to regulate the keeping and licensing of dogs within the corporate area is generally recognized. Accordingly ordinances regulating dogs and requiring them to be registered and licensed, and at times muzzled and prevented from going at large, are within the police powers usually conferred upon the local corporation. Such ordinances are authorized by virtue of general powers and the usual general welfare clause. Thus power to protect life, health and property authorizes an ordinance requiring owners of dogs, under penalty, to muzzle them, or keep them on their own premises, and directing the marshal to kill all dogs found running at large. An ordinance authorizing the mayor, whenever he may apprehend danger of the existence or spread of hydrophobia to issue a proclamation requiring all owners of dogs to confine or muzzle them is not invalid as a delegation of legislative power to an executive officer." Under this law it was unquestionably legal for the good dog "Tray" to be chastised for being in the company of the bad dog "Tiger."

Whatever may be one's individual view in regard to dogs, the law is well settled, as conceded by defendant. The sole question then—was there enough evidence to be submitted to the jury that the dog in question belonged to defendant and was a bad dog in the purview of the ordinance? We think so.

The competency, admissibility and sufficiency of the evidence is for the court to determine; the weight, effect and credibility is for the jury.

"The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference," etc. Const., of N. C., Art. IV, sec. 8.

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 accusations against defendant were (1) that defendant did on or about 22 June, 1931, unlawfully and wilfully allow a vicious (or) and dangerous dog to run at large: (2) did suffer and permit a vicious (or) and dangerous dog, known to the said defendant to be of a vicious and dangerous tendency to be at large within the city of Henderson, without being muzzled. The evidence to sustain both the accusations, set forth above, was plenary to have been submitted to the jury—(1) the identity

of the dog; (2) the ownership in defendant; (3) the same dog that had bitten Mrs. Wells and boy, indicating that the dog was vicious or dangerous; (4) the dog was off defendant's premises and at large; (5) the dog was not muzzled.

The charge of the court below is not in the record, the presumption is that the charge of the court was correct and the court below properly applied the law applicable to the facts in the case. It is for the jury, and not for us, to pass on the evidence. The jury has found defendant guilty, in law we find

No error.

W. L. PEACOCK v. ATLANTIC COAST LINE RAILROAD COMPANY AND HENRY MOYE.

(Filed 21 September, 1932.)

Ejectment C b—Where party does not claim under exception in deed rule that claimant must show claim is within exception does not apply.

In an action to recover lands the plaintiff introduced evidence of his title by deed containing an exception in favor of the defendant, but offered no evidence that the defendant's use of the land was not within the exception, and the defendant introduced no evidence: *Held*, a judgment of nonsuit was properly entered, the burden being upon the plaintiff to prove that the possession of the defendant was wrongful, and the rule that a party claiming under an exception in a deed has the burden of proving that his claim is within the exception does not apply, there being nothing to show that the defendant was claiming under the exception.

APPEAL by plaintiff from *Harris, J.*, at January Term, 1932, of WAYNE. Affirmed.

From judgment dismissing this action as of nonsuit, the plaintiff appealed to the Supreme Court.

J. Faison Thomson, James N. Smith and Hugh Brown Campbell for plaintiff.

W. B. R. Guion and Dickinson & Freeman for defendants.

PER CURIAM. The evidence offered by the plaintiff at the trial of this action tends to show that the land described in the complaint was conveyed to plaintiff by a deed containing the following language:

"Excepting from the operation of this deed all rights of the Atlantic Coast Line Railroad in and to the southern portion of said property."

Plaintiff offered no evidence tending to show the nature, character or extent of the rights of the defendant, Atlantic Coast Line Railroad

Company in and to the land in controversy, or that the defendants were claiming under the exception in his deed.

The principle that the burden of proof is on one claiming under an exception in a deed or grant to show that his claim comes within the exception (*Laffoon v. Kerner,* 138 N. C., 281, 50 S. E., 654), is not applicable in the instant case, for the reason that it does not appear that the defendants are claiming under the exception. The burden was upon the plaintiff and not upon the defendants to offer evidence tending to show that the possession of the defendants was not within their rights. In the absence of such evidence, there was no error in the judgment dismissing the action as of nonsuit. The judgment is

Affirmed.

ARTHUR ROGERS v. J. E. BANZET, JR., GUARDIAN, ET AL.

(Filed 21 September, 1932.)

Trusts A b—In suit to impress property with resulting trust complaint alleging loan but not setting forth trust held not demurrable.

In a suit to impress a resulting trust upon lands and to recover an amount due, a demurrer interposed on the ground that while a loan was alleged the complaint did not set forth the trust is properly overruled upon the facts admitted by the demurrer.

APPEAL by certain defendants from *Moore, Special Judge,* at January Term, 1932, of WARREN.

Polk & Gibbs for appellants.
Perry & Kittrell for appellee.

PER CURIAM. The purpose of the action is to impress a resulting trust upon certain property and to recover an amount alleged to be due the plaintiff. The appellants demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, since it states a loan but does not set forth a trust upon the land or its proceeds. The court overruled the demurrer.

The allegations in the complaint, which the appellants admit by filing the demurrer, precludes dismissal of the action. Judgment

Affirmed.

L. B. SMITH, ADMINISTRATOR OF PAUL SMITH, v. O. P. MATTHEWS.

(Filed 21 September, 1932.)

Appeal and Error A d—Appeal from order setting aside the verdict in the court's discretion will be dismissed as premature.

An appeal before final judgment which an appeal from the final judgment would include and protect is premature and will be dismissed.

APPEAL by defendant from *Harris, J.*, at June Term, 1932, of WAYNE. Appeal dismissed.

Charles P. Gaylor and James J. Hatch for appellant.
Dickinson & Freeman for appellee.

PER CURIAM. This is an action to recover damages for wrongful death caused by alleged negligence of the defendant. The issues of negligence, contributory negligence, and damages were answered in favor of the plaintiff. The court as a matter of discretion set aside the verdict as to damages. The defendant appealed.

"A premature appeal is one which is taken before final judgment, or upon an order affecting a substantial right which could be protected by an appeal from a final judgment." McIntosh's Practice & Procedure, sec. 676(7). The present appeal is premature and will be dismissed. *Chambers v. R. R.*, 172 N. C., 555; *Joyner v. Reflector Co.*, 176 N. C., 274; *Thomas v. Carteret*, 180 N. C., 109.

Appeal dismissed.

JOSEPH H. TAYLOR v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 21 September, 1932.)

Master and Servant C b—Wrench furnished employee held simple tool not requiring inspection by employer.

A wrench furnished an employee is a simple tool requiring no inspection by the employer while in the employee's use and possession, and in the latter's action to recover damages for a personal injury alleged to have been caused by a defect therein he must introduce evidence tending to show that the defect existed at the time the wrench was given him by the employer or that the employer had notice of the defect prior to the injury.

APPEAL by plaintiff from *Cranmer, J.*, at February Term, 1932, of NASH. Affirmed.

This is an action to recover damages for personal injuries sustained by plaintiff while at work as an employee of defendant. It is alleged in the complaint that the injuries were caused by the negligence of the defendant with respect to the wrench furnished by the defendant, and used by the plaintiff in his work as a pipe-fitter.

From judgment dismissing the action, as of nonsuit, at the close of the evidence, plaintiff appealed to the Supreme Court.

Cooley & Bone and J. W. Keel for plaintiff.
Thomas W. Davis and Spruill & Spruill for defendant.

PER CURIAM. In the absence of evidence tending to show that the defendant was negligent with respect to the wrench furnished by the defendant and used by the plaintiff in his work, as an employee of the defendant, there was no error in the judgment dismissing the action as of nonsuit. C. S., 567.

There was no evidence tending to show that the wrench was defective at the time it was furnished by the defendant to the plaintiff; nor was there evidence tending to show that defendant had notice, prior to the time plaintiff was injured, while using the wrench in his work, that the wrench had become defective as the result of its continued use by the plaintiff. The wrench was a simple tool, and was in the continuous possession of the plaintiff from the time it was furnished to him by the defendant to the date of the injuries. The defendant owed no duty to plaintiff to inspect the wrench. *Mercer v. R. R.*, 154 N. C., 399, 70 S. E., 742. The judgment is supported by *Clement v. Cannon Mills*, 198 N. C., 43, 150 S. E., 630, and is

Affirmed.

H. G. McNEILL v. SIDNEY THOMAS, ADMINISTRATOR OF W. J. MASON, DECEASED, AND A. A. McDONALD, TRUSTEE.

(Filed 28 September, 1932.)

1. Pleadings D d—Demurrer to the complaint for failure to state a cause of action may be interposed at any time.

A demurrer *ore tenus* on the ground that the complaint fails to state a cause of action may be made at any stage of the trial, and an answer does not waive such demurrer.

2. Actions B f—Purpose of this action was for recovery of usury and not for cancellation or rescission of instrument.

Where a complaint alleges that the plaintiff borrowed a certain sum from the defendant which was secured by a mortgage, and that unknown

to the plaintiff the amount of the note when it was executed was raised to a sum much larger than the amount loaned, and that later the defendant forced him to execute a renewal note in a still larger amount for the purpose of evading the usury laws, and seeks to restrain foreclosure for usury, and the sale is enjoined upon condition that the plaintiff pay a certain sum, and upon failure of the plaintiff to make payment the mortgage is foreclosed, and thereupon the plaintiff files an amended complaint alleging the foreclosure and sale of the property for the amount of the renewal note and seeks to recover double the amount brought by the property in excess of the principal sum alleged: *Held*, the action is to recover for usury charged and paid and is not for the cancellation or rescission of the instrument, and a demurrer on the ground that the complaint did not allege fraud or mistake is properly overruled.

3. Usury C a—Complaint in this case held to have sufficiently alleged cause of action to recover usury charged and paid.

A complaint alleging a loan in a certain amount and the execution of a note secured by a mortgage in an amount greatly exceeding the sum of the loan with the legal rate of interest, and that the mortgage had been foreclosed and bought in by the lender for the amount of the note, and seeking to recover twice the amount brought by the property in excess of the principal amount of the loan, sufficiently alleges a cause of action to recover twice the amount of usury charged and paid, and a demurrer thereto is bad.

4. Money Received B a—Held: issues submitted by agreement of parties constituted action for money had and received.

Where in an action to recover twice the amount of usury charged and paid the parties agree that only two issues be submitted to the jury, one as to the amount of the plaintiff's indebtedness to the defendant and the other as to the value of the land foreclosed under a mortgage given as security: *Held*, the action by this agreement is transformed into and treated as an action for an accounting for money had and received for the use of the plaintiff, and the defendant's demurrer *ore tenus* on the ground that a cause of action was not stated is properly overruled.

5. Evidence D e—Communication between attorney and client are privileged and incompetent in action against client.

Where a trustee for the lender of money secured by mortgage on lands has acted as the attorney for the lender, transactions and communications between them are strictly confidential, and testimony by the attorney of a statement of the lender amounting to an admission of a charge of usury by the lender is incompetent in an action by the borrower to recover for usury charged and paid, and its admission constitutes reversible error.

APPEAL by defendant Thomas, administrator, from *Harris, J.*, at February Term, 1932, of HARNETT.

The plaintiff filed two complaints. In the first he alleged that on 3 December, 1926, he and his wife executed and delivered to W. J. Mason their promissory note in the sum of $2,200 with interest at the rate of 6 per cent, and to secure the debt executed to W. P. Byrd, trustee, a

deed of trust conveying 25 acres of land which is one-half of a 50-acre tract hereafter described; that the papers were given for borrowed money, the plaintiff having received only $2,000 and having been charged $200 in excess of the legal rate of interest. He alleged that on 2 February, 1928, he and his wife executed to W. J. Mason their promissory note for $3,212 with interest at 6 per cent, and to secure the note executed a deed of trust to A. A. McDonald, trustee, conveying two tracts of land, one containing 128 acres and the other the 50 acres referred to above, subject to a mortgage of $4,900 held by the Federal Land Bank; that the last named note and deed of trust were given as additional security for the note of $2,000, and that the plaintiff received no other money or consideration; that on 5 January, 1929, with Mason's consent and after the release of his lien, the plaintiff and his wife conveyed the tract of 126 acres to Mollie D. Gardner, who agreed with the plaintiff and Mason to assume payment of the debt due the Federal Land Bank, and Mason agreed that he would not foreclose his deed of trust until the debt due the Land Bank was paid. It was further alleged that the plaintiff tendered the trustees $2,000 with interest in payment of the two notes and that they refused to accept this sum, whereupon the trustee McDonald advertised the 50-acre tract for sale. The plaintiff prayed that a restraining order be issued and that the deeds of trust be discharged upon payment of $2,000 with interest.

The administrator filed an answer denying the material allegations in the complaint and alleged that the release of the 126-acre tract was in consideration of acquiring a first lien on the tract of 50 acres. He asked that the plaintiff's action be dismissed and that the trust be foreclosed.

Admitting an indebtedness of $2,000 with interest from 3 December, 1928, the plaintiff applied to a judge of the Superior Court for a restraining order. The court adjudged that the plaintiff pay this amount to the defendant on or before 1 February, 1931, and in the event of his failure to do so that the restraining order be dissolved.

The plaintiff failed to make payment, the land was sold pending the action, and the plaintiff filed an amended complaint in which he alleged:

1. That the deed of trust had been foreclosed.

2. That the consideration of the notes was $2,000 loaned the plaintiff by W. J. Mason; that to this sum was added $2.00; that the note for $3,212 was a renewal of the first note; and that Mason required him to sign the renewal note, and charged $1,212 as a bonus.

3. That the renewal note was framed for the purpose of evading the law of usury.

4. That Thomas as administrator and A. A. McDonald, as trustee, sold the property at the price of $3,212, and refused to account to the plaintiff for the usury charged and collected.

5. That the plaintiff should recover $2,424 with interest from 13 May, 1931, and that the defendant has forfeited all interest on the original debt.

The administrator filed an answer denying these allegations.

The defendant Thomas testified that he caused the land to be sold under the power in the deed of trust to McDonald and bought it in at $3,200 for the benefit of the estate, took a deed for the land, and had since tried to sell it, but without success.

At the close of the plaintiff's evidence it was agreed between the parties that the plaintiff would withdraw all allegations of usury against the defendant as set out in the complaint and that the case should be tried upon the following issues:

1. In what amount was H. G. McNeill indebted to W. J. Mason at the time of the sale on 21 April, 1931? Answer: $2,000.

2. What was a fair market value of the land described in the complaint on 21 April, 1931? Answer: $3,500.

It was agreed that judgment should be rendered upon the jury's answer to these two issues, the parties stating that since it is a matter against an estate and one that should be settled, they wanted the case tried upon these issues, and waived all contentions except such as could be tried upon the issues submitted.

Upon the verdict judgment was given the plaintiff for $1,114.30 with interest from 21 April, 1931, and costs. The defendant excepted and appealed.

W. P. Byrd and K. R. Hoyle for appellant.

J. R. Hood and Charles Ross for appellee.

ADAMS, J. The action is prosecuted against the defendant Thomas, administrator. He caused the land to be sold and holds it in trust under the deed executed by A. A. McDonald as trustee. Notwithstanding his answers to the two complaints the defendant filed a formal demurrer, and on the argument here demurred *ore tenus,* on the ground that neither the original nor the amended complaint states a cause of action. The answers do not waive the demurrer *ore tenus;* a party may demur at any stage of the trial for failure to allege a cause of action. *Cole v. Wagner,* 197 N. C., 692; *Key v. Chair Co.,* 199 N. C., 794.

The defendant first insists that the action is ostensibly founded on fraud or mutual mistake and that the allegations in the complaint with respect to either of these causes is fatally defective. If this position is maintainable the demurrer should be sustained, for unless the facts relied on to constitute fraud or mistake are distinctly alleged the courts cannot grant relief. *Colt v. Kimball,* 190 N. C., 169; *Tull v. Harvey,*

197 N. C., 329. But it is perfectly obvious that the defendant's position is not supported by the facts. The plaintiff does not seek relief by the reformation or the rescission of the deeds of trust, and for this reason he did not allege mistake or fraud as the basis of his action. True, in the original complaint he did aver his ignorance of the fact that the amount set out in the second note had been raised from $2,200 to $3,212; but this is not a definite allegation either of fraud or of mutual mistake. Furthermore, the amended complaint contains an allegation that W. J. Mason required the plaintiff to execute the second note in the sum of $3,212, although the amount actually loaned the plaintiff was only $2,000. According to the first complaint the purpose of the action as constituted was to restrain a sale of the mortgaged property for usury; but after the property had been sold the plaintiff filed an amended complaint praying that he recover double the usury charged and paid.

The second cause of demurrer is that neither complaint states an action for usury. We do not agree, because on this point the amended complaint is specific: for $2,000 the plaintiff was charged $3,212. The circumstances are adequately minute and the allegations are sufficiently distinct. *Churchill v. Turnage,* 122 N. C., 426.

There is still another reason for overruling the demurrer. When the plaintiff rested his case the parties stipulated that all allegations of usury should be withdrawn and that the controversy should be heard and determined upon the two issues heretofore set out—the amount of the plaintiff's indebtedness and the market value of the land held by the defendant. The action was thus transformed into and treated as an action for an accounting as upon allegations for money had and received for the use of the plaintiff.

For these reasons the demurrer is overruled; but the court inadvertently admitted incompetent evidence to the prejudice of the defendant. A. A. McDonald was Mason's attorney. As a witness for the plaintiff he testified that he prepared the last note and deed of trust for Mason, the intestate; that this note "was for more than the old note and he advised Mason that the plaintiff might sue him for usury"; that in reply Mason said, "He would risk McNeill"; and that he saw no money pass. The defendant objected and excepted for the reason that the communication between the attorney and his client was privileged.

When persons sustain toward each other certain confidential relations the law will neither compel nor allow one of them to violate the confidence by testifying without the consent of the other. 40 Cyc., 2352. Few rules of evidence are better settled or more firmly entrenched in public policy. The facts are not within any of the recognized exceptions.

Hughes v. Boone, 102 N. C., 137; *Jones v. Marble Company,* 137 N. C., 238. On this principle the testimony excepted to should have been excluded. Eliminating all claims for usury, as the parties agreed, we find evidence from which the jury might reasonably have inferred an admission by Mason that the face of the second note was greatly in excess of the amount of money loaned to the plaintiff.

New trial.

B. D. RABIL v. FRANK F. FAGAN, RECEIVER OF WAYNE NATIONAL BANK, AND GEO. K. FREEMAN, TRUSTEE.

(Filed 28 September, 1932.)

1. Mortgages G b—Assignee of second mortgage is entitled to cancellation of first mortgage upon payment of amount due thereunder.

Where, in a suit to restrain foreclosure under a first mortgage, the plaintiff alleges that he is the assignee of a second mortgage and had tendered the amount due on the first mortgage to the mortgagee, and contends that he is entitled to have the first mortgage canceled upon the payment of the amount, and the defendant in its answer denies that the plaintiff is the assignee of the second mortgage: *Held,* the denial that the plaintiff is an assignee of the second mortgage raises an issue for the determination of the jury, the plaintiff not being entitled to the relief sought unless he is the assignee of the second mortgage, and the plaintiff's demurrer to the answer on the ground that it failed to set up a defense to the action should have been overruled.

2. Mortgages C b: G b—Later note held secured by prior mortgage deposited with payee as collateral security.

Where a borrower from a bank executes a deed of trust on his lands to secure his note, and thereafter, while the note and mortgage are unpaid and uncanceled, he executes another note directly to the bank and deposits the first note and deed of trust with the bank as collateral security for the second note, and the second note recites this agreement on its face: *Held,* the mortgage is security for the unpaid balance on both the first and second notes, and an assignee of a second mortgage would have to tender the unpaid balance on both notes in order to be entitled to the cancellation of the first mortgage.

APPEAL by defendant, Frank F. Fagan, receiver, from *Frizzelle, J.,* at Chambers, in Snow Hill, N. C., on 23 July, 1932. Reversed.

This is an action to enjoin the sale of land under the power of sale in a deed of trust under which defendants claim, upon the allegation that plaintiff claiming under a mortgage executed subsequent to the registration of the deed of trust, had tendered to the defendants, prior to the commencement of the action, the full amount of the debts secured by the deed of trust.

The action was heard on the demurrer filed by the plaintiff to the answer of the defendants, 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 admitted in the answer. The demurrer was sustained.

From judgment in accordance with the prayer of the complaint, the defendant, Frank F. Fagan, receiver, appealed to the Supreme Court.

James J. Hatch for plaintiff.
Kenneth C. Royall and Andrew C. McIntosh for defendant.

CONNOR, J. The facts alleged in the complaint and admitted in the answer of the defendants in this action, are as follows:

1. On 24 December, 1931, the Wayne National Bank of Goldsboro, N. C., closed its doors, and ceased to do business as a banking corporation. Thereafter, the defendant, Frank F. Fagan, was duly appointed by the Comptroller of the Currency as receiver of said bank and is now engaged in the performance of his duties as such receiver.

2. On 10 March, 1930, one W. Ellis executed and delivered to the Wayne National Bank his note for the sum of $7,500, and on said day also executed and delivered to the said bank a deed of trust to the defendant, Geo. K. Freeman, trustee, on a store building in the town of Farmville, Pitt County, North Carolina, by which the said note for $7,500 was secured. The deed of trust was duly recorded in the office of the register of deeds of Pitt County.

3. Prior to the commencement of this action, the defendant, Geo. K. Freeman, trustee, at the request of the defendant, Frank F. Fagan, receiver of the Wayne National Bank, had advertised the property conveyed to him by the said deed of trust, for sale, under the power of sale contained therein, on 30 June, 1932.

4. Prior to the commencement of this action, the plaintiff, B. D. Rabil, had tendered to the defendants, in full payment of the amount due on the note for $7,500, secured by the said deed of trust, the sum of $2,942.82, with interest from 24 December, 1931, contending that as assignee of a mortgage executed by W. Ellis to A. G. Rabil, subsequent to the registration of the deed of trust, he had the right to redeem the property conveyed by the deed of trust, by paying the full amount secured thereby. The defendants refused to accept the amount tendered by plaintiff, contending that in addition to said amount, there was due the defendant, Frank F. Fagan, receiver, by W. Ellis the sum of $975.00, with interest from 12 January, 1931, which was also secured by the deed of trust.

It is alleged in the complaint that on 7 September, 1931, W. Ellis, executed and delivered to A. G. Rabil a mortgage on the property theretofore conveyed by the said W. Ellis to the defendant, Geo. K. Freeman, trustee, to secure the sum of $4,000; that thereafter, for value, the said A. G. Rabil transferred and assigned to the plaintiff, B. D. Rabil, the said mortgage, and that the plaintiff is now the holder and owner of the same. These allegations are denied in the answer.

The facts alleged in the answer and admitted by the demurrer filed by the plaintiff, are as follows:

1. After the execution and delivery by W. Ellis to the Wayne National Bank of the note for $7,500, and of the deed of trust by which said note was secured, to wit: on 28 October, 1930, the said W. Ellis executed and delivered to the Wayne National Bank his note for $5,000, due and payable on 26 January, 1931; contemporaneously with the execution and delivery of the said note for $5,000, the said W. Ellis agreed with the said bank, that his note for $7,500, and the deed of trust securing the said note, should be held by the said bank as collateral security for the payment of his note for $5,000 and of any other liability of the said W. Ellis to the said bank, whether then due or to become due thereafter, or which might thereafter be contracted; this agreement was in writing and was set out in the face of the note for $5,000, which was signed by the said W. Ellis.

2. At the date of said agreement, to wit: 28 October, 1930, the said W. Ellis was liable to the Wayne National Bank on a note dated 21 February, 1930, executed by John F. Farfour, Georgiana J. Farfour and W. Ellis, and payable to the said Wayne National Bank. The amount due on said note at the commencement of this action was $975.00 with interest from 12 January, 1932.

At the hearing of this action, the demurrer of the plaintiff was sustained, and it was ordered, considered and adjudged that the deed of trust executed by W. Ellis to the defendant, Geo. K. Freeman, trustee, and recorded in the office of the register of deeds of Pitt County, be canceled by the clerk of the Superior Court of said county, upon the payment to said clerk by the plaintiff of the sum of $2,942.82, with interest from 20 January, 1932, for the use of the defendant, Frank F. Fagan, receiver of the Wayne National Bank.

The defendant, Frank F. Fagan, receiver, contends that there was error in the judgment and that the same should be reversed. This contention must be sustained for two reasons:

1. The allegation in the complaint that the plaintiff, B. D. Rabil, is the assignee of a mortgage executed by W. Ellis to A. C. Rabil, subsequent to the registration of the deed of trust from W. Ellis to the

defendant, Geo. K. Freeman, trustee, is denied in the answer. An issue is thereby raised on the pleadings, which must be submitted to and passed upon by the jury. The plaintiff is not entitled to redeem the property conveyed by the deed of trust, unless he is, as he alleges, the assignee of a mortgage on the said property, executed subsequent to the registration of the deed of trust. *Dickerson v. Simmons,* 141 N. C., 325, 53 S. E., 850.

2. On the facts alleged in the answer and admitted by the demurrer, the defendant, Frank F. Fagan, receiver, has a first lien on the property conveyed by the deed of trust from W. Ellis to the defendant, Geo. K. Freeman, trustee, not only for the amount tendered to the defendants by the plaintiff, to wit: $2,942.82, with interest, but also for the sum of $975.00, with interest, this being the amount due on the note for $1,000, on which W. Ellis was liable to the bank, on 28 October, 1930. Neither the note for $7,500, nor the deed of trust securing the said note had been paid or canceled at the date the said note and deed of trust were deposited with the bank as collateral security. For this reason neither *Saleeby v. Brown,* 190 N. C., 138, 129 S. E., 124, nor *Belton v. Bank,* 186 N. C., 614, 120 S. E., 220, is applicable to the instant case. The note for $1,000, on which W. Ellis was liable to the bank, was payable direct to the bank, and not to a third person, from whom the bank purchased the note, as was the case in *Newsome v. Bank,* 169 N. C., 534, 86 S. E., 499.

There is error in the judgment. The demurrer should have been overruled. The judgment on the facts appearing from the pleadings is

Reversed.

J. R. RIVES, ADMINISTRATOR OF J. B. RIVES, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 28 September, 1932.)

1. Railroads D b—Violation of city ordinance relating to speed, signals and warnings held negligence.

Where a train is operated through a town at an excessive speed without giving warnings by whistle or bell in violation of an ordinance of the town the railroad company is guilty of negligence.

2. Same—Where pedestrian stands upon straight, unobstructed track in day-time until struck by train he is guilty of contributory negligence.

Where the evidence discloses that plaintiff's intestate stood upon the tracks of the defendant railroad company in daylight, where the tracks

were straight and unobstructed, until he was hit by defendant's fast moving train, the evidence discloses contributory negligence as a matter of law continuing up to the moment of impact.

3. Same: Negligence B b—Doctrine of last clear chance does not apply where defendant is guilty of contributory negligence as a matter of law.

Where in an action by an administrator to recover damages against a railroad company for the death of his intestate the evidence discloses that the defendant was negligent and that the plaintiff's intestate was guilty of contributory negligence as a matter of law and that the contributory negligence continued up until the time the intestate was struck and killed by the defendant's train: *Held*, the doctrine of the last clear chance does not apply, and the defendant's motion for judgment as of nonsuit was properly allowed.

CIVIL ACTION, before *Moore, Special Judge,* at January Term, 1932, of HALIFAX.

The tracks of defendant run through the center of the town of Enfield. There was an ordinance of the town prescribing a speed limit of fifteen miles per hour. Two streets in the town approach the tracks of the railroad company at right angles, but do not cross the same. Pedestrians for a period of from eighteen to twenty-five years, walked across the tracks at a foot crossing referred to by some of the witnesses as being similar to a pig path. There was a northbound track and a southbound track with certain parallel switches or pass tracks.

On the morning of 9 March, 1931, plaintiff's intestate started across the tracks of defendant. An eye witness narrating the events, testified as follows: "I was right in front of Bellamy's wholesale house when Mr. Rives was killed. I was walking along on the west side. I saw Mr. Rives when he came out between the old hotel and Bellamy's wholesale house with a bottle of milk. He went over and stopped at the end of the ties and stayed there about a minute. There was a freight train passing on the other side something like four or five cars. He stayed there until the caboose passed, stepped over and started across, and when I knew anything the southbound train blew a distress blow as near to me as fifteen feet. The freight was moving. There was a man on the caboose. The man on the caboose was saying something to Mr. Rives, but I could not understand it. . . . I am sure Mr. Rives never saw the train, and I never saw it until it blew. . . . Mr. Rives was standing up erect in the middle of the southbound track and had made one step over the irons when the train (freight) got by. The man on the caboose said something to Mr. Rives and by the time the caboose started by him he started to go across the track. I did not see him look toward the north the way the train was coming." There was other

evidence that at the place where the plaintiff's intestate was killed the tracks were straight and the view unobstructed for a distance of from a quarter to a half mile.

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

J. W. Bailey and Ward & Grimes for plaintiff.

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

BROGDEN, J. The evidence paints the following picture: The defendant operates through the town of Enfield two parallel tracks, designated as a southbound track and a northbound track. A pedestrian using a much frequented path starts across the tracks. A freight train is slowly moving on the northbound track. He stands upon the southbound track, waiting for the freight train to clear, and as the caboose passes him, a man on the caboose says something to him. While thus standing on the southbound track a fast passenger train is rushing down upon him at the rate of fifty or sixty miles an hour, without the sound of whistle or bell and in violation of an ordinance of the town. The pedestrian does not look in the direction from which the passenger train is approaching, and perhaps never knew what struck him. The killing occurred at about nine o'clock in the morning of a clear day and the vision of the pedestrian was unobstructed for a distance of approximately a half mile.

Upon the foregoing facts three propositions of law must be considered in order to determine ultimate liability:

First: The defendant railroad company was guilty of negligence. This conclusion has been so frequently announced by the court in similar cases that it is unnecessary to cite authorities.

Second: The pedestrian was guilty of contributory negligence. In the daytime on a clear day he was standing on a live track without looking or otherwise taking any precaution for his own safety, and stood there until a fast passenger train snuffed out his life. Consequently he was guilty of contributory negligence, which continued up to the moment of the impact.

Three: Is the doctrine of "last clear chance" applicable? This inquiry must be answered in the negative. It is said in *Redmon v. R. R.*, 195 N. C., 764, 143 S. E., 829: "The doctrine does not apply when contributory negligence of the injured party barred recovery as a matter of law. Otherwise contributory negligence would totally disappear.

Affirmed.

SADIE BOOMER v. Z. Z. GRANTHAM.

(Filed 28 September, 1932.)

Deeds and Conveyances C c—Deed in this case held to convey life estate only.

Where by an examination of a deed it clearly appears from the many restraining expressions contained therein that the grantor intended to convey a life estate only it will be so construed although the deed does not use the language ordinarily employed to convey such an estate. C. S., 991.

APPEAL by plaintiff from *Sinclair, J.*, at November Term, 1931, of CRAVEN.

Civil action to remove cloud from title, and to have the plaintiff declared the owner in fee of a tract of land in Craven County.

On 28 October, 1920, John A. Boom conveyed the *locus in quo* to Sadie Boomer by deed containing the following expression: in the premises, "doth bargain, sell and convey to Sadie Boomer"; immediately following the description, "sold onley to Sadie Boomer without aney Heirs connection with it"; in the habendum, "to the said Sadie Boomer. No heirs and assigns in fee simple forever"; in the warranty, "covenants with said party of the second, No heirs and assigns."

On 12 July, 1924, John A. Boom *et al.*, conveyed the remainder in said land to the defendant, Z. Z. Grantham, by deed containing the following reference immediately after the description: "Being the same which was conveyed by the party of the first part herein to Sadie Boomer by deed recorded in the records of Craven County, in Book 239, page 31, for the life time of the said Sadie Boomer."

The judgment declares the defendant to be the owner in fee subject only to the life estate of the plaintiff, the jury having found that there was no mistake of the draftsman in preparing the deed of 28 October, 1920, from Boom to the plaintiff.

Ward & Ward for plaintiff.

W. B. R. Guion and H. P. Whitehurst for defendant.

STACY, C. J. It is provided by C. S., 991, that when real estate is conveyed to any person, the same shall be held and construed to be a conveyance in fee, whether the word "heirs" is used or not, unless such conveyance, in plain and express words, shows, or it is plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity. *Triplett v. Williams*, 149 N. C., 394, 63 S. E.,

79. This statute has the same effect upon conveyances as C. S., 4162 has upon devises. *Holt v. Holt*, 114 N. C., 241, 18 S. E., 967.

That the grantor in the deed under which the plaintiff claims intended to convey only a life estate is manifest from the many restraining expressions contained therein. *Lee v. Barefoot*, 196 N. C., 107, 144 S. E., 547. His Honor so held, and the correct result has been reached.

Plaintiff's deed was drawn upon a printed form prepared for fee-simple conveyances with usual covenants and warranty. In the blank spaces, appearing in the printed form before the word "heirs," usually filled in with the word "his" or "her," the draftsman inserted the word "no," making the context read "no heirs." And to make "assurance doubly sure," he added after the description the words: "sold onley to Sadie Boomer without aney Heirs connection with it." It is clear that this deed was intended to convey only a life estate.

We have not considered the alleged defects in the record, or case on appeal, arising upon the defendant's motion to affirm, as the same result must follow in either case.

No error.

MAY LEE ARMSTRONG v. HOME SERVICE STORES, INCORPORATED.

(Filed 28 September, 1932.)

Appeal and Error E a—Where necessary parts of record proper are not sent up the appeal will be dismissed.

The pleadings on which the case is tried, the issues, and the judgment appealed from are necessary parts of the record proper, Rule 19(1), and where no statement of case on appeal has been settled by agreement or otherwise and the record fails to contain the necessary parts and is too meager to authorize a determination of the question sought to be presented the appeal will be dismissed.

APPEAL by H. Bryan Duffy from *Cranmer, J.*, at February Term, 1932, of CRAVEN.

Claim for preference apparently filed in a receivership proceeding, which resulted in a denial of the claim, and claimant appeals.

Charles L. Abernethy, Jr., for H. Bryan Duffy.
G. A. Barden for Carmichael, receiver.

STACY, C. J. From an order made at the February Term, 1932, Craven Superior Court, notice of appeal was entered by "Plaintiff, H. Bryan Duffy," who was allowed thirty days to make out and serve

statement of case on appeal, and "Defendant, Receiver," given thirty days thereafter to prepare and file exceptions or countercase. No statement of case on appeal has been settled by agreement or otherwise. The petition and answer upon which the claim was heard are not in the record. It is provided by Rule 19(1) that "the pleadings on which the case is tried, the issues, and the judgment appealed from shall be a part of the transcript in all cases." Failure to send up necessary parts of the record proper has uniformly resulted in dismissal of the appeal. *Riggan v. Harrison, ante,* 191; *Everett v. Fair Association,* 202 N. C., 838; *Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126; *Waters v. Waters, ibid.,* 667, 155 S. E., 564.

Appellant's statement of case was served 3 September, long after time for serving it had expired. Time for filing exceptions or countercase has not yet expired, if appellant's statement was served under agreement of extension or waiver.

It may be presumed perhaps that a proceeding, entitled as above, is pending in the Superior Court of Craven County, though this fact has not been made to appear in any accredited way, except by the clerk's certificate. The record is too meager to authorize a determination of the question sought to be presented.

Appeal dismissed.

MOZELLE SASSER v. PILOT FIRE INSURANCE COMPANY.

(Filed 28 September, 1932.)

1. Insurance M c—Denial of liability is waiver of proof of loss.

By denying liability for a loss under a policy of fire insurance the insurer waives the provisions of the policy requiring the insured to file notice and proof of loss.

2. Insurance K c—Agreement as to amount of loss stipulating it should not operate as waiver held not waiver of violation of conditions.

The provision in a policy of fire insurance written in accordance with the standard statutory form, C. S., 6437, that the policy should be void if the insured was not the unconditional owner of the property in fee simple or if foreclosure proceedings were instituted against the property with knowledge of the insured is not waived by a written agreement signed by the insured and the adjuster for the insurer expressly providing that the agreement was solely for the purpose of determining the loss and to save time to the parties and that it should not operate as a waiver of any conditions or provisions of the policy.

3. Same—Evidence of admissions by adjuster, a special agent, held insufficient to show waiver by insurer of conditions of policy.

Where a policy of fire insurance provides that none of its conditions or provisions should be waived except those subject to agreement and then only by a written waiver attached to the policy itself, evidence that the adjuster for the insurer stated after a disclosure of the facts constituting a violation of a condition of the policy that the company would pay the claim is not sufficient to overrule the insurer's motion as of nonsuit, there being no evidence that the adjuster, a special agent, had authority to make such agreement or that the insurer had waived the violation through any authorized agent, there being evidence that the insurer denied liability immediately upon receipt of the adjuster's report.

APPEAL by defendant from *Harris, J.*, at Spring Term, 1932, of WAYNE. Reversed.

This is an action to recover on a policy of fire insurance by which a two-story dwelling-house owned by the plaintiff was insured by the defendant against loss or damage by fire, in a sum not exceeding $2,000.

It was admitted in the pleadings that the house covered by the policy of insurance was destroyed by fire while the policy, according to its terms, was in full force and effect.

It was further admitted in the pleadings that after the policy was issued, and before the fire, there were violations by the plaintiff of certain provisions of the policy, which, according to its express terms, rendered the policy void and released the defendant from liability thereon.

Plaintiff alleged in her reply to the answer of the defendant that after the fire defendant waived the forfeiture of the policy by reason of the admitted violations of its provisions. This allegation was denied by the defendant in its rejoinder.

The issues submitted to the jury were answered as follows:

"1. Did the defendant waive the violations of the policy set forth in the answer? Answer: Yes.

2. If so, what amount is the plaintiff entitled to recover? Answer: $2,000."

From judgment that plaintiff recover of the defendant the sum of $2,000, with interest and costs, the defendant appealed to the Supreme Court.

Kenneth C. Royall and Andrew C. McIntosh for plaintiff.

Brooks, Parker, Smith & Wharton and Langston, Allen & Taylor for defendant.

CONNOR, J. The policy of insurance sued on in this action was issued by the defendant on 11 December, 1929. It is in the form prescribed by

statute as the "Standard Fire Insurance Policy of the State of North Carolina." C. S., 6437. By its terms and subject to its provisions, a two-story dwelling-house located on a lot just outside the corporate limits of the town of Clayton, N. C., was insured against loss or damage by fire in a sum not to exceed $2,000. This house and lot was owned by the plaintiff at the date of the issuance of the policy. While the policy was in force according to its terms, the house was completely destroyed by fire. The fire occurred at about 1:30 on the morning of 30 May, 1931. At the date of the fire the house was vacant, the tenant who had occupied the same having moved out the day before the fire. On the morning after the fire, the plaintiff notified the local agent of the defendant at Clayton of her loss. The local agent thereupon reported the loss to the defendant at its home office in Greensboro, N. C. The defendant by letter requested the Fire Insurance Companies' Adjustment Bureau of Raleigh, N. C., to make an adjustment of the loss. Thereafter, on or about 15 June, 1931, J. P. Watters, an employee of the Bureau went from Raleigh to Clayton and, accompanied by John T. Talton, the local agent of the defendant at Clayton, called upon the plaintiff at her home. The local agent informed the plaintiff, that J. P. Watters was the adjuster of the defendant, and had called to adjust her loss. Before negotiations were entered into by and between the said J. P. Watters and the plaintiff, a paper-writing was signed by each of them, in words as follows:

"NON-WAIVER AGREEMENT.

It is hereby mutually stipulated and agreed by and between Mrs. Mozelle Sasser, party of the first part, and the insurance companies whose names are signed hereto, party of the second part, that any action taken, request made, or any information now or hereafter received by said party of the second part, on or while investigating and ascertaining the cause of fire, the amount of loss or damage, or other matter relative to the claim of the said party of the first part for property alleged to have been lost or damaged by fire on 30 May, 1931, shall not in any respect or particular change, waive, invalidate or forfeit any of the terms, conditions, or requirements of the policies of insurance of the party of the second part held by the party of the first part, or any of the rights whatsoever of any party hereto.

The intent of this agreement is to save and preserve all the rights of the parties and permit an investigation of the claim and determination of the amount of loss or damage in order that the party of the first part may not be unnecessarily delayed in business, and that the amount

of . . . claim may be ascertained and determined without regard to the liability of the party of the second part and without prejudice to any rights or defenses which said party of the second part may have.

Pilot Fire Insurance Company,
By J. P. Watters, Adjuster.
Mrs. Mozelle Sasser."

After the said paper-writing had been signed by the parties thereto, and after negotiations between said parties pursuant thereto had been completed, another paper-writing was signed by said parties in words as follows:

"AGREEMENT AS TO SOUND VALUE AND LOSS AND DAMAGE.

In consideration of the mutual benefits to be derived herefrom, it is expressly understood and agreed by and between the parties whose signatures are affixed hereto that this agreement is a separate and distinct agreement between Mrs. Mozelle Sasser and each of the undersigned insurance companies, and it is further agreed that at the time of the fire occurring on 30 May, 1931, the total sound value of the property belonging to Mrs. Mozelle Sasser and described in the respective policies of said undersigned insurance companies is, after a complete examination, agreed upon and determined to be $3,217.50, and that the loss and damage to said property by reason of said fire is understood and agreed to be $2,000, which said sums as herein agreed to and above set out are binding and conclusive upon all parties hereto as to the amount of sound value and amount of loss and damage only, with the expressed understanding that no liability is fixed hereby, and that this agreement does not in any sense waive formal proofs of loss or any of the conditions or provisions of the policies of said insurance companies.

The sole purpose of this instrument is to evidence the agreement between the parties hereto as to the sound value and loss and damage.

In testimony whereof, the said parties have hereto executed this agreement in duplicate, and set their hands and affixed their seals, this 15 June, 1931.

Pilot Fire Insurance Company,
By J. P. Watters, Adjuster.
Mozelle Sasser."

After the issuance of the policy sued on in this action, and while the same was in full force and effect, the plaintiff conveyed the lot on which the house insured thereby was located, by a mortgage deed which was duly recorded in the office of the register of deeds of Johnston County.

Default having been made by the plaintiff in the payment of the debt secured by said mortgage, at its maturity, the house and lot conveyed by said mortgage was sold on 23 May, 1931, under the power of sale contained therein. At said sale the highest bid for said property was $200.00. Plaintiff knew that the house and lot had been advertised for sale, and had been sold under the power of sale in the mortgage prior to the date of the fire; she did not notify defendant that she had conveyed the property covered by the policy of insurance, by the mortgage, or that said property had been advertised and sold under the power of sale contained in the mortgage executed by her, after the issuance of the policy. Defendant had no knowledge of these matters until after the fire.

Among other provisions in the policy are the following:

"This entire policy shall be void, unless otherwise provided by agreement in writing added hereto, (a) if the interest of the insured be other than unconditional and sole ownership, or (b) if the subject of insurance be a building on ground not owned by the insured in fee simple, or (c) if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale of any property insured hereunder by reason of any mortgage or deed of trust."

"No one shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement added hereto, nor shall any such provision or condition be held to be waived unless such waiver shall be in writing added hereto, nor shall any provision or condition of this policy or any forfeiture be held to be waived by any requirement, act or proceeding on the part of this company relating to appraisal or to any examination herein provided for; nor shall any privilege or permission affecting the insurance hereunder exist or be claimed by the insured unless herein granted or by rider added hereto."

The plaintiff offered evidence tending to show that after the nonwaiver agreement, and the agreement as to sound value and loss and damage, had been signed by the parties thereto, the adjuster, J. P. Watters, referring to the mortgage executed by the plaintiff after the issuance of the policy, and to the foreclosure of said mortgage by sale of the property conveyed thereby, on 23 May, 1931, said: "We will pay your insurance anyhow. Your check will be at the bank Friday afternoon." Defendant in apt time objected to this evidence, and excepted to the overruling by the court of its objections. The adjuster, J. P. Watters, did not testify as a witness at the trial. He had died before the trial. John T. Talton, the local agent of the defendant, who was present at all times during the negotiations between the plaintiff and J. P. Watters, testified that

nothing was said to the plaintiff by J. P. Watters about sending a check to pay the amount of her loss; that the said J. P. Watters told the plaintiff that he would make his report to the defendant, and that if the defendant was willing to pay the loss, it would send proofs of loss for her signature, and that the loss would not be paid until the execution by plaintiff of proofs of loss.

After the defendant received the report of J. P. Watters, its adjuster, it denied liability on the policy and declined to pay plaintiff's claim thereon. No proofs of loss, signed by the plaintiff, were filed with the defendant prior to the commencement of this action.

The failure of the plaintiff to file with the defendant proofs of loss, signed by her, as required by the policy, was not a sufficient ground to sustain defendant's motion for judgment as of nonsuit. The defendant had denied liability on the policy, and had thereby waived the filing of proofs of loss by the plaintiff. There is no contention by the defendant to the contrary on this appeal. See *Proffitt v. Insurance Co.*, 176 N. C., 680, 97 S. E., 635.

The defendant does contend, however, that there was no evidence at the trial of the action tending to show a waiver by it of the admitted violations of provisions of the policy, which according to its express terms rendered the policy void. This contention is sustained by the decision of this Court in *Hayes v. Insurance Co.*, 132 N. C., 702, 44 S. E., 404. In that case it is held that the commencement of foreclosure proceedings against the insured property terminates the policy, there being in the policy a provision to that effect. With reference to the plaintiff's contention in that case that there was evidence tending to show a waiver by the defendant of the provision with respect to the effect of the foreclosure proceeding upon the policy, it is said by *Clark, C. J.*:

"The plaintiff, however, relies upon the fact that the agent of the company went out to investigate the loss, and determined the amount of damages to be $679.00. But whatever inference of waiver might otherwise be drawn from the circumstances is negatived, not only by a stipulation in the policy that such investigation, in case of loss, should not be deemed a waiver of any objection to the liability of the company under the policy, but before making this investigation the insured and the agent of the company entered into a written agreement that such investigation and agreement should not waive or invalidate any of the conditions of the policy, or any rights whatever of either of the parties, but was merely to avoid unnecessary delay to the plaintiff, and should not be taken in any wise as an acknowledgment of liability on the part of the company. This agreement was reasonable and the considera-

tion—saving delay to the plaintiff—is not only apparent, but is recited in the agreement itself."

There was no evidence tending to show that the adjuster, who was a special agent of the defendant, with power only to adjust the loss, was authorized to pay the loss, or to admit defendant's liability for the loss. All the evidence was to the contrary. Upon its receipt of the report of the adjuster, at its home office, the defendant promptly denied liability. The instant case is distinguishable from *Modlin v. Insurance Co.*, 151 N. C., 35, 65 S. E., 605, where the insurance company, after its receipt of the report of its agent showing a violation of the policy, and after the insured had filed proofs of loss, issued a draft for the payment of the loss. This was the act of the insurance company, and not of its special agent, who had no authority to admit the company's liability for the loss. It was held in that case that the defendant, by its own act, had waived the violation of its policy.

There was error in the refusal of the court to allow defendant's motion for judgment dismissing the action as of nonsuit. For this reason the judgment is

Reversed.

IN RE GOLDSBORO SAVINGS AND TRUST COMPANY.

(Filed 28 September, 1932.)

1. Banks and Banking H a—Transferee must be legally capable of holding stock in order to relieve transferer of statutory liability.

Shares of stock in a banking corporation are usually transferable as shares of stock in other kinds of corporations, but whether the transfer is effective against creditors of the bank depends upon the facts of each particular case, the general rule of law applicable being that the transferee must be a person who is not only legally capable of holding the stock but is also legally bound to respond when an assessment is made by the Commissioner of Banks under statutory provisions, N. C. Code, 218(c), 219(a), although it is not necessary that he should be financially able to pay the assessment, and a transfer of bank stock to an infant does not relieve the transferer of his statutory liability, an infant being incapable of making a binding contract.

2. Same—Where bank stock is transferred in good faith to trustee for minor the transferer is relieved of statutory liability.

Where the owner of bank stock has had the shares transferred on the books of the bank to a trustee for the benefit of a minor, and the transfer is made in good faith when the bank is solvent: *Held*, the transferer is not liable for the statutory assessment of the stock upon the bank's insolvency, the trustee being of full age and qualified to perform all the duties required of him in his fiduciary capacity. N. C. Code, 219(c), (d).

IN RE TRUST CO.

APPEAL by S. B. Moore from a judgment of *Harris, J.*, rendered at April Term, 1932, of WAYNE, affirming an assessment of stock, on the following agreed statement of facts.

1. Prior to 21 January, 1930, S. B. Moore owned five shares of capital stock in the Goldsboro Savings and Trust Company, evidenced by certificate No. 137, and on said date this certificate was surrendered and canceled upon the records of said Goldsboro Savings and Trust Company and in lieu thereof certificate No. 189 was issued to M. K. Moore, trustee for M. S. Moore.

2. On 21 January, 1930, a reasonable market value for said five shares of capital stock was $375.00, and said bank was engaged on said date in its normal business and was solvent.

3. The transfer of certificate No. 137 by S. B. Moore to M. K. Moore, trustee for M. S. Moore, the namesake and nephew of S. B. Moore, was in good faith. M. K. Moore, trustee, is the father and natural guardian of M. S. Moore, and after the transfer of certificate No. 137, to him he was offered the sum of $75.00 per share for said stock.

4. M. S. Moore is a minor without any estate.

5. On 14 February, 1931, an assessment was made by the Corporation Commission of the State of North Carolina against M. K. Moore, trustee for M. S. Moore, in the sum of $700.00, which assessment was made upon certificate No. 189, issued in the name of M. K. Moore, trustee for M. S. Moore, and issued in lieu of certificate No. 137 (formerly in the name of S. B. Moore), and certificate No. 154 (formerly in the name of Daisy B. Moore for two shares of the capital stock of Goldsboro Savings and Trust Company); said judgment being recorded in the office of the clerk of the Superior Court of Wayne County in Judgment Book 16, p. 192, No. 5402.

6. On 10 September, 1931, an assessment was made by the Corporation Commission against S. B. Moore in the sum of $500.00 upon certificate No. 137, as appears in the office of the clerk of the Superior Court of Wayne County in Judgment Book, 16, page 220, No. 5541.

7. There does not appear upon the records of said Goldsboro Savings and Trust Company at the time it closed its doors on 19 December, 1930, any certificate stock of the Goldsboro Savings and Trust Company outstanding in the name of S. B. Moore, certificate No. 137, formerly owned by S. B. Moore prior to 1 January, 1930, having been canceled upon the records of the Goldsboro Savings and Trust Company.

8. Marvin Thompson, a resident of Wayne County, was appointed liquidating agent of said Goldsboro Savings and Trust Company on 22 December, 1930, and immediately took charge of the affairs of said Goldsboro Savings and Trust Company.

The trial court adjudged that the Commissioner of Banks, as successor of the Corporation Commission, recover of S. B. Moore the sum of $500 with interest and costs. S. B. Moore excepted and appealed.

Langston, Allen & Taylor for appellant.
Kenneth C. Royall and Andrew C. McIntosh for appellee.

ADAMS, J. The Goldsboro Savings and Trust Company closed its doors on 19 December, 1930. About eleven months before this date S. B. Moore, who owned five shares of its capital stock, for the purpose of transferring this stock to his nephew, M. S. Moore, delivered his certificate to the bank and the bank immediately recorded on its books a cancellation of the certificate and in lieu thereof issued another certificate for the same stock to M. K. Moore, as trustee for M. S. Moore. At that time the bank was solvent; the stock had a market value of $75 a share; the transfer was made in good faith; and the trustee named in the latter certificate is the father and natural guardian of the minor. The appeal brings up for review the single question whether the assessment made against S. B. Moore on 10 September, 1931, is enforceable in law.

The stockholders of a bank organized under the laws of North Carolina are individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of the corporation to the extent of the amount of their stock therein at its par value, in addition to the amount invested in such shares. The Commissioner of Banks, within the time prescribed by statute, may levy an assessment equal to the stock liability of each stockholder in the bank and shall file a copy of such levy in the office of the clerk, which, when recorded and indexed, shall have the effect of a judgment of the Superior Court and may be enforced by execution. N. C. Code, 1931, secs. 218(c), (13), 219(a).

Stock in a bank, as in any other corporation, is generally transferable, but whether the transfer is effective against creditors of the bank must be determined upon the facts of each case. It is an established rule of law that a transfer of stock in a corporation must be made to a person who is not only legally capable of holding the stock but is legally bound to respond when an assessment is made; not legally bound, necessarily, in the sense that he will be financially able to meet the liability but in the sense that he is legally capable of assuming the obligation. *Aldrich v. Bingham,* 131 Fed., 363. Assent is essential to the holding of stock, and for this reason an infant cannot be held liable on his subscription. He is without legal capacity to bind himself uncondi-

tionally by the contract. 1 Cook on Corporations, sec. 250; *Foster v. Chase,* 75 Fed., 797; *Aldrich v. Bingham, supra; Early v. Richardson,* 280 U. S., 496, 74 L. Ed., 575. There is abundant authority to the effect that if S. B. Moore had transferred his stock directly to his minor children he would have remained liable for the assessment. But he made the transfer to M. K. Moore as trustee for M. S. Moore. Cancellation of his stock was entered upon the records of the bank and another certificate was issued to the trustee for the named beneficiary. We have, then, not the case of an owner of stock who claims to hold it as trustee, as in *Trust Co. v. Jenkins,* 193 N. C., 761, but a case in which, according to the records of the bank, the parties are clearly identified—the transferer, the trustee, the *cestui que* trust. This fact is significant when considered in connection with the following statute: "Persons holding stock as executors, administrators, guardians, or trustees shall not personally be subject to any liabilities as stockholders, but the estate and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust fund would be if living and competent to hold stock in his own name." Code, 1931, sec. 219(c).

This provision is not restricted to trustees appointed by will or by an order of court; it extends to every trust relation, however created. *Trust Co. v. Jenkins, supra; Lucas v. Coe,* 86 Fed., 972; *Fowler v. Gowing,* 165 Fed., 891. Observing that it attaches liability to the estate and funds in the hands of the trustee, we must remember that we are not called upon to decide whether the trustee is personally liable or whether the assessment on 14 February, 1931, against "M. K. Moore, trustee for M. S. Moore" is valid. These questions are considered in other cases, some of which are herein cited. We are now concerned only with the inquiry whether S. B. Moore is liable on the alleged assessment of 10 September, 1931.

In *Corporation Commission v. Latham,* 201 N. C., 342, the statement of facts showed that the defendant Fred P. Latham had transferred on the books of the bank 20 shares of stock to J. R. Latham, trustee, and 20 shares to H. V. Latham, trustee, nothing appearing on the books to indicate for whom the trusts had been created; but between the defendant and the trustees, who were his sons, there was an agreement that they should hold the stock for the education of their minor children. The Court did not hold that the trustees were personally liable for the assessment and rest the decision on this ground; it held under *Trust Co. v. Jenkins, supra,* "and on the facts appearing of record," that the defendant was not personally liable. If the defendant in *Latham's case* was not liable, *a fortiori* should it be held upon the admitted facts in

the present case that S. B. Moore is not liable for the assessment imposed upon him by the Corporation Commission.

The appellee lays stress upon a clause in section 219(d) exempting those who in good faith and without intent to evade liability transfer their stock "to any person of full age"; but without regard to the question whether a stockholder's liability is statutory or contractual we learn from the agreed statement of facts that the controverted transfer of stock was not made directly to a minor but to a trustee of "full age," who was qualified to perform all the duties required of him in his fiduciary relation.

Our conclusion is that S. B. Moore is exempt from liability to assessment as a stockholder in the bank. Judgment

Reversed.

HENRY LUFF v. JOSEPH LEVEY AND RACHEL LEVEY.

(Filed 28 September, 1932.)

Cancellation of Instruments B d—Evidence in this case held insufficient to establish fraud, duress or failure of consideration.

Where the evidence discloses that a mortgage creditor of a corporation agreed to lend it more money for reorganization after its buildings were destroyed by fire, the money to be used to buy other lands and replace the buildings and a new corporation to be formed for the purpose of carrying on the business, and that during negotiations the creditor discovered that one of the organizers had had the new property conveyed to him in his own name, and upon the creditor's insistence agreed to convey the property to the new corporation if the creditor would assign to him a part of the bond to be secured by the corporation's mortgage on the property: *Held*, the evidence is insufficient to establish fraud or duress in the execution of the assignment, and the execution of a release by the assignee together with other negotiations between the parties constituted a sufficient consideration.

CIVIL ACTION, before *Schenck, J.*, at May Term, 1931, of MOORE.

The pleadings and evidence tended to show that the United Talc and Crayon Company, Incorporated, executed a mortgage deed to the defendant, Rachel Levey, to secure a bond in the sum of $15,200 upon certain land known as the Talc Mine, and that on 23 November, 1927, the building and machinery on said land used in operating the mine was burned and destroyed by fire; that thereafter the defendants and the agent of plaintiff entered into negotiations to purchase a lot of land for the purpose of erecting a new building for mining purposes, said land to be conveyed to a new corporation to be organized and known as

United Talc and Crayon Manufacturing Company; that thereupon the defendants agreed to loan to the new corporation to be used in the development of the business an additional sum of $10,000. The plaintiff undertook to close the transaction and purchased the land, taking deed thereto in his own name. The defendants demanded security for the additional money advanced to the new enterprise, and in the negotiations discovered that the title to the property was not in the name of the new corporation but in the name of plaintiff.

The evidence for defendants further tended to show that the plaintiff refused to convey the land to the corporation unless the defendants would turn over to him $5,000 of the proceeds of the $15,200 mortgage. Thereupon the defendants executed an assignment, dated 30 June, 1928, and recorded 7 July, 1928. In substance the assignment provides that the defendants have "sold and assigned and set over" to the plaintiff and his personal representatives "the sum of $5,000 of the principal of the note of bond in the sum of $15,200, made by United Talc and Crayon Company, Incorporated, payable to Mrs. Rachel Levey, dated 24 March, 1927, secured by a mortgage deed on certain real estate in Moore County. . . . The said sum of $5,000 and interest shall first be paid to said Henry Luff and his personal representatives before the said parties of the first part (defendants) shall participate in any amount of money which said real estate may bring at any sale under foreclosure for said mortgage." The defendants admitted the execution of said assignment but offered evidence which they assert tended to show that the assignment was procured by means of fraud, duress and without consideration. The assignment was drawn by a reputable attorney and the defendant, Joseph Levey, testified that the plaintiff said to him: 'I won't turn over the property until you give me $5,000,' and I had to decide one way or the other." He further testified that the plaintiff's agent said: "If you will give me $5,000 as a bonus, I will convey this property from Henry Luff to the new corporation, and you will get your mortgage," to which the defendant replied: "Why should I give you $5,000?" to which the plaintiff's agent replied: "Just because I want it."

The plaintiff alleged that $2,000 had been paid on the assignment and sued to recover $3,000 with interest thereon.

The court ruled that the burden of proof was upon the defendant and submitted the following issues:

1. "Was the execution of the assignment sued on, from Joseph Levey and his wife, Rachel Levey, to the plaintiff, Henry Luff, obtained by fraud, as alleged in the further defense?"

2. "Was the execution of the assignment sued on, from Joseph Levey and his wife, Rachel Levey, to the plaintiff, Henry Luff, obtained by duress as alleged in the further defense?"

3. "What amount, if any, remains unpaid by the defendants, Joseph Levey and his wife, Rachel Levey, to the plaintiff, Henry Luff, on said assignment?"

4. "Is the plaintiff, Henry Luff, entitled to a foreclosure of the mortgage referred to in the assignment recorded in Book 49, at page 336 of the records of mortgage deeds of Moore County?"

Thereupon the trial judge instructed the jury, if they found "the facts to be as shown by all the evidence both oral and documentary" to answer the first issue "no," the second issue "no," the third issue "$3,000 with interest," and the fourth issue "yes."

From judgment upon the verdict the defendants appealed.

A. A. F. Seawell, K. R. Hoyle, W. R. Clegg and L. B. Clegg for plaintiff.

J. A. Spence, C. A. Douglass and R. L. McMillan for defendants.

PER CURIAM. The defendants seek to set aside an assignment of the proceeds of a certain note owned by the *feme* defendant, upon the ground of fraud, duress and failure of consideration. The only evidence of fraud offered at the trial was to the effect that the plaintiff, acting through an agent, refused to convey a tract of land to a corporation in which both plaintiff and defendants were interested and to have a mortgage executed thereon and delivered to the defendants as security for sums advanced by the defendants to the new enterprise. We perceive no element of fraud in this phase of the transaction, nor is there any evidence of duress as contemplated and defined by law. The defendants had a right to stand upon their legal rights and assert them in a court of justice. The applicable rule of law is tersely stated in *Smithwick v. Whitley,* 152 N. C., 369, 67 S. E., 913, as follows: "Duress exists where one, by the unlawful act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will." The testimony offered at the trial was not of sufficient or definite probative value to be submitted to the jury. Moreover, on 7 July, the date of the recording of the assignment in controversy a certain release was executed and recorded, and this, together with other negotiations between the parties, constituted a consideration, sufficient in law to support the contract.

No error.

CLIFFORD MADRIN v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 28 September, 1932.)

Appeal and Error L c—Decision on former appeal that evidence was sufficient is conclusive on second appeal when evidence is the same.

Where on a former appeal the Supreme Court has adjudicated that the evidence was sufficient to overrule a motion of nonsuit and on the subsequent trial the evidence is substantially the same as on the first the plaintiff's exception to the court's refusal to nonsuit the second action will be overruled.

APPEAL by defendant from *Cranmer, J.*, at March Term, 1932, of PITT. No error.

F. G. James & Son for appellant.
Julius Brown and Harding & Lee for appellee.

PER CURIAM. This is an action to recover damages for injury to person and property suffered by the plaintiff at a railroad crossing. The Norfolk Southern Railroad Company and the Sinclair Refining Company were made parties defendant. The case was first tried in October, 1930, and was dismissed as to both defendants. The plaintiff appealed and this Court affirmed the judgment of nonsuit as to the Sinclair Refining Company and granted a new trial against the Railroad Company, 200 N. C., 784.

The cause again came on for trial at the March Term, 1932, of the Superior Court of Pitt County. The plaintiff alleged that on 11 March, 1928, about ten o'clock in the morning, he was traveling on a public highway in the direction of Farmville and while crossing the railroad track was injured by the negligence of the defendant. The circumstances are set out in the complaint and need not be repeated. The defendant denied negligence and pleaded the contributory negligence of the plaintiff. The usual issues were submitted to the jury and upon the return of a verdict favorable to the plaintiff he was given a judgment, from which the defendant appealed upon assigned error.

The defendant made the two statutory motions for nonsuit and excepted to the court's refusal to dismiss the action. This exception is overruled for the reason that the evidence does not differ materially and fundamentally from the evidence introduced on the first trial, the sufficiency of which to bar a nonsuit was adjudicated on the former appeal.

The appellant has several exceptions to the admission of evidence but we do not find reversible error in any one of them.

No error.

BRUCE McKEEL v. DR. JOS. R. LATHAM.

(Filed 28 September, 1932.)

Appeal and Error J b—Order rendered in exercise of discretion is not reviewable.

A motion for leave to amend a complaint under C. S., 515 is addressed to the sound discretion of the trial court, and his order denying the motion is not subject to review on appeal in the absence of gross abuse of this discretion.

APPEAL by plaintiff from *Cranmer, J.*, at April Term, 1932, of CRAVEN. Dismissed.

At September Term, 1931, of the Superior Court of Craven County, there was a judgment in this action, overruling defendant's demurrer to the complaint. Defendant appealed from said judgment to the Supreme Court. At the hearing of this appeal, the judgment was reversed. 202 N. C., 318. It was held that the demurrer should have been sustained.

At April Term, 1932, of the Superior Court of Craven County, the action was again heard on plaintiff's motion for leave to amend his complaint. C. S., 515. The motion was denied by the judge, in the exercise of his discretion. From judgment denying his motion, and dismissing the action in accordance with the decision of the Supreme Court, the plaintiff appealed to the Supreme Court.

Ernest M. Green and D. L. Ward for plaintiff.
H. P. Whitehurst and R. E. Whitehurst for defendant.

PER CURIAM. The order of the judge of the Superior Court denying plaintiff's motion for leave to amend his complaint, was made in the exercise of his discretion (C. S., 515) and is therefore not subject to review by this Court, on plaintiff's appeal. There is no contention on the part of the appellant that there was an abuse of the discretion vested in the judge by the statute; at least, there is nothing in the record to sustain this contention.

It is well settled that no appeal lies to this Court from an order or judgment made or rendered by a judge of the Superior Court in the exercise of discretion vested in him by statute. This appeal is therefore

Dismissed.

MRS. MABEL MUNFORD, WIFE OF LYMAN MUNFORD, DECEASED, v. WEST CONSTRUCTION COMPANY, EMPLOYER, AND U. S. FIDELITY AND GUARANTY COMPANY, CARRIER.

(Filed 5 October, 1932.)

1. **Master and Servant F h—In computing average weekly wage questions of length of employment and fairness of method used are for Commission.**

Where an injured employee had been employed for less than fifty-two weeks the Workmen's Compensation Act provides that his average weekly wage shall be computed by finding the average weekly wage during the term of employment provided the result would be fair and just to both parties, or in case such method is impractical because of the shortness of the term of employment or its casual nature that the average weekly wage shall be computed with regard to the average weekly wage of a person of the same grade and character employed in the same class of employment in the same locality, and the entire subsection should be construed as a whole, and where the Industrial Commission has awarded compensation in accordance with the latter method the award will be upheld, the shortness of the term and the casual nature of the employment and the finding that fair results could not be obtained by computing the average weekly wage of the employee, being questions of fact for the Commission.

2. **Master and Servant F i—Findings of fact of Commission in respect to average weekly wage are conclusive when supported by evidence.**

Where the Industrial Commission computes the average weekly wage of an injured employee in accordance with the average weekly wage of a person of the same grade and character employed in the same class of employment in the same locality, upon findings of the shortness of the term of employment, and that fair and just results would be thereby obtained, such findings based upon the evidence are conclusive and binding upon the courts upon appeal. N. C. Workmen's Compensation Act, sec. 60.

APPEAL by defendants from *Sinclair, J.*, at February Term, 1932, of LENOIR. Affirmed.

Agreed statement of facts:

This was a claim under the Workmen's Compensation Act of North Carolina, in which the claimant sought to recover compensation for the death of her husband, which resulted from injury sustained by him while in the course of his regular employment. The defendants in this case do not deny liability, but the parties disagree as to the average weekly wage to be used as a basis for the award. The claimant was in the employ of the West Construction Company of Kinston. He had been in the employ of the West Construction Company for a period of three months prior to his injury, which resulted in his death. His average weekly wages during this period of three months, computed by dividing

the total of amount earned, or his earnings during that period, by the number of weeks during which the employee earned wages, was $13.37 per week. Defendants, therefore, contend that the rate of compensation should be $8.02 per week.

The case was first heard before Commissioner Dorsett at Kinston on 2 October, 1931, and on 9 October, 1931, award was issued by the said Commissioner Dorsett, directing the payment of compensation at the rate of $10.80 per week figured on the basis of an average weekly wage of $18.00 per week, instead of $13.37 per week.

The full Commission upon appeal affirmed the award of Commissioner Dorsett. Thereupon the defendant appealed to the Superior Court of Lenoir County, and his Honor, N. A. Sinclair, affirmed and approved the award of the full Commission. Thereupon the defendant excepted, assigned error and appealed to the Supreme Court.

Sutton & Greene for plaintiffs.
Thomas A. Banks for defendants.

CLARKSON, J. The defendants contend: (1) That the court below erred in sustaining the findings and conclusions of the North Carolina Industrial Commission to the effect that the deceased's average weekly wage was $18.00, instead of $13.37; and in affirming and approving the award of the North Carolina Industrial Commission, to the effect that the defendants pay to the plaintiff compensation at the rate of $10.80 per week for a period of 350 weeks, instead of $8.02 per week for a period of 350 weeks. (2) That the court below erred in affirming the conclusions of law of the North Carolina Industrial Commission and in affirming and signing the judgment herein rendered in this cause. We cannot sustain the contentions of defendants.

The North Carolina Workmen's Compensation Act, chap. 120, Public Laws 1929, sec. 2(e), is as follows: (1) "'Average weekly wages' shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury, divided by fifty-two; but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such fifty-two weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. (2) Where the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be fol-

lowed; *provided, results fair and just to both parties will be thereby obtained.* (Italics ours.) (3) Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community. (4) But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." (Numbering ours.)

In the opinion of the full Commission, we find, in part: "It is evident that Commissioner Dorsett found that results fair and just could not be obtained in the instant case by dividing the earnings during the period of employment by the number of weeks and parts thereof and that he applied the rule of awarding to the claimant the average weekly amount which was being earned by a person of the same grade and character employed in the same class of employment."

In construing the matter in controversy, we must consider the entire subsection (e), *supra.* The intent seems to be that *results fair and just to both parties will be thereby obtained.* We think this idea of giving a liberal construction applicable to the third method, *supra,* taking also into consideration the language of the third method. In the present cause, the evidence indicated both shortness of time and casual nature of the employment—then regard shall be had to the average wages earned by others, etc. These are questions of fact for the Commission to pass on.

Section 60 of the above act, in part, is as follows: "The award of the Commission, as provided in section fifty-eight, if not reviewed in due time, or an award of the Commission upon such review, as provided in section fifty-nine, shall be conclusive and binding *as to all questions of fact,"* etc. (Italics ours.) Then the procedure on appeal is set forth and the Superior Court on appeal shall hear same "for errors of law, under the same terms and conditions as govern appeals in ordinary civil actions."

In *Aycock v. Cooper,* 202 N. C., at p. 505, speaking to the subject: "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." *Greer v. Laundry Co.*, 202 N. C., 729; *Kenan v. Motor Co., ante.*, 108.

The defendants, in their able brief, make out a strong case, but we cannot hold as a matter of law that there was no sufficient competent evidence on which the Industrial Commission based its findings of fact. The findings of fact are binding on us "although this Court may disagree with such findings." *Kenan case, supra.* For the reasons given, the judgment of the court below is

Affirmed.

CITY OF WASHINGTON v. JOHN H. BONNER, ADMINISTRATOR OF F. H. BRYAN, DECEASED, AND NATIONAL SURETY COMPANY.

(Filed 5 October, 1932.)

Limitation of Actions B a—Ordinarily, cause of action on official bond accrues upon breach of official duties.

Ordinarily the statute of limitations begins to run against an official bond from the time of its breach, and where the bond is given for a city sinking fund commissioner who is not reappointed at the expiration of his term, but another is appointed as his successor who refuses to accept certain notes for money lent by the former: *Held*, upon the termination of the former's term the law required him to account for funds and securities in his hands and his failure or refusal to do so constituted a breach of his official bond giving rise to a cause of action thereon immediately, the city being under no disability and being at liberty to sue, and an action brought on the official bond more than six years after the principal ceased to be sinking fund commissioner is barred by the six-year statute of limitations. C. S., 439.

CIVIL ACTION, before *Daniels, J.*, at April Term, 1932, of BEAUFORT.

The evidence tended to show that chapter 170, section 77 of the Private Laws of 1903 provided for the appointment of a sinking fund commissioner for the city of Washington, and that on 7 April, 1919, F. H. Bryan was duly appointed commissioner of the sinking fund of the plaintiff. On 10 April, 1919, defendant, National Surety Company, executed an indemnity bond on behalf of said Bryan for the faithful

performance of his official duties "for a period of one year, beginning 7 April, 1919, and ending on 7 April, 1920, or until his successor is duly elected or appointed and qualified." On 27 March, 1920, the defendant, Surety Company, issued a renewal of said bond "for the extended term, beginning 17 April, 1920, and ending on 7 April, 1921, subject to all the covenants and conditions of said bond." On 9 May, 1921, the minutes of the plaintiff showed the following: "The board accepts the report of the committee on custodian of the sinking fund and on loans. The Trust Company of Washington was duly elected commissioner of the said sinking fund to take effect as soon as the books are audited." On the next day, to wit, 10 May, 1921, Bryan was duly notified by the city clerk "that he was out as sinking fund commissioner and the Trust Company was in." On 31 May, 1921, Bryan loaned as sinking fund commissioner $16,714.19 to the Washington-Beaufort Land Company and $2,544 to Stewart, Bryan, Ellison and Boyd. Bryan's account as sinking fund commissioner was audited on or about 31 May, 1921, and the auditor filed his report 9 June, 1921. On the same day the financial committee of plaintiff and the auditor met with Bryan and an order was made "that the said F. H. Bryan pursuant to the audit above referred to turn over to the Trust Company of Washington, the sinking fund commissioner heretofore elected, the notes, securities and moneys set forth in the statement attached to the report of W. A. Thayer, as aforesaid," etc. On 10 June, 1921, the Trust Company accepted the office of sinking fund commissioner, refusing, however, "to receipt for any notes or securities executed by F. H. Bryan to himself as sinking fund commissioner, and refusing to become responsible for any of the notes or mortgages tendered by F. H. Bryan, sinking fund commissioner, and the president was directed to so advise Mr. Bryan, . . . and the city of Washington, and lay the matter before the city of Washington." On 11 June, Mr. Bryan was advised in writing by the Trust Company of Washington that it had decided "to accept the notes and securities tendered except those hereinafter more specifically mentioned," etc. On 11 June, 1921, the minutes of plaintiff show the following: "On motion duly made and carried the mayor and city attorney are instructed to take up the matter of sinking fund with F. H. Bryan . . . and the Trust Company of Washington, to make immediate adjustment and close the same."

Bryan died in November, 1929, and on 25 March, 1931, the present action was instituted by the plaintiff against the administrator of said deceased and the bondsman, National Surety Company, seeking to recover the amount of $16,714.19 representing a loan made by Bryan as sinking fund commissioner to the Beaufort Land Company, and the sum

of $2,544 representing a loan made by the said Bryan to Ellison and others. The National Surety Company, among other allegations pleaded as a defense the six-year statute of limitations. C. S., 439.

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

S. M. Blount and Ward & Grimes for plaintiff.
MacLean & Rodman and S. Brown Shepherd for Surety Company.

BROGDEN, J. When did the breach of the official bond of Bryan occur?

Ordinarily the statute of limitations which bars recovery upon an official bond, begins to run from the breach thereof. Our decisions have declared with unbroken uniformity that an official bond for the faithful performance of a public duty is breached at the time the officer fails or refuses to perform the required duty. *Commissioners v. MacRae,* 89 N. C., 95; *Daniel v. Grizzard,* 117 N. C., 105, 23 S. E., 93. Generally speaking, the cause of action accrues to an injured party when he is at liberty to sue, being at the time under no disability. *Eller v. Church,* 121 N. C., 269, 28 S. E., 364; *Brown v. Wilson,* 174 N. C., 668, 94 S. E., 419; *Pierce v. Faison,* 183 N. C., 177, 110 S. E., 857; McIntosh, North Carolina Practice & Procedure, page 158, section 170.

When Bryan ceased to be sinking fund commissioner the law imposed upon him the duty to account for funds and securities in his hands. His failure or refusal to do so constituted a breach of his official bond and a cause of action for the enforcement thereof immediately arose to the city, for the reason that it was then at liberty to sue and under no disability. Obviously the breach occurred in 1921, and the action was not instituted until March, 1931. Consequently the trial judge ruled correctly in entering a judgment of nonsuit.

Affirmed.

PRUDENTIAL INSURANCE COMPANY OF AMERICA v. F. J. FORBES, TRUSTEE, AND STATE BANK AND TRUST COMPANY.

(Filed 5 October, 1932.)

Mortgages C c—Held: although mortgage was not indexed in strict compliance with statute defect did not affect its priority.

While the index and cross-index of a conveyance by a husband and wife of the latter's property should set out the name of the wife, where the records would have shown from an examination by the abstractor for a second mortgagee that the mortgagor had acquired the property from

E. T., a married woman, and S. T. her husband, and the cross-index would have shown a deed of trust from "S. T. *et ux.*": *Held*, although the cross-index was not in strict compliance with the statute it was sufficient to have revealed the first deed of trust, and the contention of the trustor in the second deed of trust that his deed constituted a first lien cannot be maintained.

CIVIL ACTION, before *Frizzelle, J.*, at February Term, 1932, of PITT.

The pertinent facts are set out in the judgment and may be stated as follows: On 29 December, 1916, J. B. Hill and others conveyed to Emma J. Tucker, wife of S. D. Tucker, approximately forty acres of land. This deed was duly recorded and cross-indexed as follows:

"Hill, al J. B. to Emma J. Tucker."
"Tucker, Emma J. from J. B. Hill, al."

On 3 January, 1931, Emma J. Tucker and her husband, S. D. Tucker, executed and delivered to F. J. Forbes, trustee, for the benefit of the National Bank of Greenville, a deed of trust to secure a note for $4,000. This deed of trust was duly registered and indexed as follows:

"Tucker, S. D. *et ux.* to F. J. Forbes, Tr."
"Forbes, F. J., Tr. from S. D. Tucker, *et ux.*"

On 6 December, 1921, Emma J. Tucker and her husband, S. D. Tucker, executed and delivered a deed for the land to Leona P. Hudson, which was registered 8 December, 1921, and indexed as follows:

"Tucker, al Emma to Leona Hudson."
"Hudson, Leona P. from S. D. Tucker, *et ux.*"

On 31 July, 1922, Leona P. Hudson and her husband, H. A. Hudson, executed and delivered a deed of trust upon the land to Chickamauga Trust Company, trustee for the benefit of the plaintiff, Prudential Insurance Company of America, to secure a note of $2,000. This deed of trust was duly recorded and indexed as follows:

"Hudson, Leona P. to Chickamauga Tr. Co., Tr."
"Chickamauga Tr. Co. from H. A. Hudson, *et ux.*"

The deed of trust to the Chickamauga Trust Company was foreclosed and the land was purchased by the Prudential Insurance Company. The note secured in the Forbes deed of trust is now held by the defendant, State Bank and Trust Company.

Upon the foregoing facts the plaintiff contends that the deed of trust under which it purchased the land, being the second deed of trust upon the land, constitutes a first lien, for that the Forbes deed of trust was not properly cross-indexed; that is to say the cross-indexing "Tucker, S. D. *et ux.* to F. J. Forbes, trustee," was not a proper indexing of the instrument.

The trial judge ruled that the Forbes deed of trust constituted a first lien upon the land, and the plaintiff appealed.

W. A. Darden for plaintiff.
Harry M. Brown for defendants.

BROGDEN, J. On or about 31 July, 1922, Leona P. Hudson and her husband procured a loan from the plaintiff for $2,000, and secured the same by a deed of trust upon the land of the borrowers to Chickamauga Trust Company, trustee.

When the examiner of the title to the Hudson land undertook to search the records the first inquiry would be: From whom did the Hudsons get the land? The records answered the inquiry by showing that Emma J. Tucker was a married woman and that her husband was S. D. Tucker, because they were the grantors of Leona P. Hudson in a deed indexed on the grantor's side "Tucker al Emma to Leona Hudson." The cross-indexes further disclosed the deed from "J. B. Hill *et al* to Emma J. Tucker, recorded on 30 December, 1916. Consequently the abstractor knew from the index that the land was duly conveyed to Emma J. Tucker, and that S. D. Tucker was her husband. Hence, an examination of the grantor's cross-index would have revealed the deed of trust to Forbes, trustee, securing the $4,000 note to the National Bank of Greenville and indexed "Tucker, S. D. *et ux.* to F. J. Forbes Tr."

The merit of the controversy is determined by the principles of law declared in *West v. Jackson,* 198 N. C., 693, 153 S. E., 257. The Court said: "It must be conceded that the indexing and cross-indexing of the deed of trust in the case at bar is not a strict compliance with the statute, and the registers of deeds throughout the State should doubtless set out on the index and cross-index the name of the wife. There are perhaps hundreds of deeds of trust in the State indexed and cross-indexed in the same manner employed in the present case, and we are not inclined to strike down these instruments as a matter of law, particularly when there was sufficient information upon the index and cross-index to create the duty of making inquiry."

Affirmed.

COUNTY OF JOHNSTON v. G. A. SMITH AND WIFE, MRS. G. A. SMITH.

(Filed 5 October, 1932.)

Judicial Sales A a—Judicial sale on day prohibited by statute is void.

Where in proceedings to enforce the county's lien for unpaid taxes the clerk of the court orders a resale "according to statute," and the statute applicable to judicial sales in the county prescribes that such sales be had on certain days during term of the Superior Court, and the resale is had on a day other than the days prescribed by the statute: *Held*, the resale is void, and the parties should be put *in statu quo*, and another sale for the enforcement of the tax lien may be ordered. Public Laws of 1931, chap. 23.

APPEAL by defendants from *Grady, J.*, at ..... Term, 1932, of JOHNSTON. Reversed.

This is an action brought by plaintiff against defendants to foreclose a tax lien on defendants' real estate, assessed for the year 1927. Upon motion of defendants, movants, before the clerk of the Superior Court of Johnston County, North Carolina, the judgment was vacated and the parties placed *in statu quo,* and a resale of the land for the taxes of 1927 ordered. An appeal from this judgment was taken to the Superior Court and the judgment of the clerk was set aside by the court below, and the motion of defendants dismissed. From this judgment, defendants excepted, assigned error and appealed to the Supreme Court.

Leon G. Stevens for Mrs. Alma G. Gray, purchaser.
I. Weisner Farmer and Winfield H. Lyon for defendants.

CLARKSON, J. Public Laws of 1931, chapter 23, is as follows: "That section six hundred ninety of the Consolidated Statutes of North Carolina be and the same is hereby amended to read as follows: 'All real property sold under execution shall be sold at the courthouse door of the county in which all or a part of the property is situated on the first Monday in any month or during the first three days of any term of the Superior Court of said county. That all sales of real property sold under order of court shall be sold at the courthouse door in the county in which all or any part of the property is situated on any Monday in any month or during the first three days of any term of the Superior Court of said county, unless in the order directing such sale some other place and time are designated and then it shall be sold as directed in such order on any day except Sunday after advertising as

required by law. That all sales heretofore made under execution or by order of court on any day other than the first Monday in any month are hereby validated, ratified and confirmed, *provided* this act shall not affect pending litigation.'"

From a careful inspection of the record, the resale was not in accordance with the above statute. The land was sold on Wednesday, 15 June, 1932, which was not "during the first three days of any term of the Superior Court of said county." Nor was there an order in the cause "directing such sale some other place and time as designated and then it shall be sold as directed in such order on any day except Sunday after advertising as required by law."

The order of the clerk in reference to the sale in controversy was on 30 May, 1932, and was as follows: "Now, therefore, it is ordered, considered and adjudged that Ed. F. Ward, commissioner, advertise said land for resale in some newspaper published in Johnston County, *as provided by statute.*"

It is well settled that execution sales made at an improper time and place are void. *Mayers v. Carter,* 87 N. C., 146; *Dula v. Seagle,* 98 N. C., 458. A sale of real estate under execution made on a date other than one prescribed by statute is absolutely void. *Lowdermilk v. Corpening,* 101 N. C., 649. The sale was "dead in law," *Jeffreys v. Hocutt,* 193 N. C., 332. See *Ricks v. Brooks,* 179 N. C., 204. *Chief Justice Ruffin,* in *S. v. Rives,* 27 N. C., at p. 314, says: "Of such a regulation, every one must be cognizant and therefore we have held, that the purchaser gets no title by a sale at an improper time and place," citing authorities.

Freeman on Void Judicial Sales, 3d ed., sec. 30, at p. 56, in part: "Of course no judicial or execution sale ought to take place at any other time than that fixed by the notice of sale; and the notice of sale ought not to fix upon any time prohibited by law. A sale made in violation of this rule will, no doubt, be vacated or refused confirmation if the irregularity is suggested to the court at the proper time. It is not, however, void in most states," citing Freeman on Executions, sec. 287; *contra, Mayers v. Carter, supra.*

What occurred thereafter did not resuscitate this sale, which was void—in fact no sale—and contrary to and in the very "teeth of the statute." This is an action to foreclose a *tax lien,* the purchaser Alma G. Gray's bid for the land was $275.00. The record discloses that this home place of defendants was taxed at a valuation of $3,850. Under the facts and circumstances of this case, we think the purchaser must take cognizance of the statute, and the pretended sale was ineffectual to pass title for the reasons given.

In reference to a former statute dealing with tax sales, this Court said in *Bryson v. McCoy,* 194 N. C., at p. 97: "Under the statute, a good tax title can be obtained by sale, but the statute must be strictly followed."

The tax for 1927 is a lien on the land—the parties must be put in *statu quo.* The land can be sold again for the tax by complying with the statute. The judgment of the court below is

Reversed.

R. E. MARKS ET AL. v. KATE S. McLEOD ET AL.

(Filed 5 October, 1932.)

1. **Principal and Agent C a—Where wife ratifies husband's contract to sell by executing deed it is presumed he acted as her agent.**

   Where a husband has contracted for the sale of timber growing on his wife's land and both of them later execute a deed therefor it will be presumed that he acted as her authorized agent in executing the contract.

2. **Limitation of Actions E c—Where statute is properly pleaded burden is on plaintiff to show his claim is not barred.**

   Where in an action for breach of contract for the conveyance of certain timber on lands the plaintiff seeks to recover on the ground that the deed executed pursuant to the contract did not convey the full acreage agreed upon, and the defendant pleads the statute of limitations and contends that the deed conveyed the timber by metes and bounds and that the plaintiff should have discovered the alleged shortage upon delivery of the deed: *Held,* upon the proper pleading of the statute the burden was upon the plaintiff to show that his claim was not barred, and where he has failed to do so the defendant is entitled to the benefit of the statute, and where this result has been reached in the trial court by judgment of nonsuit the judgment will be affirmed on appeal.

APPEAL by plaintiffs from *Grady, J.,* at July Term, 1932, of LEE.

Civil action to recover damages for alleged breach of contract.

On 15 March, 1915, Alf. H. McLeod agreed to sell the plaintiffs all of the timber, measuring 10 inches at the butt, "located on my places in Lee County, known as the 'Old McLeod Place.'" Title to the property was at that time in Kate S. McLeod.

It is alleged that the "Old McLeod Place" consisted of two tracts of land, one containing 631 acres and the other 50 acres.

On 20 March, 1915, Alf. H. McLeod and wife, Kate S. McLeod, executed a deed to the plaintiffs for the timber on the lands mentioned in the contract of sale, describing it by metes and bounds.

It is alleged that by inadvertence, fraud or mistake, the 50-acre tract was omitted from the description in the deed.

It appeared upon the trial that the 50-acre tract was owned by Geo. B., A. H. and Alf. H. McLeod jointly at the date of the contract and deed and that Kate S. McLeod conveyed the timber thereon to D. J. Womack, after plaintiffs' grantee had been stopped from cutting the timber on said tract in July, 1917.

The defendant denied the allegation of inadvertence, fraud, or mistake, and pleaded the three years statute of limitations.

This action was instituted by issuance of summons dated 9 July, 1919.

From a judgment of nonsuit, the plaintiffs appeal.

K. R. Hoyle for plaintiffs.

John B. McLeod and Varser, Lawrence, McIntyre & Henry for defendant.

STACY, C. J. That Alf. H. McLeod was acting as agent of his wife in signing the contract of sale may be presumed from the subsequent ratification or execution of the deed undertaking to convey the timber in accordance with the prior agreement. *Starkweather v. Gravely,* 187 N. C., 526, 122 S. E., 297. But it is doubted whether the evidence shows the 50-acre tract was intended to be included in the contract of sale. The description in the deed is by metes and bounds, and it is not included therein. Plaintiffs say they did not know of its omission from the deed until their grantee was stopped from cutting the timber in July, 1917.

Defendant says the 50-acre tract was never intended to be included in the contract, or deed; that there was no mistake or fraud in the transaction; that the plaintiffs knew, or by the exercise of ordinary care should have discovered, upon the delivery of the deed, that it was insufficient to convey said tract, and that she is entitled to the equitable repose and beneficent peace which the three years statute of limitations gives her.

The defendant's position is supported by the decisions in *Sinclair v. Teal,* 156 N. C., 458, 72 S. E., 487, and *Peacock v. Barnes,* 142 N. C., 215, 55 S. E., 99.

The defendant having pleaded the statute of limitations, the burden was on the plaintiffs to show that their suit was brought within three years from the time of the accrual of the cause of action or that otherwise it was not barred. This has been the prevailing rule with us as to the burden of proof where the statute of limitations is properly pleaded. *Phillips v. Penland,* 196 N. C., 425, 147 S. E., 731; *Jackson v.*

Harvester Co., 188 N. C., 275, 124 S. E., 334; *Rankin v. Oates*, 183 N. C., 517, 112 S. E., 32; *Tillery v. Lumber Co.*, 172 N. C., 296, 90 S. E., 196.

A careful perusal of the record leaves us with the impression that the correct result has been reached.

Affirmed.

ROBERT S. MOYE AND MRS. LUCY G. MOYE v. THE TOWN OF GREENVILLE.

(Filed 5 October, 1932.)

1. **Actions B e—Action in this case was for trespass by city and not for damages for taking property for public use.**

   Where in an action against a city the complaint alleges that the city had trespassed upon the plaintiff's land and seeks to recover damages therefor, and the city admits that it had never condemned the property but contends that it was dedicated to public use by the plaintiff's grantor and that it had acquired title by adverse user and that the action was barred by the statute of limitations: *Held*, a provision in the city charter prescribing certain procedure for the taking of land for city streets by condemnation has no application since such charter provisions contemplate only the taking of property for public use by formal action of the city, and the city's motions to dismiss for want of jurisdiction in that the charter procedure had not been followed and for want of the complaint to sufficiently allege a cause of action are properly overruled.

2. **Trial D a—Motion of nonsuit must be renewed at close of evidence in order to be considered on appeal.**

   Where a motion as of nonsuit is not renewed at the close of all the evidence it need not be considered on appeal.

3. **Evidence H a—Testimony in this case held incompetent as hearsay.**

   In an action against a city for trespass to private lands testimony by the plaintiff that the mayor of the town, who was not a witness, had told her that if she would defer the action for a certain time he was sure that he could get her claim approved is held incompetent as hearsay evidence and constituted prejudicial error upon the city's exception and appeal.

APPEAL by defendant from *Cranmer, J.*, at March Term, 1932, of PITT. New trial.

The plaintiffs filed a complaint alleging that they are the owners of a lot in the town of Greenville, that the defendant, without right, title, or authority, trespassed thereon, and that they are entitled to damages. The jury returned the following verdict:

1. Is the claim of the plaintiffs barred by the statute of limitations? Answer: No.

2. Was the plaintiffs' land taken by the defendant as alleged in the complaint? Answer: Yes.

3. What damage, if any, is the plaintiffs entitled to recover? Answer: $1,250.

Judgment for the plaintiffs, from which, upon exceptions, the defendant appealed.

J. C. Lanier for appellant.
Gaylord & Harrell for appellees.

ADAMS, J. At the beginning of the trial in the Superior Court the defendant moved to dismiss the action for want of jurisdiction in the court and of sufficient allegations in the complaint.

The plea to the jurisdiction is based upon certain paragraphs in the amended and consolidated charter of the defendant. Private Laws 1899, chap. 155; Private Laws 1909, chap. 18. It is there provided that when in the opinion of the board of aldermen it shall become necessary to open any new street or to reopen an old one, or to repair, enlarge, or extend one already open or in use, and it shall become necessary to take, use, or condemn any private property for such purpose, or for any other public purpose, the board of aldermen may enter upon and take possession of such needed property; also, that if the parties cannot agree upon the damages the board, the owner, or the claimant of the property may file a petition before the clerk of the Superior Court and have the damages assessed.

This provision contemplates the taking of property for public use by formal action of the board of aldermen. The plaintiffs allege a trespass and seek to recover damages. The defendant admits that it has never condemned the property or exercised the right of eminent domain, but alleged that E. A. Moye, Sr., dedicated the property to public use, that it has acquired an easement by adverse user, and that the action is barred by the statute of limitations. There was, therefore, no defect of jurisdiction. It is no less obvious that the complaint states a cause of action. The motion for nonsuit was not renewed at the conclusion of the evidence and need not be considered. The court was correct in refusing the defendant's motions.

The record, however, shows an exception to the admission of incompetent evidence which, apparently of slight import, may have been prejudicial to the defense. Mrs. Moye, one of the plaintiffs, testified that the mayor of the town, who was not a witness, requested, or at least suggested, that her attorney defer for thirty days the presentation of her claim to the board of aldermen, saying "he was sure he could get

the board to act in her favor, but . . . he thought they would turn her down unless he postponed it."

This testimony, uncontradicted and unexplained, no doubt tended to create the impression that a prominent officer of the town, presumably in touch with the administration of municipal affairs, favored the allowance of the plaintiffs' claim and that he would actively put forth his efforts and influence in her behalf. It is not unreasonable to infer that this fact may have materially affected the mind of the jury. The statement was not the testimony of the mayor when subject to cross-examination; it was hearsay, and for this reason it should have been excluded.

New trial.

MEADOWS FERTILIZER COMPANY v. FARMERS TRADING COMPANY ET AL.

(Filed 5 October, 1932.)

Pleadings I b—Judgment may be entered for that part of note admitted to be due without prejudice to right of plaintiff to litigate balance.

Where in an action on a note the defendants admit liability in a certain part thereof but deny liability for the balance: *Held*, an order directing that plaintiff recover the amount admitted to be due without prejudice to plaintiff's right to litigate the balance of the note is authorized by C. S., 865, and the order will be affirmed on defendants' appeal therefrom.

APPEAL by defendants from *Cranmer, J.*, at December Term, 1931, of CRAVEN.

Civil action to recover on a promissory note of $893.65 given to the plaintiff by the defendant, Farmers Trading Company, Incorporated, and endorsed and guaranteed by the individual defendants, officers and stockholders of the defendant company.

The defendants, in their answer, admit the execution of the note, but contend that they were to pay no more for the fertilizer purchased than the same grade would have cost had it been bought from the Contentnea Guano Company. Under this alleged contemporaneous, oral agreement, it is asserted the true amount due the plaintiff is $192.66, and the defendants tender judgment for this amount, and no more.

Upon the pleadings it was adjudged that the plaintiff recover of the defendants the sum of $192.66, with interest, the amount admitted to be due, without prejudice to the plaintiff's right to prosecute its suit on the balance of the note in controversy.

From this order, the defendants appeal, assigning error.

Kenneth C. Royall and Andrew C. McIntosh for plaintiff.
Connor & Hill for defendants.

STACY, C. J. We are not now concerned with whether the defendants will be permitted to show upon the hearing the alleged contemporaneous oral agreement as to the price to be paid for the fertilizer. *Walker v. Venters,* 148 N. C., 388, 62 S. E., 510.

The appeal presents the correctness of the order directing that plaintiff recover of the defendants the amount admitted to be due without prejudice to the plaintiff's right to litigate the balance of the note.

The statute under which the order was made, C. S., 865, provides that when the answer "expressly, or by not denying, admits part of the plaintiff's claim to be just, the judge, on motion, may order the defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy."

In *Parker v. Bledsoe,* 87 N. C., 221, on facts closely akin to those here appearing, an order was entered which directed that the plaintiff recover of the defendants the amount admitted to be due and retained the action for further hearing on the balance of plaintiff's claim. This was the procedure followed in the instant case. The order is authorized by the statute. 34 C. J., 143.

Affirmed.

E. T. RUSSELL, ADMINISTRATOR OF D. S. OWEN, DECEASED, v. VIOLET RUSSELL OWEN, WIDOW, J. E. OWEN AND WIFE, MORAN OWEN, A. G. OWEN AND WIFE, GEORGIANA OWEN, A. L. OWEN AND WIFE, DOCIA OWEN, FODIE OWEN CAIN AND HUSBAND, EMMETT CAIN, BLANCHE OWEN HOWELL AND HUSBAND, CHARLIE HOWELL, CLYDE OWEN SMITH AND HUSBAND, W. C. SMITH, VASHTI OWEN SYKES AND HUSBAND, D. A. SYKES.

(Filed 5 October, 1932.)

1. Insurance N a—Where policy is assigned by insured and beneficiary, proceeds are payable to beneficiary subject to rights of assignee.

Where a policy of life insurance provides that the beneficiary therein named might be changed at the option of the insured, the beneficiary has a contingent interest therein which becomes vested upon the death of the insured without having changed the beneficiary, and an assignment of the policy by the insured and beneficiary to a creditor of the insured does not change the beneficiary's interest therein, in such case upon the death of the insured the proceeds are the property of the beneficiary payable to her subject to the rights of the assignee, and where the beneficiary is the wife of the insured she takes the proceeds free from claims of all other creditors of the insured's estate, Constitution, Art. X, sec. 7, C. S., 6464.

2. Executors and Administrators B a—Widow has claim against husband's estate for amount paid assignee of policy in which she is beneficiary.

Where a husband and wife execute a note and mortgage on his lands for money borrowed by him from an insurance company and the husband takes out two policies of life insurance with the company and names his wife as beneficiary thereof, and the husband and wife assign the policies to the insurance company with the provision that the proceeds thereof should be used first to pay off the balance of the loan and the surplus paid to the wife as beneficiary: *Held*, upon the death of the husband the proceeds of the policy are payable to the wife free from the claim of the creditors of his estate subject to the rights of the insurance company as assignee, and where the insurance company has paid the amount of the loan out of the proceeds the wife has a claim against the estate for the amount thereof, and is subrogated to the rights of the insurance company for its payment. C. S., 3964.

APPEAL by plaintiff and defendant, Violet Russell Owen, from *Grady, J.*, at Chambers, in Halifax, N. C., on 30 March, 1932. Reversed.

This is a special proceeding for the sale of land to create assets for the payment of the debts of plaintiff's intestate, as set out in the petition.

Defendants, heirs at law of plaintiff's intestate, in their answer to the petition, deny that the estate of said intestate is indebted to his widow, Violet Russell Owen, in the sum of $7,269.93, as alleged therein.

The proceeding was transferred to the civil issue docket of the Superior Court of Vance County for trial of the issues raised by the pleadings. C. S., 758.

When the proceeding was called for trial, judgment was rendered as follows:

"This cause came on for hearing at the March Term, 1932, of the Superior Court of Vance County, whereupon a jury trial was waived, and it was agreed by and between the parties that the presiding judge might hear the evidence, find the facts, and render judgment thereon, as in his opinion the facts would justify.

Thereupon evidence was offered by both the plaintiff and the defendants, and the facts found by the court as follows:

1. Delagnier S. Owen, the former husband of Violet Russell Owen, is dead; E. T. Russell has qualified as administrator upon his estate, and the defendants other than Violet Russell Owen, are the only heirs at law of the said Delagnier S. Owen, deceased.

2. On 13 March, 1929, Delagnier S. Owen borrowed from the Equitable Life Assurance Society of the United States the sum of $6,000, for which he and his wife, Violet Russell Owen, executed their bond of said date, which bond is made a part of this finding of fact. It is stipulated in said bond that all of the terms, covenants, conditions, provisions,

stipulations and agreements made by the said Owen and wife in a deed of trust collateral thereto, are made a part of said bond to the same extent and of the same effect as if the same were fully set forth therein.

In order to secure said bond, on the same date, the said Delagnier S. Owen and wife executed to J. F. Zollicoffer, trustee, a deed of trust on certain lands belonging to the said Delagnier S. Owen, situate in Vance County, which deed of trust appears of record in Book 113, at page 410, in the office of the register of deeds of Vance County, and is made a part of this finding of fact.

It is provided in said deed of trust that the Equitable Life Assurance Society of the United States should issue a policy of insurance upon the life of the said Delagnier S. Owen in the sum of $6,000, with Violet Russell Owen as beneficiary therein; and it is further provided in the 10th article of said deed of trust: 'That if the said policy of life insurance be still in force, said loan and this deed of trust shall become immediately due and payable upon the death of the insured, and the party of the third part (the Life Assurance Society) shall apply toward the payment thereof the amount due from it under the terms of said policy, and pay over the balance, if any, to such person or persons as may be legally entitled thereto.'

3. A policy of insurance was issued by said Equitable Life Assurance Society of the United States as hereinbefore stated, which policy was dated 1 April, 1929, and payable in the event of the death of Delagnier S. Owen to his wife, Violet Russell Owen. Said policy contains the following stipulation: 'With the right to the insured to change the beneficiary or assign this policy.'

The said policy was thereupon assigned by the said Delagnier S. Owen and Violet Russell Owen to the Equitable Life Assurance Society of the United States as security for the loan of $6,000.

The policy of insurance, the assignment thereof, and attached papers are all made a part of this finding of fact.

4. On 11 June, 1929, Delagnier S. Owen borrowed from the Equitable Life Assurance Society of the United States the further sum of $2,000, and on said date he and his wife executed their bond in the same language and with like provisions as contained in the first bond hereinbefore referred to; said bond also contained provision for the issuance of a policy of insurance upon the joint lives of Delagnier S. Owen and Violet Russell Owen, payable to the survivor, in the sum of $2,000; said bond was secured by a deed of trust duly executed by the said Owen and wife to J. F. Zollicoffer, trustee, which deed of trust appears of record in Book 113, at page 432, in the office of the register of deeds of Vance County, and is made a part of this finding of fact.

5. Thereupon in conformity with the provisions of said deed of trust, the said Equitable Life Assurance Society of the United States issued its policy of insurance in the sum of $2,000, upon the joint lives of Delagnier S. Owen and Violet Russell Owen, payable to the survivor of them, and in said policy it is stipulated that the right to the insured jointly to change the beneficiary or assign the policy is reserved.

Thereupon said policy was duly assigned by the said Owen and wife to the said Equitable Life Assurance Society of the United States, which assignment is made a part of this finding of fact.

It will be noted that both deeds of trust contain the provision that in the event of the death of the insured the proceeds from said policies shall be applied to the payment of the debt secured thereby, and the balance paid over to the person entitled thereto.

6. Delagnier S. Owen was killed in an automobile wreck on 26 December, 1930, and thereupon the Equitable Life Assurance Society of the United States paid to itself the full amount due on said two bonds, and marked the same 'canceled'; and paid over to Violet Russell Owen the balance due under said policies over and above the amount of said bonds, with accrued interest.

7. It is alleged by the defendant, Violet Russell Owen, that the amount due on said bonds, to wit: $7,269.93, which was paid out of said insurance money, was her property, because she was named as beneficiary in said two policies of insurance, and she prays the court to enter a decree that she is subrogated to the rights of the insurance company under said two deeds of trust, or if the court is not of that opinion, that she be declared an unsecured creditor of her husband's estate in said amount."

The court was of opinion upon the foregoing facts that Violet Russell Owen is not a creditor of the estate of her husband, Delagnier S. Owen, deceased, in the sum of $7,269.93, and is, therefore, not entitled to be subrogated to the rights of the Equitable Life Assurance Society of the United States under the deeds of trust executed by her said husband to J. F. Zollicoffer, trustee.

From judgment in accordance with this opinion, the plaintiff and the defendant, Violet Russell Owen, appealed to the Supreme Court.

D. P. McDuffie for plaintiff.

J. A. Spence for defendant, Violet Russell Owen.

J. M. Peace for defendants, heirs at law.

CONNOR, J. In both the policies of insurance issued by the Equitable Life Assurance Society of the United States, on the life of her husband,

Delagnier S. Owen, the defendant, Violet Russell Owen, his wife, was named as beneficiary. She was so named at the date of the issuance of the policies. In each policy the right to change the beneficiary at any time while the policy was in force, in accordance with its terms and provisions, was reserved to the insured. In neither case, however, was this right exercised or attempted to be exercised by the insured while the policy was in force. Therefore, at the death of the insured, the proceeds of both policies, but for the assignments executed by both the insured and the beneficiary, were payable to Violet Russell Owen, as the beneficiary named in the policies. Her right to the proceeds of the policies, while contingent during the life of her husband upon a change by him of the beneficiary, became vested at his death.

In *Parker v. Potter,* 200 N. C., 348, 157 S. E., 68, it is said: "This proposition calls for a determination of the deceased wife's interest in the contract. Was it vested or contingent? If she had an unconditional vested right, her status was such that the insured could not destroy her interest without her consent, except as he could destroy his own right or interest by a forfeiture of the policy. *Conigland v. Smith,* 79 N. C., 303, modified in *Hooker v. Sugg,* 102 N. C., 115. In an ordinary policy of life insurance, the beneficiary acquires a vested interest from the time the insurance takes effect, if in the contract there is no stipulation reserving to the insured a right to change the beneficiary, assign the policy or divert the proceeds, unless the language of the policy is inconsistent with a vested interest. *Herring v. Sutton,* 129 N. C., 107. *Lanier v. Insurance Co.,* 142 N. C., 14; *Wooten v. Order of Odd Fellows,* 176 N. C., 52; *Lockhart v. Insurance Co.,* 193 N. C., 8. This principle, however, does not prevail when the right or interest of the particular beneficiary is subject to be changed or to be defeated under the terms of the contract by which it was created. *Wooten v. Order of Odd Fellows, supra; Pollock v. Household of Ruth,* 150 N. C., 211. If thus subject to be changed or defeated, the interest of the beneficiary is not property but a mere expectancy which cannot ripen into a vested interest before the death of the insured."

In the instant case, no change of beneficiary having been made by the insured while the policies were in force, the interest of Violet Russell Owen, as beneficiary named in each policy at the time it was issued, ceased to be contingent upon the death of the insured; upon his death, it ripened into a vested interest, with the result that, subject only to the rights of the creditor of the insured, the Equitable Life Assurance Society of the United States, under the assignments executed while the policies were in force, by both the insured and the beneficiary, the proceeds of the policies became and were the property of Violet Russell

Owen, free from all the claims of the representatives of her husband or any of his creditors (Const. of N. C., Art. X, sec. 7, C. S., 6464, *Pearsall v. Bloodworth,* 194 N. C., 628, 140 S. E., 303), except the claims of the Equitable Life Assurance Society of the United States, as assignee of the policies. In *Pearsall v. Bloodworth, supra,* it is said there is a well recognized distinction in law between the assignment of a policy and a change of beneficiary, certainly where the policy itself delegates the power to change the beneficiary at the option of the insured. In the instant case, the claim of the Equitable Life Assurance Society to the proceeds of the policies was as assignee and not as beneficiary.

The policies were assigned by the insured and the beneficiary, jointly, to the Equitable Life Assurance Society, as additional security for bonds executed by the insured as principal, and the beneficiary as surety. These bonds were also secured by deeds of trust on lands owned by the insured. After the death of the insured, the bonds were paid out of the proceeds of the policies of insurance. Thus the property of the surety, with her consent, was applied to the payment of the bonds on which the insured was liable as principal. By reason of these facts, the defendant, Violet Russell Owen, became a creditor of the estate of her husband, plaintiff's intestate, in the amount due on the bonds, and paid out of her property, to wit: $7,269.93. As such creditor, she is entitled to be subrogated to all the rights of the Equitable Life Assurance Society under the deeds of trust which Delagnier S. Owen had executed to convey the bonds thereby. C. S., 3964 and cases cited.

There is error in the judgment with respect to the rights of Violet Russell Owen as a creditor of the estate of plaintiff's intestate. For this reason, the judgment is

Reversed.

COUNTY OF HARNETT v. M. C. REARDON AND WIFE, CALLIE REARDON.

(Filed 5 October, 1932.)

1. Taxation H c—Held: all parties in interest were made parties to the action by consent upon motion to set aside tax foreclosure sale.

Where on a motion to set aside a tax foreclosure sale the clerk orders that the mortgagees of the property be made parties to the action and on appeal to the Superior Court the judge finds as a fact that the appeal was heard by consent of all parties in interest: *Held,* all parties having an interest in the land were parties to the action by consent and the contention of the purchaser at the tax foreclosure sale that they were not parties cannot be sustained.

2. Judgments K d: K f—Irregular judgment is one entered contrary to usual course and practice and may be set aside by motion in cause.

An irregular judgment is one entered contrary to the usual course and practice of the courts and may be set aside in proper instances by motion in the original cause, and where the irregularity does not go to the court's jurisdiction whether the judgment will be set aside will be determined by the promptness with which the application is made and whether the applicant was prejudiced by the irregularity.

3. Taxation H c—Tax sale in this case is set aside for irregularity.

Where, in a suit to foreclose a tax certificate, the complaint alleges that there were mortgage liens existing against the property and that the county was entitled to have the owner's equity of redemption sold to satisfy the taxes due and prays that the equity of redemption be foreclosed, and the final judgment decrees that the sale be approved and that the commissioner make deed in fee simple to the purchaser upon payment of the purchase price, and it further appears that the land had been sold under one of the mortgages prior to the tax foreclosure sale and that the purchaser at the mortgage foreclosure sale had asked at the county auditor's office whether there were any taxes due on the property and was informed that there were none, and that the mortgagees were not served with summons and had no actual knowledge of the tax foreclosure sale: *Held*, the complaint in the tax foreclosure proceedings and the decree therein were at variance and the rights of the mortgagees were not affected thereby, and the sale was ineffectual because the owner's equity of redemption had been foreclosed prior to the tax sale foreclosure and the purchaser at the sale had record notice thereof or in the exercise of due care should have discovered the fact, and the tax sale should have been set aside and the parties put *in statu quo* upon motion in the original cause by the mortgagees and purchaser of the equity of redemption, the motion having been made in apt time, and the decree being irregular.

4. Courts A c—Where equitable proceeding is improvidently brought before clerk, Superior Court may retain control on appeal to it.

Where an equitable proceeding is brought before the clerk who is without equitable jurisdiction, and the cause is appealed to the Superior Court, the latter court may retain control of the case and make all necessary orders as though the case were regularly pending.

APPEAL by defendants from *Cowper, J.*, at Special April Term, 1932, of HARNETT. Reversed.

This is an action brought by plaintiff against defendants to foreclose a tax lien on defendants' real estate assessed for the year 1927. This was a motion in the cause made by M. C. Reardon and wife Callie Reardon, W. E. Nichols and the Federal Land Bank of Columbia, S. C., to vacate the judgment theretofore rendered on the ground that it was an irregular judgment rendered contrary to the course and practice of the court. The clerk found the facts and set the judgment aside. An appeal was taken by G. D. Woodley, the purchaser at the tax sale, to the Superior Court,

and the court below rendered judgment reversing the judgment of the clerk. The movants duly excepted and assigned error to the judgment as signed, and appealed to the Supreme Court.

B. F. McLeod and L. L. Levinson for M. C. Reardon and wife Callie Reardon and W. E. Nichols.

J. R. Baggett for Federal Land Bank of Columbia, S. C.

R. L. Godwin for G. D. Woodley, respondent.

CLARKSON, J. We think the judgment of foreclosure in the action of plaintiff against the defendant, of the lien for taxes of 1927, was irregular and contrary to the course and practice of the court, and the judgment of the court below should be reversed.

The evidence is to the effect that M. C. Reardon and wife Callie Reardon owned a tract of land of about 70 acres, in Harnett County, North Carolina, worth some $3,000, or more, which was purchased under a tax foreclosure sale by G. D. Woodley for $175.20. The land was sold for 1927 tax, which was a first lien on the land. There were two other liens on this land: (1) Federal Land Bank of Columbia, S. C., for $1,500, (2) under the second lien W. E. Nichols purchased the land from E. T. Dupree, trustee at the trustee sale on 20 February, 1928, the deed to same was duly registered on 5 March, 1928, in Book 222 at p. 599 in the register of deeds office of Harnett County, North Carolina. The said Nichols took possession of the land which he rented to the defendants Reardons. In the foreclosure action brought by plaintiff thereafter against the Reardons to foreclose the tax liens, neither the Land Bank nor Nichols had any summons or complaint served on them, nor did they have actual notice of said action.

In this action the record discloses that the clerk made the following order, which is not excepted to: "It is further ordered, adjudged and decreed that W. E. Nichols, the Federal Land Bank of Columbia, Columbia, S. C., and G. D. Woodley, be and they are hereby made parties to this suit, to the end that they and each of them may file such pleadings as they may be advised."

The judgment of the court below sets forth the fact that "said appeal being heard by consent of all parties in interest, who were either present in person or represented by attorneys."

From the record it appears that all the interested parties to this controversy were before the court. They were before the clerk on the motion of the movants unexcepted to, and on appeal to the Superior Court the matter was heard by consent of all the parties in interest. They are all parties to the action by consent, and the contention of Woodley, the

purchaser at the tax sale, respondent, that they are not parties, cannot be sustained.

In *Fowler v. Fowler,* 190 N. C., at p. 539, citing numerous authorities, is the following: "An irregular judgment can be set aside by direct attack—motion in the cause by a party thereto—within any reasonable time and ordinarily showing merit." And further: "A judgment is said to be irregular whenever it is not entered in accordance with the practice and course of proceeding where it is rendered. The irregularities which have been treated as sufficient to justify the vacations of judgments are very numerous, and it is not possible to prescribe any test by which, in all jurisdictions, to determine whether or not a particular irregularity is such as to require the vacation of a judgment. When the irregularity does not go to the jurisdiction of the court, its action will be largely controlled by the promptness with which the application is made, and by the consideration whether or not the irregularity is one which could have operated to the prejudice of the applicant." 1 Freeman on Judgments, 5th ed., part sec. 218; *Wolfe v. Davis,* 74 N. C., 597; *Duffer v. Brunson,* 188 N. C., 789.

We think, upon a careful examination of the record, that the judgment is irregular and contrary to the course and practice of the court. From the complaint in the action we find that it was brought to foreclose a tax lien then amounting to $48.36 on the land in controversy, but the complaint alleges: "That an inspection of the public records of Harnett County discloses that the defendants other than M. C. Reardon *have liens on the lands* described in paragraph 2 of the complaint. . . . That the plaintiff, county of Harnett, is entitled to have *the equity of redemption of the defendants in the above described lands* foreclosed and forever barred, and to have a commissioner appointed to sell so much of the above mentioned lands as the court deems necessary to pay the said sums due on said certificate of sale, and the cost of this action, including one reasonable attorney's fee. Wherefore, the plaintiff does pray judgment as follows: . . . That the *equity of redemption of the defendants* in the lands referred to in paragraph 2 of the complaint be foreclosed and forever barred and that a commissioner be appointed to sell so much of the said lands as the court deems necessary to pay the aforesaid sum and the cost of this action."

The final decree, in part, reads: "It is, therefore ordered, adjudged and decreed that the said report and sale be and the same are hereby in all respects approved and confirmed and the said commissioner upon the payment of the purchase price be and he is hereby authorized and instructed to make and deliver a deed in fee simple for the said lands to G. D. Woodley, successors and assigns."

A deed under this decree was duly made to G. D. Woodley, the respondent, who now claims the land in fee simple, free and clear of all encumbrances, and a writ of assistance was issued to place Woodley in possession of the land. This was contrary to the allegations of the complaint, which only prayed that the equity of redemption of the defendants be foreclosed. It in no way affected the rights of the Federal Land Bank or Nichols, nor were they ever served with summons and complaint or had actual notice of the action. In fact, the sale is ineffectual, as the record discloses that Nichols had purchased the equity of redemption before it was sold in the action of the county of Harnett against the Reardons for tax lien. The purchaser, Woodley, either had record notice or in the exercise of due care should have discovered that he was buying a "pig in a poke."

In Jones on Mortgages, Vol. 2, 8th ed., part sec. 1325, p. 788, we find: "Although the mortgagor had forfeited his estate at law, courts of equity allowed him to redeem his estate within a reasonable time, upon payment of the debt and all proper charges, and this right was called an equity of redemption."

In *Stevens v. Turlington,* 186 N. C., at p. 194-5, *Stacy, J.,* for the Court, says: "The decisions in this State are to the effect that, as between the mortgagor and the mortgagee, the legal title to the mortgaged premises is vested in the mortgagee, while the mortgagor is looked upon as the equitable owner of the land. This relative position continues until the land is redeemed or until the mortgage is foreclosed. Prior to the day of redemption, or condition broken, the mortgagor may pay the money according to the terms of his contract, and thus avoid the conveyance at law. This is termed his legal right of redemption. After the special day of payment has passed, or default suffered, the mortgagor still has the right to redeem at any time prior to foreclosure. This is called his equity of redemption; and such right is regarded as a continuance, and not a change, of his old estate."

Bispham's Principles of Equity, 10th ed., part sec. 151, p. 256, has the following: "This equity of redemption existed not only in favor of the mortgagor, but also of other parties claiming under him. Thus the heir, the devisee or the alienee (even though a volunteer) of the mortgagor, may redeem. So, also, may a subsequent mortgagee, or judgment creditor, or the crown, or the lord of the fee, on forfeiture. A tenant for life or for years, a remainderman, a reversioner, a tenant by the curtesy, or by devise, and a jointress may all redeem; and, in general, it may be said that this right exists in favor of any one who has an interest in the land, and would be a loser by foreclosure. But where a party is not affected by the mortgage, there is no occasion for redeeming, and he is not allowed to do so." To be sure plaintiff had a first lien in the land

for the tax, but the complaint was bottomed on the sale of the equity of redemption to pay same. The defendant Nichols bought this equity of redemption under the second deed of trust subject to the Land Bank.

Another important fact appears of record—that Nichols, subsequent to taking the deed and about the time he had it recorded, went to the county auditor's office, where the records of all back taxes were kept, and in company with a member of the board of county commissioners, inquired of the assistant auditor in charge as to any back taxes due against M. C. Reardon and Callie Reardon on the lands in controversy; the said W. E. Nichols, after the assistant auditor looked the record over, was informed by the officer that there were no unpaid taxes on the said lands in controversy for 1927, or any other year. That W. E. Nichols was able and ready to pay any taxes which were reported to him and that that was the purpose of his inquiry at the auditor's office of the plaintiff county of Harnett. That W. E. Nichols has paid all subsequent taxes except for 1931 upon the property in controversy and is now holding said property under his deed which he received from F. T. Dupree, trustee.

Although the clerk has no equitable jurisdiction, this action is now on appeal in the Superior Court, and it is held that where an equitable proceedings, brought before the clerk, who has no equity powers, is pending on appeal in a court having equity jurisdiction, the Supreme Court will permit the latter to retain control of the case, and make all necessary orders as though the case were regularly pending. *Smith v. Gudger,* 133 N. C., 627.

Equity: "In its broadest and most general signification, this term denotes the spirit and the habit of fairness, justness, and right dealing which would regulate the intercourse of men with men—the rule of doing to all others as we desire them to do to us; or, as it is expressed by Justinian, 'to live honestly, to harm nobody, to render to every man his due.' Inst. 1, 1, 3. It is therefore the synonym of natural right or justice. But in this sense its obligation is ethical rather than jural, and its discussion belongs to the sphere of morals. It is grounded in the precepts of the conscience, not in any sanction of positive law."

The judgment is irregular, of which the purchaser either had record notice or in the exercise of due care should have had notice. In good conscience, from this record, Nichols should not be deprived of the fee simple title to the land which he purchased subject to the lien of the Federal Land Bank, and the parties should be placed in *statu quo.* The taxes for 1927, with the penalty, will have to be paid by Nichols, as they are a lien on his land, and the county should make restitution to Woodley, the respondent. The judgment of the court below is

Reversed.

JOBIE WILLIAMS v. ERNEST FORREST AND GEORGE KNOTT, TRADING AS FORREST AND KNOTT.

(Filed 5 October, 1932.)

1. Appeal and Error J e—Exclusion of immaterial evidence will not be held for reversible error.

The exclusion of evidence, which if competent, is not material, will not be held for reversible error.

2. Trial E f—Misstatement of contentions must be brought to trial court's attention in apt time.

A misstatement of the contentions of a party must be brought to the trial court's attention in apt time in order to afford an opportunity for correction, and when this has not been done an exception based thereon will not be considered on appeal.

APPEAL by defendants from *Cranmer, J.*, and a jury, at May Term, 1932, of PITT. No error.

This is an action brought by plaintiff, a Negro tenant, against the defendants, landlords, to recover $639.02 and interest from 1 January, 1931, for breach of a farm contract. The issues submitted to the jury and their answers thereto, were as follows:

"1. Did the plaintiff have a full settlement of matters and things existing between them on 8 January, 1931? Answer: No.

2. What amount, if any, is the plaintiff entitled to recover of the defendants? Answer: $172.99, with interest at six (6) per cent, from 1 January, 1931."

Judgment was rendered in the court below in accordance with the verdict. The defendants made numerous exceptions and assignments of error and appealed to the Supreme Court.

Albion Dunn for plaintiff.

F. G. James & Son for defendants.

PER CURIAM. We have examined the exceptions and assignments of error made by defendants, as to the exclusion of certain evidence offered by defendants, and do not think they can be sustained. If the evidence was competent, it does not seem to be to any extent material and we do not think the exclusion of same would have affected the verdict, and therefore prejudicial. The plaintiff's action for breach of contract against the defendants was for $639.02, and there was evidence to that effect, the jury gave only $172.99.

The exceptions and assignments of error as to the charge cannot be sustained. Some exceptions were made to contentions, and, if erroneous,

the matter should have been called to the attention of the court at the time, so that correction could have been made. As this was not done, the exceptions and assignments of error cannot be considered. The charge was full and explicit and did not impinge on C. S., 564 by giving an opinion as to whether a fact is fully or sufficiently proven, this being the province of the jury to determine.

The whole matter was one of fact to be determined by the jury. The jury has decided for plaintiff against defendants, and as we find no error in law, we cannot disturb the judgment rendered on the verdict. We find

No error.

FLONNIE GULLEY v. ALTON SMITH ET AL.

(Filed 5 October, 1932.)

1. Evidence D b—Testimony in this case held not incompetent under C. S., 1795.

Held, in an action to declare a deed void on the ground that it was never delivered to the grantee who died prior to the institution of the action, testimony offered by the grantor tending to show that the deed had not been delivered is properly admitted and is not incompetent under C. S., 1795.

2. Deeds and Conveyances A e—Deed is not effectual until actual or constructive delivery to grantee.

A deed, although signed by the grantor, is not effectual until actual or constructive delivery to the grantee, and the presumption of delivery arising from registration may be rebutted by evidence that the registration was inadvertent or fraudulent.

APPEAL by defendants from *Sinclair, J.*, at June Term, 1932, of LENOIR. No error.

This is an action to have a deed recorded in the office of the register of deeds of Lenoir County declared void, and canceled of record on the ground that said deed was not delivered by the plaintiff, the grantor named therein, to the grantee, under whom the defendants claim, and that said deed was recorded after the death of the grantee.

The jury found that the deed was not delivered by the grantor to the grantee, and upon this finding it was ordered, adjudged and decreed that the deed is void, and that same be canceled on the record by the clerk of the Superior Court of Lenoir County. From the judgment, the defendants appealed to the Supreme Court, assigning errors at the trial.

Sutton & Greene for plaintiff.
D. H. Willis and Shaw & Jones for defendants.

PER CURIAM. There was no error in the rulings of the trial court on defendants' objections to evidence offered by the plaintiff, or in the instructions of the court to the jury.

The evidence was properly admitted as tending to support the contention of plaintiff that the deed was not delivered by her to the grantee named therein. The evidence was not incompetent under C. S., 1795.

The instructions to which defendants excepted are in accordance with well settled principles of law. In the absence of a delivery, actual or constructive, a deed, although signed by the grantor named therein, is not valid as a conveyance of the land described therein. The presumption of a delivery arising from the registration of the deed may be rebutted by evidence showing that the registration was inadvertent or fraudulent. The judgment is affirmed. There is

No error.

W. M. MOORE v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 5 October, 1932.)

Railroads D b—A carefully moving train is not an obstruction of a crossing in contemplation of law.

Where the evidence discloses that two of the defendant's live tracks crossed the highway at grade and that as the plaintiff approached the crossing his view of the second track was obstructed by a freight train moving on the first track in a careful manner according to law, and that upon the passing of the freight train the plaintiff attempted to cross and was hit by the defendant's fast moving passenger train going in the opposite direction on the second track, and that the passenger train gave no signal or warning upon approaching the crossing, but that the tracks were straight and unobstructed except for the moving freight train: *Held*, the defendant's motion as of nonsuit was properly allowed, a carefully moving train not constituting an obstruction in contemplation of law.

CIVIL ACTION, before *Harris, J.*, at February Term, 1932, of HARNETT.

This was a civil action to recover damages for personal injuries sustained by the plaintiff at the Granville Street crossing in the town of Dunn. At this crossing there are two main tracks designated as the eastern and western tracks. The eastern track is used by northbound trains and the western track by southbound trains. The injury occurred on 13 March, 1931, at about 3:30 p.m. The narrative given by the plaintiff is substantially as follows: "On 13 March, 1931, I was to

carry my sister to the Coast Line Depot, and when I got ready to go there was a freight train coming up from the south going north. I waited until that train went about twenty-five or thirty feet, cleared the crossing, and when it did that I made a dive to go across Granville Street crossing and eighty-nine express knocked the truck out there on the other crossing, on the other track, on the west track, and since that time I have not been able to do any work at all. I was operating a Ford truck. I was under the wheel myself. My truck was standing there at the crossing. The freight train was a quarter of a mile in length and was traveling on the east track nearest to me. I could not see up the track to the north on account of that freight train, and I did not see or hear any other train at all, except the freight. I looked all I could and listened in the north direction before going on the track as the freight train cleared. . . . The train which struck me was going south on the west track. The train which struck me did not sound any whistle or ring any bell, or give any other warning that it was approaching this crossing. If it did I never heard it. . . . The front part of the engine that they call the cow-catcher, struck the front part of the truck, and the truck had proceeded on the track about seven or eight inches. . . . I stopped at the crossing and waited for the freight train to pass, and I made a dive to get across and was struck by the passenger train. The freight train completely obstructed my view to the north, and I could not see anything at all north of that train, and until the southbound train struck me I could not see any train at all until it was right there on me. When I came from behind the freight train up on the crossing the southbound train was right on me and struck me just like that (snapping fingers). . . . I glimpsed the train as it was coming fifteen or twenty feet from me and from what I saw I estimated it was going fifty or sixty miles an hour. . . . I had lived there near the crossing for years prior to this time. . . . I knew that the tracks of the railroad were in constant use by trains going north and south. I had crossed it every day. . . . I could have seen up the railroad track in the direction from which the southbound train was coming up as far as Tilghman's mill about three-quarters of a mile away. If there had been no freight train I could have seen three-quarters of a mile up the road."

The ordinance of the town prescribing a speed limit of fifteen miles an hour was introduced in evidence.

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

James Best for plaintiff.

Rose & Lyon and Clifford & Williams for defendant.

PER CURIAM. The ruling of the trial judge upon the evidence appearing in the record is sustained upon the authority of *Harrison v. R. R.*, 194 N. C., 656, 140 S. E., 598, and *Eller v. R. R.*, 200 N. C., 527, 157 S. E., 800. The defendant was guilty of no negligence because of the fact that a freight train in the due dispatch of business and in a proper manner was moving along the northbound track. The careful movement of trains over a railroad track does not constitute an obstruction contemplated by law upon facts similar to those appearing in the record.

Affirmed.

EDDIE HENRY, ADMINISTRATOR OF CHARLES HENRY, DECEASED, v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 5 October, 1932.)

Railroads D c—Evidence held insufficient to support theory of trial that intestate was helpless on track and should have been seen.

The bare fact that the defendant's train was backing at night without a light and that the defendant's intestate was found on the track at a public passway approximately twelve hours thereafter and that the intestate had been intoxicated and was killed by being struck by a train, *is held* insufficient to support the theory of trial that the plaintiff's intestate was down on the track in a helpless condition and should have been seen by those in charge of the train, and the defendant's motion as of nonsuit was properly allowed.

CIVIL ACTION, before *Cranmer, J.*, at June Term, 1932, of CARTERET.

The evidence tended to show that on the night of 11 October, 1930, between the hours of six and seven o'clock, Charles Henry was seen about 200 yards from the Y. of defendant, headed toward the railroad. At the time he was walking along the street, apparently under the influence of liquor. A train of defendant backed into the Y. shortly after dark, without a light. A witness for plaintiff testified that as the train was backing in for the night that he stopped to let the train pass. He said: "After it (train) passed I went on and crossed the track and went where I was bound. I did not see any sign of this man when I was standing there. I didn't look. . . . I could see the train was backing toward me, and I stopped to let it pass."

Early the next morning an alarm was given that there was a dead man on the track, and the body of plaintiff's intestate was found between the tracks with his head cut off and lying on the outside of one of the rails. The first witness who reached his body said: "There wasn't

so much blood there, it didn't look like to me, but there was some blood there. It didn't look like it was right fresh to me, but it was blood. It didn't look like it was dry to me. At the time I found the body the train was on that siding. The train had not gone back from where it went that night. It had not gone back to the station then. From the edge of the street I guess the body might have been twenty feet, or something like that. . . . This section of the railroad where this body was found is used by the public as a public passway. . . . People walk there, but it is no street. People use it for a public passway." There was no street light on the corner near the place where the body was found. There was further evidence tending to show that when the train backed in from the station on Saturday night around seven o'clock that no whistle was blown, no light displayed, and no lookout stationed on the back of the train. An undertaker, witness for plaintiff, who prepared the body for burial said: "I never noticed any bruises on the body if there was any, and it would be hard to detect it on a dark complexion, that is all I observed with reference to the body, except the head was completely severed from the body and the right shoulder crushed where the wheel passed over the body. . . . His body was not completely stiff. Rigor mortis had not completely set in, when I got there next morning, I don't know what time it was. I don't know whether it was after seven o'clock, it was light when I got there. . . . After a person's death rigor mortis comes on and passes off. It generally is complete within six hours in some and in some it does not show in six. There's no two bodies alike."

The defendant offered no evidence, and judgment of nonsuit was entered, from which the plaintiff appealed.

E. W. Hill and C. R. Wheatley for plaintiff.

J. F. Duncan and Moore & Dunn for defendant.

PER CURIAM. The theory upon which the right to recover is predicated, is that the plaintiff's intestate was down on the track in a helpless condition, and consequently should have been seen by those in charge of the train which was backed into the Y. for the night. The plaintiff's intestate was never seen within 200 yards of the place where his body was found. The bare fact that the train was backing without a light and that the decapitated body of Charles Henry was found on the track approximately twelve hours afterwards, is not sufficient evidence to be submitted to the jury, and the ruling of the trial judge was correct. Indeed, the case is governed by the principles announced in *Austin v. R. R.*, 197 N. C., 319, 148 S. E., 446.

Affirmed.

HATTIE M. PITT, ADMINISTRATRIX OF TOM PITT, DECEASED, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 5 October, 1932.)

Railroads D b—Evidence disclosed contributory negligence in crossing defendant's tracks barring recovery as matter of law.

Where the evidence discloses that the plaintiff's intestate approached the two parallel live tracks of the defendant at a grade crossing, that a flagman was standing at the crossing with a flag and stop sign in his hands, that the intestate went upon the tracks apparently watching a freight train approaching from his left and was struck by a passenger train approaching from his right at an excessive speed and without signal in violation of the municipal ordinance: *Held*, a judgment as of nonsuit is properly entered.

CIVIL ACTION, before *Cranmer, J.*, at February Term, 1931, of NASH.

This was a civil action to recover damages for wrongful death. The evidence tended to show that the defendant operates a line of railroad running through the town of Elm City. The public highway crosses the tracks at grade. There are two main tracks at the crossing, the east track being the northbound, and the west track being the southbound. The evidence further disclosed that the defendant maintained a watchman at said crossing.

On or about 6 December, 1930, at about four o'clock in the afternoon, the plaintiff's intestate, riding in a buggy and driving a mule, undertook to cross the tracks. At the time, a freight train of defendant was approaching the crossing from the south going north. One eye witness to the killing testified as follows: "I saw the train when it struck his mule and buggy. He came around the corner of the depot and drove up by the side track, and just as he drove up on the side track the watchman came out with his sign and walked into the middle of the sidewalk, and just as the flagman held up his sign Thomas Pitt's mule had entered into the main track. I did not hear any whistle or other signal from the train until it had struck Thomas Pitt and had stopped. Then the bell rung and the whistle blew. The tower where the watchman stays is about seven or eight yards off from the railroad track on the east side. On the day in question I saw the watchman when he came out of this tower or house. At the time he stepped out Thomas Pitt had just entered around the curve, had come into the center of the road, and had entered upon the spur-track. The watchman stepped out and gradually walked on out in the center of the road. As he came out from the tower house and walked to the middle of the street he had in his hand a flag and a stop sign. He had them down to his side, didn't have them up.

. . . In my opinion the watchman was about six or seven or eight feet from the mule's head at the time he threw up his signal. . . . There was a freight train coming from the south and the passenger train which hit Thomas Pitt, was coming from the north. . . . He drove up on the switch-track and time the train hit his mule's head the mule was on the fast line track. I don't mean the spur-track. He didn't stop. He didn't look, but drove up on the track." Another eye witness said: "There is a driveway that runs south into the main street running from Rocky Mount to Wilson. Thomas Pitt came out of this driveway from the side station and he turned into the highway, headed toward the railroad, and about the time he drove into the Main Street headed toward the railroad, this flagman walked out, and both of them started to move about the same time, I reckon, and Thomas Pitt, he drove on and the flagman he came on, and just about the time Thomas Pitt got to the pass track where the box cars are on, the watchman raised his flag, and Thomas Pitt began to pull his old mule. He had his head south all the time. At the time the flag was raised the mule was not trotting. He was walking along peart with Pitt rushing him a little. He was pulling the reins. . . . There was a freight train coming from the south. which was Thomas Pitt's right as he approached the railroad track. At the time Thomas Pitt was headed east the passenger train that struck his mule was coming from the north, which was to his left. When Thomas Pitt turned into the highway from the driveway from behind the station he turned his head to the south and was watching the freight train I guess. . . . He kept his eyes to the south, on the northbound freight train, until I heard the train, the southbound passenger train, blow. . . . Until the time the train blew Thomas Pitt did not turn his head northward to the left. . . . From a distance of about seventy-five feet from the southbound main line track Thomas Pitt was going towards the track with his head to the south the entire time." Another eye witness said: "As Thomas Pitt swung his mule around the corner of the station into the highway I think the mule was walking. Thomas Pitt pearted his mule by jerking the reins and slapping him. I am not positive, but I think he was looking southward all the time, toward the freight train which was approaching from the south." There was evidence that the station and certain box cars obstructed the vision of travelers upon the highway, and that the passenger train which struck and killed the deceased, gave no signal by whistle or bell, and was traveling at forty or fifty miles an hour in violation of the city ordinance prescribing a speed limit of fifteen miles.

The defendant offered no evidence, and at the close of plaintiff's evidence, judgment of nonsuit was entered, and the plaintiff appealed.

Cooley & Bone and J. W. Keel for plaintiff.
Thomas W. Davis and Spruill & Spruill for defendant.

PER CURIAM. A traveler in a buggy, in the day time, approaches two parallel live tracks of defendant. A freight train, some distance away, is approaching the crossing from the right of the traveler. A fast passenger train, without signal, and in violation of the municipal ordinance, is rushing upon the crossing from the traveler's left. A flagman is standing at the crossing with a flag in one hand and a stop sign in the other. While it is unnecessary to decide, in this case in what manner a flagman should carry his signals in the face of danger, it is obvious that the symbols of danger were at hand. Moreover, the traveler was apparently watching a freight train approaching from his right, and unfortunately failed and neglected to glance to the left where the passenger train was almost upon him. The rule of liability upon such fact-status warrants and sustains the ruling of the trial judge. *Coleman v. R. R.*, 153 N. C., 322, 69 S. E., 129; *Harrison v. R. R.*, 194 N. C., 656, 140 S. E., 598; *Godwin v. R. R.*, 202 N. C., 1; *Tart v. R. R.*, 202 N. C., 52.

Affirmed.

J. M. EDGERTON v. SOUTHERN RAILWAY COMPANY.

(Filed 5 October, 1932.)

Carriers B f—Fact of injury in transitu is sufficient evidence to go to jury on issue of carrier's negligence.

In an action against a railroad company to recover damages to a shipment of mules an instruction, upon supporting evidence, that if the jury found from the greater weight of the evidence that the mules were delivered to the railroad company in a good condition and were received at destination in a sick and injured condition that the damage was not due to natural causes or innate viciousness of the animals, that such facts would be evidence against the railroad company from which the jury might or might not find that the damage was due to the negligence of the carrier is held correct.

CIVIL ACTION, before *Daniels, J.*, at Spring Term, 1932, of WAYNE.

The plaintiff instituted this action against the defendant to recover damages for injury to certain mules. The mules were purchased by plaintiff from Maxwell-Crouch Mule Company at National Stock Yards, Illinois, and were shipped under bill of lading dated 4 February, 1930.

The son of the plaintiff testified as follows: "There were twenty-four head of mules and they were shipped 4 February, 1930. Before pur-

chasing them I examined each mule thoroughly. . . . We looked them all over four or five times, and felt of their ears to see if they were gentle. That is one of the things that we wanted was to get them gentle. A wild mule is hard to sell or one that is foolish about the ears is hard to sell. I would look at the legs and eyes and examine them thoroughly to see if they were all right. . . . They were delivered to the Southern Railway Company for transportation to Goldsboro 4 February, 1930. It was a very good load of mules, as good as I could get any where—quiet, gentle mules. I did not see the mules from the time they were delivered to the Southern Railway Company until the Southern Railway Company delivered them at Goldsboro, N. C. . . . When we unloaded the mules in Goldsboro one mule was very sick . . . and there were about five other mules that were bruised on the knees and legs. I don't recall each case, but several were bruised and scarred up. One mule was sick and died that night, and five others were bruised and skinned up. . . . I went into the car at the time the mules were unloaded. Several slats, three or four slats in the side of the car were broken. I remember one slat, a piece from one post to the next was clear out of it and left cracks about five inches wide. Several were out."

The plaintiff called the attention of agents for the defendant to the bruised condition of the mules at the time they were unloaded, and on 10 February, 1930, filed a claim for the loss of the mule that died and for injury to the others as specified, amounting to $273.88. The veterinarian for the defendant, who was employed as inspector at the National Stock Yards in Illinois, inspected the shipment on 4 February, 1930, at the National Stock Yards. He said: "There were no visible signs of any injury or sickness. I examined the interior of the car, Southern No. 45244, in which the animals were loaded, for protruding nails, bolt heads or any other article that would produce injury, just prior to loading and everything was in good condition. The car was not over-crowded. None of the mules were injured in any manner while being loaded in said car."

The defendant offered the testimony of all the freight conductors, yardmasters and stock agents that handled the mules from the National Stock Yards until arrival at Goldsboro. All of these witnesses testified without equivocation or contradiction that both the mules and the car were in good condition up to the time of the arrival at Goldsboro. There was further testimony, without equivocation or contradiction of the live-stock agents who fed the mules, that they were properly fed, watered and rested during transit.

Appropriate issues were submitted to the jury and answered in favor of plaintiff. The verdict awarded damages in the sum of $193.88 for the mule that died and $80.00 for injuries to other mules in the car.

Kenneth C. Royall and Andrew C. McIntosh for plaintiff.
Langston, Allen & Taylor for defendant.

PER CURIAM. The evidence for plaintiff tended to show:

(a) That twenty-four mules were delivered at the National Stock Yards, Illinois, to the defendant carrier in good condition, and at the time of delivery said animals were quiet, gentle mules.

(b) The car in which the mules were shipped, was carefully inspected before the movement began and was found to be in good condition and free from any and all defects that might cause injury.

(c) When the car arrived at Goldsboro, N. C., the point of destination, several slats were broken, several were out, and there were cracks about five inches wide.

(d) At the time of delivery of the mules at destination four mules were bruised, one skinned and two sick. One of the sick mules died a few hours after delivery.

Upon appropriate issues arising upon the pleadings the trial judge instructed the jury in part as follows: "I charge you that if you find by the greater weight of the testimony that upon the arrival of the stock in Goldsboro that they were in a damaged condition and that such damaged condition was not due to natural causes or from innate and vicious nature of the animals, then I instruct you, if you find that to be true, that would be evidence against the Southern Railway from which you might or might not find that such condition of the stock was due to the negligence of the defendant. The rule being that when stock in a damaged condition, not caused by natural causes, or by the innate or vicious nature of the stock, is found in the possession of the carrier, the presumption is that the carrier in whose possession the stock is found in such damaged condition, and not due to the natural causes or innate vicious nature of the stock, is responsible for the injury sustained. That is, not that the burden is shifted from plaintiff to the defendant, but the finding of the stock in a damaged condition, not due to natural causes or innate viciousness of the animals, if found in the possession of the carrier, is enough evidence to go to the jury, from which evidence the jury may or may not find by the greater weight of evidence that the damage to the stock was caused by the negligence of the carrier in whose possession it is found."

This instruction correctly applies the rule of liability declared in *Farming Co. v. R. R.*, 189 N. C., 63, 126 S. E., 167, and *Davis Livestock Co. v. Davis*, 188 N. C., 220, 124 S. E., 157, and other cases of similar import. While there is a divergence of judicial opinion upon the rules of liability in such cases in other jurisdictions, this Court has adhered to the principle contained in the instruction of the trial judge.

No error.

STATE v. HARVEY WALLACE.

(Filed 12 October, 1932.)

1. Homicide G c—Testimony in this case held competent as being of dying declarations.

Where there is evidence that three Negroes entered a small country store at an early hour in the morning, that several neighbors heard shots and immediately thereafter the Negroes were seen leaving the store and the owner of the store was found therein seriously wounded, that he said "I am going to die" and related that the three Negroes had entered the store and that the "tall yellow man" had done the shooting, that the store owner died about two days thereafter and that only one of the Negroes fitted the description thus given: *Held*, testimony of the declarations of the dying man were competent, the evidence showing that the declarations were made in expectancy of death and that they sufficiently described the assailant to distinguish him from the other two Negroes in the store at the time, the question of identity being for the jury under the evidence.

2. Homicide H c—Instruction in this case held not to contain prejudicial error when construed as a whole.

An instruction in a prosecution for murder that "the use of a deadly weapon in the perpetration of a murder raises a presumption of malice" will not be held for prejudicial error for the use of the word "murder" where all the evidence tends to show that the crime was murder in the first or second degree and was committed with a pistol, and when the charge, construed as a whole, correctly states the presumptions arising from the use of a deadly weapon and instructs the jury to acquit the prisoner if they did not find from the evidence that he committed or participated in the crime, the defendant's exceptions thereto will not be sustained.

3. Same—Instruction in this case relating to presumptions from use of deadly weapon was correct.

The perpetration of an unlawful killing with a deadly weapon raises a presumption of malice and that the crime was murder in the first or second degree and although the defendants may rely on the State's evidence to show matters in mitigation of the offense, where the State introduces no such evidence an instruction that the burden was on the defendant to establish such matters is not error.

4. Same—Statement of admissions of defendant held not to contain expression of opinion by the court.

The court's recitation of the admissions of the defendant in a prosecution for murder and that from the admissions of the defendant the question of whether he was at the scene of the crime at the time of its commission was eliminated, will not be held for an expression of opinion by the court when supported by the testimony of the defendant in the case, recorded or established on appeal.

5. Criminal Law I g—Failure to instruct jury to scrutinize testimony of accomplice is not error in absence of requested instructions.

The failure of the trial court to instruct the jury to scrutinize the testimony of an alleged accomplice will not be held for error in the absence of a request for instructions to this effect, the matter relating to a subordinate and not a substantial feature of the charge.

CRIMINAL ACTION tried at the July Term, 1932, of LEE, before *Grady, J.*, and a jury upon an indictment charging the prisoner with the murder of N. H. Perry. From a sentence of death by electrocution pronounced upon a verdict for murder in the first degree the prisoner appealed to the Supreme Court upon assigned error.

At the trial several witnesses were examined for the State and the prisoner then took the stand in his own behalf. No other testimony was offered.

The evidence for the State tended to show that the homicide was committed under the following circumstances. N. H. Perry, the deceased, was a storekeeper at Cumnock. He was shot at his place of business on 18 June, 1932, early in the morning. On the preceding afternoon J. W. Poe and the deceased were sitting on the store porch when the prisoner and two other colored men, one of whom was Charlie Myers, passed by, "cutting their eyes towards the store" and watching the two who were on the porch. That night the colored men slept near by; and the next morning just before seven o'clock some of the witnesses heard three or four pistol shots which sounded as if they came from the store. Miss Ruth Burns saw three colored men go into the building a few minutes before the shots were fired and come out immediately afterwards. By other witnesses one of these men was identified as Harvey Wallace, the prisoner.

Miss Burns, the first person to go to the store, testified that she found Mr. Perry lying on the floor wounded and that he told her he was going to die. He then said that a few minutes before she came three colored men entered the store, one calling for a can of peaches; that as the deceased reached up to get the peaches the light colored man said to some one, "Hold on, Big Boy, do not come up here"; that the deceased looked around and saw Mr. Beal coming up the steps into the store

and the light colored man was speaking to him; that he (the light colored man) had a pistol in his hand and shot Mr. Beal as he came up the steps and killed him instantly. The deceased then said to Miss Burns, "They have already killed Mr. Beal and they have got me; do what you can for me."

O. D. Burns testified that he heard the shots, ran to the store, and found Mr. Perry with his head in the lap of his daughter, Ruth Burns; that Mr. Perry said, "They have killed Mr. Beal and they have got me; I am going to die." The witness then said that Mr. Perry told him that three persons came into the store, colored men, one of them a tall yellow man; that one of them called for a can of peaches and Mr. Perry reached up to get the can and heard some one say, "Hold on, Big Boy, do not come any further"; that he looked back and saw the tall yellow fellow with a pistol in his hands; that he had just killed Mr. Beal who was coming up the steps; and that as he (Mr. Perry) turned the yellow man shot him and all three colored men ran out of the store.

In reference to the dying declarations J. W. Poe said: "I heard Mr. Perry say, 'I am going to die; they have already killed Mr. Beal and they have got me; help me all you can. I want you all to know just exactly how it happened. Three strangers, colored men, came into the store early this morning; one was a tall, yellow, bright colored man, a mulatto, and the other two were smaller and much darker in color. The light colored man entered first and I turned to reach up and get a can of peaches. The tall yellow man pressed an automatic pistol against me and said, "Stick up your hands," and I did so; about that time Mr. Beal entered and started up the steps to the floor where I was, and the yellow man turned and said to him, "Hold on Big Boy, don't come up here." Mr. Beal did not stop and the colored man shot him twice and he died instantly. I turned to run and he shot me twice and I fell; then all three ran out of the front door. I do not know the names of the three colored men. It was the tall, yellow, bright colored man who did the shooting.' Mr. Perry was shot in the abdomen and was bleeding a great deal. This was early Saturday morning and he died Monday night following. I went with him to the hospital and on the way there he told me the same thing."

Ernest Kennedy's testimony is to this effect: That he went to the hospital with Mr. Perry; that Mr. Perry told him on the way that he was going to die, that he could not get well, and told him that three colored men came into the store and asked for some peaches; that as he reached to get the peaches he heard one of them say to some one, "Do not come any further." At that time he saw a gun in the man's hand, and that the yellow man shot Mr. Beal and killed him instantly; that he then turned and shot him, Mr. Perry, twice.

Other evidence for the State tended to show that a few days after the homicide the prisoner had a large army pistol, that he was seen roaming about asking for food, and that he told John McDougal he had killed the deceased.

Charlie Myers said that he was with Harvey Wallace at the time of the killing; that he got up with him in Raleigh and went to Cumnock; that he slept on the ground out at an old house near Mr. Perry's store; that Harvey Wallace called for a can of peaches and while Mr. Perry was reaching up to get the peaches Harvey Wallace stuck his pistol in Mr. Perry's side and said, "Stick 'em up." That about this time a man was coming up the steps and Harvey Wallace turned and shot the man; that the witness then ran out of the store and heard two more shots. The witness admitted that he was indicted for the murder of Mr. N. H. Perry along with Harvey Wallace and a man by the name of White. He testified that he went to Cumnock looking for work and that there was nothing said about holding up any store and he knew nothing about any trouble until after he got in the store when the shooting took place.

Testifying in his own behalf the prisoner said: "I got up with White and Myers in Raleigh and we went to Cumnock Coal Mines looking for work and saw the night watchman near Cumnock and asked him about work and asked for a drink of water. All three of us slept in an old barn near Cumnock store. The next morning all three of us went to the store to get something to eat. I leaned up against the counter with White behind me and Myers near the door. I asked the man for a can of peaches and asked him if we had to buy sugar to sweeten them, and he said, 'No, they are already sweetened.' As he reached up to get the peaches White began to curse him and said he had locked him up in that store one night when he was working at the coal mine. About that time a man came up the stairway and White shot him and then I ran and heard two more shots fired, but I do not know who was shot. I left the store and went down on the railroad and came near Sanford and stopped at a colored man's house by the name of John McDougal to get something to eat. I did not tell McDougal that I did the killing. This is the pistol that White gave me. His name is engraved on the handle. After the shooting I went under the power line and went to a camp near Pembroke where I was arrested. I had this pistol on me when I was arrested. I was taken to the State penitentiary. I went in the store to buy some peaches. I had seventy-five cents. White had the pistol in his hand when it was shot. I was next to the back of the store where Mr. Perry was getting the fruit and White was behind me and Myers behind him, between us and the door which we had entered."

The prisoner admitted that the wounds inflicted by the pistol shots caused Mr. Perry's death. He did not tender any prayers for instructions. The verdict of the jury and the judgment pronounced are given above. The prisoner appealed upon exceptions pointed out in the opinion of the Court.

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

H. M. Jackson for prisoner, appellant.

ADAMS, J. The first four exceptions taken by the prisoner question the competency of the testimony offered by the State in proof of the dying declarations of the deceased. The ground of attack is the absence of sufficient evidence to identify the assailant and to bring the declarations within the established rules of law. These exceptions, in our opinion, must be overruled.

Dying declarations are an exception to the rule which rejects hearsay evidence, but the conditions under which they are admitted by the courts have often been defined. At the time they are made the declarant must be in actual danger of death and must have full apprehension of his danger; and when the proof is offered death must have ensued. *S. v. Mills,* 91 N. C., 581. These declarations are received on the general principle that they are made in extremity—"when," as said by Eyre, C. B., "the party is at the point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice." *Rex v. Woodcock,* 168 Eng. Reports, 352.

The testimony excepted to indicates that the deceased was conscious of impending death. A few minutes after he had been shot twice he said in the presence of witnesses, "They have killed Mr. Beal and they have got me; I am going to die." He had been shot in the abdomen and was bleeding freely. In *S. v. Mills, supra,* the declaration was, "I am dying, I have been shot three times, I am bound to die"; and in *S. v. Shouse,* 166 N. C., 306, "I know I am going to die from the wound." In *S. v. Quick,* 150 N. C., 820, the language of the deceased is recorded to have been, "He is going to die"; in *S. v. Watkins,* 159 N. C., 480, "They had killed him"; and in *S. v. Franklin,* 192 N. C., 723, "He was killed." Proof of all these declarations was held to be competent.

In the present case the trial court made no error in admitting similar proof. The fact that the deceased did not identify the prisoner by name as the one who shot him is immaterial. He did not know the name; the three men who came into the store were strangers. But the deceased described the physical appearance of the prisoner and distinguished him from his two companions. His assailant, he said, was a "light colored man," a "tall yellow man," and the other two were smaller and of darker color. The prisoner admitted that of the three men who went into the store he was the light colored man. Upon this evidence the question of his identity was appropriately left to the jury. All the declarations of the deceased relate to the facts constituting the *res gestæ* of the homicide—that is, to the act of killing and the circumstances immediately attendant. Underhill's Cr. Evidence, 3d ed., sec. 178.

The prisoner excepted to the following instruction: "The use of a deadly weapon in the perpetration of a murder raises a presumption of malice and the law says that wherever there has been an unlawful killing of a human being with a deadly weapon, nothing else appearing, the prisoner charged with the crime would be at least guilty of murder in the second degree, and the burden shifts to him to offer evidence which satisfies the jury that the killing was justifiable, or that it was done under such circumstances as to reduce the crime to manslaughter. In this case there has been no such evidence. There has been no attempt at justification and I therefore charge you that upon the evidence offered here you can return one of three verdicts, which verdict must be based upon the evidence."

Objection was made to the use of the word "murder" in the first clause; but if its use was infelicitous, as suggested, we are unable to see that it was prejudicial. There is no evidence of manslaughter or self-defense. If a crime was committed it was murder either in the first or second degree. The sentence to the effect that wherever there has been an unlawful killing with a deadly weapon, nothing else appearing, "the prisoner charged with the crime would be at least guilty of murder in the second degree" must be construed in connection with the entire charge. Every part of the charge must be read with reference to what precedes and follows. This, it has been said, is so plainly fair and just to the judge and to the parties as to have commended itself to the courts as the only reasonable rule. *S. v. Exum,* 138 N. C., 599; *Kornegay v. R. R.,* 154 N. C., 389. His Honor gave the jury the express instruction to acquit the prisoner if they did not find from the evidence that he committed or participated in the homicide. If he killed the deceased the presumption is that he did so intentionally, since all persons are presumed to intend the consequences of their acts.

It is true that a person on trial for a crime of this character may rely on the State's evidence to show matters in mitigation or excuse. But as the State offered no such evidence there was no error in the instruction that it was incumbent upon the defendant to establish such matters to the satisfaction of the jury. *S. v. Gaddy,* 166 N. C., 341.

The sixth and seventh exceptions relate to the court's recital of the prisoner's admission that the deceased was killed with a deadly weapon; that he was present at the time of the homicide; that some one else in the crowd ordered the deceased to stick up his hands and then shot and killed him. They relate also to the court's remark that by these admissions the question whether the prisoner was at the store was eliminated; also to the court's stating the contention that upon the prisoner's admission and other evidence the jury should find that the prisoner and his companions entered the store for the purpose of committing robbery.

These exceptions do not disclose any substantial error. Only a part of the prisoner's testimony appears in the record; but in the case on appeal it is said that he testified to other matters which are referred to in the charge and that "all statements in the charge in reference to his testimony are correct." We must therefore treat these statements as a part of the prisoner's unrecorded testimony. Neither here nor in the outline of the State's contentions referred to in the ninth, tenth, and eleventh exceptions do we find anything indicating the court's expression of an opinion concerning the evidence. In a subsequent part of the charge the court explicitly warned the jury against the impression that he had any right to entertain or express an opinion regarding the prisoner's guilt or innocence.

The prisoner contends, finally, that there is error in the court's failure to instruct the jury carefully to scrutinize the testimony of Charlie Myers, an alleged accomplice in the crime. He tendered no prayer for an instruction to this effect. In *Rex v. Jones,* 2 Camp., 132, *Lord Ellenborough* observed: "No one can seriously doubt that a conviction is legal, though it proceeds upon the evidence of an accomplice only. Judges, in their discretion, will advise a jury not to believe an accomplice unless he is confirmed, or only so far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts he deposes. It is allowed, that he is a competent witness; and the consequence is inevitable, that if credit be given to his testimony, it requires no confirmation from another witness." In his comment upon this case *Judge Gaston* remarked, "We are not aware of any judicial decision in our country at variance with the rule brought hither by our ancestors." *S. v. Haney,* 19 N. C., 390, 397. The principle is sustained in a number of our decisions and explicitly approved in the following

words: "Instruction to scrutinize the testimony of a witness on the ground of interest or bias is a subordinate and not a substantive feature of the trial, and the judge's failure to caution the jury with respect to the prejudice, partiality, or inclination of a witness will not generally be held for reversible error unless there be a request for such instruction." *S. v. O'Neal,* 187 N. C., 22; *S. v. Sauls,* 190 N. C., 810.

We find no error in the record. The prisoner had the assistance of diligent counsel whose service, rendered under assignment by the court, is ample assurance that the prisoner has had the benefit of every available defense.

No error.

VIRGINIA GRAY THIGPEN, VIRGINIA THIGPEN LOY, MARTHA THIGPEN ROSE AND SNOW THIGPEN v. FARMERS BANKING AND TRUST COMPANY, TARBORO, NORTH CAROLINA, EXECUTORS OF W. J. THIGPEN, DECEASED; FARMERS BANKING AND TRUST COMPANY, TARBORO, NORTH CAROLINA, AND NORTH CAROLINA BANK AND TRUST COMPANY.

(Filed 12 October, 1932.)

1. **Executors and Administrators G b—Suit in this case held in nature of bill to surcharge and falsify executor's account.**

   A suit by the beneficiaries under a will to have the executor account for mismanagement of the estate is in the nature of a bill in equity to surcharge and falsify the executor's account. C. S., 135.

2. **Same—Executor is not an insurer, but is required to exercise care and diligence of ordinarily prudent man.**

   An executor is not held to the responsibility of an insurer in carrying out the terms of a will, but he is required to exercise the care and diligence in collecting and securing the assets and managing the property that a prudent and faithful man would in the management of his own business, and where the executor has failed to exercise the required diligence he may be held liable by the beneficiaries under the will.

3. **Executors and Administrators G a—Ordinarily executor of small estate will be allowed 5% on receipts and disbursements.**

   While there is no hard and fast rule in regard to the allowance of commissions to executors in not over 5 per cent as prescribed by statute, as a general rule the executors of small estates will be allowed a commission of 5 per cent on receipts and 5 per cent on technical disbursements, and technical disbursements exclude disbursements to beneficiaries or heirs.

4. **Reference C a—Court has power to make additional findings in consent reference.**

   Upon the filing of the report of the referee in a consent reference, as well as in a compulsory one, the trial court has the power to affirm, amend, modify, set aside, make additional findings and confirm, in whole

or in part, or disaffirm the report of the referee, and where the court has made additional findings and there is evidence to sustain them the action of the court will be given the effect of a verdict of a jury and will not ordinarily be disturbed on appeal. C. S., 578.

5. Appeal and Error J d—Appellant has burden of showing error.

The burden is on appellant to show prejudicial or reversible error amounting to a denial of substantial justice.

APPEAL by both plaintiffs and defendants from *Cranmer, J.*, at March Term, 1932, of EDGECOMBE. Both plaintiffs' and defendants' appeal affirmed.

The judgment of the court below, in part, is as follows: "As set forth above, it is adjudged by the court that the defendants are liable to the plaintiffs in the following sums:

$731.94	excess commissions received by defendants.
206.98	excess advancements made to croppers.
282.25	value of crops left by Satterthwaite on Hyman Farm and remaining there 28 March, 1930, being amount found by the referee to be due and not excepted to.
64.27	from M. J. Ivey, or proceeds of sale of personal property remaining on Hyman Farm 28 March, 1930, amount found to be due by the referee and not excepted to.
$1,285.44	total.

That these amounts should bear interest from 24 September, 1930, date of filing purported final account by executor.

That it is therefore by the court ordered, considered and adjudged that the plaintiffs do recover of the defendants, jointly and severally, the sum of one thousand, two hundred and eighty-five and 44/100 dollars ($1,285.44), with interest on the same at the rate of 6 per cent per annum, until paid, from 24 September, 1930, and that the plaintiffs do further recover of the defendants, jointly and severally, their costs of this action, including the sum of $80.00 heretofore advanced by the plaintiffs at the request of the referee on account of stenographic work at the hearing before the referee.

It is ordered and adjudged that W. J. Bone, referee, be and he is hereby allowed the sum of $350.00 for his services, of which amount the sum of $100.00 shall be paid by the plaintiffs and the sum of $250.00 by the defendants. E. H. CRANMER, *Judge Presiding.*"

Various exceptions and assignments of error were made by both plaintiffs and defendants, and all of the parties appealed to the Supreme Court.

H. H. Phillips for plaintiffs.
Geo. M. Fountain and Gilliam & Bond for defendants.

CLARKSON, J. This is an action brought by plaintiffs, who are the sole legatees and devisees, widow and children, under the last will and testament of Dr. W. J. Thigpen, against the Farmers Banking and Trust Company, executor under said last will and testament of the said Dr. W. J. Thigpen. The said Farmers Bank and Trust Company, is now merged with the defendant North Carolina Bank and Trust Company, defendant. C. S., 135; *Fisher v. Trust Co.*, 138 N. C., at p. 98; *S. v. McCanless*, 193 N. C., 200; *In re Estate of Wright*, 200 N. C., 620.

The matter was referred by the court below to W. J. Bone, Esq. In the record we find "It is admitted by all parties that said order of reference was duly and properly made *by consent of all parties.*" The referee found certain facts and based his conclusions of law thereon. It is contended by plaintiffs that he failed and omitted to find certain material facts, among them, the following: "That the total advancements in money overpaid said croppers as aforesaid, from the date of executor's qualification to 4 January, 1930, amounted to $206.98, for which amount the executor should be liable to account to the plaintiffs." *Snipes v. Monds*, 190 N. C., 190. This was sustained by the court below and allowed the plaintiffs. There was sufficient competent evidence to sustain this finding of fact. Both the plaintiffs and defendants made numerous exceptions and assignments of error to the referee's report, and appealed to the Superior Court. The Superior Court rendered judgment as set out in the record, and both plaintiffs and defendants made numerous exceptions and assignments of error and appealed to the Supreme Court.

The contentions of plaintiffs were bottomed on the alleged negligent mismanagement of the estate of Dr. W. J. Thigpen by the executor, the defendant Farmers Banking and Trust Company, now merged with defendant North Carolina Bank and Trust Company. The action is in the nature of a bill in equity to surcharge and falsify the executor's account.

Section 4 of the will is as follows: "It is my will and desire that my executor proceed to pay all debts against my estate *as soon as possible*, and to that end is authorized to sell such part of my estate, real or personal, without order of court, publicly or privately, as may be neces-

sary to provide such funds, and to close the administration of my said estate *as early as possible after my death.*"

In *Gay v. Grant,* 101 N. C., at p. 209, citing numerous authorities, the following observations are made: "It has been often held that an administrator is not an insurer of the estate committed to his charge. If he exercises the diligence and care in collecting and securing the assets of the estate which a prudent and faithful man would in the management of his own property, and losses occur which he could not prevent, he will not be charged with such losses. He is only required to be honest, faithful and diligent."

In *Moore v. Eure,* 101 N. C., at p. 16, we find the following: "Good faith and the use of ordinary care and reasonable diligence are all that can be required of executors and administrators, whether resident or nonresident. They are not insurers. *DeBerry v. Ivey,* 2 Jones Eq., 370; *Nelson v. Hall,* 5 Jones Eq., 32." The above principle is well settled in this jurisdiction.

In regard to public officers, the rule is different. They are insurers, including such losses as arise from the act of God or the public enemy. *Indemnity Co. v. Corporation Commission,* 197 N. C., at p. 564. The "hard rule upon public officers" has never been held to apply to executors and administrators. *Moore v. Eure, supra.*

C. S., 157, in part, is as follows: "Executors, administrators and collectors shall be entitled to a commission not exceeding five per centum upon the amount of receipts and expenditures which shall appear to be fairly made in the course of administration, and such allowance may be retained out of the assets against creditors and all other persons claiming an interest in the estate. In determining the allowance the trouble and time expended in the management of the business shall be considered," etc. It will be noted that the act says *"not exceeding 5 per centum."* Then again, in determining the allowance 5 per cent "the trouble and time expended in the management of the business shall be considered."

In *Peyton v. Smith,* 22 N. C., at p. 348-9, we find: "The defendant's exceptions, relate to the *quantum* of commissions allowed to the executor; to the subject-matter of commissions, and the mode of computation. It is so difficult for this Court to ascertain, by any means in its power, what is the reasonable rate of commissions called for in any case, by the nature of the services, labor, and responsibility of the trustee, that it is much disposed, in general, to rely, in this respect, on the judgment of the master. In this case however, the Court perceived a safer guide for the exercise of its discretion, and will follow that guide. It appears that, on one occasion, when the accounts of the executor were audited in the county court of Warren, and when the auditors recommended that

there should be allowed to the executor a commission of 5 per centum on his receipts, and 5 per centum on his disbursements, the court, nevertheless, ordered that his commission should be limited to 4 per cent, on each. The Court, therefore, overrules the allowance of 5 per cent as made by the master, and sanctions the rate established by the county court."

The general rule in small estates is an allowance of 5 per cent on receipts and 5 per cent on what is termed technical disbursements, but under the statute "the trouble and time expended in the management of the business shall be considered." There seems to be no hard and fast rule in regard to the commission "not exceeding 5 per centum." Technical disbursements "forbid commissions on the payment of legacies and distributive shares. *Potter v. Stone,* 2 Hawks, 30; *Clarke v. Cotton,* 2 Dev'xs. Eq. Rep'ts, 51." *Bank v. Bank,* 126 N. C., 539-40.

We set forth the general principle of law which governs the controversy in this action. In *Trust Co. v. Lentz,* 196 N. C., at p. 406, we find: "In view of the position taken by some of the parties that the judge was without authority to change the report of the referee—the reference being by consent—it is sufficient to say that, in a consent reference, as well as in a compulsory one, upon exceptions duly filed, the judge of the Superior Court, in the exercise of his supervisory power and under the statute, may affirm, amend, modify, set aside, make additional findings and confirm, in whole or in part, or disaffirm, the report of a referee. *Contracting Co. v. Power Co.,* 195 N. C., 649, 143 S. E., 241; *Mills v. Realty Co., ante,* 223, 145 S. E., 26." C. S., 578, 579; *Wallace v. Benner,* 200 N. C., at p. 129-30.

We find in *Thompson v. Smith,* 156 N. C., at p. 346, citing numerous authorities, the following: "We have said that where the evidence has been considered by the referee and by the judge, upon exceptions to the referee's findings, we will not review the judge's conclusions as to them, because the appellant has had two chances, and when two minds—one at least, and perhaps both professionally trained and accustomed to weigh evidence and to compare and balance probabilities as to its weight—arrive at the same conclusion, there is a strong presumption in favor of its correctness, or the same is true, even when the judge differs from the referee as to his findings, and we may safely rely on its correctness. The referee is selected, in such cases, in place of a jury, and the judge so acts when he reviews the referee. If there is any evidence to support the findings and no error has been committed in receiving or rejecting testimony, and no other question of law is raised with respect to the findings, we accept what the judge has found as final, as we do in the case of a jury." *Caldwell v. Robinson,* 179 N. C., at p. 521; *Wallace v. Benner, supra.*

It is well settled that the burden is on appellant to show prejudicial or reversible error and he must show material and prejudicial error amounting to denial of substantial justice.

We have heard the arguments and read the record and the well and ably prepared briefs on both sides of this controversy. We see no reason why the judgment of the court below should be disturbed. The judgment of the court below is

Affirmed.

L. HARVEY AND SONS COMPANY, INCORPORATED, v. G. M. ROUSE AND LILY G. ROUSE, HIS WIFE.

(Filed 12 October, 1932.)

1. Judgments L b—Decree of foreclosure estops mortgagor from thereafter attacking validity of mortgage.

A decree of foreclosure of a mortgage estops the parties as to all matters embraced therein, and where the mortgagor has failed to file answer or resist foreclosure he may not thereafter attack the validity of the mortgage for improper execution in a suit by the purchaser at the foreclosure sale to reform the instrument for mutual mistake in the description of the mortgaged premises.

2. Reformation of Instruments C d—Judgment roll and quitclaim deed held to constitute admissions sufficient to take case to jury.

In this case certain land was conveyed by deed which omitted description of one of the boundaries, and the grantee later accepted a quitclaim deed reciting and correcting the error. The grantee thereafter mortgaged the land by deed containing the same description as the original deed. The mortgage was foreclosed by suit in which a verified complaint was filed alleging the number of acres conveyed and that there was a prior mortgage thereon. The prior mortgage correctly described the property. The mortgagor filed no answer and did not resist the decree of foreclosure, and the land was bought in at the commissioner's sale by the mortgagee. Thereafter the mortgagee, the purchaser at the sale, brought suit to reform his deed for mutual mistake in describing the boundaries: *Held*, the contention of the mortgagor that there was no sufficient evidence of mutual mistake cannot be sustained, the acceptance by him of the quitclaim deed being an admission of error, and his failure to answer the verified complaint in the foreclosure proceedings being an admission of the matters therein alleged in regard to the acreage and the prior mortgage, and a directed verdict on the issue in plaintiff's favor was justified under the evidence.

3. Evidence F e—Failure to answer verified complaint is admission of its contents.

Where the complaint is verified the failure of the defendant to file answer is an admission of its contents, and the defendant is affected with notice of all proceedings pending the trial.

4. Reformation of Instruments B b—Equitable relief of reformation of foreclosure deed held not dependent upon new foreclosure.

Where the mortgagee buys in the mortgaged property at the foreclosure sale by the commissioner under decree of court, and sues the mortgagor to reform the instrument for mutual mistake of the parties in describing the property in the mortgage deed, the mortgagor's contention that the mortgagee was entitled to the relief sought only upon condition of a new foreclosure cannot be sustained, the mortgagor and mortgagee being the only parties interested and the evidence clearly establishing the fact that the description was defective through mutual mistake.

APPEAL by defendants from *Sinclair, J.*, at February Term, 1932, of LENOIR. No error.

This is a suit to correct the description of two tracts of land in a mortgage executed by the defendants to the plaintiff and in a deed executed to the plaintiff by a commissioner appointed in foreclosure proceedings.

On 25 November, 1912, R. T. Creech and Ora Creech, his wife, conveyed to the defendants two tracts of land. It was afterwards discovered that in each description one boundary line had been inadvertently omitted, and on 6 May, 1920, Creech and his wife executed and delivered to the defendants another deed without warranty containing the correct boundaries, with a clause stating that an error had been made in describing the two tracts conveyed by the first deed. The lines left out of the two tracts in the first deed and included in the second are respectively, "thence S. 44 E. 60 poles to a stake on the public road," and "thence 37 W. 90 poles to a stake"; that is, one line was left out of the boundaries of each tract.

On 13 May, 1921, more than a year after the deed containing the correct boundaries had been executed, the defendants made three promissory notes payable to the plaintiff, each in the sum of $923.55, and at the same time and as a part of the same transaction executed and delivered to the plaintiff a mortgage on the two tracts above referred to, containing the uncorrected description set out in the deed first executed by Creech and his wife.

The defendants made default in the payment of their notes, and on 22 February, 1922, the plaintiff brought suit to foreclose the mortgage. The defendants were personally served with summons and a copy of the complaint, but they filed no answer and made no objection to the foreclosure. The court gave judgment for the amount due on the notes and ordered a sale of the land by a commissioner. The plaintiff purchased the land, the court confirmed the sale, and on 28 June, 1926, the commissioner conveyed the land to the plaintiff, filed his account, and was discharged.

The plaintiff went into possession of the land, and on 20 September, 1929, finding that the description in the mortgage, the judgment, and the commissioner's deed had been taken from the first of the Creech deeds, leaving out one line in each tract, brought suit to have the correction made for mutual mistake of the parties or the mistake of the draftsman.

In behalf of the defendants Mrs. Rouse offered to testify that she signed the mortgage because C. F. Harvey, Jr., told her he would never take the land, and that she had not signed it freely and voluntarily.

G. M. Rouse proposed to testify that before the suit for foreclosure was brought he had offered to turn the property over to the plaintiff for the collection of the rents and that the plaintiff since going into possession under the commissioner's deed had derived certain profits from the land, for which it ought to account. Similar testimony was offered by another witness. All this was excluded.

The issues and answer are as follows: Was it the intent of the plaintiff and defendants that the mortgage deed executed by the defendants to the plaintiff, recorded in Book 61, page 603, registry of Lenoir County, should convey same land with same description as described in quit-claim deed to the defendants recorded in Book 66, page 522, registry of Lenoir County? Answer: Yes.

Judgment for plaintiff; appeal by defendants upon exceptions.

Rouse & Rouse for appellants.
Wallace & White and Dawson & Jones for appellee.

ADAMS, J. When the plaintiff brought suit to foreclose the mortgage, the defendants had every needful opportunity to make any defense against a decree. They declined to resist for the reason no doubt that, according to all the evidence, they had no available defense at law or in equity. They neither filed an answer, nor denied the debt, nor excepted to the judgment. They are consequently estopped from setting up any defense which was open to them on the former trial. The proposed evidence could then have been offered.

It is a familiar maxim that a man shall not be twice vexed for the same cause. If a final judgment or decree is rendered the parties cannot again be heard upon any matter which was then litigated and determined, the controversy having passed *in rem judicatam* and become conclusive between the parties. *Bunker v. Bunker,* 140 N. C., 18; *White v. Tayloe,* 153 N. C., 29. The action is not a collateral attack upon the judgment but a suit in equity to reform the papers and to make them what the parties intended them to be.

In their contention that there is no evidence of mutual mistake or mistake by the draftsman the defendants, we think, are in error. Their acceptance of the second deed, or "quit-claim," executed by Creech and his wife with its recital of an error in the description set out in their former deed, was an admission of the error and of its correction. The correct description is embraced in the deed of trust executed by the defendants to the Virginia Trust Company, and in the complaint, a copy of which was served on each of the defendants and which in the trial of this cause was introduced in evidence as a part of the judgment roll, the plaintiff alleged that the deed of trust to the Virginia Trust Company was a lien on the land prior to the mortgage given by the defendants to the plaintiff. This is repeated in the judgment of foreclosure and in the decree of confirmation.

The complaint was verified; the failure to answer was an admission of its contents; and the defendants were affected with notice of all proceedings pending the trial. In all the deeds and in the plaintiff's mortgage the tracts of land are described as containing respectively 76 and 25 acres. The plaintiff went into possession of the land under the commissioner's deed in 1923 and the defendants made no complaint until the present suit was begun. There is unquestioned evidence of mistake and none in rebuttal. The defendants, therefore, were not entitled to judgment of nonsuit.

Furthermore, the court was justified in instructing the jury to answer the issue in the affirmative if they found the facts to be as shown by all the evidence. In response to the question whether the court should write the answer the "jury signified, yes, sir"; and then upon a poll taken each juror gave the same answer. This was the only issue raised by the evidence, and this the only instruction consistent with the proof.

We cannot assent to the proposition that upon the facts of this case the plaintiff is entitled to equitable relief only on condition of a new foreclosure. We are not now concerned with the rights of innocent purchasers. *Dameron v. Lumber Co.*, 161 N. C., 495. The only parties interested are the mortgagors and the mortgagee, and as between them it would be inequitable to deny relief when all the evidence clearly points to the fact that owing to mistake the parties did not consummate the contract they intended to make. *Butler v. Durham*, 38 N. C., 589; *Durant v. Crowell*, 97 N. C., 367; *Sills v. Ford*, 171 N. C., 733; *Bank v. Redwine, ibid.*, 559; *Roberts v. Massey*, 185 N. C., 164; *Gray v. Mewborn*, 194 N. C., 348.

After considering all the exceptions in the appellants' brief we find No error.

THE BROADWAY BANK OF KANSAS CITY v. REX C. NOBLE.

(Filed 12 October, 1932.)

Trial D b—Where evidence is not conflicting and is unimpeached a directed verdict is not error.

Where the evidence upon the trial of an action is uncontradicted and is not conflicting, and there is no evidence by either party tending to impeach the witnesses, and but one reasonable inference can be drawn from the evidence, an instruction that if the jury believed the evidence to answer the issues as directed is not error, but where the judge writes the answers to the issues with the acquiescence of the jury either party may request that the jury be polled, there being no exception to the action of the court.

APPEAL by defendant from *Sinclair, J.*, at February Term, 1932, of LENOIR. No error.

This is an action to recover on two notes, both dated 17 November, 1928, each for the sum of one hundred and fifty dollars, and due sixty and ninety days after date, respectively. Both notes were signed by the defendant, Rex C. Noble; they were payable to the order of W. M. Lowthrop, and were delivered to him by the defendant. They were endorsed in blank by the payee, and were negotiated, prior to maturity, to C. W. Ament, a resident of Kansas City, Missouri, and a regular customer of the plaintiff. They were delivered by C. W. Ament to the plaintiff on 7 December, 1929, as collateral security for a loan, evidenced by a note, made by the plaintiff to the said C. W. Ament. The note of C. W. Ament to the plaintiff has not been paid, and the plaintiff is now the holder of both said notes.

The defendant has refused to pay said notes for the reason that the execution of both said notes was procured by the fraud of the payee as alleged in the answer.

The action was tried upon the issues raised by the pleadings, which are as follows:

"1. Were the notes sued on in this action, and the signatures thereon, procured by fraud as alleged in the answer?"

With respect to this issue, the court instructed the jury as follows:

"If you find the facts to be as testified to, I direct you to answer this issue, 'Yes,' and with your permission, I will write that answer for you."

"2. Is the plaintiff the holder of said notes in due course, taking them in good faith, before maturity and for value, without notice of any defect or infirmity?"

With respect to this issue, the court instructed the jury as follows:

"If you find the facts to be as testified and as shown by the record evidence, I direct you to answer this issue 'Yes,' and with your permission I will write that answer for you." The defendant excepted to this instruction.

"3. Is the defendant indebted to the plaintiff, and if so, in what amount?"

With respect to this issue, the court instructed the jury as follows:

"If you find the facts to be as testified and as shown by the written evidence, I direct you to answer this issue, '$300.00, with interest,' and with your permission I will write that answer for you." The defendant excepted to this instruction.

The court thereupon, in the presence of the jurors, wrote the answers to the issues as appears in the record, and handed same to the clerk of the court. After the charge of the court, the jurors remained silent for some time, whereupon they were asked by the clerk, in the presence of the judge, "Is this your verdict?" The jurors did not respond to the inquiry of the clerk, and the court again instructed the jury as follows:

"Gentlemen of the jury, I directed you how to answer these issues. Do you answer that way or not? The plaintiff is not the party, gentlemen, who took the notes. The plaintiff is the bank in Missouri." The defendant excepted to this instruction.

The answers to the issues as written by the judge, in the presence of the jurors, were entered as the verdict in this action.

From judgment that plaintiff recover of the defendant the sum of $300, with interest and costs, the defendant appealed to the Supreme Court.

Wallace & White for plaintiff.
Sutton & Greene for defendant.

CONNOR, J. All the evidence introduced at the trial of this action, if believed by the jury, tended to show (1) that the execution of the two notes sued on by the plaintiff was procured by the fraud of the payee, as alleged by the defendant in his answer; (2) that the plaintiff is the holder of said notes, which are in form negotiable instruments, in due course, having taken them from a prior holder in good faith, before maturity and for value, without notice of any defect or infirmity; and (3) that the defendant, as maker of the notes, is now indebted to the plaintiff in the sum of $300.00, with interest on each note from the date of its maturity.

There was no evidence on behalf of the plaintiff tending to contradict the evidence introduced by the defendant to sustain his contention that

the first issue should be answered in the affirmative; nor was there evidence on behalf of the defendant tending to contradict the evidence introduced by the plaintiff tending to sustain its contentions that the second issue should be answered in the affirmative, and the third issue, "$300.00, and interest."

There was no evidence, by cross-examination or otherwise, tending to impeach the witnesses for the defendant or the witnesses for the plaintiff.

There was, therefore, no error in the instructions of the court to the jury, which are assigned as error in this appeal. The instructions are in accord with the rule stated in *Reinhardt v. Insurance Co.,* 201 N. C., 785, 161 S. E., 528, and approved in *Somersette v. Stanaland,* 202 N. C., 685, 163 S. E., 804. This rule is stated by Prof. McIntosh, in N. C. Practice and Procedure, on page 632, as follows:

"If the evidence is all one way, and there is no conflict, the judge may say to the jury that, if they believe the evidence, they may find a certain verdict, but he cannot direct them that they must so find from the evidence. 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."

The defendant in the instant case did not except to the action of the judge in writing the answers to the issues, with the permission of the jury, as shown by their acquiescence, nor does the defendant on his appeal to this Court assign such action as error. The defendant did not request the court to poll the jury, as he had the right to do. *Lipscomb v. Cox,* 195 N. C., 502, 142 S. E., 779; *In re Will of Sugg,* 194 N. C., 638, 140 S. E., 604. The record shows that the verdict was rendered by the jury in accordance with the instructions of the court. In view of the uncontradicted evidence, no other verdict could have been rendered. The judgment is affirmed. There is

No error.

THE FEDERAL LAND BANK OF COLUMBIA v. ADA G. WHITEHURST AND HUSBAND, C. H. WHITEHURST; WILSON H. LEE AND WIFE, ELIZABETH H. LEE; DILL AND COMPANY, INCORPORATED, A CORPORATION; AND NEW BERN NATIONAL FARM LOAN ASSOCIATION.

(Filed 12 October, 1932.)

1. Mortgages F b—Transferor of equity of redemption is not entitled to notice of default by his grantee who had assumed the debt.

Where the mortgagor conveys his equity of redemption by deed in which the purchaser assumes the mortgage debt, and the purchaser in turn sells to another who also assumes the debt: *Held,* in an action by the

mortgagee to foreclose the mortgage and to recover from each of the parties, the contentions of the first purchaser of the equity of redemption that the mortgagee had collected interest directly from the second purchaser and had elected to pursue his remedy against him, that the mortgagee had failed to collect the installments on the debt as they became due and had failed to notify the first purchaser of the second purchaser's default thereon, and had failed to collect taxes advanced or prevent waste by the second purchaser, and that the first purchaser of the equity of redemption was entitled to an off-set or counterclaim therefor as against his liability on the mortgage debt is without merit, and a demurrer to his answer setting up such defenses is properly sustained, mere forbearance by the mortgagee not being sufficient to relase the first purchaser from liability on the mortgage debt assumed by him.

2. Same: Novation A a—Assumption of mortgage debt by purchaser of equity of redemption does not constitute a novation.

Where the grantee in a deed to lands merely assumes the indebtedness of a prior mortgage lien thereon the transaction is not a novation of the mortgage note, there being no element of a further consideration passing between the parties or a substitution of a new for an old or subsisting debt.

3. Mortgages F b—Mortgagor is primarily liable to mortgagee but is surety as between himself and his grantee assuming the debt.

As between the mortgagor and the mortgagee the mortgagor is primarily liable for the mortgage debt, but as between the mortgagor and his grantee assuming the debt the mortgagor is a surety, and the note and the mortgage are not merged, and the mortgagee may sue either *in rem* by foreclosure or *in personam* on the note against the mortgagor and against the purchaser of the equity of redemption on the contract made for the mortgagee's benefit.

4. Mortgages H k—Under pleadings in this case stock redeemable upon payment of mortgage debt was not available as set-off.

Where the purchaser of an equity of redemption assumes the mortgage debt in his deed and is sued by the mortgagee to recover thereon, and as a set-off or counterclaim the purchaser alleges ownership of certain stock redeemable upon payment of the mortgage debt without alleging by whom the stock was issued or by whom redeemable or that the mortgage debt had been paid: *Held*, upon the pleadings the purchaser is not entitled to set up the stock as a counterclaim in the mortgagee's action to recover on the debt assumed by the purchaser of the equity of redemption.

APPEAL by defendants, Wilson H. Lee and wife, Elizabeth H. Lee, from *Cranmer, J.*, at April Term, 1932, of CRAVEN. Affirmed.

This is an action brought by plaintiff to foreclose a certain mortgage given it by C. H. Whitehurst and wife, Ada G. Whitehurst, and prayer also for judgment against the Whitehursts, who gave the notes and mortgage, and Wilson H. Lee who assumed to pay same. The amount prayed for was $949.72 and interest from 1 January, 1930, at 5½ per cent interest in accordance with the terms of the notes and mortgage.

(1) C. H. Whitehurst and wife, Ada G. Whitehurst, on 5 May, 1925, borrowed from plaintiff the sum of $1,000, and gave a mortgage on 32.9 acres of land in New Bern Township, Craven County, North Carolina (particularly describing same), to secure the indebtedness. The indebtedness was evidenced by certain promissory notes made by C. H. Whitehurst wherein he promised to pay to the plaintiff or order, its successors or assigns, the sum of $1,000, together with interest thereon at the rate of 5½ per cent per annum from the date of said note to the first day of July, 1925, which interest was payable on that date; the said note further providing that after said date the whole amount of said principal sum remaining from time to time unpaid shall bear interest at the rate of 5½ per cent per annum, payable semiannually, both principal and interest being payable on an amortization plan in sixty-eight semiannual installments of $32.50 each, and a final installment of $32.42, the first installment being payable on 1 January, 1926, and the next installment on 1 July, 1926, and each successive installment being payable on the same date of each succeeding year thereafter until the entire amount shall be paid.

The mortgage was recorded in the register of deeds office for Craven County, North Carolina, on 5 May, 1925, Book 263, at p. 597. The mortgage also provided that the Whitehursts should pay all taxes assessed and insurance premiums, and if advanced by the Land Bank "tacked" on the mortgage and made a part thereof. The usual foreclosure clause on default was set forth in the mortgage.

(2) By deed, dated 4 March, 1926, duly recorded in Book 270, at page 270, register of deeds office for Craven County, North Carolina, C. H. Whitehurst and wife, Ada G. Whitehurst, conveyed the said land which was mortgaged to the plaintiff to the defendant, Wilson H. Lee, who assumed all the terms, covenants and conditions of the loan from the Whitehursts to plaintiff, and agreed with plaintiff and obligated himself to pay the said notes secured by the mortgage and to carry out the terms, covenants and conditions of the loan as contained in the before mentioned notes and mortgage to the plaintiff.

(3) By deed, dated 23 December, 1927, duly recorded in Book 283, at p. 159, register of deeds office for Craven County, North Carolina, Wilson H. Lee and wife, Elizabeth H. Lee, conveyed the said land mortgaged to plaintiff to the defendant Dill and Company, Incorporated, among other provisions, the said deed contained the following recital under the warranty clause: "Excepting and subject to the indebtedness of approximately $950.00 due the Federal Land Bank of Columbia by Ada G. Whitehurst and her husband, C. H. Whitehurst, dated 5 May, 1925, recorded in Book 263, at page 597, office of the register of deeds

of Craven County, which indebtedness party of the second part (Dill and Company, Incorporated) assumes and covenants to pay off according to the terms of said mortgage, which amount of indebtedness is expressly excepted from the warranty of this deed."

Dill and Company, Incorporated, defaulted in the payment of the indebtedness which it covenanted and agreed to pay. The defendant Wilson H. Lee contended that Dill and Company, Incorporated, was liable as principal debtor and he was released from the assumed obligation to plaintiff. For the reasons that (1) the defendant, Dill and Company, Incorporated, as purchaser and owner of said mortgaged premises, paid to plaintiff, the Federal Land Bank, and plaintiff received from said Dill and Company, Incorporated, the semiannual installment due on said loan for years 1928 and 1929, and the installment due 1 January, 1930, but thereafter defaulted in the payments due under the mortgage, and the installments were in arrears for two years prior to the commencement of this action, during all of which time plaintiff dealt entirely with defendant, Dill and Company, Incorporated, concerning the loan and the payment due thereon and looked entirely to it for payment of the debt and taxes.

(2) That plaintiff wrongfully and negligently failed to give defendant Wilson H. Lee prompt notice and make demand for payment of the semiannual installments and for the taxes assessed against said property and dealt with and looked solely to Dill and Company, Incorporated, and therefore plaintiff was guilty of laches and has no cause of action against him in law or equity.

(3) That he is entitled to a set-off and counterclaim against plaintiff for wrongfully and negligently not (a) collecting past-due installments, unpaid taxes, and penalties, etc., in the aggregate the sum of $445, itemizing them. (b) That plaintiff wrongfully and negligently failed to have a receiver appointed to take charge of the mortgaged land, collect the rents which were easily worth $50 each year for the years 1930 and 1931, and therefore entitled to a set-off and counterclaim in the sum of $100. (c) That plaintiff wrongfully and negligently permitted Dill and Company, Incorporated, to commit waste by cutting the timber and not applying it on the debt, and therefore entitled to a set-off and counterclaim in the sum of $250.

"9. That at the time the loan herein referred to was made, a certificate of stock was issued to the borrower, Ada G. Whitehurst, in the sum of $50, which is redeemable at its face value when the loan is paid in full, and as this defendant is advised and believes, in the event he is held liable for any sum or sums due under said mortgage, the proceeds from the said stock will inure to his benefit and the said amount is

especially pleaded as a further offset and counterclaim against any recovery sought by plaintiff against this answering defendant."

In the amended answer of Lee "3. That the defendant Wilson H. Lee is by written assignment the rightful owner and holder of the certificate of stock mentioned in paragraph 9 of defendants' answer and first further answer and further defense and it is averred that the said defendant Wilson H. Lee will be entitled to the said stock and the proceeds that may be derived therefrom in the event he is held liable for any sum or sums due under said mortgage as heretofore alleged."

The defendant Lee asks for a cross-judgment against Dill and Company, Incorporated, if judgment is recovered against them by plaintiff. The plaintiff demurs to defendant Wilson's answer and amended answer in part: "There was no duty in law, and none alleged, upon plaintiff to make demand upon defendant for the payment of the installments of the note when due, or to give him notice of the nonpayment: No facts constituting negligence or laches are alleged. Such negligence or laches, if alleged and proved, would not constitute a defense to plaintiff's right of recovery and to foreclose its mortgage. Such negligence or laches, if alleged and proved, would not entitle defendant to damages as a set-off or counterclaim against plaintiff; it is nowhere alleged that plaintiff was notified by defendant to bring suit or use diligence to save defendant harmless. It is nowhere alleged that plaintiff had knowledge or was given notice of the cutting of timber by Dill and Company, Incorporated. The defendant, W. H. Lee, having admitted the assumption of the debt, is not, as a matter of law, released from his liability for the payment thereof by failure of the plaintiff, whether negligent or otherwise, to notify defendant of its maturity and the failure of Dill and Company, Incorporated, to make payment, or the failure of Dill and Company, Incorporated, to pay taxes on the mortgaged land, or to compel Dill and Company, Incorporated, to pay the installments and taxes, or to collect rents or prevent waste on the mortgaged land; and such failure of plaintiff to make demand, or give notice, or compel payment, or collect rents, or prevent waste, does not constitute a valid defense to plaintiff's recovery of judgment against said defendant, Wilson H. Lee, and does not constitute valid grounds or cause for counterclaim or set-off in favor of said defendant against plaintiff. The right to the proceeds of the redemption of said stock does not as a matter of law entitle the defendant, W. H. Lee, to a set-off or counterclaim against plaintiff in this action. Wherefore, plaintiff prays that judgment be entered as prayed in the complaint."

The court below, Cranmer, J., upon demurrers of plaintiff to the answer and amended answer of defendants, Wilson H. Lee and wife,

Elizabeth H. Lee, the demurrers were sustained and judgment entered against all the defendants, and as to them, the defendants, Wilson H. Lee and wife, Elizabeth H. Lee, excepts, assigns error to the judgment as signed and appealed to the Supreme Court.

John A. Guion and Harry D. Reed for plaintiff.

Lawrence A. Stith and Moore & Dunn for defendants Wilson H. Lee and wife, Elizabeth H. Lee.

CLARKSON, J. The questions presented on this appeal: (1) When defendant, answering complaint for foreclosure of a mortgage, admits execution of note and mortgage by the original mortgagor, and purchase of land from mortgagor and assumption of the debt and mortgage by him, and default in payment, is his plea of subsequent conveyance by him to another who assumed the mortgage, and failure of the mortgagee to collect installments of the debt and taxes and to give him notice of the defaults and to prevent waste on the land a valid defense in bar of plaintiff's recovery of judgment against him or valid ground for a counterclaim? (2) Is defendant's allegation of ownership of stock certificate, redeemable on payment of the mortgage debt, sufficient to constitute a valid counterclaim against plaintiff, it not being alleged by whom the stock was issued or by whom it is redeemable or that the debt has been paid? We think that both questions must be answered in the negative.

This Court in *Rector v. Lyda,* 180 N. C., at p. 578, citing numerous authorities, speaking to the subject, says: "The authorities thus state the old and the new rule. The doctrine of equity is that when the grantee in a deed assumes the payment of the mortgage debt, he is to be regarded as the principal debtor, and the mortgagor occupies the position of a surety; and the mortgagee is permitted to resort to the grantee to recover the deficiency after applying the proceeds of a sale of the mortgaged premises, and this by the equity rule that the creditor is entitled to the benefit of all the collateral securities which his debtor has obtained to reinforce the principal obligation, though his right is strictly an equitable one, and its exercise at law has been refused. But the broad doctrine has since been laid down, that one for whose benefit a promise is made to another may maintain an action upon the promise, though he is not a party to the agreement or privy to the consideration thereof; and it was then held in unqualified terms that whoever has for a valuable consideration assumed and agreed to pay another's debt may be sued directly by the creditor, and that a mortgagee or other incumbrancer may maintain a personal action against a purchaser from the

owner of the equity of redemption who has agreed with his grantor to assume and pay off the incumbrance, if the party with whom the agreement was made was himself personally liable upon the mortgage debt. Sheldon on Subrogation (2d) pp. 128-9, sec. 85. We have in recent cases held that where a contract between two parties is made for the benefit of a third, the latter may sue thereon and recover although not strictly a privy to the contract."

One of the leading cases on the subject—*Baber v. Henie,* 163 N. C., 588, is cited. See 21 A. L. R., 411, 423, 433; *Parlier v. Miller,* 186 N. C., 501; *Keller v. Parrish,* 196 N. C., 733; *Green v. Elias,* 198 N. C., 256; *Brown v. Turner,* 202 N. C., 227.

We think on all the evidence in this case, there was no novation, express or implied. There was no substitution of a new debt or obligation for an existing one.

In *Brown v. Turner, supra,* at pages 229-30, the following is said: "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." From the above decision as between the defendant Lee and the plaintiff the said Lee is a principal debtor and not a mere surety. It is different as between Dill and Company, Incorporated, and Lee, in that case Lee is surety. But be that as it may if the relationship of Lee was that of surety it would not avail him.

In Arant on Suretyship (Hornbook Series, 1931), at pp. 313 and 314, the following principle is laid down: "It is also said that the creditor's indulgence toward the principal, so long as it takes the form of mere passivity, and results from motives of mere benevolence, is assumed to be for the benefit of the surety as well as the principal and, for this reason, the surety's assent to forbearance is presumed. But, if the creditor for a consideration promises to give the principal a longer time to perform, he is considered to be acting for his own interest; because

of this, the surety's assent is not presumed, and he is, as a consequence, discharged. . . . . It is generally held that the surety is liable so long as the creditor does no act that invalidates his mortgage or lien as security. . . . The same conclusion should follow where property held by the creditor as security is lost, if the creditor breaks a promise either to the principal or the surety to protect it by insuring it. The surety should also be discharged *pro tanto* when the nature of property accepted as security is such that the preservation of its value requires affirmative action by the creditor."

In *Neal v. Freeman,* 85 N. C., p. 445-6, *Ruffin, J.,* citing authorities, says: "A creditor is not bound to a surety for active diligence against the principal, for it is the contract of the surety that the principal shall pay the debt, and it is his business therefore to see that he does so. Consequently, a forbearance to sue, even if accompanied with a failure to inform the surety of the principal's want of punctuality, will not discharge the former. . . . There is no release of any security; no change in the terms of their contract; no contract to forbear for a stipulated time; no tender of the amounts due and refusal; nothing in short which could imply bad faith on the part of the creditor, or a disregard, or even indifference to the rights and interests of the sureties."

In *Bank v. Homesley,* 99 N. C., at p. 534, citing authorities: "The doctrine extracted from these cases, where the creditor merely remains passive, doing nothing himself detrimental to the sureties, while the opportunity is afforded them, by paying the debt and having the judgment assigned to a trustee, so as to place it under their control, cannot be invoked for the relief of the sureties in this case."

A surety is a maker (of a note) and is primarily liable for the payment of the debt, and is not entitled to notice of dishonor. *Rouse v. Wooten,* 140 N. C., 557; *Edwards v. Insurance Co.,* 173 N. C., 614; *Horton v. Wilson,* 175 N. C., 533.

Walters v. Rogers, 198 N. C., at p. 211, citing authorities: "There can be no doubt of the general rule that a nonassenting surety in a negotiable instrument is discharged from liability when the creditor makes a valid contract with the principal debtor to postpone the day of payment and thereby puts it beyond the power of the surety to pay the debt and sue the principal. But, if at the time the extension is granted to the principal, the creditor expressly reserves his remedies against the surety, the latter will not be discharged—this on the theory that in such event the surety could pay the debt and sue the principal, although the creditor could not."

We do not think that the right to the proceeds of the redemption of the stock as the pleadings now stand, entitles the defendant Lee to any set-off or counterclaim against the plaintiff.

When Lee assumed the debt of Whitehurst to plaintiff he obligated to pay it. There was no novation when he sold to Dill and Company, Incorporated, and it assumed the obligation. We can see no such negligence on the part of the plaintiff, under the facts and circumstances of this case, as would relieve the defendant Lee from the obligation he assumed when he purchased the land from the Whitehursts.

The judgment of the court below on the demurrers of defendant to the answer and amended answer must be sustained. The judgment is

Affirmed.

ALF. M. THOMPSON, TRUSTEE OF RALEIGH ROOFING AND CORNICE COMPANY, BANKRUPT, v. S. B. SHEPHERD, J. E. STEVICK AND MAMIE ALDERSON.

(Filed 12 October, 1932.)

1. Corporations D e—Corporation may purchase its own stock when transaction is open, fair and for valuable consideration.

The purchase of its stock by a corporation from an officer, director and attorney thereof may be valid upon resolution of all its directors and shareholders when done openly and fairly for a valuable consideration at a time when the corporation is prosperous and the consideration therefor is not a preëxisting debt of the corporation, in this case the consideration was the lands whereon the corporate business was done and a certain sum in cash, the transaction being without fraud or oppression, and the corporation thereafter borrowing money to supply the cash paid as a part of the consideration.

2. Same—Receiver's request for directed verdict in action to set aside purchase of its stock by corporation held properly refused.

Where, in an action by the receiver of a corporation to set aside the purchase by the corporation of its own stock from an officer and director thereof, the evidence tends only to show that the transaction did not affect the rights of creditors and all the directors and stockholders agreed to it at the time, that the transaction was made with a full disclosure of the facts and was free from fraud and oppression and that at the time the corporation was operating at a large profit and continued in business for several years thereafter: *Held*, the refusal of the receiver's motion for a directed verdict was not error.

3. Corporations C d—Transaction between corporation and its officer is regarded with suspicion and burden is on officer to prove fairness.

The dealings between a corporation and its officers and directors should be closely scrutinized by the courts to ascertain whether the transaction is free from fraud and oppression and that it is not prejudicial to the corporation or its creditors, and the burden of proof is on the officer or director to show that the transaction was open, fair, and for a valuable consideration.

4. Same—C. S., 1161 and 1179, held not applicable to the facts of this case.

In this case a corporation purchased its own stock from an officer and director at a time when the corporation was operating at a large profit and had no preëxisting debts, and the stock was later reissued to its other stockholders, the purchase being made with the unanimous consent of all its directors and stockholders: *Held*, upon the insolvency of the corporation several years after the transaction, the provisions of C. S., 1161 and 1179 are not applicable in the receiver's suit against the directors.

APPEAL by plaintiffs from *Devin, J.*, and a jury, at March Term, 1932, of WAKE. No error.

The Raleigh Roofing and Cornice Company, was a corporation composed of S. B. Shepherd, J. E. Stevick and Mamie Alderson, they were all the stockholders at the time of the matter hereinafter referred to. On ..... April, 1925, the following was agreed to and entered on the minutes of the meeting of the stockholders of said corporation: "That whereas the assets of the corporation, taken from the annual report made in February, 1925, shows the same to be over $65,000, over and above all its liabilities, and that the accumulative capital of the company is in excess of the amount necessary to carry on the business of the company and to maintain its credit, and the stockholders have agreed on the proposition submitted by Mr. Shepherd: Therefore, be it resolved that the said ..... be, and the same is hereby accepted, that the officers of the company are directed to pay to the said S. B. Shepherd the sum of $4,000 in cash and to make deed to the real estate lying on Davie and Gale streets in the city of Raleigh in exchange for his entire holdings of stock in the said company, the same amounting to 30 shares; and they further authorize the lease of said building from the said Shepherd upon the terms outlined in his offer."

At the time this resolution was passed, Shepherd was vice-president, director and attorney for the corporation, and held a majority of the stock. Stevick was president, and Miss Alderson was secretary and treasurer, the capital stock being $5,000 at that time at a par value of $100 and consisted of fifty shares. Of the capital stock of fifty shares, S. B. Shepherd owned 30, Stevick 19, and Miss Alderson 1.

The testimony of Miss Alderson was substantially as follows: "That she was secretary and treasurer and bookkeeper, and that she kept the minutes of the corporation, and that every year since it was organized back in 1910 or 1911, that since that time Mr. Shepherd has been a stockholder and director, and that the business was prosperous and made money, and that the dividends were paid out of the earnings of the corporation, which amounted to in many years as much as 60 per cent,

legally paid out of the earnings of the company, according to statements and that from the earnings of the company real estate was purchased and buildings erected thereon at a cost to the corporation of some $13,000, but which at the time were worth something like $30,000, and which was agreed to by Mr. Stevick, and Mr. Shepherd and Miss Alderson; that Mr. Stevick, who was president and the active man in the corporation, directing its operations, was engaged in the roofing and cornice business in the city of Raleigh, and working upon buildings, that Mr. Shepherd was drawing a considerable amount of dividends, that Mr. Stevick deemed it wise to have this stock transferred to the company for such use as he desired to make, and eliminate Mr. Shepherd so that the earnings of the company would go into the treasury, or to whom the transfer of stock might thereafter be made, and that the suggestion came from Mr. Shepherd to make arrangements by which Mr. Stevick's interest in the company might be extended, and thereupon Mr. Shepherd made a proposition, which was agreed to by Mr. Stevick and Miss Alderson, and that it was drawn up, and at a meeting of the stockholders and directors sale made of this real estate paying him $4,000 additional.

The stock purchase of S. B. Shepherd was reissued, 16 shares to Stevick, 12 to his son, and two to Miss Alderson. Thereafter the corporation borrowed $4,000 to pay Shepherd. The plaintiff contends that part of this has not been paid. Thereafter the business commenced to decline and in a few years it had to be placed in bankruptcy—on 10 December, 1929.

The court below gave the contentions in part as follows: "The defendant contends that the subsequent course of the corporation should not be considered by you in valuation of the stock at the time that this transaction was made, and which turned out to be made at a time when business was at a high and prosperous grade, that he was drawing a large dividend, and that the other stockholders wanted to get him out, and that he made this proposition which they accepted, and at that time it was fair and open, and was at that time an adequate consideration, and that business declined afterwards, and that it turned out to be a bad investment, and that at the time it was a fair and adequate consideration, and that thirty shares of stock representing 60 per cent of the total amount of the assets of the corporation, was a fair consideration for the conveyance of the real estate, and the payment of the money, and he contends that it was fair, open and above board in all respects, and no suggestion that he overreached his associates, and that no act of fraud was practiced, but contends that it was an adequate consideration, and he contends that it was fair and adequate at the time it was made,

and the plaintiff contends that it was not fair and adequate, the plaintiff contends that he occupied a dominant position, the burden being on him to show that it was a fair and adequate consideration, and the plaintiff contends that the evidence should not warrant you in finding that it was for an adequate consideration, that the transfer of these shares was not worth anything near what Mr. Shepherd got from the corporation in real estate and cash. This is a question for you. Take the issue and consider it and answer without regard to anything else except the evidence and rules of law laid down to you for your guidance. Upon your further request for information, I charge you that you are to be the sole judges of the evidence and the only matter for you to consider is the matter of the sufficiency of the consideration at the time of the transaction and what happened thereafter is of no concern to you. The matter is entirely a matter of fact for your consideration and you will have to determine for yourselves."

The following judgment was rendered by the court below: "This cause comes on to be heard and is heard before Honorable W. A. Devin, judge, and a jury, at the above stated term of court, whereupon the court submitted to the jury an issue as follows: 'Was the conveyance of the property described in paragraphs Nos. 6 and 12 of the complaint, by the Raleigh Roofing and Cornice Company to the defendant S. Brown Shepherd, openly and fairly made and for an adequate consideration?' The jury answered the issue 'Yes.'

It is now, therefore, upon motion of Ruark & Ruark and Charles U. Harris, attorneys for defendant, S. B. Shepherd, ordered, adjudged and decreed that the deed from Raleigh Roofing and Cornice Company, to S. B. Shepherd referred to in the complaint, which said deed is dated 2 May, 1925, and was filed for registration at 12 o'clock noon, on 8th day of May, 1925, and is recorded in the office of the register of deeds of Wake County, in Book 460, page 532, was and it constitutes in all respects a valid conveyance from Raleigh Roofing and Cornice Company, to S. B. Shepherd of the lands and premises referred to and described in said deed and in the complaint in this action, and that the plaintiff is not entitled to any relief by reason of any of the matters and things alleged in the complaint. It is further ordered, adjudged and decreed that defendant, S. B. Shepherd, go without day and recover of the plaintiff and the sureties on plaintiff's prosecution bond the costs to be taxed by the clerk of this court. W. A. DEVIN, *Judge Presiding.*"

The plaintiff excepted to the judgment as signed and made numerous other exceptions and assignments of error, and appealed to the Supreme Court.

J. C. Little and Briggs & West for plaintiff.
Ruark & Ruark for defendant.

CLARKSON, J. We think the main exception and assignment of error made by plaintiff and determinative of this controversy: Did the court below err in refusing plaintiff's motion for a directed verdict at the close of all the evidence? We cannot so hold.

In *Hill v. Lumber Co.*, 113 N. C., at p. 176, we find: "Neither can there be any doubt that the capital stock and property of the corporation, in case of its insolvency, constitute a fund, first for the satisfaction of its creditors, and next for the shareholders."

The principle is thus stated in *Wall v. Rothrock*, 171 N. C., at p. 391: "There is no doubt that a board of directors, unless restricted by charter, may borrow money for the *present* needs of the corporation, and authorize certain directors to endorse the notes and secure them by mortgage on the corporate property, if done in good faith. . . . There is nothing to hinder a director from loaning money and taking liens on the corporate property to secure him. If he can do that, he can lend his credit by endorsing its paper in order to obtain needed cash, and secure himself upon the corporation's property. Such transactions are looked upon with suspicion, and strict proof of their bona fides is required . . . but the directors, occupying a fiduciary relation, are not permitted to secure themselves *against preëxisting liabilities of the corporation upon which they are already bound, or for money they may have already loaned, when the corporation is in declining circumstances and verging on insolvency.* (Italics ours.) They cannot be permitted to take advantage of their intimate knowledge of the corporation's affairs for their own benefit at the expense of the general creditors." *Power Co. v. Mill Co.*, 154 N. C., 76; *Pender v. Speight*, 159 N. C., 612; *Gilmore v. Smathers*, 167 N. C., 444; *Drug Co. v. Drug Co.*, 173 N. C., at p. 508; *Redrying Co. v. Gurley*, 197 N. C., at p. 61; *Shuford v. Brown*, 201 N. C., at p. 24.

It will be noted that the vice is when the transaction affects *preëxisting liabilities.* In the present action when the matter complained of was consummated, there were no preëxisting liabilities. The $4,000 note was made subsequent.

Thompson on Corporations, Supplement, 1931, part sec. 3685, at p. 610: "It is not illegal for a corporation to retire its stock if it has sufficient surplus so that the rights of its creditors will not be adversely affected." N. C. Code, 1931 (Michie), C. S., 1161, 1179. See *Pender's case, supra.*

The matter germane to this action is succinctly stated, citing many decisions, in Thompson on Corporations, *supra,* part sec. 4081, p. 638:

"A purchase of its own stock by a corporation must be free from fraud and must not prejudice the rights of creditors. . . . Generally the propriety and desirability of a purchase by a corporation of its stock should be determined by its directors rather than by the courts."

The purchase must be free from fraud. On this aspect, the issue submitted was as follows: "Was the conveyance of the property described in paragraphs Nos. 6 and 12 of the complaint, by the Raleigh Roofing and Cornice Company to the defendant, S. Brown Shepherd, openly and fairly made, and for an adequate consideration?" To which the jury responded in the affirmative—Yes.

In *Hospital v. Nicholson,* 189 N. C., at p. 49, citing numerous authorities, speaking to the subject, it is said: "When an officer or director of a corporation purchases or leases its property, the transaction is voidable, not void, and will be sustained only when openly and fairly made for an adequate consideration. The presumption is against the validity of such contract and when it is attacked the purchaser or lessee must show that it is fair and free from oppression, imposition, and actual or constructive fraud. Firmly established in our jurisdiction is the doctrine that a person occupying a place of trust should not put himself in a position in which self-interest conflicts with any duty he owes to those for whom he acts; and as a general rule he will not be permitted to make a profit by purchasing or leasing the property of those toward whom he occupies a fiduciary relation without affirmatively showing full disclosure and fair dealing. Upon this principle it is held that a director who exercises a controlling influence over codirectors cannot defend a purchase by him of corporate property on the ground that his action was approved by them." *Mfg. Co. v. Bell,* 193 N. C., 367; *Cotton Mills v. Knitting Co.,* 194 N. C., 80; *Morris v. Y. & B. Corp.,* 198 N. C., at p. 713.

The court below charged the jury in the very language of the *Hospital case, supra.* The court below further charged the jury: "No corporation has the right to reduce its capital stock except in the manner prescribed by the statute, and there is no evidence that in the transaction of April, 1925, this was done or attempted to be done. Capital stock may be decreased by the purchase of shares for retirement at not above par. Unless restrained by some provision of the charter, a corporation may purchase its own stock for sale or proper disposition of the same. Now the action here is for the purpose of declaring void and illegal the transfer of the property of the corporation to an officer of the corporation upon the ground that it was not fair, open and for a fair and adequate consideration. . . . If you find that it was made openly, without concealment, and with full knowledge of the facts by the parties concerned,

fully disclosed, fairly and without taint of oppression, coercion, improper or undue influence, or undue advantage, in good faith and free from actual or constructive fraud, for a fair consideration, not necessarily the exact consideration to a nicety, but a fair and adequate consideration, for the conveyance was paid, and that it was openly and fairly made, if you find these are the facts by the greater weight of the evidence, answer the issue Yes, otherwise No."

We do not think C. S., 1161 or 1179, N. C. Code, 1931, (Michie), applicable to the facts in this case, but the principle is well settled as stated in *Ellington v. Supply Co.*, 196 N. C., at p. 789: "Corporations are artificial beings and are organized to do business in accordance with the statutory provisions of the law on the subject. The powers, rights, duties, and liabilities are fixed by statute and they are creatures of the law. Every one dealing with a corporation does so with the express or implied limitations imposed by statute."

It seems from the record that all the stockholders—the three—were satisfied, they were the ones most vitally interested. The jury found there was no fraud, after a charge by the court below in which we find no error. The corporation had been in existence since 1 August, 1910, it purchased Shepherd's stock in April, 1925, continued to function for years after until the business deflation of recent years, and on 10 December, 1929, it became bankrupt. There were no preëxisting debts. In law we find

No error.

STATE v. WALLACE B. DAVIS, LUKE LEA AND LUKE LEA, JR.

(Filed 19 October, 1932.)

1. Criminal Law J f—Superior Court may hear motion for new trial for newly discovered evidence after affirmance of judgment.

In order to make sure that no man shall be deprived of life, liberty or property but by the law of the land, the Superior Court has jurisdiction to hear and determine in its discretion a motion for a new trial for newly discovered evidence at the next succeeding term of court after affirmance of the judgment by the Supreme Court.

2. Same—After affirmance of judgment motion for new trial may not be made for errors during trial or for jury bias or attaint.

An application for a new trial at the next succeeding term of the Superior Court after affirmance of the judgment by the Supreme Court has not been sanctioned by our decisions, on the grounds of prejudice, misconduct or attaint of jury or for any matter occurring during the trial, or for the purpose of delay, and the Superior Court has no jurisdiction to hear the motion for errors committed on the hearing, such matters

being exclusively for the Supreme Court in its appellate or supervisory jurisdiction after adjournment of the trial term, and the Superior Court being without jurisdiction to hear appeals from another Superior Court or from the Supreme Court.

3. Criminal Law K f—Superior Court may not stay execution pending application for new trial for newly discovered evidence.

There is no authority under our decisions for an order by a judge of the Superior Court at chambers staying execution, *pro forma*, in criminal cases pending the hearing of an application for a new trial for newly discovered evidence.

4. Criminal Law J d—After affirmance of judgment by Supreme Court motion for new trial for newly discovered evidence should be scrutinized.

An application for a new trial for newly discovered evidence after the Supreme Court has affirmed the judgment is a motion after trial, and the motion should be scrutinized and allowed with caution and only for the purpose of preventing probable or manifest injustice, and it is incumbent on the defendant to overcome the presumption that the verdict is correct and he must make it appear that he has newly discovered evidence which was not procurable by him at the trial in the exercise of due diligence, and the newly discovered evidence must be more than merely cumulative or contradictory.

5. Criminal Law L e—No appeal lies from discretionary determination of motion for new trial.

No appeal will lie from the discretionary determination of a motion for a new trial for newly discovered evidence made at the next succeeding term of the Superior Court after affirmance of the judgment by the Supreme Court.

6. Criminal Law L c—Attempted appeal from discretionary order which is final may be disregarded in the Superior Court.

An attempted appeal from a discretionary ruling, which is final and not subject to appellate review, may be disregarded in the Superior Court.

ADAMS and CLARKSON, JJ., concurring in result.

MOTION by the State to docket and dismiss appeal.

At the July-August Special Criminal Term, 1931, Buncombe Superior Court, the defendants in the above entitled cause were tried upon indictments charging them with conspiracy and violations of the banking laws, which resulted in convictions and sentences. From these, the defendants appealed to the Supreme Court. The judgments were affirmed in an opinion filed 15 June, 1932. *S. v. Lea, ante,* 13.

Immediately thereafter, and before the opinion was certified down, a summary motion was made to review the record and to reconsider the opinion, which was denied 29 June. *S. v. Lea, ante,* 35. It was suggested in this motion that, if granted another trial, the defendants could refute the State's case, but, in reply, it was said that a defendant, who

speculates on the chances of a verdict by remaining silent at the trial and offers no evidence, will not, simply for this reason, be permitted to change his mind after losing, and thus seek to retrieve his supposed error by opportunity of another hearing.

An *ex parte* application was then made to Hon. P. A. McElroy, resident judge of the Nineteenth Judicial District, on 5 July, 1932, to stay the execution of the judgments pending the hearing of a motion to be lodged at the next succeeding term of Buncombe Superior Court for a new trial on the grounds of alleged errors committed on the hearing, newly discovered evidence, and jury bias or prejudice. Upon the allegations of the petition, and apparently without notice to the solicitor, stay of execution was granted in accordance with the defendants' request.

Briefly, the grounds upon which the motion for a new trial was lodged at the July Term, 1932, are as follows:

First. That at least four of the jurors were biased and prejudiced against the defendants by reason of which they were denied their constitutional right to a fair and impartial trial.

Second. That the officer in charge of the jury was hostile to the defendants, especially the defendant Davis, which militated against them on the trial.

Third. That the jurors were allowed to receive visitors, read newspapers, and converse with outsiders, both in Asheville and while on a trip to their homes in Haywood County, to the prejudice of the defendants.

Fourth. That a fair and impartial jury could not be selected from Haywood County on account of the local prejudice in said county against the defendants.

Fifth. That newly discovered evidence has come to the defendants, which, if they had known and offered at the trial, would probably have changed the result.

In support of the alleged newly discovered evidence the defendants offered the affidavits of E. P. Charlet, W. C. Walkup, W. S. Coursey and Rogers Caldwell, which said affidavits, however, only purported to be in explanation or contradiction of the State's evidence.

An answer to the motion was filed by the solicitor in which it is specifically averred:

First. That the allegations of bias and prejudice on the part of jurors are untrue and denied.

On the other hand, it is alleged, on information and belief, that one Howard Dye, agent of the defendant, Luke Lea, during and after the trial, was and has continuously been active in Haywood County trying to secure affidavits from the jurors and others attacking the verdict. It

is further alleged, on information and belief coming to the solicitor since the trial, that, during the trial, an effort was made to bribe one of the jurors on behalf of the defendants; and that money has since been offered to some of the jurors by agents of the defendant, Luke Lea, to induce them to impeach their verdict.

Second. That the alleged hostility of the officer in charge of the jury is untrue and denied.

Third. That the allegation of misconduct on the part of the jury is untrue and denied.

Fourth. That the allegation of local prejudice against the defendants in Haywood County is untrue and denied.

Fifth. That the so-called newly discovered evidence, which at most is only contradictory of the evidence offered by the State on the hearing, purports to come (1) from E. P. Charlet, one of the defendants, who sat for many weeks throughout the trial, and is associated with the defendant, Luke Lea, in Tennessee, (2) from Rogers Caldwell, also of Tennessee and closely associated with the said Lea, (3) from W. C. Walkup of Nashville, Tennessee, available at all times during the trial and who actually did converse with the defendant Davis about his defense, and (4) from W. S. Coursey, a witness for the State, subject to cross-examination and who was cross-examined by the defendants on the trial.

It is further alleged that, greatly to the surprise of the prosecution, the witness W. S. Coursey, who proposes to oblige the defendants by changing his testimony, or adding thereto, has, since the trial of the cause, moved to the State of Tennessee and is now in the employ of the defendant, Luke Lea.

Hon. John H. Clement, who presided at the July Term, 1932, Buncombe Superior Court, found the facts against the defendants, and, in his discretion, overruled their motion for a new trial, from which they gave notice of appeal.

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

R. R. Williams for respondent, Wallace B. Davis.

Clyde R. Hoey and L. E. Gwinn for respondents, Luke Lea and Luke Lea, Jr.

STACY, C. J. A few simple observations will make clear the right of the State to docket and dismiss the attempted appeal in this case.

1. In the first place, it should be remembered that the object of a trial is to ascertain the truth and to do justly. Both parties are privileged

to present their evidence at the hearing. This is their opportunity to make the truth appear, and, if not seized, it may be lost. Every litigant is entitled, as a matter of right, to one trial, but not necessarily to two. *Pico v. Cohn,* 91 Cal., 129, 13 L. R. A., 336.

However, to make sure that no man shall be deprived of his life, liberty or property but by the law of the land, and to safeguard against fallibility, not every case has been limited to a single day in court, nor every party to one "bite at the cherry." It is better to be right than to worship blindly at the shrine of form. "There always has been and always will be," to quote a distinguished member of the bar, "an irreconcilable conflict between him who wants to get there right and him who wants to get there quick." The rightites and the quickites will never agree. The golden mean or the *medium aureum* of Virgil, where the rights of litigants may be preserved without becoming entangled in the net of form, is the quest of the courts.

2. We have held that, as a *dernier ressort,* in certain cases, upon proper showing, application for new trial on the ground of newly discovered evidence may be made in the Superior Court at the next succeeding term following affirmance of judgment on appeal. *S. v. Casey,* 201 N. C., 620, 161 S. E., 81; *Allen v. Gooding,* 174 N. C., 271, 93 S. E., 740. See, also, concurring opinion in *S. v. Jackson,* 199 N. C., 321, 154 S. E., 402.

There is nothing new about this procedure. It was invoked in *Black's case* (1892), 111 N. C., 303, 16 S. E., 412, a civil action, and in *Starnes' case* (1887), 97 N. C., 423, 2 S. E., 447, a criminal prosecution, forty and forty-five years ago respectively. A striking illustration of its wisdom may be seen in *S. v. Shipman, post,* 325. The authority is not questioned in civil actions, and the courts are empowered by C. S., 4644 to "grant new trials in criminal cases when the defendant is found guilty, under the same rules and regulations as in civil cases."

It has been thought that, while relentless in their efforts to right the wrongs of others, *a fortiori* the courts should be slow to abnegate their functions, or to declare the power of the judiciary exhausted, when called upon to right an alleged wrong inflicted by the machinery of the law itself in the administration of justice. It may not be amiss to observe, however, that "such applications are regarded with suspicion and examined with caution, the applicant being required to rebut the presumption that the verdict is correct and that he has not exercised due diligence in preparing for trial." 14 A. & E. Enc. Pl. and Pr., 790; *Turner v. Davis,* 132 N. C., 187, 43 S. E., 637.

Indeed, it was said in *Carson v. Dellinger,* 90 N. C., 226, speaking of the former practice when a new trial, as here sought, could be had only

by intervention of a court of equity, such relief "was afforded with reluctance and in a narrow range of cases, as in case of fraud (*Powell v. Watson,* 41 N. C., 94), or where the new evidence is such as in effect to destroy the adversary proof (*Houston v. Smith, ibid.,* 264), or where a false witness, known to be such by the party for whom he testifies, without means of contradiction at the trial, and the witness has been prosecuted for perjury or has escaped beyond the process of law. *Dyche v. Patton,* 43 N. C., 295, and *S. c.,* 56 N. C., 332."

3. We have not held that such application may be made as a matter of course, or for purposes of delay. *Carson v. Dellinger, supra.* It is not to challenge the regularity of the procedure on the original hearing or to question the correctness of the judgment. *S. v. Shipman, supra.* It is addressed to the discretion of the court, and there remitted for final determination. *S. v. Moore,* 202 N. C., 841; *S. v. Griffin,* 202 N. C., 517, 163 S. E., 457; *S. v. Morris,* 109 N. C., 820, 13 S. E., 877.

4. We have not held that such application may be made, either in a civil action or a criminal prosecution, where no new evidence has been discovered, or due diligence has not been exercised in preparing for trial. *S. v. Casey, supra; S. v. Lea, ante,* 35.

5. We have not held that application for new trial may be made at such term by motion in the cause for alleged jury defect, bias or prejudice, or for any matter occurring during the trial. *S. v. Davis, post,* 327; *S. v. Casey, supra; S. v. Levy,* 187 N. C., 581, 122 S. E., 386; *S. v. Upton,* 170 N. C., 769, 87 S. E., 328; *S. v. Drakeford,* 162 N. C., 667; *S. v. Lipscomb,* 134 N. C., 689; *Murdock v. R. R.,* 159 N. C., 131, 74 S. E., 887; *S. v. Tart,* 199 N. C., 699, 155 S. E., 609; *S. v. Lambert,* 93 N. C., 618; *Carson v. Dellinger, supra.*

6. We have not held that application for new trial may be made at such term by motion in the cause for alleged jury attaint or misconduct. *McCoy v. Justice,* 199 N. C., 602, 155 S. E., 452; *S. c.,* 196 N. C., 553, 146 S. E., 214; *S. v. Perry,* 121 N. C., 533, 27 S. E., 997; *S. v. Tilghman,* 33 N. C., 513. Nor has it been thought that a defendant in whose behalf such attaint was sought or effected would *ipso facto* be entitled to another hearing. The suggestion is *sui generis.*

7. We have not held that application for new trial may be made at such term by motion in the cause for errors committed on the hearing. The court would be without authority or jurisdiction to entertain the application on any such ground. *S. v. Davis, post,* 327. No appeal lies from one Superior Court to another, or from this Court to the Superior Court. *Wellons v. Lassiter,* 200 N. C., 474, 157 S. E., 434; *Power Co. v. Peacock,* 197 N. C., 735, 150 S. E., 510; *Broadhurst v. Drainage Com-*

missioners, 195 N. C., 439, 142 S. E., 477; *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.

8. We have not held that a judge of the Superior Court at chambers may grant stay of execution *pro forma* in criminal cases pending the hearing of such application. *S. v. Davis, post* 327; *S. v. Casey, supra.*

9. We have held that such application is a motion after trial, and may be resorted to only to prevent a probable or manifest injustice and wrong. *Alexander v. Cedar Works,* 177 N. C., 536, 98 S. E., 780.

10. We have held that such application may be entertained only after careful scrutiny, and then cautiously, under somewhat stringent rules, to prevent the endless mischief which a different course would undoubtedly produce. *S. v. Casey, supra; Chrisco v. Yow,* 153 N. C., 434, 69 S. E., 422; *S. v. Turner,* 143 N. C., 641, 57 S. E., 158.

11. We have held that on the hearing of such application both counsel and litigants are presumed to have been properly advised in preparing for trial, and this presumption is not to be lightly overthrown or rebutted. *S. v. Lea, ante,* 35; *Johnson v. R. R.,* 163 N. C., 431, 79 S. E., 690. If it should appear that the newly discovered evidence, "by ordinary diligence, could have been discovered and used at the hearing, or was in possession of the counsel or agent of the party," the application will be denied. *Matthews v. Joyce,* 85 N. C., 258.

12. We have held that no appeal lies to this Court from the discretionary determination of such application. *S. v. Moore,* 202 N. C., 841; *S. v. Griffin,* 202 N. C., 517, 163 S. E., 457; *S. v. Cox,* 202 N. C., 378, 162 S. E., 907; *S. v. Lambert,* 93 N. C., 618; *Carson v. Dellinger, supra; Holmes v. Godwin,* 69 N. C., 467.

Speaking generally to the subject as far back as *Vest v. Cooper* (1873), 68 N. C., 131, *Reade, J.,* delivering the opinion of the Court, said: "There seems to be an impression that there may be an appeal from every motion for a new trial; and the fact is overlooked that it must 'involve a matter of law or legal inference,' and not a mere matter of discretion. This will illustrate: Plaintiff recovers of defendant $1,000. Defendant files affidavit that since the trial he has discovered that he can prove the debt has been paid. His Honor says: 'I believe your affidavit, and I grant a new trial,' or 'I do not believe it, and I refuse a new trial.' This is a matter of discretion and no appeal lies."

13. We have also held that an attempted appeal from a discretionary ruling, which is final and not subject to appellate review, may be disre-

garded in the Superior Court. *Goodman v. Goodman,* 201 N. C., 794, 161 S. E., 688; *Goodman v. Goodman,* 201 N. C., 808, 161 S. E., 686; *Likas v. Lackey,* 186 N. C., 398, 119 S. E., 763.

Applying the principles gleaned from the foregoing epitome of what has been, and what has not been, held in connection with an application of this kind, to the one brought under review by the State's motion, it appears on the face of the record that the attempted appeal is without merit, and the motion to docket and dismiss is well advised. Rule 17.

Needless to say the court was without authority to hear the defendants in their assault upon the validity of the trial. (Par. 7, *supra.*)

"Newly discovered evidence," in the sense this phrase is used in connection with an application such as the present one, means something more than a mere appellation or characterization. *S. v. Casey, supra; S. v. Lea, ante,* 35. It is not alleged that the State's witness, W. S. Coursey, committed perjury, as was the case in *Peagram v. King,* 9 N. C., 605, and the evidence alleged to have been lately discovered by the defendants falls far short of the necessary requirements. It is agreed by all the writers on the subject that a new trial for newly discovered evidence should be granted "with the utmost caution and only in a clear case," lest the courts should thereby encourage negligence or minister to the litigious passions of men. The defendants in the instant case are persons of education and intelligence. They are represented by eminent counsel. The presumption of proper advice and due preparation for trial has not been rebutted. Indeed, if the defendants were as diligent before trial as they have been since, nothing was overlooked.

The suggestion that a new trial should be granted the defendants because it appears an effort to bribe the jury in their behalf failed of its purpose has at least the merit of novelty, and is without precedent in this jurisdiction. It is likewise unavailing on a motion of this kind. *S. v. Davis, post,* 327. It is unthinkable that the State should want to bribe the jury against itself, and it is a *non sequitur* that a new trial must be ordered unless the defendant is shown to be connected with the offer of the bribe made in his behalf. Such a holding might put it in the power of allies, friendly to the defendant, to upset every trial. Perhaps the burden would be on the defendant to exculpate himself from any participation or implication, it having been undertaken in his behalf, but, however this may be, the defendants are in no position to complain at the action of the court in this respect, or any other, and they have been deprived of no rights to which they were entitled, by the State's motion to docket and dismiss the attempted appeal.

Motion allowed.

STATE *v.* LEA.

ADAMS, J., concurring in result: When the opinion in *S. v. Casey* was delivered (201 N. C., 620) I was unable to agree with the majority of the Court. I differed from them not only on the question of policy, but on several of their conclusions of law. While my convictions on these questions are positive and in fact deepened by results which are observable in the new procedure, I am reminded of the sentiment expressed by *Chief Justice Holmes* in one of his opinions: "When a question has been decided by the Court, I think it proper, as a rule, that a dissenting judge, however strong his convictions may be, should thereafter accept the law from the majority and leave the remedy to the Legislature if that body sees fit to interfere." *Plant v. Woods*, 176 Mass., 504.

I have concurred in later decisions which hold that the question whether a new trial shall be granted for newly discovered evidence is addressed to the discretion of the court, which when exercised is not subject to review on appeal. *S. v. Griffin*, 202 N. C., 517; *S. v. Moore*, 202 N. C., 841.

Judge Clement denied the defendants' motion as a matter of discretion. I therefore concur in saying that the appeal should be docketed and dismissed.

CLARKSON, J., concurring in result: I concur in the result of the opinion of the *Chief Justice*, but I feel it my duty to state that I wrote a dissenting opinion in the case of *S. v. Casey*, 201 N. C., 620. In that dissenting opinion the authorities quoted were, in my opinion, to the effect that the majority opinion was contrary to the long established course and practice of this Court in criminal matters. In closing the dissenting opinion, I said: "This is a new departure, without precedent, provides for delay and fraught with possibilities of untold evil. Orderly government is the very foundation of our civilization. Mob violence for any crime is abhorrent, therefore it is encumbent to have speedy trials 'and right and justice administered without sale, denial or delay.' Constitution of North Carolina, Art. I, sec. 25. Applications for new trials on newly discovered evidence are not favored by the courts and are subjected to the closest scrutiny to prevent as far as possible fraud and imposition, which defeated parties may be tempted to practice."

I think that since writing the above what has occurred in the procedure in criminal cases in the State has demonstrated the danger of removing the ancient landmarks. The procedure has, as was predicted, opened the door to the untold evils.

STATE v. THOMAS H. SHIPMAN, J. H. PICKELSIMER, C. R. McNEELY, RALPH FISHER AND JOSEPH S. SILVERSTEEN.

(Filed 19 October, 1932.)

1. **Criminal Law L e—Appeal from order denying motion for new trial after affirmance of judgment by Supreme Court will be dismissed.**

Under the facts of this case this appeal from an order of the Superior Court denying a motion for a new trial after affirmance of the judgment by the Supreme Court is without merit and is dismissed.

2. **Criminal Law J f—Superior Court has no jurisdiction to hear motion for new trial for error in judgment affirmed by Supreme Court.**

After the Supreme Court has affirmed a judgment in a criminal action the Superior Court is without authority to hear a motion made at the next succeeding term for a new trial for errors in the judgment, the Supreme Court alone having authority to correct such errors either in its appellate or supervisory jurisdiction.

3. **Criminal Law L e—Supreme Court will correct patent error in judgment regardless of how case comes before it.**

Upon conviction of criminal conspiracy the defendants may be fined or imprisoned, but not both, and where through inadvertence the judgment of the Superior Court imposes both fine and imprisonment, the error will be corrected in the Supreme Court either in its appellate or supervisory jurisdiction, regardless of how the case is brought before the Court, and although the defendants are not entitled to a new trial, the judgment will be vacated and the case remanded to the Superior Court with direction that proper judgment be entered, and for the purpose of correcting such error the Supreme Court will exercise its supervisory jurisdiction on a motion to docket and dismiss an appeal from an order of the Superior Court denying application for a new trial after affirmance of the judgment by the Supreme Court, the motion to dismiss being treated as a return of a writ of *certiorari*.

MOTION by State to docket and dismiss or to dismiss appeal, the transcript of the case having been sent up and docketed, 8 October, 1932, at the instance of the solicitor of the district as was his right. *Carswell v. Talley,* 192 N. C., 37, 133 S. E., 181.

At the August Special Criminal Term, 1931, Transylvania Superior Court, the defendants in the above entitled cause were tried upon indictments charging them with conspiracy and misapplication in violation of the banking laws, which resulted in convictions and judgments. From these, the defendants appealed to the Supreme Court. The judgments were affirmed as to five of the defendants in an opinion filed 6 April, 1932, reported in 202 N. C., 518, 163 S. E., 657.

At the next succeeding term of Transylvania Superior Court, July-August Term, 1932, following affirmance of the judgments on appeal,

the defendants, Thos. H. Shipman, J. H. Pickelsimer, C. R. McNeely and Ralph Fisher, made application to Hon. Walter E. Moore, judge presiding, for new trials on the grounds of (1) alleged misconduct of jurors; (2) newly discovered evidence, and (3) errors in the original judgments.

The original judgment imposed on each of the said defendants, on the charge of conspiracy, was a fine of $5,000 and imprisonment in the State's prison of not less than 2 nor more than 5 years.

No further judgment was imposed upon the defendant, Thos. H. Shipman; prayer for judgment was continued as against the defendants, J. H. Pickelsimer and C. R. McNeely, on the charge of misapplication; and an order was entered disbarring the defendant, Ralph Fisher, from practicing law in North Carolina.

The defendant, J. S. Silversteen, appears not to have joined in the application for a new trial. The judgment imposed upon him was a fine of $5,000 and the costs of the action, which presumably has been satisfied.

His Honor denied the application of the four defendants on the first and second grounds, and held that he was without authority to entertain the motion on the third ground, or for errors in the original judgments, from which rulings the said defendants gave notice of appeal.

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

Johnson, Smathers & Rollins for Thos. H. Shipman.

Jones & Ward and Louis Hamlin for J. H. Pickelsimer, C. R. McNeely and Ralph Fisher.

STACY, C. J. The appeal in so far as it challenges the rulings of Judge Moore is without merit, and the motion to docket and dismiss or to dismiss is well founded. *S. v. Lea, ante,* 316. The application was properly denied, and his Honor was correct in holding that he was without authority or jurisdiction to entertain the petition on the ground of alleged errors in the original judgments. No appeal lies from one Superior Court to another, or from this Court to the Superior Court. *S. v. Lea, supra.* After the adjournment of the trial term, this Court alone may order the correction of such errors, either in its appellate or supervisory jurisdiction, depending upon how the case is presented.

It appears on the face of the record now before us that the judgments imposed upon the four defendants, Thos. H. Shipman, J. H. Pickelsimer, C. R. McNeely and Ralph Fisher, on the charge of conspiracy, are illegal or erroneous (*S. v. Walters,* 97 N. C., 489, 2 S. E., 539; S

R. C. L., 237), in that, in each instance, both fine and imprisonment were imposed, whereas, for such offense, it is permissible to impose either fine or imprisonment, but not both (*S. v. Ritter,* 199 N. C., 116, 154 S. E., 62), hence it becomes our duty to take cognizance of the matter; and this irrespective of how the case is brought before us, whether by appeal, *habeas corpus, certiorari,* or motion to docket and dismiss appeal. *S. v. Satterwhite,* 182 N. C., 892, 109 S. E., 862; *S. v. Beasley,* 196 N. C., 797, 147 S. E., 301.

While no error was committed on the hearing of the application from which the present appeal is sought to be taken, nevertheless, it may be regarded in the nature of a return to writ of *certiorari,* if need be, such as was issued in *S. v. Walters, supra,* and in *S. v. Lawrence,* 81 N. C., 522. The record is before us and the error is apparent. By inadvertence on the part of the solicitor, the judge and counsel for defendants, the incorrectness of the judgments was overlooked when they were first imposed, and the matter was not called to our attention on the original appeal. The result is one of clear oversight or inadvertence on all hands.

The defendants, however, are not entitled to a new trial. The verdict stands. The fact that judgment of both fine and imprisonment was imposed, when only one is authorized, is not ground for a new trial, but such judgment will be vacated and the cause to this extent remanded with direction that a lawful sentence be imposed. *S. v. Cherry,* 154 N. C., 624, 70 S. E., 294; *S. v. Black,* 150 N. C., 866, 64 S. E., 778; *S. v. Crowell,* 116 N. C., 1052, 21 S. E., 502; *S. v. Austin,* 121 N. C., 620, 28 S. E., 361.

The judgments against the four defendants, Thos. H. Shipman, J. H. Pickelsimer, C. R. McNeely and Ralph Fisher, on their convictions for conspiracy, will be set aside and the cause to this extent remanded for lawful sentences on these convictions. In no other respect will the proceedings now be disturbed.

Error and remanded.

STATE v. WALLACE B. DAVIS.

(Filed 19 October, 1932.)

1. Criminal Law J f—After affirmance of conviction Superior Court may not hear motion for new trial for jury bias or errors at hearing.

After the Supreme Court has affirmed the judgment against the defendant in a criminal action, the Superior Court is without authority to hear a motion at the next succeeding term for a new trial on the grounds of jury bias, prejudice or attaint, or for errors committed on the hearing.

STATE *v.* DAVIS.

2. Criminal Law K f—Superior Court may not stay execution pending application for new trial after affirmance of conviction.

An application for a stay of execution pending the hearing of a motion for a new trial for bias, prejudice, or attaint of jury or for errors committed during the trial, made after the Supreme Court has affirmed the judgment of conviction, is improvidently granted.

MOTION by State to docket and dismiss appeal.

At the April Special Term, 1931, Buncombe Superior Court, the defendant in the above entitled cause was tried upon an indictment charging him with violations of the banking laws, which resulted in conviction and sentence. The defendant appealed to the Supreme Court. The judgment was affirmed in an opinion filed 15 June, 1932, reported, *ante,* 47.

Immediately thereafter, and before the opinion was certified down, a summary motion was made to review the record and to reconsider the opinion, which was denied 29 June on authority of *S. v. Lea, ante,* 35.

Application was then made to Hon. P. A. McElroy, resident judge of the Nineteenth Judicial District, on 5 July, 1932, to stay the execution of the judgment pending the hearing of a motion to be lodged at the next succeeding term of Buncombe Superior Court for a new trial on the ground of alleged jury bias, prejudice and misconduct. Upon the allegations of the petition, and apparently without notice to the solicitor, stay of execution was granted in accordance with the defendant's request.

At the July Term, 1932, the application for new trial was based upon the following allegations:

First. That several of the jurors were biased and prejudiced against the defendant.

Second. That the officer in charge of the jury was hostile to the defendant, which militated against him on the trial.

Third. That the trial judge gave contradictory instructions to the jury, and counsel for the defendant was inadvertently misled because of an instruction given after the argument had closed.

Hon. John H. Clement, who presided at the July Term, 1932, Buncombe Superior Court, found the facts against the defendant, and, in his discretion, overruled his motion for a new trial, from which the defendant again gave notice of appeal.

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

R. R. Williams for respondent.

STACY, C. J. The motion to docket and dismiss the attempted appeal is allowed on authority of *S. v. Lea, ante,* 316.

The court was without authority to entertain the application on the grounds alleged. The stay of execution was improvidently granted, and the application might well have been dismissed on motion of the solicitor.

Motion allowed.

STATE v. J. MACK RHODES.

(Filed 19 October, 1932.)

Criminal Law J d—Held: defendant failed to show sufficient grounds for granting of motion for a new trial after affirmance of judgment.

In this case: *Held,* the defendant failed as to those matters within the jurisdiction of the Superior Court, to make a sufficient showing on his motion for a new trial at the next succeeding term after affirmance of the judgment by the Supreme Court, and his appeal from the order of the Superior Court denying his motion is dismissed.

MOTION by State to docket and dismiss or dismiss appeal, the transcript of the case having been sent up and docketed 4 October, 1932, at the instance of the solicitor of the district as was his right. *S. v. Shipman, ante,* 325.

At the March Term, 1931, Henderson Superior Court, the defendant in the above entitled cause was tried upon an indictment charging him with violations of the banking laws, which resulted in convictions and sentences. From these, the defendant appealed to the Supreme Court. The judgments were affirmed in an opinion filed 8 January, 1932, reported in 202 N. C., 101, 161 S. E., 722.

At the next succeeding term of Henderson Superior Court following affirmance of the judgments on appeal, the defendant made application to Hon. John H. Clement, judge presiding, for a new trial on the grounds of (1) alleged disqualification of jurors, (2) newly discovered evidence, and (3) errors committed on the hearing.

After hearing the application, his Honor denied the same in his discretion, from which ruling the defendant again gave notice of appeal.

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

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

STACY, C. J. The showing made upon the allegations of the petition, of which Judge Clement could take cognizance or had authority to hear,

was not such as to call for a favorable exercise of the court's jurisdiction or to invoke its aid in behalf of the defendant. The petition was properly denied.

The motion to docket and dismiss or dismiss the appeal will be allowed on authority of *S. v. Lea, ante,* 316.

Motion allowed.

A. O. NEWBERRY ET AL. v. MEADOWS FERTILIZER COMPANY, DAVISON CHEMICAL COMPANY, AND C. WILBUR MILLER.

(Filed 19 October, 1932.)

1. **Garnishment D a—Upon payment of debt or delivery of property to defendant the garnishee may be liable to the plaintiff.**

After a writ of garnishment is served on the garnishee it is his duty to retain possession of the property or of the debt attached or to deliver the property or pay the debt to the officer serving the writ, and the garnishee delivers the property to the owner or pays the debt to his creditor at his peril and may be held liable to the plaintiff therefor upon his recovery of judgment against the defendant.

2. **Attachment A c—All property in this State owned by nonresident defendant is subject to attachment in action under C. S., 798.**

Under our statute all property in this State, real or personal, tangible or intangible, owned by a nonresident defendant in an action to recover on any of the causes of action included within C. S., 798, is liable to attachment. C. S., 816.

3. **Attachment E b—Plaintiff has lien on property possessed or levied on under attachment where statute has been complied with.**

Where the officer has served a writ of attachment by taking into his possession tangible personal property or by collecting debts due the defendant under orders of court, or by levying on the real estate of the defendant, and has complied with the applicable provisions of the statute, the plaintiff has a lien on such property which is enforceable against all subsequent purchasers from the defendant. C. S., 807.

4. **Garnishment D b—No lien attaches to any specific property upon attachment of intangible property in hands of third person.**

Where a warrant of attachment and writ of garnishment is served on a corporation or debtor to attach shares of stock in the corporation or a debt due the defendant, such third person shall be summoned as garnishee, C. S., 819, but no lien attaches to any specific property of the garnishee until the issuance of execution on the judgment and proceedings to enforce such execution.

5. **Garnishment E c—Where garnishee has paid debt to defendant court may not order defendant to return sum to court's jurisdiction.**

The service of a writ of garnishment on debts due the defendant or shares of stock owned by him does not create a lien on any specific prop-

erty in the hands of the garnishee, and where the garnishee has paid the debt to the defendant after the service of the writ, the court may not order that the defendant return such sum to the jurisdiction of the court.

6. Same—Court may order garnishee not to make further payments to defendant pending final determination of action.

Where the court has found that the garnishee has paid part of the debt attached to the defendant after the service of the writ of garnishment and that there remains a part of the debt attached still due the defendant, the court may enjoin the garnishee from making further payments to the defendant until the final determination of the action. C. S., 843; but the defendant and the garnishee may move that the plaintiff's bond be increased to fully protect them against loss resulting from the injunction.

APPEAL by defendants and certain garnishees from *Frizzelle, J.*, at Chambers in Snow Hill, N. C., on 13 August, 1932. Modified and affirmed.

This action was begun by summons issued on 30 June, 1931, and thereafter duly served on the defendants. Plaintiffs prayed judgment on the causes of action alleged in the complaint that they recover of the defendants the sum of $1,500,000, as damages for breach of contract, and wrongful conversion of personal property. Defendants by answers duly filed, denied the allegations of the complaint which constitute the causes of action on which plaintiffs prayed judgment, and prayed judgment that the action be dismissed. The action has not been tried on the issues raised by the pleadings.

The defendant, Davison Chemical Company, is a corporation, with its principal place of business in the city of Baltimore, in the State of Maryland. The said defendant is a nonresident of this State. The garnishees, Meadows Fertilizer Company and Eastern Cotton Oil Company, are corporations organized under the laws of the State of North Carolina. They are both residents of this State.

In attachment and garnishment proceedings instituted in this action by the plaintiffs at the date of the summons, the indebtedness of the Meadows Fertilizer Company in the sum of $366,103.80, and the indebtedness of the Eastern Cotton Oil Company in a sum not exceeding $1,500,000, to the nonresident defendant, Davison Chemical Company, was attached and levied on by notices served on said garnishees pursuant to the order made in the action and dated 8 August, 1931. Thereafter the action was heard by the Honorable J. Paul Frizzelle, resident judge of the Fifth Judicial District, at Chambers in Snow Hill, North Carolina, on 13 August, 1932, when and where an order was made in the action as follows:

"This cause coming on to be heard, and being heard by his Honor, J. Paul Frizzelle, upon motion of plaintiffs, after notice, as appears in the record, returnable at Snow Hill, North Carolina, on 2 July, 1932, and after continuance on motion of counsel for defendants until 6 July, at Snow Hill, when and where the Meadows Fertilizer Company, defendant and garnishee, the Eastern Cotton Oil Company, garnishee, and the defendants, Davison Chemical Company and C. Wilbur Miller, each, appeared through counsel, and upon answers filed to said motion, evidence was heard by the court, and from such evidence the court finds the following facts:

1. That on 30 June, 1931, this action was instituted, and that concurrent with the issuance of summons, writs of attachment were issued against the Davison Chemical Company, a nonresident corporation, and the said writs were duly served upon the Meadows Fertilizer Company and upon the Eastern Cotton Oil Company, North Carolina corporations, and that publication of the warrant of attachment and summons were duly made in accordance with the statute, and in accordance with the order of the Superior Court of Craven County.

2. That in addition to the writs of attachment, there also issued orders and notices of garnishment, the same being duly served upon the Meadows Fertilizer Company and upon the Eastern Cotton Oil Company.

3. That upon the return day of said notices and orders of garnishment, neither the Meadows Fertilizer Company, nor the Eastern Cotton Oil Company appeared, and that, thereupon, the clerk of the Superior Court of Craven County entered conditional judgments as provided by statute against said garnishees, and in favor of the plaintiffs. That thereafter, the Meadows Fertilizer Company, garnishee, appeared and moved to vacate said conditional judgment, and disclosed under oath its indebtedness to Davison Chemical Company in the sum of $366,-103.80, and further disclosed that 3,494 shares of its capital stock were outstanding on its books in the name of the Davison Chemical Company, and further disclosed that one share of its capital stock was outstanding on its books in the name of C. Wilbur Miller, being all of its capital stock except five shares.

4. That the Eastern Cotton Oil Company, garnishee, appeared and moved to vacate said conditional judgment, and disclosed under oath its indebtedness to Davison Chemical Company in the sum of $2,550,-659.21, and further disclosed that 13,305 shares of its capital stock were outstanding on its books in the name of the Davison Chemical Company, and one share in the name of C. Wilbur Miller, being all of its capital stock except ..... shares.

5. That it further appeared that the indebtedness due from the respective garnishees was by open account, and by custom was payable in December, 1931.

6. That thereupon the clerk of the Superior Court of Craven County entered an order modifying the conditional judgments theretofore entered, and decreed a lien in favor of the plaintiffs and against the garnishees on the amount of money due from said garnishees to the defendant, Davison Chemical Company, and upon the capital stock in the respective corporations outstanding in the names of the Davison Chemical Company and C. Wilbur Miller.

7. That in June, 1932, the plaintiffs were informed that the respective garnishees had paid to the Davison Chemical Company all their collections which were applied by the Davison Chemical Company, with the consent and direction of said garnishees, upon the indebtedness owing to the Davison Chemical Company at the time of the levy of said writ of attachment and garnishment. That upon the hearing of this cause on 6 July, the plaintiffs caused the books of the Meadows Fertilizer Company, and of the Eastern Cotton Oil Company to be produced by subpœna, and said books disclosed that subsequent to the levy of said attachments and writs of garnishment, the Eastern Cotton Oil Company had paid to the Davison Chemical Company, or for its account, applicable to said indebtedness, the sum of $749,960.52, and that the Meadows Fertilizer Company had, since the levy of said writ of attachment and garnishment, paid to the Davison Chemical Company, or for its account, the sum of $134,579.48, which said amounts are over and above the repayment of advances made to the said garnishees by the Davison Chemical Company, and purchases since the levy of said attachments. That E. F. C. Metz is the nominal president of the Meadows Fertilizer Company, and has one share of its capital stock, and that J. V. Champion, is the nominal president of the Eastern Cotton Oil Company, and has one share of its capital stock, which said share was transferred to each as qualifying stock by the defendant, Davison Chemical Company, and for which no consideration passed from the said Metz and the said Champion. That the remainder of the officers and directors of the respective garnishees are the nominees, employees, directors or officers of the Davison Chemical Company, with the exception of one director of the Eastern Cotton Oil Company, and that a majority of such officers are residents of Baltimore, Maryland, where most of the directors' meetings of said respective garnishees are held, and that by order of the directors so nominated by the Davison Chemical Company, at meetings, which it appears were not attended by the said Metz or the said Champion, rules were prescribed by which all funds

received by the Meadows Fertilizer Company and the Eastern Cotton Oil Company from their customers should be deposited in a bank account designated Account No. 1, subject only to check drawn by the officers of said respective corporations resident in Baltimore, who were the officers, servants, agents or employees of the Davison Chemical Company. That since October, 1931, all payments made to Davison Chemical Company by the Meadows Fertilizer Company and by the Eastern Cotton Oil Company were made by checks drawn in Baltimore in the office of the Davison Chemical Company by the said nonresident officers of the respective garnishees.

8. That the Meadows Fertilizer Company is seized of a fertilizer plant and one or two farms in Craven County. That the Eastern Cotton Oil Company is seized of five fertilizer plants in five several counties in North Carolina, and some scattered farms. That the Meadows Fertilizer Company is now unable to pay, and the Eastern Cotton Oil Company is now unable to pay, the remainder of the respective debts due the Davison Chemical Company.

9. That the Davison Chemical Company is heavily indebted to a group of banks, which said indebtedness has been existent for a number of years, and which it has been unable to pay. During the current year it paid on said debt only approximately the same amount of money that it took from the Meadows Fertilizer Company and the Eastern Cotton Oil Company, subsequent to the service of the writs of attachment and garnishment, but that there still remains due said banks many million dollars, which it is unable to pay.

10. That the Davison Chemical Company, in addition to the debt to its bank creditors, is endorser or guarantor upon the bonds of a corporation known as the Silical Gel Corporation to the amount of $1,700,000, which said bonds mature on 1 October, 1932, and that the Silical Gel Corporation will be unable to pay said bonds at maturity, and that said Silical Gel Corporation has heretofore been wholly dependent upon the Davison Chemical Company for its financial support.

11. That on or about 1 October, 1931, upon the suggestion of the group of creditor banks of the Davison Chemical Company, the said defendant elected to its board of directors representatives of said bank creditors, and of the bond holders of the Silical Gel Corporation, including the appointment of Henry Triede as executive vice-president, which office he continues to hold, by which such bank creditors dominate the acts and policies of the Davison Chemical Company.

12. That the Eastern Cotton Oil Company and the Meadows Fertilizer Company are each wholly controlled subsidiaries of the Davison Chem-

ical Company, and that their acts and policies are determined by the officers, agents, servants and employees of the Davison Chemical Company.

13. That unless the Davison Chemical Company is required to restore to the jurisdiction of this court, the funds taken by it from the respective garnishees since the levy of said writs of attachment and garnishment, any recovery that plaintiffs obtain in this action may be wholly lost to them.

Upon the foregoing findings of fact, and upon all the evidence, the court concludes, and thereupon it is adjudged and decreed:

1. That the Davison Chemical Company shall immediately return to the jurisdiction of this court the sum of $885,540, so wrongfully taken, had and received from Meadows Fertilizer Company and Eastern Cotton Oil Company, garnishees, since the levy of said writs of attachment and notices and orders of garnishment issued by this court.

2. That said money shall be paid into the hands of D. L. Ward, who is hereby appointed the officer of this court, for the following purposes:

(a) To demand, sue for, collect, receive and take into his possession the sums so ordered to be paid by the Davison Chemical Company, amounting to $885,540.

(b) To institute suit or suits, or actions at law or in equity, in his own name as receiver of this court, or in the name of plaintiffs, in this action, in the jurisdiction of this court, or in any foreign jurisdiction.

(c) To safely hold the funds so collected by him pending the further orders of this court.

3. The said D. L. Ward, as officer and appointee of this court, shall give a bond in the sum of $5,000 for the faithful performance of the duties hereby imposed upon him. He shall immediately report to the court any and all sums received or collected by him in order that the court may, in its discretion, require such further and additional bond, and for the further purpose that the court may direct the deposits and investments of said funds.

4. That the plaintiffs have and recover of the Meadows Fertilizer Company, as garnishee, the sum of $366,103.80, to be discharged upon payment by the Davison Chemical Company of the amount of any recovery decreed against the Davison Chemical Company in this action.

5. That the plaintiffs have and recover of the Eastern Cotton Oil Company, as garnishee, the sum of $1,500,000, to be discharged upon the payment by the Davison Chemical Company of the amount of any recovery decreed against the Davison Chemical Company in its action.

6. That the Meadows Fertilizer Company, as garnishee, and the Eastern Cotton Oil Company, as garnishee, are hereby restrained and

enjoined from making any further payments to the Davison Chemical Company on the amounts due the Davison Chemical Company at the time of the institution of this action, and until its final determination, but this provision shall not be construed to prevent said Eastern Cotton Oil Company and said Meadows Fertilizer Company from purchasing from the Davison Chemical Company, or receiving advances in the ordinary conduct of its business, and to pay therefor out of their collections made in the ordinary course of their business.

7. That the sums paid by the Davison Chemical Company into the hands of D. L. Ward shall be credited *pro tanto* to the discharge of the lien decreed against Meadows Fertilizer Company and Eastern Cotton Oil Company, garnishees.

8. That upon the receipt of said funds by the said D. L. Ward from the Davison Chemical Company, upon his demand or by suit, the plaintiffs herein shall execute a good and sufficient bond, to be approved by the clerk of the Superior Court of Craven County, in the sum of $50,000, conditioned to pay to the Meadows Fertilizer Company, as garnishee, and the Eastern Cotton Oil Company, as garnishee, any and all damages, which the court may decree that said Meadows Fertilizer Company and/or said Eastern Cotton Oil Company, as garnishees, may have sustained by reason of the entry of this order.

This 13 August, 1932.

J. PAUL FRIZZELLE, *Resident Judge, etc.*"

The defendants and the garnishees duly excepted to the foregoing order, and appealed therefrom to the Supreme Court.

W. B. R. Guion, Ernest M. Green and R. E. Whitehurst for plaintiffs.
L. I. Moore and Kenneth C. Royall for defendants.

CONNOR, J. On an appeal by defendants from a judgment in this action at September Term, 1932, of the Superior Court of Craven County, overruling their demurrer to the complaint filed by the plaintiffs, on the grounds stated in said demurrer, the judgment was affirmed. *Newberry v. Fertilizer Co.,* 202 N. C., 416, 163 S. E., 116. It was held by this Court that 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 to the plaintiffs, which they are entitled to recover of the defendants, jointly and severally. The judgment was affirmed on the authority of *Trust Co. v. Peirce,* 195 N. C., 717, 143 S. E., 524.

On this appeal, the defendant, Davison Chemical Company, and the garnishees, Meadows Fertilizer Company and Eastern Cotton Oil Company, contend that there is error in the order of Judge Frizzelle, entered

in this action, at Chambers in Snow Hill, North Carolina, on 13 August, 1932, (1) for that by said order the defendant, Davison Chemical Company is required to return to the jurisdiction of the Superior Court of Craven County, the sum of $885,540, this amount being the sum which was paid to said defendant by the garnishees on their respective indebtedness to said defendant, after such indebtedness had been attached and levied upon by the notices served on the garnishees pursuant to the order in this action dated 8 August, 1931; and (2) for that by said order the said garnishees are restrained and enjoined from making further payments on their respective indebtedness to the defendant, Davison Chemical Company, until the final determination of the action.

No question is raised on this appeal as to the liability of the garnishees to the plaintiffs in the event that plaintiffs recover judgment in this action against the defendant, Davison Chemical Company. That question is settled by an authoritative decision of this Court. In *Tindell v. Wall,* 44 N. C., 4, it was held that payment made by a garnishee to his creditor, the defendant in an attachment and garnishment proceeding, after the service of the writ of garnishment, did not relieve the garnishee of liability to the plaintiff in the action in which the writ of garnishment was issued. In such case, the payment is made by the garnishee at his peril, for it is the duty of a garnishee to retain possession of the property or of the debt attached, or to deliver the property or pay the debt to the officer who has served the writ of garnishment on him. If pending the garnishment proceeding, the garnishee delivers the property to the owner, or pays the debt to his creditor, he does so at his own risk, and is not relieved of liability to the plaintiff in the proceeding upon his recovery of judgment against the defendant, 28 C. J., 261.

The first contention on this appeal presents the question as to whether the plaintiffs had a lien on the money which the garnishees paid to the defendant, after the service of the writ of garnishment. If plaintiffs had no lien on this money, at the time it was paid to the defendant by the garnishees, this contention must be sustained; otherwise, there is no error in the order by which the defendant, Davison Chemical Company, is required to return the money which it received from the garnishees, as voluntary payments on their indebtedness to the said defendant.

By express statutory provision, all property in this State, whether real or personal, tangible or intangible, owned by a nonresident defendant in an action to recover on any of the causes of action included within the provisions of C. S., 798, is liable to attachment. C. S., 816.

The officer to whom the warrant of attachment is directed and delivered is required to seize and take into his possession the tangible

personal property of the defendant, or so much as is necessary, and he is liable for the care and custody of such property as if it had been seized under execution. He shall levy on the real estate of the defendant as prescribed for executions. He shall make and return with the warrant an inventory of the property seized or levied on, and subject to the direction of the court, he shall collect all debts owing to the defendant, and take such legal proceedings in his own name or in that of the defendant, as are necessary for that purpose. C. S., 807. When the officer has served the warrant of attachment by taking into his possession the tangible personal property of the defendant, or by collecting the debts due the defendant, under the orders of the court, or by levying on the real estate of the defendant, and has complied with the provisions of the statute, with respect to the inventory, and the certificate to the clerk of the Superior Court, the plaintiffs have a lien on such property, which is enforceable against all subsequent purchasers from the defendant.

When the property of the defendant which the officer is ordered to attach consists of intangible personal property—as shares of stock in a corporation, or debts due by a debtor, he shall serve the warrant of attachment and the writ of garnishment by leaving certified copies of the warrant and of the writ, with the president or other head of the corporation, or with the debtor, with a notice showing the property levied on. C. S., 817. When the officer serves a warrant of attachment and a writ of garnishment on a person supposed to be indebted to the defendant in the action, he shall at the same time summon in writing such person as garnishee. C. S. 819. Judgment may thereafter be rendered in favor of the plaintiff and against the garnishee for the amount of the debt due by the garnishee to the defendant in the action. No lien is acquired by the rendition of the judgment against any specific property of the garnishee, which is applicable to the payment of the debt. A lien can be acquired against such property, only by the issuance of an execution on the judgment, and by proceedings to enforce the execution.

It has been said that "it would seem that unless the statutes expressly so provide, the service of a writ or summons in garnishment or trustee process does not in a strict sense create a lien upon any specific property in the hands of the garnishee or trustee, but gives rise only to a contingent personal liability to respond therefor to any judgment which may thereafter be recovered by plaintiff against defendant. However, the right acquired by plaintiff is frequently described as a lien, or an equitable lien, or *quasi* lien, or as an inchoate lien, which must be perfected by judgment against the garnishee; more accurately, it is a specific right conferred upon plaintiff to the indebtedness or property for

the payment of this claim over and above more general creditors. But it constitutes a lien in the sense that so long as it continues and the garnishee seeks to preserve his own rights, he cannot pay to the principal defendant, nor can the principal defendant collect the debt from him. However, in some jurisdictions, it is expressly provided by the statutes that the service of garnishment shall create a lien." 28 C. J., 252.

In the instant case, no execution had been served on the garnishees, prior to the payment by them of money to the defendant, Davison Chemical Company, and, therefore, no lien had been acquired upon any specific property owned by the garnishees. The contention of appellants that there is error in the order requiring the defendant, Davison Chemical Company, to return the money to the jurisdiction of the Superior Court of Craven County must be sustained. This provision in the order and so much thereof as provides for its enforcement should be stricken from the order.

Upon the facts found by Judge Frizzelle, and set out in his order, there is no error in the other provisions by which the garnishees are restrained and enjoined from making further payments on their indebtedness to the Davison Chemical Company, until the final determination of the action. C. S., 843, subsection 2. The defendant, Davison Chemical Company, and the garnishees may move in the Superior Court of Craven County, at any time, that the bond required of the plaintiffs shall be increased in amount, to the end that said defendant and the garnishees shall be fully protected against loss or damage resulting from the injunction.

The order as modified in accordance with this opinion is affirmed.

Modified and affirmed.

VIRGINIA-CAROLINA JOINT STOCK LAND BANK, AND SOUTHERN TRUST COMPANY, TRUSTEE, v. C. W. MITCHELL, JR., AND J. L. PRITCHARD, EXECUTORS OF C. W. MITCHELL, AND MRS. CARRIE PRITCHARD, AND J. A. JERNIGAN AND WIFE, L. ALICE JERNIGAN.

(Filed 19 October, 1932.)

1. Deeds and Conveyances B c—As between the parties an unregistered deed conveys title.

Between the immediate grantor and grantee in a deed the registration of the instrument is not necessary to pass title to lands, the provisions of our registration laws applying only to the rights of subsequent purchasers and creditors of the grantor.

2. Mortgages C c—Mortgage registered prior to mortgagor's deed but subsequent to its execution held prior to later registered mortgage.

Where after receiving a deed conveying title to lands the grantee mortgages the same but fails to have his deed registered until after the registration of the mortgage, and thereafter the grantee executes another mortgage which is registered subsequent to the registration of the two prior instruments: *Held*, it will be presumed that the deed was delivered at the time of its execution, and the registration thereof showing the time of its execution, the abstractor for the latter mortgage should have examined the title to the date of the execution of the deed, and the second mortgagee cannot successfully contend that his mortgage constituted a prior lien on the lands, the first mortgage being valid and its existence being discoverable upon a proper examination of the registry. *Door Co. v. Joyner*, 182 N. C., 518, relating to estoppel and after-acquired title, cited and distinguished.

APPEAL by plaintiffs from *Midyette, J.*, at May Term, 1932, of BERTIE.

Controversy without action upon the following agreed statement of facts:

1. That the defendant, Carrie Pritchard, is the rightful owner and holder of a certain note and mortgage dated 1 August, 1916, executed by J. A. Jernigan and wife, L. Alice Jernigan, to C. W. Mitchell, payable 1 January, 1920; that said mortgage is duly recorded in the registry of Bertie County, in Book 189, p. 116, having been filed for registration and recorded on 3 March, 1917; that said mortgage is properly indexed in the registry's general index book No. 10; that said mortgage covers the following described land, to wit: Situate in Bertie County, North Carolina, adjoining the lands of the late William Pritchard heirs, Jules P. White, Geo. Jernigan and others, bounded as follows, viz.: Lying on the south side of the path leading from the T. H. Pritchard place to the A. L. Hoggard place, and being the same land deeded to W. T. White on 12 January, 1910, by J. E. Jernigan and wife, Addie E. Jernigan, containing 50 acres, more or less.

2. That the said note held by Carrie Pritchard is not barred by the statute of limitation, and that the power of sale in her said mortgage is not barred; that there is now due and unpaid on said indebtedness the sum of $619.29, with interest thereon from 1 January, 1929; that the said mortgage deed contained a general warranty of the title to the said land as follows: And said parties of the first part do covenant to and with said party of the second part, his heirs and assigns, that they are the owners and seized of said premises in fee simple; that they have the right to convey the same; that the same are free from all encumbrances whatsoever, and that they will forever warrant and defend the title to the same from the lawful claims of all persons whomsoever.

3. That J. A. Jernigan acquired title to the tract of land described in paragraph 1 above, by warranty deed from W. T. White and wife, dated 13 May, 1916, duly acknowledged and private examination taken 13 May, 1916, and filed for record 11 May, 1920, and duly recorded in Book 212, at page 244, said instrument being duly indexed in general index book No. 14.

4. In 1926, the plaintiff, Virginia-Carolina Joint Stock Land Bank made a loan to J. A. Jernigan, in the sum of $5,400, and to secure same J. A. Jernigan and wife, L. Alice Jernigan, executed a deed of trust to Southern Trust Company, trustee, said deed of trust being dated 1 May, 1926, filed for registration on 1 May, 1926, and duly recorded in Book 248, at page 26, registry of Bertie County, said deed of trust embracing the identical 50 acres above referred to, together with several additional tracts of land in Bertie County; said deed of trust containing usual warranties of title and covenants against encumbrances.

5. That J. A. Jernigan and wife defaulted in the payment of the deed of trust held by the plaintiff, the Virginia-Carolina Joint Stock Land Bank, and pursuant to the terms and provisions of said deed of trust, the lands of J. A. Jernigan were advertised and sold at public auction on 27 December, 1931; that the Virginia-Carolina Joint Stock Land Bank became the last and highest bidder for said lands, including the 50-acre tract about which this controversy centers, and the said Virginia-Carolina Joint Stock Land Bank is now owner of said property in fee simple, subject only to the lawful rights, if any, to which the defendant, Carrie Pritchard, may be entitled to in the 50-acre tract by virtue of the mortgage held by her.

6. That the said Carrie Pritchard came into possession of the above mentioned note and mortgage as a distributee of the estate of C. W. Mitchell, deceased, the original holder of said note and mortgage, the same having been transferred to her as a part of her distributive share as an heir at law of said C. W. Mitchell, in the settlement of the estate of her father.

7. That, after the recordation of the deed from White to Jernigan, the said Jernigan and wife executed a mortgage or deed of trust, including the lands involved in this controversy to the Bank of Aulander, said instrument being dated 21 April, 1925, and recorded in Book 232, page 159, registry of Bertie County, and securing the principal sum of $3,500 payable according to its terms on the first day of January, 1926; that this instrument was unpaid and uncanceled of record at the time the Virginia-Carolina Joint Stock Land Bank made its loan to the said J. A. Jernigan; that same was reported by the examining attorney as the only prior encumbrance against the property of J. A. Jernigan, and

the said Land Bank required said mortgage to be paid and canceled of record from the proceeds of its loan, believing that upon the cancellation of this mortgage the deed of trust taken by it would then constitute first and prior liens against said land.

8. That the above mortgage from Jernigan and wife to Bank of Aulander, and the deed of trust from Jernigan and wife to Southern Trust Company, trustee, being the instrument under which the Virginia-Carolina Joint Stock Land Bank claims, are the only conveyances of record affecting title to the 50-acre tract, about which this controversy centers, subsequent to the date of the recordation of the deed from White to Jernigan, being the deed whereby Jernigan, the common grantor, acquired title to the said 50 acres, which deed was not placed on record until 11 May, 1920, three years, two months and eight days after the recordation of the mortgage from Jernigan to C. W. Mitchell, under which the defendant, Carrie Pritchard, now claims.

9. That the only negligence, if any, attributable to the defendant, Carrie Pritchard, and her predecessor in title, C. W. Mitchell, is the fact that the mortgage held by her was accepted and recorded before the recordation of the deed from White to Jernigan, being said deed whereby the mortgagor acquired title to the said lands, and her failure, or the failure of her predecessor in title, to require said deed to be duly recorded at the time of or prior to the recordation of said mortgage.

10. That the only negligence, if any, attributable to the Virginia-Carolina Joint Stock Land Bank, was the failure of the title examiner to examine the records antedating the recordation of the deed from White to Jernigan, being the deed whereby Jernigan, the common grantor, acquired title to the said 50-acre tract, and have the said mortgage deed paid and canceled on the record; that neither the bank nor its examining attorney had notice of the existence of the Mitchell mortgage, being the mortgage under which Carrie Pritchard now claims, other than the notice thereof given by the properly recorded and indexed record thereof.

Carrie Pritchard contends that the mortgage held by her constitutes a first and prior lien upon the 50-acre tract therein described and that she has a right to demand the foreclosure of same.

The Virginia-Carolina Joint Stock Land Bank contends that in examining its title it was not incumbent upon it to search the records as to the 50-acre tract beyond the date upon which the deed whereby Jernigan, the common grantor, acquired title was filed for record; that the mortgage held by Carrie Pritchard does not appear, properly speaking, in the chain of title to the 50-acre tract, because said mortgage appeared of record 3 years or more before Jernigan, the common grantor, held

any record title to the property in question, and that said bank's title is unaffected by the record of said mortgage and that same is null and void so far as the said Land Bank's title is concerned; that said bank should be adjudged to be the owner in fee simple of said lands.

The case was heard in the general county court of the May Term, 1932, and the court adjudged that the mortgage held by the defendant Carrie Pritchard is a first lien upon the tract of land described in her mortgage and in the agreed statement of facts and that she recover of J. A. Jernigan and L. Alice Jernigan $619.29 with interest from 1 January, 1929, until paid. It was further adjudged that if this amount is not paid on or before 1 October, 1932, the above described land be sold and the mortgage foreclosed.

On appeal to the Superior Court the judgment was affirmed and the plaintiffs excepted and appealed.

W. G. Mordecai and Alex Lassiter for appellants.
J. H. Matthews for appellees.

ADAMS, J. The deed from White and his wife to Jernigan was executed on 13 May, 1916, and was filed for registration on 11 May, 1920, and duly recorded. On 1 August, 1916, Jernigan and his wife gave C. W. Mitchell a mortgage on the land conveyed by White, which was registered on 3 March, 1917, and properly indexed. On the first day of May, 1926, Jernigan and his wife executed a deed of trust to the Southern Trust Company to secure a loan to Jernigan of $5,400 by the Virginia-Carolina Joint Stock Land Bank, one of the plaintiffs. The deed of trust was filed for registration and we assume was registered on the day it was executed. Upon these facts the appellants rest their argument that the Land Bank can hold title to the land under the deed of trust as against the present holder of the mortgage to Mitchell. In support of this position they advance two propositions: First, that the Mitchell mortgage cannot prevail against the title held by the plaintiffs because they succeeded to the title of Jernigan first after his deed was registered, and, in the second place, for the reason that in the examination of Jernigan's title the plaintiffs were under no legal obligation to search for any records antedating the registration of the deed executed by White to Jernigan.

By way of maintaining the first proposition the plaintiffs undertake to apply the doctrine of after-acquired property. They say that before the enactment of our present registration laws an after-acquired title enured to the benefit of one who had taken a conveyance prior to the grantor's acquisition of title, but that by virtue of these laws title now passes to the purchaser who claims under any unbroken chain of re-

corded conveyances. They cite and rely upon the case of *Sash and Door Company v. Joyner,* 182 N. C., 518. The facts in that case are easily to be distinguished from those in the case before us. There it was admitted, or not denied, that Jones Smith had the legal title. On 28 February, 1913, he and his wife, to secure a debt due B. H. Bunn, executed to J. B. Ramsey a deed of trust, which was registered on 11 April, 1913. The trust was foreclosed and on 14 December, 1914, a conveyance was made to Mrs. Ella B. Ramsey and was registered on 9 January, 1915. On 20 August, 1917, Mrs. Ramsey conveyed the property to Nellie Smith by a deed which was registered on 22 August, 1917, and on 24 November, 1917, Nellie Smith and her husband executed to the Sash and Door Company, the plaintiff in that action, a deed of conveyance, which was registered on 25 January, 1918. The plaintiff had an unbroken chain of title—"a connected line of deeds."

The defendant offered a deed from Jones Smith and Nellie, his wife, to William Bullock, which was dated 10 April, 1913, and registered 11 March, 1914; a deed of trust executed by Bullock and wife to J. N. Bone, trustee, which was dated 10 March, 1914, and registered on the day following; and a deed from Bone to Joyner, the defendant, giving 10 October, 1916, as the date of its execution and 5 February, 1917, as the date of its registration.

The court held that as the plaintiff's title from the true owner had priority of registration it should prevail unless the title of Nellie Smith, acquired under the deed from Mrs. Ramsey, validated the deed which she and her husband had executed to Bullock, and held, further, that it did not have this effect. In the following words the court stated the principle applicable to the facts in the cited cases: "A purchaser having the prior registry is not affected with constructive notice by reason of deeds or claims arising against his immediate or other grantor prior to the time when such grantor acquired the title, but the deed or instrument first registered after such acquisition shall confer the better right." This principle might be invoked here if Jernigan had had no title to the land when he made the mortgage to Mitchell, and having thereafter acquired title had executed the deed of trust and the latter had been the first to be recorded after Jernigan received his deed.

But these are not the facts in the present case. The controversy cannot be determined upon the principle of estoppel and after-acquired property. Jernigan executed the Mitchell mortgage more than two months after he had taken the deed from White. We do not assent to the suggestion that Jernigan got no title until his deed was registered. An unregistered deed conveys title from its delivery as against the grantor and all others except creditors and purchasers for value. *Warren*

v. Williford, 148 N. C., 474; *Hughes v. Fields,* 168 N. C., 520; *Proffitt v. Insurance Co.,* 176 N. C., 680; *Trust Co. v. Brock,* 196 N. C., 24.

The deed of trust under which the plaintiffs claim was executed about six years after the registration of the White deed and more than nine years after the registration of the mortgage to Mitchell. The plaintiffs had constructive notice of these facts and are bound by it unless, as they contend, they were not affected with notice of any registration preceding that of the deed from White.

On this point, among other cases, the appellants cite *Ford v. Unity Church Society at St. Joseph,* 23 L. R. A., 561, which deals with a statute relating to the effect of the subsequently acquired title of a grantor, and is not applicable to the facts agreed on in the case under consideration. In that case it is said that a second purchaser should search the records until he finds the deed of his vendor but is not expected to look for conveyances from his vendor prior to the time the vendor acquired title. Jernigan acquired title before he executed the mortgage to Mitchell, and the plaintiffs when they examined his title, were notified of the date of his deed and in the absence of other evidence should have assumed that it was delivered at that time. *Devereux v. McMahon,* 108 N. C., 134. In these circumstances they are not entitled to priority for the asserted reason that they were exempt from the necessity of tracing the grantor's title back to its source and ascertaining whether he had conveyed or encumbered the property during the time intervening between the execution and the registration of the deed from White. Judgment

Affirmed.

W. C. ROUSE, ADMINISTRATOR OF THE ESTATE OF MRS. W. C. ROUSE, DECEASED, v. OLD COLONY INSURANCE COMPANY, INCORPORATED.

(Filed 19 October, 1932.)

Insurance P c—Contractual limitation on time for suit on fire insurance policy is valid.

The contractual limitation in a policy of fire insurance that action thereon must be brought within twelve months after loss is valid and binding, C. S., 6437, and a demurrer is properly sustained where the complaint alleges that the suit was not brought within the prescribed period because of representations of the insurer's agent that the policy was void.

CIVIL ACTION, before *Cranmer, J.,* at August Term, 1932, of LENOIR.

The complaint alleged in substance that on 3 September, 1929, the defendant, through its Kinston agency, executed and delivered to the plaintiff's intestate a certain fire insurance policy covering property

described in the policy; and furthermore, that on 14 November, 1929, the property was destroyed by fire, and that the loss sustained by reason thereof was $1,500.

It was further alleged that the defendant, through its agents, represented to plaintiff's intestate that the land and property described in the policy of insurance, were covered by a mortgage invalidating the provisions of said policy and declined to make settlement by reason thereof. "That the said defendant, through its agents, held several conferences with the plaintiff and his counsel, in all of which said conferences the said defendant asserted positively that the premises upon which the building stood and which were destroyed by fire, were covered by a mortgage avoiding the policy, and that no liability existed thereon; that the said plaintiff, acting and relying upon said statements, representations and inducements made by the defendant, through its agents and employees, desisted from bringing suit on said policy, . . . until after the time within which said plaintiff could, under the terms of said policy, bring action, had expired." The action was instituted on 26 February, 1932.

The defendant demurred upon the ground that it appeared from the complaint that the action was not commenced within twelve months after the fire as required by the terms of the policy, and that the complaint did not state a cause of action.

The judgment of the court sustained the demurrer upon the ground that it appeared "to the court that the plaintiff did not institute his action on the policy sought to be recovered on within the twelve months next after the fire, and under the terms of said standard fire insurance policy of the State of North Carolina, the type of the policy sued on, it is required, as a condition precedent to the maintenance of any action for recovery thereon that such action shall be commenced within said period."

From the foregoing judgment plaintiff appealed.

Louis R. Rubin and Shaw & Jones for plaintiff.
W. S. Wilkinson, Jr., and J. P. Bunn for defendant.

PER CURIAM. The decisions of this Court are to the effect that the contractual limitation of twelve months in which to bring suit, inserted in a fire insurance policy by virtue of C. S., 6437, is valid and binding. *Holly v. London Assurance Co.*, 170 N. C., 4, 86 S. E., 694; *Tatham v. Insurance Co.*, 181 N. C., 434, 107 S. E., 450.

The cause of action is laid upon the policy, and it is manifest that the suit cannot be maintained.

Affirmed.

IN RE WILL OF BYRON BROWN.

(Filed 19 October, 1932.)

1. **Evidence D b—In caveat proceedings neither propounders nor caveators may testify as to transactions with deceased.**

Under the provisions of C. S., 1795, a party or person interested in the event, or a person under whom such party or person interested derives his interest, may not testify in his own behalf against the executor, administrator or survivor of a deceased concerning transactions or communications with the deceased except where testimony of the same transaction is introduced by the representative of the deceased, and propounders and caveators are parties interested in the event within the meaning of the statute.

2. **Same—Heirs at law may testify as to transactions with deceased in order to show basis of their testimony relating to mental capacity.**

Heirs at law of a deceased are not excluded by reason of their interest in the event from testifying as to the mental capacity of the deceased upon the issue of mental capacity raised upon caveat of his will, and it is competent for them to testify concerning transactions or communications with the deceased for the purpose of showing the basis of their opinions relative to the mental capacity of the deceased, and where the charge of the trial court instructs the jury upon the reception of such evidence in accordance with this rule within the understanding of the jury, the charge will not be held for error in that the jury were instructed not to consider such testimony of transactions with the deceased as "substantive" evidence.

3. **Evidence K b—Nonexpert witness may testify, from observation, as to sanity of certain person.**

It is not required that a witness be an expert in order to be qualified to testify, from observation, whether a certain person was sane or insane.

4. **Trial E g—Instructions will be construed as a whole.**

The instructions of the trial court will be construed as a whole, and the charge will not be held for error when it clearly and correctly states the law within the understanding of the jury when so construed.

APPEAL by caveators from *Small, J.*, at May Term, 1932, of WARREN.

Issue of *devisavit vel non,* raised by a caveat to the will of Byron Brown, late of Warren County, based upon alleged mental incapacity.

It appears from the record that the caveators offered nineteen witnesses, three of them daughters of the deceased, who gave evidence tending to show mental incapacity at the time of the execution of the paper-writings propounded as the will, and codicils thereto, of the alleged testator.

The propounders offered twenty-six witnesses in reply who gave evidence of his mental capacity to make a will when the paper-writings

in question were executed. The preponderance of the evidence, it is said, was greatly in favor of the propounders.

The following instruction concerning the testimony of the three interested witnesses, daughters of the deceased, forms the basis of the 12th exceptive assignment of error:

"The court has instructed you heretofore that certain evidence (the testimony of Lucinda Davis, Elizabeth Davis, and Ellen Jones) was admitted of persons claiming under the will, that is, certain instances upon which they based their testimony he did not have mind enough to know the objects of his bounty, to know his children and their claims upon him, and the scope and effect of a will. That testimony is admitted when testified to by those who are claiming under the will, not as substantive testimony, but is admitted as evidence to be considered by you in connection with other testimony, as showing the basis of opinion of these witnesses. That is, an heir to a deceased person, or one claiming under a will, or an heir who is trying to upset the will, is allowed to testify that in his or her opinion the deceased did not have mind enough to know his property, his children, the claims his children had upon him, and the scope and effect of a will, and then there is an exception to the rule wherein such witnesses can testify to transactions or conversations between them and the deceased—in this case their father—and they are allowed to testify, not as substantive testimony, but as showing upon what they base their opinion of the mental capacity of the deceased."

From a verdict and judgment declaring the paper-writings propounded to be the last will and testament of the deceased, the caveators appeal, assigning errors.

Kerr & Kerr and Yarborough & Yarborough for caveators.
George C. Green, Perry & Kittrell and Julius Banzet for propounders.

STACY, C. J. The case turns on the twelfth assignment of error.

The three daughters of the deceased, parties interested in the event, testified that their father did not have sufficient mental capacity to make a will when the paper-writings propounded as such were executed. They then related a number of personal transactions and communications had with the deceased, upon which they based their opinions.

Was the testimony relating to these transactions and communications competent as substantive evidence?

It has been held that, in a proceeding of this kind, both propounders and caveators are "parties" within the meaning and spirit of C. S., 1795, which disqualifies a party or person interested in the event, or a person under whom such party or person interested derives his interest,

from testifying as a witness in his own behalf against the executor, administrator or survivor of a deceased person, concerning a personal transaction or communication between the witness and the deceased, except where the executor, administrator or survivor, is examined in his own behalf, or the testimony of the deceased person is given in evidence concerning the same transaction or communication. *In re Mann,* 192 N. C., 248, 134 S. E., 649; *In re Chisman,* 175 N. C., 420, 95 S. E., 769.

The disqualification of such witnesses to give evidence concerning personal transactions or communications had with a decedent, rests not merely upon the ground "that the dead man cannot have a fair showing, but upon the broader and more practical ground that the other party to the action has no chance by the oath of the relevant witness to reply to the oath of the party to the action." *McCanless v. Reynolds,* 74 N. C., 301. Men quite often understand and interpret personal transactions and communications differently, at best; hence, the Legislature, in its wisdom, has provided that an *ex parte* version of such matters may not be received in evidence except as above stated and as further provided by the statute. *White v. Evans,* 188 N. C., 212, 124 S. E., 194; *Sherrill v. Wilhelm,* 182 N. C., 673, 110 S. E., 95; *Insurance Co. v. Jones,* 191 N. C., 176, 131 S. E., 587. The reason for the provision was stated by *Rodman, J.,* in *Whitesides v. Green,* 64 N. C., 307, as follows: "No interested party shall swear to a transaction with the deceased, to charge his estate, because the deceased cannot swear in reply. If, however, the representative of the deceased will swear to such a transaction, to benefit the estate, fair play requires the rule to be altogether dispensed with."

Unless both parties can be heard, it is better to hear neither, because it not only has the appearance of unfairness, but, where only one participant can speak, it affords an easy opportunity, and a temptation perhaps, to commit perjury. *Bissett v. Bailey,* 176 N. C., 43, 96 S. E., 648.

"If self the wavering balance shake,
It's rarely right adjusted."—Burns, Epistle to a Young Friend.

It is conceded that the testimony of parties and persons interested in the event, concerning personal transactions or communications had with a decedent, is not within the inhibition of C. S., 1795, when such testimony is offered to show the basis of the opinions of the witnesses relative to the mental capacity of the deceased. *In re Hinton,* 180 N. C., 206, 104 S. E., 341; *Bissett v. Bailey, supra; In re Will of Stocks,* 175 N. C., 224, 95 S. E., 360. Witnesses prohibited from testifying to per-

sonal transactions or communications with a decedent, by reason of their relation to the action or the interest which they may have in its outcome, are not thereby excluded from giving their opinions as to his mental condition. *Rakestraw v. Pratt,* 160 N. C., 436, 76 S. E., 259; *Erwin v. Fillenwarth,* 160 Iowa, 210, 137 N. W., 502; 22 C. J., 603. "And so are held to be competent, as outside the purpose of the statute, declarations and acts of the deceased upon a question of mental capacity, through whatever witness the testimony is derived." *Halliburton v. Carson,* 100 N. C., 99, 5 S. E., 912.

It is otherwise on the issue of undue influence. *Hathaway v. Hathaway,* 91 N. C., 139; *In re Will of Chisman, supra; Linebarger v. Linebarger,* 143 N. C., 229, 55 S. E., 709. But there is no question of undue influence raised by the present caveat.

Evidence concerning personal transactions or communications with a decedent is not prohibited by the statute, but only certain witnesses from giving it. *In re Mann, supra; Erwin v. Fillenwarth, supra.* Indeed, such evidence may be the best and most pertinent to the issue. *In re Will of Stocks, supra.* "The declarations are not received to show the truth of the things declared, but as evidence of a disordered intellect, of which they are the outward manifestations. . . . The admissibility of the witness' opinion, resting, as it necessarily must, upon past opportunities of observing one's conduct, requires, in order to a correct estimate of the value of the opinion, an inquiry into the facts and circumstances from which it has been formed. There seems to be no sufficient reason for receiving the opinion and excluding proof of the facts upon which it is founded." *McLeary v. Norment,* 84 N. C., 235.

It has likewise been held in this jurisdiction that a witness, expert or other, who has had opportunity of knowing and observing the character of a person, whose sanity or mental capacity is assailed or brought in question, may not only depose to the facts he knows, but may also give in evidence his opinion or belief as to the sanity or insanity of the person under review, founded upon such knowledge and observation, and it is for the jurors to ascribe to his testimony that weight and credibility which the intelligence of the witness, his means of knowledge and observation, and all the circumstances attending his testimony, may in their judgment deserve. *Clary v. Clary,* 24 N. C., 78.

Anyone who has observed another, or conversed with him, or had dealings with him, and a reasonable opportunity, based thereon, of forming an opinion, satisfactory to himself, as to the mental condition of such person, is permitted to give his opinion in evidence upon the issue of mental capacity, although the witness be not a psychiatrist or expert in mental disorders. *White v. Hines,* 182 N. C., 275, 109 S. E., 31.

"One not an expert may give an opinion, founded upon observation, that a certain person is sane or insane." *Whitaker v. Hamilton,* 126 N. C., 465, 35 S. E., 815.

It will be observed that the exception is not to the competency of the evidence, which was admitted, but to the limitation of its use as contained in the court's charge. While the learned judge may have been infelicitous in the use of the word "substantive," nevertheless, interpreting the instruction in the light of the whole charge, as we are required to do, it would seem that what he meant to say, and did say, within the understanding of the jury, was that personal transactions or communications had between parties or persons interested in the event and the deceased, were not offered by such witnesses to prove the truth of such transactions or communications, as tending within themselves to fix liability upon the estate, but as evidence of the mental condition of the deceased and in support of the witness' opinion concerning it. As thus understood, no harm is perceived as having come to the caveators. The verdict and judgment will be upheld.

No error.

N. M. GIBBS v. PLYMOUTH MOTOR CORPORATION ET AL.

(Filed 19 October, 1932.)

1. Principal and Agent A a—Contract between manufacturer and local dealer of automobiles held competent upon conflicting allegations of agency.

Where the purchaser of an automobile sues the manufacturer thereof for breach of warranties made by the manufacturer's local dealer, and alleges that the local dealer was an agent of the manufacturer, and the allegation of agency is denied in the answer: *Held,* the contract between the manufacturer and the local dealer is competent on the question of agency, and its exclusion from the evidence after proof of its execution constitutes reversible error.

2. Same—Evidence in this case held insufficient to establish agency.

The contract between a manufacturer of automobiles and its local dealer is not conclusive upon the question of whether the dealer was a sales agent or independent dealer, but where the contract by its express terms upon a proper interpretation creates the relationship of vendor and independent dealer, and there is no evidence of a course of dealing between the parties tending to establish the relationship of agency, a nonsuit should be granted upon the manufacturer's motion therefor in an action by a purchaser from the local dealer to recover upon warranties made by the local dealer upon allegations that such dealer was the agent of the manufacturer.

3. Principal and Agent C a — Evidence held insufficient to establish ratification by alleged principal.

Where the purchaser of an automobile sues the manufacturer upon warranties alleged to have been made by the manufacturer's local dealer as sales agent, and the evidence is insufficient to establish the fact of agency, the fact that the manufacturer rendered gratuitous service in endeavoring to make the machine entirely satisfactory to the purchaser after complaint by him to the local dealer is not sufficient to establish ratification by the manufacturer of the warranties made by the local dealer, and the manufacturer's motion of nonsuit should be granted.

CIVIL ACTION, before *Cranmer, J.*, at May Term, 1932, of CRAVEN.

The defendant, Blades Motor Company, is a dealer in automobiles in New Bern, North Carolina.

It was alleged that said Blades Motor Company was a sales agent of its codefendant, Plymouth Motor Corporation, and as such sales agent was authorized to represent and warrant automobiles sold by said agent for and in behalf of its principal. The Blades Motor Company filed an answer admitting that Plymouth automobiles were advertised by it as "being cars of good quality, material and workmanship, properly constructed to stand the wear and tear incident to the use for which manufactured," but denied that it ever made representations or warranties of automobiles other than the standard form of written guaranty made by the manufacturer thereof.

The Plymouth Corporation filed an answer setting up a written warranty and averring that if its codefendant, Blades Motor Company, sold the said automobile with any warranty that it did so without any authority from said defendant, "and that this defendant's sole liability on said standard form of warranty is to the party contracting with it, to wit, its codefendant, Blades Motor Company."

The plaintiff testified that in March, 1929, he bought a Plymouth automobile from the defendant, Blades Motor Company, through Mr. Roberts, the manager thereof. Plaintiff said: "I bought it with Mr. Dan Roberts' recommendation. I didn't have any other warranty, guarantee, and had not seen any, and didn't know of any other, only I had seen the car advertised in the *Ladies Home Journal*, or some journal that carried a sheet advertisement. . . . I asked Mr. Roberts if this car was all right and he said, 'Yes, absolutely,' and I asked him how much mileage it would give, and he said about twenty or twenty-two miles, depending on how I drove it, and I asked him about the speed, and he said, 'Why, sixty-three miles,' and I asked him if it rode good and he said, 'Yes,' and went on to say it was the best car the Chrysler people had put out, and that it was Mr. Chrysler's special favorite, that it was his special make, and would guarantee it to give me satisfaction and that it would suit me."

In a short time, according to plaintiff's testimony, the car began "to shimmy," and "almost shook the wheel out of my hand," and I had to stop and start all over again. That happened a great many times, and I came back and complained to Mr. Roberts, and he said it could be remedied."

After making repeated complaints the plaintiff testified that Mr. Roberts told him they would have a factory man there in a few days to examine the car, and that in a few days the factory man did come and drove the car and sent it to the Blades Motor Company Garage to be worked on. Subsequently the car was taken to the Chrysler Garage, and plaintiff was told by Mr. Dixon, the mechanic there, that the car could not be fixed. The plaintiff kept the car from March, 1929, until June, 1931, when he traded it to a Ford dealer in Red Springs, receiving $100 in a trade. The original cost of the car was $825.

The agreement between the Plymouth Motor Corporation and the Blades Motor Company was offered in evidence, but was excluded by the trial judge. This agreement provides among other things:

1. That the Plymouth Corporation "grants unto the dealer the non-exclusive right to sell Plymouth motor vehicles in the vicinity of his place of business at New Bern, Craven County, North Carolina.

2. The company agrees to sell and deliver to the dealer at the company's factory, Detroit, Michigan, and the dealer agrees to purchase from the company and accept delivery of, as and when tendered by the company, the products described in the schedule of purchases.

3. The dealer agrees to pay the company for the products above referred to in lawful money of the United States of America, its regular current list prices f. o. b. its loading docks at Detroit. . . . Payment shall be made in cash in advance or sight draft against bill of lading, etc.

4. Plymouth Motor Vehicles are sold upon the standard warranty of the National Automobile Chamber of Commerce, which is as follows: "We warrant each new motor vehicle manufactured by us, whether passenger car or commercial vehicle, to be free from defects in material or workmanship under normal use and service, our obligation under this warranty being limited to making good at our factory any parts or part thereof which shall within ninety (90) days after delivery of such vehicle to the original purchaser, be returned to us with transportation charges prepaid, and which our examination shall disclose to our satisfaction to have been thus defective; this warranty being expressly in lieu of all other warranties, express or implied, and of all other obligations or liabilities on our part, and we neither assume nor authorize any other person to assume for us any other liability in connection with the sale of our vehicles."

"This warranty will not apply to any vehicle which shall have been repaired or altered outside of our factory in any way so as, in our judgment, to affect its stability or reliability, nor which has been subject to misuse, negligence or accident, nor to any commercial vehicle made by us which shall have been operated at a speed exceeding the factory rated speed, or loaded beyond the factory rated load capacity."

"It is understood and agreed that in order to be entitled to credit for parts returned, the parts must be returned charges prepaid within the period of the warranty to the factory of the company, properly tagged, giving the serial and motor numbers of the vehicle from which the part was taken, the name and address of the owner, the date of sale, and the number and date of invoice of the part used to make replacement. All parts returned must be accompanied by a notice of disposition in case claim for defense is not allowed. In the absence of such notice the company may dispose of such parts and not be liable to the dealer or any other person therefor."

5. It is hereby expressly agreed and understood by and between the parties hereto that the dealer is in no way the representative or agent for the company, and has no right or authority from it to assume or create any obligations of any kind, express or implied, on its behalf, or to bind it in any respect whatsoever."

The following issues were submitted to the jury:

1. "Did the defendant, Blades Motor Company, represent and warrant the automobile as alleged in the complaint?"

2. "If so, was said warranty broken by a breach of said warranty?"

3. "What damages, if any, is plaintiff entitled to recover of the Blades Motor Company?"

4. "Did the defendant, Plymouth Motor Corporation, represent and warrant the automobile, as alleged in the complaint?"

5. "If so, was there a breach of said warranty?"

6. "What damages is plaintiff entitled to recover of Plymouth Motor Corporation?"

The jury answered the first issue "No," the second issue "No," the third issue "None," the fourth issue "Yes," and the sixth issue "$100."

Thereupon judgment was entered upon the verdict against Plymouth Motor Corporation and it appealed.

R. E. Whitehurst and Ward & Ward for plaintiff.
John A. Guion for Plymouth Motor Corporation.

BROGDEN, J. The dealer's agreement between the Blades Motor Company, the alleged agent, and the Plymouth Motor Corporation, the alleged principal, was competent and admissible in evidence, and conse-

quently the ruling of the trial judge excluding this contract constitutes reversible error. The execution of the contract was proven by Mr. Roberts, manager of defendant, Blades Motor Company. It was alleged in the complaint that the Blades Motor Company was the agent of the Plymouth Motor Corporation. Hence upon denial of agency the contract between the parties immediately became material. Indeed, the case of *Ford v. Willys-Overland,* 197 N. C., 147, 147 S. E., 822, is practically identical with the case at bar and is determinative of the merits of the present controversy.

While the written contract is not conclusive upon the question of agency between the Blades Company and the Plymouth Company, there was no other evidence of agency or course of dealing between the parties, and the written contract expressly negatived the relationship of principal and agent.

However, the plaintiff contends that the fact that the Plymouth Corporation sent a man from the factory to examine the car and to attempt to repair it or put it in good order, constituted a ratification of the representations and warranties made by the seller, Blades Motor Company. This contention, however, cannot be sustained. *Farquhar v. Hardware Co.,* 174 N. C., 369, 93 S. E., 922. In the *Farquhar case, supra,* the Court said: "The plaintiff did not waive its contractual rights by rendering services to the purchasers gratuitously during the season in the effort to give them perfect satisfaction." As there was no evidence of agency expressly created or resulting from a course of dealing or otherwise between the Plymouth Motor Corporation and the Blades Motor Company, the motion for nonsuit made in apt time by the Plymouth Company should have been allowed.

Error.

Reversed.

STEPHENS HOWARD COMPANY v. LOUIS BAER, TRADING AS BAER DRY GOODS COMPANY; FIRE ASSOCIATION OF PHILADELPHIA AND INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, GARNISHEES.

(Filed 19 October, 1932.)

Attachments C b—Affidavit for attachment against resident defendant must show grounds for belief that property is about to be assigned, etc.

In order to be a valid attachment against a resident defendant it is necessary for the plaintiff to show by his affidavit the facts from which he draws his conclusion that the defendant is about to assign, dispose of, or secrete his property, and where the affidavit does not so show it is fatally defective.

HOWARD CO. *v.* BAER.

CIVIL ACTION, before *Grady, J.*, at Chambers, in Smithfield.

Summons was issued 14 August, 1932, and an affidavit and petition for warrant of attachment filed by the plaintiff. The affidavit declared that the defendant Baer was indebted to the plaintiff in the sum of $2,037.50 on rent account, and that the building and mercantile stock of defendant therein were destroyed by fire on 7 May, 1932. It was also averred in the affidavit that the defendant had collected all of his insurance with the exception of insurance due by the garnishees, but that the defendant Baer informed the plaintiff "that he had written checks distributing practically all of his collections from insurance companies to his other creditors, and that he cannot and will not pay the plaintiff its account as promised," and "that the plaintiff has reason to believe, and does believe from the conduct and statement of the defendant Baer, as hereinbefore set forth, that he is about to dispose of all his liquid assets and get the same beyond the reach of this plaintiff so as to prevent the plaintiff from collecting its debt." It was further alleged in the affidavit that the insurance companies, garnishees, had in their possession approximately $5,000 for the defendant, and that the defendant was insolvent.

Upon the foregoing affidavit a warrant of attachment was issued on 13 August, 1932, and notice of levy given to the insurance companies. The defendant Baer filed an answer to the affidavit and warrant of attachment, admitting that he was indebted to the plaintiff in the sum of $812.50, but denying that he was insolvent or that he had attempted to put his property beyond the jurisdiction of the court and prayed that the attachment be vacated and dissolved. Upon said motion to dissolve and vacate the attachment, the trial judge was of the opinion that the complaint and affidavit was not "as full and clear as the law contemplates, but the court holds that it is sufficient to support the issuance of the warrant of attachment and the plaintiff, if it so desires, may amend its allegations in that respect so as to comply fully with the law as to attachments."

The defendant excepted to the judgment and thereafter the plaintiff amended the affidavit and petition for warrant of attachment as follows: "That the defendant, Louis Baer, . . . although receiving about $20,000 on account of fire insurance out of which he promised the plaintiff to pay his indebtedness . . . has, according to his own declaration, disposed of all of said funds with the exception of that represented by the insurance indebtedness attached in this proceeding, and has threatened to distribute practically all of said funds without paying the plaintiff his indebtedness. . . . The defendant, Louis Baer, has thus

assigned, disposed of, or secreted, and is about to assign, dispose of or secrete all of his tangible property and visible property with intent to defraud his creditors, and especially the plaintiff."

Clifford & Williams for plaintiff.
Young & Young for defendant.

BROGDEN, J. The only question of law presented by the appeal is whether the affidavit and complaint are sufficient to justify the issuance of the warrant of attachment against the defendant, who is a resident of this State.

There are two decisions of this Court directly in point: The first is *Judd v. Mining Co.,* 120 N. C., 398, 27 S. E., 81, and the other is *Bank v. Cotton Factory,* 179 N. C., 203, 102 S. E., 195. A petition to rehear the case was denied in *Bank v. Cotton Factory,* 180 N. C., 128, 104 S. E., 129. The opinion in the original case asserts: "The precedents seem to hold that the affidavit upon which the warrant of attachment was issued is insufficient. It alleges that the defendant is about to assign, dispose of, and secrete the sum of money in the sheriff's hands with intent to defraud its creditors, but it fails to set forth the grounds upon which this belief is based. This omission is fatal." The original record in the case discloses that the pertinent part of the affidavit was in the following language: "And that the said defendant is about to receive and dispose of, and assign and secrete the said sum of money with intent to defraud its creditors." The affidavits in the *Bank case, supra,* and the *Judd case, supra,* are almost in the identical language of the affidavit in the case at bar, and the foregoing opinions of the Court are decisive of the present controversy.

The fact that a resident creditor has written or is about to write checks to pay a portion of his indebtedness, and at the same time refuses to pay other creditors, does not constitute secreting, assigning or disposing of his property with intent to defraud his creditors.

Affirmed.

D. R. JACKSON ET AL. V. COMMERCIAL NATIONAL BANK ET AL.

(Filed 19 October, 1932.)

1. Usury C a—Complaint in this case held insufficient to state cause of action to recover for usury.

Where the complaint alleges that the defendant had charged and received usury on certain indebtedness but fails to allege the time and amount of the payment of the alleged usury, it is insufficient to state a cause of action to recover for usury charged and received.

2. Account A a—Plaintiff held not entitled to accounting upon allegations in this action.

Where the plaintiff alleges that the first mortgage on his lands had been foreclosed and that he contemplated attacking the validity of the foreclosure, but that the defendant, who held a second mortgage on the lands, agreed to acquire the lands by paying the first mortgagee and to sell the lands and pay the plaintiff any surplus after payment of the indebtedness due the defendant, and that the defendant sold part of the lands: *Held*, the plaintiff is not entitled to an accounting, the plaintiff's interest in the lands having been foreclosed prior to the defendant's acquisition of the lands, and the foreclosure not having been attacked, and there being nothing to show that the plaintiff had paid anything for the alleged agreement or on the repurchase of the lands.

APPEAL by plaintiffs from *Devin, J.*, at Second February Term, 1932, of WAKE.

Civil action (1) for usury, and (2) for an accounting.

Plaintiffs being indebted to the defendant bank in the sum of $15,000, evidenced by note, dated 29 March, 1928, bring this action to recover as an off-set, to be credited on said note, usury alleged to have been paid on other indebtedness, but the amounts and times of payment are not specified; and for an accounting for lands alleged to have been turned over to the defendant bank for sale for the joint account of plaintiffs and defendant.

The court held that the allegations of usury were not sufficiently definite to state a cause of action, and, on motion of defendant, struck the same from the complaint. Exception.

The evidence pertaining to the second cause of action, to wit, for an accounting, relates to 310 acres of land, known as Forest Heights or the Mull Lands, upon which the North Carolina Joint Stock Land Bank held a first deed of trust and the defendant bank a junior lien. The first deed of trust was foreclosed in December, 1927, and the land bought in by the Land Bank.

Plaintiffs thereafter "contemplated attacking said foreclosure," when it was agreed defendant bank would acquire said Mull Lands by paying off the Land Bank, sell the property within a reasonable time and give plaintiffs the benefit of any surplus realized after reimbursing itself for whatever amount was paid to the said Land Bank.

Plaintiff further testified the defendant bank "either directly or indirectly acquired said Mull lands from the Land Bank and sold a part at auction," but the amount realized was not known. Nor did it appear as to how much the defendant bank paid for said lands.

At the close of plaintiffs' evidence, there was a judgment of nonsuit on the second cause of action.

Judgment on counterclaim for amount of note, with interest.

Plaintiffs appeal, assigning errors.

N. Y. Gulley and H. L. Swain for plaintiffs.
Briggs & West for defendants.

STACY, C. J. The allegations of usury are fatally defective, and, for this reason, were properly stricken out. No cause of action has been stated in this respect. *Clark v. Bank,* 200 N. C., 635, 158 S. E., 96; *Bank v. Wysong,* 177 N. C., 380, 99 S. E., 199.

Nor does it appear that the plaintiffs are entitled to an accounting on the second cause of action. Their interest in the Mull lands had been foreclosed at the time they were taken over by the defendant bank, and it is not alleged or shown that plaintiffs paid anything for said agreement or towards the repurchase of said lands. The foreclosure was never attacked as contemplated by plaintiffs.

From a careful perusal of the record, we are unable to discover any reversible error.

Affirmed.

C. H. WILSON v. STANDARD FERTILIZER COMPANY, INCORPORATED.

(Filed 19 October, 1932.)

1. Trial G b—Verdict will be construed in relation to the charge and evidence.

Where a mortgagor alleges that he executed a chattel mortgage as security for a preëxisting debt and to secure payment of fertilizer to be shipped by the mortgagee, and seeks to have the mortgage declared void for fraud and to recover damages for the mortgagee's refusal to ship the fertilizer as agreed, and the mortgagee alleges that the chattel mortgage was not to become effective or the fertilizer shipped until payment of a certain sum in cash by the mortgagor, and the jury finds from the evidence that the mortgagee had not wrongfully refused to ship the fertilizer and had not procured the execution of the mortgage by fraud: *Held,* the verdict of the jury will be construed in the light of the testimony and the charge of the court, and amounts to a finding that the mortgage never became effective for failure of the mortgagor to make the cash payment constituting a condition precedent, and judgment should be rendered declaring the chattel mortgage of no effect and for the defendant on the amount admitted to be due on the preëxisting debt.

2. Evidence J a—Parol evidence of condition precedent to effectiveness of written contract is admissible.

Parol evidence is admissible to show a verbal agreement constituting a condition precedent to the effectiveness of a written contract when such verbal agreement does not contradict the written terms of the contract.

APPEAL by plaintiff from *Devin, J.,* at June Term, 1932, of WAKE. Modified and affirmed.

The purpose of the action is to have a chattel mortgage declared void for fraud and to recover damages for the defendant's breach of its contract to deliver fertilizer to the plaintiff in the year 1931. The plaintiff admits he became indebted to the defendant in 1930 in the sum of $351.76, but alleged that he executed to the defendant a chattel mortgage, procured by fraud, in the sum of $666, which included the debt of 1930 and the purchase price of fertilizer to be furnished by the defendant in 1931.

Answering the complaint the defendant set up the plaintiff's indebtedness for 1930, and alleged that the chattel mortgage was to become effective and the fertilizer was to be shipped only upon payment by the plaintiff of $150 in cash, that the plaintiff failed to pay this sum, and that the defendant refused to ship the fertilizer.

In response to issues submitted the jury found that the defendant had not wrongfully refused to make the shipment, that it had not fraudulently procured the execution of the chattel mortgage, and that the plaintiff was not entitled to damages.

It was therefore adjudged that the plaintiff recover nothing and that the defendant recover of the plaintiff the admitted indebtedness of 1930 and the cost of the action.

The plaintiff excepted and appealed.

Albert Doub and Clyde A. Douglass for plaintiff.
Coburn & Coburn and R. L. McMillan for defendant.

ADAMS, J. The verdict must be interpreted by reference to the testimony of the witnesses and the charge of the court. *Balcum v. Johnson*, 177 N. C., 213, 218; *Weldon v. R. R., ibid.*, 179; *Jones v. R. R.*, 176 N. C., 260. Giving it this interpretation we are led to the conclusion that the jury accepted the defendant's contention that the chattel mortgage never became effective because the plaintiff did not comply with his agreement to make a cash payment of one hundred and fifty dollars—an agreement in parol, not contradicting the written instrument but constituting a condition precedent to its efficacy. For this reason the defendant was not obligated to furnish the fertilizer. If the mortgage did not go into effect the plaintiff could not have been benefited by a finding that its execution had been fraudulently procured. The jury found with the defendant on all the issues; and as the plaintiff admitted the debt of 1930 the court properly gave the defendant a judgment for this amount. We find no error in the trial, but the judgment should be modified by declaring the chattel mortgage of no effect. The contract was entire, not divisible.

Modified and affirmed.

STATE v. JOE GARNER, HERBERT GARNER, ET AL.

(Filed 19 October, 1932.)

1. **Criminal Law H a—Continuance should be granted where it is necessary to afford defendant fair opportunity to confront witnesses.**

While a motion for a continuance is addressed to the sound discretion of the trial court such motion should be granted where it is necessary for the preservation of the defendant's constitutional right to a fair opportunity to confront his accusers and witnesses with other testimony, but where on appeal from the court's order refusing defendant's motion for a continuance, it is not made to appear that this right had been denied the exception to the court's refusal to grant a continuance will not be sustained.

2. **Criminal Law L e—Burden is on appellant to show error.**

The burden is on appellant to clearly show that error has been committed, as the presumption is against him.

APPEAL by defendants from *Sinclair, J.*, at February Term, 1932, of DUPLIN.

Criminal prosecution tried upon an indictment charging the defendants, Joe Garner and Herbert Garner, and two others, with robbing the Bank of Magnolia of $14,000 on 12 January, 1932, and cognate offenses, set out in a five-count bill.

The defendants were arrested on Tuesday, 2 February, the bill was returned the next day and the trial was had on Friday of the same week. The defendants asked for a continuance, or time within which to prepare their defense. Motion overruled; exception.

From convictions and judgments thereon, the defendants appeal, assigning errors.

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

R. D. Johnson and J. J. Gresham, Jr., for defendants.

STACY, C. J. The only exception, which needs to be specifically noticed, is the one addressed to the refusal of the court to grant the defendants' motion for a continuance. While, ordinarily, this is a matter resting in the sound discretion of the trial court, nevertheless, it should be remembered that defendants have a constitutional right of confrontation, which cannot lawfully be taken from them, and this includes the right of a fair opportunity to face "the accusers and witnesses with other testimony." Section 11, Bill of Rights; *S. v. Lea, ante,* 13; *S. v. Ross,* 193 N. C., 25, 136 S. E., 193. But the record is barren of any

affidavits, or evidence tending to show a denial of this right. *S. v. Rhodes,* 202 N. C., 101, 161 S. E., 722; *S. v. Sauls,* 190 N. C., 810, 130 S. E., 848; *S. v. Riley,* 188 N. C., 72, 123 S. E., 303. In the absence of a clear showing, the exception must be overruled. The burden is on appellants to show error, and they must make it appear clearly, as the presumption is against them. *Baker v. Clayton,* 202 N. C., 741; *Poindexter v. R. R.,* 201 N. C., 833, 160 S. E., 767.

No error.

IN THE MATTER OF RAY BAILEY, ALIAS RAY KEITH.

(Filed 26 October, 1932.)

1. Extradition B c—Upon hearing of habeas corpus in extradition proceedings court must hear allegations and proof on controverted facts.

Where a writ of *habeas corpus* has been issued in extradition proceedings it is the statutory duty of the court, if an issue is raised concerning material facts, to "proceed in a summary way to hear the allegations and proof of both sides," and the words of the statute import more than a mere perfunctory or formal hearing. C. S., 2234.

2. Same—Court may determine whether prisoner was in demanding state at time of crime upon issue of whether he is a fugitive from justice.

Upon the hearing of a writ of *habeas corpus* in extradition proceedings the hearing judge may determine from the evidence, when the fact is controverted, whether the prisoner was in the demanding state at the time of the commission of the crime upon the question of whether he is a fugitive from justice.

3. Same—Appeal and Error J c—Judge hearing habeas corpus in extradition proceedings must determine disputed facts in his discretion.

Where upon a hearing of a writ of *habeas corpus* in extradition proceedings it is controverted as to whether the prisoner was in the demanding state at the time of the commission of the crime an issue of fact is raised for the determination of the hearing judge in his sound discretion, and his finding upon supporting evidence that the prisoner was not a fugitive from justice is conclusive on appeal.

4. Extradition B a—Upon finding that prisoner was not a fugitive from justice judgment releasing prisoner is correct.

Where on a hearing of a writ of *habeas corpus* in extradition proceedings the court finds upon supporting evidence that the prisoner was not a fugitive from justice and was not in the demanding state at the time of the commission of the crime, and releases the prisoner, the judgment speaks the mind of the judge, and is not affected by certain remarks of the judge in the record outside the judgment indicating that he decided the case from the standpoint of the guilt or innocence of the prisoner, and the judgment will be affirmed.

IN RE BAILEY.

HABEAS CORPUS, before *Moore, J.*, 27 June, 1932. From JACKSON.

On 5 May, 1932, a warrant was issued by a magistrate of Greenville County, South Carolina, charging that on 1 May, 1932, Ray Bailey, alias Ray Keith, "did shoot, kill and murder one A. B. Hunt" in the town of Greenville, South Carolina. The Governor of South Carolina duly made requisition upon the Governor of North Carolina, and on 9 May, 1932, the Governor of North Carolina duly issued a warrant of extradition, requiring the arrest of said Bailey. Bailey was arrested on 7 June, by the sheriff of Jackson County, and thereupon applied for a writ of *habeas corpus*. The writ was issued by Moore, J., on 7 June, and was heard by him on 27 June, 1932. At the hearing it appeared that Hunt had been killed in Greenville, South Carolina, at about 10:30 p.m. on the night of 1 May. A police officer of Greenville, South Carolina, who claimed to be present at the killing testified positively to the identification of Bailey, and further testified that, in the gun battle between Bailey and police officers, resulting in the death of Hunt, Bailey had been shot by police officers and seriously wounded in the hand and abdomen. Another police officer of Greenville, South Carolina, who claimed to be present at the shooting also positively identified Bailey as the man who killed Hunt. A merchant of Greenville, South Carolina, also identified Bailey as the slayer of Hunt.

Bailey offered evidence of many witnesses as to his whereabouts on the day of the killing, and further offered positive evidence from several disinterested witnesses that he was found shot down on the road between Burnsville and Asheville at about 10:30 o'clock on the night of 1 May. The place, where the testimony showed that he was found lying in the road seriously wounded, was approximately eighty-five miles from Greenville, South Carolina. The evidence for Bailey further tended to show that the persons who found him lying in the road seriously wounded, carried him to Asheville and from thence he was then carried to a hospital at Sylva in Jackson County. Bailey testified that he had been shot by a companion on the night of 1 May, resulting from a quarrel over a poker game, and offered testimony of disinterested witnesses tending to corroborate his statement. Bailey denied that he was in South Carolina on the day of the crime or that he had been in the state for sometime prior thereto, and contended that he was charged with the crime merely because he had been found in a hospital seriously wounded early the next morning. There was further evidence to the effect that police officers of South Carolina had arrested other members of the Bailey family, charging them with the murder of Hunt, and positively identifying them as present at the killing, and that failing to offer at the hearing evidence of identity, they had all been discharged under writ of *habeas corpus*.

Bailey offered the evidence and affidavits of approximately twenty witnesses, and the State offered affidavits and testimony of twelve witnesses.

At the conclusion of the hearing the record shows the following: (By the Court.) "Gentlemen, I think there has been an issue raised here, I don't think I have a right to pass on, that of identity, and at the same time I don't think it would be fair to the defendant to send him to South Carolina to stand a trial, as it would be very expensive to him and his folks; under the testimony I don't think there would be a jury anywhere that would ever find him guilty beyond a reasonable doubt. I shall, therefore, discharge him under the writ and let him go.

The respondents except to the rulings of the court and hereby give notice in open court of intention to appeal to the Supreme Court, and also give notice in open court that respondents will make application to the Supreme Court for a writ of *certiorari* for the purpose of reviewing the record and rulings and findings of the court."

Thereafter a formal judgment was entered as follows:

"This cause coming on to be heard and the same being heard before the undersigned judge, resident of the 20th Judicial District of North Carolina, at Sylva, N. C., on 27 June, 1932, upon the petition and writ of *habeas corpus* in this cause, and it appearing to the court that a fugitive warrant was issued for Ray Bailey, alias Ray Keith, and that thereafter the Governor of North Carolina, upon request of the State of South Carolina, issued warrant of extradition for Ray Bailey, alias Ray Keith, and thereafter petition for writ of *habeas corpus* was sworn out by the said Ray Bailey, and writ of *habeas corpus* was thereupon issued, and the State of South Carolina appearing in court and being represented by Hon. J. G. Leatherwood, John M. Queen, solicitor of the 20th Judicial District, and D. D. Alley; and the State of South Carolina having introduced its evidence, and the defendant, Ray Bailey, having introduced evidence, all of which appears in the record;

Thereupon, the court finds as a fact:

1. That Ray Bailey (alias Ray Keith) is a citizen and resident of the State of North Carolina.

2. That he is not a fugitive from justice from the State of South Carolina, and was not present at the time of the commission of the alleged crime at Greenville, South Carolina.

3. That the State of South Carolina has failed to show probable cause for holding the said Ray Bailey in custody, or that he committed the alleged crime—the murder of A. B. Hunt, and has failed to produce sufficient evidence to warrant the court in refusing the writ, and the court finding from all the evidence introduced in this cause that the

petitioner is entitled to the relief sought in his petition and the writ of *habeas corpus;*

It is, therefore, upon motion of Clyde R. Hoey, G. D. Bailey, Dan K. Moore and Charles Hutchins, attorneys for the petitioner, considered, ordered, decreed and adjudged by the court that the petition and writ be allowed and that the defendant be and he is hereby released from custody."

A petition was filed in the Supreme Court of North Carolina for a writ of *certiorari* to bring up the record, which was duly granted on 31 August, 1932, and the record was duly certified by Judge Moore on 13 September, 1932.

John M. Daniel, Attorney-General of South Carolina, Cordie Page, Assistant Attorney-General of South Carolina, J. G. Leatherwood and Queen & Alley for demanding State.

Clyde R. Hoey, G. D. Bailey, Dan K. Moore and Charles Hutchins for petitioner.

BROGDEN, J. When a writ of *habeas corpus* has been issued to inquire into the legality of an arrest on a warrant of extradition, what is the function of the hearing judge and the legal effect of his findings of fact?

C. S., 2234, defines the duty of the judge before whom the writ is returnable, and also, prescribes the scope of the hearing. He shall immediately (a) "examine into the facts contained in such return and into the cause of the confinement;

(b) "and if issue be taken upon the material facts, . . . or other facts are alleged to show that the imprisonment . . . is illegal";

(c) "the . . . judge shall proceed in a summary way to hear the allegations and proofs on both sides;

(d) "and . . . do what to justice appertains, in delivering, bailing or remanding such party."

The statutory words "if issue be taken upon the material facts . . . the judge shall proceed in a summary way to hear the allegations and proofs of both sides," preclude the idea that such hearing shall be perfunctory and merely formal. This Court said *In re Veasey,* 196 N. C., 662, 146 S. E., 599: "One who is sought to be extradicted may contest the validity of the extradition proceedings on writ of *habeas corpus* by showing (1) that he is not charged with a crime in the demanding state, or (2) that he is not a fugitive from the justice of the demanding state. Both of these are jurisdictional matters, and, if the accused can establish either, he is entitled to be discharged from custody. The first

is a question of law to be determined upon the face of the requisition and the indictment or affidavit accompanying it, the law of the demanding state, of course, furnishing the test; while the second is a question of fact which, when controverted, may be established by evidence like any other disputed fact." See, also, *In re Hubbard,* 201 N. C., 472. All the authorities, including the decisions of this State are to the effect that it is not proper to hear evidence upon the guilt or innocence of the prisoner or to take into consideration the merits of the case or of the defense to be interposed at the trial or of an alibi, or of other matters involving the ultimate issue of guilt. Nevertheless, these are general observations and legal assertions. If the petitioner was not in the demanding state when the crime was committed, certainly he could not be guilty of a crime, and hence it is obvious that the question of presence in the demanding state at the time of the crime involves in a certain sense guilt or innocence, alibi or other defenses that may be interposed at the trial. It is apprehended, however, that the courts mean to say that the bald question of presence in the demanding state at the time of the commission of the alleged crime was the primary question to be considered.

In arriving at a conclusion as to whether the prisoner should be remanded or discharged, a difficult question stands at the threshold: What quantum of proof shall the hearing judge require in order to determine the ultimate issue of fact as to whether the prisoner was in the demanding state at the time of the crime? It has been asserted that if the evidence is conflicting upon the subject of presence in the demanding state at the time the crime was committed that the prisoner is not entitled to be discharged, but should be remanded for trial. It has also been said that if there is some evidence of the presence of the prisoner in the demanding state at the time the offense was committed, a discharge is not warranted or justified. See *Munsey v. Clough,* 196 U. S., 364, 49 L. Ed., 515; *Hyatt v. New York,* 188 U. S., 691, 47 L. Ed., 657. That is to say, that if there is more than a scintilla of evidence in favor of the demanding state, the judge should discharge the writ of *habeas corpus* and remand the prisoner. Hence, if any sort of reckless or fanciful testimony should be offered tending to show the presence of a prisoner in the demanding state, the accused might thereupon offer the testimony of a thousand disinterested persons who knew absolutely that he was not in the demanding state at the time, nevertheless the courts would be powerless to afford protection. Manifestly under such interpretation the beneficent powers of *habeas corpus* would be set at naught and the "hearing" provided by law would be no more than a hollow form or fleeting shadow. Nevertheless the demanding state is vitally interested in

the outcome. It has the right to try and punish offenders against its peace and dignity, committed within its jurisdiction. Consequently a difficult task is imposed upon a judge in undertaking to decide the important question involved.

The statute of this State, C. S., 2234, enjoins the judge "to do what to justice appertains in delivering, bailing or remanding such party." Obviously the statute does not undertake to limit the judge in arriving at his conclusions, but apparently commits the result to the exercise of his sound legal discretion. The nearest approach to a positive declaration of this Court upon the quantum of proof is contained in *S. v. Herndon,* 107 N. C., 934, 12 S. E., 268. Upon the facts appearing in the record, the Court said: "If the judge, upon the investigation of the evidence on a petition for *habeas corpus,* adjudges that there is or is not probable cause, and admits or refuses to admit to bail, no appeal or *certiorari* lies, either in favor of the state or the petitioner. . . . The quantum of evidence and the number of witnesses to be examined must necessarily be left also to the sound discretion of the judge who hears the writ, and his action in that regard cannot be reviewed."

In the case at bar a controversy of fact arose between the contending parties, that is the demanding state and the prisoner, as to whether the prisoner was in the demanding state at the time the alleged offense was committed. The writ of *habeas corpus* was created and fashioned for the express purpose of determining such controverted fact. The statute and public policy require that such fact be determined in a summary manner. Doubtless in given cases different minds would work out diverse conclusions, but after all it is perhaps wise that the determination of the ultimate fact should be lodged in the sound legal discretion of an impartial judge, commissioned by the law of the land and the inherent sense of the responsibility of his high office "to do what to justice appertains." He hears the witnesses and observes their mental leanings or bias toward the question involved. He senses the atmosphere of the case. Moreover it would doubtless be a dangerous experiment to undertake by a judicial decree of an appellate court to prescribe a legal straitjacket for such matters.

Exercising the power delegated by statute and supported in principle by the decisions of this State, the hearing judge found certain facts and set them forth in his judgment. The last inquiry in the solution of the appeal is: What is the effect of the findings of fact set out in the judgment? Whatever may be the variable conclusions reached by other courts, that inquiry is settled in North Carolina. The law is thus stated: "The findings of fact made by the judge of the Superior Court, found as they are upon competent evidence, are also conclusive on us,

and we must therefore base our judgment upon his findings, which amply sustain his order." *In re Hamilton,* 182 N. C., 44, 108 S. E., 385. See, also, *Clegg v. Clegg,* 186 N. C., 28, 118 S. E., 824; *In re Hayes,* 200 N. C., 133, 156 S. E., 791.

It is true that the judge made certain remarks appearing in the record, tending to show that he was undertaking to view the case from the standpoint of guilt or innocence or the ultimate probability of acquittal upon trial in the demanding state. If these remarks had been incorporated into the judgment itself, a wholly different factual situation would be presented upon the appeal, but the judge expressly declared in the judgment as signed that he found as a fact "that he (prisoner) is not a fugitive from justice from the State of South Carolina, and was not present at the time of the commission of the alleged crime at Greenville, South Carolina." The judgment as written and signed speaks the mind of the judge and his conclusion upon the matters in issue. Therefore, the judgment as rendered must stand.

Affirmed.

ROY LAWSON v. BANK OF BLADENBORO.

(Filed 26 October, 1932.)

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

Where the court below finds the facts under an agreement of the parties his findings are conclusive on appeal when supported by sufficient competent evidence.

2. Bills and Notes I b—Bank collecting draft is agent of drawer and is liable to him for allowing unauthorized deduction.

Where A. sells cotton to B. who in turn sells it to a cotton mill, and gives A. a draft on the mill in payment of the purchase price, and A. ships the cotton to the mill and deposits the draft with bill of lading attached in a bank which sends the draft to another bank for collection, and the collecting bank allows the mill to deduct therefrom an amount owed it by B. and remits the balance to A.: *Held,* the collecting bank was the agent of A. and is liable to him for the amount of the deduction unless A. had authorized or ratified such deduction.

3. Same: Principal and Agent C a—Held: drawer ratified act of collecting bank in allowing drawee to deduct sum from amount of draft.

Where the collecting bank allows the drawee of a draft to deduct therefrom a certain sum due the drawee by another, and the drawer is notified of such deduction and accepts the amount collected and attempts to collect the amount of the deduction from the one who owed the sum to the drawee: *Held,* the acceptance by the drawer of the amount collected

on the draft and his attempt to collect the amount of the deduction from the third person constituted a ratification of the act of the collecting bank in allowing the deduction, and the drawer may not thereafter collect the amount of the deduction from the collecting bank.

4. Principal and Agent C a—Principal must ratify acts of agent in whole or reject them in whole.

A principal will not be allowed to accept the benefits of the unauthorized acts of his agent and repudiate the burdens, but the principal must ratify the whole transaction or reject it completely, and where written instruments of ratification are to be construed or where the facts are undisputed, or only one inference can be drawn therefrom, the question of ratification is for the court.

APPEAL by plaintiff from *Small, J.*, at September Term, 1932, of BLADEN. Affirmed.

The judgment of the court below is as follows:

"It having been agreed that the court find the facts, the court finds the following: That Roy Lawson, the plaintiff, sold to G. W. Branch fifty bales of cotton, that G. W. Branch resold the cotton to the Bladenboro Cotton Mills; that Roy Lawson consigned the fifty bales of cotton to Bladenboro Cotton Mills with draft attached to the bill of lading made by G. W. Branch, said draft being made payable to Roy Lawson at sight for the sum of $1,884.22. That said draft with bill of lading attached was transmitted to the Bank of Bladenboro and the Bank of Bladenboro notified the Bladenboro Cotton Mills that it had same for collection and that the Bladenboro Cotton Mills deducted from the amount of said draft the amount of $383.97, that said Branch owed said Cotton Mills.

That said Bank of Bladenboro forwarded draft as agent for plaintiff to the Citizens Bank of Morven, Georgia, that the bank of Morven, Georgia, notified plaintiff of said deduction by Bladenboro Cotton Mills and that said Morven Bank credited the account of plaintiff with $1,500.25, that plaintiff learned of said credit of said Bank of Morven on Monday following Saturday the Bank of Morven received said draft. That plaintiff accepted said draft from his forwarding agent the Bank of Bladenboro and allowed same to remain to his credit in the Bank of Morven, Ga. That subsequent to receiving the $1,500.25 draft in Georgia bank plaintiff attempted to collect the $383.97 difference from G. W. Branch. That practically seven days thereafter, that is after receipt and credit of said amount in the Georgia bank and after plaintiff failed to collect from Branch he then attempted to collect the difference from the Bank of Bladenboro. The plaintiff failed to attempt to collect from the Bank of Bladenboro until he learned he could not collect from

Branch. The plaintiff saw exhibited to him the $1,500.25 draft in the Bank of Morven, Georgia, and knew of the deduction on Monday following the Saturday the Georgia bank received same, and that in person he saw a statement of the deduction made by the Bladenboro Cotton Mills.

The court finds the above facts in this cause: It is therefore ordered, adjudged and decreed that the plaintiff take nothing in this action and that the plaintiff pay the costs, to be taxed by the clerk."

The plaintiff's only exception and assignment of error is as follows: "The court erred in rendering judgment for defendant upon the facts found and contained in the judgment."

H. H. Clark for plaintiff.
Varser, Lawrence, McIntyre & Henry for defendant.

CLARKSON, J. It was agreed that the court below should find the facts. We are bound by the findings if there is sufficient competent evidence to support them, which we think there is.

The *first* question involved: Did the defendant, as plaintiff's agent, violate the trust imposed in it by the plaintiff in acceptance of $1,500.25 and delivery of the draft for $1,884.22 with the bill of lading to Bladenboro Cotton Mills? We think it did.

The plaintiff, Roy Lawson, sold to G. W. Branch fifty bales of cotton for $1,884.22. Branch sold the cotton to the Bladenboro Cotton Mills, and drew a sight draft for $1,884.22 on the cotton mills payable to Roy Lawson, with the bill of lading for the cotton attached. Roy Lawson deposited the draft in the Citizen's Bank of Morven, Ga. The draft was sent to the Bank of Bladenboro for collection. It turned out that Branch owed the cotton mills $383.97, and when the $1,884.22 draft with the bill of lading was presented by the Bank of Bladenboro to the cotton mills, the defendant Bank of Bladenboro accepted from the cotton mills $1,500.25, and turned the draft and bill of lading for the cotton over to the cotton mills, and allowed a deduction from the draft of $383.97, and sent $1,500.25 to the Bank of Morven, Ga., which was credited to plaintiff's account.

The well settled law in this jurisdiction is thus stated: "If a bank receive a paper for collection on a party at a distant place, the agent it employs at the place of payment is the agent of the owner and not of the bank; and, if the bank selects a competent and reliable agent and gives proper instructions, its responsibilities cease." *Bank v. Bank,* 71 Mo. App., 451; *Bank v. Floyd,* 142 N. C., 191-2; *Qualls v. Bank,* 197 N. C., 438.

If nothing else appeared the plaintiff would be entitled to recover the amount he sued for from the defendant. But there is a *second* question involved: Has the plaintiff ratified the acts of its agent, the defendant, in delivery of the said draft and bill of lading for less than the amount of the draft? We think so.

The defendant sent the $1,500.25 to the Bank of Morven, and notified it of the deduction. The Bank of Morven received the amount on Saturday, credited it to the account of plaintiff, and notified plaintiff on Monday of the deduction. Plaintiff saw the $1,500.25 draft in the Bank of Morven and in person saw the statement of the deduction made by the cotton mills. The plaintiff thereafter attempted to collect the amount from Branch and, after learning he could not collect from Branch, attempted to collect the difference from defendant, which was about seven days thereafter, and brought this action 24 March, 1932.

It will be noted in the present case that plaintiff is not suing Bladenboro Cotton Mills, the party whom he had a draft on, but is suing the agent, the Bank of Bladenboro. It is well settled that if he had sued the cotton mills the suit would be a ratification. The matter is thus stated in 21 R. C. L., Principal and Agent, part sec. 106, at pp. 927-8: "Ratification of the unauthorized acts of one assuming to act as agent may be either express or implied: express as by spoken or written words applied, when the conduct of the principal constitutes an assent to the acts in question. And the acts of the principal, it seems, will be liberally construed in favor of a ratification. One of the most unequivocal methods of showing a ratification of an agent's unauthorized act is the bringing of an action or basing a defense thereon. For example, where an agent sells the goods of his principal at an agreed price, to be paid for in services to be rendered to the agent by the purchaser, and the principal, with full knowledge of the facts, sues the purchaser in assumpsit for the price agreed, he thereby affirms the contract of his agent, both as to the sale and the mode of paying the price."

In the case of *Bank v. Justice,* 157 N. C., 373, the plaintiff bank held a note of $1,400 on defendant Justice, and sent it to the Mitchell County Bank of Bakersville, N. C., for collection. The bank returned the note of $1,400, and remitted $432 which it collected and credited on the note and the cashier of the bank wrote plaintiff "the drawers of this paper claim that the note should have been for $500 instead of $1,400, and the $432 which they ask that we tender you is to cover the $500 and interest for three years and four months, making $600, less the $68 credit which appears on the back of the note. If you do not care to accept enclosed remittance, you can return same to us. . . . The drawers of the note tell me they will stand to be sued on the paper

before making any further settlement." The plaintiff made no reply to this communication, and without returning or offering to return the $432, claiming that same shall be considered only as a credit for that amount, instituted the present suit to recover the balance of the $1,400.

In the above case, the suit was not against the agent who made full disclosures of the purpose of Justice, and the note was not turned over to Justice by the agent bank, but returned to the plaintiff bank. Full warning was made by the collecting bank and the makers of the note. The plaintiff bank sued the makers of the note. The Court said, at p. 375: "In our opinion, this letter gave clear intimation to plaintiff that if the money was retained it was to be in settlement of the claim, and under our decisions further recovery may not be allowed. *Aydlett v. Brown,* 153 N. C., 334; *Armstrong v. Lonon,* 149 N. C., 434; *Cline v. Rudisill,* 126 N. C., 523. . . . It is urged that plaintiff did not know the positive character of the tender when the latter was received transmitting the payment, but he knows it now and insists on retaining the money. The principle applicable is very well stated in 30 Cyc., p. 1267, as follows: 'It is a well settled principle of ratification that the principal must ratify the whole of an agent's unauthorized act or not at all, and cannot accept its beneficial results and repudiate its burdens. It follows as a general rule that if a principal with full knowledge of all the material facts takes and retains the benefits of the unauthorized act of his agent, he thereby ratifies such act and with the benefits accepts the burdens resulting therefrom.' *R. R. v. R. R.,* 147 N. C., 385."

In *DeLoache v. DeLoache,* 189 N. C., at p. 398, the learned former *Associate Justice Varser,* of this Court, in reference to this subject said: "Business transactions cannot be safely conducted upon secret reservations of mind that are totally inconsistent with the open acts. It was open to plaintiff to refuse to accept check No. 2 if he was unwilling to affirm its provisions in every respect. When he accepted its proceeds he made effective and binding its every stipulation. *Ore Co. v. Powers,* 130 N. C., 152; *Aydlett v. Brown,* 153 N. C., 334."

In *Parks v. Trust Co.,* 195 N. C., at p. 455-6: "Speaking to the subject in *Waggoner v. Publishing Co.,* 190 N. C., 829, 130 S. E., 609, it was said: 'The defendant will not be permitted to repudiate the act of its agent as being beyond the scope of his authority, and at the same time accept the benefits arising from what he has done while acting in its behalf. *Starkweather v. Gravely,* 187 N. C., 526. It is a rule too well established to admit of debate that if a principal, with full knowledge of the material facts, takes and retains the benefits of an unauthorized act of his agent, he thereby ratifies such act, and with the benefits he must necessarily accept the burdens incident thereto or which naturally result

therefrom. The substance of ratification is confirmation after conduct. 2 C. J., 467. It is also a settled principle of ratification that the principal must ratify the whole of his agent's unauthorized act or not at all. He cannot accept its benefits and repudiate its burdens. *Bank v. Justice,* 157 N. C., p. 375."

In *Sugg v. Credit Co.,* 196 N. C., at p. 99, it is said: "Conceding without deciding, that the cashier of the Snow Hill Banking and Trust Company, was not authorized by the payee to endorse the check in question, still we think the plaintiff must fail in his suit if not upon the principle of ratification then upon the doctrine of estoppel. The law will not permit him to take and to hold the fruits of what was done for him by the cashier of the bank and at the same time repudiate its consequences. *Bank v. Justice,* 157 N. C., 375."

If plaintiff had brought an action against the cotton mills the authorities are to the effect that the present suit was an unequivocal ratification. We think, under the facts and circumstances of this case, the principle applies to the defendant agent, the Bank of Bladenboro. The plaintiff should have promptly returned the $1,500.25 to the Bank of Bladenboro, and the bank could then have called on the cotton mills to pay the full amount of the draft or the parties placed in *statu quo.* This cannot now be done. If the Bank of Bladenboro or the cotton mills could not or did not place the parties in *statu quo,* plaintiff would have at once a cause of action.

In Mechem on Agency, 2d ed. Vol. 1, sec. 479, p. 352, we find: "Ratification is not a matter to be presumed; it must be proved. And the burden of proof rests upon him who alleges it." Section 481, p. 353: "Where written instruments of ratification are to be construed, the question is for the court. So, if the facts are undisputed and only one inference can reasonably be drawn from them, the question whether they constitute ratification or not, is one of law for the court; but where the facts are in dispute, or where the inferences to be deduced from them are such that men may reasonably differ concerning them, the question of ratification or not is for the jury. This is especially true where ratification is sought to be implied from conduct, or deducted from acts of alleged acquiescence," etc.

We think the undisputed facts in this case constitute ratification. The plaintiff could not accept the money derived from the draft, less the deduction, and reserve the right to repudiate the transaction and sue for the amount deducted. The suit was an unequivocal ratification.

Mr. Mordecai, in his Law Lectures (1907), at p. 72, tersely states the principle: "The principal cannot of his own authority ratify a part and repudiate the rest, he cannot take the rose without the thorns."

The hardship on plaintiff in a distant state is apparent, but being *sui juris,* no fraud or mistake alleged, or proved, he must bear the consequence of not repudiating his agent's conduct and returning the draft. He made an election which he is bound by and the court cannot relieve him. The judgment of the court below is

Affirmed.

STATE v. JAKE JONES.

(Filed 26 October, 1932.)

1. Criminal Law G l—Confession is not rendered involuntary by mere fact of presence of officers and arrest of defendant.

Only voluntary confessions are admissible in evidence, and a confession is voluntary only when it is in fact voluntarily made, but where there is no duress, threat or inducement, the mere fact that the prisoner was under arrest and that officers were present does not render his confession involuntary.

2. Criminal Law B c—Burden of proving mental incapacity to commit crime is on defendant.

Where the defendant in a criminal prosecution sets up the defense of insanity the burden is on him to prove such defense to the satisfaction of the jury, and where the jury finds against the defendant on the evidence the verdict will not be disturbed on appeal.

3. Same: Criminal Law G i—Nonexpert witness may testify as to sanity of defendant.

Where the defense of insanity is set up by the defendant in a criminal prosecution it is competent for nonexpert witnesses to testify as to his sanity or insanity when such testimony is based upon the witnesses' knowledge and observation of the defendant, the weight and credibility of such testimony being for the jury.

APPEAL by defendant from *Devin, J.,* at February Term, 1932, of WAKE.

Criminal prosecution tried upon an indictment charging the prisoner with the murder of one J. H. Poole.

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.

W. Y. Bickett and W. T. Hatch for defendant.

STACY, C. J. The evidence on behalf of the State tends to show that on the night of 26 October, 1931, the prisoner, a colored boy 18 or 19 years of age, went out on the Milburne Road to Circle Filling Station No. 2, about one-half mile from the city of Raleigh, for the purpose of robbing said filling station. He was armed with a 32-caliber Smith and Wesson revolver. As he approached the station, he saw J. M. Jackson, the manager, and J. H. Poole, the night watchman, standing by an open fire in the yard. It was a cold night. After waiting a few minutes, while a number of cars were passing along the highway, the prisoner fired from ambush in the direction of the two men, hitting the night watchman who fell to the ground before reaching the door of the filling station. The prisoner then approached his victim and shot him again while he was down. He entered the filling station and robbed the cash register of part of its contents, retreating just in time to escape the return fire of the manager, J. M. Jackson. The injured watchman was rushed to the hospital where he died shortly thereafter.

The prisoner was arrested at the home of George Garner with whom he lived. At the time of his arrest he had a Smith and Wesson pistol under his pillow. He informed the officers that George Garner needed some money to pay his house rent, and had told him to go to the filling station, which place he had robbed before, and get the money; that he undertook to do so, arming himself with his Smith and Wesson pistol; that he did not intend to shoot Mr. Poole, but did intend to shoot Mr. Jackson as the latter had shot him in the arm a month before while he was robbing the filling station; and that he divided the money he got on the night of the homicide with George Garner.

The principal question presented by the appeal is the competency of the prisoner's confession made to the officers while under arrest. *S. v. Livingston,* 202 N. C., 809; *S. v. Myers,* 202 N. C., 351, 162 S. E., 764, and *S. v. Davis,* 125 N. C., 612, 34 S. E., 198, are cited as authorities for its exclusion.

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.

It has been held in a number of cases that where there is no duress, threat or inducement, and the judge finds there was none here, *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603, the fact of arrest or incarceration of the defendant when the confession is made does not *ipso facto* render it incompetent. *S. v. Newsome, supra; S. v. Drakeford,* 162 N. C., 667, 78 S. E., 308; *S. v. Lance,* 166 N. C., 411, 81 S. E., 1092; *S. v. Jones,* 145 N. C., 466, 59 S. E., 353; *S. v. Bohanon,* 142 N. C.,

695, 55 S. E., 797; *S. v. Horner,* 139 N. C., 603, 52 S. E., 136; *S. v. Exum,* 138 N. C., 599, 50 S. E., 283; *S. v. Flemming,* 130 N. C., 688, 41 S. E., 549. "We are not aware of any decision which holds a confession, otherwise voluntary, inadmissible because of the number of officers present at the time it was made. Nor has the diligence of counsel discovered any." *S. v. Gray,* 192 N. C., 594, 135 S. E., 535.

Speaking to the subject in *Hopt v. Utah,* 110 U. S., 574, *Mr. Justice Harlan,* delivering the opinion of the Court, said:

While some of the adjudged cases indicate distrust of confessions which are not judicial, it is certain, as observed by *Baron Parke* in *Regina v. Bald,* 2 Den. Cr. Cas., 430, 445, that the rule against their admissibility has been sometimes carried too far, and in its application justice and common sense have too frequently been sacrificed at the shrine of mercy. A confession, if freely and voluntarily made, is evidence of the most satisfactory character. Such a confession, said *Eyre, C. B.,* 1 Leach, 263, 'is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and, therefore, it is admitted as proof of the crime to which it refers.' "

And in *S. v. Patrick,* 48 N. C., 443, *Nash, C. J.,* animadverted on the subject as follows:

"*Baron Eyre,* in *Rex v. Hearne,* 4 Car. & Payne, 215 (19 E. C. L., 350), observes, a free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and, therefore, it is admitted as proof of the crime to which it refers; but a confession wrung from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape that no credit ought to be given to it. The material inquiry, therefore, always, in such cases, is, has the confession been obtained by the influence of hope or fear, applied by a third person to the prisoner's mind? This inquiry is, in its nature, preliminary, and is addressed to the judge, who admits the confession to the jury, or not, as he may find it to have been drawn from the prisoner by these motives. . . . Many cases are contained in our reports upon this rule of the criminal law; many of them irreconcilable with the principle announced by *Baron Eyre,* in the case cited, pressing the principle of exclusion too far, and applied when there could be no reason to believe that the inducement had any influence on the mind of the prisoner, and, thereby, occasioned the escape of many criminals. Philips Ev., 424; Joy on Jurors, 21.

"It seems now to be settled law upon this point, if the prisoner has made his own calculations of the advantages to be derived from confessing, and thereupon has confessed the crime, there is no reason to say it is not a voluntary confession. In order to exclude a confession,

the motive of hope or fear must be directly applied by a third person, and must be sufficient, in the judgment of the court, so far to overcome the mind of the prisoner as to render the confession unworthy of credit. Gr. Ev., 279, note 5."

The further defense interposed by the prisoner was that of mental irresponsibility or insanity. The evidence tending to support this plea was submitted to the jury and rejected or found to be unsatisfactory. *S. v. Campbell,* 184 N. C., 765, 114 S. E., 927; *S. v. Terry,* 173 N. C., 761, 92 S. E., 154.

In criminal prosecutions in this jurisdiction, as well as in many others, where insanity is interposed as a defense, the burden rests with the defendant, who sets it up, to prove such insanity, not beyond a reasonable doubt, but to the satisfaction of the jury. *S. v. Walker,* 193 N. C., 489, 137 S. E., 429; *S. v. Jones,* 191 N. C., 753, 133 S. E., 81.

Lastly, the prisoner complains that, in answer to his witnesses, the State was permitted, over objections, to offer the testimony of non-experts who expressed opinions upon his sanity or his ability to understand the difference between right and wrong. The exception is untenable. *S. v. Hauser,* 202 N. C., 738. Any witness who has had opportunity of knowing and observing the character of a person, whose sanity or mental capacity is assailed or brought in question, may not only depose to the facts he knows, but may also give in evidence his opinion or belief as to the sanity or insanity of the person under review, founded upon such knowledge and observation, and it is for the jurors to ascribe to his testimony that weight and credibility which the intelligence of the witness, his means of knowledge and observation, and all the circumstances attending his testimony, may in their judgment deserve. *Clary v. Clary,* 24 N. C., 78.

Anyone who has observed another, or conversed with him, or had dealings with him, and a reasonable opportunity, based thereon, of forming an opinion, satisfactory to himself, as to the mental condition of such person, is permitted to give his opinion in evidence upon the issue of mental capacity, although the witness be not a psychiatrist or expert in mental disorders. *White v. Hines,* 182 N. C., 275, 109 S. E., 31. "One not an expert may give an opinion, founded upon observation, that a certain person is sane or insane." *Whitaker v. Hamilton,* 126 N. C., 465, 35 S. E., 815.

The prisoner was accorded on trial every protection which the law affords him. The verdict and judgment will be upheld.

No error.

C. H. ROUSE v. J. M. CREECH.

(Filed 26 October, 1932.)

Husband and Wife E c—Complaint in this case alleged cause of action for criminal conversation, and testimony of wife was incompetent.

Where in a civil action the complaint alleges that the defendant proposed sexual intercourse with the plaintiff's wife, and upon her refusal persisted and overcame her with the power of his personality and the force of persuasion to such an extent that she was unable to resist him, etc., without any allegation that such result was procured through physical force, violence, drugs, intoxicants or other forms of coercion: *Held*, the allegations of the complaint are insufficient to constitute rape or ravishment, but alleges only a cause of action for criminal conversation, and the testimony of the wife relating thereto is incompetent under the provisions of C. S., 1801.

CIVIL ACTION, before *Daniels, J.*, at February Term, 1932, of BEAUFORT.

This is an action by the husband against the defendant, a minister, for damages for carnal knowledge of plaintiff's wife. Plaintiff and his wife are still living together, but plaintiff alleged in paragraph 3 of the complaint that "plaintiff's wife became obsessed by and subservient to the defendant's doctrines and wonderful powers and unheard of acts bearing evidence of great and extraordinary and unnatural possession of divination, and was enchanted by him and became easily subject to his will and the power of his personality, to the extent that she was unable to resist his influence and the force of his persuasions; that, under the condition above stated, in the privacy of plaintiff's home, defendant wrongfully, maliciously, with great cruelty and wickedness, and with grossly wanton indifference to plaintiff's rights, proposed sexual intercourse to plaintiff's wife, and, being first refused, followed up the said wicked proposal and persisted in same, and exercised his peculiar influence until he finally overreached her and overcame her powers of resistance and protestations of wrong and expressions of unwillingness, and actually had sexual intercourse with plaintiff's wife in plaintiff's home, and debauched and carnally knew her."

The defendant filed an answer alleging that he had been a minister of the gospel for twenty-seven years, and denying all material allegations in the complaint.

At the trial the plaintiff offered his wife as a witness, and the record shows the following: "The witness being asked 'Where were you living at the time you say the things happened as alleged in the complaint?'

The defendant objected. It is admitted, if allowed to answer, the witness would have testified that defendant had sexual intercourse with her in her home and without her husband's consent. Objection sustained to both the question and the answer, and the plaintiff excepts. Plaintiff having announced in open court that he would submit to judgment as of nonsuit because of the ruling of the court on the competency of evidence offered by plaintiff; plaintiff stating that he had no evidence other than that objected to, submitted to a nonsuit."

Judgment of nonsuit was entered and the plaintiff appealed.

Ward & Grimes for plaintiff.
Ward & Ward and MacLean & Rodman for defendant.

BROGDEN, J. In a civil action for damages, brought by the husband for debauching his wife, is the testimony of the wife competent and admissible to prove the act or acts of adultery?

Apparently it was admitted at the trial that the only evidence of adultery was the proffered testimony of the wife. C. S., 1801, provides: "Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any actions or proceedings in consequence of adultery, . . . or in any action or proceeding for or on account of criminal conversation," etc. Obviously the express wording of the statute would exclude the testimony of the wife, but the plaintiff contends that the action is not for criminal conversation, but is in the nature of a ravishment resulting from overpowering mental force exerted by the defendant upon the resistance of the wife. There is no evidence of physical violence, threats, or other demonstrations of physical coercion. The complaint alleges that the defendant preached strange doctrine, evidencing "extraordinary and unnatural possession of divination." This allegation is doubtless reminiscent of "a certain damsel possessed with the spirit of divination," who met the Apostle Paul at Philippi, and who "brought her master much gain by soothsaying." It is also alleged that the blandishments and enchanting personality of defendant rendered plaintiff's wife "unable to resist his influence and the force of his persuasions." Consequently, the bald question is whether the power of personality and force of persuasion exerted by a man upon the mind of a woman constitutes such force, violence or coercion as to amount to a ravishment, or is of such character as to render the resulting adultery involuntary. The pertinent cases upon the subject disclose that the courts usually classify ravishment or rape as the result of bodily violence. No decision has been found which holds that the breakdown of feminine resistance, pro-

duced merely by overpowering personality or persistent and unremitting persuasion, is sufficient to turn adultery into rape or ravishment.

The plaintiff relies upon *Hirdes v. Cross,* 146 N. W., 646, 51 L. R. A. (N. W.), 373. In that case the defendant furnished the wife with a quart of whiskey and induced her to drink to such an extent that she became "so intoxicated that she was not in a condition to resist the action of said Hirdes, and that, while in such condition produced by him, he had sexual intercourse with her, she not being able, by reason of such intoxication, to resist his acts and conduct." The Michigan statute involved in that case was similar to C. S., 1801. The wife was offered as a witness to prove the adultery and the Court said: "We are of the opinion that it would be competent for her to so testify, and, should those facts be shown to the satisfaction of a jury, that they would be warranted in finding that the conduct of said Hirdes, under such circumstances, amounted to rape." However, in the case at bar, there is no allegation of rape unless the words "was enchanted by him and became easily subject to his will and the power of his personality, to the extent that she was unable to resist his influence and the force of his persuasions," sufficiently allege rape or ravishment. The Court is of the opinion that this language is not adequate for such purpose.

The mere fact that a man out-talked a woman and over-persuaded her to do wrong, does not constitute rape or involuntary intercourse, resulting from force, threats, drugs, intoxicants or other forms of coercion.

The cause of action, as alleged in the complaint, is for criminal conversation and falls within the inhibitions of C. S., 1801. Commenting upon the philosophy of the statute, *Adams, J.,* in *Hyatt v. McCoy,* 194 N. C., 760, 140 S. E., 807, approved the following instruction: "Our law does not permit, and very wisely, a woman in a situation of this kind to testify as to facts which would tend to establish the second charge in this case, that is, the charge of criminal intercourse. Our lawmakers have in their wisdom decided this would lay down too broad an opening for fraud and collusion, and have enacted a statute prohibiting a woman in all cases of this kind to testify as to acts of adultery. . . . Upon the second issue the court charges the jury that the wife of plaintiff is not a competent witness for the plaintiff to show criminal intercourse between herself and the defendant, and the jury in passing upon this issue will not consider her testimony for such purpose."

Affirmed.

GEORGE ROUNTREE, JR., ADMINISTRATOR OF HOWARD BROWN, DECEASED, v. W. G. FOUNTAIN.

(Filed 26 October, 1932.)

1. Negligence A a—Elements of actionable negligence.

The essential elements of actionable negligence are the failure to use due care, injury or damage, and proximate cause, and upon the plaintiff's failure to establish any one of them a judgment of nonsuit is correct.

2. Trial D a—Upon motion of nonsuit evidence is to be considered in light most favorable to plaintiff.

Upon a motion of nonsuit the sufficiency of the evidence is a question of law, and in passing upon the question the courts must give the plaintiff the benefit of the most favorable interpretation of the evidence and of every reasonable inference.

3. Negligence D c—Evidence in this action held insufficient to resist defendant's motion of nonsuit.

Where in an action to recover for the negligent killing of plaintiff's intestate the evidence tends to show that the intestate was a child of about four years and lived with its mother in a house next but one to a store, that for a number of years it had been the custom for the defendant to deliver oil to the store by backing his truck up the alley between the two houses, and that the intestate was seen playing under a tree in a yard sometime before the accident, and was found mortally injured after being struck by defendant's truck as the truck driver was backing up the alley according to custom, and there is no evidence of how long the child had been in the alley and nothing to show that the child had not rushed into the alley immediately in front of the truck: *Held*, the evidence is insufficient to be submitted to the jury on the issue of negligence in the driver's failure to give proper warning or in backing the truck up the alley instead of driving forward, or his failure to keep a proper lookout, or the negligence of the owner of the truck in failing to keep the mirror in the truck in repair, the evidence failing to show a causal connection between the alleged negligence and the injury in suit.

APPEAL by plaintiff from *Grady, J.*, at May Term, 1932, of NEW HANOVER. Affirmed.

Herbert McClammy for plaintiff.
Robert W. Davis and Robert D. Cronly, Jr., for defendant.

ADAMS, J. This is an action to recover damages for the death of the plaintiff's intestate, alleged to have been caused by the negligent operation of the defendant's truck. When the plaintiff rested his case the court granted the defendant's motion for nonsuit, and for this reason a statement of the material facts is essential to a presentation of the appellant's exceptions.

The death occurred in the town of Southport, Brunswick County, in an alley the outlet of which is on West Street. At the northwest corner

of the intersection of West and Horne streets there is a store which was occupied by C. J. Williamson. Mrs. Southerland lived in a house situated on a part of the Williamson lot and facing on Howe Street. Between her residence and the Williamson store there was an unoccupied space about twenty-five feet in width, and immediately west of these lots is the one on which the deceased lived with his mother and stepfather. There is a twelve-foot alley between this lot and the lots occupied by Williamson and Mrs. Southerland, and in the alley there is an intake valve through which oil is transferred from the tank on the truck to the tank in the store. For four or five years the defendant has periodically delivered oil to Williamson in this way, and for eight or ten years Williamson has used the alley for this purpose. There was no objection to his using it. Mrs. Etherton, mother of the deceased, rented the house in which she lived together with the alley and a garage situated at its north end. She testified that the deceased, Howard Brown, born of her first marriage, would have been four years old in November, 1931, and that he was killed in the preceding September.

On the morning of the accident he went across the alley to the home of Mrs. Southerland. She gave him a small box, left him in her yard picking up berries under a magnolia tree, and went across the street. A few minutes afterwards a man named Bender, an employee of the defendant, backed a gasoline or oil truck into the alley, suddenly left the truck, and went to the owner of the store and exclaimed, "Come here, I have killed a child." The body was found about three feet from the sidewalk and about the same distance from the store. Blood was on the sand; nearby was the box. There were bruises on the child's body and his nose was bleeding. The cause of his death was a fracture of the skull.

The plaintiff charges as the principal acts of negligence the defendant's failure (1) to give reasonable warning when backing the truck into the alley, (2) to keep a proper lookout, (3) to keep the mirror in the truck in repair, and (4) to drive instead of backing the truck into the alley.

Negligence is the breach of a legal duty to use due care. The essential elements of actionable negligence are the failure to exercise such care, injury or damage, and proximate cause. If there is sufficient proof of all these elements there is error in the judgment; if the evidence fails to establish either one of them the judgment must be affirmed. Whether there is enough evidence to support a material issue is a matter of law; and in passing upon the question of its sufficiency we must give the plaintiff the benefit of the most favorable interpretation of the evidence and of every reasonable inference. *Hancock v. Southgate*, 186 N. C.,

278; *Tinsley v. Winston-Salem,* 192 N. C., 597; *Brock v. Franck,* 194 N. C., 346.

Mrs. Etherton testified that she kept her car in the garage at the end of the alley, and Williamson said that backing the truck into the alley was the usual mode of delivering oil and "had been going on for eight or ten years." The plaintiff argues that a jury might reasonably infer that the defendant's employee knew the alley was frequently used by Williamson and by the owner or the lessee of the property; that the driver gave no signal either before or at the time he entered the alley; that it was his duty to look to the rear not only before he began backing but while he was engaged in the act; that the truck was so large and the mirror so defective that the driver could not see the child; and that the evidence would justify a finding of negligence.

The defendant denies that he was negligent and says that the utmost care could not have averted the injury, as there is no evidence that the deceased was in the alley even a moment before the accident occurred.

No one saw the deceased in the alley at any time before the impact. How long he had been there no one knows. There is no evidence he was there when the truck began to move backward. When last seen alone he was on the Southerland lot. When did he leave the magnolia tree? Had he been in the alley long enough for the driver to see him and avert the injury or did he at the fatal moment rush into the alley immediately in front of the advancing truck? The witnesses do not inform us, and at this point the plaintiff's case fails him. In the absence of evidence we cannot conclude that the deceased went into the alley at any particular time. Negligence is not presumed from the mere fact that he was killed; something more is required. The plaintiff had the burden of establishing the proximate causal relation of the alleged negligence to the injury and death, and in his search for it he is led into the uncertain realm of conjecture. *Henry v. R. R., ante,* 277; *Austin v. R. R.,* 197 N. C., 319. Judgment

Affirmed.

CHARLES STRAYHORN v. THE FIDELITY BANK ET AL.

(Filed 26 October, 1932.)

Appeal and Error J g—Assignments of error on trial are not presented for review where court has set aside verdict in his discretion.

The trial court has the power at any time during the term to set aside the verdict and grant a new trial in the exercise of his sound legal discretion, and no appeal will lie therefrom, C. S., 591, and where the court has so set aside a verdict in defendant's favor and the defendant

appeals, the defendant's assignments of error in the admission of evidence and the refusal of his motion as of nonsuit are not properly presented for review, and the appeal will be dismissed.

APPEAL by defendant bank from *Barnhill, J.*, at May Term, 1932, of DURHAM.

Civil action to recover value of collateral sold and proceeds used to pay the note with which it was hypothecated, and part of residue applied on a different obligation.

There was a verdict for the defendant upon which judgment was tendered. His Honor set the verdict aside in his discretion and ordered a new trial. Defendant appeals, assigning error in the admission of evidence and failure to nonsuit.

R. O. Everett for plaintiff.
Fuller, Reade & Fuller for defendant bank.

STACY, C. J. The questions sought to be presented are not properly before us. *Thomas v. Carteret,* 180 N. C., 109, 104 S. E., 75.

So long as the matter was *in fieri,* the keeping of the verdict resided in the breast of the judge, and he was at liberty, at any time during the term, in the exercise of a sound discretion, to set it aside and to award a new trial, from which ruling no appeal lies. C. S., 591; *Goodman v. Goodman,* 201 N. C., 794, 161 S. E., 688; *Welch v. Hardware House,* 202 N. C., 642, 163 S. E., 801; *Smith v. Matthews, ante,* 218; *Bank v. Sanders, post,* ..... (Per curiam case.)

Appeal dismissed.

LOTTIE McMILLAN PENDERGRAFT v. DR. H. A. ROYSTER.

(Filed 26 October, 1932.)

1. Physicians and Surgeons C b—Evidence in this case held sufficient to go to jury on issue of surgeon's negligence.

In an action against a surgeon for malpractice there was evidence tending to show that the plaintiff was put under the influence of an anesthetic and that in performing the operation the surgeon used cat gut which came in glass tubes, that the nurse broke the glass tubes beforehand and handed the cat gut to the surgeon, and also that there was a glass nozzle to a rubber tube used by the physician in irrigating the wound while performing the operation, there was also evidence that the patient improved in health after the operation, but that several months thereafter she removed from her body a broken piece of glass about an inch long which appeared in form to have been broken from either the glass tube inclosing the cat gut

or from the nozzle used by the surgeon in irrigating the wound: *Held*, the evidence was sufficient to take the case to the jury under the doctrine of *res ipsa loquitur*.

2. Trial D a—Doctrine of res ipsa loquitur is sufficient to take the case to the jury.

Where the doctrine of *res ipsa loquitur* applies it is sufficient to carry the case to the jury upon the question of negligence, but the burden of proof on the issue remains upon the plaintiff.

3. Physicians and Surgeons C b—Physician warrants that he has required skill and will use best judgment.

A surgeon in undertaking to operate upon a patient does not insure or warrant the results of the operation but impliedly warrants that he has the knowledge and skill ordinarily possessed by the members of his profession similarly situated, and that he will exercise reasonable diligence and will exert his best judgment in the treatment and care of the case.

4. Trial D a—On motion of nonsuit all evidence is considered favorably to plaintiff.

On a motion as of nonsuit all the evidence, whether offered by the plaintiff or elicited from defendant's witnesses, should 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.

5. Physicians and Surgeons C b—Nonexpert witness may testify to fact of glass passing from body of patient after operation.

Where there is sufficient evidence that a surgeon in his operation on his patient had used certain receptacles and instrumentalities made of glass it is competent for the patient and other nonmedical experts to testify as a fact within their own knowledge that certain pieces of glass passed from the patient's body subsequent to the time of the operation.

CONNOR, J., dissenting.

APPEAL by defendant from *Cowper, Special Judge* and a jury, at January Special Term, 1932, of WAKE. No error.

This was a civil action for actionable negligence, instituted by plaintiff against defendant, in which she alleges damages. The plaintiff contends, and it is admitted by the defendant, that in January, 1929, she submitted herself to Dr. W. B. Dewar, of Raleigh, North Carolina, for a thorough examination and that plaintiff consulted the defendant and after an examination by the defendant that the defendant advised an operation and that defendant operated upon plaintiff at Rex Hospital in the city of Raleigh.

The plaintiff testified, in part: "We have one little girl who is five years old; after the birth of this child I have had physical trouble. . . . I went to see Dr. Dewar and he made a physical examination, and in consequence of what he told me I consulted Dr. Royster. When I went to Dr. Royster's office he gave me a physical examination, and he

told me that my womb was misplaced, and in my then condition that it would be impossible for me to give birth to a child and he told me that the pain I was suffering was probably coming from my womb—that it was misplaced—fallen, and I had lacerations that should be attended to, and several other things should be done, and that I should be operated upon as soon as possible. This was in January, about the middle of January, 1929, I believe, and I asked him if he thought it would be all right to wait until March and he said he thought it should be done immediately, and I asked him what he meant by immediately, and he said he thought if I could possibly do so I should go tomorrow night and he would operate on me Thursday morning. . . . I went to the hospital on Wednesday night and was operated on on Thursday morning. . . . He made an incision in my right side and it looked as though it might have been for the appendix; it is about four inches long. Before I was operated on I was told that it would be a middle line incision, and when I found that it was not I asked Dr. Royster about it and he said that he had made all repairs and done everything through that incision that could not be done through the vagina. I was carried back to the room. . . . I seemed to be improving and went home in two weeks. After I got home I was in bed part of the time and up part of the time. I began to feel very much better and I was very well pleased with my condition, and I thought I was going to be rid of my suffering and I felt well for two or three months, and I think it was sometime in April. . . . I walked out in the yard and picked up a rake, and ran a little trench for planting flower seed, and as I bent over I had a pain that struck me in the bottom of my stomach; in my body from the waist down, and it seemed to be in the very bottom of my stomach. . . . I sat on the edge of a chair and placed my finger on the mouth of my womb and I felt something touch it, it felt like a wiry hair, and I thought it was one of the things that they used in sewing up lacerations with, and I had taken them out before on several occasions, and I kept working it more and more and it went back so far I could not touch it at all, and then again I sat down in the same position and strained myself, and I worked at it until it slipped out in my hands, and I still thought it was one of those things that they use to sew up with, and when I looked at it I could not tell what it was, it was covered with a filmy mucus, and I wiped it off and it was a jagged piece of glass; it was a piece of glass almost an inch long with jagged ends, and it looked like it had been part of a tube, and it was rounded. It was concave and it was not flat, and almost one inch long with jagged edges. This was right after lunch. I took the piece of glass; I could not believe that it was glass, and I kept rubbing and looking at

it, and I thought what should I do, and I was in the house alone. I think I laid the piece of glass on the mantel, and I wondered if I should call my husband, and it occurred to me that it would worry him. I laid the piece of glass down and I walked around the house all Sunday afternoon; I did not go out of the house, and just could not get myself composed. . . . I went to bed about eight o'clock and I dropped off to sleep, and the next thing I knew my husband was standing over me, asking me what was the matter; this was between eight-thirty and nine o'clock. He brought Dr. Royster with him. Dr. Royster came that night about an hour after my husband telephoned. He brought Dr. Dewar with him. When they came in the room I was in bed, and Dr. Royster spoke to me kindly and asked me how I was feeling, and he asked me to tell him how I was feeling and how it happened, and I told him beginning with Saturday afternoon, and he said 'I will make a slight examination now and see if I can tell whether or not there is more glass,' and he did, and after he did that Dr. Dewar sat down by the side of my bed and Dr. Royster was at the foot, and after they sat there and talked about it, and they said they could not understand how it was, and what it was, they asked to see the glass; any way my husband brought it and started to put it into the hands of Dr. Royster and Dr. Dewar took it, and they both looked at it, and Dr. Dewar was by the table and he laid it down and he said it looked like a capsule, and I do not know what instrument he had in his hands, but he began to crunch that instrument with the piece of glass, and he talked about what it could be, and I reached over and took the glass up and handed it back to my husband, and Dr. Royster said 'You need not worry because there is no more there, and you just go to sleep and come to my office tomorrow and let me make a thorough examination.' The next morning I went to his office. When I got to his office he said there was no use to make an examination because the examination would not reveal anything, and he said 'the only reason I examined you last night was to relieve your mind, I wanted you to feel that it was all right,' and he was sympathetic and kind to me. . . . I said how about having another operation, and he said I cannot guarantee that it would be found if it were there, and he said you can rest assured that there is no more glass. I went back home. About a month after that during a menstruation period I felt a piece of glass in an article of clothing, and I looked at it and it was a small piece of glass of the same kind. At three or four other times more came. I suppose it has been a year ago since the last piece came, it continued for about a year. . . . I think it was about the last of April this glass came from my womb. . . . I was in bed and I proceeded to tell Dr. Dewar and Dr. Royster about

my complaint, and exhibited to them the piece of glass which came from my womb. Dr. Dewar broke the glass; I don't remember what he used, he laid the glass down on the table and pecked off the end, and I do not know whether he did that with his thumb or knife. I did not pay any attention to what he did it with. I don't remember how much he crushed off but my first impression of the piece of glass was that it was almost an inch long, and it was about one-half inch long when he handed it back to me."

Ralph Pendergraft, the husband of plaintiff, testified, in part: "I know about this piece of glass my wife testified about. I was in the living room on Sunday night and my wife had gone to bed, and I was reading, and it was probably between eight and nine; it might have been a little later than nine, I am not positive, and I heard her sobbing, and I went in and she said she was worried, that she had passed a piece of glass that afternoon, and she showed it to me, and I went to the phone and called Dr. Royster right then. I told him that I wanted him to come to my house immediately and he said 'what is the matter,' and I said 'my wife has passed a piece of glass,' and he said 'that is a case for your family physician, Dr. Dewar, and not for the surgeon,' and then I told him that it came from the place where he operated on and he said 'where,' and then I told him that I rather not tell him over the phone, and he said he would come right then and he came in about an hour and Dr. Dewar was with him. When they came in they asked me what was the trouble and I told them that she had found this piece of glass around the mouth of the womb. I think it was about an inch long. It was rounded on the bottom, and it was part of a glass tube, and the end tapered like a tube, I mean like a pen point. . . . Dr. Royster came in and Dr. Dewar was with him, and sat down by the bed. Dr. Royster spoke to her and asked her how she was feeling, and she told him and he asked to make an examination and she let him make the examination, and Dr. Dewar said it was impossible to pass that piece of glass that way, and Mrs. Pendergraft said she took it out of the mouth of her womb, and he said 'You could not, you could not touch the mouth of your womb,' that it is impossible, and Dr. Royster said 'I guess she could' and he says that she knows her anatomy pretty well, and Dr. Royster said 'Let's see the piece of glass,' and Dr. Dewar took it and said 'I believe it is glass,' and he said it looked like a piece of capsule at first, and he sat down and started to break it up with some instrument, picked the edge off, and I was on the other side of the bed, and Mrs. Pendergraft reached over and got it and I put it in a little box and put it on the dresser. . . . The piece of glass my wife showed me had evidence of blood on it; there was pus like on the inside and

there was a streak of blood across it. I did not wash it off, it was there when Dr. Royster saw it. That is what I took and delivered to Mr. Hinsdale; he has it. My wife passed four or five pieces after that, possibly more; I think she passed it over a period of 12 months, after April, 1929."

The plaintiff alleged "that she was injured by the grossly careless and negligent manner in which defendant performed said operation upon her, in that he carelessly and negligently, after said operation, left in her body a glass drainage tube which has become broken, or at the time of dressing her wound carelessly and negligently used gauze packing which had imbedded in it broken pieces of glass tube which upon the removal of the packing, was carelessly and negligently allowed to remain in her body."

The defendant denied these allegations. The defendant, in regard to the glass drainage tube and glass, testified, in part: "I used irrigation of tincture of iodine diluted with water. There is a large can of about two quarts suspended, and there is a long rubber tube, and there is a nozzle, and that is used for washing out—when you are operating you wash out any discharge. That can is usually a large glass can, top open and norrowed toward the bottom, to which is attached this long rubber tube. It has a glass nozzle which is attached to the end of the rubber tube, and it comes to a very fine point so as to wash in and out small pieces. This is exactly the type I used at that time. (Witness has nozzle in hands.) This is attached to the tube. There is a clasp that you cut the water on and off with, and that was used in and around the neck of the womb by pulling it down. During the operation and irrigation I had that in my hands all the time; no portion of it broke. . . . The gauze I put in was in strips about two inches wide, and I suppose one yard long, and we sometimes used two or one and the strip to the cervix is possibly half an inch wide. This is opened in the operating room, and it is kept on a separate table and used only for that purpose, vaginal packs. The gauze is prepared by the operating room nurses and wrapped up and opened at the time; it is sterile. The gauze is handled by my assistant and myself. There was not any glass or any portion of the glass in the gauze which I used. (Cross-examination.) If I had put the glass nozzle and the curetting instrument in it would have been possible for me to have struck them. I never broke one. I don't think I made any special examination of it after the operation. There are many things possible, but I know that I did not break it. I cannot account for the glass being in there. The neck of the womb was torn sideways. The womb is entered through the cervix, and the mouth is a small opening which we dilate, and the cervix pro-

trudes to the vagina. It varies from one inch to three inches depending upon the architecture of the patient. I should say in this patient it was one or one and a half inches. . . . Cat gut comes in a little bottle sealed up. It is broken before the operation is started, and it is done by the nurses. It is usually done half an hour or an hour before. If you take this cat gut out an hour before the operation it would be sterile; you put it between two sterile towels and wrap it up. A tube is broken right there sometimes when you need an extra supply. When I go in there to perform an operation the nurse had the sterilized gauze. The tube is never broken around or near where the vagina packing is done, and it is done on an entirely different table in the opposite side of the room. When you need an extra one it is done there but at a different table. It is not probable that when this glass was broken in the piece of gauze that that piece of gauze was used to pack with, and I would say it was impossible. Any man in the world in straightening it out would see whether there was any glass in it and he would not put it in the womb. . . . These tubes Mr. Hinsdale asked about and broke one for the jury contain cat gut. They are broken by the nurse between two gauzes or towels."

Dr. George Wright an expert witness for defendant, testified, in part: "The tube which contains this cat gut varies in size, and it is medically sealed so no air can get in there, and it contains the cat gut and the preservation fluid: and a center line has been formed around it so as to facilitate the breaking of the tube. The table where these tubes are broken is some five to seven feet from the table containing the sponges or the surgeon's table. After that tube is broken the piece of gauze that contained the glass particles of the tube is put in the waste basket. No part is put back on the operating table to be used by the doctor. No gauze was used in this operation by Dr. Royster in which a piece of glass had been broken."

Dr. A. S. Oliver, an expert witness for defendant testified, in part: "I know Dr. H. A. Royster. I have known him probably 20 years. I know his general character; it is excellent. He is considered one of the best in the medical profession in the South. . . . I am familiar with the surgical operation on the womb known as curetting; and also in the laceration of the vagina. I heard the statement of Dr. Royster as to the manner in which this operation was performed upon the plaintiff in this case. That operation was performed in the usual, ordinary and customary manner as similar operations are performed by surgeons generally. That is the usual and acceptable manner in which it is performed. The irrigation referred to by Dr. Royster through a glass nozzle is the usual and ordinary manner. It is the general acceptable manner,

and in general use. If the jury should find from the evidence in this case that on 24 January, 1929, Dr. Royster performed an operation upon this plaintiff and removed her appendix, curetted her womb, and sewed up certain lacerations of her vagina, and that she remained in the hospital for about 2 weeks, gradually improving in her condition, and that thereafter she went to her home, and from the period of 24 January, 1929, up until 27 or 28 April, her menstruation periods were regular, and there was no spotting, and her menstruation periods were normal, and she had but little leucorrhea, and but very little pain at intervals, and that thereafter on 28 April, after the operation in January, she removed from the neck of her womb a piece of glass from one-half to one inch in length, a jagged piece of glass, I have an opinion satisfactory to myself as to whether that piece of glass could have been embedded in her womb over that period of time under those conditions. My opinion is it could not under those circumstances have been there. You mean could the average woman remove from the neck of her womb a piece of glass from one-half to one inch in length by the use of two of her fingers—I have an opinion that the average woman could not do that—I mean remove the piece of glass with her fingers."

It was in evidence that the cat gut came in small sealed glass tubes, these are usually broken and the cat gut prepared before the operation, sometimes glass tubes are broken during the operation, when the cat gut runs out. A tube was broken before the jury and Mrs. Pendergraft selected a piece of this broken tube that she testified corresponded very closely to the piece of glass that came out of her womb. She testified "It looks as though it might have been the identical piece." It was further in evidence that in this particular case neither the defendant nor any of his witnesses saw the tubes broken before the operation, but that they testified from the general method used in such cases. "The usual custom for inserting the gauze packing in the vagina is for the nurse to hand you the gauze and you open it with the forceps and just slip it in. The assistant often times takes the gauze and has it ready, and hands it to the surgeon, as a rule it is the assistant's job to furnish the instruments and sponges. I think that it is the duty of the surgeon to see that it is in proper form."

The issues of negligence and damage were answered in favor of plaintiff. Judgment was rendered on the verdict. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

W. Brantley Womble and John W. Hinsdale for plaintiff.
Jones & Brassfield and Chas. U. Harris for defendant.

CLARKSON, J. The questions involved in this appeal: (1) Did the trial court commit error in refusing to sustain defendant's motion as of nonsuit at the close of plaintiff's evidence and at the close of all of the evidence? C. S., 567. (2) Did the trial court commit error in its charge to the jury, as is set forth in the assignments of error, upon the doctrine of *res ipsa loquitur?* We think both questions must be answered in the negative.

In the case of *Nash v. Royster,* 189 N. C., at p. 415, the court below charged the jury: "The court charges you that upon the employment of a physician or surgeon for treatment of a patient, there is an implied contract that the physician will use *all known and reasonable means* to accomplish the object for which he is called to treat the patient, and that he will attend the patient carefully and diligently; and that is no guaranty that he will cure the patient or that he will not commit an error of judgment."

On this aspect of the case, this Court said, at p. 416, citing numerous authorities: "A physician or surgeon is not required to use *'all known and reasonable means'* to accomplish the object for which he is employed, unless by specific contract he obligates himself to do so.'" In this same case, *Stacy, C. J.,* in an able and well considered opinion, citing numerous authorities, said at pp. 413-414: "Ordinarily, when a physician or surgeon undertakes to treat a patient without any special arrangement or agreement, his engagement implies three things: (1) that he possesses the requisite degree of learning, skill and ability necessary to the practice of his profession, and which others similarly situated, ordinarily possess; (2) that he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to the patient's case; and (3) that he will exert his best judgment in the treatment and care of the case entrusted to him." *Pangle v. Appalachian Hall,* 190 N. C., 833; *Covington v. Wyatt,* 196 N. C., 367; *Johnson v. Hospital,* 196 N. C., 610; *Smith v. Wharton,* 199 N. C., 246; *Penland v. Hospital,* 199 N. C., 314; *Childers v. Frye,* 201 N. C., 42; *Ferguson v. Glenn,* 201 N. C., 128; *Bowditch v. French Broad Hospital,* 201 N. C., 168; *Smith v. McClung,* 201 N. C., 648; *Gosnell v. R. R.,* 202 N. C., 234; *Byrd v. Hospital,* 202 N. C., 337.

In *Smith v. McClung, supra,* at p. 651, *Brogden, J.,* says: "Hence, if the principle of *res ipsa loquitur* does not apply, the case should have been nonsuited. . . . These cases do not deny the application of the principle where the facts warrant it, but merely hold that the facts of the particular cases do not justify the application.

In *McLeod v. Hicks, ante,* at p. 134, the observation is made by the same learned judge, "It cannot be said as a matter of law that a layman

cannot testify as to the location of a knife incision or wound upon the exterior of the body or that such testimony should not be entitled to the same weight as that of an expert witness." This principle is sustained by almost the unanimous holdings of the courts.

We think the principle well stated and digested in Medical Jurisprudence (Herzog), (1931), sec. 187 p. 162-3: "The doctrine of *res ipsa loquitur,* that negligence need not be proved where the act causing the injury is such that negligence would necessarily be inferred, has been applied in a few malpractice cases; but generally the plaintiff is required to point out wherein the defendant was negligent, even though it is obvious that the results of the treatment was harmful. In a Kentucky case the defendant had treated the plaintiff for 'trench mouth' by injecting salvarsan into his arm. There was no evidence to show that this was an improper method of treatment, or that the defendant had administered it in a negligent manner. Therefore the court held him not liable, saying that harmful results may follow when a powerful and dangerous drug is used even though the physician proceeds with the utmost care and skill. In many other cases it has been held that mere proof of a mistake or poor results does not itself prove malpractice, *but where the injury is received while the patient is unconscious, the doctrine commonly is held to apply because under such circumstances the patient would not be able to testify as to what had happened, whereas the physician could.* (Italics ours.) It is also frequently applied in actions to recover damages for X-ray burns." The author is editor of the Medico-Legal Journal, and therefore well qualified to write on the subject.

The general rule is to the effect that there is in malpractice actions no presumption of negligence from error of judgment in the diagnosis by a doctor of the patient's illness, or in the treatment prescribed in the failure to successfully effect a remedy or to accomplish as good results as some one else might have done. A doctor is neither a warrantor of cures nor an insurer.

"There is, however, a well-recognized exception to the above rules, 'where there is manifest such obvious gross want of care and skill as to afford, of itself, an almost conclusive inference' of negligence (*Simak v. Foster,* 106 Conn., 366; *Donahoo v. Lovas,* 288 Pac., 698). In such cases, neither affirmative proof of negligence, nor expert testimony as to want of skill, need be given by the plaintiff. This presumption of negligence from certain proven facts, otherwise known as the doctrine of *res ipsa loquitur,* has been frequently applied, in actions for malpractice, to cases where the surgeon has left a foreign substance, such as sponges or gauze, in the patient's body after an operation. The dis-

tinction between the application of the general rule, and of the exception, is tersely pointed out in *Evans v. Roberts,* 172 Iowa, 653, where it appeared that a surgeon, in removing adenoids, had injured surrounding healthy tissue. The Court said: 'If a surgeon, undertaking to remove a tumor from a person's scalp, lets his knife slip and cuts off his patient's ear, or if he undertakes to stitch a wound on the patient's cheek, and by an awkward move thrusts his needle into the patient's eye, or if a dentist, in his haste, leaves a decayed tooth in the jaw of his patient and removes one which is perfectly sound and serviceable, the charitable presumptions, which ordinarily protect the pactitioner against legal blame where his treatment is unsuccessful, are not here available.'" U. S. Law Review (Nov., 1930), at p. 610. *Moore v. Steen et al.,* 283 Pac. (Cal.), 833. *Quillen v. Skaggs* (Ky.), 25 S. W. (2d series, 1930), 33; *Brown v. Shortlidge,* 277 Pac., 134 (Cal.); *McCormick v. Jones,* 152 Wash., 508, 278 Pac., 181.

"The maxim *res ipsa loquitur* applies in many cases, for the affair speaks for itself. It is not that in any case negligence can be assumed from the mere fact of an accident and an injury, but in these cases the surrounding circumstances which are necessarily brought into view, by showing how the accident occurred, contain without further proof sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof that the injured person is able to offer or that it is necessary to offer." Sh. and Redf. on Negl., sec. 59. *Womble v. Grocery Co.,* 135 N. C., 474; *Ridge v. R. R.,* 167 N. C., at p. 518; *O'Brien v. Parks-Cramer Co.,* 196 N. C., at pp. 365-6; *Springs v. Doll,* 197 N. C., 240.

In 65 A. L. R., p. 1028, citing cases from Alabama, Indiana, Iowa, Kentucky, Minnesota, Missouri, Nebraska, Ohio, and Washington, we find: "It is generally held that it is a proper question for the jury to determine whether the leaving of a sponge or foreign substance in a wound is negligence on the part of the defendant."

In *Reynolds v. Smith,* 148 Iowa, 264, 127 N. W., 192; "the plaintiff was allowed to recover for the negligence of the defendants in leaving a piece of gauze in her abdominal cavity. The defendants requested instructions to the effect that all exacted of them was that they follow the customs and usages of physicians in the vicinity where they practiced. The Court said: 'They were rightly refused, for no evidence was adduced that any particular custom or usage in the matter of avoiding leaving the gauze in plaintiff was actually followed. Moreover, if there has been such evidence, these instructions ought not to have been given, for, in view of the failure of the wound to heal, to continuance of sup-

puration, together with the significance of leaving such a substance in the body, the issue of negligence must have been submitted to the jury." 65 A. L. R., *supra.*

In *Baer v. Chowning,* 135 Minn., 453, 161 N. W., 144, another abdominal operation, a gauze pack or sponge and a portion of *a rubber drainage tube that had been used by the defendant were left by him in plaintiff's abdominal cavity.* The Court held that that testimony made the question of the defendant's negligence for the jury. To the same effect, see *Sellers v. Noah,* 209 Ala., 103, 95 So., 167. 65 A. L. R., *supra.*

"There are some authorities that uphold the view that the failure of the surgeon to remove a sponge or other foreign substance from an incision constitutes negligence *per se.*" 65 A. L. R., *supra,* at p. 1030.

It is the settled rule of practice and the accepted position in this jurisdiction that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim and which tends to support her cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and she is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

Plaintiff's testimony, corroborated by her husband, was to the effect that a jagged piece of glass, almost an inch long, which was rounded and looked like it had been part of a tube, about three months after the operation, she took from the mouth of her womb. "I kept working it more and more and it went back so far I could not touch it at all, and then again I sat down in the same position and strained myself, and I worked at it until it slipped out in my hand." Notice was given defendant at once of this occurrence. Plaintiff further testified that thereafter she passed some small pieces of glass three or four times over a period of twelve months.

The evidence was to the effect that glass similar to that which the plaintiff alleged she took from her womb was used in the operation by defendant and placed in her parts—irrigation through a glass nozzle. Then again, a glass tube contains the cat gut used and the glass tube is broken to get it out. "After that tube is broken the piece of gauze that contained the glass particles of the tube is put in the waste basket." "They are broken by the nurse between two gauzes or towels." "The usual custom for inserting the gauze packing in the vagina is for the nurse to hand you (the surgeon) the gauze and you open it with the forceps, and just slip it in."

We think the direct and circumstantial evidence sufficient to be submitted to the jury. *Speas v. Bank*, 188 N. C., 529; *Eaker v. International Shoe Co.*, 199 N. C., pp. 383-4. In *Hutchins v. Taylor-Buick Co.*, 198 N. C., at p. 779, it is held: "A prima facie showing carries the case to the jury."

In *Bryant v. Construction Co.*, 197 N. C., at p. 643, *Adams, J.*, says: "In some of our decisions the expressions *res ipsa loquitur*, prima facie evidence, prima facie case, and presumption of negligence have been used as practically synonymous. As thus used, each expression signifies nothing more than evidence to be considered by the jury."

In operations like the present, the patient is unconscious from the administration of anesthetics. If the principle of *res ipsa loquitur* did not apply in an action like the present, the patient would be remediless. The court below in charging the jury took the law copiously from the *Nash case, supra*. The defendant contends that the court below in its charge overlooked the fact that the alleged injury to plaintiff, caused by the glass in the wound, was denied as existing and therefore to sustain the principle of *res ipsa loquitur* the plaintiff had to prove same.

We think the judge's charge, and the theory upon which the action was tried in the court below, sufficient to meet defendant's objection and it cannot be sustained.

As to *res ipsa loquitur*, the court below charged the jury correctly as follows: "Where a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have control and management of it use the proper care, it furnishes or would be some evidence, in the absence of explanation of the defendant that the accident arose from want of care. The principle of *res ipsa loquitur* (which means the thing speaks for itself) in such cases carries the question of negligence to the jury, not, however, relieving the plaintiff of the burden of proof, and not raising any presumption in her favor, but simply entitles the jury in view of all the circumstances and conditions as shown by the plaintiff's evidence to infer negligence and say whether upon all the evidence the plaintiff has sustained her allegation. The plaintiff upon all the evidence must satisfy the jury by the greater weight of the evidence that the defendant was negligent, and that such negligence was the proximate cause of plaintiff's injury as alleged by plaintiff."

The defendant contended in his brief: "In this case it was incumbent upon the plaintiff to show by evidence, either direct or circumstantial, first, that her injury, if any, occurred through some agency or instrumentality under defendant's control; and, second, that in the use of

such agency or instrumentality the defendant was guilty of negligence, in that he did not exercise his best judgment, ordinary care and skill, as is usually done in such cases of surgeons."

We think the following portion of the charge of the court below meets the very contention: "If the plaintiff has failed to satisfy you by the greater weight of the evidence that glass was in the plaintiff's body incident to the operation, it would be your duty to answer the first issue No. Even if you should find that some glass was found in her body two or three months after the operation, but that the plaintiff has failed to satisfy you by the greater weight of the evidence that the defendant failed to exert his best judgment, skill and ability, then it would be your duty to answer the first issue No."

Under the facts and circumstances of this case, we think the above charge as favorable to defendant as could be asked for under the authorities.

The physician has been of untold value to the human race. Without them pestilence and famine would walk hand in hand on this earth. Health is wealth. The priceless boon of modern medicine and surgery in the last third of a century has added untold blessings to the human family, and longevity of life. The achievements of medicine and surgery are too numerous to mention here and far be it that the courts should put a stumbling block in the way of these communal and humanitarian efforts. It has become a veritable cornerstone of our civilization, and without science of medicine and surgery our structure would crumble. Science now has control of pain by the use of anesthetics. It was the eminent Georgia physician, Dr. Crawford W. Long, who is credited with the initial discovery of this blessing to the human family, in consequence of which pain in surgery has been diminished and science controlling pain. In recognition of his work, the Georgia Legislature erected his statue in the hall of statuary, Washington, D. C. It is written in medical works that in regard to the discovery of anesthesia Dr. Long was, without doubt, the first to make use of the condition, producing it intentionally after deliberate calculations. The principle set forth by Dr. Herzog in his Medical Jurisprudence, *supra,* is to the effect that where the injury is received while the patient is unconscious the doctrine of *res ipsa loquitur* is applicable.

The defendant and his witnesses, expert and otherwise, contend that the injury could not have occurred as alleged by plaintiff. This, we think, is a fact to be determined by a jury. We think the evidence sufficient to have been submitted to the jury; they, and not we, are the triers of the disputed facts. This Court on appeal to it can only review "any decision of the courts below, upon any matter of law or legal in-

ference." Constitution of North Carolina, Art. IV, part sec. 8. From the record the court below tried the case with care, according to the authorities in this and other jurisdictions. The jury has found for the plaintiff. In law we find

No error.

CONNOR, J., dissenting. The primary question of law presented by the defendant's appeal to this Court is whether there was any evidence at the trial of this action in the Superior Court from which the jury could find as a fact that the defendant, at the time he performed the operation on the body of the plaintiff, left in the wound made by him as a surgeon, or in her body, pieces of broken glass, which more than three months after the operation were discovered by plaintiff in her body. In the absence of such evidence, the question of law discussed in the opinion of this Court as to whether the principle of *res ipsa loquitur* is applicable in this case, cannot, I think, arise.

Conceding that the unsupported testimony of the plaintiff, notwithstanding its improbability as shown by the testimony of all the expert witnesses, was sufficient as evidence to show that plaintiff took from her body pieces of broken glass, more than three months after the defendant performed the operation on her body, there was no evidence, I think, tending to show that defendant, while performing the operation, or at any other time, inserted pieces of broken glass into the body of plaintiff, intentionally or otherwise. No witness for the plaintiff so testified; all the witnesses for the defendant who were present during the operation testified to the contrary. The witnesses for the defendant, who were found by the court to be experts, testified that it was impossible that pieces of broken glass could have been in the body of the plaintiff from the date of the operation until she testified that she discovered the glass. The fact that defendant performed the operation on the body of the plaintiff on 24 January, 1929, and the further fact that plaintiff on or about 28 April, 1929, took from her body a piece of broken glass, about an inch in length, as she testified, do not justify an inference that defendant left the piece of glass in plaintiff's body, especially when all the evidence is to the effect that defendant while performing the operation did not use any glass such as plaintiff testifies she took from her body. I think that there was error in the refusal of the trial judge to allow defendant's motion for judgment as of nonsuit. For this reason I dissent from the decision of the Court in this appeal.

BANKERS TRUST COMPANY v. CITY OF STATESVILLE.

(Filed 26 October, 1932.)

1. **Bills and Notes B c—Municipal bonds payable to bearer and conforming to C. S., 2982, are negotiable instruments.**

   Where under valid statutory authority a municipality issues its bonds payable to bearer and the form of the bonds in other respects comply with the provisions of C. S., 2982, they are negotiable instruments and in the hands of a holder in due course are not subject to defenses ordinarily available to the municipality, and as against such holder the only defense available to the municipality is the want of power and authority to have issued them.

2. **Bills and Notes A c—Delivery of negotiable municipal bonds is conclusively presumed when in the hands of a holder in due course.**

   Where a negotiable municipal bond is in the hands of a holder in due course, C. S., 3033, it is conclusively presumed that a valid delivery of the bonds had been made so far as the rights of the holder are concerned, and in an action by such holder the defense that the bonds were not delivered is not available to the municipality. C. S., 2997.

3. **Bills and Notes A a—City paying coupons held estopped to deny consideration for its negotiable bonds in hands of holder in due course.**

   Where a municipal corporation pays the interest coupons on its bonds for several years it is estopped to deny the validity of the bonds for want of consideration or delivery as against a holder in due course.

4. **Bills and Notes C d: Taxation A f—Failure to strictly follow statutory procedure does not invalidate bonds in hands of holder in due course.**

   Whether the statutory provisions that an issuance of bonds by a municipality should be authorized at a regular and not a special meeting of its governing body is mandatory or merely directory is immaterial where the bonds are in the hands of an innocent holder in due course, the failure of the governing body to strictly observe the provisions of the statute not being sufficient to invalidate the bonds in the hands of such holder, especially where the city is estopped by its conduct from denying the validity of the bonds.

APPEAL by defendant from *McElroy, J.*, at November Term, 1931, of IREDELL. No error.

This is an action to recover of the defendant the sum of $375, with interest from 1 April, 1929. This is the aggregate amount of fifteen interest coupons, each for the sum of $25, now in the possession of the plaintiff. The coupons were attached to fifteen bonds, each for the sum of $1,000, which by recitals contained therein purport to have been issued by the defendant. These bonds are now in the possession of the plaintiff.

The plaintiff alleges in its complaint that the bonds and coupons now in its possession were issued by the defendant, and that plaintiff is the holder in due course of both the bonds and the coupons. The defendant in its answer to the complaint denies these allegations, and alleges that the bonds, with coupons attached, were never delivered by it, and that it has never received value for said bonds.

This action was begun on 8 October, 1929. The coupons sued on were due on 1 April, 1929. At the trial, it was agreed that if the defendant should be held liable to plaintiff, on the bonds, and on the coupons which were due at the date of the commencement of the action, judgment should be rendered in this action against the defendant for the aggregate amount of all the coupons due at the date of the trial, to wit: $2,250.

The facts as shown by all the evidence introduced at the trial are as follows:

1. The defendant, city of Statesville, is a municipal corporation, created by and organized under chapter 243, Private Laws of North Carolina, 1911. It is provided by section 17 of said chapter that "all the corporate powers of the city of Statesville shall be exercised by the board of aldermen of said city, subject to the provisions of this act, and consistent with the powers herein granted. The board of aldermen shall have power and authority by ordinance duly enacted (1) to provide for the payment of any existing indebtedness and of any valid obligations that may be made from time to time by the city, and to appropriate funds for that purpose, and (2) to establish, construct, open, grade and repair streets, sidewalks, public alleys, bridges, culverts and drains in the city."

2. Sometime prior to 1 April, 1914, the defendant city of Statesville, as authorized by its charter, had incurred an indebtedness in the sum of $30,000, for work done in the improvement of streets and sidewalks of the city. At a regular meeting of the board of aldermen of the defendant, held on 3 April, 1914, bids for bonds to be issued and sold by the defendant in the aggregate amount of $30,000, for the payment of said indebtedness, were received, and duly entered on the minutes of said board. All of said bids except the bid of Cutter, May and Company of Chicago, Ill., and the bid of another bond buyer, were rejected by the board. The bids not rejected were referred by the board to D. M. Ausley, a member of said board, and the chairman of its finance committee. Thereafter there was considerable correspondence between the attorney of the defendant, and Cutter, May and Company and its attorneys, in regard to the form of the ordinance which should be passed by the board of aldermen, authorizing the issuance and sale of said bonds. An ordinance passed by the board at a meeting held on 13 April,

1914, was unsatisfactory to Cutter, May and Company because of its form. At a special meeting of the board of aldermen of the defendant held on 13 July, 1914, pursuant to the call of its mayor, an ordinance was introduced and passed by the affirmative vote of all the members of the board present at said meeting. Only one member of the board was absent at said meeting. This ordinance, with the names of the members of the board who voted for its passage, was duly recorded in the minutes of the board, and by its terms authorizes the treasurer of the defendant to issue and sell its negotiable coupon bonds in the aggregate principal amount of $30,000, for the purpose of paying off and discharging the floating indebtedness of the city of Statesville legally incurred for necessary expenses in improving the streets and sidewalks of the city. It is provided in said ordinance that thirty bonds, each for the sum of $1,000, shall be issued and sold by the defendant, and that said bonds shall be dated 1 April, 1914, shall be due on 1 April, 1944, and shall bear interest from date at the rate of five per centum per annum, payable semiannually on the first day of October and of April of each year, at the Hanover National Bank of New York City. It is further provided in said ordinance that said bonds shall be signed by the mayor, and countersigned by the city clerk of the defendant, and that the corporate seal of the defendant shall be affixed to each of said bonds. The form of the said bonds, and of the interest coupons to be attached thereto, is prescribed by the ordinance. It was ordered that the sale of said bonds to Cutter, May and Company, of Chicago, Ill., for the amount of its bid, be and the same was ratified and confirmed, and further that all ordinances or resolutions in conflict with said ordinance be and the same were repealed. This ordinance by its terms became effective from and after its passage, to wit: 13 July, 1914.

Provision is made in the charter of the city of Statesville for both regular and special meetings of its board of aldermen. Section 9 of said charter provides that it shall be the duty of said board of aldermen to meet at such time and place as the board may select, once each month, and to continue in session until all the business of the board shall be disposed of. Section 12 of said charter, with respect to special meetings of the board, is as follows:

"Section 12. Special meetings of the board of aldermen may be held on the call of the mayor, or of a majority of the aldermen, and at every such meeting, when called by the mayor, all the aldermen then in the city shall be notified, and when called by a majority of the aldermen, such as do not join in the call, and the mayor shall be notified."

Section 15 of the charter of the city of Statesville, with respect to the passage by the board of aldermen of an ordinance or resolution, is as follows:

"Section 15. No ordinance or resolution shall be passed upon the date of its introduction except the same be passed by a three-fourths majority of all the aldermen, or unless it be a cause of public emergency. All ordinances except in case of public emergency shall be introduced at a regular meeting, and shall stand for passage at the next regular meeting of the board; Provided, that no ordinance or resolution making a grant of any franchise or special privilege, nor any ordinance amending or extending such grant made prior thereto shall ever be passed on the date of its introduction, and in no event until notice by advertisement in some newspaper published in the city of Statesville for four weeks shall have been given by the beneficiary of said ordinance or by the city to the public, that such ordinance has been introduced and that its passage will be asked for at the next regular meeting of the board. And any such ordinance passed in any other manner than is herein provided shall be null and void."

3. The bonds now in the possession of the plaintiff were signed by L. C. Caldwell, mayor, and countersigned by C. D. Moore, city clerk of the defendant during the year 1914. The corporate seal affixed to each of said bonds is the corporate seal of the defendant, city of Statesville. The bonds are payable to bearer, and are in all respects in the form prescribed by the ordinance passed by the board of aldermen of the defendant, at the meeting of said board held on 13 July, 1914. The coupons attached to said bonds at the time the same came into the possession of the plaintiff, are in all respects in the form prescribed by said ordinance, and are signed by L. C. Caldwell, mayor, and countersigned by C. D. Moore, city clerk. Each of said bonds contains recitals as follows:

"This bond is one of a series of thirty (30) bonds of like date, tenor and amount, aggregating the principal sum of thirty thousand dollars ($30,000) issued for the purpose of providing funds to pay off and discharge the floating indebtedness of said city, legally incurred for the necessary expenses thereof for improving the streets and sidewalks, under authority of the Constitution and laws of North Carolina, and of the charter of said city of Statesville, and pursuant to a resolution of the board of aldermen of said city, duly and regularly adopted on 13 July, A.D. 1914.

And it is hereby certified and recited that all acts, conditions and things required to be done precedent to and in the issuance of these bonds, have been properly done, happened, and have been performed in regular and due form as required by law; that the total indebtedness of the city of Statesville, including this bond, does not exceed the constitutional or statutory limitation; and that due provision has been made

for the levy and collection of a direct annual tax upon all the taxable property within said city, sufficient to pay the interest thereon, and to create a sinking fund for the retirement of the principal hereof at maturity."

4. After the passage of the ordinance authorizing the issuance and sale of bonds in the aggregate amount of $30,000, by the defendant, to wit, on 28 August, 1914, D. M. Ausley, a member of the board of aldermen of the city of Statesville, and chairman of its finance committee, wrote to the Security Bank Note Company of Philadelphia, Pa., enclosing a copy of the bond authorized by said ordinance, and requested said company to print thirty bonds, with interest coupons attached, in accordance with said copy. On 4 September, 1914, the Security Bank Note Company of Philadelphia, forwarded by mail to W. M. Ausley, thirty bonds, with coupons attached, printed in accordance with his request. These bonds, and coupons were printed on green paper. On 9 December, 1914, the defendant issued its voucher for the sum of $144.50, payable to the Security Bank Note Company, of Philadelphia. This voucher was for the payment of the bill of said company for printing said bonds in accordance with the request of D. M. Ausley.

5. On or about 1 October, 1926, the Commercial National Bank of Statesville, N. C., borrowed from the Independence Trust Company of Charlotte, N. C., the sum of $12,500, and as collateral security for its note for that amount, deposited with said Trust Company, fifteen of the green bonds printed by the Security Bank Note Company at the request of D. M. Ausley. At that time these bonds were signed by L. C. Caldwell, mayor, and countersigned by C. D. Moore, city clerk of the defendant. The corporate seal of the defendant was affixed to each of said bonds. Upon the payment of the note, on 27 April, 1927, the bonds were returned by the Independence Trust Company to the Commercial National Bank of Statesville. Thereafter, on 12 September, 1927, these identical bonds were again deposited by the Commercial National Bank of Statesville with the Independence Trust Company, as collateral security for a note of the said bank in the sum of $14,000. Before this note was paid, the Commercial National Bank of Statesville was adjudged insolvent, and a receiver of said bank was appointed to take charge of its affairs. Upon default in the payment of the note for $14,000, the Independence Trust Company, with the approval of the receiver of the Commercial National Bank, sold the bonds to the plaintiff. On or about 10 July, 1929, the plaintiff paid to the Independence Trust Company, for said bonds, the sum of $15,510.42. Out of this sum, the Independence Trust Company paid off the note of the Commercial National Bank, and turned over to its receiver, the balance, to wit:

$1,771.69. At the time the bonds were deposited by the Commercial National Bank of Statesville with the Independence Trust Company of Charlotte, N. C., as collateral security, there were no past due coupons attached to either of said bonds. Neither the Independence Trust Company nor the plaintiff at the time the said bonds came into their possession, respectively, had actual notice of any defect or infirmity in the title of the Commercial National Bank of Statesville, to said bonds.

6. The fifteen bonds purchased by the plaintiff from the Independence Trust Company, aggregating in amount $15,000, each for the sum of $1,000, are dated 1 April, 1914, and will be due on 1 April, 1944. Each of these bonds is payable to bearer, and is in all respects in the form prescribed by the ordinance passed by the board of aldermen of the defendant at its meeting held on 13 July, 1914. Interest coupons attached to said bonds, and due on 1 October, 1927, and on 1 April, 1928, were duly presented by plaintiff for payment, and were paid by the defendant. Interest coupons which thereafter became due prior to the commencement of this action were also duly presented by the plaintiff for payment. Payment of these coupons was refused by the defendant, on the ground that the bonds from which the coupons were detached are not valid, for the reason that said bonds were not executed by defendant, had never been delivered by defendant, and that defendant had not received value for said bonds.

7. After the passage of the ordinance authorizing the issuance and sale of bonds by the defendant in the aggregate principal amount of $30,000, at the meeting of its board of aldermen on 13 July, 1914, Cutter, May and Company of Chicago, Ill., was notified by the attorney of the defendant that the bid of said company for said bonds had been accepted, and the said Cutter, May and Company was requested by said attorney to have the bonds printed and forwarded to the defendant for execution. After considerable correspondence between the attorney of defendant and the said Cutter, May and Company and its attorneys, the bonds printed by said company were sent to defendant, and were thereafter, on or about 1 January, 1915, signed by L. C. Caldwell, mayor, and countersigned by C. D. Moore, city clerk of defendant. The bonds, with the corporate seal of the defendant affixed thereto, were delivered by the defendant to Cutter, May and Company in January and February, 1915. Cutter, May and Company paid to the defendant, upon the delivery of said bonds, the sum of $30,035, the amount of their bid. The bonds delivered by defendant to Cutter, May and Company, with interest coupons attached thereto, are in the identical form prescribed in the ordinance passed at the meeting of the board of aldermen of the defendant, on 13 July, 1914. The validity of these bonds and of the

coupons attached thereto, has been and is now recognized by the defendant. All the coupons attached to said bonds, as they have become due, have been duly paid by the defendant.

Both the bonds in the possession of the plaintiff, numbered 1 to 15, inclusive, and aggregating in amount the sum of $15,000, and the bonds delivered by the defendant to Cutter, May and Company, numbered 1 to 30, inclusive, and aggregating in amount the sum of $30,000, are signed by L. C. Caldwell, mayor, and countersigned by C. D. Moore, city clerk. The corporate seal of the defendant is affixed to each of said bonds. The recitals in said bonds are identical, and are in accordance with the provisions of the ordinance passed by the board of aldermen of the defendant on 13 July, 1914. The bonds differ only in that the bonds in the possession of the plaintiff are printed on green paper, while the bonds delivered to Cutter, May and Company, are printed on yellow paper.

Both L. C. Caldwell, mayor, and C. D. Moore, city clerk of the defendant, during the year 1914, died prior to the commencement of this action. D. M. Ausley, member of the board of aldermen of the defendant, and chairman of its finance committee, during the year 1914, was also during said year cashier of the Commercial National Bank of Statesville. He continued as such cashier until his death in 1928.

The issues submitted to the jury, and answered under the instructions of the court, are as follows:

"1. Did the city of Statesville have authority, in 1914, to issue funding bonds to fund an indebtedness created for street improvement purposes? Answer: Yes.

2. Did the board of aldermen of the city of Statesville, at a meeting duly called and convened on or about 13 July, 1914, and in the exercise of its lawful authority, adopt an ordinance authorizing the execution, issuance and sale of $30,000 funding bonds by said city of Statesville, as alleged in the complaint? Answer: Yes.

3. Were the bonds sued on in this action signed by L. C. Caldwell, mayor, and countersigned by C. D. Moore, city clerk, as alleged in the complaint? Answer: Yes.

4. Do said bonds bear the seal of the city of Statesville, as alleged in the complaint? Answer: Yes.

5. Did the Independence Trust Company acquire said bonds as collateral security and become the holder thereof in due course, as alleged in the complaint? Answer: Yes.

6. Is the plaintiff the owner and holder in due course of said bonds as alleged in the complaint? Answer: Yes.

7. Is the defendant indebted to the plaintiff in the amount of said interest coupons, with interest thereon, from their respective maturities? Answer: Yes."

On the verdict and on the agreement set out in the record, it was ordered, adjudged and decreed:

"1. That the plaintiff have and recover of the defendant on the interest coupons due 1 April, 1929, 1 October, 1929, 1 April, 1930, 1 October, 1930, 1 April, 1931, and 1 October, 1931, respectively, the total principal sum of $2,250, with interest on the principal amount of each set of said interest coupons, to wit: on the principal sum of $375, from the respective maturities thereof, at the rate of six per centum per annum.

2. That the plaintiff is the owner and holder in due course of bonds Nos. 1 to 15, both inclusive, each for $1,000, dated 1 April, 1914, maturing 1 April, 1944, bearing 5 per cent interest from date, payable semiannually on the first days of October and April of each year, evidenced by attached interest coupons, both principal and interest being payable at the Hanover National Bank of New York City, executed in the name and behalf of the city of Statesville, by L. E. Caldwell, mayor, and C. D. Moore, city clerk, and bearing the official seal of the city of Statesville, payable to bearer, each of said fifteen bonds being in the form of bond No. 1, an exact copy of which marked exhibit 'B,' is attached to and by reference made a part of the complaint in this action, the aforesaid fifteen bonds being printed on green paper, and bearing the notation, 'Security Bank Note Company. Phila.'

3. That the plaintiff is the owner and holder in due course of the semiannual interest coupons attached to said fifteen bonds, the same to mature on the first days of April and October of each year hereafter, commencing 1 April, 1932, and ending 1 April, 1944, each semiannual interest coupon attached to each of said fifteen bonds being for the principal sum of $25.

4. That said fifteen bonds, and aforesaid coupons attached thereto, be and are adjudged the absolute, valid and binding obligations of the city of Statesville.

5. That the defendant be and is hereby taxed with the costs of this action."

From the foregoing judgment, defendant appealed to the Supreme Court.

Stewart & Bobbitt and Grier, Grier & Joyner for plaintiff.

Long & Glover, Morehead & Murdock and J. E. Horton for defendant.

CONNOR, J. A municipal bond payable to bearer, and otherwise complying as to form with the provisions of C. S., 2982, is a negotiable instrument, and as such when in the hands of a holder in due course as defined by C. S., 3033, is not subject to defenses which would otherwise ordinarily be available to the municipal corporation by which the bond was issued. The only defense available to the corporation in whose name and in whose behalf the bond was lawfully executed, when the bond is in the hands of a holder in due course, is that the corporation was without power or authority to issue the bond. Thus in *Belo v. Commissioners,* 76 N. C., 489, it is said by *Bynum, J.,* speaking for this Court: "Municipal bonds are negotiable instruments, and the legal rights of the holders of such paper do not so much rest upon abstract principle, though true, as upon a system of practical rules found by experience to be essential to healthy commercial life. For the public protection and the convenience of trade every intendment is made in favor of the validity of negotiable instruments. Where bonds have been issued and sold in the market, and have come into the hands of a bona fide holder before maturity, as a general rule such bonds are prima facie valid, and the onus is upon the party impeaching them to show the contrary. This rule, however, which subsists between individuals, is much modified in respect to corporate bonds. Such bonds can be issued only in pursuance of a special grant of power, and the party claiming the benefit of such bonds must show a power in the corporate body to issue them. But if he is a purchaser for value, without notice and before maturity, he need do no more. If a municipal corporation has the power to issue bonds only on a compliance with conditions precedent, as, for instance, here in pursuance of a popular vote, and the bonds are issued, the presumption is that the conditions have been observed and they are prima facie valid, though the defendant may show the contrary, unless he is estopped by his own acts from doing so."

In the instant case, the city of Statesville had the power and authority to issue the bonds which are now in the hands of the plaintiff. The issuance and sale of the bonds was authorized to pay off and discharge a valid indebtedness of the city, incurred for a necessary expense, to wit: the expense of improving its streets and sidewalks. *Kinston v. Trust Co.,* 169 N. C., 207, 85 S. E., 399. The jury has found under instructions of the court, to which the defendant did not except, that the defendant had the power to issue the bonds, which are now in the possession of the plaintiff. It is not contended by the defendant, on its appeal to this Court, that there was error in the trial in the Superior Court with respect to the instructions applicable to the first issue. In *Commissioners v. Webb,* 148 N. C., 120, 61 S. E., 670, it is said by *Hoke, J.:* "When

the power to incur a debt for a necessary expense exists, there would seem to be no good reason of law to prevent the governing authorities of a town from making provision for the present or ultimate payment of such a debt by issuing bonds for the purpose, if good business prudence and existing conditions are such as to render this course desirable." This principle is approved in *Wolfe v. Mount Airy*, 197 N. C., 450, 149 S. E., 589.

The defense urged by the defendant in the instant case that the bonds now in the possession of the plaintiff, were never delivered and that defendant received no value for the bonds, cannot avail the defendant. The delivery of the bonds by the defendant is conclusively presumed in favor of the plaintiff who purchased them from the Independence Trust Company, before maturity, without notice, and for value. It is expressly provided by statute that where an instrument negotiable in form, and executed by the defendant as maker, is in the hands of a holder in due course, a valid delivery of the instrument by the defendant, so as to make the defendant liable as maker of the instrument to the holder, is conclusively presumed. C. S., 2997. This conclusive presumption is applicable to a holder in due course of the green bonds now in the possession of the plaintiff, as well as to such holder of the yellow, or gold bonds, which were delivered by the defendant to Cutter, May and Company. The defendant has recognized the validity of these latter bonds, by paying the interest coupons attached to the same as they have become due. It would seem that as to these bonds, the defendant is estopped to deny their validity.

The defendant contends, however, that the bonds involved in this action, although in the hands of the plaintiff as a holder in due course, are void, because the ordinance by which the bonds were authorized, and under which they were executed, was passed at a special meeting, and not at a regular meeting of its board of aldermen, as provided in the charter of the city of Statesville. Whether this provision is mandatory, as contended by the defendant, or merely directory, as contended by the plaintiff, this contention cannot be sustained. It is generally held that where a municipal corporation has the power to issue bonds, and it is provided in its charter that such power shall be exercised in accordance with certain statutory provisions, the failure of the governing body of the corporation to act in strict accordance with such provisions will not invalidate the bonds in the hands of a holder in due course, especially where, as in the instant case, the corporation is estopped from attacking the validity of the bonds by its recognition for a long time of their validity. In such case, the principle on which *Blackmore v. Duplin County*, 201 N. C., 243, 159 S. E., 354, was decided is not controlling.

See *Proctor v. Commissioners,* 182 N. C., 56, 108 S. E., 360, where it is said that in that case there had been no sale of the bonds proposed to be issued, and that for this reason the rights of purchasers for value, without notice and before maturity, were not involved. The judgment in the instant case is affirmed. There is

No error.

IN THE MATTER OF S. H. FOWLER, SURVIVING PARTNER OF CAROLINA CREDIT COMPANY.

(Filed 26 October, 1932.)

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

Where under the terms of a written contract the surviving partner agrees to wind up the affairs of the firm for commissions as fixed by the courts not to exceed that allowed by law, the amount of the compensation fixed by the lower court will not be disturbed on appeal when there is nothing on appeal to show that the amount fixed by the judgment was erroneous in law, the burden of showing error being upon the appellant.

CIVIL ACTION, before *Cranmer, J.,* at April Term, 1932, of CRAVEN.

S. H. Fowler and T. G. Hyman were partners, trading under the firm name of Carolina Credit Company. Hyman died testate on 7 February, 1931, and his widow, Mrs. Harriet L. Hyman, qualified as executrix. After the death of Hyman, Fowler, as surviving partner, undertook to wind up the partnership. On 13 February, 1932, Fowler and the executrix of Hyman entered into a written agreement to the effect that upon payment and delivery to the respective parties of all goods and property allotted to him "each of said parties shall release and discharge the other from liability on account of said partnership, saving and excepting the amount of commissions to be allowed by the court to said Fowler for his services as surviving partner in settling said partnership estate, and as to such commissions it is agreed that whereas, said Fowler claims and has retained out of the assets of said partnership estate the sum of $2,400 for commissions, and said executrix contends that said Fowler is not entitled to so much. It is agreed that said Fowler for his services in settling said partnership estate shall receive such commissions as may be allowed by the court, not to exceed the amount prescribed by law," etc. The clerk of the Superior Court found the facts substantially as above stated, and also found the amount of receipts and disbursements for various purposes, and allowed Fowler the sum of $1,327.78 as commissions.

Mrs. Hyman filed exceptions to the findings of the clerk and appealed to the judge of the Superior Court. The pertinent part of the judgment is as follows: "It is now considered by the court and ordered and adjudged that said exceptions be and the same hereby are sustained except as herein provided; that said S. H. Fowler, surviving partner, for his services in settling said partnership estate, shall receive, and hereby he is allowed the sum of $223.91 as commissions, to be paid out of the share of the deceased partner," etc.

From the foregoing judgment Fowler appealed.

D. L. Ward, Jr., for Fowler.

R. A. Nunn for executrix.

PER CURIAM. It was expressly agreed between the parties that the commissions to be allowed Fowler, the surviving partner, for services should be determined by the court, it being stated in the contract that Fowler "shall receive such commissions as may be allowed by the court, not to exceed the amount prescribed by law." Upon appeal from the clerk the trial judge allowed the commissions specified in the judgment. No evidence is contained in the record, and there are no findings of fact made by the trial judge. Hence, there is nothing to indicate that the judgment was based upon a false or erroneous theory of law. The burden is upon the appellant to show error.

Affirmed.

DUNCAN TILLEY AND WIFE, ALIS TILLEY, v. C. L. LINDSEY, C. A. POPE, AND VICTOR V. YOUNG, TRUSTEE.

(Filed 26 October, 1932.)

Judgments L b—Consent Judgment in this case held to bar subsequent suit to restrain collection of note.

A consent judgment stipulating that the plaintiff recover of the defendant the amount of the note secured by a mortgage and that foreclosure on the mortgage should be delayed for six months upon payment by the defendant of a certain sum per month will operate as a bar to a later action by the defendant to restrain the plaintiff from collecting on the note until it had been listed as personal property and the taxes paid thereon.

APPEAL by plaintiffs from *Barnhill, J.*, at Chambers, 17 May, 1932. From DURHAM. Affirmed.

R. O. Everett for plaintiff.
Brawley & Gantt for defendants.

PER CURIAM. This action was instituted by plaintiffs against defendants on 21 May, 1932. The complaint contained certain allegations and the prayer of plaintiff is as follows: "(1) That they have judgment against the defendants, jointly and severally, in the sum of $2,000. (2) That C. L. Lindsey and his agent, C. A. Pope, be restrained from selling plaintiffs' property, or interfering with it. (3) That C. L. Lindsey be required to list the note and pay taxes and the penalties thereon as required by law before he be allowed to proceed to collect the note."

The defendant, C. A. Pope, set up the defense that the note made to him by plaintiffs on 21 February, 1930, for borrowed money, in the sum of $1,650, bearing 6 per cent interest due in twelve months, secured by deed in trust to Victor V. Young, trustee, securing same on certain real estate in the city of Durham, N. C., was sold some weeks later to the defendant C. L. Lindsey. The defendant Lindsey denied the material allegations of the complaint, set up the defense that for many years he and his family have been residents of Washington, D. C., and "lists and pays his personal property tax in the city of Washington, D. C." The defendant Lindsey further pleaded *res judicata;* a judgment signed by consent in an action of plaintiffs against defendants (except Pope) on 28 September, 1931. The material part is as follows: "That the defendant, C. L. Lindsey, shall have and recover of the plaintiffs, Duncan Tilley and wife, Alis Tilley, the sum of $1,650 and interest thereon from 21 February, 1929 (this is evidently an error, as the note bears date of 21 February, 1930), until paid, which said indebtedness is represented by a note and deed of trust referred to in the pleadings; that the foreclosure shall be delayed for a period of six months, or until 25 March, 1932, provided and upon the condition that the plaintiffs pay to the defendant, C. L. Lindsey, $25.00 on the 25th day of October, 1931, and on the 25th day of each month for a period of six months, and upon failure to pay said sum of $25.00 each month for the period of six months, the trustee, Victor V. Young, is authorized and instructed to advertise and sell, according to the terms of the deed of trust, the property mentioned and described in the deed of trust and the pleadings."

The defendant further sets up the defense that "This defendant admits that the plaintiff began to pay this defendant the $25.00 per month as stipulated in said judgment, and that the first installment of $25.00 was paid 21 October, 1931, and, the second installment of $25.00 was paid 1 December, 1931, and the third installment which was due 25

December, 1931, was paid in three installments during the latter part of January, 1932, making the total amount paid of $75.00. . . . That the plaintiffs defaulted in the payment which was due on 25 October, 1931; that same was not paid until 31 October, 1931, and neither of the other payments were made as provided in said judgment and that the plaintiffs were in default according to the terms of said judgment on or after 25 October, 1931, and this defendant would have had the right to have had said mortgage foreclosed under the terms of said judgment any time after 25 October, 1931, but did not do so in order to give the plaintiffs an opportunity to sell said property and pay off said loan, or make other arrangements to take up same, and the foreclosure under said deed of trust was delayed until it was demonstrated that the plaintiffs were collecting the rents from said property and using it for other purposes, and would be unable to sell said property for a sum sufficient to pay off said loan, and it was then that this defendant called upon Victor V. Young, trustee, to advertise said property for sale. . . . And that the property described in the petition was sold on 16 April, 1932, after due advertisement and this defendant bid same in for $1,750 in order to protect his interest."

The plaintiff contends the property was worth $2,500. The defendant Lindsey, in his answer, says further: "That this defendant did not then and does not now want said real estate, and the only reason he purchased said property was to protect said loan and is now willing to cancel said judgment and deed of trust, or to have said property deeded to any one designated by plaintiff upon the payment of the indebtedness due this defendant, and the costs in said two actions incurred, and the foreclosure expenses."

The plaintiff denied that Lindsey was a resident of Washington, D. C. The court below rendered the following judgment: "That the sale made by the defendant, Victor V. Young, trustee, on 16 April, 1932, was reported as provided by law and no upset bid was placed thereon within ten days permitted by law. The court being of the opinion that the matters and things in controversy in this action with respect to the $1,650 note is *res judicata*, and without passing on the controverted question whether the defendant, C. L. Lindsey, is a resident of the State of North Carolina, or the District of Columbia, or whether said note has been listed for taxation. The court is further of the opinion that the foreclosure of a deed of trust by the trustee named therein is neither an action at law nor a suit in equity. . . . It is therefore, considered, ordered and decreed by the court that the temporary restraining order heretofore issued be and the same is hereby dissolved."

The plaintiff excepted and assigned error to the above judgment as signed and appealed to the Supreme Court. The exception and assignments of error cannot be sustained. On all the evidence we think the plea of *res judicata* must be sustained. The case of *Wooten v. Bell*, 196 N. C., 654, and cases therein cited in regard to payment of tax, no recovery allowed on note until tax and penalty is paid (N. C. Code, 1931 (Michie), sec. 7971, subsec. 47), is not germane, although the question of residence may be a question of fact; but we think this matter was also *res judicata*. The judgment of the court below is

Affirmed.

JOSEPH SAMPSON, ADMINISTRATOR OF THE ESTATE OF CAIN B. THOMPSON, DECEASED, v. JACKSON BROTHERS COMPANY, INCORPORATED, AND WILLIAM S. GORDY, JR.; W. N. JACKSON, AND L. R. VARSER, RECEIVERS FOR JACKSON BROTHERS COMPANY, INCORPORATED.

(Filed 26 October, 1932.)

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

On 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. Master and Servant E a: E b—Under C. S., 3467, contributory negligence does not bar recovery and the act applies to logging roads.

The provisions of C. S., 3467, that in personal injury cases against a railroad company contributory negligence of plaintiff will not bar recovery but merely minimize the damages, and the provisions of C. S., 3465, abrogating the fellow-servant rule and imposing liability for injuries caused by defective appliances are applicable to tram or logging roads under the provisions of C. S., 3470.

3. Master and Servant E b—Evidence held insufficient to be submitted to jury in action against logging road for wrongful death.

Where the evidence in an action against a logging road is to the effect that the plaintiff's intestate was killed in the course of his employment by being struck by the defendant's train in the day-time at a place where the track was straight and unobstructed for several hundred yards, that the noise made by the moving train and signals given by it of its approach could have been heard for a considerable distance and that the defendant was apparently in possession of his faculties, and there is no evidence that he was in a helpless condition upon the tracks: *Held*, the evidence is insufficient to be submitted to the jury on the issue of defendant's negligence, and the fact that the defendant failed to have a watchman or lookout upon the back of the train does not alter this result.

4. Pleadings G a—Allegations must be supported by evidence in order to avail the pleader.

The allegations of the complaint must be supported by sufficient evidence introduced at the trial in order to avail the pleader.

5. Master and Servant E b—Where person is not helpless on track and is not oblivious to danger doctrine of last clear chance does not apply.

Where there is no evidence that the plaintiff was on the defendant's track in a helpless condition or that he was oblivious of the danger of the defendant's approaching train, or that the defendant was guilty of negligence occurring after the plaintiff's contributory negligence, the doctrine of last clear chance does not apply.

6. Trial D a—Evidence raising mere surmise, guess, conjecture or speculation is insufficient to be submitted to the jury.

The verdict of the jury must rest upon facts proven and not on mere surmise, conjecture, guess or speculation.

APPEAL by plaintiff from *Barnhill, J.*, at June Term, 1932, of ROBESON. Affirmed.

This is an action for actionable negligence brought by plaintiff, administrator of Cain B. Thompson, deceased, against defendant, alleging damage.

The plaintiff, as administrator, instituted this suit against the Jackson Brothers Company, Incorporated, to recover damages for the wrongful death of the plaintiff's intestate, which occurred on 10 July, 1930, while the plaintiff's intestate, Cain B. Thompson, was in the employ, and working for the defendant, Jackson Brothers Company, Incorporated, upon one of its railroad tracks in Brunswick County, North Carolina. Thereafter, the above named receivers were duly made parties defendant in the action.

The plaintiff alleges, in part: That Jackson Brothers Company, Incorporated, were the owners and operators of a large lumber manufacturing plant in Brunswick County, North Carolina, and in connection therewith, were the owners and operators, as aforesaid, of many miles of railroad and logging road, over and upon which they operated locomotives, propelled by steam, to use for the purpose of conveying logs and freight from one point to another, in and through the counties of Brunswick and Columbus, North Carolina. That on 10 July, 1930, the said Cain B. Thompson, deceased, as an employee of the defendant, Jackson Brothers Company, Incorporated, under the directions of the said defendant, was assigned to work on one of the defendant's railroad tracks in Brunswick County, and among other things, was assigned to do repair work upon the track, in the nature of fastening down to the

cross-ties, the tee irons upon said railroad, and to tighten and adjust properly, the taps, or nuts upon said tee iron, and to clean down the said right of way of the defendant, and to keep extinguished any fires that might originate on or near said railroad track, or right of way, and to perform other duties in the way of repairing and general upkeep of said railroad. That on 10 July, 1930, and while the said Cain B. Thompson, deceased, was performing his said duties, as aforesaid, under the instructions and directions of the foreman, the said Cain B. Thompson, deceased, went upon the railroad tracks of the defendant, and while performing his duties, as aforesaid, and while down upon said track, in an apparent helpless condition, the defendant, Jackson Brothers Company, Incorporated, through its agents, servants and employees, boss and foreman, caused to be operated upon its said railroad track, at the point where Cain B. Thompson was assigned to perform his duties, a long line of railroad, or logging cars, and caused the said cars to be backed along the defendant's railroad track, without having, or placing upon the front car, a person, or persons, to warn the plaintiff's intestate of the approach of said car, or cars, or without sounding some whistle, or horn, or bell, or giving some signal for the purpose of warning the said Cain B. Thompson, deceased, of the approach of said cars, or train, and thus negligently, carelessly, unlawfully, and wantonly caused said cars, or car, to be backed over and upon the said Cain B. Thompson, deceased, lacerating, wounding and mangling his body so severely until the said Cain B. Thompson died in a few minutes thereafter, as a result of said injuries, all of which was done while the said Cain B. Thompson was down upon said track, performing his duties, or in a helpless condition upon said track. The plaintiff set forth many acts of negligence founded on the above allegations, and prayed judgment in the sum of $3,000.

The defendants denied the material allegations of the complaint and alleged that it used due care and the plaintiff's intestate was guilty of contributory negligence.

The evidence on the part of plaintiff was to the effect that the view of defendant's logging road in both directions for a considerable distance was unobstructed and the road was level at the place where plaintiff's intestate was killed—straight in both directions two or three hundred yards from the way the train was coming and some four or five hundred yards the other way. Plaintiff's intestate was killed in the day, about 12:30 o'clock just after the dinner hour.

Luther Hunt, brother-in-law of the deceased, a witness for the plaintiff, testified, in part: "I gave Cain (plaintiff's intestate) and Bonnie Sampson a water bucket, crowbar, hammer and track wrench and sent

them off to watch for fire up and down behind trains and to keep track in repair, instructing them if track happened to spread to spike up the track where it would spread, to bring it back to proper gauge, and if the joints got loose, to tighten them. . . . There was blood on the cross-ties on the outside of the rail, on the right-hand side. . . . At the point where the blood was on the cross-ties there was stringers under the cross-ties, putting the T-irons twelve or eighteen inches above the ground. (Cross-examination.) I heard *the whistle several times* as the logging train came down from the woods just before the four signals were given, the usual signals to warn employees and those that were out there on or near the tracks that the logging train was approaching. I don't remember whether it blew when close up or not. *I heard it coming two or three miles down the road.* I was pretty near against where the wreck was, about a quarter of a mile. I couldn't see the train or hear it coming all the way. *The deceased was familiar with the tram-road,* for the space of time he had been there, about a week and a half, and was out there for the purpose of keeping the tracks clear."

Bonnie Sampson, a witness for plaintiff, also a brother-in-law of deceased, testified, in part: "I was about five or six hundred yards, something like that, away when the deceased was run over. . . . I did not see the train when it ran over deceased, I saw it as it was going over him. It was coming toward me, reached deceased first. I saw deceased under the train; one of the wheels was on him; train was going backward with fifteen or sixteen empty cars. Deceased was on the outer edge of the track, *the same track deceased and I were working on,* one of the cars had passed over him when I got to him. . . . Deceased and I carried wrenches and buckets all along and deceased *had a wrench and bucket and he was walking up and down the track and he was in a normal condition;* I saw deceased about three-fourths of an hour before he was hurt. We had just got through with dinner and I left deceased standing there on the track when I went off for water. *When I next saw him he had already been struck* and was trying to get away from the right-hand side of the cars; I don't know how he got there. . . . *I did not see deceased before train ran over him. I heard the train blow all along,* signals warning people the train was coming into the woods after timber, and irrespective of the whistle the roar of the train could be heard a good ways off, two or three miles. . . . In returning to the track after getting the water I approached on the same side where deceased was killed, but didn't see him until the train was running over him. If deceased had been standing up I could have seen him."

The defendant introduced no evidence. The judgment of the court below was as follows: "This cause coming on to be heard and being heard before his Honor, M. V. Barnhill, judge presiding, and a jury, at the June Term, 1932, of the Superior Court of Robeson County, and the defendant's counsel having in apt time made motion for judgment as of nonsuit at the close of the plaintiff's evidence and after plaintiff had rested its case, and the court being of the opinion that plaintiff, upon the evidence offered to the court and the jury, was not entitled to recover on the issues raised by the complaint: It is therefore, on motion of Johnson & Floyd, attorneys for the defendants, considered, adjudged and decreed that said action be and the same is hereby dismissed as of nonsuit."

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

W. S. Britt and Dye & Clark for plaintiff.
Johnson & Floyd for defendants.

CLARKSON, J. The defendant introduced no evidence, and at the close of plaintiff's evidence made motion as in case of nonsuit, C. S., 567. The court below sustained the motion, and in this we see no error.

It is the 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 on the part of plaintiff was to the effect that defendant operated a logging road.

C. S., 3467, provides that contributory negligence is no bar but mitigates damage, and under C. S., 3470, this section is applicable to logging and tram roads. *Stewart v. Lumber Co.*, 193 N. C., 138; *Hawkins v. Lumber Co.*, 198 N. C., 475. C. S., 3465, is to the effect that railroads are held liable where the injuries are sustained through negligence of fellow-servants or defective appliances. The track for a considerable distance, several hundred yards, was straight and level in both directions from where the plaintiff's intestate was killed. The evidence was to the effect that it was the plaintiff's intestate's duty, and he was given the implements and instructed "to watch for fire up and down behind trains and to keep track in repair." Plaintiff contends that the death of his intestate, in the exercise of due care, could have been avoided by the

defendant, had it stationed upon the front car of its backing train a person, or persons, to give the proper warning and signal of the approach of said long line of cars then being backed over the defendant's track.

But the evidence on the part of the plaintiff's witness is to the effect "*I did not see deceased before the train ran over him.* I heard the train blow all along, signals warning people the train was coming into the woods after timber, and irrespective of the whistle the roar of the train could be heard a good ways off, two or three miles."

Plaintiff also contends that in the day-time a logging train in the woods, when backing must have a person, or persons, stationed upon the front car backing to give warning to employees working or walking on the track. That in *Sawyer v. R. R.*, 145 N. C., at p. 27, the following principle is laid down: "And it is well established that the employees of a railroad company engaged in operating the trains are required to keep a careful and continuous outlook along the track, and the company is responsible for injuries resulting as a proximate consequence of their negligence in the performance of this duty," citing authorities. In the present case, the evidence as to warning was not only the blowing and signal warnings and irrespective of the whistle "the roar of the train could be heard a good ways off . . . two or three miles."

We can find in the record no evidence to sustain plaintiff's allegations that plaintiff's intestate was "down upon said track performing his duties or in a helpless condition upon said track." Nor was there any evidence that plaintiff's intestate was so absorbed and engaged in his work that he was "oblivious to his surroundings." The evidence does not support the allegations in plaintiff's complaint. There must be proof to sustain the allegations.

The humanitarian principle is set forth in *Jenkins v. R. R.*, 196 N. C., at p. 469, as follows: "If the jury found from the evidence that deceased by his own negligence contributed to the injuries which resulted in his death, then there was evidence from which the jury could have further found that notwithstanding such contributory negligence, the proximate cause of such injuries was the failure of defendants to exercise due care, after deceased could have been discovered, sitting on the end of the cross-tie, in an apparently helpless condition, to stop the train and thus avoid the injuries to deceased. The principle upon which the doctrine of the 'last clear chance' is found, is recognized and enforced in this jurisdiction, as just and necessary for the protection of human life. *Redmon v. R. R.*, 195 N. C., 764." *Davis v. R. R.*, 187 N. C., 147; *Buckner v. R. R.*, 194 N. C., 104; *Caudle v. R. R.*, 202 N. C., 404.

The *Jenkins case, supra,* is not applicable to the facts in the present case, nor is *Sawyer v. R. R., supra,* cited by plaintiff. In the *Sawyer case,* the evidence was to the effect: "The train, with the skidder on the front car, was at this time being backed down the track toward plaintiff at the rate of about two miles an hour, and could have been stopped within a distance of fifteen feet; that as plaintiff and Billie Boyd were so moving down the track to take protection in the skidder, they were struck by a bolt of lightning, Boyd being instantly killed and plaintiff knocked down and rendered unconscious, remaining so until he was run over by the train. The place where the plaintiff fell and remained upon the track was seventy-five yards ahead of the moving train, on a straight track and in view of the hands and employees on the train, if any had been looking." The Court said at pp. 29-30: "A negligent act of plaintiff does not become contributory unless the proximate cause of the injury; and, although the plaintiff, in going on the track, may have been negligent, when he was struck down and rendered unconscious by a bolt of lightning his conduct as to what transpired after that time was no longer a factor in the occurrence, and, as all the negligence imputed to defendant on the first issue arose after plaintiff was down and helpless, the responsibility of defendant attached because it negligently failed to avail itself of the last clear chance to avoid the injury; so its negligence became the sole proximate cause of the injury; and the act of plaintiff in going on the track, even though negligent in the first instance, became only the remote and not the proximate or concurrent cause. This responsibility of a defendant by reason of a negligent failure to avail itself of the last clear chance to avoid an injury is sometimes submitted to a jury under a separate issue; and, while it is sometimes desirable, it is not always necessary so as to prevent it, and the trial judge, in his discretion, as he did in this instance, may submit the proposition and have same determined by his charge on the issue as to contributory negligence." *Lassiter v. R. R.,* 133 N. C., 244, cited by plaintiff and *Inge v. R. R.,* 192 N. C., 522, are distinguishable from the case at bar.

The matter is fully discussed by *Clark, C. J.,* in *Moore v. R. R.,* 185 N. C., 189, at p. 190, we find: "In *Lassiter v. R. R.,* 133 N. C., 244; *Smith v. R. R.,* 132 N. C., 819, and *Peoples v. R. R.,* 137 N. C., 96, the distinction is clearly recognized between the presumption which arises when a person in the apparent possession of all his faculties is seen walking on the track and the duty owed to one of the railroad employees who is absorbed and engrossed in his work. In the *Lassiter case, supra,* the conductor of a freight train had his back to an approaching shifting engine, and while engaged in giving orders to his men on his own train, stepped in front of the box cars attached to the shifting engine and was

run over and killed. The Court held that it should have been left to the jury on the issue of the last clear chance, as defendant was negligent in having no watchman to notify the engineer of the shifting engine, for it is the duty of the defendant company to keep a lookout. On page 249 of that case, it is said in words very applicable to this case: 'The intestate was at a disadvantage, was not upon equal opportunity with the defendant to avoid the injury, for his manner and conduct showed that he was oblivious to his surroundings and was engrossed in the management of his train and his crew, . . . his action showed that he did not hear the bell ringing, . . . the condition of the intestate was as helpless as if he had been asleep or drunk on the track, and the defendant owed him at least as high a duty as if he had been asleep or drunk.'"

A verdict or finding must rest upon facts proven, not on surmise, conjecture, guess or speculation. We do not think the evidence sufficient to be submitted to a jury, and the humanitarian doctrine of the last clear chance is not applicable in this case. The judgment of the court below is

Affirmed.

STATE OF NORTH CAROLINA ON THE RELATION OF B. L. PHIPPS, GUARDIAN OF FLORENCE BAGWELL AND LEROY BAGWELL, AND FLORENCE BAGWELL AND LEROY BAGWELL, v. ROYAL INDEMNITY COMPANY.

(Filed 2 November, 1932.)

1. Clerks of Court B a: Guardian and Ward H a—Payment of ward's funds to assistant clerk appointed guardian is not payment into court.

Where the funds of minors are paid into the hands of the assistant clerk of the Superior Court as their guardian, the assistant clerk having been regularly appointed guardian by the clerk and having given bond executed by a surety company: *Held*, the funds were not paid into court, but to the assistant clerk as guardian, and the guardianship bond is liable for misapplication of the funds by the guardian, and the surety on the guardianship bond may not successfully contend that the clerk's bond was liable therefor, N. C. Code, 934(a), the commingling of the guardianship funds by the assistant clerk with deposits made by him in his official capacity, and his failure to prove payment into court, tending to establish a breach of his trust as guardian.

2. Guardian and Ward H a—Guardianship bond covered all funds paid to guardian for which ward or third person had rightful claim.

Where a guardianship bond for two wards is executed with a surety company, and the surety company claims that the bond as originally executed contained the name of one ward only and that the name of the other was later inserted, and in an action on the bond to recover the amount due both wards the surety tenders evidence to this effect which

is excluded: *Held*, the exclusion of such evidence does not constitute prejudicial error since the bond would be liable for the whole sum paid to the guardian under the provisions of the bond obligating the parties to the faithful performance of the guardianship and to account for the funds to the ward "or such other persons as shall be lawfully empowered to receive the same."

3. Appeal and Error J c—Relevancy of excluded testimony must be made to appear on appeal.

Where the relevancy of proposed testimony excluded upon the trial is not made to appear on appeal an exception to its exclusion will not be sustained.

4. Same—Exceptions to admission of testimony in this case are not sustained.

In an action against the surety on a guardianship bond executed by an assistant clerk who had been appointed guardian by the clerk: *Held*, exception to testimony by the clerk that he knew the amount due the wards will not be sustained on appeal when the clerk has identified a record in his office showing the amount the guardian had received and the amounts lawfully paid out by the guardian are not in dispute.

5. Trial F b—Issues tendered by defendant held not relevant to inquiry and refusal to submit them was not error.

Where the ward's funds have been paid into the hands of an assistant clerk as guardian under appointment by the clerk, and the guardianship bond has been duly executed with a surety company, in an action against the surety company for breach of the bond: *Held*, the liability of the clerk's bond is not relevant, and issues tendered relating to such liability and to whether any of the funds had inured to the benefit of the clerk's office, and whether the funds had been commingled with official deposits by the assistant clerk are properly refused.

APPEAL by defendant from *Small, J.*, at February Term, 1932, of NEW HANOVER. No error.

This is an action on a guardian's bond. It is alleged that on 18 January, 1928, M. J. Shuffler was appointed guardian of Florence Bagwell and LeRoy F. Bagwell, minors, and that on the same day he executed his bond as guardian with the defendant as his surety thereon. He immediately entered upon the discharge of his duties. On 6 August, 1929, the administrator of Oscar LeRoy Bagwell, father of the minors, paid to M. J. Shuffler, for their benefit, the sum of $1,386.56. LeRoy F. Bagwell reached the age of 21 on 6 September, 1929, and thereafter demanded of the guardian the amount due him. He and his wife received $50 from the guardian; Florence Bagwell has received nothing. She, also, is now of age. It is admitted that demand was made upon the defendant for payment and that payment was refused.

The plaintiffs allege that Shuffler made default as guardian and appropriated to his own use the funds of his wards and that the defendant

is liable on the default. Shuffler was removed from the position of guardian at the November Term, 1930, of the Superior Court. Thereafter, on 11 December, 1930, B. L. Phipps was appointed and qualified as guardian of Florence Bagwell. Summons in this action was issued 18 December, 1930. In their complaint the plaintiffs demand judgment for $1,346.56 with interest from 6 August, 1929, and costs.

In its further answer the defendant alleges that it signed the bond for Shuffler as guardian of LeRoy F. Bagwell only and not as guardian of Florence Bagwell; that Shuffler who had been out of the jurisdiction of the court had returned to Wilmington and should be made a party to the action, and that this action be consolidated with another brought by the plaintiffs against the clerk of the Superior Court.

At the trial the following verdict was returned:

In what amount, if any, is the defendant indebted to the plaintiff? Answer: $1,386.56, with interest from 6 August, 1929, less $50 paid 21 October, 1929, and less $13 paid for premium 18 January, 1928, less $13 paid for premium 18 January, 1929, and less $13 paid for premium 18 January, 1930.

Judgment for plaintiffs; appeal by defendant.

Woodus Kellum and Burney & McClelland for plaintiffs.
J. C. Wright for defendant.

ADAMS, J. Perhaps because it raises the dominant question the appellant first interposes its exception to the following instruction: "If you believe all the evidence, both the record and oral testimony, and you find the facts to be true as testified to, and as the evidence indicates, and, as I say, find the facts to be true by the greater weight of the evidence, it would be your duty to answer the issue $1,386.56, with interest from 6 August, 1929, less $50 paid on 21 October, 1929, and less $13 premium due on the bond on 18 January, 1928, and $13 due the defendant for premium on 18 January, 1929, and $13 admitted to be due the defendant on 18 January, 1930. To repeat, gentlemen of the jury: If you believe all the testimony by the greater weight and find the facts to be as testified to by the greater weight of the evidence, it will be your duty to answer the issue $1,386.56, with interest from 6 August, 1929, less $50 paid by Shuffler 1 October, 1929, I am including the $10 the wife got, and less the $13 due defendant for premium 18 January, 1929, and the $13 due the defendant, 18 January, 1930."

This exception seems to rest upon the theory that the funds in controversy were paid into court and that the clerk of the Superior Court is liable on his bond for their nonproduction. Accordingly the defendant

offered in evidence an itemized statement of account kept by M. J. Shuffler, assistant clerk, with the Peoples Savings Bank and Trust Company showing a deposit of $1,386.56, the sum claimed to have been received for the benefit of the minors, and various disbursements to other parties. We are referred to the Code of 1931, sec. 934(a), authorizing the appointment of assistant clerks and providing that the several clerks shall be held responsible for the acts of their assistants; also to the doctrine that clerks may be chargeable in certain instances with funds held in a dual capacity. *Presson v. Boone,* 108 N. C., 79.

The error in the defendant's position is the assumption that the funds in question were paid into court, into the office of the clerk. For the reason that they had not been paid into court and were deemed to be in the hands of the guardian this Court held on the former appeal that the clerk was not a necessary party to the action. *Phipps v. Indemnity Co.,* 201 N. C., 561. On this point the decision is conclusive. It appears, furthermore, that pursuant to an order of Judge Devin—an exception to which is without merit—the administrator of Oscar LeRoy Bagwell paid the money of the wards, not into the clerk's office, but to Shuffler as their guardian. Indeed, Shuffler testified that he had received the funds in his capacity as guardian and had disbursed only $63 for the benefit of the wards. The fact that he mingled this trust fund with other funds which he deposited in the bank as assistant clerk, instead of proving payment into court, tends to establish a breach of trust. *Duffie v. Williams,* 148 N. C., 530; *Dunn v. Dunn,* 137 N. C., 533. We see no error in the instruction.

The second assignment is an exception to the court's exclusion of testimony by H. W. Wells that the guardian's bond as at first prepared did not contain the name of Florence Bagwell and that her name was subsequently inserted. Shuffler testified that the name was written in the bond by the authority of Wells, who as the defendant's agent had executed the bond in its behalf. It is alleged in the complaint that the administrator paid the funds to Shuffler as guardian of both minors and in the pleadings we find no denial of this allegation. This was on 6 August, 1929, and on 18 January, 1930, the defendant accepted payment of the last premium. By the terms of the bond the guardian and the surety were obligated in the sum of $2,600 to the faithful execution of the guardianship; to secure and improve the wards' estate; and to account to the wards "or to such other persons as shall be lawfully empowered or authorized to receive the same and the profits arising therefrom." If it be granted that the name of Florence Bagwell was not in the bond as originally drafted and that LeRoy F. Bagwell is entitled to only one-half the funds, this fact by the express provisions of the bond would

not exempt the guardian from the legal necessity of accounting for the remainder. So in no view of the case was the exclusion of the evidence prejudicial to the defendant.

The defendant offered to prove by cross-examination that the clerk had in his possession or had seen a holograph will of O. L. Bagwell. The witness testified that it had never been recorded as a will but was found in a record of accounts. The relevancy of the proposed testimony does not appear and the exception to its rejection is overruled.

An exception was taken to the admission of the clerk's testimony that he knew the amount due the wards, that is, the amount received by the guardian less two small payments. As to these items there seems to have been no substantial controversy. The witness identified a record in his office showing that the guardian had received $1,386.56 and then testified that LeRoy F. Bagwell had received fifty dollars and his wife ten. The guardian admitted these items and there was no proof to the contrary. We perceive no satisfactory reason for excluding the testimony of either of these witnesses. We must therefore overrule the fifth and sixth assignments of error, including also exceptions to the admission of evidence which do not call for special comment.

The defendant by issues tendered sought to inquire whether the guardian had deposited the wards' funds in his name as assistant clerk, whether any of the funds had been taken from the bank for the benefit of the clerk's office, and whether the clerk was interested in this case. These matters were irrelevant. The single issue submitted to the jury was sufficient in form and substance to present all phases of the controversy between the parties. *Bank v. Bank*, 197 N. C., 526, 532.

None of the exceptions set out in the appellant's brief affords sufficient cause for disturbing the judgment.

No error.

N. D. BITTING v. THADDEUS GOSS AND WACHOVIA BANK AND TRUST COMPANY, GUARDIAN.

(Filed 2 November, 1932.)

Infants B a—Infant is liable for medical services rendered in emergency to save his life.

Where an infant, living with his father, is seriously injured in an automobile accident, and is rushed to a hospital and a doctor therein renders professional services in the emergency to preserve his life, and thereafter both the infant, through his next friend, and the father recover damages against the driver of the automobile, the father's damages in-

cluding hospital and medical expenses incurred as a result of the injuries to the infant, and both judgments have been paid and satisfied: *Held*, although the father would be liable to the physician for such emergency services, the infant is also liable, and the physician may recover the reasonable worth of the services in an action against the infant and his guardian, and judgment directing the guardian to pay therefor out of the proceeds of the judgment recovered in the infant's behalf will be affirmed on appeal.

APPEAL by defendants from *Devin, J.*, at May Term, 1932, of WAKE. Affirmed.

This action was originally brought by plaintiff, a physician, against the defendants, before Wiley G. Barnes, judge of the city court of Raleigh, to recover a medical bill of $178.12, for services rendered defendant Thaddeus Goss, an infant. On appeal to the Superior Court the matter was heard upon an agreed statement of facts as follows:

"The plaintiff is a natural person residing in Durham County, North Carolina, and is licensed to practice medicine in North Carolina. The defendant, Thaddeus Goss, is a minor residing with and generally supported by his father, T. R. Goss, and now resides in Harnett County, North Carolina, but at the times hereinafter mentioned resided in Wake County. The defendant, the Wachovia Bank and Trust Company, is a corporation organized and existing under and by virtue of the laws of the State of North Carolina, having a place of business in Wake County. On or about 16 March, 1927, Thaddeus Goss was struck by an automobile owned by Warren R. Williams and seriously injured, suffering a broken leg and other injuries. He was taken to Watts Hospital in the city of Durham and there treated by the plaintiff, N. D. Bitting, who rendered to Thaddeus Goss certain medical and surgical services over a long period of time. The said services were of the fair and reasonable value of $178.12. T. R. Goss, the father of the defendant, Thaddeus Goss, frequently came to the said hospital during the period when the services were rendered and made no objection to the services being made. There was no express contract made between the plaintiff and any one else as to who would pay the value of the said services and the same has not been paid. The plaintiff has demanded payment for said services from T. R. Goss, but no part of the said reasonable value of the services has been paid, and the said T. R. Goss has at all times and still refuses to pay the same or any part thereof.

The defendant, Thaddeus Goss, suing by T. R. Goss, as next friend, sued Warren R. Williams in the Superior Court of Wake County and received a judgment against him in the sum of $3,000 for damage for the said injuries, which judgment has been paid in full.

The defendant, the Wachovia Bank and Trust Company, was appointed guardian for the defendant, Thaddeus Goss, after the recovery and payment of the said judgment and after the said services were rendered. The proceeds of the judgment, after deducting the attorney's fees were paid over to the defendant, the Wachovia Bank and Trust Company, as guardian for the defendant, Thaddeus Goss, and out of the said proceeds the defendant, the Wachovia Bank and Trust Company, now has in its hands a sum sufficient to pay the reasonable value of the services rendered by the plaintiff to the defendant, Thaddeus Goss.

T. R. Goss, the father of Thaddeus Goss, recovered a judgment in the sum of $900 in the Superior Court of Wake County against Warren R. Williams. In his complaint in the said action T. R. Goss alleged as his cause of action the expense, including hospital and medical expenses, incurred and the loss of the services of Thaddeus Goss resulting from the said injuries to Thaddeus Goss. The said judgment has been paid in full.

The plaintiff has demanded payment of the reasonable value of his services from the defendant, the Wachovia Bank and Trust Company, out of the proceeds now in its hand as guardian for Thaddeus Goss, and the same demand has been refused.

We agree that the foregoing statement is a correct statement of the facts in the above entitled action."

The court below rendered the following judgment: "This cause coming on to be heard before his Honor, W. A. Devin, judge of the Superior Court presiding over the courts of the Seventh District, at the first May Term, 1932, and the court finding that the facts are such as set forth in the agreed statement of facts between the parties herein, and it appearing to the court that the plaintiff is entitled to the relief prayed for, it is, therefore, upon motion of Messrs. Smith & Joyner, attorneys for the plaintiff, considered, ordered and adjudged that the plaintiff have and recover of the defendant, Thaddeus Goss, and his guardian Wachovia Bank and Trust Company, the sum of $178.12, together with interest from 16 September, 1930, together with the cost of this action, and that the defendant, Wachovia Bank and Trust Company, guardian of the defendant, Thaddeus Goss, minor, is hereby authorized and directed to pay the said amount to the plaintiff from the funds of the defendant, Thaddeus Goss, held by it as guardian."

The defendants excepted, assigned error and appealed to the Supreme Court: "(1) That the court erred in holding that the plaintiff is entitled to recover under the agreed statement of facts. (2) That the court erred in signing judgment as set out in the record."

Smith & Joyner and John H. Anderson, Jr., for plaintiff.
J. C. Little for defendants.

CLARKSON, J. The question presented on this appeal: "Is an infant living with his father liable for medical services where such services were uncontradicted but were necessary in an emergency and the infant recovers damages for the injuries which made the services necessary, although the father also recovers for his own expenses (including hospital and medical) and damages? We think so.

Thaddeus Goss, by his next friend T. R. Goss, recovered a judgment against Warren R. Williams for $3,000 and on appeal to this Court no error was found in the trial in the Superior Court. 196 N. C., 213. After paying the expenses of the litigation the balance of the $3,000 was paid to defendant Wachovia Bank and Trust Company, as guardian. T. R. Goss, the father of Thaddeus Goss recovered a judgment in the sum of $900, and in the complaint T. R. Goss alleged "as his cause of action and expense, including hospital and medical expenses incurred and the loss of the services of Thaddeus Goss, resulting from the said injuries to Thaddeus Goss." The judgment has been paid in full. It now appears that the father T. R. Goss "has at all times and still refuses to pay the same or any part thereof." That is the bill of the plaintiff physician. It goes without saying that the father was liable to plaintiff the physician for the services rendered his infant son.

We think, under the facts and circumstances of this case, that the infant is also liable. The defendants say in their brief: "In good conscience and equity it ought to have been collected out of the father when he recovered his judgment in a substantial amount for this very obligation." We think this should have been done and the father liable to the infant, but from the record it may be he is insolvent. Thaddeus Goss, when injured, for which recovery was had, was about 7 or 8 years of age. He was "seriously injured suffering a broken leg and other injuries." He was taken to Watts Hospital and there treated by the plaintiff, Dr. N. D. Bitting, who rendered to him certain medical and surgical services over a long period of time. It is admitted that the charges for the services rendered by plaintiff were fair and reasonable.

Defendants contend that in the case of *Cole v. Wagoner,* 197 N. C., 692, the recovery by the infant included the hospital bill. The decision in that case went further—at p. 698, we find: "It was an emergency, and quick action had to be taken. During the period of treatment the father paid for no hospital, medical or surgical treatment for the infant. It seems that he was either unable, at least he did not provide for the infant. The circumstances were peculiar. The father did not provide

this attention necessary to save his life and usefulness—the hospital did. The infant now has an estate, and it is unthinkable that the guardian of the infant should not pay the reasonable expense for saving the child's life and usefulness. . . . (p. 699.) The amount of recovery is bottomed on *quantum meruit* or reasonable worth of services."

In Page on the Law of Contracts, 3rd vol. part sec. 1521, p. 2602, speaking to the subject, we find: "A case in which considerations of humanity control, and enable one who has rendered services without request to recover therefor, is found where medical or surgical attention is rendered to one who is injured or taken ill so that he is unconscious and unable either to request or forbid the rendition of such services. In cases of this sort, the courts are confronted with the alternative of requiring the injured person to pay reasonable compensation for services rendered to him, or of saying that all who render services do so as a matter of charity or in reliance upon the generosity of the person for whom such services are rendered. While there is little authority upon this question, from the nature of the case it is held that the interest of the person who is injured requires the law to impose a liability upon him for reasonable compensation for such medical and surgical services."

In the present case the plaintiff physician rendered services in an emergency and to preserve human life. We think the *Cole case, supra*, applicable to the present case. In that case the authorities are set forth in full. The judgment below is

Affirmed.

MRS. VENORA KISER v. OSCAR M. KISER.

(Filed 2 November, 1932.)

Divorce D b—Allowance to wife under C. S., 1667, should be based on husband's means and condition in life.

While C. S., 1665, relating to alimony upon judgment for divorce *a mensa et thoro*, does not apply to an action for alimony without divorce under C. S., 1667, yet the two statutes are cognate and may be considered together, and in an action under C. S., 1667, the allowance of reasonable subsistence to the wife and children and the allowance of counsel fees should be based on the defendant's means and condition in life, etc., and where the record on appeal from an order relating to such allowance is not sufficiently definite on this question the case will be remanded.

APPEAL by defendant from *Harding, J.*, and a jury, at March Term, 1932, of FORSYTH. Error and remanded.

KISER *v.* KISER.

This was an action originally for necessary or reasonable subsistence without divorce brought by the plaintiff against the defendant (C. S., 1667); cross-action by the defendant against the plaintiff for a divorce *a mensa et thoro;* each charging cruel and abusive treatment against the other; from verdict and judgment rendered before Harding, J., at March Term, 1932, in favor of the plaintiff, defendant excepted, assigned error and appealed to the Supreme Court.

Elledge & Wells, W. H. Boyer, John C. Wallace and R. Glenn Key for plaintiff.

Parrish & Deal for defendant.

CLARKSON, J. This is a controversy between husband and wife. The parties were married in Rural Hall, N. C., 14 October, 1916, and lived together until 27 January, 1930. A child, Frances Elizabeth Kiser, was born of the union on 17 December, 1918, and is now living.

The jury found all the issues in favor of the plaintiff, which are unnecessary to set forth. It was contended by defendant that Judge Harding in his judgment found as a fact that the defendant was making $60 a month and made an allowance to plaintiff of $70 a month. It is contended by plaintiff that he further found "that for about ten years prior to December, 1930, he earned the salary of $125 per month; that he is an able-bodied man of good education," etc.

At June Term, 1932, of the Superior Court of Forsyth County, North Carolina, the matter was heard by Clement, J., on application of plaintiff; that defendant be cited to appear and show cause "why he should not be attached for contempt of court for failure to comply with the terms of the judgment of this court entered at the March Term, 1932, of this court; and the defendant having appeared and having shown to the court that he has paid to the plaintiff the sum of $35 per month since the entry of said order, and that she has had the use and occupancy of the dwelling-house referred to in the order of the value of $25 per month. . . . And it appearing to the court that the defendant has in good faith attempted to comply with the requirements of the order entered at the March, 1932, Term of court, but that he has been unable to do so, and that he has not wilfully violated the terms of said order; and it appearing to the court that the defendant is unable to comply with the terms of said order, and the defendant having prayed that said judgment be modified; it is, therefore, ordered, adjudged and decreed by the court that the defendant is discharged from the citation for contempt, and is adjudged not to be in contempt of court; pending the appeal of this action to the Supreme Court, it is ordered, adjudged and

decreed that the defendant continue to pay to the plaintiff the sum of $35 per month, she to have the use and occupancy of the house referred to in the judgment entered at the March, 1932, Term; that during such time the defendant shall not be required to pay any further fees for plaintiff's counsel, and until the appeal to the Supreme Court has been disposed of, the provisions of the judgment entered at the March, 1932, Term, as they relate to alimony and counsel fees, are suspended. Hereupon, this cause is retained for further orders."

In the matter of contempt of court in cases of this kind, see *West v. West,* 199 N. C., 12.

In reference to the issues submitted, we see no error on the trial of the cause in the court below.

In *Davidson v. Davidson,* 189 N. C., 625, it was held: "While the amount allowed in the Superior Court as alimony for the wife's support and counsel fees *pendente lite* (C. S., 1666) is not ordinarily reviewable on appeal to the Supreme Court, it may be otherwise in exceptional cases, where the allowance is altogether disproportioned to the husband's earnings or income from property, and the findings in this case appearing to be meager in this respect, the case is remanded for the inquiry to be proceeded with, to ascertain what allowance would be 'just and proper, having regard to the circumstances of the parties.'" We think that where an action is instituted under C. S., 1667, as in this case, that C. S., 1665, as to alimony should be considered.

C. S., 1665, is as follows: "When any court adjudges any two married persons divorced from bed and board, it may also decree to the party upon whose application such judgment was rendered such alimony as the circumstances of the several parties may render necessary; which, however, shall not in any case exceed the one-third part of the net annual income from the estate, occupation or labor of the party against whom the judgment shall be rendered."

In *Anderson v. Anderson,* 183 N. C., at p. 142, we find: "It should be noted that the limitation to one-third of the net annual income from the estate (section 1665) applies when the court adjudges the husband and the wife divorced from bed and board, but not when the wife institutes the proper proceeding for alimony *pendente lite* under section 1666 or for a reasonable subsistence under section 1667. . . . His Honor, therefore, was not required in this proceeding to confine the subsistence to one-third part of the defendant's net annual income."

C. S., 1667: "If any husband shall separate himself from his wife and fail to provide her and the children of the marriage with the necessary subsistence according to his means and condition in life, . . .

to have a reasonable subsistence and counsel fees allotted and paid or secured to her from the estate or earnings of her husband," etc.

While perhaps the limitation in C. S., 1665, would not apply to C. S., 1667, nevertheless the two are cognate statutes, dealing with similar questions, and may be considered as the composite will of the Legislature.

As a basis, but not controlling under the *Anderson case, supra,* the allowance to the wife of "necessary subsistence," C. S., 1665, *supra,* should be considered and necessary subsistence of child or children and counsel fees also allowed. C. S., 1667, *supra.* The whole matter of alimony and counsel fees is carefully discussed in the *Davidson case, supra.* See *McManus v. McManus,* 191 N. C., 740; *Vincent v. Vincent,* 193 N. C., 492; *Byerly v. Byerly,* 194 N. C., 532; *Taylor v. Taylor,* 197 N. C., 197; *Brewer v. Brewer,* 198 N. C., 669.

The cause is remanded for the court below to ascertain facts more definite on which necessary or reasonable subsistence to the wife and child and counsel fees can be based, according to the defendant's means and condition in life, and to make the allowance in accordance with the law as indicated. From the record in this case, it appears that before the separation the parties had lived together as husband and wife for some fourteen years, the child of the marriage is a girl now some sixteen years of age. Perhaps there should be a truce, as separation and divorces between husbands and wives are not looked on with favor by the courts.

Error and remanded.

PRUDENTIAL INSURANCE COMPANY OF AMERICA AND PROPERTY LOANS, INCORPORATED, AGENT OF PRUDENTIAL INSURANCE COMPANY OF AMERICA, v. W. L. TOTTEN.

(Filed 2 November, 1932.)

Ejectment C b—Under facts of this case defendant was not estopped to deny tenancy and issue of title was raised.

Where a deed of trust contains a provision that in the event the property is foreclosed the holder of the bond secured by the deed of trust should have the right to bid in the property and if the property was so bid in the person in possession of the property should be considered the tenant at will of the purchaser, and the property is foreclosed under the deed of trust and bid in by the bondholder, and thereafter the bondholder brings summary action in ejectment before the justice of the peace, C. S., 2365, and the defendant sets up the defense that the bondholder bid in the property at the sale for the benefit of the defendant, etc.: *Held,* the principle that a tenant will not be allowed to dispute his landlord's

title during the continuance of the tenancy applies only where the conventional relationship of landlord and tenant exists, and the title to the property being in issue, the jurisdiction of the justice of the peace was ousted, and the proceeding was properly dismissed as in case of nonsuit upon appeal to the Superior Court.

APPEAL by plaintiffs from *Moore, Special Judge,* at March Special Term, 1932, of DURHAM.

Civil action in the nature of a summary proceeding in ejectment.

On 28 August, 1926, the defendant and his wife, being indebted to the Prudential Insurance Company of America in the sum of $11,000 for money borrowed, executed a deed of trust on a house and lot in the city of Durham to secure payment of same according to its tenor. The Raleigh Real Estate and Trust Company was named trustee in said deed of trust, and the following stipulation appears therein:

"The said parties of the first part hereby agree that in the event of a sale the lawful holder of said bond shall have the right to bid at such sale and become the purchaser thereat, and that if a sale shall be made, whoever may be in possession of said premises at that time shall at once become the tenant or tenants at the will of the purchaser at the monthly rental of one hundred and ten and no/100 dollars ($110), payable monthly in advance, and shall and will remove at any time thereafter or upon one month's notice from said purchaser, without regard to any previous lease, contract or agreement relating to the use or occupation of said premises."

The said deed of trust was foreclosed 22 July, 1931, at which the Prudential Insurance Company of America became the last and highest bidder. Deed was executed to the purchaser by the trustee 4 August, 1931, and on 30 September following, plaintiffs demanded possession of the premises.

It is the contention of the defendant that the Prudential Insurance Company of America bid in said property at the foreclosure sale for the defendant and his wife and that the same is now held by said plaintiff as trustee for the defendant and his wife.

No demand for rent was made by plaintiffs before or after the institution of the present proceeding.

From a judgment of nonsuit, entered for want of jurisdiction, the plaintiffs appeal.

Basil M. Watkins for plaintiffs.
O. G. Barker for defendant.

STACY, C. J. In the statement of case on appeal, the parties have styled the present proceeding "a civil action in the nature of a summary

proceeding in ejectment." It was commenced in a court of a justice of the peace, and heard *de novo* on appeal to the Superior Court of Durham County.

It is the position of the plaintiffs that the defendant is estopped by the terms of his own deed of trust to deny the tenancy now existing between the Prudential Insurance Company of America as landlord and the defendant and his wife as tenants. *Gaylord v. Gaylord,* 150 N. C., 222, 63 S. E., 1028.

The defendant, on the other hand, contends that the demise inserted in said deed of trust, if, indeed, the same be valid (*McCombs v. Wallace,* 66 N. C., 481; *Brooks v. Griffin,* 177 N. C., 7, 97 S. E., 730), does not create such a tenancy within the meaning of the landlord and tenant act as to subject the defendants to eviction by a summary proceeding before a justice of the peace. C. S., 2365; *Hughes v. Mason,* 84 N. C., 473; *Hauser v. Morrison,* 146 N. C., 248, 59 S. E., 693; *Hamilton v. Highlands,* 144 N. C., 279, 56 S. E., 929; *Shelton v. Clinard,* 187 N. C., 664, 122 S. E., 477; *McLaurin v. McIntyre,* 167 N. C., 350, 83 S. E., 627.

In *McDonald v. Ingram,* 124 N. C., 272, 32 S. E., 677, it was said: "The only question the court can try under the statute in this proceeding is: 'Was the defendant the tenant of plaintiff, and does she hold over after the expiration of the tenancy?'" No demand for rent has ever been made by plaintiffs in the instant case.

The defendant further contends that under the principle applied in *McNinch v. Trust Co.,* 183 N. C., 33, 110 S. E., 663, and other cases of like import, the relation of trustee and *cestui que trust* exists between the Prudential Insurance Company of America and the defendant, which also takes the case from under the landlord and tenant act. *McCombs v. Wallace, supra; Riley v. Jordan,* 75 N. C., 180; *Abbott v. Cromartie,* 72 N. C., 292.

That a tenant who takes possession of demised premises under a lease from the landlord, or being in possession unconditionally agrees to hold as such (*Riley v. Jordan, supra*), will not be permitted to dispute the landlord's title, during the continuance of the tenancy, is established by all the authorities on the subject. *Hobby v. Freeman,* 183 N. C., 240, 111 S. E., 1; *Clapp v. Coble,* 21 N. C., 177. But this principle, founded upon reasons of public policy, applies only in cases where the simple relation of landlord and tenant exists (*Abbott v. Cromartie, supra*), and does not extend to instances where title to the property is brought in question or equities are to be adjusted between the parties. *Hughes v. Mason, supra; Hauser v. Morrison, supra; Turner v. Lowe,* 66 N. C., 413.

It follows, therefore, as the title to the property is in issue, and the relation between the parties other than that of conventional landlord and tenant, the jurisdiction of the justice of the peace was ousted and the proceeding was properly dismissed as in case of nonsuit. *Hughes v. Mason, supra; Shelton v. Clinard, supra.*

Affirmed.

GRACE W. RUSHING, ADMINISTRATRIX OF JOHN W. RUSHING, v. SOUTHERN PUBLIC UTILITIES COMPANY.

(Filed 2 November, 1932.)

Electricity A a—Evidence in this action against power company held to disclose contributory negligence barring recovery as matter of law.

In an action against a power company to collect damages for wrongful death alleged to have been caused by its negligently causing an excessive voltage of electricity to be transmitted to the home of the intestate through a defective transformer, resulting in the death of the intestate when he came in contact with a wire in his basement, the evidence tended to show that the intestate had installed an extension wire in his basement without proper insulation or connection, and that he was killed while attempting to cut the live wire with metal pliers, and that he failed to cut off the current going into the house before attempting to cut the wire, together with evidence that under the conditions of dampness in the basement an ordinary voltage for houses could have produced death: *Held*, the defendant's motion as of nonsuit should have been allowed, the evidence when viewed in the light most favorable to the plaintiff disclosing contributory negligence barring recovery as a matter of law.

APPEAL by plaintiff from *Clement, J.*, at June Term, 1932, of FORSYTH. Affirmed.

This is an action for actionable negligence brought by plaintiff against the defendant alleging damage for the death of plaintiff's intestate by electrocution, on 20 August, 1930, when in the basement of his home.

The allegations of the complaint are to the effect that defendant's transformer was defective, and there was no inspection and defendant negligently caused an "excessive voltage" to be transmitted into the home of plaintiff's intestate. That it was the intention of the plaintiff's intestate to disconnect and remove an extension cord in the basement; that he equipped himself with a flashlight and a pair of pliers and also a pocket knife, and after having turned the current off of said switch and wire as aforesaid, he went into the basement for the purpose afore-

said; that the plaintiff's intestate went into the basement of the house, and while disconnecting the aforesaid extension cord, he came in contact with an overcharged wire and received a shock of electricity which caused his death.

The defendant denied negligence and the answer, in part, says: "In taking hold of a live wire under the conditions as aforesaid, and in failing to cut all of the current off the wires in said residence by throwing the general switch, directly and proximately causing his death, and the defendant pleads such negligence on the part of the plaintiff's intestate in bar of the plaintiff's right to recover in this action. . . . That the plaintiff's intestate carelessly, negligently, and unlawfully, ran an old, defective and improper wire under the house in which he was living, extending from an outlet on the rear porch and connecting with a radio in one of the front rooms of the house; that the wire used by him was dangerous, in that it was not intended to be used as electric light wire; that it was negligently and unlawfully installed by being fastened with staples, tacks, or nails, and that no insulating material was used; and that at the time the plaintiff's intestate received the injury causing his death, he was negligently and unlawfully engaged in changing or removing said wire, in violation of the ordinance, referred to in the original answer, and in violation of the law of the State; that the plaintiff's intestate, on account of the negligent and unlawful acts aforesaid, contributed to and proximately caused his injury and death."

At the close of plaintiff's evidence, the defendant made motion for judgment as in case of nonsuit. C. S., 567. The motion was allowed. Plaintiff excepted, assigned error and appealed to the Supreme Court.

John C. Wallace and L. L. Wall for plaintiff.
Manly, Hendren & Womble for defendant.

CLARKSON, J. Taking the evidence in the light most favorable to plaintiff, with every reasonable intendment and inference, we do not think the exception and assignment of error made by her to the judgment as in case of nonsuit, can be sustained. Conceding, but not deciding, that the evidence was to the effect that the defendant was negligent in transmitting into the house "excessive voltage" over 110, the normal voltage, yet the plaintiff's intestate, on the evidence introduced by her, was we think guilty of contributory negligence. *Hendrix v. R. R.*, 198 N. C., 142. The high power line that goes to the transformer has approximately 2300 volts in it, and the transformer cuts it down to be distributed to the line going into residences, which is customarily 110 voltage.

The evidence on the part of plaintiff does not correspond with the allegations in the complaint. The plaintiff administratrix, the wife of deceased, testified, in part: "When I got to my husband in the basement *his back was lying on one wire, the one that was cut in two, and the pliers were in his right hand. His right hand was blistered from burns,* and there was a blister right above his heart on the left side and one on his left arm and shoulder."

Plaintiff's witness, H. J. Maille, an expert, testified in part: "*Under the conditions* described in the basement of this home, blisters or burns would indicate either a high voltage above normal, or a very *heavy anchorage.* (By heavy anchorage is meant the degree of dampness of the basement.) . . . The harm that one would receive from a current of electricity with his feet damp, or by standing on wet ground, depends on the depth of the dampness, the volume of the dampness. The dampness according to its volume amounts to so much resistance, according to the volume of water you have. . . . It is a fact well known and recognized by electricians generally that there are certain conditions under which men will be killed if they come in contact with 110 volts, but it is out of the ordinary for a person to be killed that way."

We think from the evidence *the conditions* mentioned existed in this case. W. H. Holt, witness for plaintiff, testified: "It was damp where he was lying." The plaintiff's intestate while standing on damp ground in the basement, cutting a live wire, uninsulated, with metal pliers and without turning the general switch off, and with his knowledge of the bungling manner or method of the set-up made by himself of this particular live wire, and other causes, we think constituted contributory negligence, and plaintiff cannot recover in this action. This case is not like *McAllister v. Pryor,* 187 N. C., 832, and kindred cases cited by plaintiff. The judgment of the court below is

Affirmed.

STATE v. V. M. RAWLS.

(Filed 2 November, 1932.)

Indictment A a—In this case prosecution should have been dismissed for want of proper indictment.

The statutory crime of misapplication of partnership funds by a member of the partnership, chapter 127, Public-Local Laws of 1921, is a misdemeanor, and where a county court having original criminal jurisdiction of petty misdemeanors only issues its warrant for such violation, chapter 681, Public-Local Laws of 1915, the warrant is invalid, and where the

defendant has been granted a new trial on a former appeal in the Supreme Court, and upon the second trial in the Superior Court the defendant is tried without an indictment and moves to dismiss the action for want of jurisdiction, the motion should be allowed. Art. I, sec. 12.

APPEAL by defendant from *Cranmer, J.*, at April Term, 1932, of PITT. Action dismissed.

This is a criminal action begun in the county court of Pitt County. The defendant was tried in said court on a warrant issued on an affidavit in which it was charged that defendant had violated the provisions of chapter 127, Public Laws of North Carolina, 1921. This statute is entitled, "An act making the appropriating of partnership funds to the use of any partner without due consent a misdemeanor," and provides that "any person or persons violating the provisions of this act, upon conviction, shall be punished as is now done in cases of misdemeanors." The statute by its express terms became effective from and after 4 March, 1921.

From judgment on his conviction in the county court, the defendant appealed to the Superior Court of Pitt County. The action was first tried at January Term, 1932, of the Superior Court. The defendant was convicted at this trial, and appealed to the Supreme Court. On this appeal it was held that defendant was entitled to a new trial for error in the instructions of the court to the jury. *S. v. Rawls*, 202 N. C., 397, 162 S. E., 899.

The action was again tried at April Term, 1932, of the Superior Court of Pitt County. When the action was called for trial at said term, the defendant by motion, challenged the jurisdiction of the Superior Court to try him on the warrant issued by the county court. There was no indictment in the Superior Court. The defendant excepted to the refusal of the court to allow his motion that the action be dismissed. The action was thereupon tried in the warrant issued by the county court, and the defendant was again convicted.

From judgment that he be imprisoned in the common jail of Pitt County for a term of fifteen months, and assigned to work on the public roads under the State Highway Commission, the defendant appealed to the Supreme Court.

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

Shaw & Jones for defendant.

CONNOR, J. The county court of Pitt County was created by and organized under chapter 681, Public-Local Laws of North Carolina,

1915. The jurisdiction of this Court, both civil and criminal, is prescribed by the statute. The validity of the statute was challenged by the defendant in *S. v. Boyd,* 175 N. C., 791, 95 S. E., 161, on the ground that the statute is unconstitutional. It is said in the opinion in that case that the statute is valid, and that the constitutionality of courts such as the court created by the statute has been settled by repeated decisions of this Court. Constitution of North Carolina, Art. IV, sections 2 and 12.

It is provided in section 4 of chapter 681, Public-Local Laws of North Carolina, 1915, that the court created by said statute shall have original jurisdiction of all misdemeanors "as contained in chapter 81, of the Revisal of 1905 and acts amendatory thereof, where the punishment does not exceed a fine of two hundred dollars and imprisonment for two years." Such offenses are declared by the statute to be petty misdemeanors. It is further provided by said section that said court shall have original jurisdiction of all crimes which under the common law are misdemeanors, and punishable in the discretion of the court. Such crimes are declared by the statute to be petty misdemeanors. Trials in said county court of all criminal actions of which the court has original jurisdiction shall be on warrants issued by the clerk of said court.

Chapter 127, Public-Local Laws of North Carolina, 1921, is not and does not purport to be an amendment of any section of chapter 81 of the Revisal of 1905, or of chapter 82 of the Consolidated Statutes of 1919 which has superseded chapter 81 of the Revisal of 1905. The offense defined by said statute is not a common-law crime; it is a statutory crime, punishable as a misdemeanor. It is not declared by the statute or elsewhere to be a petty misdemeanor, and for that reason within the original jurisdiction of the county court of Pitt County. The said court, therefore, did not have such jurisdiction of this action. It follows that the Superior Court of Pitt County was without jurisdiction to try the defendant on the warrant issued by the clerk of the county court. It is expressly provided by section 12 of Article I of the Constitution of North Carolina that "no person shall be put to answer any criminal charge, except as hereinafter allowed, but by indictment, presentment or impeachment." The charge in this action does not come within the exception allowed by this section.

There was error in the refusal of the court to dismiss the action on the motion of the defendant, challenging its jurisdiction to try the defendant on the warrant issued by the clerk of the county court. In the absence of an indictment, the action should be and is

Dismissed.

E. V. ELLER v. W. L. DENT AND THOMAS DENT.

(Filed 2 November, 1932.)

Parent and Child A a—Father is liable for injuries proximately caused by reason of allowing 15-year-old son to drive truck.

It is negligence on the part of a father to permit his minor son who is under the legal driving age to drive his truck upon the public highway, and the father may be held liable for injuries proximately caused by such negligence, and although the mere fact that the son was under the legal driving age would not of itself establish such negligence as the proximate cause of an accident, under the evidence in this case the issue of proximate cause was for the determination of the jury.

APPEAL by defendants from *Stack, J.*, at July Term, 1932, of ASHE.

Civil action to recover damages for alleged negligent injury caused by collision between a Ford coupe, in which the plaintiff was riding as an invited guest, and a truck, owned by the defendant, W. L. Dent, and operated at the time by his minor son, Thomas Dent. The scene of the collision was on the highway between Jefferson and West Jefferson in Ashe County; the time Sunday afternoon, 23 February, 1930.

There is evidence tending to show that the defendant, Thomas Dent, 15-year-old son of the defendant, W. L. Dent, took his father's truck out of the garage just after lunch on the day in question for the purpose of going to West Jefferson to see a basketball game. The father knew that the son was away with the truck. The collision occurred on the return trip about 6 o'clock that afternoon.

From a verdict and judgment in favor of plaintiff, the defendants appeal, assigning errors.

C. W. Higgins, U. S. G. Bauguess and Ira T. Johnston for plaintiff.
T. C. Bowie and W. B. Austin for defendants.

STACY, C. J. The liability of the defendant, W. L. Dent, is not predicated solely upon the negligence of the son in driving the father's truck on the day in question (*Linville v. Nissen*, 162 N. C., 95, 77 S. E., 1096), but upon the alleged negligence of the father in permitting the 15-year-old son to operate his truck upon the highway in violation of law. *Taylor v. Stewart*, 172 N. C., 203, 90 S. E., 134. If this alleged negligence of the father be the proximate cause, or one of the proximate causes, of plaintiff's injury, as the jury has so found, then W. L. Dent has properly been held liable in damages therefor. *White v. Realty Co.*, 182 N. C., 536, 109 S. E., 564.

Speaking to the question in *Linville v. Nissen, supra*, it was said: "We would not be understood, however, as holding that the father would

not be liable if he should place his automobile in charge of a child of tender years any more than if he would intrust an unruly horse to him. But in such case the liability arises from the father's negligence, and not from the imputed negligence of the child."

Thomas Dent was driving the truck in violation of law, in that, he was under 16 years of age at the time, and while this circumstance alone, under the evidence disclosed by the record, would not perforce, as a matter of law, proclaim such fact the proximate cause, or one of the proximate causes, of plaintiff's injury, nevertheless, the issue was one for the jury. *Taylor v. Stewart, supra.*

"When a motor car is used by one to whom it is loaned for his own purposes, no liability attaches to the lender unless, possibly, when the lender knew that the borrower was incompetent and that injury might occur."—*Clark, C. J.*, in *Reich v. Cone*, 180 N. C., 267, 104 S. E., 530.

There was nothing said in *Tyson v. Frutchey*, 194 N. C., 750, 140 S. E., 718, or *Grier v. Grier*, 192 N. C., 760, 135 S. E., 852, which militates against plaintiff's right to recover in the instant case.

No error.

STATE v. RUBY GOLDEN AND EMMETT GOLDEN.

(Filed 2 November, 1932.)

1. Criminal Law L d—Appeal in this case dismissed for failure to send up necessary parts of record proper.

It is the duty of the appellant to see that the record is properly made up and transmitted, and where the transcript on appeal in a criminal case fails to show the organization of the court or that the court was held by an authorized judge at the time and place prescribed by law, and fails to contain the indictment against one of the appellants and fails to contain the verdict of the jury, the appeal will be dismissed for failure to send up necessary parts of the record proper.

2. Criminal Law D a—Defense that crime was committed in another state is available on plea of not guilty.

The defense that the crime charged, if committed at all, was committed in another state is available under a general plea of not guilty, with the burden of proof on the defendant.

APPEAL by defendants from *Harding, J.*, at February Term, 1932, of SURRY.

Criminal prosecution tried upon indictments charging the defendants with violations of the prohibition laws.

From an adverse verdict and judgment of six months on the roads, the defendants appeal.

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

Folger & Folger for defendants.

STACY, C. J. The appeal must be dismissed for the following reasons:

1. The transcript fails to show the organization of the court (*S. v. May*, 118 N. C., 1204, 24 S. E., 118), or that the "court was held by judge authorized to hold it, and at the time and place prescribed by law." *S. v. Butts*, 91 N. C., 524.

2. No indictment against Ruby Golden appears in the record. *S. v. McDraughon*, 168 N. C., 131, 83 S. E., 181. Only the one against Emmett Golden has been sent up.

It is the duty of appellant to see that the record is properly made up and transmitted. *S. v. Frizell*, 111 N. C., 722, 16 S. E., 409.

3. The verdict has been omitted from the transcript. *Riggan v. Harrison, ante*, 191.

It is the uniform practice to dismiss the appeal for failure to send up necessary parts of the record proper. *Pruitt v. Wood*, 199 N. C., 788, 156 S. E., 126; *Waters v. Waters, ibid.*, 667, 155 S. E., 564.

The principal defense was, that the offense charged, if committed at all, was committed in Virginia. This was a matter of defense, available, it is true, under the general plea of not guilty, with the laboring oar cast upon the defendants. His Honor so charged, and, in this, there was no error. *S. v. Barrington*, 141 N. C., 820, 53 S. E., 663.

Appeal dismissed.

SAM J. CASTLE v. E. H. THREADGILL, MRS. LULA SMITH AND JOHN N. DUNCAN, TRUSTEE.

(Filed 2 November, 1932.)

1. Appeal and Error J a—Supreme Court may review facts in injunction suits.

Upon appeal in injunction suits the Supreme Court has the power to find and review the findings of fact, but the burden of showing error is on the appellant.

2. Injunctions D b—Temporary order will ordinarily be continued where it seems plaintiff will be able to make out his case at hearing.

Where the plaintiff in an injunction suit shows probable cause or a prima facie case, or it can be reasonably seen that he may be able to make out his case at the final hearing, his temporary order will ordinarily be continued.

APPEAL by plaintiff from *Devin, J.*, at June Term, 1932, of WAKE. Error.

This is an action brought by plaintiff to restrain defendants from selling certain real estate. The temporary restraining order was dissolved and plaintiff assigned error and appealed to the Supreme Court.

Biggs & Broughton for plaintiff.
R. L. McMillan and R. Roy Carter for defendants.

CLARKSON, J. It has long been the settled rule in this jurisdiction that this Court on appeal in injunction suits has the power to find and review the findings of fact in controversies of this kind. On the record it appears that as to material facts there is a serious conflict. The rule is to the effect that if plaintiff has shown probable cause or a prima facie case, or it can reasonably be seen that he will be able to make out his case at the final hearing, the injunction will be continued. It is also settled that the burden is on appellant to show error. *Wentz v. Land Co.*, 193 N. C., 32; *Realty Co. v. Barnes*, 197 N. C., 6.

In *Ohio Oil Co. v. Conway, supervisor*, 279 U. S., at p. 815, speaking to the subject, we find: "Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted. *Love v. Atchison, T. & S. F. R. Co.*, 107 C. C. A., 403, 185 Fed., 321, 331, 332." In the judgment of the court below, there is

Error.

STATE v. CHARLIE McLAMB.

(Filed 2 November, 1932.)

1. Assault B a—Evidence held sufficient to show secret assault in prosecution under C. S., 4213.

In a prosecution under C. S., 4213, for a secret assault and battery with a deadly weapon with malice and intent to kill, evidence that there had been ill-feeling between the prosecuting witness and the defendant, that the prosecuting witness had seen and recognized the defendant standing outside a window in the witness's home, that the defendant appeared there suddenly at night and shot the prosecuting witness before he could do anything, and seriously wounded him, is *held* sufficient to overrule defendant's motion as of nonsuit, C. S., 4643, and to show that the assault was done in a secret manner.

2. Criminal Law G p—Evidence that persons could be identified under conditions existing at time of crime held competent.

Where, in a prosecution under C. S., 4213, the defendant sets up an alibi and the prosecuting witness testifies that he saw and recognized the defendant when the defendant appeared suddenly at night at a window of the prosecuting witness's home and shot him through the window: *Held*, it is competent for other witnesses to testify that when sitting at the place where the prosecuting witness was sitting when assaulted they were able to identify people appearing at night outside the window when the same light was burning in the room that was burning on the night of the crime, the circumstances and conditions on the two occasions being identical, and their answers that they could identify people coming to the window at the place where the evidence tended to show the defendant stood on the night of the crime is not an invasion of the province of the jury and an objection thereto on the ground that the witnesses were allowed to state a conclusion rather than the facts cannot be sustained.

3. Criminal Law G e—Testimony in this case held properly excluded as hearsay evidence.

Where in a criminal prosecution the defendant does not take the stand but sets up an alibi and introduces evidence that on the night the crime was committed he was in a certain store some distance from the scene of the crime, and introduces testimony of the store-owner as to the time the defendant was in the store: *Held*, the exclusion of hearsay testimony of another witness as to a conversation between the defendant and the store-owner, also relating to the time the defendant was in the store, will not be held for error.

4. Criminal Law I g—Charge of the court will be construed as a whole.

Where, in a prosecution under C. S., 4213, the court reads the bill of indictment to the jury and the charge properly instructs them as to reasonable doubt and the burden of proof, and correctly sets out the elements of the crime and contains no prejudicial error when construed as a whole, objections thereto will not be sustained on appeal.

5. Same—Defendant desiring further elaboration in charge as to specific point should offer prayer for special instructions.

Where the charge of the court correctly instructs the jury as to all substantial features of the case, a defendant desiring special explanations as to one of the features should make proper request for special instructions.

6. Criminal Law K d—Court may increase punishment during term before prisoner has begun to serve sentence.

Where a sentence has been imposed by the judge in a criminal action it remains in the breast of the court during the term and it is within his sound discretion to reopen the case and increase the punishment within the limitations of the statute when the prisoner has not begun to serve any part of the sentence.

APPEAL by defendant from *Cranmer, J.*, and a jury, at August Term, 1932, of SAMPSON. No error.

Prentice Jackson, white man, lived in Piney Grove Township, Sampson County, North Carolina, about two and a half miles from defendant, a Negro man. On 29 June, 1932, about 10 o'clock at night, the prosecuting witness describes what occurred as follows: "Had a tub of water drawn, put it in the kitchen, shut the door and sat down to take a bath, while my wife was fixing the bed. I was washing this leg, and heard something click like a gun, and I looked in the window and saw a double barrel shot gun, and I aimed to holler or run. I looked and saw Charlie McLamb, and he had a gun ready to shoot and I hollered, but don't know anything else. I knew Charlie McLamb and saw him. It was he that shot me, and that is the truth. . . . When I looked at the window, he had the gun ready to shoot, and I didn't have time to do anything, or even say a word. There are four panes of glass to the sash, four below and four above. He shot me through the right-hand pane from me, and through his left-hand pane. It was about ten and one-half feet from where I was sitting to the window. I didn't have time to do anything, and after the gun fired, I didn't know anything. . . . I do not know how many shot hit me, forty-eight shot could be found in the house. I have two on each side of my hair, some on my shoulder and some went through here, and some in my nose and part of them buried in my skull. At that time I lost one eye on the count of the shooting. I went to two hospitals and stayed about a week. The gun shot that went through my neck, affected my voice, and it strains me to talk. I am talking as loud as I can. I am partly deaf in this ear, so many shot in here that I cannot open my mouth but half as much as I used to. I cannot eat my food, except a little crumb at the time."

On 3 April, 1932, Jackson had trouble with defendant. Jackson with his brother was going to Faison for a doctor. As they got into the Faison and Clinton road, Jackson's brother was making a curve and a car driven by defendant dashed by and if it had run into Jackson and his brother it would most likely have killed them, as indicated by the evidence. The car driven by defendant after it passed "was zig-zagging across the road." "After we got by Mr. Ross Ireland's he (defendant) stopped and got out, he had a crank in his hand. There was another fellow that he had met up with. He motioned us to stop, and we stopped and Charlie McLamb wanted to know what in the God dam hell we blowed on him for. I said 'We wanted to go and get some medicine for a sick baby.' He said 'Its a God dam lie,' if you wanted to go by you could get by.' I said 'No, we could not have gone by when you did not get out of the road.' He said, 'You s. o. b. that aint so.' When he called me that I stepped out of the car and said 'Who are you cursing,' and he said 'Where is my God damn hammer,' and he reached in the car and

got the hammer, and my brother stepped out, and he then said 'Where is my God dam gun.' He got his gun and the other fellows were scared and he tried to get the other fellow to come and beat hell out of us. We could not do anything, and I got into the car and Charlie kicked my brother and started to pull my brother out of the car, and I said 'Don't you pull him out of the car,' and he said 'I want to kill you anyhow—I will get you.' I went to Mr. Sam Howard's, the police at Faison, and indicted him Monday morning. His trial was put off until 5 July, and I was shot on 29 June."

S. K. Bradshaw lived about 100 yards from Prentice Jackson who lived on his place, and went to his house that night after the shooting. He testified, in part: "We picked him up and put him on the bed. Prentice said 'Mr. June, I am shot, I know who did it.' He died away, and when he came to he said 'Charlie McLamb.' I went after a trained nurse. He said 'I saw him through that window, I saw his gold teeth." He seemed to be in his right mind for a few minutes, and then would faint away. Later on in the night when Prentice revived he said that McLamb shot him, and to tell his father to go get him. . . . I could tell where Prentice Jackson was sitting by the sign of the blood and by the chair in the door. Prentice Jackson has shown me once, and you could tell by the signs of blood where he was sitting. The tub was down there when he was washing. The lamp on the table was burning when I got there. It was pulled out from the side of the room so it gave light to see him bathe. It threw light as far beyond the window as here to the courthouse door. Q. Have you, since the shooting, sat with the lamp on the table or dresser where it was, and knew where Prentice Jackson said he was sitting, and did anybody come up to that window to see whether or not you could identify them, and if so, what time of day or night was it? Answer: Night time, after dark. . . . Q. Relate to the jury, whether or not you could tell a man coming up to the window? Answer: Yes, sir, you could tell a man. I had several to go up to the window. They had a gun. Dave Oats and my little boy, and you could tell who he was. He had a gun, but was not tall enough for you to look like you ought to. Q. Did you try it with a colored person? Answer: Yes, sir, had a colored person at window. You could tell better through the window pane than the one that was shot out. Seems that the glass reflected upon the gun and upon the person." The defendant excepted and assigned error as to the evidence. There are several exceptions and assignments of error as to this kind of evidence introduced on the part of the State.

The witness testified further: "I examined Mr. Jackson that night to see how he was shot up. I didn't count the shot then, but there were,

when the doctor counted, thirty some odd shot, and they were number four shot. His eye was shot out, and the sight of his eye was running out, and he was bleeding mighty bad all over."

This testimony was corroborated by several witnesses who went to Jackson's house shortly after the shooting.

Sheriff W. H. Moore, testified, in part, that he went to defendant's home that night. "I found Charlie McLamb in the house. I found his shoes, they had sand sticking around the soles, as if they had been worn out in the dew. The next morning I went back there for further examination. I looked around the place to see what I could find. Back of Prentice Jackson's house, in a squash patch, behind the squash bush, I found the print of two knees, and the print of the gun stock where it had stood between the knees. I went to Charlie McLamb's and got the gun and looked at the end of it, and it had grass stains on the end of the stock where it had been sitting on the ground, and there were grit sticking on the end of the stock. I took the gun to Prentice Jackson's where the imprint of the gun was between the two knees, and it was exactly the same print. Q. Did you examine the grit on the gun stock with the grit on the ground as you found there? Answer: Yes, sir, I was careful not to knock that sand off until I got back there. The grit on the gun compared with the sand of the ground at the squash bush."

Prentice Jackson was corroborated by Sheriff Moore as to his telling him how he was shot and by the defendant. The defendant did not go upon the stand, but set up an alibi that at the time that it is alleged that Prentice Jackson was shot that he, the defendant, was in Faison. Charlie McLamb lives some 8 or 9 miles west of Faison. Mr. Jackson lives 9 miles west of Faison.

In rebuttal the evidence on the part of the State, Ben Cooper testified, in part: "I live at Faison and run a barbecue stand and fish market. I know Charlie McLamb. On the night of 29 June, I saw Charlie McLamb. I was taking in my stuff from the outside, when Charlie McLamb came by headed out of town in the direction that Prentice Jackson lives; I looked up at the train come in, I figured it was 8:30 or 8:35."

Roscoe Cooper testified, in part: "I live in Faison, and am the son of B. R. Cooper, and was working with him on the night of 29 June. I saw Charlie McLamb that night. He was going along the road that leads out of the town towards where Prentice Jackson lives. He could have turned to the right, and gone home, or he could have turned to the left. It was about 9:00 o'clock. I cannot say how many were with him."

Arnold Vann testified, in part: "I live about three-fourths mile from town of Faison, and know Charlie McLamb and know his automobile

when I see it. I was coming from Faison about 8:40 and just as I turned into the yard to go to my house, Charlie's Ford passed, and I walked to the back door. The train came, and it was about 8:40. I know where Prentice Jackson lives. Charlie was going toward Prentice Jackson's house at the time he passed me."

The bill of indictment charges: (1) defendant unlawfully, wilfully, maliciously and feloniously, and in a secret manner did assault, beat and wound one Prentice Jackson with a deadly weapon, a shot gun, with felonious intent to kill, inflicting serious injuries; (2) and assault with a deadly weapon, a shot gun, with intent to kill. The two counts are in the usual legal form.

The verdict of the jury was as follows: "Do say upon oath that the said Charlie McLamb is guilty of an assault with a deadly weapon with intent to kill in a secret manner, one Prentice Jackson."

The judgment of the court below was as follows: "It is therefore considered by the court that the said Charlie McLamb shall be confined, on the first count in the State's prison at hard labor for a period of five years." On 17 August, 1932, during the term of the court, "upon request of the State, the case was reopened. To the reopening of the case the defendant objected. Objection overruled, defendant excepted. Sentence was increased by the court from five to six and a half years. To this increase of sentence, the defendant objected. Objection overruled. Defendant excepted."

The defendant made numerous exceptions and assignments of error among them those above set forth, and appealed to the Supreme Court. We will only consider the material ones.

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

J. Faison Thomson, Rivers D. Johnson and Hugh Brown Campbell for the defendant.

CLARKSON, J. The defendant, at the close of the State's evidence and at the close of all the evidence moved to dismiss the action or for judgment of nonsuit. C. S., 4643. The court below denied the motions, and in this we can see no error.

C. S., 4213, is as follows: "If any person shall in a secret manner maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise, with intent to kill such other person, notwithstanding the person so assaulted may have been conscious of the presence of his adversary, he shall be guilty of a felony and shall be punished by imprisonment in jail or in the penitentiary for not less

than twelve months nor more than twenty years, or by a fine not exceeding two thousand dollars, or both, in the discretion of the court."

In *S. v. Bridges,* 178 N. C., at p. 738, we find: "The defendants were waiting in the dark for him, as much concealed as if they had been hidden in ambush, prepared to slay without a moment's warning to their victim, who was thus unexpectedly confronted by this hitherto unseen peril. J. W. Cole describes the situation in such way as to show conclusively, if his testimony was truthful, that he was so surprised that he was instantly rendered helpless because he did not know of the presence of the defendants behind the house, as they were hidden by the darkness. As was said, 'they loomed up before him' with a suddenness of an apparition; and he first saw them when the gun flashed."

In *S. v. Kline,* 190 N. C., at p. 178-9, is the following: "It appears that on the night of 22 April, 1925, the prosecuting witness, Truby Proctor, was visiting at the home of J. F. Wicker, near Colon in Lee County. While there some one secreted himself in the rear of his automobile. The prosecuting witness left about 10:00 o'clock and was driving towards the public highway from the Wicker house, when the person in the rear of the car struck him over the head with an iron bar, inflicting serious injury upon him. Proctor testified that in the scuffle which followed, partly in the light of the automobile, he recognized the defendant as his assailant; that the defendant left the car, ran down the road, across the field and towards the woods. The defendant testified that he was at the home of Mr. R. S. Kelly on the night in question; that he roomed there; that he knew nothing of the occurrence until about 1:00 or 1:30 o'clock that night when he was aroused from his bed and charged with the offense. The evidence was plenary on both sides. It was sufficient on behalf of the State to warrant a conviction and on behalf of the defendant to warrant an acquittal." The evidence in both of the above cases was held sufficient to be submitted to the jury as to a secret assault. *S. v. Oxendine,* 187 N. C., 658.

The defendant contends that as a defense he set up an alibi. To corroborate the prosecuting witness Jackson, who testified that he recognized the defendant, that certain evidence offered by the State was prejudicial as the evidence did not show similarity of the conditions. These exceptions and assignments of error cannot be sustained.

Speaking to the subject, we find the following in 22 C. J., p. 755, sec. 842(1): "The conditions of a relevant occurrence may be artificially created in an experiment, and where the material facts bearing on the particular issue are precisely duplicated in the experiment, the result may be received in evidence. Such evidence is appropriate where the question to be determined relates to such matters as whether an object in a

certain position can be seen from a given height above a designated spot, or from a given distance," etc. Section 843(3) at p. 756: "Whether or not evidence of experiments is admissible is, under the circumstances of each case, a preliminary question for the determination of the court, in the exercise of its discretion, which will not be interfered with by an appellate tribunal unless an abuse is made clearly to appear." *Blue v. R. R.*, 117 N. C., 644; *Cox v. R. R.*, 126 N. C., 103.

In *Conrad v. Shuford*, 174 N. C., at p. 722, in reference to similarity in essential conditions, quoting from 17 Cyc., at p. 285, it is said: "Evidence of other facts or occurrences is then admitted, provided the court deems this course a wise exercise of its administrative discretion. The probative fact or occurrence may be (1) found in actual life by observation, or (2) reproduced voluntarily in an experiment. A sufficient ground of admissibility is furnished where physical conditions are shown to have been identical on the two occasions."

The defendant contends that the court below admitted a question "which called for a conclusion from the witness rather than the witness stating facts from which the jury could draw its own conclusions. This is clearly an erroneous method of questioning witnesses and is an intrusion into the duty of the jury." We can see no prejudicial error, if error at all, in the question and answer.

Nor do we think the exclusion of certain hearsay evidence can be sustained in an attempt to fix the time that defendant was in Owens' store by John Avery Cox: "I went to Mr. Owens' store twice that night, the first time about ten o'clock to get a drink. I saw Mr. Lee Stevens, Jesse Ashford and Charlie (McLamb, defendant). Mr. Precise's son was clerking in the store, and he waited on me. Mr. Jackson lives on another road from Charlie. Q. Was there anything said, and if so, what, between Charlie McLamb and Ralph Precise about what time they were going to close the store? (If permitted to answer, the witness would have said, Mr. Precise asked him about selling him some fish, and Charlie said he was not ready to go home, and Charlie asked what time it was then, and Mr. Precise said it was twenty minutes to ten o'clock)." The defendant thereafter had Ralph Precise to testify, and the time fixed by him "It was around ten o'clock."

We do not think the objections of defendant to the charge can be sustained, taking it as a whole and not disconnectedly. The court below, in the beginning of the charge, read the bill of indictment in which it set forth fully all the ingredients of a secret assault.

In *S. v. Kline, supra*, at p. 178, the principle is set forth as follows: "The statute under which defendant was indicted and convicted provides that if any person shall commit an assault and battery upon another (1)

maliciously, (2) with a deadly weapon, (3) in a secret manner, and by waylaying or otherwise, notwithstanding the person so assaulted may have been conscious of the presence of his adversary, (4) with intent to kill such other person, he shall be guilty of a felony and shall be punishable by imprisonment in jail or in the penitentiary (State's prison) for not less than twelve months nor more than twenty years, or by a fine of not exceeding two thousand dollars, or both, in the discretion of the court. C. S., 4213. In order to warrant a conviction under the statute, all of the essential elements of the crime must be proved by competent evidence (*S. v. Crisp,* 188 N. C., 800), and the burden is on the State to establish the defendant's guilt beyond a reasonable doubt, where a plea of 'not guilty' is entered, as was done in the instant case. *S. v. Redditt,* 189 N. C., 176; *Speas v. Bank,* 188 N. C., p. 527." The evidence on the part of the State was plenary.

The court below accurately defined reasonable doubt, and charged the jury: "If the State has satisfied you beyond a reasonable doubt, it would be your duty to convict the defendant. If it has not so satisfied you, it would be your duty to acquit him."

The court fully instructed the jury as to the alibi set up by the defendant, and further charged: "As to the first count, you will remember that I read the count and read the words 'wilfully and feloniously and in a secret manner.' The State contends that the crime was done wilfully and maliciously and that he went up there with malice in his heart against Mr. Jackson and shot him with a shot gun and that it was done in a secret manner, and that Mr. Jackson was bathing, preparing to go to bed and take his night's rest and that McLamb shot him, inflicting serious injury upon him."

On the aspect of secret assault, the defendant did not ask for fuller or more specific instructions.

In *S. v. O'Neal,* 187 N. C., at p. 24, the following is set forth: "The statute, it is true, requires the judge plainly and correctly to state the evidence and to declare and explain the law arising thereon (C. S., 564), and this requirement has been construed as implying that on all the substantial features of a case a correct charge must be given without regard to a special prayer, but as subordinate features or particular phases of the evidence a litigant who desires special explanation should make proper request for appropriate instructions."

Although we have considered the material exceptions and assignments of error to the charge of the court below made by defendant yet nowhere are they set forth in the body of the charge as "continuity of the charge is necessary with the 'specific' exceptions." *Rawls v. Lupton,* 193 N. C., at p. 432.

The defendant further complains of the court below changing the punishment. In *S. v. Crook*, 115 N. C., at p. 764, we find: "The judgments, orders and decrees of a court as a general rule are under its control and subject to modification during the term at which they are entered; but where a defendant had undergone a part of the punishment, the sentence cannot be revoked and another, except in diminution or mitigation, substituted for it, because he would be twice placed in jeopardy and twice subjected to punishment for the same offense. *S. v. Warren*, 92 N. C., 825; *Ex parte Lange*, 18 Wall., 173."

It is well settled in this jurisdiction that the court below, in its sound discretion can, during the term, as said in *S. v. Warren*, 92 N. C., at p. 827, "correct, modify or recall an unexecuted judgment in a criminal, as well as in a civil case." This cannot be done when the defendant has undergone a portion, though an inconsiderable part, of his sentence. *Warren's case, supra.*

We think under the facts and circumstances of this case, that the defendant had not undergone a part of the punishment. He had given notice of appeal, he was still in jail, it was during the term of court in which he was tried, and we think the whole matter remained *in fieri*. The punishment of defendant was the responsibility of the court below. Succinctly the defendant with malice, in a secret manner at the prosecuting witness' home, in the night time, without provocation, assaulted and maimed him by shooting out one of his eyes. The final judgment of the court below was six and a half years. Under the law the court below could have sentenced defendant to twenty years imprisonment and fined him $2,000. From the record, we find in law

No error.

C. J. NASSIF AND A. NASSIF, TRADING AS NASSIF BROTHERS, v. ARTHUR GOODMAN, SAMUEL SAFFER, A. SCHRETER AND SON, INCORPORATED, AND THOMAS E. BASS.

(Filed 2 November, 1932.)

1. Malicious Prosecution A b—Bankruptcy proceedings will support an action for malicious prosecution.

The filing of an involuntary petition in bankruptcy is for the purpose of having the debtor's property taken by the courts for payment of all creditors according to law, and it is more than a mere civil action for debt, and where in bankruptcy proceedings the petitioning creditors have caused the court to appoint a receiver to take charge of the debtor's property and upon the hearing of the petition it is adjudicated that the debtor is solvent and had committed no act of bankruptcy, and he is

discharged: *Held*, the debtor may bring an independent action for malicious prosecution, and may recover upon a showing of malice and want of probable cause.

2. Malicious Prosecution B c—Evidence in this case held competent on the questions of malice and damages.

Where the debtor in involuntary bankruptcy proceedings has been discharged in the Federal Court and brings independent action against the petitioning creditors for malicious prosecution: *Held*, in the action for malicious prosecution evidence that the salesman of the petitioning creditors had threatened to ruin the debtor's credit if the debt were not paid is competent on the question of malice, and evidence of the debtor's standing in the community is competent on the question of damages.

3. Malicious Prosecution A d—Discharge of bankrupt is sufficient termination of prosecution to support action for malicious prosecution.

Where the debtor has been discharged in the Federal Court in bankruptcy proceedings upon a finding that he was not insolvent and had committed no act of bankruptcy, and the cause is retained only for the purpose of assessing damages against the bonds of the petitioning creditors: *Held*, it is a sufficient termination of the proceedings to support an action by the debtor for malicious prosecution, and he may either bring an independent action for malicious prosecution or have his damages assessed in the bankruptcy proceedings.

4. Election of Remedies A a—Debtor may sue for malicious prosecution or have damages assessed in bankruptcy proceedings.

Where the creditors of a person file an involuntary petition in bankruptcy against him with malice and without probable cause, and the debtor has been discharged in the Federal Court, he has the right of election to have his damages assessed in an independent action for malicious prosecution or have them assessed in the bankruptcy proceedings.

APPEAL by defendants, Arthur Goodman and Samuel Saffer, from *Harris, J.*, at February Term, 1932, of JOHNSTON. No error.

The plaintiffs are merchants, and on 5 March, 1930, and for many years prior to said date, were engaged in the business of buying and selling, at retail, dry goods, clothing and other merchandise in stores owned and operated by them at Wagram, N. C., and at Smithfield, N. C.

The defendants, other than Thomas E. Bass, are also merchants, and on 5 March, 1930, and for many years prior to said date, were engaged in the business of selling, at wholesale, merchandise of various kinds, and especially the kinds bought and sold by the plaintiffs. The defendants, Arthur Goodman and A. Schreter and Son, Incorporated, are residents of the city of Baltimore in the State of Maryland, where each has his principal place of business. The defendant, Samuel Saffer, is a resident of the city of New York, where he has his principal place of business. On 5 March, 1930, the said defendants were creditors of the plaintiffs, the aggregate amount of their several claims being in excess

of $500. These claims against the plaintiffs were all in the hands of the defendant, Thomas E. Bass, for collection. The said Thomas E. Bass is a resident of the town of Tarboro, N. C., where he is engaged in the practice of his profession as an attorney at law. He is a member of the firm of McNair, Moses & Bass, attorneys at law, and has been duly admitted to practice as an attorney in the United States District Court for the Eastern District of North Carolina.

On 5 March, 1930, the defendant, Thomas E. Bass, in the name and on behalf of his codefendants in this action, instituted an involuntary proceeding in bankruptcy against the plaintiff by filing a petition in the United States District Court for the Eastern District of North Carolina. It was alleged in said petition that the plaintiffs were then insolvent, and that while insolvent they had committed various acts of bankruptcy, as specifically alleged in the petition. The prayer of the petition was that the plaintiffs be adjudged bankrupts, in accordance with the provisions of the act of Congress. The petition was verified by the said Thomas E. Bass, as attorney for his codefendants, who were named therein as the petitioning creditors. Simultaneously with the filing of said petition the defendants prayed the court to appoint a receiver with power to take charge of and hold the property of the plaintiffs until they had been adjudicated as bankrupts, in accordance with the prayer of their petition. A receiver was thereupon appointed by the court, and said receiver, as authorized by the court, took charge of the property of the plaintiffs, including the stocks of goods in the stores at Wagram and at Smithfield, and held the same for about twenty-one days, until the receiver was discharged and said property restored to the plaintiffs by order of the court.

Immediately upon the service upon them of the petition filed by the defendants in the United States District Court for the Eastern District of North Carolina, the plaintiffs filed an answer to said petition, in which they denied the allegations therein that they were insolvent and that they had committed acts of bankruptcy as alleged by the defendants. The proceeding was thereupon referred by the Court to the referee in bankruptcy as a special master, who, after hearing evidence offered by both the petitioning creditors and the respondents, filed his report to the Court, in which he set out his findings of fact, and his conclusions thereon. The referee and special master found and so reported to the Court that the plaintiffs were solvent and that they had not committed any act of bankruptcy. He recommended that the Court dismiss the petition, and order the defendants to pay the costs of the proceeding. The report of the referee and special master was heard by the Court, and confirmed in all respects. It was ordered that the petition filed by

the defendants be and the same was dismissed, and that the defendants pay the costs of the proceeding. It was further ordered by the courts that the cause be and it was retained for the purpose of making allowances for costs, expenses and damages occasioned to the plaintiffs by the seizure, taking and detention of their property, as provided for in the bond filed in the proceeding by the defendants, as petitioning creditors, and "for no other purpose." This order was made on 26 April, 1930.

At the date of the institution of the involuntary proceeding in bankruptcy by the defendants against the plaintiffs, the defendants filed a bond in said proceeding. This bond was in the sum of $1,000, and was conditioned for the payment to the plaintiffs by the defendants of all costs, expenses and damages occasioned by the seizure, taking and detention of the property of the plaintiffs, as the result of the filing of the petition in said proceeding, in the event that said petition was dismissed. After the answer to the petition was filed by the defendants, it was ordered by the court that the defendants, as petitioning creditors, file a bond in the sum of $10,000, with like condition as the bond filed by them in the sum of $1,000. The defendants did not comply with this order.

This action was begun in the Superior Court of Johnston County on 28 October, 1930. The summons was duly served on the nonresident defendants by publication. Attachments levied on the property of said defendants in this State were vacated on 10 November, 1930, upon the filing by said defendants in this action of a bond in the sum of $16,000, with the Fidelity and Deposit Company of Maryland, as surety, conditioned that the said defendants pay such judgment as may be rendered against them in this action, together with all costs.

At the trial of the action, motions for judgments as of nonsuit, made at the close of the evidence for the plaintiffs by the defendants, A. Schreter and Son, Incorporated, and Thomas E. Bass, were allowed, and as to these defendants, the action was dismissed. Issues arising on the pleadings, involving the liability of the other defendants, were submitted to the jury and answered as follows:

"1. Did the defendant, Arthur Goodman, maliciously and without probable cause, file and prosecute a petition in bankruptcy against the plaintiffs, as alleged in the complaint? Answer: Yes.

2. Did the defendant, Samuel Saffer, maliciously and without probable cause, file and prosecute a petition in bankruptcy against the plaintiffs as alleged in the complaint? Answer: Yes.

3. What amount of damages, if any, are the plaintiffs entitled to recover? Answer: $6,320."

From judgment on the verdict that plaintiffs recover of the defendants, Arthur Goodman and Samuel Saffer, and of the Fidelity and Deposit Company of Maryland, as surety on the bond filed in the action, the sum of $6,320, with interest on said sum from 22 February, 1932, and the costs of the action, the defendants appealed to the Supreme Court.

R. L. McMillan, C. A. Douglass, F. H. Brooks and Parker & Lee for plaintiffs.

Varser, Lawrence, McIntyre & Henry and Abell & Shepherd for defendants.

CONNOR, J. The first contention of the defendants on their appeal to this Court is that no action to recover damages for malicious prosecution can be maintained where it is alleged in the complaint, and contended at the trial, that the damages resulted from the institution by the defendants of an involuntary proceeding in bankruptcy against the plaintiffs, by a petition filed in a United States District Court, as provided by the act of Congress, although it is alleged in the complaint and shown at the trial that such proceeding was instituted with malice, and without probable cause, and had been terminated before the commencement of the action by the dismissal of the petition. This contention is presented by defendants' assignment of error based upon their exception to the refusal of the court to allow their motion for judgment as of nonsuit. Defendants did not demur to the complaint, for the obvious reason that it is alleged therein, not only that the defendants filed the petition praying that the plaintiffs be adjudged bankrupts, but also that at the time of filing the petition, the defendants procured the appointment by the court of a receiver, who, as authorized and directed by the court, at once took charge of and held the property of the plaintiffs for about twenty-one days, during which time the plaintiffs suffered damages in a large sum, by reason of the seizure and detention of their property. In support of their contention, the defendants rely upon the principle that no action for the malicious prosecution of a civil action by the defendants against the plaintiffs, can be maintained, as was held by this Court in *Terry v. Davis,* 114 N. C., 31, 98 S. E., 943. This principle, however, as stated in the opinion in that case, is subject to certain exceptions. It is there said that an action will not lie for the malicious prosecution of a civil action, unless there was an arrest of the person, or a seizure of property, as in attachment proceedings at law, or their equivalent in equity, or in proceedings in bankruptcy or like cases when there was some special damage resulting from an action and

which would not necessarily result in all cases of the like kind. In *Shute v. Shute,* 180 N. C., 386, 104 S. E., 764, it is said by *Clark, C. J.,* "That actions for malicious prosecution will lie when there has been interference with person or property in civil proceedings where the circumstances justify a charge of malicious prosecution, is tacitly recognized in many cases. *Estates v. Bank,* 171 N. C., 579, 88 S. E., 783, *Wright v. Harris,* 160 N. C., 542, 76 S. E., 489, *Carpenter v. Hanes,* 167 N. C., 555, 83 S. E., 577."

An involuntary proceeding in bankruptcy, instituted by a petition duly filed in a United States District Court, as provided by the act of Congress, by creditors, praying that their debtor be adjudged a bankrupt, is not a mere civil action against the debtor for the collection of the debt due by him to the petitioning creditors; the primary purpose of the proceeding, for the relief of such creditors, is to impound the property of the debtor in the custody of the court, in order that it may be equitably distributed among all the creditors, upon the adjudication of the debtor as a bankrupt. 7 C. J., 46. The fact that the debtor, after his adjudication as a bankrupt may file a petition and be discharged by the court from personal liability for his debts, does not affect the principle that the proceeding is not a civil action. In the instant case, it is alleged and shown by the evidence not only that defendants filed the petition, but also that they procured the seizure and detention of the property of the plaintiffs by a receiver, with malice and without probable cause. The contention that plaintiff cannot maintain this action, and that it was therefore error to refuse the motion for judgment as of nonsuit, cannot be sustained.

We have considered the assignments of error on this appeal based upon defendants' exceptions to rulings of the court on defendants' objections to evidence offered by the plaintiffs at the trial. These assignments of error cannot be sustained. The evidence tending to show that the defendant, Arthur Goodman, and a salesman of the defendant, Samuel Saffer, who had collected money from the plaintiffs on his account, had threatened to ruin the credit of the plaintiffs in Baltimore and New York, was competent and properly admitted for the purpose of showing malice on the part of the defendants in filing and prosecuting the petition in bankruptcy against the plaintiffs. The evidence tending to show the standing of the plaintiffs as business men and merchants in Wagram and in Smithfield, was competent and properly admitted for the purpose of showing the damages which they suffered by the wrongful acts of the defendants. The order of the United States District Court, dismissing the petition, and discharging the receiver, upon the findings of the special master that plaintiffs were solvent, and had committed

no act of bankruptcy, which were approved by the judge, showed that the proceedings in involuntary bankruptcy had terminated before the commencement of this action. Its retention by the court solely for the purpose of hearing plaintiffs' motions for allowances for costs and expenses, and the assessment of damages, did not show the contrary. The plaintiffs had the right, at their election, to have their damages caused by the wrongful acts of the defendants assessed in this action, rather than in the bankruptcy proceeding. *Shute v. Shute, supra.* The defendants, who failed to comply with the order of the United States District Court that they file a bond in said court in a sum adequate for the protection of the plaintiffs, cannot complain that plaintiffs, instead of moving in said court for an assessment of their damages, brought this action.

The court instructed the jury with respect to want of probable cause in accordance with the law uniformly applied in the courts of this State and elsewhere. There was no error in the charge of the court to the jury. The judgment is affirmed.

No error.

B. H. STANCILL, THE CHICKAMAUGA TRUST COMPANY, TRUSTEE, AND THE PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA, v. J. B. NORVILLE, THE PINETOPS BANKING COMPANY, HENRY C. BOURNE, TRUSTEE FOR PINETOPS BANKING COMPANY, MRS. G. A. STANCILL AND O. D. INGRAM, TRUSTEE FOR MRS. G. A. STANCILL.

(Filed 2 November, 1932.)

1. Limitations of Actions B b—Statute runs from time fraud or mistake is discovered or should have been discovered with due diligence.

While subsection 9 of C. S., 441, originally applied only to actions for relief on the ground of fraud in cases solely cognizable by courts of equity, by statutory amendment and the decisions of our courts it now applies to all actions for relief on the ground of fraud or mistake, and bars all actions therefor within three years from the discovery of the fraud or mistake or from the time such fraud or mistake should have been discovered in the exercise of due diligence.

2. Same — Docketed judgment held sufficient notice to start statute running against action for mistake relating to priorities of liens.

The owner of lands made application to plaintiff for a loan to pay off the mortgages thereon, and the application was accepted under an agreement that the loan should be secured by a mortgage which should constitute a first lien on the lands. Before the execution and registration of the plaintiff's mortgage a judgment against the mortgagor was docketed. The

prior mortgages were paid out of the proceeds of the loan and canceled of record, and the plaintiff's mortgage was registered, the plaintiff having no actual knowledge of the docketing of the judgment, and thinking his mortgage constituted a first lien on the lands in accordance with the agreement. Upon issuance of execution on the judgment the plaintiff restrained the execution sale and brought this action seven years after the cancellation of the prior mortgages to revive them and to have the plaintiff declared subrogated to the rights of the beneficiaries thereunder on the ground that they were canceled through the mistake of the plaintiff in thinking his mortgage would constitute a prior lien on the lands: *Held*, the docketed judgment was a lien on the land itself which an examination of the records would have disclosed and the plaintiff's cause of action is barred by the three-year statute of limitations. C. S., 441(9).

APPEAL by J. B. Norville from *Cranmer, J.*, at January Term, 1932, of PITT.

Controversy without action upon an agreed statement of facts, among which are the following:

On 16 June, 1922, B. H. Stancill made a written application to the Chickamauga Trust Company, of Raleigh, agent of the Prudential Life Insurance Company of America, for a loan of $5,000 for a term of ten years. The loan was approved, and on 11 July, 1922, Stancill executed a note for this sum payable to the Prudential Life Insurance Company of America, or its order, on or before ten years from the date thereof in annual installments, and at the same time in order to secure the note and interest executed to the Chickamauga Trust Company as trustee for the Insurance Company a deed of trust on 200 acres of land situated in Pitt County, which was duly registered in said county on 20 July, 1922.

At this time there appeared of record in the office of the register of deeds of Pitt County the following two deeds of trust covering the same tract of land:

(a) A deed of trust from B. H. Stancill to Henry C. Bourne, trustee for Pinetops Banking Company, dated 1 January, 1922, securing a note in the sum of $4,160.33, due 1 January, 1923, the said deed of trust having been filed for record 13 February, 1922, and recorded in Book H-14, page 615.

(b) A deed of trust from B. H. Stancill to O. D. Ingram, trustee for Mrs. G. A. Stancill, dated 16 March, 1922, filed for record 18 March, 1922, and recorded in Book K-14, page 72, securing a note in the sum of $3,500 due 1 January, 1924.

At the same time there appeared of record in the office of the clerk of the Superior Court of Pitt County in judgment docket 25, page 232, a judgment in favor of J. B. Norville and against B. H. Stancill and J. M. Norville, in the sum of $2,546.46, with interest from 1 March,

1922, said judgment appearing to have been docketed on 22 June, 1922, and being a transcript of judgment from Edgecombe County.

B. H. Stancill borrowed the money from the Prudential Company for the purpose of paying the lien held by the Pinetops Banking Company, and the Prudential Company made the loan to Stancill upon his agreement to execute a deed of trust on the premises, expecting said deed of trust to be a first lien thereon.

From the proceeds of the loan made by the Prudential Company to Stancill the sum of $4,160.33 was paid over to Pinetops Banking Company on 20 July, 1922, whereupon the note and deed of trust held by said Pinetops Banking Company were duly marked paid and satisfied and the instruments were thereupon exhibited to the register of deeds and the following entry made upon the record: "The original of this instrument together with the notes secured thereby, having been exhibited to me marked paid and satisfied by the mortgagee, I herewith cancel the same of record by authority of chapter 180, Laws of 1891, being section 1046, subsection 2, Revisal of 1905. This 20 July, 1922, J. G. Gaskins, register of deeds, by J. H. Manning, D. R."

On the same date, to wit, 20 July, 1922, the deed of trust from B. H. Stancill to O. D. Ingram, trustee for Mrs. G. A. Stancill, was exhibited to the register of deeds of Pitt County, whereupon similar cancellation of record was made.

The Prudential Company, at the time of closing said loan, had no actual knowledge of the Norville judgment other than the constructive notice given by the records thereof, and did not receive any actual notice of said judgment until just a short time before the institution of this suit.

B. H. Stancill has made certain payments on the indebtedness held by the Prudential Company, and there is now due on this indebtedness a total balance of $4,250, as of 11 July, 1929. The Prudential Company has declared the entire indebtedness due and under proper accelerating provisions in the note and deed of trust, the power of sale therein is now operative.

No sums whatever have been paid on the Norville judgment since its rendition, and the full amount of principal, interest and cost thereon is now due.

Summons in the cause of J. B. Norville *v.* B. H. Stancill and J. M. Norville was issued 22 April, 1922, returnable before the clerk on 8 May, 1922, and judgment in said cause was rendered by the clerk of the Superior Court of Edgecombe County by default final on 5 June, 1922, for the failure of the defendants to file any answer thereto.

On 20 July, 1922, the note due Pinetops Banking Company was paid in full. The summons in this action was issued 3 May, 1929, and defendant duly pleaded C. S., 441, as a bar to this action.

The defendant Norville duly issued execution on his judgment against Stancill in April, 1929, whereupon plaintiffs instituted this suit and obtained a restraining order on 5 July, 1929, restraining sale under execution.

Upon the facts agreed it was adjudged that the Norville judgment could not be attacked collaterally for irregularities; that the Prudential Life Insurance Company of America is entitled to have the deed of trust to the Pinetops Banking Company revived and to be subrogated to the extent of the amount applied thereon by the Insurance Company with interest from the date of payment, not to exceed the actual balance Stancill owes the Insurance Company; also that the land described in the deed of trust is impressed with a first lien in favor of the Insurance Company in the amount of $4,250 with interest from 11 July, 1929, and that it be sold by commissioners appointed by the court.

Henry C. Bourne for appellant.

W. G. Mordecai and Harding & Lee for appellees.

ADAMS, J. The ultimate purpose of the action is to revive the two deeds of trust executed by B. H. Stancill to Henry C. Bourne and O. D. Ingram respectively as trustees and to subrogate the plaintiffs to the rights of the beneficiaries who were creditors of the grantor. The plaintiffs seek equitable relief on the ground of mistake—the mistake consisting in the entry of payment and satisfaction on the registry of each deed of trust when they had no actual knowledge of the Norville judgment. In their brief the plaintiffs assert that the real mistake of which they complain was the failure of the Prudential Company to discover the Norville judgment, which had apparent priority over the deed of trust that the Prudential Company had agreed to accept under the impression that it would be a first lien upon the land.

It is provided in C. S., 441(9), that suits for relief on the ground of fraud or mistake must be commenced within three years from the time the cause of action accrues, and this section is pleaded in bar of the plaintiff's recovery. The only questions debated in the briefs are the bar of the statute and the alleged right of subrogation. If the action is barred the doctrine of subrogation need not be considered.

The subsection just cited was formerly confined to actions for relief on the ground of fraud in cases theretofore solely cognizable by courts of equity; but in 1879 the Legislature inserted the word "mistake"

after the word "fraud" and in 1889 struck out the clause restricting relief for fraud or mistake to cases cognizable only in courts of equitable jurisdiction. Battle's Revisal, 150; Public Laws, 1879, ch. 251; Public Laws, 1889, ch. 269. While this clause remained in the statute it was regarded as a legislative declaration that the effect of the statute could not be defeated unless the fraud or mistake was such that the jurisdiction of a court of equity was alone competent to afford relief. *Blount v. Parker,* 78 N. C., 128; *Jaffray v. Bear,* 103 N. C., 165. But with the clause omitted the statute makes all actions subject to the same rule whether or not they were formerly cognizable solely in courts of equity. *Alpha Mills v. Engine Co.,* 116 N. C., 798; *Little v. Bank,* 187 N. C., 1. As the section is now written three years is the period prescribed for the commencement of actions for relief on the ground of fraud or mistake; but the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting such fraud or mistake.

When does the statute of limitations begin to run? In the earlier cases it was said that the limitation prescribed is not three years from the mistake, but from its discovery. *Stubbs v. Motz,* 113 N. C., 458; *Bonner v. Stotesbury,* 139 N. C., 3; *Tuttle v. Tuttle,* 146 N. C., 484, 493. Afterwards when the question of actual or constructive discovery arose the Court applied the principle that the means of knowledge is equivalent to knowledge and that a party who has the opportunity of knowing the facts constituting the fraud or mistake cannot be supine or inactive and for this reason assert a want of knowledge. *Peacock v. Barnes,* 142 N. C., 215. The result, as declared in a number of subsequent cases is this: the statute runs from the time the fraud or mistake is discovered or should have been discovered in the exercise of ordinary care. *Sinclair v. Teal,* 156 N. C., 458; *Jefferson v. Lumber Co.,* 165 N. C., 46; *Ewbank v. Lyman,* 170 N. C., 505; *In re Johnson,* 182 N. C., 522, 528; *Latham v. Latham,* 184 N. C., 55, 65; *R. R. v. Hegwood,* 198 N. C., 309, 316. The statement in *Taylor v. Edmunds,* 176 N. C., 325, 329, that the statute begins to run from the discovery of the facts was evidently intended to distinguish the discovery, actual or constructive, from the breach of contract as the time when the period of limitation began to operate.

It has been correctly held that the simple registration of a deed is not sufficient to give notice that a fraud has been committed. *Modlin v. R. R.,* 145 N. C., 218, 227; *Tuttle v. Tuttle, supra; Rhodes v. Tanner,* 197 N. C., 458. It is claimed that by analogy a docketed judgment is not sufficient notice of mistake. Mistake or fraudulent representations in procuring the execution of a deed do not usually appear upon the

face of the instrument or upon the registry, and neither the instrument nor the registry generally imparts or necessarily suggests notice of fraud. It is otherwise when the record itself constitutes an encumbrance upon property the title to which is under investigation. In this case the docketed judgment was a lien on the land and was itself an encumbrance which an examination of the record would have disclosed. *Sanderlin v. Cross,* 172 N. C., 242.

The statute of limitations began its course when the mistake complained of should have been discovered. There is no evidence of fraudulent concealment as in *Dunn v. Beaman,* 126 N. C., 766, and *S. v. Gant,* 201 N. C., 211.

The action was instituted on 3 May, 1929, and we are of opinion that upon the agreed facts it is barred by the statute of limitations.

Error.

J. E. SINGLETON v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 2 November, 1932.)

1. Carriers B h: Contracts A c—Rule that railroad cannot limit liability for negligence applies to duties as common carrier.

The rule that a common carrier may not contract against liability for its negligence applies to transactions in the performance of its duties to the public as a common carrier and not to transactions involving no public duty or obligation.

2. Same—Goods on railroad platform were not for shipment by rail and railroad could contract against negligent injury thereto.

Where a railroad company issues a revocable, nontransferable license permitting the licensee to assemble and handle baled cotton on the company's platform upon condition that the railroad would not be liable for the negligent destruction of the cotton, and this agreement is set out in a written contract which, by its terms, is applicable only to such cotton which had not been tendered or accepted by the carrier for shipment and for which no bill of lading had been issued, and the contract does not obligate the licensee to ultimately ship by rail, and it appears that a large part of the cotton was shipped by truck: *Held,* in executing the contract the licensee was not undertaking to deal with the railroad company as a common carrier, but he executed the contract for his own convenience in using a part of the platform, and the contract bars an action by the licensee to recover for the negligent destruction of the cotton.

3. Contracts D d—In order for conduct to constitute abandonment it must be positive unequivocal and inconsistent with contract.

A valid written contract may be abandoned by agreement, conduct, or by the substitution of a new and inconsistent contract, but in order for conduct to constitute an abandonment of a contract such conduct must be positive, unequivocal, and inconsistent with the terms of the instrument.

4. Evidence J a—Parol evidence of intent of party is not admissible when contrary to the terms of the written instrument.

Evidence of the intent of one of the parties to a written contract is not admissible against the other when it is contrary to the intent expressed in the contract itself under a proper interpretation of the instrument.

CIVIL ACTION, before *Burnhill, J.*, at March Term, 1932, of ROBESON.

The evidence tended to show that the defendant is the owner of a platform in the town of Red Springs, North Carolina, and that the plaintiff is a cotton raiser and cotton buyer. Various people placed cotton on said platform. "This platform was the general weighing place for Robeson people bringing their cotton in and weighing it." The agent for the defendant said: "Other people put cotton on this platform besides buyers. He did purchase a great deal of cotton. Cotton was shipped from that platform. I do not recall Mr. Singleton having shipped any . . . that was the place they put the cotton for shipment, and the railroad took it from that platform. The railroad did not have the scales there nor owned the scales. The public weigher had the scales. The railroad permitted him to have his scales on the platform. . . . A large quantity of cotton was moved from the platform at that time by a truck. Cotton would be placed on the platform, weighed, sold elsewhere and moved by truck. A large part of the cotton at that time was placed on the platform and weighed by the cotton weigher and moved by truck and not by train."

On 17 October, 1924, the plaintiff and the defendant entered into a contract as follows: "In consideration of this revocable and nontransferable license granted the undersigned to assemble and handle baled cotton on the premises of Atlantic Coast Line Railroad Company, at Red Springs, N. C., in the State of North Carolina from date of the execution of this instrument until its cancellation, said cotton not having been tendered or accepted for shipment and bill of lading not having been issued therefor but ultimately for movement via said railroad, the undersigned licensee recognizing the great danger and hazard to said cotton due to its being so situated, hereby agrees to indemnify and save harmless the Atlantic Coast Line Railroad Company from any and all liability for loss or damage to said cotton while so placed on said railroad company's premises, due to any cause or causes whatsoever, whether occasioned by the negligence of said railroad company, its agent or employees, or otherwise, and against any and all claims, demands, suits, judgment and costs based thereon."

On Saturday afternoon, 13 February, 1926, the plaintiff had sixty bales of cotton upon said platform and an engine of the defendant negligently put out fire, igniting the cotton and destroying it, together with

certain hay. The value of the cotton destroyed by fire was $3,422.86, and the damage to the hay was $320.50. The plaintiff instituted an action to recover the value of the cotton and the hay, and the defendant relied upon the contract as a bar to recovery of the value of the cotton.

The following issues were submitted to the jury:

1. "Was the plaintiff's property damaged by the negligence of defendant as alleged?"

2. "If so, what damage, if any, was done to plaintiff's cotton?"

3. "If so, what damage, if any, was done to plaintiff's hay?"

4. "Was the paper-writing referred to as the release set out in defendant's further answer, executed by the plaintiff as alleged by the defendant?"

5. "If so, has said contract been canceled or abandoned as alleged by the plaintiff?"

The jury answered the first issue "Yes," the second issue "$3,422.86, with interest to date," the third issue "$320.50, with interest to date," the fourth issue "Yes," the fifth issue "No."

Judgment was entered in favor of plaintiff for the sum of $320.50, from which judgment the plaintiff appealed.

Varser, Lawrence, McIntyre & Henry for plaintiff.
Dickson McLean and H. E. Stacy for defendant.

BROGDEN, J. The primary question of law may be stated as follows: Was the contract or lease valid and enforcible as a bar to recovery for the value of cotton negligently destroyed by fire?

The plaintiff insists that the contract or lease entered into by the parties in October, 1924, was contrary to public policy and void, for the reason that said contract permitted the defendant to relieve itself from the consequence of its own negligence. It is well settled here and elsewhere that a common carrier, while performing its duties to the public, cannot contract against its negligence. *Mule Co. v. R. R.*, 160 N. C., 215, 76 S. E., 513; *Cooper v. R. R.*, 161 N. C., 400, 77 S. E., 339. The defendant insists that the rule of law forbidding common carriers to relieve themselves of liability for negligence applies only to transactions in which the carrier is discharging his duty to the public and not to transactions involving no public duty or obligation. This distinction is pointed out and applied in *Slocumb v. R. R.*, 165 N. C., 338, 81 S. E., 335. In that case the railroad company leased a part of its right of way for the erection and maintenance of a distillery. The distillery was destroyed by fire, resulting from the negligence of defendant. The Court said: "It is well settled here and elsewhere that a common carrier while performing its duties to the public cannot contract against its negli-

gence; but the public had no interest in the plant of the plaintiff or in the lease between him and the defendant, and the authorities seem to be uniform that such contracts are not against public policy and are enforcible." Hence recovery was denied. The *Slocumb case* has been cited and applied by the Circuit Court of Appeals in *Southern Railway Co. v. Stearns Bros.*, 28 Fed. (2d), 560. *Parker, Circuit Judge,* wrote: "It is well settled that a railroad company cannot contract against liability for its negligence with respect to the performance of its duty as a common carrier. This rule has no application, however, to contracts by which it leases portions of its right of way for uses not connected with the discharge of its duty as such carrier. The public has no interest in such contracts, and a provision that the railroad is not to be held liable for negligence resulting in damage to property placed upon the leased premises is not void as being contrary to public policy. This is the holding not only of the Federal Courts, but also of the courts of North Carolina, by whose public policy the validity of the contract is to be governed." See, also, *Godfrey v. Power Co.*, 190 N. C., 24, 128 S. E., 485. A case directly in point is *German-American Ins. Co. v. Southern Ry. Co.*, 58 S. E., 337. In that case cotton upon a platform of the railroad company was destroyed by fire. The Supreme Court of South Carolina said: "The authorities generally hold that a contract by a railroad corporation is not against public policy because it exempts from liability for fires, even negligently communicated by its agents or defective instrumentalities to property placed by the owner upon railroad premises, not as a patron dealing with the company as a common carrier, but by virtue of the special agreement."

In the case at bar the plaintiff did not place his cotton upon the platform as a patron of the defendant, for the reason that the contract or lease expressly states that "said cotton not having been tendered or accepted for shipment, and bill of lading not having been issued therefor but ultimately for movement via said railroad," etc. It is to be observed that the contract did not obligate the plaintiff to "ultimately" ship the cotton by railroad, and there is abundant evidence in the case that substantial portions of cotton placed upon the platform were moved by truck and not tendered to the defendant for shipment. Consequently, the Court is of the opinion that the facts disclose that the plaintiff in making the contract, was not undertaking to deal with the railroad in its capacity as common carrier, but rather for his own convenience upon the basis of using a portion of the right of way for the purpose of assembling cotton. Hence the special agreement or lease agreement constituted a bar to the right of recovery for negligent destruction of the cotton.

Two secondary questions of law are urged by the plaintiff. First, that the contract was abandoned, and second, that the trial judge excluded certain evidence offered by the plaintiff tending to show that the lease or special agreement was intended by the parties to apply only to a certain lot of cotton which the plaintiff had on the platform at the time the contract was executed.

When a valid contract has been duly executed it is presumed to remain in force and effect until it is abandoned or relinquished. This Court has declared that "a written contract may be abandoned or relinquished: (1) by agreement between the parties; (2) by conduct clearly indicating such purpose; (3) by substitution of a new contract inconsistent with the existing contract." *Bixler v. Britton,* 192 N. C., 199, 134 S. E., 488. It is not contended that the first or third method of contractual abandonment was effective in this case. Hence the second method or abandonment by conduct is the only method available to the plaintiff. Upon that aspect of the law, the Court has spoken in these words: "But it is clear that the acts and conduct constituting such abandonment must be positive, unequivocal and inconsistent with the contract." *Robinet v. Hamby,* 132 N. C., 353, 43 S. E., 907. See, also, *Harper v. Battle,* 180 N. C., 375, 104 S. E., 658. Nor did the trial judge err in excluding the testimony as to the understanding and intent of the plaintiff at the time the written contract was executed. The controlling principle of law was tersely stated in *Walker v. Venters,* 148 N. C., 388, 62 S. E., 510, as follows: "A contemporaneous agreement shall not contradict that which is written. The written word abides and is not to be set aside upon the slippery memory of man."

The plaintiff relies upon *Herring v. R. R.,* 189 N. C., 285, 127 S. E., 8. However, an examination of the facts in that case indicates that the plaintiff was dealing with the railroad company as a patron or in its capacity as a common carrier.

No error.

MRS. PEARL C. BAIN v. TRAVORA MANUFACTURING COMPANY.

(Filed 2 November, 1932.)

Master and Servant F b—Injury caused by stray bullet fired by third person at sparrow in public highway held not compensable.

In an application for compensation under the provisions of the Workmen's Compensation Act, evidence tending to show that the employee at the time of the injury was attending a switch light on the premises of the employer in the course of his duties, and was struck and injured by a

stray bullet from the gun of a third person who was shooting at sparrows across a public highway, is sufficient to sustain a finding by the Industrial Commission that the accident did not arise out of and in the course of the employment, and such finding is not reviewable by the courts.

CIVIL ACTION, before *Midyette, J.*, at May Term, 1932, of ALAMANCE.

The evidence tended to show that plaintiff's intestate, Grover C. Bain, was employed by the defendant as a general utility man and required to perform the major portion of his duties on the outside of the mill. In the performance of his duties he was required to attend a switch lamp at a railroad siding upon the premises of the company. On 7 August, 1930, about noon, while on his way to attend the switch light, he was accidentally injured by reason of being struck by a bullet fired by one W. C. Thomas. The injured man died on or about 23 August, 1930. Thomas was not an employee of the defendant, but was a salesman or clerk in a store located upon the premises of the defendant but leased by it to a third party. Thomas was shooting at an English sparrow across the public highway and in the direction in which Bain was walking. Apparently the sparrow was in the highway and Bain was struck in the back by the bullet. There was evidence that for some time employees of the mill had been shooting sparrows on the premises of the mill, and that Thomas had also been engaged in this practice with the knowledge of the mill officials.

Claim was filed with the Industrial Commission, and the hearing Commissioner denied an award upon the ground "that the said accidental shooting did not arise out of the employment of Grover C. Bain by the Travora Manufacturing Company." Upon appeal to the full Commission and after hearing additional evidence, an award was denied "upon the finding that death of the deceased was not the result of injury by accident which arose out of and in the course of the employment."

Upon appeal to the Superior Court the ruling of the Industrial Commission was upheld and affirmed. From the judgment of the Superior Court the plaintiff appealed.

Long & Long and Long & Ross for plaintiff.
Sapp & Sapp for defendant.

PER CURIAM. There are three decided cases bearing upon the principles of law involved in the controversy, to wit: *Whitley v. Highway Commission,* 201 N. C., 539; *West v. Fertilizer Co.,* 201 N. C., 556, and *Goodwin v. Bright,* 202 N. C., 481. In the *West* and *Goodwin cases* there were elements of special hazard, or as the Court said, circumstances

bringing the employee "within the zone of special danger." In the case at bar the ultimate question is whether the shooting of a sparrow in a public highway constitutes a risk of the business. Although the facts in *Whitley v. Highway Commission, supra,* are somewhat different from the facts in the present case, notwithstanding the principle of law therein announced determines the merit of this litigation. The Industrial Commission found the facts upon competent evidence, and its findings are conclusive. Even though the facts should all be admitted, the ruling of the *Whitley case* would exclude liability.

Affirmed.

R. A. HAMILTON v. SOUTHERN RAILWAY COMPANY AND SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 9 November, 1932.)

Supersedeas B a: Torts B b—Joint tort-feasor paying judgment is entitled to contribution and supersedeas bond of other tort-feasor is liable.

The provisions of a statute in force at the time of making a contract enter into and become a part of the agreement as if fully written therein, and where a judgment has been entered against two joint *tort-feasors* and supersedeas bonds with sureties have been executed to stay execution pending appeal, C. S., 630, the provisions of C. S., 618, will be construed as incorporated in the supersedeas bonds, and where the judgment against both *tort-feasors* has been affirmed on appeal and one of them pays the whole judgment and costs and demands that the judgment be transferred to a trustee for his benefit: *Held,* it is proper for the court, upon motion duly made after notice to all parties, to order that the *tort-feasor* paying the judgment be reimbursed in one-half the judgment and costs out of the funds deposited with the clerk by the surety on the supersedeas bond of the other *tort-feasor,* C. S., 650, and the provision in the bond of such other *tort-feasor* that it should be void upon payment of the judgment by either of the parties will not be given effect, and the order discharges the clerk from liability for the funds so deposited.

CONNOR, J., dissents.

APPEALS by defendants Seaboard Air Line Railway Company and National Surety Company, from *Harris, J.,* at July Term, 1932, of WAKE. Affirmed.

The order appealed from by the Seaboard Air Line Railway Company and National Surety Company, is as follows: "This matter came on to be heard before the undersigned resident judge of the Seventh Judicial District of the Superior Court of North Carolina, at chambers at Raleigh, North Carolina, at eleven-thirty o'clock a.m. on 27 August, 1932, pursuant to notice of motion given to all parties in this cause and

was heard on motion of the Southern Railway Company and John H. Andrews, trustee for the Southern Railway Company. After argument of counsel, it appeared to the court that the record in this cause disclosed that the Southern Railway Company has paid the total amount due to plaintiff in this cause, together with the total costs accrued and has demanded assignment of judgment to the trustee for the Southern Railway Company, and upon such demand judgment in this cause was transferred and assigned by R. A. Hamilton, plaintiff, to John H. Andrews, trustee for the Southern Railway Company in accordance with the provisions of Consolidated Statutes, 618; and that the record discloses that the clerk of Superior Court of Wake County has in his hands and possession the sum of more than $20,000 deposited with him by the defendant, National Surety Company, in lieu of a supersedeas bond on the former appeal, and that the application of this fund has been ordered and directed to the satisfaction of the judgment in this cause. Now, therefore, upon motion of Messrs. Smith & Joyner, attorneys for John H. Andrews, trustee for the Southern Railway Company, and attorneys for the Southern Railway Company, it is ordered, adjudged and decreed: (1) That the clerk of the Superior Court of Wake County be, and he is hereby authorized and directed to pay to John H. Andrews, trustee for the Southern Railway Company, out of the funds of the National Surety Company now in his hands, an amount equal to one-half of the principal judgment entered in this cause and 6 per cent interest on said one-half of said judgment from 25 November, 1929, until the date of such payment by the clerk. (2) That the clerk of the Superior Court of Wake County be, and he is hereby authorized and directed to pay to John H. Andrews, trustee for the Southern Railway Company, out of the money of the National Surety Company now in his hands an amount of money equal to one-half of the court costs which have accrued in this cause of action and which have been paid. (3) That the clerk of the Superior Court of Wake County be, and he is hereby authorized and directed to pay to the National Surety Company the balance of said deposit made with him by the National Surety Company after the application and payments as hereinbefore directed in this order. Signed at Raleigh, this 27 August, 1932. W. C. Harris, judge."

To the foregoing order the National Surety Company and Seaboard Air Line Railway Company excepted, assigned error and appealed to the Supreme Court.

Smith & Joyner for John H. Andrews, trustee for Southern Railway Company and Southern Railway Company.

Murray Allen for Seaboard Air Line Railway Company.

S. Brown Shepherd for National Surety Company.

CLARKSON, J. The appeal by the Seaboard Air Line Railway Company and National Surety Company will be considered as one. They involve practically the same questions of law. The defendants railroads were sued as joint *tort-feasors* and judgment for plaintiff, R. A. Hamilton, was recovered against both in the Superior Court of Wake County, North Carolina, and they both appealed to this Court and this Court found no error in the judgment. *Hamilton v. R. R.*, 200 N. C., 543. A writ of *certiorari* to the Supreme Court of the United States was denied on 19 October, 1931. The case came here again, on appeal taken to this Court by the plaintiff, R. A. Hamilton, against the Seaboard Air Line Railway Company and the National Surety Company, *ante*, pp. 136 and 140-1. The facts, in part, on that appeal: "(1) The Seaboard Air Line Railway Company on appeal from the Superior Court to the Supreme Court of North Carolina, gave supersedeas bond with the National Surety Company, as surety in the sum of $36,000. The provision is as follows: '*Now, if the said defendants, or either of them,* shall pay to the said plaintiff the amount directed to be paid by said judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages and costs which shall be awarded against the said appellants upon said appeal, *this obligation to be null and void;* otherwise to be and remain in full force and effect.' (2) The Southern Railway Company on appeal to the Supreme Court of North Carolina, gave supersedeas bond with the United States Fidelity and Guaranty Company, as surety in the sum of $36,000. The provision is as follows: 'Now, if the said Southern Railway Company shall pay the amount it is directed to pay by the said judgment, if affirmed or appeal dismissed, or that part of the said judgment that may be affirmed, and all damages, which may be awarded against the appellant upon said appeal, then this obligation to be void; otherwise to remain and be in full force and virtue in law.' . . . After judgment was rendered against the Seaboard Air Line Railway Company, on appeal by it to the Supreme Court of North Carolina, and before decision was rendered, it became insolvent and receivers were appointed for it on 23 December, 1930, in the United States District Court for the Eastern District of Virginia." (Italics ours.) *Hamilton v. R. R., ante,* at p. 137.

In that case this Court reversed the judgment of the court below, and said, in part: "The questions involved in this appeal are (1) As to whether or not the Southern Railway Company was entitled to an order staying execution against it. (2) As to whether or not the United States Fidelity and Guaranty Company, surety upon the supersedeas bond of said Southern Railway Company, was entitled to an order staying issuance of execution against it. (3) *As to whether or not the*

National Surety Company, surety upon the supersedeas bond of Seaboard Air Line Railway Company, was entitled to a stay of execution against it. All the questions must be answered in the negative. . . . The judgment signed by Small, J., in conformity with the opinion of the Supreme Court was against the *Southern and Seaboard Air Line Railway Companies, and their sureties.* All are bound to plaintiff and the *joint defendants, tort-feasors,* must contribute. C. S., 618, provides that when payment is made by one of several joint *tort-feasors,* then transfer is to be made to a trustee for payor, etc. We can see no reason for holding up the collection of plaintiff's judgment while the defendants, *joint tort-feasors, litigate between themselves. By paying the whole judgment, the Southern Railway Company, under C. S., 618, can lose no right it has against the Seaboard Air Line Railway Company, or its surety, the National Surety Company.* The surety, the National Surety Company, is a party to the judgment and bound thereby and *cannot now raise the question of its liability* to the defendant Southern Railway Company, when it pays said judgment in full and requires the transfer of said judgment of plaintiff to a trustee by virtue of the provision of C. S., 618. The judgment below is reversed." (Italics ours.)

The National Surety Company contends that the provision of its bond is as follows: *"Now if said defendants, or either of them,* shall pay to the said plaintiff the amount directed to be paid by said judgment, or the part of such amount as to which the judgment shall be affirmed, . . . *this obligation to be null and void."* That on account of the wording of its bond, making it conditioned upon the payment by the Seaboard Air Line Railway Company, *or* the Southern Railway Company, that the National Surety Company bond is null and void, as the Southern Railway Company has paid the judgment. We cannot so hold. The position is untenable in law or morals. The Surety Company overlooks the opinion of this Court before recited and the well settled principle of law applicable in this and other jurisdictions, which is as follows: "It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of a contract, as if they were expressly referred to or incorporated in its terms. This principle embraces those which affect its validity, construction, discharge, and enforcement." *Von Hoffman v. City of Quincy,* 4 Wall., 535; *Bateman v. Sterrett,* 201 N. C., at p. 62. *Farmers & Merchants Bank v. Federal Reserve Bank,* 262 U. S., at p. 660; *Electric Co. v. Deposit Co.,* 191 N. C., at p. 658; *Supply Co. v. Plumbing Co.,* 195 N. C., at p. 635.

When the National Surety Company signed the supersedeas bond for the Seaboard Air Line Railway Company, the following statute entered into and formed a part of it, and was incorporated in its terms: C. S., 618, in part: "In all cases in the courts of this State wherein judgment has been or may hereafter be, rendered against two or more persons or corporations, *who are jointly* and severally liable for its payment either as joint *tort-obligors or joint tort-feasors,* the same has not been paid by all the judgment debtors by each paying his proportionate part thereof; *if one of the judgment debtors shall pay the judgment creditor,* either before or after execution has been issued, the amount due on said judgment, and shall at the time of paying the same, *demand that said judgment be transferred to a trustee for his benefit,* it shall be the duty of the judgment creditor or his attorney to transfer without recourse *such judgment to a trustee for the benefit of the judgment debtor paying the same;* and a transfer of such judgment as herein contemplated *shall have the effect of preserving the lien of the judgment and of keeping the same in full force as against any judgment debtor who does not pay his proportionate part thereof to the extent of his liability thereunder in law and in equity," etc.* (Italics ours.) *Peebles v. Gay,* 115 N. C., at p. 41; *Fowle v. McLean,* 168 N. C., at p. 542; *Davie v. Sprinkle,* 180 N. C., at p. 582.

In the *Hamilton appeal, supra,* the Court said: "By paying the whole judgment, the Southern Railway Company, under C. S., 618, can lose no right it has against the Seaboard Air Line Railway Company or its surety, the National Surety Company."

In accordance with the decision in the above case, premised on the statute, *the Southern Railway Company paid the whole judgment against it and the Seaboard Air Line Railway Company, joint tort-feasors,* and did as this Court said it had a right to do under the statute and transferred and assigned the judgment to John H. Andrews, trustee, for Southern Railway Company. Further John H. Andrews, trustee for payor, Southern Railway Company, and the Southern Railway Company contends: "It is a matter of record in this Supreme Court that upon the former appeal the Southern Railway filed a petition alleging that the National Surety Company held specific collateral from the Seaboard adequate to protect the National Surety Company. This allegation was not denied by any pleading or affidavit by the Seaboard Air Line or by the National Surety Company. It has not yet been denied by counsel for the Seaboard Air Line or for the National Surety Company. It must stand as an admitted fact."

There can be no question as to the liability of the Seaboard Air Line Railway Company, nor as to the National Surety Company; the latter has in its possession the collateral to pay this very liability, and the

two now combine in an attempt to defeat its just obligation. The National Surety Company, on its former appeal (*ante,* 140), in lieu of the bond made a cash deposit of $20,000 with the clerk of the Superior Court of Wake County, North Carolina. "It is ordered that execution upon said judgment against National Surety Company be and the same is hereby stayed pending said appeal upon said National Surety Company depositing with the clerk of the Superior Court of Wake County the sum of $20,000 in lieu of supersedeas bond."

The order, on this aspect, in the court below, which is now appealed from, is as follows: "That the clerk of the Superior Court of Wake County be, and he is hereby authorized and directed to pay to John H. Andrews, trustee for the Southern Railway Company, out of the money of the National Surety Company now in his hands an amount of funds equal to one-half of the principal judgment entered in this cause and 6% interest on said one-half of said judgment from 25 November, 1929, until the date of such payment by the clerk."

In Southerland, Damages, Vol. 2 (4th ed.), under "Appeal and Supersedeas Bonds," it is written, part sec. 531, p. 1765: *"In other words, the surety undertakes to pay the judgment if the condition of the bond is not fulfilled. That obligation attaches by virtue of the affirmance of the judgment. The judgment creditor is not bound to proceed against the judgment debtor, and the sureties have no right to have proceedings against them stayed until attached lands of their principal are sold. The obligee may elect which of the sureties he will proceed against or what security he will resort to for the satisfaction of his judgment.* . . . On the receipt of the mandate affirming the judgment, with interest from its date and costs, on entering a summary judgment against the sureties it should be for the amount of the original judgment, with interest and costs; the interest should not be computed to date and judgment entered for the full amount." (Italics ours.)

C. S., 630, is as follows: "Writ of *certiorari,* recordari, and supersedeas are authorized as heretofore in use. The writ of *certiorari* and recordari, when used as substitutes for an appeal, may issue when ordered upon the applicant filing a written undertaking for the costs only; but the supersedeas, to suspend execution, shall not issue until an undertaking is filed *or a deposit made to secure the judgment sought to be vacated, as in case of appeal where execution is stayed.*"

C. S., 650, in part, is as follows: "Whenever it is necessary for a party to an action or proceeding to give a bond or an undertaking with surety or sureties, *he may, in lieu thereof, deposit with the officer into court money to the amount of the bond or undertaking to be given.*"

In *Spear v. Johnson* (111 Minn., 74), 126 N. W., at p. 402, the following is written: "In cases where money is deposited with the court to

abide the event of an action, the successful party may obtain the same by applying to the court for an order to the clerk directing its payment. 13 Cyc., 1038, and cases cited. The application being made upon notice, the rights of all parties will be protected, and the clerk, custodian of the money, relieved from responsibility. Such should be the procedure in cases like that at bar, where money in lieu of an appeal bond is deposited with the clerk."

The appellant, National Surety Company, citing numerous authorities, says: "The contract as written, and not otherwise, fixed the rights and determines the liability of the surety."

This is ordinarily true, but the position absolutely ignores the well settled rule that the statute (C. S., 618) enters into and becomes a part of the contract, so the contention of appellant Surety Company that under the terms of its contract the Surety Company bond is secondarily liable and upon payment by the Southern Railway Company the bond is discharged, cannot be sustained, as the payment was under C. S., 618. We see no impairment of contract. The judgment was transferred under the statute (C. S., 618) and in accordance with the former opinion of this Court. The contention that the National Surety Company is not liable for the payment of its proportionate part thereof, half of this judgment, and Judge Harris had no jurisdiction, is without merit. The fund was in *custodia legis*, and the court had the right and power, and it was its duty to make the order. For the reasons given, the judgment of the court below is

Affirmed.

CONNOR, J., dissents.

NATHANIEL OATES BY HIS NEXT FRIEND, FANNIE OATES, v. THE TEXAS COMPANY.

(Filed 9 November, 1932.)

1. Judgments K c—In attacking judgment for fraud the facts and circumstances constituting fraud must be alleged.

A judgment may be attacked in an independent action for fraud, but the facts constituting such fraud must be sufficiently alleged to enable the court to pass upon the question, and a mere allegation that the plaintiff was deprived by the former judgment of a large sum to which he was entitled as damages is insufficient, there being no allegation of fraud on the part of counsel or the defendant, but in this case, for the purpose of deciding the case on its merits, the action is treated as a motion in the original cause attacking the judgment for irregularity.

2. Judgments E a—Consent judgment is binding on minor where it recites investigation by court and finding that it was just.

It is necessary for the court to approve and pass on a judgment by consent in a tort action in which a minor is plaintiff in order for the judgment to be binding on the minor, but where the judgment recites an investigation by the court and a finding that the compromise reached by the parties was just and reasonable such finding is conclusive in the absence of fraud, and the judgment is regular and binding until set aside in an action upon a proper showing of fraud.

3. Judgments L a—Consent judgment in this case held bar to subsequent action.

Where in a suit brought by a minor by his next friend for a negligent personal injury the parties reach a compromise and the court enters a consent judgment for the amount of the compromise and recites in the judgment that the court had investigated the facts and that the settlement was just and reasonable: *Held*, the consent judgment is binding on the minor and constitutes a bar to a later suit against the same person on the same cause of action upon allegations that the amount of the judgment was inadequate.

4. *Infants G a*—Where next friend appears in fact for infant and the court so treats him it is sufficient for jurisdictional purposes.

Where in a suit to recover for negligent injuries to a minor it appears that in fact a next friend appeared for the minor and was so treated by the court, it is sufficient for the court to acquire jurisdiction, and the fact that the record does not recite the appointment of such person as the next friend of the minor will not render the judgment invalid.

APPEAL by defendant from *Harding, J.*, at June Term, 1932, of FORSYTH. Reversed.

This is an action to recover damages for personal injury alleged to have been caused by the negligence of the defendant in 1918. The cause of injury is stated in the third paragraph of the complaint: "That on 7 December, 1918, while the plaintiff, Nathaniel Oates, at that time a child 4 years of age, was in the act of crossing Linden Street from the east to the west side, at or near the intersection of Linden and Third streets in Winston-Salem, a large truck, owned and operated by the defendant and drawn by a team of horses turned into Linden Street from Third Street, proceeding in a northwardly direction along Linden Street, and that due to the negligence of the defendant, particularly its failure to keep a proper lookout for Nathaniel Oates and other pedestrians crossing the street, and due to the recklessness, carelessness, and negligence of the driver in whipping-up the horses and in failing to have the horses under proper control, the horses and the truck suddenly and without warning ran over the body of the plaintiff, causing him to suffer excruciating pain and mental anguish and causing serious and permanent injuries to the said Nathaniel Oates as will be hereinafter more particularly set out."

Following this paragraph is a detailed statement of the injury and the prayer for relief.

The defendant pleaded in bar the following judgment rendered in the Forsyth County Court at the April Term, 1919, in an action entitled "Nathaniel Oates by his next friend, William Oates *v.* The Texas Company, Incorporated": "This cause coming on to be heard and being heard before his Honor, H. R. Starbuck, judge presiding at the April Term, 1919, of the Forsyth County Court, and it appearing to the court that the case has been compromised by the plaintiff and the defendant and that the defendant has agreed to pay the plaintiff the sum of $150, and after investigation by the court this settlement having been found to be just and reasonable:

"It is therefore ordered and adjudged: That the plaintiff recover of the defendant the sum of one hundred and fifty ($150) dollars and the costs of the action to be taxed by the clerk.

H. R. STARBUCK, *Judge Presiding.*

Consented to:

S. J. Bennett, attorney for plaintiff.

Manly, Hendren & Womble, attorneys for defendant."

The plaintiff replied, alleging that the defendant in an attempt to make a settlement of the controversy entered into an agreement with the plaintiff's father, or his attorney, to pay $150 in satisfaction of all damages and arranged for the institution of a friendly suit in the name of the plaintiff's father as next friend, by which the plaintiff should receive the sum agreed on, and that judgment was entered in accordance with the agreement. It was further alleged that no evidence was offered or proof made at the trial either as to the extent of the plaintiff's injuries or as to the question whether the judgment was for the welfare of the plaintiff, and that the judgment given in the county court in 1919 is null and void. The defendant denied the reply, and when the cause came on for trial the judge of the county court being of opinion that the former judgment is a bar dismissed the action. On appeal the Superior Court reversed this judgment and remanded the cause for trial. The defendant excepted and appealed.

Manly, Hendren & Womble for appellant.

Ingle & Rucker for appellee.

ADAMS, J. In the county court, at April Term, 1919, the plaintiff, who appeared in the cause by his father as next friend, recovered a judgment for the injury complained of in the present action, and on 20

May his attorney signed and filed a receipt for $156.70 in full payment of the principal and costs. By his mother as next friend he brought the pending suit on 6 July, 1931, and now prays judgment for additional damages alleged to have resulted from his injury. The defendant answered, pleading in bar the judgment of the county court, and the plaintiff filed a reply in which he challenged the validity of the former judgment. In his reply he alleged that this judgment is void and not binding in any way, but in his brief he seems to treat it as voidable.

Of course a party may attack a judgment for fraud by an independent action, but he must set forth facts and circumstances by which the court may finally determine whether fraud is sufficiently alleged; and in this respect the plaintiff's pleading, we think, is defective. He frankly disavows any fraudulent conduct on the part of counsel who participated in the former proceeding and none is charged against the defendant. The only color of fraud is the allegation that if the judgment binds the plaintiff he will be deprived of his rights and damages to the extent of $25,000. It is insisted, however, that the action should be treated as a motion in the cause and that the judgment should be set aside for irregularity. We prefer to rest our decision upon the merits of the controversy and not upon a technicality in procedure.

The plaintiff makes his contention upon the settled principle that where issues are joined in an action between an infant and an adverse party and no evidence is introduced at the hearing, it merely appearing that an agreement is made by the parties that judgment be entered by consent, the judgment will not be binding upon the infant. To support this position the plaintiff cites several cases to which brief reference may be made. The proposition just stated is clearly set out in *Ferrell v. Broadway,* 126 N. C., 258; but the Court was careful to guard against misunderstanding by saying, "We are not intimating by making this order to remand the case, that a next friend of the infants cannot agree to a consent decree or judgment in a case where all the facts are developed and found by the court, and an order made that the arrangement would be best for the interest of the infants." In *Rector v. Logging Co.,* 179 N. C., 59, the Court adhering to the doctrine that a next friend is without authority to compromise and adjust a claim in tort without the sanction and approval of the trial judge after an investigation of the facts, concluded that final decision on the matters in controversy ought to await a full disclosure of the facts, the defendant meantime having raised an issue of fraud. Substantially the same course was pursued in *Patrick v. Bryan,* 202 N. C., 62. According to the record in *Keller v. Furniture Company,* 199 N. C., 413, judgment was given for the plaintiff in the first suit without any investigation of

the facts and was afterwards set aside on this ground by the judge who tried the cause.

In the case before us the facts are easily distinguishable. Here the judgment recites an investigation by the trial court and a finding that the settlement was just and reasonable. If "just and reasonable" the compromise was not prejudicial to the infant. To assail the judge's finding without allegation and proof of fraud would be equivalent to an impeachment, not of irregularity in the procedure, but of the essence of the judgment—a denial of the specific act which the court declares it performed. We should be reluctant to concede that the verdict of a jury, after the lapse of twelve years, can supersede the solemn adjudication of the trial judge concerning a judicial matter peculiarly within his own experience. In the absence of fraud his finding is conclusive, even if it should be granted that without an investigation of the facts the consent judgment might have been deemed "colorable and collusive."

The appellee suggests that there is no record or recital of an appointment of a next friend for the plaintiff in the first action. There was an allegation in the complaint that William Oates had been duly appointed as his next friend. But if not duly appointed, as was said in *Tate v. Mott*, 96 N. C., 19, 27: "He did irregularly what was necessary and proper to be done by a next friend. It must be so taken, because as we have said, the court recognized him as serving a proper purpose—that of a next friend—and acted upon the appearance of the infants by him. Otherwise, it would not have granted the prayer of the petition. It was essential that there should be an appearance by a next friend, who ought to have been regularly appointed, but as one appeared in fact, and the court so treated him, that was sufficient for the purpose of acquiring complete jurisdiction." The judgment of the Superior Court is

Reversed.

CHARLES H. KING v. BYNUM PRINTING COMPANY.

(Filed 9 November, 1932.)

Master and Servant C b—Evidence held insufficient to show that employer failed to exercise due care to furnish reasonably safe place to work.

Where the evidence discloses that the plaintiff was employed in the defendant's composing room in a commercial printing company, that there were a number of machines in the room with alleys or walkways between them, and that in the usual method of doing the work there

was a small box on wheels used for the purpose of carrying metal from the machines back to the melting pot, and that the truck or box was moved about the alleys as the progress of the work required, that the plaintiff was an experienced workman and knew of such conditions and that in attempting to cross the room in the performance of his duties he tripped and fell over the movable metal box which was in the walkway, and the plaintiff testifies that he saw the box after he fell over it: *Held*, the evidence is insufficient to establish the contentions of the employee that the room was improperly lighted and that the employer failed to exercise reasonable care to furnish a reasonably safe place to work, it being evident that the employee knew that the movable metal box was shifted about the room as the progress of the work required and that he could have seen it and avoided the injury in the exercise of reasonable care for his own safety.

CIVIL ACTION, before *Devin, J.*, at Fall Term, 1932, of WAKE.

This was a civil action for damages for personal injury sustained on 4 June, 1929. The alleged elements of negligence consisted in the failure to furnish plaintiff a reasonably safe place in which to work, for that a truck was negligently left in a walkway in the printing establishment of defendant, and that the room in which plaintiff was working was poorly lighted. The plaintiff was an experienced workman and had been working for the defendant in the same capacity approximately eighteen months prior to his injury.

Plaintiff's narrative of his injury is as follows:

"I was employed by this company in the capacity of compositor. My duties were to set type and make up book forms and do general run of commercial work. My duties were usually performed in the composing room. The composing room was on the first floor in the rear of the building. The type which was used in connection with my work was in the cases, in the stand, about in the office, by office I mean composing room. I cannot give you the exact dimensions of the composing room, it is approximately fifty feet square. The composing room had in it the following fixtures: Frames for type work where cases were kept in frames, stones for locking up the forms, linotype machines, casting machines and a number of composing machines." Between rows of machines in the room there was an open space about four feet wide, sometimes referred to in the testimony as an alley way or walkway for employees. Continuing the narrative, plaintiff further said: "The end of the path to the composing room was back to the rear near a window and it was about 4:30 in the afternoon and Mr. Carder come to me and asked me how long it would take me on that job, and he said as soon as you finish that job here are a couple of cards for the Carolina Power and Light Company that I want you to set up, and he said this one on

the first case I have got to have the proof by nine o'clock in the morning. That order required moving from where I was to get to other type which was located in another place in the room. The type that had to be used in connection with that job was located on the west side of the building, 25 or 30 feet from where I was. As I finished with this job and took the two cards they told me they wanted and I started with them and I stepped around out of one alley way into another. That was the usual way to go to the place where I started. When I started down this alley looking in the alley way and using every precaution that I could, there was a truck there, box I should say two feet wide and four feet long and similar in color to the floor, I guess it was about eight inches high with rollers on it, small iron rollers. This box was strictly under the supervision of Mr. Carder and it was used for transporting metal to and from the composing room to the machines. It would take the old metal back to the melting room. . . . When I stepped around into the second alley way, that is when I struck my foot against the truck and fell. I could not see this truck until I came in contact with it. At that point the lights in the building were very poor. I did not know the truck was there. When I came in contact with it I fell, struck my foot on it and my composing stick flew out of my hand and I fell to the floor and it knocked a hole in the right side of my ankle, the inner side. . . . I did not report my condition to the foreman at that time . . . but I reported it next morning. . . . I have seen a box there, I suppose it was for the purpose of raking off slugs and rolling them back to be melted. I have seen it filled and rolled out. In this very shop I have seen men kill linotype, place the slugs in a box on wheels for the purpose of rolling it back to the melting pot to be melted over again. Whatever was done about killing the type or linotype slugs and placing them in a box, it stayed there until enough was placed there before it was rolled back, was done right there in the room where I was. . . . I have seen the stone man break the slugs up to be rolled back to be melted again. I could not say how often it was done. I have seen the box there and I suppose it was there for that purpose. I have seen it filled and rolled out. . . . I have taken the chase clear off the form and rolled them off in a truck before carrying them there and dumped them in a box. I have never raked them off in a truck at Bynum Printing Company, but the way I say is the accepted and usual procedure. . . . I should judge I struck the center of my ankle against the truck from the hole it knocked in there. I found out there was a truck there when I fell there. After I fell over it I saw it. I did not see it before. I saw it after I struck it. Naturally I saw it when I looked at it; of course, I was not blind. I could not tell you how many

times I had seen it. I had seen them push them but I did not know whether the man used it that way or whether he pushed it with a stick or how."

The evidence further tended to show that the plaintiff continued his work with the defendant until June, 1930. Plaintiff said: "I brought this suit in July, 1930, after I had been discharged."

Issues of negligence, contributory negligence, assumption of risk and damages were submitted to the jury and answered in favor of plaintiff. Damages were awarded in the sum of $3,500, and from judgment on the verdict the defendant appealed.

C. A. Douglass and Simms & Simms for plaintiff.
John M. Duncan, E. E. Duncan and Murray Allen for defendant.

BROGDEN, J. The material elements of negligence alleged as constituting a cause of action are: (1) that the composing room was poorly lighted, and (2) that a slug truck was permitted to remain in an open space before rows of machines, which open space or walkway was used by employees in going from one part of the room to another in the performance of their duties.

The testimony of plaintiff clearly discloses that the slug truck was a customary and essential appliance or piece of equipment. It was designed for the purpose of being moved from place to place in the room as the progress of the work required. No defect appeared in its construction, and the plaintiff, an experienced printer, knew that when "men killed a linotype" they "place the slugs in a box on wheels for the purpose of rolling it back to the melting pot to be melted over again. It stayed there until enough was placed there before it was rolled back." Consequently the location of this piece of movable equipment shifted to accommodate the changing conditions of the work. The principle of law applicable to such changing conditions of work was declared and applied in *Brown v. Schofields Sons Company,* 174 N. C., 4, 93 S. E., 381. The Court said: "The place where plaintiff was standing when hurt was not a place within the legal signification of that term. It was a condition liable to change at any moment whenever the prosecution of the work required plaintiff to change his position. The defendant's foreman could not possibly be aware of such changing conditions unless he was personally present all the time and exercising that vigilance for plaintiff which the law required him to exercise for himself." Further quoting from a former decision, the Court said: "This Court has often held that an employer's duty to provide for his employees a reasonably safe place to work does not extend to ordinary conditions arising during

the progress of the work when the employee doing his work in his own way can see the dangers and avoid them by the exercise of reasonable care."

The principle of liability involved in the case at bar is similar to that announced in *Miller v. Globe Mfg. Co.*, 202 N. C., 254. In that case a workman in the cabinet room of defendant stepped on a "dowel pin" lying on the floor, causing him to fall and break his leg. The plaintiff said: "The reason that I stepped on it was not because the dowel pin was so small I could not see it, I was not looking." The Court, speaking through the *Chief Justice*, said: "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 reasonable prevision on the part of the defendant." See, also, *Owenby v. Power Co.*, 194 N. C., 129, 138 S. E., 529; *Weatherman v. Tobacco Co.*, 198 N. C., 603, 152 S. E., 796; *Goddard v. Southern Desk Co.*, 199 N. C., 22, 150 S. E., 608.

Cases involving injuries to third parties or customers in stores have no application to the present controversy.

The plaintiff was an experienced employee and thoroughly familiar with the methods of work pursued in the composing room. The slug truck was a part of the movable equipment necessary for the proper performance of the work. The plaintiff neither alleged nor testified that the particular space in which the slug truck was parked, was the only walkway or alley way open to his use in performing the duty required by the employer. If a chair or a tool or dowel pin had been left in the walkway in all probability the same result would have been produced.

The plaintiff, however, asserts that the room "was poorly lighted," the injury occurred at 4:30 in the afternoon, and plaintiff said, "After I fell over it I saw it. I did not see it before. I saw it after I struck it. Naturally, I saw it when I looked at it; of course, I was not blind." There is no evidence that there was any change in the light before he fell and afterwards. Manifestly plaintiff, as the evidence discloses, was in a hurry, doubtless attempting to serve his employer the best he could, but the truck was there and the plaintiff could have seen it. It was said by this Court in *Scott v. Telegraph Co.*, 198 N. C., 795, 153 S. E., 413: "The law does not impose on the employer any duty to take better care of his employee than the latter should take of himself."

The Court is of the opinion that the motion for nonsuit should have been allowed.

Reversed.

WACHOVIA BANK AND TRUST COMPANY, TRUSTEE, v. M. S. CLIFTON ET AL.

(Filed 9 November, 1932.)

1. Bills and Notes H c—Where pleadings do not set up basis for enlarging liability of parties exclusion of evidence thereof is proper.

Where suit is entered on a note as it is written against the makers and guarantors thereof, and there is no attempt in the pleadings to enlarge the liability of the parties, and there is no plea of *nudum pactum* set up as a defense: *Held*, the exclusion of evidence tending to enlarge the liability of the guarantors to that of makers is not error.

2. Bills and Notes D b: Limitation of Actions A b—Action against guarantor on note is barred in three years.

A guaranty of the payment of a note is an obligation arising out of contract by which the guarantors assume liability for the payment of the note in case the makers thereof do not pay same upon maturity, and right to sue upon such guaranty arises immediately upon failure of the makers to pay the note according to its tenor, and suit against the guarantors is barred by the statute of limitations after three years from the maturity of the note, C. S., 441, in the absence of evidence of an extension of time binding the guarantors, or of other matters preventing the running of the statute.

3. Same—Payment of interest by makers will not prevent running of statute against guarantors on note.

The liability of a guarantor on a note is collateral to that of the maker, and the payment of interest on the note by the maker after the maturity of the note does not prevent an action against the guarantor thereon from being barred by the lapse of three years from the maturity of the note, nothing else appearing, the interest being paid on the principal debt and not on the contract of guaranty.

APPEAL by plaintiff from *Harding, J.*, at June Term, 1932, of FORSYTH.

Civil action instituted 14 November, 1930, to recover on a promissory note.

The complaint alleges:

1. That on 27 July, 1924, the defendants, M. S. Clifton and L. L. Joyner, executed their negotiable promissory note in the sum of $3,000, payable two years after date, to the Wachovia Bank and Trust Company, or order, with interest from date of making, interest payable semi-annually, secured by 85 shares of the capital stock of the Farmers and Merchants Bank of Louisburg, N. C., and payment thereof guaranteed by endorsement on the back of said note as follows:

"For value received, we guarantee payment of the within note and waive notice of dishonor and protest and all other formalities and consent to remain bound in case of any extension or renewal until said note with interest is fully paid. Mrs. T. W. Bickett, W. Y. Bickett."

2. That the plaintiff, acting under an express trust for the use and benefit of Mrs. Amelia L. Holt, paid full value for said note, and is now the holder and owner of same in due course; that the payment of the principal amount of said note was extended from time to time, as interest was paid, until 27 January, 1930, at which time the full amount of the principal became due; wherefore plaintiff prays judgment against the defendants, jointly and severally, for $3,000 with interest from 27 January, 1930, and costs.

The guarantors pleaded the three-year statute of limitations in bar of the plaintiff's right to recover as against them, because the plaintiff, without notice to said defendants, had waited until the collateral given to secure said note had become worthless, and the makers insolvent, before demanding payment.

On the hearing, the plaintiff offered to show that on and prior to 27 January, 1924, the Wachovia Bank and Trust Company held a note of the guarantors, as makers, for $3,000 secured by 85 shares of the capital stock of the Farmers and Merchants Bank of Louisburg. Upon the maturity of this note, it was agreed that the collateral should be sold to M. S. Clifton and L. L. Joyner, officers of the said Farmers and Merchants Bank, their note for like amount taken therefor, secured by the transferred stock, and payment guaranteed by the makers of the original note. The plaintiff bank received $120 for exchanging said notes. Over objection, the evidence was excluded.

The purpose of this evidence was to show that the relation of the guarantors to the note in suit was really that of sureties and thus to repel the plea of the statute.

There was no evidence to support the allegation that the payment of the principal of said note had been extended or renewed from time to time.

In the county court, judgment was rendered against the makers, M. S. Clifton and L. L. Joyner, and nonsuit ordered against the guarantors, which was affirmed on appeal to the Superior Court of Forsyth County, from which latter judgment, the plaintiff appeals, assigning errors.

Manly, Hendren & Womble for plaintiff.

Yarborough & Yarborough and R. B. White for defendants.

STACY, C. J. The exclusion of the evidence, which forms the basis of a number of exceptions, may be upheld upon the ground that the complaint declares on the note as it is written, and not otherwise. There is no effort in the pleadings to enlarge the liability of any of the parties. *S. v. Bank*, 193 N. C., 524, 137 S. E., 593. Nor is there a plea in defense of *nudum pactum*. Consideration is admitted or not denied. The defendants have been sued simply as makers and guarantors of a note, and this more than three years after its maturity. There is no evidence that said note was extended or renewed from time to time. *Wrenn v. Cotton Mills*, 198 N. C., 89, 150 S. E., 676.

The question then arises: Does payment of interest by the makers of a note, after maturity but before it is barred, nothing else appearing, toll the statute of limitations against those who have guaranteed the payment of said note? We think not.

It is provided by C. S., 441, that an action upon a contract, obligation or liability arising out of contract, express or implied (except those mentioned in preceding sections), shall be barred if not brought within three years after the cause of action accrues. *Welfare v. Thompson*, 83 N. C., 276.

A guaranty is a contract, obligation or liability arising out of contract, whereby the promisor, or guarantor, undertakes to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is himself in the first instance liable to such payment or performance. *Cowan v. Roberts*, 134 N. C., 415, 46 S. E., 297; *Carpenter v. Wall*, 20 N. C., 279; *Chemical Co. v. Griffin*, 202 N. C., 812. And the right to sue upon said contract or guaranty arises immediately upon the failure of the principal debtor to pay the debt at maturity or to meet his obligation according to its tenor. *Beebe v. Kirkpatrick*, 321 Ill., 612, 152 N. E., 539, 47 A. L. R., 891.

In the instant case, therefore, the action against the guarantors is barred by the three-year statute of limitations, unless the payment of interest by the makers in the meantime, which repels the plea of the statute as to them, also repels it as to the guarantors.

Guarantors are not sureties; nor are they endorsers, though with respect to the plea of the statute of limitations, their liability is more nearly analogous to that of the latter than to that of the former. *Coleman v. Fuller*, 105 N. C., 328, 11 S. E., 175. The obligation of a surety is primary, while that of a guarantor is collateral. *Rouse v. Wooten*, 140 N. C., 557, 53 S. E., 430; *Dole v. Young*, 24 Pick. (Mass.), 252. A surety may be sued as a promisor with the principal debtor; a guarantor may not; his contract must be especially set forth or pleaded. *Coleman v. Fuller, supra; Bank v. Haynes*, 8 Pick. (Mass.), 423, 19 Am. Dec., 334.

But it is contended under the doctrine announced in *Green v. Greensboro College,* 83 N. C., 449, approved in *Le Duc v. Butler,* 112 N. C., 458, 17 S. E., 428, and *Garrett v. Reeves,* 125 N. C., 529, 34 S. E., 636, "that a payment made by the principal, before the action is barred, operates as a renewal as to all the obligors—sureties as well as principals," applies equally to a guarantor, if not before maturity of the note, then certainly after default of the makers to pay, by virtue of C. S., 2977 which provides that the person "primarily liable" on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. This contention, however, overlooks the fact that the payment of interest by the makers in the instant case was on the note, evidencing the principal debt, and not upon the contract of guaranty which determines the liability of the guarantors. *Barber v. Absher Co.,* 175 N. C., 602, 96 S. E., 43; *Wood v. Barber,* 90 N. C., 76.

It would seem that the plaintiff has failed to repel the plea of the statute of limitations as against the guarantors, and that the judgment of nonsuit as to them is correct. *Marks v. McLeod, ante,* 257.

Affirmed.

L. L. HACKNEY, IN BEHALF OF HIMSELF AND OTHERS LIKE INTERESTED, v. GURNEY P. HOOD, COMMISSIONER OF BANKS, LIQUIDATING THE CONTINENTAL TRUST COMPANY.

(Filed 9 November, 1932.)

Banks and Banking H a—Depositors and creditors of insolvent bank are entitled to interest as against rights of stockholders.

After demand by a depositor or creditor of a bank for the payment of the amount due and refusal of the bank to make payment, the bank is liable for the amount of the claim plus interest at the rate of six per centum per annum, C. S., 2305, 2309, and the institution of proceedings under the statute for its liquidation is a waiver of demand by the depositors and creditors and is equivalent to a refusal to pay on the part of the bank, and in the statutory distribution of its assets by the Commissioner of Banks all depositors and other creditors of the bank are entitled to the legal rate of interest upon their claims from the date the insolvency proceedings are begun until payment by the receiver, as against the stockholders of the bank who have paid the statutory liability on their stock. C. S., 219(a).

APPEAL by plaintiff from *Harris, J.,* at Chambers, in Raleigh, N. C., on 27 August, 1932. Affirmed.

This is a controversy without action submitted to the court on a statement of facts agreed. C. S., 626.

The Continental Trust Company, a banking corporation created by and organized under the laws of this State, is now in the hands of the defendant, Commissioner of Banks, for liquidation, as provided by statute. Section 218(c), N. C. Code of 1931, chapter 113, Public Laws of North Carolina, 1927. The assets of said Trust Company, including the amounts which have been collected by the defendant from the plaintiff and other stockholders of said company in payment of assessments on account of their statutory liability as stockholders (N. C. Code of 1931, section 219(a), section 21, chapter 4, Public Laws of North Carolina, 1921), after the payment of all costs and expenses of liquidation heretofore incurred, are more than sufficient in amount for the payment in full of the aggregate principal amount of all claims of depositors and other creditors of the company, which have not been paid, because not allowed by the defendant, or otherwise established. The principal amounts of all claims which have been allowed by the defendant, have been paid. After reserving from the assets now in the hands of defendant, (1) a sum sufficient to pay all costs and expenses which may be incurred hereafter; (2) a sum sufficient to pay the aggregate principal amount of all claims which have been filed with the defendant, but which have not been allowed by him, or otherwise established as valid claims; and (3) a sum sufficient to pay interest on all claims against the company, which have been allowed and paid by the defendant, or which may be hereafter allowed or established as valid claims, from the date on which the defendant took possession of the assets of said company until his final settlement with the stockholders as provided by statute, at the rate of six per cent, there will remain in the hands of the defendant, Commissioner of Banks, assets for distribution among the stockholders. N. C. Code of 1931, section 218(c), subsection 19.

The court was of opinion that upon the facts agreed the defendant, Commissioner of Banks, before making settlement with the stockholders of the Continental Trust Company, as provided by statute, should reserve from the assets now in his hands, not only the sum required for the payment of all costs and expenses of the liquidation, which may be hereafter incurred, and the sum required for the payment of the principal amounts of claims now in dispute, but also the sum required for the payment of interest, at the rate of six per cent, on the principal of all claims, both those heretofore paid, and those to be paid hereafter, if allowed by the defendant or duly established as valid claims, from the date on which the defendant took possession of the assets of the Continental Trust Company, for purposes of liquidation, until his final settlement with its stockholders, and should apply such sum to the payment of interest on said claims.

From judgment in accordance with the opinion of the court, plaintiff appealed to the Supreme Court.

D. E. Henderson for plaintiff.

Attorney-General Brummitt, Assistant Attorney-General Seawell and C. I. Taylor for defendant.

CONNOR, J. The only question of law presented by this appeal is whether depositors and other creditors of a banking corporation, created by and organized under the laws of this State, and in the hands of the Commissioner of Banks of this State, for liquidation under the provisions of section 218(c), N. C. Code of 1931, are entitled to interest, at the rate of six per cent, on the principal amount of their claims, from the date on which the Commissioner of Banks took possession of the corporation and its assets, until his final settlement with the stockholders, where after the payment of all costs and expenses of the liquidation, assets including amounts collected from stockholders in payment of assessments on account of their statutory liability as stockholders, remain in the hands of the Commissioner of Banks for distribution among the stockholders as provided by statute.

This question has not heretofore been presented to this Court for decision. We, therefore, have no authoritative decision in accordance with which the question must be answered. We think, however, that the question must be answered in the affirmative.

It is provided by statute that all sums of money due by contract of any kind, excepting money due on penal bonds, shall bear interest. C. S., 2309.

It is further provided by statute that the legal rate of interest in this State shall be six per cent per annum for such time as interest may accrue and no more. C. S., 2305. It is well settled that from and after demand made by a depositor or other creditor of a bank for payment of his deposit or debt, and refusal by the bank to pay upon such demand, the bank is liable to its depositor or creditor, not only for the amount of the deposit or debt, but also for interest on such amount, at the legal rate, from the date of such demand and refusal, although there was no special agreement between the bank and its depositor or creditor for the payment of interest. *McRae v. Malloy*, 87 N. C., 196; *Bank v. Hart*, 67 N. C., 264; *Crawford v. Bank*, 61 N. C., 136. The bank is not relieved of this liability by its insolvency. The commencement of a proceeding authorized by statute for the equitable distribution of the assets of an insolvent bank among its depositors and other creditors, is equivalent to a refusal by the bank to pay the amounts due by the

bank to such depositors and creditors, and in legal effect is a waiver of a demand by them for the payment of such amounts. By statute the stockholders of a banking corporation created by and organized under the laws of this State, are "individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporation, to the extent of the amount of their stocks therein at par value thereof, in addition to the amount invested in such shares." C. S., 219(a). By reason of this statutory liability, stockholders are not entitled to a return to them of any part of the amounts which they have paid to the Commissioner of Banks, in discharge of such liability, until all the claims of depositors and other creditors against the bank, including interest, on the amounts of such claims from the date on which the said commission took possession of the assets of the insolvent bank for liquidation, have been paid.

The rule in other jurisdictions has been stated as follows: "In the distribution of the estate of an insolvent, interest should be computed to the time of the institution of insolvency proceedings upon all debts drawing interest either by agreement of the parties, or as legal damages for nonpayment. If there is a surplus after paying the principal and interest thus computed, interest should also be allowed on all the debts from the date of the institution of the proceedings." 32 C. J., 884. This is a just rule and is well supported by decisions in other jurisdictions. See *Richmond v. Irons,* 121 U. S., 27, 30 L. Ed., 864. There is no error in the judgment in the instant case. It is

Affirmed.

STATE v. C. B. RAPER ET AL.

(Filed 9 November, 1932.)

1. Criminal Law I e—In this case held: defendant introduced no testimony and was entitled to concluding argument to jury.

Where the defendant in a civil or criminal action introduces no evidence he is entitled as a matter of substantive right to conclude the argument to the jury, Rules of Practice in Superior Courts, 3, which right cannot be deprived by the exercise of judicial discretion, and the cross-examination of a State's witness by counsel for a defendant which elicits testimony that the defendant's character was good up to the time of the accusation against him does not amount to an introduction of evidence by the defendant, and where upon such testimony the defendant has been deprived of his right to conclude the argument to the jury a new trial will be granted.

2. Criminal Law L e—Where new trial is ordered on one exception other exceptions need not be considered on appeal.

Where a new trial is ordered on appeal for error of the trial court in refusing to allow the defendant to conclude the argument to the jury, other exceptions relating to the trial of the action need not be considered on appeal.

APPEAL by defendants, C. B. Raper, C. R. Wilson and E. A. Brookshire, from *Stack, J.*, at July Term, 1932, of FORSYTH. New trial.

The defendants in this action, C. B. Raper, C. R. Wilson, E. A. Brookshire, H. G. Myers and George Hilton, were tried in the Superior Court of Forsyth County on an indictment, in which it was charged that said defendants "on the first day of May, in the year of our Lord one thousand nine hundred and thirty-two, with force and arms, at and in the county aforesaid, unlawfully, wilfully and feloniously did conspire, confederate and agree together to commit the following violations of the criminal law:

1. Feloniously to forge and counterfeit a bill of lading on the Winston-Salem Southbound Railway Company for a carload shipment of cigarettes and by means thereof to get possession of said car and contents.

2. Feloniously to break the seal on railway cars containing cigarettes as freight in due course of transit on said railway, and to steal said cigarettes.

3. Feloniously to break and enter said car for the purpose of feloniously taking, stealing and carrying away cigarettes being shipped as freight from Reynolds Tobacco Company.

4. Feloniously to take, steal and carry away cigarettes being shipped as freight by Reynolds Tobacco Company over Winston-Salem Southbound Railway Company, to the evil example of all persons in like case offending, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

At said trial, there was a verdict of "not guilty" as to the defendants, H. G. Myers and George Hilton, and of "guilty" as to the defendants, C. B. Raper, C. R. Wilson and E. A. Brookshire.

From judgment that the defendants, C. B. Raper, C. R. Wilson and E. A. Brookshire, and each of them, be confined in the State's prison, at hard labor, for a term of not less than eighteen months, nor more than two years, the said defendants appealed to the Supreme Court.

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

John C. Wallace for defendant, C. B. Raper.

John D. Slawter for defendants, C. R. Wilson and E. A. Brookshire.

CONNOR, J. As the defendants are entitled to a new trial of this action for error in the refusal of the court to allow their counsel the right at least to conclude the argument to the jury, in accordance with the provisions of Rule 3, Rules of Practice in the Superior Courts of this State (200 N. C., 843) as prescribed by this Court under statutory authority (C. S., 1421), we have not considered and do not pass upon assignments of error on this appeal based on exceptions to rulings of the court with respect to evidence introduced by the State, or to instructions of the court in the charge to the jury. The motion of the defendants, at the close of the evidence, for judgment dismissing the action as of nonsuit (C. S., 4643), was properly denied. The evidence introduced by the State was sufficient in probative force to sustain a verdict that the defendants, and each of them, is guilty as charged in the indictment. It would seem that none of the assignments of error other than that based on the exception to the holding of the court that the State was entitled not only to open but also to conclude the argument to the jury, because the defendant, C. B. Raper, had introduced evidence at the trial, could be sustained.

It appears from the statement of the case on appeal as certified to this Court, that the State introduced as a witness for the prosecution, E. B. Kearnes. On his direct examination by the State, this witness testified that he is the local freight agent of the Norfolk and Western Railway Company and of the Winston-Salem Southbound Railroad Company, at Winston-Salem, N. C.; that the defendant, C. R. Wilson, on 31 May, 1932, was employed as billing clerk by both the Norfolk and Western Railway Company and the Winston-Salem Southbound Railroad Company, with an office in the station at Winston-Salem, and as such clerk had access to blank bills of lading and blank way-bills kept in said office; and that the defendant, C. B. Raper, on 31 May, 1932, was employed by the Southern Weighing and Inspection Bureau, in its office in the station of the Norfolk and Western Railway Company and the Winston-Salem Southbound Railroad Company at Winston-Salem. On his cross-examination by counsel for the defendant, C. B. Raper, the witness, without objection by the State, testified that he knew the general character of the defendant, C. B. Raper, and that up to the time of his accusation of the crime charged in the indictment in this action, his general character was good. No evidence was offered or introduced by the defendant, C. B. Raper, or by any of the other defendants, after the State rested. The court was of opinion that by eliciting from a State's witness, on his cross-examination, evidence that his general character was good up to the time of his accusation of the crime charged in the indictment in this action, the defendant, C. B. Raper, had introduced

evidence and that, therefore, neither he nor his codefendants were entitled to open or conclude the argument to the jury, in accordance with the provisions of Rule 3, Rules of Practice in the Superior Courts of this State (200 N. C., 843), as prescribed by this Court under statutory authority. C. S., 1421.

We do not concur in the opinion of the court, and hold that it was error for the court, upon the facts shown in the statement of the case on appeal to deny the defendants the right to have their counsel at least to conclude the argument to the jury. This is a substantial legal right, of which the defendants could not be deprived by an exercise of judicial discretion. The defendant in an action, civil or criminal, who introduces no evidence after the plaintiff, or the State, as the case may be, has rested, is entitled as a matter of right to reply to the argument of counsel for the plaintiff or of the solicitor for the State, and to that end to conclude the argument to the jury. The eliciting of evidence in his behalf by the cross-examination of a witness for the plaintiff or for the State, is not such introduction of evidence by the defendant, as deprives him of his right. To hold otherwise, would tend to impair the right of a defendant to cross-examine a witness for the adverse party, without endangering his right, in the event he elects to introduce no evidence, after such party has rested, to have his counsel reply to the argument of counsel for the adverse party, by concluding the argument to the jury. The defendants are entitled to a

New trial.

LOUISE THOMPSON CROWELL v. W. L. BRADSHER, ADMINISTRATOR C. T. A. OF THE ESTATE OF NANNIE E. MORTON, AND UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND.

(Filed 9 November, 1932.)

Wills D a—Probate of will in common form is conclusive until it is vacated on appeal or held void by competent tribunal.

Where a will has been duly probated in common form its validity may not be collaterally attacked even for fraud, and where after the probate of the will a legatee therein brings action against the administrator *c. t. a.* to recover the balance due on the legacy, the administrator may not set up the defense that the bequest to the legatee had been altered after the execution of the will by changing the numbers and figures denominating the bequest to twice the original amount, and that such change was not in the handwriting of the testatrix, and judgment granting plaintiff's motion to strike out allegations in the answer setting up such defense and ordering a reference will be affirmed on appeal. C. S., 4145.

CROWELL *v.* BRADSHER.

APPEAL by defendant administrator from *Midyette, J.*, at April-May Term, 1932, of PERSON. Affirmed.

Fuller, Reade and Fuller and B. I. Satterfield for appellant.
O. B. Crowell for appellee.

ADAMS, J. On 23 August, 1928, Nannie E. Morton duly executed her last will and testament, which after her death in the month of May, 1929, was regularly admitted to probate in common form in Person County. The testatrix appointed two executors who qualified as such on 17 June, 1929. In consequence of their death the defendant Bradsher qualified as administrator *cum testamento annexo* on 23 November, 1929, and executed a bond in the penal sum of $20,000 with the United States Fidelity and Guaranty Company as his surety.

The testatrix bequeathed to the plaintiff $2,000 as a pecuniary legacy, on which the defendant administrator has made a payment of one thousand dollars. The defendants admit that the plaintiff before instituting her action demanded payment of the remaining half of her legacy and that they refused to comply with her demand.

The ground of defense is set forth in the administrator's further answer to the complaint. He alleges that after the will had been executed and witnessed a change was made in the bequest to the plaintiff by substituting two thousand dollars for one thousand; that the word "one" before the word "thousand" was changed to "two"; that the figure "1" immediately after the dollar mark was made to read "2"; and that the changes were not in the handwriting of the testatrix, but of some other person. It is contended that the change amounted to a cancellation of the bequest, that the plaintiff is not entitled to any sum, and that the administrator is entitled to recover of the plaintiff the sum previously paid her.

The plaintiff made a formal motion to strike these allegations from the answer. The court granted the motion, adjudging that the administrator should not be permitted collaterally to attack the will after it had been duly probated without caveat, objection, or exception, that the pretended attack does not constitute a legal defense to the plaintiff's action, and that the alleged defense and counterclaim should be stricken from the answer. Thereupon the court ordered a compulsory reference.

The judgment of the Superior Court must be affirmed. The probate of a will in the manner provided by law is declared by statute to be conclusive in evidence of the validity of the will until it is vacated on appeal or held void by a competent tribunal. C. S., 4145. It was formerly provided that the probate of a will devising real estate should be

conclusive as to the execution thereof, against the heirs and devisees of the testator, whenever the probate thereof, under the like circumstances, would be conclusive against the next of kin and legatees of the testator. R. S., chap. 122, sec. 9; Revised Code, chap. 119, sec. 20.

The statute in its present form appears in the Code of Civil Procedure, sec. 438, which went into effect 24 August, 1868. *Ragland v. Currin,* 64 N. C., 355.

It was held as early as 1799 that when a will had been admitted to probate and registration by a court possessing competent authority all circumstances necessary to its validity must be presumed to have been duly established, *Stanly v. Kean,* 1 N. C., p. 150, in 1 Taylor's Reports, and since the enactment of the present statute it has been consistently held that the probate of a will is a judicial act which is conclusive on the question adjudicated until vacated or declared void by a court of competent jurisdiction in a proceeding instituted for that purpose. *McClure v. Spivey,* 123 N. C., 678; *Holt v. Ziglar,* 163 N. C., 390; *Starnes v. Thompson,* 173 N. C., 466; *Mills v. Mills,* 195 N. C., 595; *In re Will of Cooper,* 196 N. C., 418; *Moore v. Moore,* 198 N. C., 510. It is said that "fraud is not a ground of collateral attack, as the identity, validity, and sufficiency of the instrument propounded as the last testamentary act of the deceased is the very question determined." *Edwards v. White,* 180 N. C., 55. Judgment

Affirmed.

STATE v. M. L. McKEITHAN.

(Filed 9 November, 1932.)

1. Criminal Law G r — Testimony of accomplice's narration of crime held competent as corroborative of his testimony on trial.

Where in a prosecution under C. S., 4175, 4245, an accomplice testifies that the defendant procured him to burn a certain house, it is competent for other witnesses to testify as to the narration by the accomplice of the commission of the crime as corroborative evidence of the accomplice's testimony on the trial.

2. Criminal Law I g—Court need not again state that certain evidence was admitted for restricted purpose in absence of request.

Where the court admits certain testimony as corroborative evidence and so instructs the jury at the time of its admission, the failure of the court to again instruct the jury in his charge as to the nature of such evidence is not ground for exception in the absence of a request for such instructions, nor will the court's failure to state to the jury at the time of the admission of such evidence that it was admitted for a restricted purpose constitute ground for exception unless the appellant asks at the time of its admission that the court so state.

3. Arson C a—Indictment in this case held to sufficiently identify property alleged to have been burned.

In a prosecution for arson under C. S., 4175, 4245, an indictment stating that the defendant procured another to burn a certain house owned by the defendant and another as tenants in common is held sufficient, and the fact that the same parties owned other houses in like capacity is not ground for demurrer or *quashal*, the indictment containing sufficient matter to enable the court to proceed to judgment, and a conviction on the charge being sufficient to sustain a plea of former jeopardy in case of a second prosecution. C. S., 4623.

4. Criminal Law G j—Charge in respect to testimony of accomplice held correct, and refusal of exact instructions requested was not error.

Where the court modifies the defendant's prayers for instructions relative to testimony of an accomplice, but the instruction as given charges that such testimony should be accepted with care and caution in connection with the witness's admission of guilt of the crime: *Held*, the charge contained all that the defendant was entitled to as a matter of law, and the refusal to give the instructions as requested will not be held for error.

APPEAL by defendant from *Barnhill, J.*, at April Term, 1932, of HOKE.

Criminal prosecution tried upon indictment charging, in the first count, that the defendant did on 5 March, 1932, feloniously aid, counsel and procure one Curtis Smith feloniously to burn a dwelling-house, the property of said defendant and one Campbell as tenants in common, contrary to the provisions of C. S., 4175; and, in the second count, that the defendant, being tenant in common with one Campbell of a dwelling-house, then insured against loss, did on 5 March, 1932, feloniously procure one Curtis Smith to burn said dwelling-house in violation of C. S., 4245.

The evidence tends to show that the defendant, M. L. McKeithan, and L. J. Campbell owned a farm near Raeford in Hoke County as tenants in common, known as the Watkins Place, as Jasper Watkins, a colored man, was tenant thereon. This farm had a house on it worth about $25.00, which was insured for $1,000. Curtis Smith, a young white man, testified that the defendant agreed to pay him $50.00 if he would burn the Jasper Watkins house. The evidence is plenary that, in consequence of this understanding and procurement, the defendant helping to arrange the details, Curtis Smith did, on the night of 5 March, 1932, burn the house in question. Smith had taken several drinks before the burning, and immediately thereafter, due to this circumstance perhaps, he talked rather freely about the matter. He later confessed to the sheriff.

The statements of Smith, especially those made after the burning, were the subject of a number of objections and exceptions. They were admitted in corroboration of Smith's testimony.

It was also in evidence that the defendant and L. J. Campbell owned as tenants in common, in addition to the Watkins place, two other farms near Raeford, with a house on each, not in the same locality, but "on the other side of town." The defendant thereupon requested the court to direct a verdict of not guilty, as the property was not described in the indictment with sufficient definiteness. He also demurred to the bill and moved to quash. Overruled; exception.

The defendant in apt time requested the court to instruct the jury as follows:

"The State relies upon the testimony of one Curtis Smith, together with such other facts and circumstances that you may find from the evidence that tend to corroborate the testimony of the said Curtis Smith. The court charges you that the said Curtis Smith is what the law calls an accomplice, that is, one who admits and testifies that he committed a crime, but in his testimony charges others to have participated in some manner with him in the commission of such crime in such case, and the court so charges in reference to your consideration of the testimony of the said Curtis Smith that, while you may find a verdict of guilty on the unsupported testimony of an accomplice, if you are satisfied therefrom beyond a reasonable doubt of the guilt of the defendant, yet the law makes it the duty of the court to say to you that it is dangerous and unsafe to convict upon the testimony of an accomplice."

The court gave this request but modified the last clause as follows:

"Yet the law makes it the duty of the court to say to you that in passing upon the testimony of an accomplice you should accept the same with care and caution, and your consideration of it should be in connection with the fact that he, himself, upon his own admission, is guilty of the crime."

The defendant excepts to the failure of the court to charge as requested, and to the modification as noted.

From an adverse verdict, and judgment of from 3 to 5 years in the State's prison and a fine of $500, the defendant appeals, assigning errors.

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

Varser, Lawrence, McIntyre & Henry and H. W. B. Whitley for defendant.

STACY, C. J. The narration by a number of witnesses of what Curtis Smith told them about the burning was competent as corroborative of

Smith's testimony given on the trial, and the court so limited its use at the time of its admission. It is now the rule of practice with us that when testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge does not in his charge again instruct the jury specifically upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; nor will it be ground for exception that evidence competent for some purpose, but not for all purposes, is admitted generally, unless the appellant asks, at the time of its admission, that its purpose be restricted to the use for which it is competent. *S. v. Steele,* 190 N. C., 506, 130 S. E., 308; Rule 21, Supreme Court, 200 N. C., 827. The record discloses no infraction of the rule, or noncompliance with the decisions on the subject. *S. v. Steele, supra.*

The form of the indictment would seem to be sufficient. *S. v. Farmer,* 104 N. C., 887, 10 S. E., 563. The ownership of the house is properly laid in the defendant and Campbell as tenants in common. *S. v. Haddock,* 3 N. C., 162; *S. v. Harbert,* 185 N. C., 760, 118 S. E., 6. The fact that these same parties own other houses in like capacity, is not ground for demurrer or *quashal. S. v. Sprouse,* 150 N. C., 860, 64 S. E., 900; *S. v. Daniel,* 121 N. C., 574, 28 S. E., 255; *S. v. McCarter,* 98 N. C., 637, 4 S. E., 553. Sufficient matter appears on the face of the indictment to enable the court to proceed to judgment. C. S., 4623; *S. v. Gallimore,* 24 N. C., 372; *S. v. Green,* 151 N. C., 729, 66 S. E., 564. And the defendant could not be tried again for the same offense. *S. v. Prince,* 63 N. C., 529. His plea of former conviction would easily avail in case of a second prosecution. *S. v. King,* 195 N. C., 621, 143 S. E., 140; *S. v. Freeman,* 162 N. C., 594, 77 S. E., 780. See, also, *S. v. Beal,* 202 N. C., 266, 162 S. E., 561, 80 A. L. R., 1101, and note.

There was no error in modifying the defendant's prayer with respect to the testimony of an accomplice. *S. v. Ashburn,* 187 N. C., 717, 122 S. E., 833. The charge as given was all the defendant was entitled to as a matter of law, and the judge is not required to instruct the jury, except on the law of the case. *S. v. Haney,* 19 N. C., 390.

A careful perusal of the record leaves us with the impression that the case has been tried in substantial conformity to the principles of law applicable and the decisions apposite The verdict and judgment will be upheld.

No error.

E. McL. WILSON AND WIFE, ETHEL B. WILSON, v. O. O. ALLSBROOK, TRUSTEE, AND E. L. WHITE.

(Filed 9 November, 1932.)

Reference B b: Mortgages H b—Mortgagor held entitled to finding as to whether note was paid or was to be paid out of rents.

Where the plaintiff brings suit to restrain the foreclosure of a mortgage on his property and alleges that the note secured by the mortgage was paid or was to be paid out of rents collected by the mortgagor, and the matter is referred to a referee by consent: *Held*, the mortgagor is entitled to a finding of fact as to whether the note had been paid or was to be paid out of rents, and where the report of the referee does not contain any finding on this aspect of the case the cause will be remanded on the mortgagor's exception to the report.

APPEAL by plaintiffs from *Grady, J.*, at June Term, 1932, of NEW HANOVER.

Civil action to restrain threatened foreclosure under third deed of trust, and for an accounting.

On 21 April, 1930, plaintiffs executed a note to the defendant, E. L. White, for $694.16, secured by third mortgage, or third deed of trust, on plaintiffs' home and dairy, O. O. Allsbrook, employee of defendant's company, being named as trustee therein.

At the February Term, 1932, New Hanover Superior Court, the cause was by consent referred to Hon. K. O. Burgwin to find the facts and report the same together with his conclusion of law to the court. It was further adjudged that the temporary restraining order be continued upon execution by the plaintiffs of an indemnity bond in the sum of $500; otherwise, the restraining order was to be dissolved and vacated if said bond was not furnished within ten days.

The sale was thereafter had on 25 March as plaintiffs were unable to post the required bond, but the matter is still in *custodia legis*.

The referee in his report states the account between the parties, but he fails to find whether the note secured by the third deed of trust, as alleged by plaintiffs, has been paid or was to be paid from rents collected by the defendant. Exception; overruled.

From a judgment affirming the report of the referee, the plaintiffs appeal, assigning errors.

I. C. Wright and R. G. Grady for plaintiffs.
Chas. B. Newcomb and John A. Stevens for defendants.

STACY, C. J., after stating the case: From the pleadings, it would seem that plaintiffs are entitled to a finding on their allegation that the

note secured by the third deed of trust has been paid or was to be paid from rents collected by the defendant. *Stockton v. Lenoir,* 201 N. C., 88, 158 S. E., 856, *S. c.,* 198 N. C., 148, 150 S. E., 886; *Parker Co. v. Bank,* 200 N. C., 441, 157 S. E., 419; *Justice v. Coxe,* 198 N. C., 263, 151 S. E., 252; *Bank v. Winslow,* 193 N. C., 470, 137 S. E., 320; *Typewriter Co. v. Hardware Co.,* 143 N. C., 97, 55 S. E., 417; *Evans v. Freeman,* 142 N. C., 61, 54 S. E., 847; *Gooch v. Vaughan,* 92 N. C., 611. To this end, the order of confirmation will be vacated and the cause remanded for further proceedings as to justice appertains and as the rights of the parties may require.

Error and remanded.

MAY LEE ARMSTRONG v. HOME SERVICE STORES.

(Filed 9 November, 1932.)

Corporations G e—Failure to affix seal to corporation's chattel mortgage does not render the chattel mortgage void.

A chattel mortgage duly executed by a corporation is not void for want of the corporate seal, but in the absence of the seal there is no presumption of corporate action and the burden of proving its authenticity is on the party claiming under it, but in this case the authorization of the execution of the chattel mortgage was admitted, and the mortgagee was entitled to a preference against other creditors of the insolvent corporation.

APPEAL by H. Bryan Duffy from *Cranmer, J.,* at February Term, 1932, of CRAVEN.

Claim for preference, filed in a receivership proceeding and based upon the following pertinent facts:

1. On 19 March, 1931, the Home Service Stores, Incorporated (now in receivership), executed a chattel mortgage on certain furniture and fixtures to H. Bryan Duffy to secure a debt of $150. This mortgage is spread upon the public registry of Craven County.

2. It is admitted that the corporate seal was not affixed to said instrument.

3. The mortgage recites that the "Home Service Stores, Incorporated, has caused this instrument to be signed in its name by its president, attested by its secretary and its corporate seal hereto affixed, all by order of its board of directors."

4. The certificate of probate conforms to the requirements of C. S., 3326, and recites that the secretary deposes and says, *inter alia,* that "said instrument is the act and deed of the said corporation."

His Honor held that the chattel mortgage was void as against creditors for want of a corporate seal; and from this ruling, the claimant, H. Bryan Duffy, appeals, assigning error.

Charles L. Abernethy, Jr., for H. Bryan Duffy.
G. A. Barden for Carmichael, receiver.

STACY, C. J. The appeal in this case was dismissed, *ante*, 231, for failure to comply with the rules; but, on motion and completion of the record, it has been reinstated.

A single question is presented for decision: Is a chattel mortgage duly authorized by a corporation and signed in its name by its president and attested by its secretary void for failure to attach the corporate seal? We think not.

It was said in *Duke v. Markham*, 105 N. C., 131, 10 S. E., 1017, 18 Am. St. Rep., 889, that a seal is not essential to the validity of a chattel mortgage whether executed by an individual or a corporation.

The party claiming under such corporate mortgage, however, would have the burden of showing its authenticity, for in the absence of the company's seal, there is no presumption of corporate action. *Duke v. Markham, supra; Despatch Line v. Bellamy Mfg. Co.*, 12 N. H., 205, 37 Am. Dec., 203. Here, the due authorization of the execution of the mortgage in question is conceded. *Jones-Phillips Co. v. McCormick*, 174 N. C., 82, 93 S. E., 449; *Benbow v. Cook*, 115 N. C., 324, 20 S. E., 453; *Comron v. Standland*, 103 N. C., 207, 9 S. E., 317; *Rawlings v. Hunt*, 90 N. C., 270; 5 R. C. L., 393.

Perhaps it should be observed that we are not dealing with a conveyance or real estate mortgage of a corporation. *Bailey v. Hassell*, 184 N. C., 450, 115 S. E., 166; *Caldwell v. Mfg. Co.*, 121 N. C., 339, 28 S. E., 475.

Error.

BANK OF ASHE v. J. L. DICKSON, EXECUTOR OF D. D. DICKSON, DECEASED, MRS. MARTHA J. DICKSON, AND C. M. DICKSON.

(Filed 9 November, 1932.)

Bills and Notes A a—Widow received no consideration for execution of note in this case and was not liable thereon in action by payee.

Where a husband executes a note as maker for money borrowed from the bank which note is signed by another as surety, and after the death of the husband, his widow, upon request of the surety, executes a note in like amount in substitution therefor which is also signed by the surety in the same capacity: *Held*, in a suit by the bank to recover the amount borrowed an instruction that if the jury believed the evidence the

widow would not be liable is correct, the action being to recover the amount of the husband's indebtedness and not on the note executed by the widow, and the widow having received no consideration for the note.

APPEAL by defendant, C. M. Dickson, from *Stack, J.*, at July Term, 1932, of ASHE. No error.

This is an action to recover of the defendants the sum of $1,316, the amount of the indebtedness of G. D. Dickson, deceased, to the plaintiff, at the date of his death.

At his death, which occurred prior to 26 December, 1928, G. D. Dickson was indebted to the plaintiff, Bank of Ashe, in the sum of $1,316, for money loaned to him. This indebtedness was evidenced by seven notes aggregating the sum of $1,316, each executed by G. D. Dickson as principal and C. M. Dickson, as surety, and all payable to the plaintiff. After the death of G. D. Dickson, at the request of J. L. Dickson, who had duly qualified as his executor, and of C. M. Dickson, the defendant, Mrs. Martha J. Dickson, widow of G. D. Dickson, deceased, on 26 December, 1928, executed a note for the sum of $1,316, payable to the plaintiff and due six months after date. This note was signed by C. M. Dickson, as surety, and was delivered to the plaintiff. The defendant, Martha J. Dickson, received no consideration for this note from the plaintiff, or from any one else. This action was begun on 17 June, 1930.

Under instructions of the court, the jury answered the first issue, to wit: "In what amount, if any, is the defendant, Mrs. Martha J. Dickson, indebted to the plaintiff bank on the note sued on in their action?" "Nothing."

From judgment that plaintiff recover nothing of the defendant, Mrs. Martha J. Dickson, the defendant, C. M. Dickson, appealed to the Supreme Court.

W. B. Austin for defendant, C. M. Dickson.

T. C. Bowie for defendant, Mrs. Martha J. Dickson.

PER CURIAM. There was no error in the instruction of the court to the jury that if the jury believed all the evidence, they should answer the first issue, "Nothing." This is not an action to recover on the note executed by the defendant, Mrs. Martha J. Dickson, widow of G. D. Dickson, but to recover of the defendants the amount of the indebtedness of G. D. Dickson to the plaintiff at his death. All the evidence was to the effect that she received no consideration for said note either before or after the death of her husband. *Loan Association v. Swaim*, 198 N. C., 14, 150 S. E., 668. The judgment is affirmed.

No error.

N. C. THOMPSON AND HIS WIFE, CARRIE R. THOMPSON v. CITY OF REIDSVILLE.

(Filed 16 November, 1932.)

Municipal Corporations H b—Order prohibiting parking in designated area held valid exercise of police power.

An order of a city manager prohibiting parking of automobiles on the opposite side of the street from the city's fire station, entered in order to facilitate the ingress and egress of the city's fire engines, is held to be valid exercise of the police power, and the defendant's contention that the order was arbitrary and discriminatory and that he was entitled to damages resulting to his property by reason of the loss of a "curb-service" business theretofore maintained in front of his store in the prohibited parking area cannot be maintained.

CLARKSON, J., dissenting.

APPEAL by plaintiff from *Clement, J.*, at June Term, 1932, of ROCKINGHAM. Affirmed.

The plaintiff, Carrie R. Thompson, is now and has been continuously since some time prior to April, 1929, the owner of a lot in the city of Reidsville, N. C. This lot is located on a corner at the intersection of Morehead Street and West Market Street. It fronts on Morehead Street, which runs east and west, a distance of about 100 feet, and on West Market Street, which runs north and south, a distance of about 40 feet. Both streets are paved with asphalt, and afford easy access to persons traveling over and along said streets, in automobiles or other vehicles, to the sidewalks, which lie between said streets and plaintiffs' lot. There is situate on this lot a two-story brick building, which was designed and constructed for use as a retail store, and offices. There are entrances to the store from the sidewalks on both Morehead Street and West Market Street.

Prior to April, 1928, the plaintiffs had leased the store in said building to a lessee, who conducted in said store a retail mercantile business, from the date of his lease, to wit: 23 March, 1925, to some time during the month of May, 1930, when he vacated said store. This lessee had built up a good business with customers, who parked their automobiles on Morehead Street opposite the entrance from said street to the store, and were given "curb-service," while they sat in their parked automobiles. This business constituted a large part of the lessee's business prior to April, 1928, and enabled him to pay his rent promptly and satisfactorily, in accordance with the terms of his lease.

During the month of April, 1928, the defendant, city of Reidsville, caused "No Parking" signs to be placed along Morehead Street, for a

distance of about 100 feet from the intersection of said street with West Market Street, in an easterly direction. These "No Parking" signs were placed on the north side of Morehead Street, just off the sidewalk between said street and plaintiffs' lot. After these signs were placed by the defendant on Morehead Street, persons who had theretofore availed themselves of the "curb-service," which was offered by plaintiffs' lessee, ceased to patronize him, with the result that his business declined in volume. He was unable thereafter to pay his rent as stipulated in his lease, and finally vacated the store in May, 1930. Plaintiffs have been unable to rent said store since 30 May, 1930.

The defendant, city of Reidsville, has maintained "No Parking" signs on Morehead Street continuously since April, 1928. There was no ordinance of said city, prior to the commencement of this action on 17 June, 1930, authorizing or directing the placing of these signs on Morehead Street. The signs were placed and maintained on said street under the orders of the city manager of the defendant, for the purpose of keeping said street open and unobstructed. On the corner at the intersection of Morehead Street and West Market Street, opposite the corner on which plaintiffs' building is situate, is a building owned by the defendant, city of Reidsville, and used as the city's fire department. The fire truck and other apparatus used by the fire department are kept in this building. The fire truck is about 42 feet long. Morehead Street, between the sidewalk which runs by the fire department and the sidewalk on the opposite side of the street, which runs by plaintiffs' building, is 40 feet wide. The "No Parking" signs were placed and maintained on Morehead Street to prevent collisions between the fire truck, when it was necessary to take it from the fire department building, and automobiles or other vehicles on said street.

Since the commencement of this action, to wit, on 14 August, 1930, the defendant, city of Reidsville, has adopted an ordinance, which is as follows:

"Section 312. Be it ordained by the city council of the city of Reidsville that no person, firm or corporation shall park any automobile or other vehicle on the north side of Morehead Street in the city of Reidsville, immediately in front of the city's fire department and extending along said Morehead Street from the intersection of West Market Street for a distance of 82 feet.

The purpose of this ordinance is to facilitate the uninterrupted exit and return of the city's fire trucks.

Provided this ordinance shall not apply to casual stopping of vehicles for the purpose of receiving or letting off passengers or for the purpose of unloading, provided further, that no such vehicles shall be left in

said area unattended, and in no event shall be allowed to stand for a greater length of time than two minutes."

The plaintiffs allege in their complaint that the action of the defendant in placing and maintaining the "No Parking" signs on Morehead Street, on or near the sidewalks adjacent to their building was unlawful, arbitrary, unjust and unreasonable, and that as the result of such action, they have suffered damages in a large sum, (1) by the loss of rents from their building and (2) by the diminished value of their property.

At the conclusion of the evidence introduced at the trial by the plaintiffs, there was a judgment dismissing the action as of nonsuit. From this judgment, plaintiffs appealed to the Supreme Court.

F. Eugene Hester and Wm. Reed Dalton for plaintiffs.
Allen H. Gwyn for defendant.

CONNOR, J. The validity of the ordinance adopted by the defendant, city of Reidsville, on 14 August, 1930, and in force at the time of the trial, is not involved in this action which was begun on 17 June, 1930. The acts of the defendant, of which the plaintiffs complain, were all before the adoption of the ordinance. For this reason the question as to whether or not the ordinance is valid is not presented in this action.

There was no evidence tending to show that the orders of the city manager of the defendant, under which the "No Parking" signs were placed and maintained on Morehead Street, were arbitrary, unreasonable or unjustly discriminatory. These orders were made in the exercise of the police powers of the defendant, and plaintiffs are not entitled to recover of the defendant for any loss suffered by them which was incident to the exercise of this power. There was no error in the judgment dismissing the action as of nonsuit. The judgment is

Affirmed.

CLARKSON, J., dissenting: Property owners facing on streets of a city and merchants doing business in stores located thereon have certain rights which the governing body of a municipality is the forum that should determine, and the limitation of the use of the street must not be arbitrary, unreasonable or unjustly discriminatory. A one-man power, a city manager, in his discretion, as in this case, should have no such power over the streets of a city. It is elementary that it is contrary to the genius of a free and independent people.

STATE OF NORTH CAROLINA ON THE RELATION OF THE BOARD OF COMMISSIONERS OF BRUNSWICK COUNTY v. W. H. WALKER AND THE AMERICAN SURETY COMPANY OF NEW YORK.

(Filed 16 November, 1932.)

Principal and Surety B c—Bond of county officer is liable for his receipt of and refusal to return compensation in excess of statutory maximum.

Where the statute fixes the salary of a register of deeds of a county and *ex-officio* clerk to the board of county commissioners, and expressly excludes his receiving any further compensation, the action of the board in ordering the payment of a further sum as compensation for alleged extra service is unlawful, and the acceptance of such amount by the register of deeds and his refusal to repay the amount upon the demand of the county commissioners after a change in its personnel by election are unlawful acts constituting a breach of the register's official bond for which both he and the surety on his bond are liable.

APPEAL by the defendant, the American Surety Company of New York, from *Grady, J.*, at June Term, 1932, of BRUNSWICK. Affirmed.

This is an action to recover on a bond executed by the defendant, W. H. Walker, register of deeds of Brunswick County, as principal, and the American Surety Company of New York as surety. Judgment was rendered in the action as follows:

"This cause came on for trial at the June Term, 1932, of Brunswick Superior Court, and it was agreed by the parties and their counsel in open court, that a jury trial should be waived, and that the presiding judge should hear the evidence, find the facts, and render judgment out of term or out of the county, to have the same effect as if rendered during the term.

From the evidence offered by the parties plaintiff and defendants, the court finds the following facts:

1. The board of commissioners of Brunswick County is a body politic and corporate, and at the November, 1930, election B. W. Benton, W. H. Varnum and J. J. Ludlum were duly elected as members of the board of commissioners of Brunswick County, and were duly qualified and inducted into office on the first Monday in December, 1930; at the general election in November, 1928, John J. Jenrette, H. L. Clemmons and Daniel R. Johnson were duly elected as county commissioners of said county and on 3 December, 1928, they were duly qualified and inducted into office, as required by law.

2. At the general election held in November, 1928, the defendant, W. H. Walker, was duly elected to the office of register of deeds of Brunswick County for a term of two years, and on the first Monday

in December, 1928, was duly qualified and inducted into office, and, thereafter, he served as register of deeds and clerk to the board of commissioners of said county until the first Monday in December, 1930.

3. Upon his induction into office, the defendant, W. H. Walker, filed with said board of commissioners a bond in the penal sum of $5,000, for the faithful performance of his duties as such register of deeds of said county; said bond having been signed and issued by the American Surety Company of New York, and the same was approved by the board of commissioners of said county, and was during the tenure of office of the said W. H. Walker in full force and effect. A copy of said bond is incorporated as part of article five of the complaint, and is made a part of this finding of fact.

4. Chapter 498, section 5, Public-Local Laws of North Carolina, session 1923, is as follows: 'The register of deeds of Brunswick County shall receive a salary of two thousand dollars per annum, and shall be allowed one clerk or assistant at a salary to be fixed by the board of county commissioners.'

Section 6 of said act is as follows: 'The board of commissioners may at their discretion increase the salary of any officer hereinbefore mentioned; provided, said increase shall not exceed five hundred dollars per annum.'

Section 7 of said act provides: 'The officers hereinbefore mentioned shall faithfully perform all duties of their several offices imposed upon them by law, and shall receive no other compensation or allowance whatsoever for any extra additional service rendered to the county or State or other governmental agencies and they shall be liable to all the pains and penalties now or hereafter provided by law for failure to perform the duties of their several offices.'

5. The board of county commissioners of Brunswick County allowed the defendant, W. H. Walker, an additional salary of $500 per annum, under the provisions of the foregoing act; and during said term of office he drew a salary of $2,500 per annum, payable to him in monthly installments; and it was also provided by the board of commissioners that he should be allowed a clerk at an annual salary of $900, and in conformity therewith the defendant, W. H. Walker, employed a clerk, who was paid a salary of $900 per annum in accordance with the resolution of the board of commissioners.

6. There are several items declared upon in the complaint, but at the suggestion of the court, the plaintiffs withdrew all claims against the defendants except the two items hereinafter referred to.

7. The defendant, W. H. Walker, was defeated in the election of 1930, and on 28 November, 1930, the board of commissioners of Bruns-

wick County made a special allowance to him of $450, and on 29 November, 1930, said board of commissioners made an additional allowance to him of $425; both of said amounts were represented by vouchers drawn by the said W. H. Walker and countersigned by John Jenrette, chairman of the board of commissioners, purporting on their face to be for extra work done by the said W. H. Walker. Immediately thereafter, said vouchers were cashed by the said W. H. Walker, who thereby received from the county of Brunswick the sum of $875, the said sum being the total amount of said two vouchers.

8. The court finds as a fact that no written claim or demand, itemized or otherwise, was ever presented by the said W. H. Walker to said board of commissioners, covering said two vouchers; and the court further finds as a fact that he did not perform any extra work as register of deeds or otherwise, which would entitle him to additional compensation, his salary having been fixed by the General Assembly and the board of commissioners of said county at $2,500 per annum. The court, therefore, holds as a matter of law, that the payment of said vouchers amounting to $875, to the said W. H. Walker by the board of commissioners of Brunswick County was unlawful; that the issuance of said vouchers by the said W. H. Walker, was contrary to law, and the acceptance of the money represented thereby constituted a breach of duty on his part, and a breach of his official bond, which was given in accordance with section 3545 of the Consolidated Statutes, for the discharge of the duties of his office.

Wherefore, upon the foregoing facts, it is now considered, ordered and adjudged by the court that plaintiff have and recover of the defendants, W. H. Walker and the American Surety Company of New York, the sum of $5,000, the penalty of the bond in question, to be discharged upon the payment of the sum of $875, with interest thereon, at the rate of 12 per cent per annum, from 29 November, 1930, together with the costs of this action to be taxed by the clerk.

Done at Wilmington, N. C., this 5 July, 1932.

H. A. GRADY, *Judge Presiding.*"

The defendant, the American Surety Company of New York, excepted to the judgment, and appealed to the Supreme Court.

J. W. Ruark and Woodus Kellum for plaintiff.
John D. Bellamy & Sons for defendant.

CONNOR, J. The action of the board of commissioners of Brunswick County, on 28 and 29 November, 1930, in ordering the payment to the defendant, W. H. Walker, register of deeds of said county, and clerk

ex officio of said board of commissioners (C. S., 3562), of the sums of $450 and $425, respectively, out of the money in the treasury of said county, was unlawful, not only because not authorized by law, but also because such action was in direct violation of an express provision of chapter 498, Public-Local Laws of North Carolina, 1923. The action of the defendant, W. H. Walker, in receiving said sums of money as compensation for extra services alleged to have been rendered by him as clerk *ex officio* of the board of commissioners, was also unlawful, for the same reason. He had no right in law or in morals to retain said sums of money, when the board of commissioners, upon a change in its personnel following the election in November, 1930, demanded its return by him. His failure to return the money which he had unlawfully received, and which he unlawfully retained in his possession was a breach of his official bond, for which both he and his surety are liable to the board of commissioners of Brunswick County. *S. v. Young*, 106 N. C., 567, 10 S. E., 1019. There is no error in the judgment. It is

Affirmed.

JAMES W. BROWN v. E. H. CLEMENT COMPANY.

(Filed 16 November, 1932.)

1. Bill of Discovery A a—Affidavit in this case held sufficient to support order for examination and inspection of writings.

Where it appears from the plaintiff's affidavit for an examination of the officers and agents of the defendant corporation and for an inspection of its books that the plaintiff was seeking to recover on a contract for the division of profits from the construction of a certain building by the corporation, and that the plaintiff could not approximately state the amount due thereunder without such discovery, and that the facts and records were peculiarly within the knowledge and possession of the officers and agents of the defendant, an order by the clerk granting the plaintiff's motion is not erroneous.

2. Same—Order for discovery may be issued where plaintiff is unable to approximately state amount due without such order.

A motion for an examination of the defendant and for the inspection of records and books will not be granted for mere inability of the plaintiff to allege the exact amount claimed, but such motion may be granted where it appears that the plaintiff could not otherwise even approximately state the amount claimed, but the plaintiff is entitled to inspect only the books and records pertinent to the inquiry and the plaintiff should be required to state specifically the books and records which he contends contain such matter.

3. Appeal and Error A d—Appeal from proper order for discovery is premature and will be dismissed.

An appeal from a proper order for an examination of the corporate defendant's officers and agents and for an inspection of its books and records is premature and will be dismissed, but in this case the appeal is dismissed without prejudice to the defendant to move for a modification of the order so that it should include only such books and records as are pertinent to the inquiry.

APPEAL by defendant from *Barnhill, J.,* at Chambers in Durham, N. C., on 22 July, 1932. Appeal dismissed.

The summons in this action was issued by the clerk of the Superior Court of Durham County, on 29 June, 1932. It was duly served on the defendant, a corporation, by the sheriff of Mecklenburg County, on 30 June, 1932. No complaint in the action has been filed by the plaintiff. Upon his application, as provided by statute (C. S., 505), time for filing the complaint has been extended from time to time, by orders of the clerk of the Superior Court of Durham County.

Before the time for filing the complaint had expired, the plaintiff moved before the clerk of the Superior Court of Durham County for an order for the examination of certain officers and employees and of the books and records of the defendant. This motion was supported by an affidavit in which the nature and purpose of the action is set forth. It appeared from the affidavit that certain information was required by the plaintiff to enable him to draft and file his complaint in this action, and that such information could be secured only from the officers and employees, and from the books and records of the defendant. This information could not be secured otherwise by the plaintiff. It also appeared from the affidavit that the application for the order of examination was made in good faith. The order was made by the clerk on 9 July, 1932. Thereafter the defendant appeared before the clerk, and moved that the order be quashed and vacated, on the ground that it was improvidently and improperly made by the clerk. This motion was supported by an affidavit filed by the defendant. After notice to the plaintiff, defendant's motion was heard and denied by the clerk on 16 July, 1932. From the order of the clerk, denying its motion, the defendant appealed to the judge holding the Superior Court of Durham County. Upon the hearing of this appeal, the order of the clerk was affirmed by the judge, and defendant appealed to the Supreme Court.

Marshall T. Spears for plaintiff.

McLendon & Hedrick and Thomas C. Guthrie for defendant.

CONNOR, J. It appears from the affidavit filed by the plaintiff with the clerk of the Superior Court of Durham County, in support of his motion for an order for the examination of certain officers and employees, and of the books and records of the defendant, that this is an action to recover on a contract for services rendered by plaintiff to the defendant. Plaintiff alleges that defendant agreed to pay him a certain percentage of the profits made by the defendant on certain construction work for Duke University. The action is to recover the amount due under the contract. It is not an action for an accounting. The amount now due the plaintiff by the defendant cannot be determined by the plaintiff without certain information now in the exclusive possession of the defendant. It has been held that an examination of the defendant, or where the defendant is a corporation, of its officers and employees, cannot be had merely to enable the plaintiff to allege the exact amount to which he is entitled, or to make an estimate of the damages sustained by him, unless the dealings between the parties were of such a character that the amount sued for cannot be otherwise approximately stated. 18 C. J., 1088. It appears from the affidavit filed by the plaintiff in this case, that the dealings between plaintiff and defendant were of the character stated in the exception to the general rule. The contention of the defendant that no examination of its officers and employees, or of its books and records, should be had, until the issue raised by its denial of the contract as alleged by the plaintiff has been tried and determined favorably to the plaintiff, cannot be sustained. The authorities in this and the decisions in other jurisdictions cited by the defendant are not applicable in this case.

This appeal must be dismissed on the authority of *Johnson v. Mills*, 196 N. C., 93, 144 S. E., 534. As said in the opinion in that case, when a proper order for the examination of the officers and employees, or of the books and records of a corporate defendant, has been duly made, an appeal from the order for such examination to this Court is premature, and will be dismissed. The authorities cited in the opinion in that case support this principle.

The appeal in the instant case is dismissed without prejudice to the right of the defendant to move, if so advised, in the Superior Court, before the judge or the clerk, for a modification of the order for the examination by the plaintiff of its books and records, to the end that only such books and records as contain information pertinent to plaintiff's cause of action, shall be produced by the defendant and submitted to examination by the plaintiff. It would seem that the plaintiff should be required to designate specifically the books and records which he contends contain the information to which he is entitled. At least after

his examination of the officers and employees of the defendant, named in the order, the plaintiff will doubtless be able to do this, and thus have ample opportunity to secure the information to which he is entitled, without a denial of the right of the defendant to be protected from "a drag-net" examination of all its books and records. The appeal is

Dismissed.

MRS. J. C. WALKER v. L. B. PRICE MERCANTILE COMPANY AND G. A. PUTT.

(Filed 16 November, 1932.)

Damages E a—Plaintiff's recovery held not defeated by failure of verdict to distinguish between actual and punitive damages.

Where the plaintiff establishes an assault by the verdict of the jury upon supporting evidence he is entitled to nominal damages at least, and where the verdict of the jury fixes the damages at "$200 punitive" and there is evidence that the plaintiff was entitled to recover a large sum as actual or compensatory damages: *Held*, the fact that the jury did not distinguish between actual and punitive damages will not deprive the plaintiff from recovering the sum designated. The distinction is pointed out where the verdict of the jury establishes that the plaintiff is not entitled to recover any actual damages.

APPEAL by defendants from *Harding, J.*, at August-September Term, 1932, of GUILFORD. No error.

In her complaint in this action, the plaintiff alleges two separate and distinct causes of action, on which she demands judgment that she recover of both defendants both compensatory and punitive damages. The issues raised by the pleadings and submitted to the jury were answered as follows:

"FIRST CAUSE OF ACTION.

1. Did the defendant, G. A. Putt, speak of and concerning the plaintiff in substance the words alleged in the complaint? Answer: Yes.

2. Was the defendant, G. A. Putt, the agent of the defendant, L. B. Price Mercantile Company, and acting within the scope of his authority as such agent at the time of the speaking of said words? Answer: Yes.

3. What damage, if any, is the plaintiff entitled to recover? Answer: $50.00.

SECOND CAUSE OF ACTION.

1. Did the defendant, G. A. Putt, assault the plaintiff as alleged in the complaint? Answer: Yes.

2. Was the defendant, G. A. Putt, the agent of the defendant, L. B. Price Mercantile Company, and acting within the scope of his authority as such agent at the time of said assault? Answer: Yes.

3. What damage, if any, is the plaintiff entitled to recover? Answer: $200.00 punitive."

From judgment that plaintiff recover of the defendants, and each of them, the sum of $250.00, and the costs of the action, the defendants appealed to the Supreme Court.

Wm. E. Comer, S. B. Adams and Allen Adams for plaintiff.
Smith & Joyner and Henderson & Henderson for defendants.

CONNOR, J. The evidence offered by the plaintiff, and admitted by the court, at the trial of this action, was sufficient to sustain affirmative answers to the first and second issues in each of the causes of action alleged in the complaint, and also to sustain the answers to the issues as to the damages which plaintiff is entitled to recover of defendants, on each of said causes of action. This evidence, although sharply contradicted by evidence introduced by the defendants, was properly submitted to the jury. There was no error in the charge of the court to the jury, which entitles the defendants or either of them to a new trial.

The defendants contend that there was error in the judgment, for that the jury did not find that plaintiff is entitled to actual or compensatory damages on her second cause of action, and that in the absence of such finding, she is not entitled to recover the sum of $200.00, which the jury awarded her as punitive damages on her cause of action for assault. Having established her cause of action for assault, plaintiff was entitled to recover nominal damages at least, 5 C. J., 701, and there was evidence in this case, tending to show that she was entitled to recover in addition to nominal damages, a substantial sum as actual or compensatory damages. The fact that the jury did not distinguish between compensatory and punitive damages in the answer to the third issue in the second cause of action, ought not, and does not deprive plaintiff of her right to judgment on the verdict as returned by the jury. In *Gilman v. Devereaux*, 67 Mont., 75, 214 Pac., 606, 33 A. L. R., 381, cited by defendants in support of their contention, the jury expressly found that plaintiff was not entitled to compensatory damages. It was held in that case, that plaintiff was not entitled to judgment for the punitive damages assessed by the jury. That case is distinguishable from the instant case. The judgment in this action is affirmed.

No error.

STATE v. NEALIE BROWN ET AL.

(Filed 16 November, 1932.)

Criminal Law L d—Record in this case is remanded for correction.

The record of a case is presumed correct and the trial court should not change it unless it contains error which it is his manifest duty to correct, in which case the trial court has the power at term to correct the error to make the record speak the truth, and on this appeal the case is remanded for correction of the record, it appearing that the verdict of the jury was inadvertently recorded as "guilty of murder in the third degree" when the jury had returned a verdict of guilty of manslaughter.

APPEAL by defendant, Nealie Brown, from *Cranmer, J.*, at July Term, 1932, of DUPLIN.

Criminal prosecution tried upon an indictment charging the defendants with the murder of one Ambrose Lanier.

Verdict: "Guilty of murder in the third degree."

Judgment: Imprisonment in the State's prison as to each of the defendants for a term of fifteen years.

The defendant, Nealie Brown, appeals, assigning errors.

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

J. T. Gresham, Jr., for defendant, Nealie Brown.

STACY, C. J. It appearing that the verdict was inadvertently recorded "guilty of murder in the third degree," when in reality the jury returned a verdict of manslaughter, the motion of the State to remand the cause for correction of the record will be allowed. *S. v. Harrison,* 104 N. C., 728, 10 S. E., 131; *S. v. Farrar, ibid.,* 702, 10 S. E., 159, *S. c.,* 103 N. C., 411, 9 S. E., 449.

That the Superior Court at term has the power to make its records speak the truth, and, to this end, to correct them, if need be, is established by a number of decisions. *S. v. Marsh,* 134 N. C., 184, 47 S. E., 6; *S. v. Currie,* 161 N. C., 275, 76 S. E., 694; *S. v. Bordeaux,* 93 N. C., 560; *S. v. Davis,* 80 N. C., 384; *S. v. Swepson,* 81 N. C., 571. See, also, *S. v. Lea, ante,* 35; *LaBarbe v. Ingle,* 201 N. C., 814, 161 S. E., 486; *Durham v. Cotton Mills,* 144 N. C., 705, 57 S. E., 465.

The presumption is, that the record as it appears is true, and the court ought not to interfere with it at all, unless, upon thorough inquiry, its duty of correction is manifest. *S. v. Harrison, supra.*

Ordinarily, the court may proceed *ex mero motu* to correct its records, and to make them speak the truth, but in *Durham v. Cotton Mills, supra,* it was suggested, as the better practice, to do so only after notice to the party to be affected by the correction, especially if the change be material. *Summerlin v. Cowles,* 107 N. C., 459, 12 S. E., 234.

Remanded.

TOM PEMBERTON ET AL. v. CITY OF GREENSBORO.

(Filed 16 November, 1932.)

Appeal and Error J e—As no substantial harm has or will result to appellant from order appealed from the judgment will not be disturbed.

Where on appeal from the court's refusal to grant a written motion to strike certain allegations from the complaint on the ground of irrelevancy, it appears that the plaintiff is to file a bill of particulars and that no substantial injury has or is likely to result to the defendant on account of the refusal of the motion and that the matter can better be determined upon the filing of the bill of particulars, the order denying defendant's motion will not be disturbed. C. S., 537.

APPEAL by defendant from *Oglesby, J.,* at June Term, 1932, of GUILFORD.

Civil action to recover compensation for the partial taking of plaintiffs' lands, or damages for an alleged nuisance arising out of the construction and maintenance of a sewerage disposal plant.

The complaint alleges several elements of damage, a number of which the defendant asked to have stricken out, as irrelevant and immaterial. C. S., 537. The motion was allowed in part—the plaintiffs offering to file a bill of particulars—and the defendant appeals because his Honor "refused to strike from the complaint the irrelevant or redundant matter set forth therein, as specified in defendant's written motion." There are eight specifications in the defendant's motion.

Frazier & Frazier and Brooks, Parker, Smith & Wharton for plaintiffs.

Andrew Joyner, Jr., and Sapp & Sapp for defendant.

STACY, C. J. It may be doubted whether the exception is sufficiently definite to enable us to review the different specifications, but however this may be, it is not discernible from the record that any harm has

come, or is likely to come, to the defendant by reason of the court's ruling. *Hosiery Mill v. Hosiery Mill,* 198 N. C., 596, 152 S. E., 794; *Ellis v. Ellis, ibid.,* 767, 153 S. E., 449.

It is readily conceded that nothing ought to be in a complaint, or remain there over objection, which is not competent to be shown on the hearing. C. S., 506; 21 R. C. L., 452. But the matter can better be determined after the bill of particulars has been filed. *S. v. Lumber Co.,* 199 N. C., 199, 154 S. E., 72. See, *Hines v. Rocky Mount,* 162 N. C., 409, 78 S. E., 510, for scope of recoverable damages.

As no substantial right, of which the defendant can apparently complain, has presently been affected or impaired, the judgment will not be disturbed. C. S., 537; McIntosh, N. C. P. & P., 378.

Affirmed.

E. W. COLTRANE v. D. L. DONNELL, TAX COLLECTOR OF GUILFORD COUNTY.

(Filed 16 November, 1932.)

Taxation D b—Tax lien attaches to personalty only from levy, and owner is not liable for taxes for years prior to his possession.

There is no lien for taxes on personal property except from levy thereon, N. C. Code of 1931, 7986, and where certain personal property comes into the hands of the defendant first as administrator and then as distributee he is personally liable for the taxes thereon only from the date he obtained possession, and the county cannot collect from him the taxes due on the property for the years prior to his possession of the property as administrator. N. C. Code of 1931, 7971(50), 7985.

APPEAL by plaintiff from *Harding, J.,* at August Term, 1932, of GUILFORD. Reversed.

This is a controversy without action submitted to the court on a statement of facts agreed. C. S., 626. The facts are as follows:

The plaintiff, E. W. Coltrane, is a resident of Jamestown Township, in Guilford County, North Carolina. He is now the owner of certain personal property, which came into his possession, as owner, in 1930. The said personal property was formerly owned by John L. Coltrane, who at his death in November, 1928, was a resident of Guilford County. At the death of John L. Coltrane, the plaintiff, E. W. Coltrane, duly qualified as his administrator, and as such administrator took into his possession the said property, as assets of the estate of his intestate. He held said property as administrator during the years 1929 and 1930.

During the year 1930, after the date for listing property for taxation, the plaintiff became the owner of said property as a distributee of the estate of John L. Coltrane.

During the month of January, 1932, the board of commissioners of Guilford County, listed the personal property, which was owned by John L. Coltrane, deceased, during the years 1927 and 1928, and which is now owned by the plaintiff, E. W. Coltrane, for taxation for the years 1931, 1930, 1929, 1928 and 1927, and levied taxes on said property for each of said years. The said property had not theretofore been listed for taxation by John L. Coltrane, by E. W. Coltrane, administrator, or by E. W. Coltrane.

The plaintiff has paid to the defendant, D. L. Donnell, who is the tax collector of Guilford County, the taxes levied on said personal property, for the years 1931, 1930 and 1929. He has refused to pay the taxes levied for the years 1928 and 1927. These taxes, with penalties, aggregate the sum of $287.59.

The court was of opinion that upon the facts agreed, the defendant, D. L. Donnell, tax collector of Guilford County, was entitled to recover of the plaintiff, as owner of said personal property, the sum of $287.59, with penalties and costs, and rendered judgment in accordance with this opinion. Plaintiff appealed to the Supreme Court.

Walser & Casey for plaintiff.
B. L. Fentress for defendant.

CONNOR, J. The presumption created by statute (N. C. Code of 1931, section 7971(50), that plaintiff, who was in possession of the personal property involved in this controversy in January, 1932, was the owner and in possession of said property on 1 April of the five preceding years, is rebutted by the facts admitted by the defendant. He was not the owner or in possession of said property in 1928 or in 1927. He now owns the property as a distributee of the estate of John L. Coltrane, and was such owner on 1 April, 1931. The property was in his possession, as administrator of John L. Coltrane, deceased, on 1 April, 1930, and 1929. He failed to list or pay taxes on said property for these years, or for the year 1931. He was, therefore, personally liable for the taxes for each of these years, N. C. Code of 1931, section 7985. He has paid these taxes. He is not, however, personally liable for the taxes for the years 1928 or 1927. He was not in possession of the property, either as administrator or as owner, during either of these years.

Guilford County had no lien on the personal property now owned by the plaintiff for the taxes due for the years 1928 or 1927. Taxes are

not a lien upon personal property, but from a levy thereon. N. C. Code of 1931, section 7986. There had been no levy on said property for taxes prior to the date on which plaintiff became the owner. His title to the property is, therefore, free from any lien for taxes. There was error in the judgment, which is

Reversed.

MARY WILLIS v. WILL WILLIS AND MAGGIE WILLIS.

(Filed 16 November, 1932.)

1. Husband and Wife G a: Estoppel A a—Husband held estopped by deed to wife from denying her title to land formerly held by entirety.

Although the right of survivorship in lands held by husband and wife by entirety cannot be defeated by the deed of either one of them alone, where the husband gives the wife a fee simple deed thereto with full covenants of warranty, and thereafter the husband obtains an absolute divorce: *Held*, upon the securing of the divorce the parties became tenants in common in the lands, and the husband's deed will estop him from denying the wife's title thereto in fee simple.

2. Estoppel D b—Under facts of this case it was not necessary that estoppel be pleaded.

Where a husband gives a deed to his wife for lands held by them by entirety, and thereafter the husband obtains an absolute divorce from the wife: *Held*, in the wife's action for the possession of the lands it is not necessary that she specifically plead that the husband was estopped by his deed from denying her title.

3. Cancellation and Rescission of Instruments B c—Right to rescission held lost by laches in this case.

The cancellation of an instrument for fraud should be sought within a reasonable time from the discovery of the fraud and where the husband deeds certain lands to his wife and thereafter obtains a divorce from her and the wife brings action for the possession of the lands, the husband may not seek to avoid his deed for alleged fraud in its procurement when such fraud occurred and was discovered more than three years prior to the commencement of the action.

4. Cancellation and Rescission of Instruments A b—Misrepresentations must be of past or subsisting fact in order to support rescission.

Misrepresentation must be of a past or subsisting fact in order to support an action for the rescission of a deed for fraud, and in this case, granting that the allegations in the pleadings were sufficient to support the relief of rescission, the evidence is held to be of insufficient probative force to be submitted to the jury.

WILLIS *v.* WILLIS.

APPEAL by defendants from *Harding, J.,* and a jury, at September Term, 1932, of DAVIDSON. No error.

The facts: (1) J. L. Michael and wife, L. B. Michael, on 25 April, 1921, conveyed a certain lot of land located in the city of Lexington, Davidson County, North Carolina, describing same by metes and bounds, to Will Willis and Mary Willis, who were husband and wife. Said deed is recorded in the office of the register of deeds for Davidson County, North Carolina, Book 109, p. 142. The consideration was $450. (2) Will Willis, on 19 June, 1928, conveyed one-half interest in the said land to the plaintiff Mary Willis "in consideration of one dollar and other considerations." In said deed is the following warranty clause: "And the said party of the first part, for themselves and their heirs, executors and administrators, covenant with said party of the second part, heirs and assigns, that he is seized of said premises in fee and has right to convey the same in fee simple; that the same are free and clear from all encumbrances, and that he do hereby forever warrant and will forever defend the said title to the same against the claims of all persons whomsoever." Said deed is duly recorded in the office of the register of deeds for Davidson County, North Carolina, Book 109, page 198.

At the February Term, 1931, of Davidson County Superior Court, Will Willis was decreed an absolute divorce from Mary Willis, on the ground of adultery "that the bonds of matrimony between the plaintiff and defendant be forever dissolved." The plaintiff Mary Willis brought this action against defendants for the possession of the land. Defendants denied plaintiff's right to recover on the grounds: (1) That the deed of Will Willis to Mary Willis executed on 19 June, 1928, is void and does not convey any interest whatsoever; (2) that the consideration was that the plaintiff stay at home as a wife should do and "quit running around with other men."

It is further more fully alleged by defendants: "That if said deed made by Will Willis to Mary Willis on 19 June, 1928, did not reserve a life estate to Will Willis, there was a mistake and misunderstanding in the drafting of said deed and the execution of the same and this defendant Will Willis alleges that the said deed should be reformed to conform to the agreement. . . . That the plaintiff knowingly and wilfully at the time the deed of Will Willis to Mary Willis was made, on 19 June, 1928, entered into the agreement with the defendant, to stay at home and 'quit running around with other men,' for the purpose of cheating and defrauding the defendant Will Willis of his interest in the property described in paragraph two of the complaint, and did cheat and defraud the defendant by her promises (which

promises were the making of and consideration of said deed) in obtaining his signature to said deed knowing full well at the time that she, the plaintiff, after securing said deed intended to abandon the defendant and live in illicit cohabitation with other men. . . . That the plaintiff Mary Willis disregarded the consideration of the said deed referred to in paragraph two of the complaint dated 19 June, 1928, by immediately leaving and abandoning her husband Will Willis, and immediately continuing her old life and living in fornication and adultery with one .... Wherefore the defendants pray: (1) That the deed of Will Willis to Mary Willis dated 19 June, 1928, be declared void. (2) That if said deed is not declared void that the same be reformed or set aside for want of consideration and violations of the terms and conditions under which said deed was delivered or be reformed to speak the truth. (3) For such further and other relief as may be just."

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

1. Is the plaintiff the owner and entitled to the immediate possession of the land described in the complaint? Answer: Yes.

2. What amount, if any, is the plaintiff entitled to recover of the defendants for rent of said premises? Answer: Not anything."

On the verdict judgment was rendered for plaintiff. The defendants made numerous exceptions and assignments of error and appealed to the Supreme Court.

Spruill & Olive for plaintiff.
P. V. Critcher and Walser & Walser for defendants.

CLARKSON, J. Will Willis and wife Mary Willis, as husband and wife, held an estate by the entirety in a certain lot of land in Lexington, N. C. Will Willis conveyed one-half interest in the land to the plaintiff his wife, on 19 June, 1928. The deed had full covenants of warranty. Thereafter at February Term, 1931, Davidson Superior Court, an absolute divorce was granted Will Willis from his wife Mary Willis on the ground of adultery.

The first question involved: Has plaintiff under the facts a fee simple title to the land in controversy? We think so by estoppel.

In *Dorsey v. Kirkland,* 177 N. C., at p. 522-3, is the following: "The deed under which the defendant claims, having been made to him and his wife, they took an estate by entirety, which carried with it the right of survivorship, and neither acting alone could by deed destroy this right or affect the estate of the other (*Freeman v. Belfer,* 173 N. C.,

581), but while this is so, during the joint lives of the husband and wife, the husband is entitled to the control and use of the land as his own property. . . . In *Bynum v. Wicker,* 141 N. C., 96, a mortgage executed by the husband alone was sustained, the Court saying, 'This estate by entirety is an anomaly, and it is perhaps an oversight that the Legislature has not changed it into a cotenancy, as has been done in so many states. This not having been done, it still possesses here the same properties and incidents as at common law. *Long v. Barnes,* 87 N. C., 333. At common law, "the fruits accruing during their joint lives would belong to the husband." (*Simonton v. Cornelius,* 98 N. C., 437), hence the husband could mortgage or convey it during the term of their joint lives, that is, the right to receive the rents and profits; but neither could encumber it so as to destroy the right of the other, if survivor, to receive the land itself unimpaired,' and in *Greenville v. Gornto,* 161 N. C., 342, a lease for ten years made by the husband was held to be valid, and the Court said of the nature of the estate and the rights and powers of the husband during the life of the wife: 'As Brady and his wife held, not as tenants in common or joint tenants, but by entireties, their rights must be determined by the rules of the common law, according to which the possession of the property during their joint lives vests in the husband, as it does when the wife is *sole seized.*' "

In *Potts v. Payne,* 200 N. C., at p. 249, is the following: "In *McKinnon v. Caulk,* 167 N. C., 411, it is held that a decree of absolute divorce destroys the unity of husband and wife, and therefore converts an estate by the entirety into a tenancy in common."

When Will Willis and Mary Willis were granted an absolute divorce the estate by entireties was severed and they became tenants in common, except for the fact that Will Willis had already conveyed to Mary Willis.

In *Hallyburton v. Slagle,* 132 N. C., at p. 952, we find: "Indeed, it has been said to have been fully established as a principle by the best authority, that the doctrine of estoppel applies to conveyances without warranty where it appears, by the deed, that the parties intended to deal with and convey a title in fee simple. *Graham v. Meek,* 1 Ore., 325; 1 Greenleaf on Ev., sec. 24. And, if this is not true, the estoppel certainly arises when the conveyance of the land is coupled with a covenant of warranty. Mr. Greenleaf says: 'A covenant of warranty estops the grantor from setting up an after-acquired title against the grantee, for it is a perpetually operating covenant.' " *Capps v. Massey,* 199 N. C., 196.

From the facts and circumstances of this case we do not think the question of estoppel had to be pleaded. In *Meyer v. Thompson,* 183

N. C., at p. 545 (quoting from *Bank v. Glenn,* 68 N. C., 36) is the following: "'And if, after the sale to the vendee, the vendor perfects the title, such subsequently acquired title inures to the vendee by estoppel; which, being a part of the title, may be given in evidence without being specially pleaded.'"

By the divorce absolute the estate by entireties was converted into a tenancy in common—Mary Willis and defendant Will Willis each having an undivided half interest. Will Willis having deeded a half interest to Mary Willis by warranty, is estopped to deny plaintiff's title.

The second question involved: Have the defendants alleged sufficient facts to set aside the deed from Will Willis to Mary Willis for fraud and deceit, and is the evidence of sufficient probative force to sustain the allegations? We think not.

In *Stone v. Milling Co.,* 192 N. C., at p. 586, it is said: "The general conditions under which factual misrepresentations may be made the basis of an action for deceit are stated in Pollock on Torts (12 ed.), 283, as follows: 'To create a right of action for deceit there must be a statement made by the defendant, or for which he is answerable as principal, and with regard to that statement all the following conditions must concur: (a) It is untrue in fact. (b) The person making the statement, or the person responsible for it, either knows it to be untrue, or is culpably ignorant (that is, recklessly and consciously ignorant) whether it be true or not. (c) It is made to the intent that the plaintiff shall act upon it, or in a manner apparently fitted to induce him to act upon it. (d) The plaintiff does act in reliance on the statement in the manner contemplated or manifestly probable, and thereby suffers damage.' (At p. 587.) Our decisions are to the effect that 'where it is sought to base one's relief on the ground of fraud, the allegations of fact must be specific and definite.' *Evans v. Davis,* 186 N. C., p. 45." *Hawkins v. Carter,* 196 N. C., 538.

In *Hinsdale v. Phillips,* 199 N. C., at p. 572, citing numerous authorities, we find: "As a general rule, fraud as a ground for the rescission of contracts, cannot be predicated upon promissory representations, because a promise to perform an act in the future is not in the legal sense a representation. Fraud, however, may be predicated upon the nonperformance of a promise, when it is shown that the promise was merely a device to accomplish the fraud. A promise not honestly made, because the promisor at the time had no intent to perform it, where the promisee rightly relied upon the promise, and was induced thereby to enter into the contract, is not only a false, but also a fraudulent representation, for which the promisee, upon its nonperformance is ordinarily entitled to a rescission of the contract."

In *Young v. Hamilton,* 196 N. C., at p. 819, is the following: "pretermitting the question as to whether the defendant in her counterclaim has alleged facts sufficient to constitute a defense or a cause of action for deceit (*Stone v. Milling Co.,* 192 N. C., 585, 135 S. E., 449) we are of opinion that the evidence offered in support thereof is too vague and indefinite or too gossamery to sustain such an action or to defeat plaintiff's claim."

The deed to plaintiff was made and executed by defendant Will Willis on 19 June, 1928. He obtained a divorce from plaintiff nearly three years thereafter, February Term, 1931, Davidson Superior Court. This action was commenced 2 October, 1931, and the alleged defense of fraud, etc., set up over three years after the deed was made and in and after this action was instituted. The defendants tendered no issue of fraud nor did they except to the issues upon which the theory of the case was tried.

In *May v. Loomis,* 140 N. C., 359, the Court says: "In order to rescind, however, the party injured must act promptly and within a reasonable time after the discovery of the fraud, or after he should have discovered it by due diligence; and he is not allowed to rescind in part and affirm in part; he must do one or the other." *McNair v. Finance Co.,* 191 N. C., at p. 718.

Defendant Will Willis testified in part: "The consideration between me and my wife, was when I made her this deed that she would stop riding, running around with this man at night. . . . And I made her this deed and *she left with him three weeks after that.*"

Conceding that there was fraud, yet with the knowledge of the fraud that the defendant Will Willis alleged was practiced on him, more than three years before, he never brought an action to set aside or rescind the deed for fraud, but set up the defense of fraud in this action, over three years after he knew of the fraud. He is too late under the facts and circumstances of this case. 72 A. L. R., p. 729. Of course the three-year statute if pleaded is also applicable. C. S., 441(9); *Stancill v. Norville, ante,* 457. We see no evidence of mutual mistake.

In Black on Rescission and Cancellation, 2nd ed. (1929), part sec. 541, p. 1334, speaking to the subject: "It is also a general principle that a person who knows that he is entitled to rescind a contract cannot wait until suit is brought for payment or other enforcement of the contract and then set up his grounds of rescission, or at least, such a course is regarded with great disfavor by the courts if there has been any considerable lapse of time since his discovery of the facts."

"In *Van Gilder v. Bullen,* 159 N. C., 291, 74 S. E., 1059, it is said: 'It is also well established that the right to rescind must be exercised promptly, and if there is unreasonable delay, the right is lost, and the

party defrauded is generally relegated to his action for damages. *Alexander v. Utley,* 42 N. C., 242; *Knight v. Houghtalling,* 85 N. C., 17.' In that case it was held that the party who alleged that he had been induced to enter into the contract by fraudulent representations made by the other party had no right of rescission, as there had been a delay of about two years after the discovery of the alleged fraud, before the action in which he prayed for rescission was commenced." *Hinsdale v. Phillips, supra,* at p. 574.

Conceding that the allegations of the defendants' further answer to the complaint is plenary, yet the evidence offered by defendants is not of sufficient probative force to be submitted to a jury. We do not think the other exceptions and assignments of error made by defendants material and necessary to be considered. For the reasons given, we find

No error.

MANUFACTURERS' FINANCE ACCEPTANCE CORPORATION v. C. H. JONES AND W. S. SCALES.

(Filed 16 November, 1932.)

Trial G a—Trial court may set aside verdict in his discretion during term, but not thereafter unless parties consent to continuance.

The trial judge has the discretionary power during the term to set aside a verdict as being against the weight and credibility of the evidence, and his action in so doing is not ordinarily reviewable, C. S., 591, but an order setting aside the verdict on such grounds at a succeeding term of court upon a continuance of the defendant's motion therefor will be reversed on appeal where the record shows that the plaintiff did not consent to the continuance and did not waive his right to except thereto.

APPEAL by defendants from *Stack, J.,* at September Term, 1932, of FORSYTH. Reversed.

This was an action brought by plaintiff against defendants to recover the sum of $2,803.49 with interest on same from 15 April, 1930, secured by conditional sales contract and for the recovery and sale of the property. The plaintiff alleges that on 15 April, 1929, the defendants executed to Thos. A. Branon, a conditional sales agreement on 1 Disc Standard Model Biophone Equipment, which was installed in the Lincoln Theatre, Winston-Salem, North Carolina, for which they agreed to pay the sum of $4,500 payable as follows: *$1,250 in cash,* and $3,250 payable $225 on 15 May, 1929, and a like amount on the 15th day of each month thereafter until ten monthly payments had been made, and two payments, 11 and 12 months after date, in the sum of $500

each. That on said date the defendants executed to the said Thos. A. Branon a promissory note in the sum of $3,250, payable $225 per month for the first ten months and $500 per month for the eleventh and twelfth months, with interest on said notes at 6 per cent per annum from date. That on or about 4 May, 1929, the said Thos. A. Branon did transfer, sell and assign the conditional sales contract and the promissory note to the plaintiff in this action, for value received, and before maturity of any portion of said note.

The defendants admitted some of the allegations of the complaint, but "it is specifically denied that the plaintiff is a holder of the note in due course without notice of any defenses." As a further defense, the defendants, in part say: "That the defendants were unable to use the said equipment due to its failure to give service; that the said Thomas A. Branon knew at the time of the sale of the said Standard Model Biophone that the same was inferior; incomplete condition of the equipment sold to the defendants at the time the same was sold them; that the defendants are informed and believe, and so allege, that the market value of the equipment sold to them was far below the amount which they paid for the said equipment," etc.

The defendants introduced many witnesses who testified in substance as did Jack O'Kelly, who said, in part: "I am a motion picture operator and have been for about 19 years. In 1929, I was employed at the Lincoln and Rex Theatres as chief operator. I was employed there at the time the biophone equipment was installed. I didn't exactly help install it; Mr. Branon was supposed to install it, but I did little odd jobs. My duty was to operate the equipment after he made the installation, to run the pictures. I operated that equipment about four or five months, something like that. The equipment did not give continuous service for that period. You just couldn't get it to work; everything was the matter with it, as far as I was concerned, the tubes, then the speaker, then the amplifier, then the pick-ups. Sometimes it would synchronize for half a day, and then maybe only for two or three shows. The record on the biophone was supposed to synchronize with the film that was being run. For a while it would talk and synchronize together, and then get out, and then it would stop talking and we wouldn't have any sound at all. Sometimes the picture would be saying one thing and the record another, and just different things; today it would be one thing, tomorrow another, sometimes the same thing right over and over."

C. H. Jones testified, in part: "We finally took that biphone equipment out and it is packed up down here in a room now. We took it out because it didn't give service. We couldn't return it to the seller after we took it out because he wouldn't accept it. . . . Then it wouldn't

work and Mr. Branon would come back from time to time and have people to work on it, and we paid them a right smart more on it. He was telling us that it would work. Then he would come back and tell us he was building other machines, or making improvements on these machines, and as soon as he could get to us he would put another one in the place of this one, if he couldn't get this one to work. . . . The last time he came when we made the last payment we did make, and he told us that he was ready then in the next week or two to put in a new machine that would take care of the situation. He didn't say in a week or two; he said 'just right away.' Then he didn't do that, and then when he came back again he told us that he had just wired for our connections, and so on, and then he didn't do any more to the machine and didn't come back any more. He never did offer to take the machine back. I saw Mr. Branon perhaps a dozen times in all after he sold us this equipment; *I saw him at one time with the conditional sales agreement and note in his possession, but I don't know* that I saw the signature on it."

The contract was entered into 15 April, 1929, and plaintiff contended it purchased the notes and conditional sale shortly afterwards, 4 May, 1929.

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

"1. Did the defendants execute the note and conditional sales agreement, as alleged in the complaint? Answer: Yes.

2. Is the plaintiff the owner and holder in due course of the note described in the complaint? Answer: No.

3. What amount, if any, are the defendants indebted to the plaintiff? Answer: Nothing.

4. Is the plaintiff the owner and entitled to the immediate possession of the personal property described in the complaint? Answer: Yes."

The following is in the record at the term the action was tried: "In the Forsyth County Court—(January 4th Term, 1932) minutes of the clerk (Docket Book 53, p. 154): The plaintiff moves to set the verdict aside. Motion continued until the next term of this court. Prayer for judgment is also continued until the next term of court. . . . Judgment tendered by defendants: North Carolina, Forsyth County—In the Forsyth County Court, January 4th Term, 1932—Title of case. (The judgment on the verdict is set forth ..... judge, Forsyth County Court. The court declined to sign the judgment tendered by the defendants, to which the defendants except."

Thereafter at the January 25th Term, of the Forsyth County Court, the judge set the verdict aside as being against the greater weight of

the evidence and in the judgment said: "The court is of the opinion that the verdict is against the greater weight of the evidence, and the prayer for judgment on the verdict tendered by the defendants is disallowed by the court."

The judge of the county court in making up defendant's exceptions, among other things put this in: "Upon the rendition of the verdict, the plaintiff moved to set aside the verdict as being against the greater weight of the evidence. The defendants tendered judgment to be signed, but the court refused to sign same and intimated in open court and in the presence of counsel for both parties that he was going to set the verdict aside unless the parties could agree upon a compromise whereby defendants should make a cash payment to plaintiff, and advised the defendants to reach some settlement with plaintiff." The judge also put this in: "There was no agreement between counsel for plaintiff and counsel for defendants for this continuance, but neither party made objection."

On appeal to the Superior Court, the court below overruled defendants' exceptions and assignments of error and affirmed the judgment of the Forsyth County Court, setting aside the verdict. The defendants duly excepted, assigned error and appealed to the Supreme Court.

Peyton B. Abbott and Hastings & Booe for plaintiff.
Hosie V. Price and W. Avery Jones for defendants.

CLARKSON, J. The plaintiff says the question involved in this case is: Did the trial court commit prejudicial error in continuing to a subsequent term plaintiff's motion to set aside the verdict, and in acting upon the motion at such subsequent term by allowing the motion and setting aside the verdict, under the circumstances of this case? We think so.

C. S., 591, is as follows: "The judge who tries the cause may, in his discretion, entertain a motion to be made on his minutes, to set aside a verdict and grant a new trial upon the exceptions, or for insufficient evidence, or for excessive damages; *but such motion can only be heard at the same term at which the trial is had.* When the motion is heard and decided upon the minutes of the judge and an appeal is taken from the decision, a case or exceptions must be settled in the usual form, upon which the argument of the appeal must be had." (Italics ours.) See *S. v. McLamb, ante,* at p. 451.

There is no question but that the Forsyth County Court in its sound discretion, not arbitrarily or capriciously, had the right to set the verdict aside as "against the greater weight of the evidence." This is so well settled that it is not debatable. From this ordinarily there is no appeal. *Hoke v. Whisnant,* 174 N. C., 658; *Hardison v. Jones,* 196 N. C., 712.

"In *Settee v. Electric Ry.,* 170 N. C., 365, 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 presenting what may seem to him an equitable result.' And again in *Cates v. Tel. Co.,* 151 N. C., 506: '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.'" *Bailey v. Mineral Co.,* 183 N. C., at p. 527. In the *Bailey case, supra,* it will be noted that the facts were "The jury returned a verdict in favor of the plaintiffs, and the defendants at the same term duly entered a motion to have the same vacated and set aside. This motion, *by consent,* was continued to be heard in vacation at some time and place convenient to the parties and to the court." Under that consent agreement, the court upon notice to the counsel set the verdict aside as "contrary to the weight of the evidence."

Now under C. S., 591, we have clear and strong legislative language "but such motion can only be heard at the same term at which the trial is had." Now this statute of course can be waived by express or implied consent. On this record there is no express consent and taking the record as a whole there was no implied consent, we think the defendants did all that was necessary to preserve their legal rights under all the facts and circumstances of this case. We can see no consent express or implied made by defendants to waive their legal rights under the statute.

The cases examined all seem to be premised that to waive the provisions of C. S., 591, the continuance must be by consent. *England v. Duckworth,* 75 N. C., 309; *Moore v. Hinnant,* 90 N. C., 163; *Myers v. Stafford,* 114 N. C., 231; *Stilley v. Planing Mills,* 161 N. C., 517.

In *Clothing Co. v. Bagley,* 147 N. C., at p. 38, *Brown, J.,* says: "His Honor had no right to set aside the verdict at the succeeding June Term, although the said judge held both terms, unless the parties to the action had consented to the continuance of such motion to the June Term. At June Term the judge finds as a fact that such consent had been duly given at March Term, and that finding, entered of record, is practically an amendment of the record at March Term. We cannot review the exercise of his Honor's discretion in granting a new trial upon the ground that the verdict is against the weight of the evidence!" *Decker v. R. R.,* 167 N. C., 26, is not at variance with the position here enunciated. In that case, at p. 31, it is said: "The legal effect of the transaction was to set aside the verdict, with leave to strike out the order if the proposition of the judge was afterwards accepted. This was the substance of it." And this was done at the term in which the action was tried.

From the facts gathered on the hearing and the record, the Lincoln Theatre was a Negro place of amusement operated by defendants. A jury has found for the defendants. A verdict is the unanimous decision made by a jury and reported to court and is a substantial right. *Sitterson v. Sitterson,* 191 N. C., 319, 131 S. E., 641.

Defendants through their counsel seemed to have used due care, as appears from the record, not to consent to a continuance of the case, either by express or implied language or conduct. They seem to have been cautious and polite about the matter. As a matter of common knowledge this whole proceeding was in an Anglo-Saxon atmosphere. A jury has, and as the evidence indicates, decided with the defendants that the vendor was putting over a worthless talking picture machine in the Negro Lincoln Theatre, and the plaintiff corporation that purchased the notes and now own same had notice. From the evidence: "The record on the biophone was supposed to synchronize with the film that was being run. For awhile it would talk and synchronize together, and then get out, and then it would stop talking and we wouldn't have any sound at all. Sometimes the picture would be saying one thing and the record another."

It seems as if the vendor sold defendants a "crazy biophotophone" or talking picture machine. The defendants in their brief say in regard to the judge making up their exception in the Forsyth County Court and his finding, that their attitude "was merely a peaceful protest." We can understand their respect for the court, and this ought not to be held against them, when the record as a whole shows that their exceptions and assignments of error were to the effect that they never consented to waive the rights that the statute gave them. In fact the Forsyth County Court judge says "There was no agreement."

We think there was prejudicial error for which the judgment of the court below must be

Reversed.

STATE v. JAMES H. GREGORY.

(Filed 16 November, 1932.)

1. Criminal Law E d—Solicitor's statement before trial that State would not ask for conviction of highest degree is equal to nol. pros. thereon.

In a prosecution for homicide an announcement by the solicitor before entering upon the trial that the State would not ask for a verdict of more than murder in the second degree is tantamount to taking a *nolle prosequi* or accepting an acquittal on the capital charge.

2. Homicide G c—Held: proper foundation was laid for dying declarations.

In this case held: proper foundation was laid for introduction of dying declarations of deceased.

3. Homicide G b—Under the evidence in this case held: instruction that killing was presumed to be murder in second degree was error.

Although an intentional killing with a deadly weapon raises a presumption that the crime was murder in the second degree, nothing else appearing, yet where the presumption therefrom has been rebutted, from the whole evidence it is the duty of the court to instruct the jury that they should not bring in a verdict of more than manslaughter; in this case there was no evidence that the killing was intentional, and there was competent testimony of dying declarations of the deceased that the killing was accidental: *Held*, an instruction that the killing was presumed to be murder in the second degree is reversible error.

APPEAL by defendant from *Shaw, Emergency Judge,* at June Term, 1932, of GUILFORD.

Criminal prosecution tried upon an indictment charging the defendant with the murder of his son, Tyro Gregory.

When the case was called for trial, the solicitor announced that the State would not insist upon a verdict of murder in the first degree, but would ask for a verdict of murder in the second degree or manslaughter as the evidence might disclose.

The record discloses that in consequence of a telephone call, the sheriff of Guilford County went to the home of the defendant on 13 July, 1931. He found the defendant in the corner of the yard, "just walking around with some other gentleman." When the sheriff drove up, the defendant came to his car. He seemed to be under the influence of whiskey or a dope of some kind. In answer to the sheriff's inquiry as to what was the trouble, the defendant replied: "I am not going to tell any lie about it. We had some trouble out here and my boy would not mind me and I just went in the house and got my shotgun and got two shells and stepped out on the back porch and told him I was going to be the boss around there and when I went to put the shells in the gun and breech it up the gun went off and killed him, or shot him."

The deceased in a dying declaration stated that his father accidentally shot him "while fooling with an old gun. It was purely accidental." He later repeated, while in the hospital: "I want it understood that it was purely an accident."

The defendant testified that he could not recall his conversation with the sheriff. "It scared me pretty nigh to death when I shot that boy." Tyro had been plowing that day; he had just come in from the field and was sitting on the steps washing his feet; it was about 5:30 or

6 o'clock. "I came out of the door with the gun intending to shoot a rabbit; as I walked down the steps, I put the two shells in the gun, I didn't even look at the boy, not thinking anything, and when I snapped it back it fired and the boy hollered and said he was shot."

The following instruction forms the basis of defendant's 7th exception:

"Where one kills another with a deadly weapon, nothing else appearing, the law presumes that the killing is a case of murder in the second degree, that is, the law presumes that such killing, nothing else appearing, was done with some motive sufficiently bad to make it murder in the second degree, even though the State may not be able to show what the motive was."

Verdict: Guilty of manslaughter.

Judgment: Imprisonment in the State's prison for a period of not less than 2 nor more than 5 years.

The defendant appeals, assigning errors.

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

Sapp & Sapp for defendant.

STACY, C. J. The announcement of the solicitor, made before entering upon the trial, that the State would not ask for a verdict of more than murder in the second degree, was tantamount to taking a *nolle prosequi,* or accepting an acquittal, on the capital charge. *S. v. Brigman,* 201 N. C., 793, 161 S. E., 727; *S. v. Spain, ibid.,* 571, 160 S. E., 825; *S. v. Hunt,* 128 N. C., 584, 38 S. E., 473.

The dying declaration of the deceased was admitted only after proper foundation or predicate had been laid for its introduction. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604.

The only serious exception appearing on the record is the 7th, or the one addressed to the court's charge that a killing with a deadly weapon, nothing else appearing, raises a presumption of murder in the second degree. This instruction finds support in the following cases: *S. v. Robinson,* 188 N. C., 784, 125 S. E., 617; *S. v. Benson,* 183 N. C., 795, 111 S. E., 869; *S. v. Fowler,* 151 N. C., 731, 66 S. E., 567; *S. v. Worley,* 141 N. C., 764, 53 S. E., 128; *S. v. Willis,* 63 N. C., 26; *S. v. Haywood,* 61 N. C., 376. But in each of these cases the Court was dealing with an intentional killing and not with one in which the State's evidence suggested an accidental killing, or homicide by misadventure. *S. v. Eldridge,* 197 N. C., 626, 150 S. E., 125.

In *S. v. Quick,* 150 N. C., 820, 64 S. E., 168, it was said that where an intentional killing is admitted or established, the law presumes malice from the use of a deadly weapon, and the defendant is guilty of murder in the second degree, unless he can satisfy the jury of the truth of facts which justify his act or mitigate it to manslaughter. "The burden is on the defendant to establish such facts to the satisfaction of the jury, unless they arise out of the evidence against him." This rule has since been uniformly adhered to in indictments for homicide. *S. v. Cox,* 153 N. C., 638, 69 S. E., 419; *S. v. Yates,* 155 N. C., 450, 71 S. E., 317; *S. v. Rowe, ibid.,* 436, 71 S. E., 332; *S. v. Lane,* 166 N. C., 333, 81 S. E., 620; *S. v. Cameron, ibid.,* 379, 81 S. E., 748; *S. v. Pasour,* 183 N. C., 793, 111 S. E., 779; *S. v. Ashburn,* 187 N. C., 717, 122 S. E., 833, and formerly in *S. v. Clark,* 134 N. C., 698, 47 S. E., 36, *S. v. Brittain,* 89 N. C., 481; *S. v. Ellick,* 60 N. C., 450.

Speaking of the presumption which arises from an intentional killing with a deadly weapon, nothing else appearing, *Avery, J.,* delivering the opinion of the Court in *S. v. Miller,* 112 N. C., 878, 17 S. E., 167, said:

"It is true that when the killing with a deadly weapon is proved and admitted, the burden is shifted upon the prisoner, and he must satisfy the jury, if he can do so, from the whole of the testimony, as well that offered for the State as for the defense, that matter relied on to show mitigation or excuse is true. *S. v. Vann,* 82 N. C., 631; *S. v. Willis,* 63 N. C., 26; *S. v. Brittain,* 89 N. C., 481. But when it appears to the judge that in no aspect of the testimony, and under no inference that can be fairly drawn from it, is the prisoner guilty of murder, it is his duty, certainly when requested to do so, to instruct the jury that they must not return a verdict for any higher offense than manslaughter, just as it would be his duty to instruct, in a proper case, that no sufficient evidence had been offered to either excuse or mitigate the slaying with a deadly weapon. Though the law may raise a presumption from a given state of facts, nothing more appearing, it is nevertheless the province of the court, when all of the facts are developed and known, to tell the jury whether in every aspect of the testimony the presumption is rebutted. *S. v. Roten,* 86 N. C., 701; *Doggett v. R. R.,* 81 N. C., 459; *Ballinger v. Cureton,* 104 N. C., 474."

This statement of the law was quoted with approval in *S. v. Baldwin,* 152 N. C., 822, 68 S. E., 148, and *S. v. Pollard,* 168 N. C., 116, 83 S. E., 167.

Again, in *S. v. Wilcox,* 118 N. C., 1131, 23 S. E., 928, *Montgomery, J.,* delivering the opinion of the Court, dealt with the subject as follows:

"The prisoner having admitted that he killed the deceased with a pistol, the law presumes that he acted with malice, and the burden is shifted upon him to show, not beyond a reasonable doubt, but to the satisfaction of the jury, if he can, that the facts and circumstances on which he relies to show mitigation or excuse or justification are true. These he can show from the whole evidence, as well that offered by the State as that offered by himself. And the act of 1893 (chapter 85), which divides murder into two degrees, modifies this principle of the law only to the extent of making the killing, nothing else appearing, murder in the second degree, instead of murder in the first degree, as was the case before the statute. But in the trial of cases where this doctrine of legal presumption is applicable it may happen that, when the whole of the proof is in, it is manifest that, looking at it as a whole and in its every aspect and as to every inference that could be fairly drawn from it, the presumption has been completely rebutted. A part of the testimony may prove simply a homicide, and yet, afterwards, upon the whole state of facts being made known, there is left no doubt that matters of justification or excuse or mitigation have been shown. In such a case it therefore appears that in no aspect of the testimony, in which it may be believed as a whole, can the prisoner be guilty of murder in the second degree, and the court ought to tell the jury that, in every view of the whole testimony, the presumption has been rebutted, and that they must not convict of a higher offense than manslaughter, just as the court would have power to tell them that no mitigating or excusing or justifying circumstances had been shown to reduce the degree of the offense charged, when no such testimony had been, in fact, introduced. *S. v. Miller,* 112 N. C., 878. 'As malice is a presumption which the law makes from the fact of killing, it must necessarily be a matter of law what circumstances will rebut the presumption.' *S. v. Matthews,* 78 N. C., 523."

There is nothing on the present record to show an intentional killing. The case rests upon statements coming from the defendant, in none of which is it said the killing was intentional. The dying declaration of the deceased was to the effect that the shooting was accidental. True, the State's evidence shows a killing with a deadly weapon, but it also shows circumstances of mitigation, if not of exculpation. Under these conditions, we think the instruction that the killing was presumed to be a case of murder in the second degree, was misleading and perhaps weighed too heavily against the defendant. *S. v. Bryson,* 200 N. C., 50, 156 S. E., 143; *S. v. Lee,* 193 N. C., 321, 136 S. E., 877; *S. v. Waldroop, ibid.,* 12, 135 S. E., 165.

New trial.

J. J. PRIDGEN v. MARY PRIDGEN.

(Filed 23 November, 1932.)

1. **Marriage C a—Void marriage is a nullity and may be impeached collaterally.**

   A voidable marriage is valid for all civil purposes until annulled by a court of competent jurisdiction in a direct proceeding, while a void marriage is a nullity and may be impeached at any time.

2. **Same—Marriage may be attacked by party thereto on ground that other party had not obtained valid decree dissolving prior marriage.**

   Where a wife attempts to marry again when no valid divorce *a vinculo* had been obtained from her living husband, such second attempted marriage is absolutely void and may be annulled by the husband of the second attempted marriage in an action instituted for that purpose. C. S., 1658, 2495.

3. **Divorce D a: States A a—Divorce of another state based upon service by publication on resident of this State is not valid here.**

   Where a husband domiciled in another state obtains a decree of absolute divorce from his wife domiciled in this State in which proceeding the wife is served with summons by publication in accordance with the laws of such other state, and in which the wife does not appear in person or by attorney: *Held*, the decree of divorce based upon such service is not valid in this State, and an attempted second marriage of the wife will be declared void in an action brought by the husband of the second attempted marriage. The distinction is noted where both parties are residents of such other state and its courts have jurisdiction of both parties.

APPEAL by plaintiff from *Barnhill, J.*, at May Term, 1932, of DURHAM.

This is an action to annul a pretended marriage between the plaintiff and the defendant on the ground that the defendant had a living husband by a preceding marriage at the time the ceremony between the plaintiff and the defendant was celebrated.

The material facts are as follows: The parties to this action are residents of North Carolina, the defendant all her life having resided in Durham County. They were married in Halifax County in 1921 or 1923. The plaintiff was a widower. The defendant admits that at the time she married the plaintiff her first husband, John A. Dowd, was living and that he is now a resident of North Carolina. In her answer she alleged that prior to her intermarriage with the plaintiff she and her former husband had been divorced, and for the purpose of showing that the decree is invalid in this State, the plaintiff introduced with-

out objection the following record and judgment roll of a civil action prosecuted in the county of Richmond, State of Georgia, entitled "John A. Dowd *v.* Mary Dowd."

"State of Georgia—Richmond County.

To the Superior Court of said county:

The petition of John A. Dowd, of said county, shows:

1. That in the year 1907 plaintiff and Mary Cheek intermarried in due form of law, and petitioner and defendant have been ever since and now are man and wife.

2. Petitioner has been a bona fide resident of the State of Georgia for 12 months before the filing of this application for divorce.

3. That on 1 May, 1913, his said wife deserted him, petitioner, without any cause on his part; that said desertion was wilful and has been continuous up to the present time.

4. That his said wife, Mary Dowd, is a nonresident of the State of Georgia, and her present address is unknown to petitioner.

5. Wherefore, petitioner prays that process may issue directed to the defendant directing and requiring her to be and appear at the next term of this court to be held in and for said county to answer your petitioner's libel for total divorce.

Henry C. Roney, Attorney for Petitioner.

(Filed in office, this 25 May, 1916.)

Richmond Superior Court—July Term, 1916. Libel for Divorce.

John A. Dowd *v.* Mary Dowd.

It appearing from the petition that the defendant in the above stated case, Mary Dowd, is a nonresident of the State of Georgia;

Ordered, that service be perfected on the defendant by publication in the Augusta *Herald,* a public gazette of said county in which legal advertisements are published; twice a month for two months, before the next term of this court. This 25 May, 1916.

Henry C. Hammond, J. S., C. A. C.

State of Georgia—Richmond County.

Libel for Divorce in Richmond Superior Court, July Term, 1916.

John A. Dowd *v.* Mary Dowd.

To the defendant, Mary Dowd: You are hereby required in person or by attorney to be and appear at the Superior Court next to be held in and for the county aforesaid on the third Monday in July, 1916, then and there to answer the plaintiff in action for libel for divorce.

In default of said appearance said court will proceed thereon as to justice may appertain.

Witness the Honorable Henry C. Hammond, judge of the said court. This 25 May, 1916. Daniel Kerr, clerk.

Richmond Superior Court—July Term, 1916. Libel for Divorce.

John A. Dowd *v.* Mary Dowd.

I do hereby certify that notice in the above entitled action was advertised in the Augusta *Herald,* the legal medium for advertisement in Richmond County, once a week for four weeks, to wit: 26th and 30th of May, 1916, and 7th and 12th of June, 1916.

R. E. Cothran, of the Augusta *Herald.*

It appearing that advertisement has been made in the Augusta *Herald* once a week for four weeks of the above stated case, it is hereby ordered that due and legal service has been made and perfected upon defendant as required by law.

31 October, 1916. Henry C. Hammond, J. S., C. A. C.

JUDGMENT.

Richmond Superior Court—July Term, 1916. Libel for Divorce.

John A. Dowd *v.* Mary Dowd.

Two concurring verdicts having been rendered in this case granting a divorce *a vinculo matrimonii* between the parties upon legal principles, it is therefore considered and adjudged by the court that the marriage contract made and entered into between the parties in this case be, and the same is hereby, declared to be set aside and dissolved as fully and effectually as if no such contract had ever been made and entered into and that both parties may remarry.

Ordered further that defendant pay the costs of these proceedings.

This 27 January, 1917.

Henry C. Hammond, J. S., C. A. C.

State of Georgia—Richmond County.

Clerk's Office—Superior Court.

I, Daniel Kerr, clerk of Superior Court of said county, certify that the foregoing five typewritten pages contain a true copy of the record *In re* John A. Dowd *v.* Mary Dowd, of file in this office and of record in the minutes and book of writs of said court.

Witness my signature and seal of said court. This 21 November, 1931.

(Signed) David Kerr, clerk of Superior Court.

(Seal.) Superior Court, Richmond County."

The Code of Georgia provided as one of the grounds of total divorce the wilful and continued desertion by either of the parties for the term of three years.

The defendant offered no evidence, and the jury returned the following verdict:

1. Is the plaintiff now, and has been, for the two preceding years, a resident of North Carolina, as alleged in the complaint? Answer: Yes.

2. Was there a contract of marriage between plaintiff and defendant, as alleged? Answer: Yes.

3. Did the defendant at the time of said contract of marriage then have a living husband by a preceding marriage, as alleged? Answer: No.

With reference to the third issue the court gave this instruction: "Now, if she had a living husband at the time she entered into the contract with plaintiff, then she could not contract—could not enter into another contract of marriage with him, because it would be bigamous and contrary to law, but if she had been married theretofore and her husband was either dead or there had been a binding decree of divorce, then that left her where she could remarry. The plaintiff himself offers a certified copy of the record in the courts of Georgia, in which a decree of divorce was entered in 1917 between the defendant, who was then Mary B. Dowd, and John A. Dowd, and upon that evidence the court instructs you that at the time of the marriage upon that record, if you believe it, then that she did not have a living husband at the time she entered into the contract in 1923 with the plaintiff and it would be your duty to answer that issue, No."

The plaintiff excepted.

J. W. Barbee for plaintiff.

B. Ray Olive, M. M. Leggett and A. G. Johnson for defendant.

ADAMS, J. For the purpose of showing that the decree of divorce rendered by the court in Georgia is without legal validity in North Carolina the plaintiff introduced the judgment roll, from which it appears that the defendant in the action was served with constructive and not with personal service of process. If the decree is a nullity here the plaintiff is not estopped by its introduction, "for what the law pronounces void cannot estop." *Gathings v. Williams,* 27 N. C., 487. We must therefore direct our investigation to the legal efficacy in this State of the decree granted by the Georgia court.

Between void and voidable marriages the law recognizes a distinction which applies to the status of the parties before the marriage relation is

dissolved. A voidable marriage is valid for all civil purposes until annulled by a competent tribunal in a direct proceeding, but a void marriage is a nullity and may be impeached at any time. Schouler's Marriage, etc., sec. 1081; *Johnson v. Kincade,* 37 N. C., 470; *Crump v. Morgan,* 38 N. C., 91; *Williamson v. Williams,* 56 N. C., 446; *Taylor v. White,* 160 N. C., 38. In *Gathings v. Williams, supra,* the principle is stated in these words: "Where the marriage is between persons, one of whom has no capacity to contract marriage at all, as where there is want of age ("want of age" being obiter, *Koonce v. Wallace,* 52 N. C., 194), or understanding, or a prior marriage still subsisting, the marriage is void absolutely and from the beginning, and may be inquired of in any court. For, although in such case there may be a proceeding in the ecclesiastical court, it is not to dissolve the marriage, but merely, for the convenience of the parties, to find the fact and declare the marriage thereupon to have been void *ab initio,* and no civil rights can be acquired under such a marriage. It is said to be no marriage, but a profanation of marriage, and the *factum* is a nullity."

The General Assembly has provided that all marriages between persons either of whom has a husband or wife living at the time of such marriage shall be void, and that the aggrieved party may seek relief in the Superior Court, which has succeeded to the functions of the ecclesiastical courts of England. C. S., 1658, 2495; *Gathings v. Williams, supra; Johnson v. Kincade, supra; Setzer v. Setzer,* 97 N. C., 252; *Watters v. Watters,* 168 N. C., 411. The plaintiff accordingly brought suit, not for divorce, but to have the marriage relation between the defendant and himself adjudged void from the beginning, on the ground that at the time their marriage was solemnized the defendant had a husband living. *Taylor v. White, supra.*

The cause of action is founded almost entirely upon documentary evidence which is made a part of the case on appeal. It is admitted that the defendant has all her life been a resident of North Carolina and at the commencement of the action was a resident of Durham County. In the year 1907, in this State, she married a man named John A. Dowd, who afterwards left North Carolina and went to Richmond County, in the State of Georgia. There he brought suit against his wife, the present defendant, for divorce from the bonds of matrimony. The Code of Georgia provided as one of the grounds for total divorce the "wilful and continued desertion by either of the parties for the term of three years."

In his petition Dowd alleged that he and Mary Cheek, the defendant, had intermarried in due form of law and had since been husband and wife; that he had been a bona fide resident of the State of Georgia for

twelve months before the filing of his application for divorce; that on 1 May, 1913, his wife deserted him without any cause on his part; that her desertion of him was wilful and had been continuous up to 25 May, 1916, the date his petition was filed; that his wife was a nonresident of the State of Georgia; and that her address was unknown to him. It was thereupon ordered that service be perfected on the defendant by publication in a public gazette of the county in which legal advertisements were published, and upon certificate of the publisher it was "ordered that due and legal service on the defendant had been made and perfected." The defendant was served with process only in this way; she neither appeared in person or by attorney nor filed an answer. At July Term, 1916, the court adjudged, two concurring verdicts having been rendered in accordance with the law of Georgia, that the marriage contract entered into between the parties in the case be declared to be set aside and dissolved as fully and effectually as if no such contract had been made and that both parties might marry again.

Upon these undisputed facts the plaintiff contends that the judgment rendered in the Georgia Court is void in North Carolina as against the defendant and that at the time of his pretended intermarriage with her she was disqualified by reason of her former marriage to enter into another matrimonial contract.

It is a settled principle of law that a personal judgment rendered in the court of one state against a nonresident merely upon constructive service without acquiring jurisdiction of the person of the defendant, is void by operation of the due process clause of the Fourteenth Amendment of the Constitution of the United States: "Nor shall any State deprive any person of life, liberty, or property without due process of law." *Pennoyer v. Neff,* 95 U. S., 714, 24 L. Ed., 565. But every government as regards its own citizens possesses inherent power over the marriage relation; from which it results that where a court of one state has acted as to a citizen of that state concerning the dissolution of the marriage, such action is binding in that state as to such citizens, and the judgment may not therein be questioned on the ground that the action of the state in dealing with its own citizens was repugnant to the due process clause of the Federal Constitution. *Maynard v. Hill,* 125 U. S., 190, 31 L. Ed., 654.

If a husband and his wife are domiciled in the same state there exists jurisdiction in such state to enter a decree of divorce which will be entitled to enforcement in another state by virtue of the full faith and credit clause; and if a bona fide domicile has been acquired in a state by one of the parties to the marriage and a suit for divorce is brought in

such state by the domiciled party, the courts of that state, if they acquire personal jurisdiction of the other party, have authority to enter a decree of divorce entitled to be enforced in every state by reason of the full faith and credit clause. *Cheever v. Wilson,* 9 Wall., 108, 19 L. Ed., 604. Still, the mere domicile in the state of one party to the marriage does not confer upon the courts of that state jurisdiction to make a decree of divorce enforceable in all the other states, by the full faith and credit clause, against a nonresident who was constructively served with process and did not appear in person or by attorney. *Haddock v. Haddock,* 201 U. S., 562, 50 L. Ed., 867.

In the light of these principles it is important to know what this Court has said in opinions dealing directly with the subject.

In *Irby v. Wilson,* 21 N. C., 568, the facts were as follows: In 1804 Alexander Jones and Mary Smith, having their domicile in South Carolina, intermarried according to the laws of that state, and in 1809 removed to Tennessee, where they became permanently domiciled. The wife separated from her husband in 1810 and came to Lincoln County, North Carolina. Thereafter Jones brought suit for divorce against his wife in Tennessee upon constructive service. The defendant neither answered nor appeared nor resisted the relief sought. The Circuit Court of Giles County, Tennessee, on 11 April, 1816, ordered and decreed "that the bonds of matrimony existing between the said Alexander Jones and the said Mary H. Smith be entirely dissolved and made void." On 5 July, 1821, Joshua Irby and the said Mary H. Jones intermarried in Lincoln County. Jones died in 1827 and Joshua Irby in 1828. After the death of the latter a contest involving alleged rights to property arose between the plaintiffs, who claimed under him, and his wife and the administrator. It was contended that Joshua Irby had no interest in certain property of Mary H. by virtue of his marital rights because the marriage between him and her was void, the decree rendered in Tennessee having no extra-territorial effect. In an opinion delivered by *Chief Justice Ruffin* the Court adjudged that the marriage of Joshua Irby with Mary H. Jones was void and that he did not thereby acquire any property that was hers. It is there said: "The Court is of opinion that the decree of the court of Tennessee is altogether inoperative and null, because it was not an adjudication between any parties; since the wife did not appear in the suit, nor was served with process, and was not a subject of Tennessee, but was a citizen and inhabitant of this State, and therefore not subject to the jurisdiction of Tennessee, nor amenable to her tribunals. It lies at the foundation of justice that every person who is to be affected by an adjudication should have the opportunity of

being heard in defense, both in repelling the allegations of fact, and upon the matter of law; and no sentence of any court is entitled, intrinsically, to the least respect in any other court, or elsewhere, when it has been pronounced *ex parte,* and without opportunity of defense. . . . Admitting, nevertheless, in this country such a judgment in one state between the citizens of that state to be conclusive in all the others, it will not yet follow that the same effect is to be allowed to a judgment in like circumstances pronounced by a court in favor of one of its own citizens against an absent citizen of another state who did not appear, was not served with process, nor had any notice of the proceeding. The utmost extent to which the courts of one country can be expected to go in execution of the judicial sentences of another country in such a case is, when both persons are the citizens of the state of the forum. When the party to be charged belongs to a different state, and especially to that from which the execution of the sentence is asked, the answer must be given, 'We cannot aid in such a palpable disregard of right and violation of justice.' . . . But it is said that notice was in the contemplation of the law of Tennessee, given by proclamation, suing out process, and advertisement in a newspaper. The regularity of the judicial proceedings in those respects is not questioned here. They cannot be; for it is supposed that every interlocutory adjudication stands on the same ground with the final one, and proves itself to be right. It is assumed, therefore, that the wife had the notice, as prescribed in the law of Tennessee; and that the court of Giles was the proper court, in reference to the jurisdiction of this subject, as between it and the other courts of Tennessee, under her law. But the notice there deemed legal is not, in fact, notice; and the courts of this State are not bound by the fiction imposed by Tennessee on her own courts. The reason is, not that fault is to be found with the courts of Tennessee, but with the law of Tennessee. That state has no power to enact laws to operate upon things or persons not within her territory; and if she does, although her domestic tribunals may be bound by them, those of other countries are not obliged to observe them, and are not at liberty to enforce them. The laws of one country have no direct extra-territorial efficacy. The wife, Mary H. Jones, was not bound to appear in a court in Tennessee; nor is she concluded by the sentence in a cause to which she was not a party. That is the principle which controls the opinion of this Court."

There are several cases in which this opinion has been reaffirmed. *Gathings v. Williams, supra; Davidson v. Sharpe,* 28 N. C., 14; *Yarbrough v. Arrington,* 40 N. C., 291; *Battle v. Jones,* 41 N. C., 567; *Calloway v. Bryan,* 51 N. C., 569; *Harris v. Harris,* 115 N. C., 587. It is clearly held in these cases that one State cannot pass a law to

operate out of its territory, or to authorize its courts to act on things or persons not within its jurisdiction, and that while a statute may bind the courts of the state in which it is enacted, the courts of other states will not acknowledge its obligation or aid in executing it directly or indirectly.

In *Bidwell v. Bidwell,* 139 N. C., 402, there is an expression apparently inconsistent with the cases above cited. It is this: "The better doctrine, however, now seems to be that where the domicile of the plaintiff has been acquired in good faith, and not in fraud or violation of some law of a former domicile, a divorce of this kind (decreed upon constructive service) should be recognized as binding everywhere." In reference to this statement the Supreme Court of the United States remarked: "A line of decisions in the State of North Carolina would also cause us to embrace the law of that State within this classification (appearing in *Haddock's case*) but for a doubt engendered in our minds as to the effect of the law of North Carolina on the subject, resulting from suggestions made by the North Carolina Court in the opinion in *Bidwell v. Bidwell.*"

The statement in the *Bidwell case* was obiter, apparently founded on *Atherton v. Atherton,* 181 U. S., 155, 45 L. Ed., 794. In *Haddock v. Haddock, supra,* the *Atherton case* is distinguished, the one point there decided being the validity of a divorce obtained at the matrimonial domicile; and in *S. v. Herron,* 175 N. C., 754, this Court said that an examination of *Bidwell v. Bidwell* does not show that North Carolina should be taken out of the class of states which decline to recognize the validity of a divorce rendered in a court which had jurisdiction over only one of the parties. The opinion was written by *Chief Justice Clark. Justice Allen* wrote a concurring opinion in which he suggested that the expression referred to was based on two decisions of the Supreme Court of the United States which were modified in the *Haddock case.* The *Justice* who wrote the opinion in the *Bidwell case* was then a member of this Court and apparently concurred in the law as declared in *S. v. Herron.* We may therefore conclude that the expression used by him is not to be taken as modifying the doctrine laid down in *Irby v. Wilson* and subsequent cases of like tenor. According to these decisions the decree granted in Georgia is a nullity here and must be declared void in this State. There is error in the charge to the jury and in the judgment of the court.

Error.

STATE OF NORTH CAROLINA ON THE RELATION OF BOARD OF COMMISSIONERS OF BRUNSWICK COUNTY v. ROBERT F. INMAN, AMERICAN SURETY COMPANY OF NEW YORK, E. H. SMITH, HALE BEACH CORPORATION, HOME SAVINGS BANK OF WILMINGTON, N. C., ET AL.; AND STATE OF NORTH CAROLINA ON THE RELATION OF THE BOARD OF EDUCATION OF BRUNSWICK COUNTY v. ROBERT F. INMAN, AMERICAN SURETY COMPANY OF NEW YORK, E. H. SMITH, HALE BEACH CORPORATION, HOME SAVINGS BANK OF WILMINGTON, N. C., ET AL.

(Filed 23 November, 1932.)

1. Estoppel C b—Treasurer and surety held estopped to deny validity of treasurer's official bond under facts of this case.

Where a county treasurer offers his official bond executed by a surety company, but not signed by him, and the bond is accepted by the county commissioners and the treasurer enters upon his duties under the bond, and thereafter the treasurer and the surety tender another bond in a smaller penal sum in substitution of the first bond: *Held*, although the failure of the treasurer to sign the first bond was an irregularity, C. S., 344, both the treasurer and the surety recognized their liability thereon by offering the second bond in substitution, and both are estopped to deny the validity of the first bond on the ground of such irregularity.

2. Principal and Surety B c—County commissioners are without power to cancel treasurer's official bond previously accepted by them.

Where the county commissioners have accepted the official bond of the treasurer of the county and he has entered upon his official duties under the bond, the commissioners are without power in the absence of statutory authority to order the bond canceled and to accept another bond in a smaller penal sum in substitution of the first bond, and the treasurer and the surety are liable on the first bond notwithstanding the attempt of the commissioners to release them of liability thereon, but they may not be held liable on the second bond also, the second bond being offered only in substitution of the first, and the condition upon which it was offered being impossible of performance.

3. Same—Allowance of credit for certain funds irregularly expended by treasurer but for which county received benefit held not error.

Where a county attorney acts as the treasurer of a county as agent of the duly elected treasurer under an agreement between them, and an action is instituted against the treasurer, his surety, the county attorney, and others to recover for sums misappropriated by the county attorney acting as treasurer, and judgment is rendered against the defendants for the funds so misappropriated in building a certain highway to a private beach owned by the county attorney and for the development of the beach: *Held*, it was not error for the trial court upon findings of fact supported by the evidence to allow a credit for the money expended upon that part of the highway duly authorized by the county commissioners as a public road and for which the county received the benefit, although the expenditure therefor by the county attorney acting as treasurer was irregular.

4. Banks and Banking C c—Bank held not liable to county for paying checks drawn by authorized county agent although funds were misapplied.

Where a bank which is not a county depository pays in good faith the checks on county funds drawn by the county attorney acting as treasurer under authority of the duly elected treasurer, the county commissioners having authorized the bank to pay checks so drawn: *Held*, the bank is not liable to the county for the payment of the checks although the sums thereby obtained were misappropriated and were made payable to the order of persons not legally entitled to receive the county funds.

APPEALS by the plaintiff, the board of commissioners of Brunswick County and by the defendants, American Surety Company of New York, and E. H. Smith and Hale Beach Corporation, respectively, from *Grady, J.*, at June Term, 1932, of BRUNSWICK. Affirmed in each appeal.

The above entitled actions, which were pending in the Superior Court of Brunswick County at January Term, 1928, were referred under C. S., 573, for trial. They were thereafter consolidated by consent. After such consolidation, they were tried by the referee, who duly filed his report, setting out therein his findings of fact and his conclusions of law. This report, with exceptions filed thereto, came on for hearing at June Term, 1932, before Honorable Henry A. Grady, judge presiding. At this hearing it was agreed by all parties that a jury trial of the issues raised by the exceptions to the report of the referee should be, and the same was waived. It was further agreed that the judge presiding should review all the evidence taken at the trial by the referee, together with the exceptions filed to the report, and should thereafter render his judgment. The judgment rendered was as follows:

"After reviewing the evidence in a careful manner, and after hearing the argument of counsel for the several parties, and considering all the exceptions filed, the court finds the following facts:

1. The defendant, Robert F. Inman, was elected treasurer of Brunswick County at an election held in November, 1924, for a term of two years, beginning with the first Monday in December, 1924, and ending on the first Monday in December, 1926. It was his duty under the law to file a good and sufficient bond for the faithful performance of his duties as the treasurer of said county, and also an additional bond for the faithful performance of his duties as treasurer of the funds and property coming into his hands belonging to the board of education of said county.

2. On 15 December, 1924, the board of commissioners of Brunswick County, which is a body corporate and politic, in meeting assembled, passed a resolution granting the said Robert F. Inman until 5 January,

1925, within which to file his official bond as treasurer, both for the general funds and for the school funds of said county, which resolutions are copied in the fourth articles of the respective complaints filed in these causes.

3. On 26 December, 1924, the said Robert F. Inman appeared before said board of commissioners and tendered the said board a proper bond, and requested said board to induct him into office as treasurer of said county. Thereupon the said board of commissioners adopted a resolution accepting and approving said bond, and the said Robert F. Inman took the oath required by law and was duly inducted into the office of treasurer of Brunswick County; said resolution appears in paragraph five of the complaint and is made a part of this finding of fact. Said bond was in the penal sum of $25,000, and was issued and executed by the defendant, American Surety Company of New York, conditioned as required by statute in such case made and provided. Said bond was not signed by the said Robert F. Inman, but was regularly and properly issued by said American Surety Company of New York, tendered by him as his official bond, and accepted by the plaintiff, board of commissioners of Brunswick County.

4. The defendant, Robert F. Inman, thereupon assumed the duties of the office of treasurer of Brunswick County, and settled with the Murchison National Bank for all funds it had in hand belonging to said county, and immediately thereafter took control of the said funds, and the Murchison National Bank accounted to the said Robert F. Inman for all funds which it had, or should have had, in its hands belonging to said county.

5. On 5 January, 1925, the said Robert F. Inman appeared before said board of commissioners of Brunswick County in meeting assembled and tendered a bond in the penal sum of $30,000, for the faithful performance of his duties as treasurer of the school funds of said county, which bond was also issued and signed by the defendant, American Surety Company of New York, conditioned as required by law in such cases made and provided, and the same was accepted by said board of commissioners, and thereafter the said Robert F. Inman, either in person or through his duly constituted agent as hereinafter stated, exercised the functions of treasurer of said school funds for said county. At the same time the said Robert F. Inman requested said board of commissioners to accept a substitute bond in the penal sum of $15,000, in lieu of the former bond of $25,000, delivered by him to said board, conditioned upon the faithful performance of his duties as county treasurer in handling the general county funds coming into his hands as such; and thereupon said board of commissioners adopted a resolution agree-

ing to accept a substitute bond in the penal sum of $15,000 in lieu of the $25,000 bond previously executed and delivered by the said Inman to the said board, which bond in the penal sum of $15,000 was also issued by the defendant, American Surety Company of New York. A correct copy of said resolution appears in the sixth paragraph of the complaint, and is made a part of this finding of fact. A correct copy of said $15,000 bond is attached to the complaint, marked Exhibit 'B,' and is made a part of this finding of fact; a correct copy of said $30,000 bond is attached to the complaint, marked Exhibit 'A,' and is made a part of this finding of fact.

Said board of commissioners of Brunswick County approved and accepted said bond in the penal sum of $30,000, tendered to said board by the said Robert F. Inman, and the American Surety Company of New York, conditioned upon the faithful performance of his duties in handling the school funds of Brunswick County, and also accepted the said $15,000 bond executed by the said Robert F. Inman and the American Surety Company of New York, conditioned upon the faithful performance of his duties in handling the general county funds as treasurer of said county, which said bond in the sum of $15,000, the board of commissioners undertook to accept and approve in lieu of the $25,000 bond theretofore executed by the American Surety Company of New York, and delivered to the said board by the said Robert F. Inman, treasurer as aforesaid; and said board, by resolution, ordered the cancellation of said $25,000 bond.

6. The defendant, E. H. Smith, was elected county attorney of Brunswick County at the December, 1924, meeting of the board of commissioners of said county and continued to act as such attorney until December, 1926. Soon after his election and induction into office, an agreement was made by and between the said E. H. Smith and Robert F. Inman, treasurer, whereby the said E. H. Smith, as agent and representative of the said Robert F. Inman, was to handle all of the county and school funds, and was to do and perform all of the acts and things required of the said Robert F. Inman, as treasurer of said county, in the place and stead of the said Robert F. Inman, and during the entire time of his incumbency as treasurer of said county, the said Robert F. Inman acted in name only, the said E. H. Smith being the *de facto* and actual treasurer of said county under the agreement above mentioned; and all of the duties imposed by law upon the treasurer of said county, so far as any were done and performed, were done and performed by the said E. H. Smith, or under his supervision, guidance and direction with the full knowledge and consent of the said Robert F. Inman, treasurer, as aforesaid.

7. On 3 May, 1926, at a regular meeting of the board of commissioners of Brunswick County, a resolution was adopted, which is copied in the eighth finding of fact of the referee in his original report, which in substance recites that a corporation known as the Hale Beach Development Company was then being organized by the said E. H. Smith, attorney, and providing that the sum of $75,000 should be appropriated by the county for the building of a road and causeway 'across the sound from the mainland to the beach at the east end of what is known as the Gause Beach, and which was formerly owned by W. A. Bland, Sr., and such other roads as are necessary to connect with highway.' It was provided in said resolution that one-half of said appropriation of $75,000 was to be returned to the county out of the proceeds from the sale of stock and lots in said Development Company.

On the same day a contract was entered into by and between said board of commissioners and Hale Beach Development Company, by E. H. Smith, attorney, attempting to carry into effect the provisions of said resolutions, which purported and attempted contract is set out in full in the eighth finding of fact of the referee in his original report.

8. The board of commissioners of Brunswick County had never established, laid out or attempted to lay out and establish any causeway from Gause Landing across the sound to Hale Beach, nor had they provided or attempted to provide for the expenditure of any money on said causeway; at the time of said attempted contract and the adoption of said resolution referred to in the next preceding finding of fact, there was no such corporation in existence as the Hale Beach Development Company, the said corporation having been thereafter chartered on 1 September, 1926.

After the issuance of the charter of said Hale Beach Development Company by the State of North Carolina, some time after 1 September, 1926, there was a meeting of the incorporators, but at no time, at said meeting or at any subsequent meeting, did the said corporation, through its officers and directors, approve, adopt or ratify the resolution of the board of commissioners, or the contract made by and between the said board of commissioners and E. H. Smith, nor has said corporation, or the said E. H. Smith, ever listed the Hale Beach Corporation's land for taxation at a value that would produce interest at the rate of 6 per cent per annum on one-half of the money that has been spent by the said E. H. Smith upon said project, nor did the said Smith, or any one else in his behalf, inquire of the said board of commissioners whether or not the said board desired bond, nor did the said Smith ever tender to, or file with the said board a bond for the faithful performance by him of said attempted contract, as therein provided. The court is of the

opinion, and so holds, that the resolution adopted by the said board of commissioners, and the attempt on the part of said board and E. H. Smith to carry the provisions thereof into effect under the purported contract executed by them, were without warrant of law, or any original authority vested in said board of commissioners, and that, therefore, said resolution and purported contract are void and of no force and effect.

9. Some time during the year 1922, a petition was filed with said board of commissioners relative to the establishment of a road from Grissett Town to Gause Landing, which said petition is fully set out in the referee's eleventh finding of fact in his original report. Said petition was approved by the proper authorities, and a public road ordered established in accordance therewith.

10. On 3 May, 1926, said board of commissioners adopted a resolution, which is set out in full in the thirteenth finding of fact in the original report of the referee, which resolution provided for the issuance of $75,000 worth of county notes, to be issued in anticipation of the collection of taxes for the expense of the county, for which the county has lawfully levied, or will levy taxes. Said notes were to be dated 3 May, 1926, bearing interest at the rate of 6 per cent per annum, payable 3 November, 1926, and 3 February, 1927.

On the same day, and at the same meeting, the said notes, aggregating $75,000, were sold to Bray Brothers, of Greensboro, N. C., who gave to J. J. Knox, chairman of said board of commissioners a check for $75,000 in payment therefor, and said check was handed by the chairman of the said board to the defendant, E. H. Smith, acting as a representative of Robert F. Inman, treasurer of Brunswick County, who received the same as such acting and *de facto* treasurer.

11. On 11 May, 1926, the defendant, E. H. Smith, deposited said check in the Home Savings Bank, Wilmington, N. C., to the credit of 'Brunswick County, E. H. Smith, attorney,' and on 21 May, 1926, the said E. H. Smith drew a check on said Home Savings Bank against said account, for the sum of $37,500, payable to the Hale Beach Corporation, which said check was paid by the said Home Savings Bank, and the sum of $37,500 credited to the account of said Hale Beach Corporation in said bank; said check for $37,500 was signed 'Brunswick County, by E. H. Smith,' and thereafter, on 24 July, 1926, the Hale Beach Corporation, through E. H. Smith, its attorney, drew its check for the sum of $31,575, payable to Brunswick County, and said check was deposited in said Home Savings Bank by the said E. H. Smith, and credited to the account of Brunswick County. Said item of $31,575 constituted a return by the Hale Beach Corporation to the county of Brunswick

of a part of the item of $37,500, theretofore credited to the account of said Hale Beach Corporation, on 21 May, 1926.

12. On or about 12 July, 1926, the chairman of the board of commissioners, sent by the defendant, E. H. Smith, in an envelope, to W. H. Walker, register of deeds of Brunswick County, a letter in words as follows: '6/10/26. W. H. Walker: Don't record the resolution that you have in the Hale Beach Corporation matter, as there seems to be some misunderstanding in the matter about the legal effect in matter. Very truly yours (signed) J. J. Knox.'

E. H. Smith knew the contents of said letter, and no further action was taken at that time with reference to rescinding said contract. At a meeting of the board of commissioners in July, 1926, the register of deeds was told that said resolution awarding the contract to the Hale Beach Corporation was withdrawn, whereupon said register of deeds entered in pencil at the top of the resolution the word, 'Withdrawn.' No formal action was taken by said board of commissioners looking to a withdrawal of said resolution, and cancellation of said contract until some time after 28 October, 1926, at or about which time the following was entered, and signed, at the bottom of the letter from J. J. Knox to W. H. Walker, of date 12 June, 1926: 'This resolution and agreement has been withdrawn. This 6 June, 1926 (signed) J. J. Knox, chairman board of county commissioners; Troy Hewitt, member; W. H. McLamb, member; E. H. Smith, attorney.'

13. Pursuant to the petition and action of the board of commissioners, and of the county road commission hereinbefore referred to, the county commissioners of Brunswick County duly advertised, laid off and adopted a public road from Grissett Cross Roads to Gause Landing. The causeway across the sound from the mainland to Hale Beach, as provided for in the resolution hereinbefore referred to, was to extend the said road across the sound to said beach; but in respect to said causeway, the court finds that it was nothing more or less than a private enterprise promoted by the said E. H. Smith, for which the county of Brunswick could receive no possible benefit.

14. During the two years in controversy, covering the tenure of the said Robert F. Inman as treasurer, the defendant, E. H. Smith, acting for and in behalf of the said treasurer, withdrew from funds belonging to the school funds of said county the sum of $19,580.66 and deposited the same to the credit of the general county funds; between 3 May, 1926, and 29 October, 1926, the defendant, E. H. Smith, in his capacity as *de facto* treasurer, expended from the Brunswick County general fund the sum of $47,694.52.

Of this amount, the sum of $10,334 was expended in the construction of the public road from Grissett Cross Roads to Gause Landing, and the sum of $37,360.52, was expended in connection with the construction of the causeway from Gause Landing, across the sound, to Hales Beach. In making such expenditures the said E. H. Smith, from time to time, drew checks on the Brunswick County funds on deposit in the Home Savings Bank, which checks were signed 'Brunswick County Funds, E. H. Smith, attorney.' Said checks did not indicate on their face the purpose for which such expenditures were being made; they were paid by the Home Savings Bank without any vouchers having been issued for the same, or any of the same, and no record of such expenditures appears on the treasurer's books, or in his accounts; said checks were drawn by the said E. H. Smith as representative of and in his capacity as agent for, the said Robert F. Inman, treasurer of said county, to the same effect as if said checks had been drawn by the treasurer himself.

15. During said period, from 3 May, 1926, to 20 October, 1926, the individual members of the board of commissioners of Brunswick County had actual knowledge of the fact that said construction was in progress, and took no action to withdraw the resolution or cancel the contract, hereinbefore referred to, until about 28 October, 1926, at which time said resolution was withdrawn, and said contract canceled, and no expenditures were made on account of said construction work after said date.

16. On 30 November, 1925, there was a balance on deposit in the Bank of Cherryville of $25,000 of Brunswick County funds, together with a credit of accrued interest of $336.70, which funds came into the hands of the treasurer of Brunswick County by virtue of his office; and the defendant, E. H. Smith, from time to time, withdrew from said Bank of Cherryville the sum of $25,336.70, thereby closing said account.

17. The referee finds as a fact, and said finding is approved by the court, that the said E. H. Smith, during the time he was acting as *de facto* treasurer of Brunswick County, expended the sum of $59,461.15, of which amount the sum of $34,094.45 was by disbursement of funds deposited in said Home Savings Bank by E. H. Smith, acting in behalf of the treasurer, and the sum of $25,366.70 was by disbursement of amounts withdrawn by the said E. H. Smith, acting on behalf of the treasurer, from the Bank of Cherryville; and of the total shortage of $59,461.15, the sum of $47,694.52 was expended by said E. H. Smith in the construction of said causeway and public road, extending from Grissette Cross Roads to Gause Landing, thence across the sound to the private property of the said E. H. Smith, known as Hales Beach. Said findings of fact by the referee are hereby approved and reaffirmed by the court.

18. The court finds as a fact, in conformity with the findings of the referee, that the Home Savings Bank paid all checks drawn by the said E. H. Smith, in good faith, nor did said bank or any of its officials or employees profit, either directly or indirectly on account of said withdrawals or receive any of the proceeds thereof; but all the said checks were paid by said bank in due course of business, just as said bank would pay the checks of other depositors; that said bank had no knowledge, express or implied, that said checks were improperly presented or that the funds derived therefrom were improperly expended by the said E. H. Smith; but, to the contrary, the officers of said bank were specially informed by the chairman of the board of commissioners of Brunswick County that said funds were properly deposited, and that the sum of $75,000 was to be used for the purpose of defraying the expense incident to the construction of said road and causeway as provided for in the resolution and contract hereinbefore referred to. The court is, therefore, of the opinion that the said Home Savings Bank, and Gurney P. Hood, Commissioner of Banks, who has been substituted as a defendant in the place and stead of said Home Savings Bank, are not liable in this action, either to the plaintiffs, or to their codefendants, for any funds expended by the said E. H. Smith or any withdrawals made by him in the prosecution of the Hale Beach development; and as to the said Home Savings Bank and Gurney P. Hood, Commissioner of Banks, the plaintiffs and the defendant, American Surety Company of New York are nonsuited.

19. The court is of the opinion, and so finds as a fact, that the $15,000 bond filed by the said Robert F. Inman as treasurer of Brunswick County, on 5 January, 1925, was intended by the surety company as a substituted bond, and that the said surety company issued said bond and delivered the same to the said Robert F. Inman upon the distinct understanding and agreement that the former bond in the penal sum of $25,000 filed 26 December, 1924, was to be canceled and abrogated, and that it would be unjust and inequitable for the court to hold, under the facts, that the defendant, American Surety Company of New York, is now liable upon both bonds. However, the court is of the opinion that the $25,000 bond, although not signed by the said Robert F. Inman, was a valid and subsisting obligation on the part of the said American Surety Company of New York, and the attempted cancellation thereof by the board of commissioners of Brunswick County was a nullity and of no force and effect. Therefore, the court holds as a matter of law that the plaintiffs are not entitled to recover anything out of said American Surety Company of New York on account of said $15,000 bond; but

that the plaintiffs are entitled to recover out of said American Surety Company of New York, on account of said $25,000 bond, as will be hereinafter adjudged.

20. The court finds as a fact from the evidence offered that the total sums of money wrongfully and unlawfully expended by the said E. H. Smith, acting as treasurer of Brunswick County, from funds on deposit in both the Home Savings Bank and the Bank of Cherryville amounted to $59,461.15; that no vouchers were issued for any of said expenditures as required by law, that no itemized statements were ever filed by the said E. H. Smith representing said expenditures; but it is also found as a fact that of the said sum of $59,461.15, the county of Brunswick was actually benefited to the extent of $10,334, said amount having been expended by the said E. H. Smith on the construction of a public road from Grissette Cross Roads to Gause Landing, which road had theretofore been regularly laid off and established as provided by law; and the court is of the opinion that the county of Brunswick ought not now to be allowed to recover said sum out of the said E. H. Smith, Robert F. Inman, or the surety on the bonds hereinbefore referred to.

According to the foregoing statement, the balance for which the said E. H. Smith and the said Robert F. Inman are liable amounts to $49,127.15; and the court finds as a fact that said sum is the total amount now due and owing by the said E. H. Smith and Robert F. Inman to the plaintiffs. Of the foregoing amount, the court finds as a fact that the sum of $19,580.66 belonged to the school funds of Brunswick County, and the remainder, to wit: $29,546.49, belonged to the general county fund.

All of the findings of fact in the original and supplemental report filed by the referee, which are in conformity with the foregoing findings of the court, or which are not herein expressly overruled, are reaffirmed and adopted; and all findings of fact made by the referee, which are not in conformity with the foregoing findings by the court are overruled and disaffirmed.

All of the exceptions filed by the plaintiffs and the defendants which are not in harmony with the findings by the court are overruled; and those exceptions which are in harmony with the findings of the court are sustained. The court does not set out and refer to said exceptions *seriatim;* but all of them have been carefully considered in connection with the evidence and arguments of counsel, and the foregoing rulings in respect to said exceptions are made for the purpose of brevity, and in conformity to the decision in *Abbitt v. Gregory,* 201 N. C., 577.

Wherefore, upon the foregoing findings of fact by the court, and the findings of the referee, which are adopted and not overruled, it is now,

Ordered, adjudged and decreed that the plaintiffs have and recover of the defendants, E. H. Smith, Robert F. Inman and the American Surety Company of New York, for the use and benefit of the general county fund, the sum of $29,546.49, with interest at the rate of 12 per cent per annum from 20 October, 1926, together with the costs of this action, to be discharged insofar as the American Surety Company of New York is concerned upon the payment of the sum of $25,000.

It is further ordered, adjudged and decreed that the plaintiffs have and recover of the defendants, E. H. Smith, Robert F. Inman and the American Surety Company of New York, for the use and benefit of the school fund of Brunswick County, the further sum of $30,000, to be discharged upon the payment of the sum of $19,580, with interest thereon at the rate of 12 per cent per annum from 20 October, 1926.

It is further ordered, adjudged and decreed that the plaintiffs have and recover of the defendant, Hales Beach Corporation, the sum of $37,360.52, with interest thereon at the rate of 12 per cent per annum from October, 1926; which amount, when and if collected, shall be credited upon the foregoing recoveries against E. H. Smith and Robert F. Inman; said amount being the total sum expended by E. H. Smith in the construction of the causeway from Gause Landing to Hales Beach.

It is further ordered, and adjudged that upon the payment by the American Surety Company of New York of the foregoing sum of $29,546.49, interest and costs, that the said Surety Company shall thereupon be subrogated to the rights of the plaintiffs in respect to the recovery hereinbefore adjudged against the said Hales Beach Corporation in excess of the amount necessary to pay the balance due by said Hale Beach Corporation to the plaintiffs under recoveries hereinbefore adjudged.

It is further ordered and adjudged that neither the plaintiffs nor the American Surety Company of New York is entitled to recover anything out of the Home Savings Bank or Gurney P. Hood, Commissioner of Banks, and all causes of action alleged by the plaintiffs or the said American Surety Company of New York against said bank and said Commissioner of Banks are hereby nonsuited.

Done at Wilmington, N. C., this 5 July, 1932.

HENRY A. GRADY, *Judge Presiding.*"

From this judgment, the plaintiff, the board of commissioners of Brunswick County, and the defendants, American Surety Company of New York, and E. H. Smith and Hale Beach Corporation, respectively, appealed to the Supreme Court.

J. W. Ruark, C. Ed. Taylor, Bryan & Campbell and I. C. Wright for plaintiff.

John D. Bellamy & Sons for defendant, American Surety Company of New York.

J. O. Carr and George Rountree for defendants, E. H. Smith and Hale Beach Corporation.

Woodus Kellum for Home Savings Bank.

CONNOR, J. It must be conceded that the transactions involved in the controversies out of which this action has arisen, were at least irregular. It does not follow, however, that no rights or liabilities arose out of the transactions, because they were irregular. It is difficult, because of these irregularities, to determine the rights and liabilities of the respective parties to the action, in accordance with well settled principles of law and clear statutory provisions, which are ordinarily applicable to such transactions, and should be strictly followed by public officials, and by those who deal with them in matters affecting the public, but a review of the entire judgment as set out in the record leads us to the conclusion that the assignments of error on which the appellants rely in their respective appeals for a reversal or modification of the judgment cannot be sustained, and that the judgment should be affirmed. There was sufficient evidence to support the findings of fact on which the judgment was rendered, and for this reason we shall consider only assignments of error based on exceptions to the judgment.

The bond in the penal sum of $25,000, dated 23 December, 1924, and duly executed by the defendant, American Surety Company of New York, was not signed by the defendant, Robert F. Inman, the principal, at the time the said bond was tendered by him to the board of commissioners of Brunswick County, and accepted by said board, as his official bond. This was at least an irregularity. The statute provides that such bond, when duly executed by the principal and the surety, and otherwise in compliance with the law, shall be accepted, upon presentation, by the person who is authorized to take, accept and file the bond. C. S., 344. However, in the instant case, the bond was presented by Robert F. Inman as his official bond, and at his request was accepted by the board of commissioners as such bond. He was immediately inducted into his office as treasurer of Brunswick County. He undertook to perform and did perform official duties, by virtue of and under said bond. On 5 January, 1924, both he and the American Surety Company of New York, recognized their respective liabilities under this bond, when they offered another bond in substitution therefor, and asked that said bond be canceled. Both the defendant, Robert R. Inman, as principal, and the defendant, American Surety Company of New York, are now estopped

to deny the validity of the bond, on the ground that the bond was not signed by Robert F. Inman, as principal. The bond remained in full force and effect, according to its terms, during the continuance of the term of office of Robert F. Inman, as treasurer of Brunswick County, unless the order of the board of commissioners that the bond be canceled, was valid.

On 5 January, 1925, the board of commissioners of Brunswick County, at the request of the defendant, Robert F. Inman, and the defendant, American Surety Company, ordered that the bond in the penal sum of $25,000 be canceled as of that date, and that a bond in the sum of $15,000 be accepted in substitution for said bond. These defendants contend that they were thereby released from further liability under said bond. This contention cannot be sustained. The board of commissioners, having accepted the bond for $25,000 as the official bond of the defendant, Robert F. Inman, treasurer of said county, were without power to release him or his surety from liability under the bond, by ordering that the said bond be canceled. *Fidelity Co. v. Fleming,* 132 N. C., 332, 43 S. E., 899. In that case it is said: "There can be no doubt as to the intention of the commissioners to release the plaintiff as surety for the sheriff, but it is not a question of intention, but one of power, and the authority to release must be derived, either by expression or implication, from some statute. If the statutory power did not exist at the time the commissioners attempted to release the plaintiffs, then the act of the commissioners was invalid, no matter how clearly and explicitly they expressed their intention to release." In the absence of a statute specifically authorizing the board of commissioners of a county to cancel an official bond, which the board has taken, accepted and filed, in the performance of its official duty, the duty imposed by section 2 of Article VII of the Constitution upon such board, with respect to the finances of the county, does not confer upon the board such power. There is no error in the judgment in this action that the defendants, Robert F. Inman and American Surety Company of New York, are liable on the bond in the penal sum of $25,000, notwithstanding the order of the board of commissioners that said bond be canceled.

The bond in the penal sum of $15,000, dated 31 December, 1924, and executed by both the defendant, Robert F. Inman and the defendant, American Surety Company of New York, was tendered by said defendants, and accepted by the board of commissioners of Brunswick County, in lieu of and in substitution for the bond in the penal sum of $25,000. It was not contemplated by the parties to said bond that it should be cumulative, and there is no error in the judgment to that effect. On the facts found by the court, it would be unjust and inequitable to hold otherwise, and we concur in the opinion to that effect of Judge Grady.

There is no liability under this bond, because it was rendered and accepted upon condition that the principal and surety should be released from liability under the bond in the penal sum of $25,000. As the condition could not be performed, there was no liability under the bond.

The expenditure by the defendant, E. H. Smith, of the sum of $10,344, out of the money in his hands as agent for Robert F. Inman, treasurer of Brunswick County, in the construction of a public road from Grissett's Cross Road to Gause Landing, was irregular, but on the finding that Brunswick County has received the benefit of such expenditure, there is no error in the judgment with respect to this sum. It was proper to allow the defendant, Robert F. Inman, treasurer, credit for this sum. *Realty Co. v. Charlotte,* 198 N. C., 564, 152 S. E., 686.

There is no error in the judgment that the plaintiffs respectively recover of the defendant, Robert F. Inman, as principal, and of the defendant, American Surety Company of New York, the penal sums of their respective bonds, to be discharged in accordance with the terms of the judgment. The contention of the plaintiff, the board of commissioners of Brunswick County that it was entitled to judgment against the Home Savings Bank of Wilmington, N. C., cannot be sustained. This bank was not a depository of Brunswick County. It is not liable to the plaintiff for amounts which it paid to its depositor, E. H. Smith, attorney, on checks signed by him.

The contentions of the defendants with respect to their rights as against each other have been duly considered. They cannot be sustained. There is no error in the judgment.

Affirmed.

R. LESTER CRANE v. GUY T. CARSWELL.

(Filed 23 November, 1932.)

Trial G b: Negligence D e—Verdict awarding damages upon finding that both parties were negligent is not inconsistent and bars recovery.

Where in an action to recover for a negligent personal injury the jury finds that both the plaintiff and defendant were negligent and awards damages to the plaintiff: *Held,* the finding that the plaintiff was negligent bars his recovery, and the verdict is not inconsistent, and no appeal will lie from the trial court's refusal to set aside the verdict in his discretion.

APPEAL by plaintiff from *Harding, J.,* at March Term, 1932, of UNION. No error.

The plaintiff brought suit to recover damages for injury alleged to have been caused by the collision of the plaintiff's truck and the defend-

ant's car. The defendant denied that he had been negligent, pleaded negligence on the part of the plaintiff, and set up a counterclaim for damages. The verdict was as follows:

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

2. Did the plaintiff by his own negligence contribute to his own injury? Answer: Yes.

3. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: $200.

4. Was the defendant's car injured by the negligence of the plaintiff, as alleged in the answer? Answer: No.

5. What damage, if any, is the defendant entitled to recover of the plaintiff? Answer: None.

Judgment for defendant. Exception and appeal by plaintiff.

W. B. Love and H. B. Adams for plaintiff.

J. Laurence Jones and Vann & Milliken for defendant.

PER CURIAM. The contributory negligence of the plaintiff bars his recovery although damages were assessed upon the third issue. *Baker v. R. R.*, 118 N. C., 1015; *Sasser v. Lumber Co.*, 165 N. C., 242; *McKoy v. Craven*, 198 N. C., 780; *Allen v. Yarborough*, 201 N. C., 568. We find nothing inconsistent in the verdict and his Honor's refusal to set it aside as a matter of discretion is not reviewable.

There is no reversible error in the instruction complained of. The ordinance referred to is practically the same as the State law. Code, 1931, sec. 2621(58).

No error.

JAMES L. HANNA AND LILLIE G. HANNA v. J. W. TIMBERLAKE, TRUSTEE, ET AL.

(Filed 23 November, 1932.)

Appeal and Error F g—Affidavit for appeal in forma pauperis must contain averment that counsel has advised that there is error.

The affidavit for appeal *in forma pauperis* must contain an averment that appellant is advised by counsel learned in the law that there is error of law in the decision appealed from, C. S., 649, and the matter is jurisdictional and where the affidavit is defective in this respect the appeal will be dismissed. As to whether the clerk may authorize an appeal *in forma pauperis* where the trial court has fixed appeal bond, *quære?*

APPEAL by plaintiff, Lillie G. Hanna, from *Warlick, J.*, at Chambers in Charlotte, 30 August, 1932. From GASTON.

Civil action to restrain foreclosure sale under power contained in deed of trust.

From judgment dissolving temporary restraining order, entered 30 August, 1932, the plaintiff gave notice of appeal. Appeal bond fixed at $100. Thereafter, 5 October, 1932, on affidavit which omits to aver appellant "is advised by counsel learned in the law that there is error of law in the decision of the Superior Court in said action," the clerk of the Superior Court signed an order allowing plaintiff to appeal *in forma pauperis.*

Motion by appellees to dismiss appeal.

J. L. Hamme for plaintiff.
Cherry & Hollowell for defendants.

PER CURIAM. The Court is without jurisdiction to entertain the appeal, and the same will be dismissed on authority of *Honeycutt v. Watkins,* 151 N. C., 652, 65 S. E., 762.

The attempted appeal is *in forma pauperis,* and the affidavit, filed more than ten days after entry of judgment, is defective, in that, it does not contain the averment, required by C. S., 649, that appellant "is advised by counsel learned in the law that there is error of law in the decision of the Superior Court in said action." This is a jurisdictional requirement. *Riggan v. Harrison, ante,* 191; *Russell v. Hearne,* 113 N. C., 361, 18 S. E., 711; *S. v. Gatewood,* 125 N. C., 694, 34 S. E., 543.

Furthermore, it may be doubted whether the clerk had authority to authorize an appeal *in forma pauperis,* even upon proper affidavit and certificate of counsel filed in apt time, in the face of the order by the judge fixing the appeal bond at $100. As to this point, however, we make no definite ruling. The question is not presently presented. *S. v. Divine,* 69 N. C., 390; *S. v. Harris,* 114 N. C., 830, 19 S. E., 154.

Appeal dismissed.

FANNIE S. HOOVER, ADMINISTRATRIX, v. GLOBE INDEMNITY COMPANY.

(Filed 23 November, 1932.)

APPEAL by plaintiff from *Warlick, J.,* at August Term, 1932, of GASTON.

Civil action to recover damages for alleged wrongful death.

Demurrer interposed for that (1) the complaint does not state facts sufficient to constitute a cause of action, and (2) the court has no

jurisdiction of the alleged cause of action, the matter being cognizable only by the Industrial Commission, 202 N. C., 655.

From a judgment sustaining the demurrer, the plaintiff gave notice of appeal. Appeal bond fixed at $50. Thereafter, the clerk of the Superior Court, on affidavit which fails to aver that appellant "is advised by counsel learned in the law that there is error of law in the decision of the Superior Court in said action," signed an order allowing plaintiff to appeal *in forma pauperis.*

J. L. Hamme for plaintiff.
P. W. Garland for defendant.

PER CURIAM. Dismissed on authority of *Hanna v. Timberlake, ante,* 556.

Appeal dismissed.

THE UNIVERSITY OF NORTH CAROLINA v. THE CITY OF HIGH POINT.

(Filed 23 November, 1932.)

1. Wills E b—Devise in this case held to convey fee simple title to lands to incorporated town.

A devise of lands to an incorporated town, describing same, and thereafter stating that the lands be kept for its comfort and to protect its health and for suitable grounds for public buildings, the meeting house thereon to be held more especially for the use of the Society of Friends and generally for the use of religious denominations, conveys the fee-simple title to the town unencumbered by a trust or condition subsequent which would work a reversion of the lands to the grantor, the later clauses not being repugnant to the fee previously granted.

2. Escheat A b—Land held by incorporated town held to escheat upon repeal of town charter under the facts of this case.

Where an incorporated town is devised lands in fee simple unencumbered by a trust or condition subsequent, and thereafter the town charter is repealed by the General Assembly, the lands so devised to the town escheat to the State, and under the provisions of our statute to the University of North Carolina, Art. IX, sec. 7, C. S., 5784, the town having the fee-simple title to the property and having no debts at the time of its dissolution, and the lands not having been purchased for other than strictly governmental purposes, and the General Assembly not having undertaken to dispose of the property. The history of escheat in the light of the doctrine of the old English feudal tenures and of its present significance discussed by *Stacy, C. J.*

3. Municipal Corporations A f—Upon repeal of municipal charter no trust attaches to its lands for benefit of community.

Where the charter of an incorporated town is repealed by the General Assembly the lands formerly held by the town in fee is not fastened with a trust in favor of the local community.

4. Municipal Corporations A b—Legislature has authority over municipal property and may dispose of it upon repeal of municipal charter.

The General Assembly has authority to deal with property held by a municipal corporation for a public purpose and to provide for its disposition upon the repeal of the municipal charter.

5. Escheat B c—3 C. S., 5784, applies to proof and not to pleadings in action by University claiming lands by escheat.

The provisions of C. S., 5784(a), applies only to proof and not to pleadings, and its provisions may not be taken advantage of by a demurrer to the pleadings.

APPEAL by plaintiff from *Shaw, Emergency Judge,* at February-March Term, 1932, of GUILFORD.

Civil action in ejectment, heard upon demurrer.

The complaint alleges:

1. That the plaintiff is a corporation vested with title to all property accruing to the State from escheats.

2. That the town of Jamestown, located near the confluence of the north and south forks of Deep River in Guilford County, was chartered by act of Assembly, 1858-1859, under which the "commissioners of Jamestown," and their successors in office, were created a body politic with the right to take, hold and sell property, etc.

3. That under the will of George C. Mendenhall, duly probated in 1860, about six acres of land situate near the south fork of Deep River, the property of said testator, was devised as follows:

"I give and devise to the commissioners of the corporation of Jamestown and their successors in office all the land within the following boundaries, to wit: (Description). The same to be kept for the comfort and held to protect the health of the town and for suitable grounds whereon to erect any buildings for public use, and the brick meeting house thereon to be held more especially for the use of the Society of Friends and generally for the use of all religious denominations who profess the religion of Jesus Christ—and said land, grove, meeting house and graveyard to be under the direction of the commissioners of the corporation of Jamestown and their successors."

4. That the charter of the town of Jamestown was repealed by the Legislature in 1893, and that the said town and its people have since been without corporate existence.

5. That the tract of land in question was never conveyed or in any manner aliened by the "commissioners of Jamestown," and the same has escheated to the University of North Carolina.

6. That the defendant is in the unlawful possession of said property, and has damaged the same, by ponding water thereon, to the extent of $2,500.

Demurrer interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action; demurrer sustained; plaintiff appeals, assigning error.

Attorney-General Brummitt, Jos. B. Cheshire, Jr., escheator, Leland Stanford and R. D. Dickson for plaintiff.

G. H. Jones for defendant.

STACY, C. J. It is alleged that the plaintiff is the owner by escheat of the *locus in quo,* that the defendant is wrongfully in possession thereof, and this is admitted by the demurrer.

True, the validity of plaintiff's title is, in part, made to depend upon the construction of a clause in the will of George C. Mendenhall.

That a fee-simple was devised to the commissioners of the corporation of Jamestown, unencumbered by a trust or condition subsequent, such as to work a reversion of the title, would seem to follow from what was said in *Tucker v. Smith,* 199 N. C., 502, 154 S. E., 826, *Hall v. Quinn,* 190 N. C., 326, 130 S. E., 18, *Blue v. Wilmington,* 186 N. C., 321, 119 S. E., 741, *Brittain v. Taylor,* 168 N. C., 271, 84 S. E., 280, *Church v. Young,* 130 N. C., 8, 40 S. E., 691. There is nothing in the clause, following the description, at variance with or repugnant to the fee previously devised. No disposition of the property was made by the Legislature at the time of the repeal of the charter of the town of Jamestown, nor has any subsequently been undertaken.

Assuming, therefore, that the commissioners of the corporation of Jamestown took a fee under the will of George C. Mendenhall, the question occurs: Did this property as a matter of law escheat to the State, and become vested in the University, upon the repeal of the charter of the town of Jamestown in 1893? We think it did. *Meriwether v. Garrett,* 102 U. S., 472. The agency of the municipal corporation ceased with the repeal of its charter, and all the property held by it for public purposes passed under the immediate control of the State. *Alexander v. Garcia,* 168 S. W. (Tex. Civ. A.), 376.

In the Texas case, just cited, the third head-note, which accurately digests the opinion, is as follows:

"In 1810 the Spanish government established the town of Palafox, granting to it four leagues of land. In 1818, the town was completely destroyed by Indians, and most of the inhabitants killed, and remainder abandoned the town, and for more than 65 years there was a complete abandonment of the town. More than 50 years after such abandonment defendants 'squatted' on the land. Held, that upon abandonment of the town all parts of the grant not having been conveyed by the town to individuals reverted to the Spanish government, and hence passed and became a part of the public domain of the state of Texas by the treaty of Guadalupe Hidalgo, and, being such, defendants could not acquire title to any part thereof by limitations."

This case, however, dealt with lands originally granted to a town by the Spanish government for municipal purposes, and it is contended that the doctrine of reverter under the Spanish law is not after the similitude of an escheat, as the property was not granted to the town in fee in the first instance.

In *Lilly v. Taylor,* 88 N. C., 489, the question arose as to whether property held by the town of Fayetteville for public uses, such as public buildings, streets, squares, parks, wharves, landing places, and generally property held for governmental purposes, could be subjected to the payment of the debts of said municipality, at the instance of creditors, after the repeal of its charter. It was held that the public character of such property forbid its appropriation for this purpose, and the Court added: "Upon the repeal of the charter of the city such property passed under the immediate control of the State, the power, once delegated to the city in that behalf, having been withdrawn." The cases of *Meriwether v. Garrett, supra,* and *Wallace v. Trustees,* 84 N. C., 164, are cited as authorities for the position.

It is provided by C. S., 5784—a statute enacted pursuant to Article IX, section 7, of the Constitution—that all real estate which has heretofore accrued to the State, or shall hereafter accrue from escheats, shall be vested in the University of North Carolina, and shall be appropriated to the use of that corporation. It was said in *Gilmore v. Kay,* 3 N. C., 108, "The word *escheat,* as used in our act of Assembly, embraces every case of property falling to the sovereign for want of an owner"; and in *Trustees v. Gilmour,* 3 N. C., 129, "The act giving escheat lands to the University meant to substitute the University in the place of the public in regard to all such real property as fell to the State for want of heirs capable to take."

Again, speaking to the subject in *University v. Johnston,* 2 N. C., 373, it was said:

"It was argued for the university that it would probably be objected on the part of the defendant that there were no escheat lands in North Carolina, escheat being a consequence of feudal tenure, one of the conditions of which was that when the heritable blood of the tenant failed through want of relations, or by corruption of blood, that the feud should fall back to the lord. It must be admitted that was the correct idea of escheat, yet it is to be observed that this word having been used by the Legislature so late as 1789, where they speak, too, of lands thereafter to escheat, must have been understood by them to represent some other idea than that of escheat according to its strict technical meaning. They intended the act should have some effect; and one sense in which this word is sometimes used even in the old books, is this: the accidental and unexpected falling of lands to the lord for want of heirs. Another sense is, when those who held of the king (or public) die leaving no heirs, and the lands relapse *in fiscum*. Co. Litt., 13, a. In this sense it is used in the act, and signifies that the university shall be entitled to all such lands as have been once appropriated, but by some accident have been left without any legal proprietor—no matter by what means they came into this situation, whether by a dying without heirs or by becoming an alien to the government, as was the case with many upon the adoption of a new form."

Without undertaking to follow the line of escheat from its initial rise in feodal tenure as a strict reversion to substantially a caducary possession *ab intestato* which it later became (*Burgess v. Wheate*, 1 Eden's Cas., 177), it is sufficient to say that whereas originally the law gave the escheat for want of a tenant to render feudal service, *propter defectum tenentis*, it now gives it for want of an owner or rightful claimant. *Fox v. Horah*, 36 N. C., 358; *Gilmour v. Kay, supra*. At one time privity between feoffor and feoffee was thought to be essential, afterwards the Crown came in on failure of heirs as *parens patriæ*. Note, 29 Am. Dec., 232. The word "escheat" is derived from the French, and originally signified the falling of lands by accident to the lord of whom they were holden, in which case the fee was said to be *escheated*. The escheat was not always to the Crown, as a fee might be holden either from the Crown or from some inferior lord. At feudal law escheat was the right of the lord of the fee to reënter, upon the estate becoming vacant by extinction of the blood of the tenant, either *per defectum sanguinis* or *per delictum tenentis*. But the word "escheat" in this country, at the present time, "merely indicates the preferable right of the state to an estate left vacant, and without there being anyone in existence able to make claim thereto." Note, 29 Am. Dec., 232. Lands, so left vacant, it is said, sink back into their original condition of com-

mon property for the general benefit. *Sands v. Lyndham,* 27 Gratt., 295, 21 Am. Rep., 348. See, also, *In re Neal,* 182 N. C., 405, 109 S. E., 70.

"By the law of England, before the Declaration of Independence, the lands of a man dying intestate and without lawful heirs reverted by escheat to the King as the sovereign lord, but the King's title was not complete without an actual entry upon the land, or judicial proceedings to ascertain the want of heirs and devisees. *Atty-Gen. of Ontario v. Mercer,* L. R., 8 App. Cas., 767, 772; 2 Bl. Com., 245. . . . In this country, when the title to land fails for want of heirs and devisees, it escheats to the state as a part of its common ownership, either by mere operation of law, or upon an inquest of office, according to the law of the particular state." *Hamilton v. Brown,* 161 U. S., 256, reported in 40 L. Ed., 691, with valuable note. See, also, *University v. Foy,* 5 N. C., 58, and *University v. Harrison,* 90 N. C., 385; Annotation, 79 A. L. R., 1364.

The common-law doctrine that real estate held by a private corporation at the time of its civil death, forfeiture, repeal, or expiration of its charter, reverted to the grantor or his heirs was recognized in *Fox v. Horah,* 36 N. C., 358, but this was overruled in *Wilson v. Leary,* 120 N. C., 90, 26 S. E., 630, and again disapproved in *Broadfoot v. Fayetteville,* 124 N. C., 478, 32 S. E., 804. See Annotation, 47 A. L. R., 1288.

Mr. Dillon in his work on Municipal Corporations, sec. 112 (68a), gives it as his opinion that the legislature is without power to deprive the people of the locality of the enjoyment of property held by a municipality. He says: "It is in effect fastened with a trust for the incorporated municipality as long as the Legislature suffers it to live, and for the benefit of the people of the locality if the corporate entity which represents their rights shall be dissolved." But Mr. Dillon's view, as thus broadly expressed, is not supported by the authorities. 43 C. J., 175; 10 R. C. L., 608. He cites none for his position.

It is suggested that while property held by a municipality for governmental purposes passes under the immediate control of the State upon the repeal of its charter, such passage is not by way of escheat, but by investiture under the title held by the municipality at the time of its dissolution, especially where only the use was acquired by dedication or condemnation. 8 R. C. L., 910. Here, the *locus in quo* was acquired in fee by purchase and not merely its use by dedication or condemnation.

To accept the suggestion of investiture under the original devise, and reject that of escheat, as applicable to the facts of the present record would be to constitute the State the ultimate taker in remainder of all such property granted or devised to a municipal corporation. This would

be an innovation in the law hitherto unknown. *Bond v. Moore,* 90 N. C., 239.

On the other hand, if only the control of such property passes to the State, upon the repeal of a municipal charter, the title thereto would remain *in nubilus,* like Mahomet's coffin,

"In Aladdin's tower
Some unfinished window unfinished must remain,"

which perhaps a squatter might acquire, but which the University could not take. This likewise would be a Don Quixote estate, hitherto unknown to the law.

Lastly, it is suggested that such property passes under the immediate control of the State fastened with a trust in favor of those for whom the municipality originally held it. But there are no inhabitants of the town of Jamestown, and it is not after the character of a fee to become a trust estate upon failure of takers. If it were, escheats would never have come into being. Furthermore, a trust without a *cestui que trust* must fail. *Thomas v. Clay,* 187 N. C., 778, 122 S. E., 852; *Trust Co. v. Ogburn,* 181 N. C., 324, 107 S. E., 238; *Keith v. Scales,* 124 N. C., 497, 32 S. E., 809; *Bridges v. Pleasants,* 39 N. C., 26 ("foreign missions," "home missions" and "poor saints" held too indefinite). It was held in *Highland Grove Township v. Winnipeg Junction,* 125 Minn., 280, 146 N. W., 974, that a township which embraced the site of a dissolved municipality was not entitled to its funds or property in the absence of a statute so providing, thus rejecting the idea of a trust in favor of the local community.

It is true the doctrine of escheat has had to accommodate itself to the evolutionary process in order to meet the changes in government and institutional life, but its vitality has neither waned nor ebbed along the way. The causes of its birth were such as to give it sustained existence. The doctrine remains as well as the necessity out of which it arose. Its preservation is salutary, and its application to the facts of the present record—to care for an unexpected windfall as it were—would seem to be more in keeping with the precedents than the inhospitable innovations above mentioned.

When property of the character we are now considering becomes vacant *propter defectum tenentis,* or ownerless, and, for this reason, the law returns it to the source from whence it came—formerly the King, later the State—such return apparently comes within the meaning of an escheat. It passes under the immediate control of the State, relapses *in fiscum* as it were, or sinks back into its original condition of common

property for the general benefit. *Sands v. Lyndham, supra.* Even if the original conception of an escheat did not embrace such relapse *in fiscum* of municipal property, the enlarged significance of the term as used in the statute would seem to be broad enough to include it. *University v. Johnston, supra.*

Perhaps it should be observed that we are not now dealing with property which has been purchased by a municipality for other than strictly governmental purposes, such as waterworks, lighting plants, street railways, etc., which may be subject to peculiar considerations. 43 C. J., 175. Nor are we considering property conveyed or devised to a municipality in trust, or on a condition subsequent, such as to work a reversion to the grantor, donor, devisor, or his or her heirs. *Mormon Church v. U. S.,* 136 U. S., 1.

It should also be observed that upon the repeal of the charter, there were no outstanding obligations of the municipality, or debts to be paid, and the General Assembly did not undertake, either proximately or remotely, to make any disposition of the property now in suit (*Highlands v. Hickory,* 202 N. C., 167, 162 S. E., 471); nor is it of such character that the commissioners of Jamestown could not have disposed of it at will prior to the dissolution of the municipal corporation. *Hall v. Quinn, supra.*

The General Assembly has ample authority to deal with property held by a municipal corporation for public purposes, and to provide for its disposition upon the repeal of the municipal charter, in which case, it would seem, the question presently debated could not arise. *Highlands v. Hickory, supra; Hasty v. Southern Pines,* 202 N. C., 169, 162 S. E., 480; *Torrence v. Charlotte,* 163 N. C., 562, 80 S. E., 53; *Montpelier v. East Montpelier,* 29 Vt., 12.

The decisions in *Smith v. Dicks,* 197 N. C., 355, 148 S. E., 464, and *Broadfoot v. Fayetteville,* 124 N. C., 478, 32 S. E., 804, cited and relied upon by defendant, are not presently helpful to its position. The rights of creditors of the civilly dead village of Jamestown are not involved in the present proceeding, as there were none. *Smith v. Comrs.,* 182 N. C., 149, 108 S. E., 443.

Nor can the provisions of 3 C. S., 5784(a) avail the defendant on demurrer. This statute deals with proof, not pleading.

Reversed.

MRS. MAMIE G. MIXON ET AL. v. JAMES G. MIXON, ADMINISTRATOR OF MRS. MARCELLA EBORN AND WILLIAM R. EBORN.

(Filed 23 November, 1932.)

1. Insurance N a—Upon death of beneficiary of War Risk Insurance heirs of soldier are to be determined as of date of his death.

After the death of a soldier insured under the provisions of the Federal War Risk Insurance Act and the death of the beneficiary named in the policy, the commuted value of the remaining installments is payable to the administrator of the deceased soldier as personalty belonging to his estate to be distributed among his heirs at law under the statute of distribution, such heirs to be determined as of the date of the death of the deceased soldier and not as of the date of the death of the beneficiary.

2. Same—Proceeds of War Risk Insurance in hands of administrator of deceased soldier are not subject to debts of distributees.

Where after the death of a soldier insured under the provisions of the War Risk Insurance Act his mother, as the beneficiary named in the policy, receives the monthly installments from the policy until her death, and the commuted value of the remaining installments are then paid to his administrator: *Held*, the funds in the administrator's hands are not subject to the debts of the deceased soldier nor of the distributees under the Federal Act, and neither the creditors of the mother's nor the father's estate are entitled to payment out of the funds as against the brothers and sisters of the deceased soldier who are his heirs at law and the distributees of the funds, no payment having been made to any distributee of the estate of the deceased soldier. But after the distribution of the funds in accordance with the statute the funds in the hands of the distributees would be subject to their debts.

3. Same—War Insurance Act will be liberally construed to exempt proceeds of policies from claims of creditors.

The World War Veteran's Act and the amendments thereto will be liberally construed to effectuate the intent of the act to provide for American soldiers and their dependents and to exempt the proceeds of the policies from the claims of creditors. 454 title 38 U. S. C. A.

CIVIL ACTION, before *Parker, J.*, at October Term, 1932, of BEAUFORT.

The agreed facts are as follows: "1. That William R. Eborn, a sailor in the United States Navy, during the late war, received a certificate of insurance on his life, issued by the United States, through the Bureau of War Risk Insurance. His mother, Mrs. Marcella Eborn, was named as beneficiary. He died intestate, and having never married, 22 October, 1918, a resident of Beaufort County, North Carolina, leaving him surviving, his father, W. S. D. Eborn, his mother, Mrs. Marcella Eborn, also the plaintiffs herein, his brothers and sisters.

2. On 30 October, 1926, W. S. D. Eborn, father of the deceased veteran, died leaving a will and naming his wife as his executrix and sole devisee. On 12 June, 1932, Mrs. Marcella Eborn, mother of deceased veteran, died intestate, and James G. Mixon was appointed administrator of her estate, she having received monthly installments of $57.50 per month from 22 October, 1918, to 21 June, 1932, the remaining installments, that she would have received, had she lived, in the amount of $3,932, has been awarded and paid to, and is now in the hands of James G. Mixon, administrator of the estate of William R. Eborn, under section 303, World War Veteran's Act and amendments thereto, to be distributed to heirs or next of kin of the deceased veteran under the statute of distributions of the State of North Carolina.

3. That the creditors of W. S. D. Eborn, and Mrs. Marcella Eborn, father and mother respectively, of the veteran, are claiming that the debts of W. S. D. Eborn and Mrs. Marcella Eborn, father and mother of veteran, should be paid by the administrator of the veteran's estate, out of the award heretofore referred to.

4. That your petitioners, the plaintiffs herein, are brothers and sisters of the deceased veteran, and under the statute of distributions of North Carolina, are the next of kin, of the deceased veteran, since death of the father and mother, and under the statute of descents of North Carolina, are his heirs.

The parties to this proceeding pray the court that their relative rights under the above state of facts be determined and judgment rendered accordingly."

Upon the foregoing facts it was adjudged "that the funds now in the hands of James G. Mixon, as administrator of William R. Eborn, deceased veteran, are not subject to the claims of creditors of W. S. D. Eborn, and Mrs. Marcella Eborn, father and mother respectively, nor either of them, of the deceased veteran. The said James G. Mixon, as such administrator, is hereby ordered to pay to the plaintiffs herein, brothers and sisters of the deceased veteran, the funds in his hands, as administrator of William R. Eborn, deceased, subject to the proper costs and charges of administration, it being adjudged by the court that the creditors of W. S. D. Eborn and Mrs. Marcella Eborn, respectively, are not entitled to participate in the same."

From the foregoing judgment the defendant appealed.

J. S. Benner for plaintiffs.
MacLean & Rodman for defendant.

BROGDEN, J. Are proceeds of war risk insurance in the hands of the administrator of the dead veteran subject to the claims of creditors of distributees of the dead soldier?

A sharp divergence of judicial opinion is disclosed by the opinions of many appellate courts upon the question as to whether the distributees of war risk insurance of a deceased soldier are to be ascertained at the time of the death of the soldier or at the time of the death of the beneficiary named in the certificate of insurance. Probably the latest utterance upon the subject is contained in the opinion of the Supreme Court of the United States in *Singleton v. Cheek,* 76 L. Ed., p. 308. The Court, referring to the amendment of the World War Veteran's Act in 1925, said: "By that amendment, the rule, which, upon the happening of the contingencies named in the prior acts, limited the benefit of the unpaid installments to persons within the designated class of permittees, was abandoned, and "the estate of the insured" was wholly substituted as the payee. All installments, whether accruing before or after the death of the beneficiary named in the certificate of insurance, as a result, became assets of the estate of the insured upon the instant of his death, to be distributed to the heirs of the insured in accordance with the intestacy laws of the state of his residence, such heirs to be determined as of the date of his death, and not as of the date of the death of the beneficiary. The state courts, with almost entire unanimity, have reached the same conclusion." A complete and comprehensive array of authorities appear in a note appended to the opinion. See *Trust Co. v. Brinkley,* 196 N. C., 40, 144 S. E., 530; *In re Pruden,* 199 N. C., 256, 154 S. E., 7; *Grady v. Holl,* 199 N. C., 666, 155 S. E., 565.

Consequently when William R. Eborn died on 22 October, 1918, his father, W. S. D. Eborn, and his mother, Mrs. Marcella Eborn, were entitled to his personal property under the intestate laws of North Carolina. *In re Pruden,* 199 N. C., 256. However, the mother of the dead soldier, Marcella Eborn, was named as beneficiary in the certificate of insurance, and, as a result, was awarded the monthly installments of $57.50 per month from 22 October, 1918, until her death in June, 1932. After her death the commuted value of the remaining installments, aggregating $3,932, was awarded James G. Mixon, administrator of the estate of the deceased soldier, in accordance with the provisions of the World War Veteran's Act and amendments thereto. Thus the insurance money became an asset of the estate of the deceased soldier. The Court of Appeals of Kentucky in an illuminating opinion by *Drury,* said: "This sum is a part of the personal estate of the soldier, it is payable to and is receivable by his personal representative, and, with the exception of not being subject to his debts, to be administered just like any other personal estate of the soldier, just as any cash he may have had on hand, his choses in action, a flock of sheep, a drove of hogs, a herd of cattle, or a stud of horses." *Mason's Adm's. v. Mason's Guardian,* 39

S. W. (2d), 211. Many adjudicated cases appear in the opinion upon various aspects of the law of war risk insurance.

Therefore, nothing else appearing, the proceeds of war risk insurance, when paid by the Federal Government to "the estate of the insured," would become a general asset of such estate and subject to the claims of creditors. However, the Congress of the United States had a different view and expressed the intention of the lawmakers in the form of a statute, which is section 454, title 38 U. S. C. A. This statute provides that "the insurance . . . payable under parts II, III, and IV respectively, . . . shall not be subject to the claims of creditors of any person to whom an award is made under parts II, III, or IV; . . . such insurance . . . shall be subject to any claim which the United States may have . . . against the person on whose account the . . . insurance . . . is payable." Manifestly, this statute was designed to relieve the "estate of the insured" from liability for debts of the deceased soldier. See *Funk v. Luithle,* 226 N. W., 595, and *Whaley v. Jones,* 149 S. E., 841.

Conceding that the proceeds of war risk insurance are exempt from the claims of creditors of the insured, is such fund exempt from the claims of creditors of the distributee or distributees of such fund under the intestate laws of this State?

An examination of the World War Veteran's Act and the amendments thereto will perhaps disclose that the original idea of this beneficent legislation was to provide for American soldiers and their dependents. Hence a permitted class of beneficiaries was named in the early statutes, including the closest kin of the soldier, thus confirming the view that war risk insurance, as originally conceived, was a sort of special fund to stand guard about the family of the soldier who was offering his blood upon the altar of his country. The same idea is expressed in our statute C. S., 160, which excepts the proceeds of recovery for wrongful death from the claims of creditors. Moreover, section 454, title 38 U. S. C. A. is broad and comprehensive and should doubtless be given a liberal construction in furtherance of the prevailing idea of exemption from the claims of creditors. Furthermore, in the case at bar the original fund or the "insurance" referred to in said section 454 is now in the hands of the administrator. No distributee of the estate of the dead soldier has received a penny of it under the intestate laws. The entire fund is now war risk insurance in the hands of his administrator, and the exemption, created by the Federal statute, from the claims of creditors still rests upon it. Obviously, if any part of the fund had been actually turned over to a distributee or transferred

into his possession, such money would be subject to the debts of the distributee. See *Funk v. Luithle, supra.* The decision of this Court in *Martin v. Guilford County,* 201 N. C., 63, rests upon the fact that the money had actually been received by the person entitled thereto, and invested by him in property subject to taxation. Hence, this decision has no direct bearing upon the question of law involved in this appeal.

Affirmed.

BANK OF DUPLIN, ROSE HILL BRANCH, AND W. T. WALLACE, TRUSTEE, AND GURNEY P. HOOD, COMMISSIONER OF BANKS, v. W. I. HALL, H. H. HALL, W. H. HALL, ANNIE L. HALL, J. F. WILLIAMS, ET AL.

(Filed 23 November, 1932.)

1. Chattel Mortgages A b—Chattel mortgage to bank is not void because acknowledgment thereof is taken by bank's cashier.

Although a grantee in a chattel mortgage is not qualified to take the acknowledgment thereof, a chattel mortgage to a bank will not be declared void because the acknowledgment thereof was taken by its cashier. C. S., 3345.

2. Execution A b—In this case held: sheriff did not make a valid levy on personal property of judgment debtor.

Where the sheriff into whose hands an execution on a judgment is placed returns the same with a notation that the judgment debtor having filed a stay bond the execution is returned, and attached to the return is a bond reciting that the sheriff had levied upon the personal property of the debtor and permitted it to remain in the debtor's possession: *Held,* although the return of the sheriff is prima facie evidence of a proper levy, the presumption is rebuttable, and the return failing to contain an itemized statement of the property and disclosing that the property had not been taken into the possession of the sheriff rebuts the presumption, and the levy will be held void. C. S., 675.

3. Chattel Mortgages J c: Fraudulent Conveyances A e—In this case prior mortgage held valid, it not being discharged by substituted mortgage.

Where a borrower from a bank executes a chattel mortgage on his personal property to secure the note, and thereafter gives the bank another note in substantially the same amount and another chattel mortgage on his personalty: *Held,* nothing else appearing the second note and chattel mortgage given in substitution of the first does not discharge the first in the absence of its surrender to the mortgagor and its cancellation of record, and where there is no evidence that the first mortgage covered practically all of the mortgagor's property, or that the mortgagor was insolvent at the time of its execution, the first mortgage is valid and will not be construed as an assignment for benefit of creditors.

BANK *v.* HALL.

CIVIL ACTION, before *Grady, J.*, at December Term, 1931, of DUPLIN.

On or about 10 December, 1924, the defendants, W. I. Hall, W. H. Hall and H. H. Hall executed and delivered to the Bank of Rose Hill two notes, aggregating $2,700, and secured the same by chattel mortgage upon certain cows, horses, mules, sheep and hogs. The chattel mortgage was registered 11 December, 1924. Thereafter on or about 15 July, 1926, all the assets of the Bank of Rose Hill were transferred and assigned to the Bank of Duplin. At the June Term, 1927, Boyle Ice Company obtained a judgment in the Superior Court of New Hanover County against the defendants, W. I. Hall, William Heman Hall and Henry H. Hall, trading as W. I. Hall and Sons, and Hall Ice Cream Company in the sum of $638.30 with interest from 1 July, 1926. This judgment was duly docketed on 16 June, 1927. Execution issued thereon and was received by the sheriff on 16 June, 1927. The return of the sheriff on said execution is as follows: "To hand 16 June, 1927 . . . Executed . . . By . . . W. I. Hall and Sons, having filed a stay bond to stay execution until a motion and appeal to set aside this judgment could be heard, I herewith return this execution to W. N. Harriss, C. S. C., together with bond of W. I. Hall and Sons. This 19 July, 1927. D. W. Williamson, sheriff." Attached to said return was a forthcoming bond executed by W. I. Hall, Heman Hall, Henry Hall, and A. L. Ward in the sum of $713.10. Said forthcoming bond recited that "the said D. S. Williamson, sheriff as aforesaid, hath this day levied an execution in favor of Boyle Ice Company against the above bounden Heman Hall, Henry Hall and W. I. Hall upon all the personal property and real property, and hath permitted all of said property to remain in the possession of said W. I. Hall, Heman Hall and Henry Hall," etc. Thereafter the Halls executed and delivered to the Bank of Duplin a note for the sum of $2,709.87, dated 22 July, 1927, and in order to secure the payment thereof executed a chattel mortgage, dated 22 July, 1927, covering cows, horses, mules, sheep, hogs, and certain farming implements. Thereafter, on or about 29 July, 1930, the Bank of Duplin instituted a claim and delivery proceeding against the Halls to take possession of the property described in said chattel mortgage in order to sell the same to apply to said debt. The Boyle Ice Company, the appellant, filed an answer alleging that the chattel mortgage held by the Bank of Duplin was void for that the Boyle Ice Company had secured a judgment against the Halls and issued execution thereon, and that the sheriff of Duplin County had seized the personal property described in the chattel mortgage by virtue of said execution and acquired a lien thereon prior to the execution of the chattel mortgage. It was further alleged that the Halls were insolvent when they executed

said chattel mortgage, and that the same was intended to secure a pre-existing debt, and that the mortgagors had retained no other property sufficient to pay their debts, and consequently said chattel mortgage was equivalent to an assignment for the benefit of creditors.

The following issues were submitted to the jury:

1. "Was the chattel mortgage made by W. I. Hall to the Bank of Duplin recorded in Book 300, page 117, of the register's office of Duplin County, made for the purpose of securing the preëxisting debt as alleged by the defendant, Boyle Ice Company?"

2. "Did said chattel mortgage convey to said bank practically all of the property belonging to the said W. I. Hall, as alleged by the Boyle Ice Company?"

3. "Was said chattel mortgage from W. I. Hall to the bank of Duplin made for the purpose of defrauding the creditors of the said W. I. Hall, as alleged by defendant, Boyle Ice Company?"

4. "Did the Bank of Duplin file inventory and schedule as assignee of W. I. Hall *et al.*, as required by the statute regulating the assignment for the benefit of creditors?"

5. "Is the plaintiff the owner and entitled to the possession of the personal property described in the chattel mortgage from W. I. Hall to the Bank of Duplin, recorded in Book 300, page 117, of the register's office, Duplin County?"

6. "What was the value of said property at the time it was seized by the sheriff under claim and delivery?"

7. "What is the balance due and owing by the defendants Hall on the note from W. I. Hall *et al.*, to the Bank of Duplin?"

The trial judge charged the jury to answer the first issue "No," the second issue "Yes," the third issue "No," the fourth issue "No," and the fifth issue "Yes." The sixth and seventh issues were answered by consent.

From judgment upon the verdict in favor of the Bank of Duplin and Gurney P. Hood, Commissioner of Banks (the Bank of Duplin having become insolvent), and further that said plaintiffs were the owners and entitled to the possession of the personal property described in the chattel mortgage, the Boyle Ice Company appealed.

George R. Ward for plaintiff.

I. C. Wright for Boyle Ice Company.

BROGDEN, J. The execution of the chattel mortgage, dated 10 December, 1924, was acknowledged before S. D. Pittman, notary public, who was cashier of the bank, the grantee in the mortgage, and the Boyle Ice

Company insists that said mortgage was void. This contention, however, cannot be sustained. C. S., 3345. It has been held that a grantee in such an instrument is not qualified to take the acknowledgment thereof. *Cowan v. Dale,* 189 N. C., 684, 128 S. E., 155.

The Boyle Ice Company further asserts that it had a lien upon the personal property described in the mortgage by virtue of a levy duly made by the sheriff of Duplin County on or about 19 July, 1927. No lien is acquired upon personal property in this State until a levy is duly made. C. S., 675, subsection 1; McIntosh, North Carolina Practice and Procedure, pp. 844-845. Consequently, the question arises: Did the sheriff make a proper levy upon said personal property? The return of the sheriff is prima facie evidence of a proper levy. *Perry v. Hardison,* 99 N. C., 21. The essential elements of a levy are discussed and applied *In re Phipps,* 202 N. C., 642. The levy in the case at bar does not comply with the principles of law heretofore declared. In the first place, the return of the sheriff does not recite a levy nor disclose an itemized statement of the property seized. Indeed, the express language of the return would apparently exclude the conclusion that the property was either actually or constructively seized. The following declaration of the court in *Perry v. Hardison, supra,* is directly in point and conclusive: "Here the prima facie proof is rebutted, and it is shown there never was any levy, and that the goods remained uninterfered with, in the defendant's hands, and were appropriated by him to his own use." *In re Phipps, supra.* See, also, C. S., 682. While the forthcoming bond recites a levy, it is manifest upon an inspection of the record that no legal levy was made, and hence the Ice Company acquired no lien by virtue thereof.

The record discloses that the bank held a chattel mortgage given by the Halls in December, 1924, and that this mortgage covered practically the same property as the chattel mortgage of July, 1927. There is no evidence that the Halls were insolvent in 1924, or that the chattel mortgage then given was for a preëxisting debt, or that the property described therein was practically the entire property of the mortgagors. The giving of another mortgage in 1927, nothing else appearing, did not discharge the lien of the existing mortgage given in 1924. This principle was announced in *Wilkes v. Miller,* 156 N. C., 428, 72 S. E., 482, as follows: "The substitution of one note and mortgage for another will not discharge the lien of the original note and mortgage unless the latter is surrendered to the mortgagor, or canceled of record. It is only a renewal or acknowledgment of the same debt."

An examination of the entire record does not disclose the presence of reversible error.

Affirmed.

J. W. WATSON v. J. A. HILTON AND C. R. HICKS.

(Filed 23 November, 1932.)

1. Judgments F b—Judgment in this case held not erroneous as entitling plaintiff to recover whole award from both tort-feasors.

Where the jury has returned a verdict in favor of the plaintiff in an action in tort against two defendants and has awarded damages, a judgment that the plaintiff recover against the defendants and each of them will not be held for error, the judgment being merely indicative of the joint and several liability of the defendants and not entitling the plaintiff to recover the whole sum from each of them.

2. Execution K a—Execution against the person of defendant in action for malicious prosecution will not issue in absence of actual malice.

No execution can issue against the person of a defendant in an action for malicious prosecution in the absence of a finding of express or actual malice, and where the jury's verdict, interpreted in the light of the issues and charge, finds only implied malice, it is error for the judgment of the Superior Court to order that execution against the persons of the defendants issue upon return of execution against the property unsatisfied.

APPEAL by defendants from *Finley, J.*, at April Term, 1932, of MECKLENBURG.

This is an action for malicious prosecution. The jury returned the following verdict:

1. Was the plaintiff caused to be arrested and prosecuted by the defendant, J. A. Hilton, maliciously and without probable cause? Answer: Yes.

2. Was the plaintiff caused to be arrested and prosecuted by the defendant, C. R. Hicks, maliciously and without probable cause? Answer: Yes.

3. What damages, if any, is the plaintiff entitled to recover: Answer: $190.

It was thereupon adjudged that the plaintiff recover of the defendants "and each of them" the sum of $190 and costs, and that upon failure to pay the judgment and the return of an execution unsatisfied, execution issue against the person of the defendants, as provided by law. The defendants excepted and appealed.

R. Pearson Upchurch for appellants.
No counsel contra.

ADAMS, J. We do not interpret the judgment as signifying that the full amount of the recovery may be twice collected from the defendants.

The words "and each of them" simply indicate the joint and several character of the defendants' liability for the sum assessed as damages. But there is error in that part of the judgment which directs that upon the return of an execution unsatisfied the plaintiff may issue an execution against the person of the defendants. Construing the first and second issues in connection with the charge of the court we find that the answer to each of them may have been and probably was made upon a finding of implied malice. No issue was submitted and no finding appears which shows that the defendants were actuated by express malice. To justify an execution against the person there must be an affirmative finding of express or actual malice. *Swain v. Oakley,* 190 N. C., 116; *Harris v. Singletary,* 193 N. C., 583. No execution therefore, can be issued against the person of the defendants. As thus modified the judgment is affirmed.

Modified and affirmed.

R. C. LEWELLYN v. MAGGIE LEWELLYN.

(Filed 23 November, 1932.)

Courts B b: A c—Order of municipal court without jurisdiction of case removing it to Superior Court of another county does not confer jurisdiction.

Where the statutory jurisdiction of a city court over the parties is confined to instances in which the plaintiff lives within one mile of the city limits, the court has no jurisdiction where the plaintiff lives beyond it, nor can the parties confer jurisdiction by consent, and where the municipal court orders the case transferred to the Superior Court of another county, no jurisdiction is thereby conferred on the Superior Court, there being no statutory authority for such removal, and the judgment of the Superior Court will be treated as a nullity and an appeal therefrom will be dismissed.

APPEAL by defendant from *Moore, Special Judge,* at July Special Term, 1932, of SURRY. Action dismissed.

This action was begun in the municipal court of the city of High Point, on 22 September, 1931. After the complaint was filed, and before the time for filing answer had expired, the defendant moved that the action be transferred from said court to the Superior Court of Surry County, for trial, on the ground that both plaintiff and defendant are residents of Surry County. Thereafter the motion was heard, and by consent the action was transferred from the municipal court of the

city of High Point to the Superior Court of Surry County. At the trial, the issues raised by the pleadings were submitted to a jury and answered as follows:

"1. Were plaintiff and defendant married as alleged in the complaint? Answer: Yes.

2. Has there been a separation of plaintiff and defendant, husband and wife, and have they lived separate and apart from each other for five successive years next preceding the beginning of this action and the filing of this complaint, as alleged in the complaint? Answer: Yes.

3. Were there no children born to this marriage as alleged in the complaint? Answer: Yes.

4. Is the plaintiff now a resident of the State of North Carolina, and has he been a resident of the State of North Carolina for five successive years next preceding the filing of this complaint, and the beginning of this action? Answer: Yes."

From judgment that the bonds of matrimony heretofore existing between plaintiff and defendant be and that same was dissolved, the defendant appealed to the Supreme Court, assigning errors at the trial.

J. H. Folger and H. H. Llewellyn for plaintiff.

A. T. Grant for defendant.

CONNOR, J. The municipal court of the city of High Point is a statutory court, created by the General Assembly as authorized by certain provisions of the Constitution of this State. It was created as "a special court for the trial of petit misdemeanors" by chapter 599, Public-Local Laws of North Carolina, 1913. It was given civil jurisdiction in certain cases by chapter 699, Public-Local Laws of North Carolina, 1927. See *Cecil v. Lumber Co.*, 197 N. C., 81, 147 S. E., 735. Also *Hendrix v. R. R.*, 202 N. C., 579, 163 S. E., 752.

The civil jurisdiction of said court is limited to cases in which the plaintiff is a resident of the city of High Point or one mile thereof. The plaintiff in the instant case is not a resident of the city of High Point, nor does he reside within one mile of said city; he is and was at the date of the commencement of this action a resident of Surry County, North Carolina. For this reason, the municipal court of the city of High Point did not have jurisdiction of this action, nor did the Superior Court of Surry County acquire jurisdiction by the order of the municipal court transferring the action to said court, for trial. *Corporation Commission v. R. R.*, 196 N. C., 190, 145 S. E., 19; *Trust Co. v. Leggett*, 191 N. C., 362, 131 S. E., 752; *Bank v. Leverette*,

187 N. C., 743, 123 S. E., 68; *Hall v. Artis,* 186 N. C., 105, 118 S. E., 901. The principle that jurisdiction cannot be conferred by consent is especially applicable in an action for divorce. There is no provision in the statute by which the municipal court of the city of High Point was created authorizing said court to transfer an action begun and pending in said court to the Superior Court of a county other than Guilford.

The questions of law debated in this Court involving the construction of chapter 72, Public Laws of North Carolina, 1931, cannot be considered on this appeal. The judgment of the Superior Court of Surry County is a nullity, for the reason that said court was without jurisdiction of the action in which the judgment was rendered. As the want of jurisdiction appears upon the record, the action is

Dismissed.

C. A. ANDERSON v. CALVIN MORRIS AND JAMES B. MORRIS.

(Filed 23 November, 1932.)

1. **Appeal and Error J b—Record in this case showed that verdict was set aside in discretion of court from which no appeal will lie.**

   Where the trial judge refuses a motion to set aside a verdict as a matter of discretion and later grants a motion to set aside on the ground that the verdict was against the weight and credibility of the evidence, also as a matter of his discretion, and later refuses a motion to make the record show that he had set it aside as a matter of law, the entry to that effect necessarily implies that the verdict was set aside as a matter of discretion, and no appeal will lie from his order.

2. **Appeal and Error J g—Where order setting aside verdict is upheld exceptions to charge and refusal to nonsuit will not be considered.**

   Where an order of the court setting aside the verdict is not disturbed on appeal, exceptions relating to the court's instructions to the jury and to a motion of nonsuit will not be considered, no final judgment having been rendered.

APPEAL by defendants from *MacRae, Special Judge,* at April Term, 1932, of MECKLENBURG.

Boone D. Tillett, Cansler & Cansler and M. C. Moysey for plaintiff.
C. H. Gover and William T. Covington, Jr., for defendants.

ADAMS, J. The plaintiff brought suit to recover damages for injury to his person and his property resulting from the collision of an auto-

mobile owned by James B. Morris and driven by Calvin Morris, his son, a minor, with a Plymouth coupe owned and operated by the plaintiff. The cause came on for hearing and the court submitted to the jury issues involving the usual questions of the defendants' negligence, the plaintiff's contributory negligence, and damages. In response to the first issue the jury found that the plaintiff had not been injured by the negligence of the defendants as alleged, and left the two remaining issues unanswered.

When the verdict was returned the plaintiff moved that it be set aside as a matter of discretion. The motion was overruled. The plaintiff then moved that it be set aside as being contrary to the weight of the evidence and the motion was allowed. Sometime afterwards the defendants, by consent, requested the court to amend or modify this order so as to make it appear that the verdict had been set aside as a matter of law and not as a matter of discretion. The request or motion was resisted by the plaintiff and the court made this entry: "The record will have to stand as it is. I refuse to insert in there 'as a matter of law,' and the Supreme Court will have to construe my first order." The defendants excepted.

Granting, as said in *Abernethy v. Younts,* 138 N. C., 337, that the action of a judge in setting aside a verdict will not be ascribed to discretion unless he plainly says so, or there is no other explanation of his conduct, we are of opinion that the foregoing entry clearly indicates that the presiding judge did not set aside the verdict as a matter of law. The only alternative was the exercise of discretion. The asserted inconsistency between the orders, if apparent, is in fact not controlling. This Court has repeatedly and consistently held that the trial court in setting aside a verdict on the ground that it is against the weight of the evidence exercises a discretionary power which in the absence of abuse is not subject to review on appeal. Vacating a verdict on this ground depends on such a variety of circumstances that it is impossible to prescribe a fixed rule of law by which the subject can be regulated. *Armstrong v. Wright,* 8 N. C., 93; *Edwards v. Phifer,* 120 N. C., 405; *Wood v. R. R.,* 131 N. C., 48; *Clothing Co. v. Bagley,* 147 N. C., 37; *Bouldin v. Daniel,* 151 N. C., 283; *Mica Co. v. Mining Co.,* 184 N. C., 490; *Alston v. Odd Fellows,* 189 N. C., 204; *Hardison v. Jones,* 196 N. C., 712; *Acceptance Corporation v. Jones, ante,* 523.

As no final judgment has been rendered we need consider neither the instructions to the jury nor the motion for nonsuit.

No error.

CARRIE JOHNSON, WIDOW OF PINK JOHNSON, DECEASED, v. CHARLOTTE BAGGING COMPANY AND MARYLAND CASUALTY COMPANY.

(Filed 30 November, 1932.)

1. **Master and Servant F i—Findings of Industrial Commission must be based on competent evidence in order to be binding on appeal.**

Where there is competent legal evidence to support a finding of fact by the Industrial Commission in a compensation hearing before it, such finding is binding on the courts on appeal, but its findings are not conclusive when based on incompetent evidence.

2. **Master and Servant F b—Evidence held sufficient to support finding that injury did not arise out of and in course of employment.**

Where there is evidence by a medical expert witness who attended the deceased employee that from his own observation of the deceased employee his death was caused by pneumonia which was not connected with any injury sustained arising out of and in the course of the employment, such evidence is sufficient to sustain a finding of the Industrial Commission to that effect and to sustain its award denying compensation, and the decision of the Commission will be upheld on appeal although there was incompetent evidence introduced at the hearing regarding a declaration of the deceased and his wife that the deceased employee had injured his head while at home at the same place where he had received an injury arising out of and in the course of his employment, the evidence being sufficient to sustain the finding that the injury received in the course of the employment and arising out of it did not cause death.

APPEAL by plaintiff from *Finley, J.*, at June Term, 1932, of MECKLENBURG. Affirmed.

The material facts of record were to the effect: That Pink Johnson had been in the employ of the Charlotte Bagging Company from twelve to fourteen years; was a hearty and robust working man, prior to January, 1931, and while in the employ of the defendant company, on 7 January, a brick weighing four pounds, and falling some eight or ten feet, struck the deceased on top of the head, making an incision about one inch in length; and at which time and place, first aid treatment was given; Pink Johnson continued to work in such condition until 12 o'clock on 12 January, 1931, at which time he informed his superintendent, that he was chilly and felt badly. Johnson went home, was put to bed and visited later by an employer and foreman of defendant company. He was found to be in bed with a high temperature and very sick. On 14 January, 1931, Dr. E. R. Hipp called to see him, and found Johnson with a temperature of 102, he was very sick. Dr. Hipp's report of 23 January, pronounced that the deceased had erysip-

elas of the scalp, ears and face, and that the deceased's disability at that time was a result of the injury sustained on 7 January. The deceased was confined to his bed until 23 February, 1931, when he was moved to the Good Samaritan Hospital, dying on 3 March, 1931. The further testimony of Dr. Hipp will be set forth in the opinion.

The material part of the Commissioner's finding of facts is as follows: "On 3 March, 1931, Pink Johnson died as the result of pneumothorax, following bronchitis. After the injury by accident on 7 January 1931, Pink Johnson, the deceased, worked four or five days. He asked to be relieved of his duties, after working a half day on the 12th, saying that he was feeling badly, and felt like he was going to have a chill. His employer permitted him to go home. Pink Johnson, the deceased, suffered injury by accident, the second one occurring when at home, he struck a nail in the exact spot on his head where he had received an injury from the falling brick. Erysipelas immediately followed that injury."

Conclusions of law by the Commissioner: "All the witnesses for the claimant have testified definitely that the claimant's intestate never returned to his job with the Charlotte Bagging Company, after being hit in the head by a falling brick. All of these witnesses are positive that immediately or within a day or two after being hit in the head by a falling brick, the deceased's head began to swell, are equally positive in their testimony that the deceased did not suffer any injury at his own home, while going underneath the house for something and sticking a nail in the same spot where he had been injured by the falling brick. The witnesses for the defendants are positive that the deceased worked three or four days after being hit in the head with the falling brick. The payroll records of the employer show that the deceased lost no time until the afternoon of the 12th. Dr. Hipp, the only medical expert who testified, said that he received a history from the deceased and his wife, that the deceased had injured his head with a rusty nail several days after having been injured by the brick falling on his head. *The doctor is positive in his testimony that the deceased did not die as the result of the injury sustained by the falling brick. The doctor says that the deceased died from pneumothorax and erysipelas following this second injury.* The Commissioner is of the opinion that the claimant has failed to make out her case. We cannot be convinced from this evidence, that there is any connection between the death of Pink Johnson and the injury by accident which he suffered while employed by the Charlotte Bagging Company on 7 January, 1931, since no connection, in the opinion of the Commissioner, has been established, compensation must be denied, and it is so ordered."

On appeal the judgment of the full Commission is as follows: "That the findings of fact and conclusions of law set out in the opinion of Commissioner J. Dewey Dorsett, are proper and justified from all the evidence, and they are hereby adopted as findings of fact and conclusions of law of the full Commission, and that the award heretofore issued on 12 March, 1932, reading as follows: 'Upon the findings that the death of the deceased was not the result of any injury arising out of and in the course of his employment, the claim for compensation is denied and case dismissed. Each side to pay its own cost,' be in all respects affirmed."

On appeal from the judgment of the full Commission to the Superior Court, the judgment is as follows: "It is thereupon, considered, ordered and adjudged, that the award of the said North Carolina Industrial Commission be and the same is hereby in all respects approved and affirmed, and that the plaintiff be taxed with the costs of this appeal." The plaintiff excepted and assigned error and appealed to the Supreme Court.

Ralph V. Kidd and H. P. Whitacre for plaintiff.
U. S. Alexander and W. C. Ginter for defendants.

CLARKSON, J. The plaintiff contends: "That the judgment of the Superior Court should be reversed because the only evidence upon which the Industrial Commission issued an award *was upon the incompetent testimony of Dr. Hipp,* no one else, as the record will show, testified that the deceased received any other injury except the one caused by the falling brick." We think the record discloses evidence that Pink Johnson deceased, died as a result of pneumothorax following bronchitis and not of any injury.

In *Brown v. Ice Co., ante,* at p. 100, we find; *Brogden, J.:* "Obviously, if all the testimony offered by a claimant, tending to show an injury sustained in the course of his employment, was hearsay and incompetent, no finding based upon such testimony could be upheld."

This principle of law is sane and sound, and should be adhered to. It goes without saying that courts must hold to the well settled rules of evidence.

Conceding, but not deciding, that the testimony of Dr. Hipp, giving the history of the second injury as narrated to him by Pink Johnson and his wife, Carrie Johnson, was incompetent, yet we think there is sufficient competent evidence on the record to sustain Commissioner Dorsett, affirmed by the full Commission and the court below. In admitting the testimony contended by plaintiff as incompetent, the Com-

missioner, stated: "By the court: I know it is not competent, but I am going to admit it for what it might be worth, in helping me find the facts, give plaintiff an exception." The evidence admitted, as testified to by Dr. Hipp, of what the Johnsons narrated to him, in part, is as follows: "On or about 7 January, 1931, while working at the Charlotte Bagging Company, Charlotte, North Carolina, a brick fell a short distance, striking him on the left side of the head. The wound which was rather small was treated at the Charlotte Bagging Company by the first aid man. The wound had apparently healed nicely and caused no inconvenience or discomfort. He continued working following the accident. Several days previous to 14 January, 1931, *he stated he was under his residence getting coal and he struck his head on a nail protruding through the floor, the nail tearing open the apparently healed wound, which he received on 7 January, 1931.* Following the injury to his scalp with the nail, the wound became very sore and gave him pain. He also stated that for some time he had had a bad cold with a rather severe cough. This cold and cough ante-dated his injury at the Charlotte Bagging Company. At the time of my examination on 14 January, 1931, I found this man to have a small lacerated wound of the scalp on the left side of the head, the wound being infected and draining pus. I cleaned it thoroughly, and applied antiseptic dressing."

The full Commission found: "Upon the findings that the death of the deceased was not the result of any injury arising out of and in the course of his employment, the claim for compensation is denied and case dismissed."

The injury complained of by Pink Johnson, deceased, while working for the defendant his employer, was on 7 January, and he died on 3 March, 1931. Dr. Hipp further testified, unobjected to: "Q. Then she gave a history of his scraping his head on a nail underneath the house? A. Yes, sir. Q. Tearing open the same wound? A. Yes, sir. Q. The wound developed erysipelas? A. The same wound? Yes, sir. Q. You gave antitoxin for erysipelas? A. Yes, sir. Q. And it cleared up the erysipelas? A. Yes, sir. Q. *And you do not see any connection between the erysipelas and the pneumonia that caused his death? A. No sir. Q. And in fact, the first time you saw him, he was suffering from bronchitis and a cold or lung trouble? A. Yes, sir.*" This is sufficient evidence, to sustain the finding.

In *Kenan v. Motor Co., ante,* at p. 110, is the following: "It is well settled that if there is any competent evidence to support the findings of fact of the Industrial Commission, although this Court may disagree with such findings, this Court will sustain the findings of fact made by the Commission."

In *Garris v. Hines Bros., ante,* at p. 148, we find, often reiterated: "The law has established the Industrial Commission as a tribunal to find the facts in compensation cases. This Court has consistently held in accordance with the statute that, if there is any competent evidence to support the findings of fact made by the Commission, such findings are binding upon the appellate courts."

The well considered brief and able argument of plaintiff was persuasive, but we are bound by the findings of the Industrial Commission. The judgment below is

Affirmed.

GURNEY P. HOOD, COMMISSIONER OF BANKS OF NORTH CAROLINA, EX REL. COMMERCIAL BANK AND TRUST COMPANY, v. W. T. LOVE, J. WHITE WARE, W. H. WRAY, ROBERT GOLDBERG, J. O. PLONK, J. A. COSTNER, L. A. CROWELL, C. H. HOOVER, W. S. BRUICE, A. S. KARESH, W. W. GLENN, M. E. HERNDON, MRS. KATE FALLS, ADMINISTRATRIX OF O. G. FALLS, DECEASED; O. M. ROBINSON, C. D. STROUPE, W. J. T. STYERS, V. E. LONG, R. G. CHERRY, A. H. GUION, J. B. THOMASSON, H. C. HARRELSON, J. A. ABERNETHY, E. H. BYARS, JR., E. E. GROVES, LUCY B. CANSLER, EXECUTRIX OF ESTATE OF THOS. B. CANSLER, DECEASED; T. L. WARE, T. M. MCCOY, M. L. PLONK, R. P. ROBERTS, AND F. H. DUNN.

(Filed 30 November, 1932.)

1. Pleadings A a: D b—Complaint against directors of bank alleging general course of dealing and systematic neglect held not demurrable.

In an action brought by the Commissioner of Banks against directors of a bank for damages on account of negligent mismanagement, the complaint enumerating in detail negligent acts and omissions of the defendants and alleging that such acts and omissions constituted a general course of dealing and systematic policy of neglect, wrongdoing and mismanagement, in which all defendants participated, and that such negligence proximately caused great losses to the bank, is *held* not demurrable for misjoinder of parties and causes of action.

2. Pleadings D e—Complaint is to be liberally construed upon demurrer.

In passing upon the sufficiency of a complaint upon demurrer the courts will construe it liberally with a view to substantial justice between the parties and will overrule the demurrer if any portion of the complaint presents facts sufficient to constitute a cause of action or such facts may be fairly gathered therefrom, the remedy being given the defendant in proper instances to apply for a bill of particulars, C. S., 534, or for an order that the pleadings be made more definite and certain by amendment. C. S., 537.

HOOD, COMR. OF BANKS *v.* LOVE.

APPEAL by defendants from *Cowper, Special Judge,* at May Term, 1932, of GASTON. Affirmed.

O. F. Mason, Jr., and Tillett, Tillett & Kennedy for plaintiff.

E. T. Cansler, W. C. Feimster, A. C. Jones, Clyde R. Hoey, E. B. Denny, E. R. Warren, R. G. Cherry and A. L. Quickel for defendants.

CLARKSON, J. The question involved, in substance, is as follows: Where, in an action brought by the Commissioner of Banks against directors of a bank for damages on account of negligent mismanagement, the complaint enumerates in detail negligent acts and omissions of the defendants and alleges that such acts and omissions constituted a general course of dealing and systematic policy of neglect, wrongdoing and mismanagement, in which all defendants participated, and that such negligence proximately caused great losses to the bank, is the complaint demurrable? We think not.

The defendants contend that there is a misjoinder of causes and parties, we cannot so hold. We think the present action is similar to *Trust Co. v. Peirce,* 195 N. C., at p. 718, where we find the following: "The one circumstance which differentiates this case from those cited by the defendants, especially *Emerson v. Gaither,* 103 Md., 564, 7 Ann. Cas., 1114, most nearly in point and upon which great reliance is put, is the allegation of a general course of dealing and systematic policy of wrongdoing, concealment and mismanagement, virtually amounting to a conspiracy, in which the defendants are all charged with having participated at different times and in varying degrees. *Cotten v. Laurel Park Estates, post,* 848, 141 S. E., 339. 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 demurrers. *Cotton Mills v. Masline, ante,* 12; *Bedsole v. Monroe,* 40 N. C., 313; *Fisher v. Trust Co.,* 138 N. C., 224, 50 S. E., 659; *Oyster v. Mining Co.,* 140 N. C., 135, 52 S. E., 198; *Hawk v. Lumber Co.,* 145 N. C., 47, 58 S. E., 603; *Chemical Co. v. Floyd,* 158 N. C., 455, 74 S. E., 465."

Chapter 344, Public Laws 1931, "An act to amend the Code of Civil Procedure as to joinder of parties." It amends C. S., 455, "Who may be plaintiffs" and 456 "Who may be defendants," as follows: "All persons may be made defendants, jointly, severally, or in the alternative, who have, or claim, an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the questions involved. . . . If the plaintiff is in doubt as to the persons from whom he is entitled to redress, he may join two

or more defendants, to determine which is liable." This act liberalizes the joinder of both plaintiffs and defendants.

In the case of *S. v. Bank,* 193 N. C., at p. 527-8, citing numerous authorities, we find: "When a case is presented on demurrer we are required by the statute, C. S., 535, to construe the complaint liberally 'with a view to substantial justice between the parties' and in enforcing this provision, we have adopted the rule 'that if in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand however inartificially it may have been drawn, or however uncertain, defective and redundant may be its statements, for contrary to the common-law rule every reasonable intendment and presumption must be made in favor of the pleader,'" *Foy v. Stephens,* 168 N. C., 438; *S. v. Trust Co.,* 192 N. C., 246; *Enloe v. Ragle,* 195 N. C., 38; *Minnis v. Sharpe,* 198 N. C., 364, 202 N. C., 300, *ante,* 110. Amendment inserting name of Gurney P. Hood, Commissioner, etc., defendants contend was not valid. We cannot so hold.

We find in *Commissioner of Banks v. Carrier,* 202 N. C., at p. 851, the following: "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. (Citing numerous authorities.) This is a defect which may be cured by amendment." C. S., 446, 513, 515, 547. *Goins v. Sargent,* 196 N. C., 478, C. S., 549.

The trial court has plenary power, without consent, to amend pleadings, so far as the amendment did not allege substantially a new cause of action. *Bridgeman v. Insurance Co.,* 197 N. C., 599. Allowing all amendments in pleadings is in the sound discretion of the court. *Sheppard v. Jackson,* 198 N. C., 627. The trial court can, in its discretion, amend pleadings before or after judgment to conform to facts proved. *Finch v. R. R.,* 195 N. C., 190.

The defendants, under C. S., 534, may apply to the court below for a bill of particulars, and under C. S., 537, apply to make the allegations of the pleadings definite and certain by amendment when not so. *Power Co. v. Elizabeth City,* 188 N. C., at p. 285-6.

In *Glass Co. v. Hotel Corp.,* 197 N. C., at p. 12, this Court says: "A demurrer goes to the heart of a pleading and challenges the right of the pleader to maintain his position in any view of the matter, admitting for the purpose, the truth of the allegations of fact contained therein."

We are only dealing now with a demurrer which admits for the purpose the allegations of fact, contained in the complaint. It may be by answer and on the trial of the action a different picture may be shown by the defendants.

The able argument of counsel in this Court for defendants was learned and persuasive, but not convincing, for our liberal practice has gone beyond the position taken by him. Yet the courts must be careful not to allow jungle pleadings whereby injustice may be done litigants. The judgment below overruling the demurrer must be

Affirmed.

STATE v. ALEX GRIER.

(Filed 30 November, 1932.)

1. **Criminal Law L d—In this case exceptions of record are considered although transcript is imperfect.**

In this case the exceptions of record are considered although the transcript may be imperfect, there being no motion by the Attorney-General to dismiss the appeal and the defendant having been convicted of a capital offense.

2. **Criminal Law G l—It is not necessary to competency of confession to officer that defendant be warned he is not compelled to answer.**

It is necessary that a defendant examined by a magistrate in relation to the offense charged should first be informed that he is not compelled to answer and that his refusal to answer shall not be used to his prejudice, C. S., 4561, the proceeding before the magistrate being judicial, but such warning is not necessary in the extra-judicial examination of the defendant by a police officer, and where the defendant has made a confession to the officer which is excluded on the ground that such warning had not been given, and there is evidence that such confession was not induced by hope or fear, his latter confession, also made without inducement of hope or fear, will not be held incompetent on the ground that the defendant might not feel at liberty to depart from the statements of the first confession which was excluded.

3. **Same—Confession is deemed voluntary unless defendant makes contrary appear.**

In order for a confession to be admissible in evidence it must be voluntary, the test usually being whether it was induced by hope or extorted by fear, but all confessions are to be taken as voluntary unless the person making them shows facts authorizing a legal inference to the contrary.

4. **Criminal Law G j—Evidence competent in regard to one defendant only was properly restricted and other defendant could not complain.**

Where on the trial of two defendants for homicide the court admits in evidence the statement of one of them that he was not present at the time of the crime, but plainly charges the jury that such statement was not competent against the other defendant who denied it, the exception to its admission entered by the latter will not be sustained.

STATE *v.* GRIER.

APPEAL by defendant from *Finley, J.*, at June Term, 1932, of GASTON. No error.

Alex Grier, the prisoner, and Clyde Smith were indicted for the murder of Harold Carter. Grier was convicted of murder in the first degree and was sentenced to death. Smith was convicted of murder in the second degree. Grier alone appealed.

The deceased operated a filling station about four miles from Gastonia. On Sunday, 1 May, 1932, early in the morning he was found behind the stove in the filling station, lying in a pool of blood, unconscious. Three oil bottles had been broken, and the fragments were on the floor, together with a hand axe. He had lost considerable blood, and his head was fractured in numerous places. He was carried to the hospital and died without regaining consciousness.

After his arrest Grier made a confession implicating Smith as the one who had done the actual killing, while Grier waited at the door with a pistol. Smith likewise made a statement. At the trial both testified in their own behalf and each denied participation in the crime.

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

J. A. Wilkins for prisoner.

ADAMS, J. It is suggested in the brief of the Attorney-General that the transcript is imperfect, but as the prisoner has been convicted of a capital felony and no motion has been made to dismiss the appeal the exceptions entered of record will be duly considered. The principal assignment of error is the admission of evidence relating to the alleged confession of the prisoner and of a statement said to have been made by his codefendant, Clyde Smith.

The State first offered to prove the prisoner's confession by John Hord, a policeman, but his testimony was excluded for the reason that the prisoner had not been told that any statement he made could be introduced on the trial as evidence against him. Subsequently the solicitor of the district advised him "that any statement he might make would be used against him," that "he did not have to make a statement unless he so desired," and that "nothing was being offered him to make such statement." The prisoner then signed a statement of the circumstances attending the homicide, which had been reduced to writing by the court stenographer. In a lengthy statement, the minute intricacies of which need not be given, the prisoner said that he and Smith planned the homicide and that Smith killed the deceased while he remained outside

the station holding the pistol: "I was watching while he killed the fellow and got the money." The stenographer was permitted as a witness for the State, to read to the jury the prisoner's signed statement and John Hord testified as to the confession made by the prisoner after he had been advised of his rights. Exception was taken to Hord's testimony and to the admission of the written statement.

The prisoner while in jail was examined or "in one sense of the word cross-examined" by some of the officers, and after saying that he had nothing to do with the homicide finally made a confession; but this evidence, heard by the court in the absence of the jury, was excluded. Afterwards before the same officers he made the statement taken by the stenographer, which he said was "of his own free will." The statement was not induced by hope or fear or any other proffered advantage, but it is contended that the circumstances make it doubtful whether the prisoner felt at liberty to depart from the former admission of his participation in the crime and that if the first confession was improperly brought about this infirmity attached to the later statement.

It was shown affirmatively that the prisoner's first confession was not induced by hope or fear. His statement was excluded apparently for the reason that the prisoner had not been advised that he was not compelled to answer, and upon this theory he insists that the second confession was not admissible because there is no evidence that the motives inducing the first confession were not operative in the subsequent statement. *S. v. Roberts,* 12 N. C., 259; *S. v. Lowhorne,* 66 N. C., 638; *S. v. Fox,* 197 N. C., 478. This argument raises the question whether a confession of crime must be rejected unless it appears from the evidence that the person charged is informed at the time that he is at liberty to refuse to answer any question and that his refusal to answer shall not be used to his prejudice. Such information must be given to a prisoner who is examined by a magistrate in relation to the offense charged. C. S., 4561. This caution is essential to the examination at the hearing after arrest because the proceeding is judicial and after the examination of the complainant and his witnesses "the magistrate shall then proceed to examine the prisoner," but not on oath. This warning is not required in an extra-judicial conference between an officer and a person charged with crime who is under no constraint to answer. *S. v. Conrad,* 95 N. C., 666; *S. v. Howard,* 92 N. C., 772; *S. v. Suggs,* 89 N. C., 527. A confession voluntarily made by a person under arrest is competent, *S. v. Ellis,* 97 N. C., 447, *S. v. Rodman,* 188 N. C., 720; and all confessions are to be taken as voluntary unless the person making them shows facts authorizing a legal inference to the contrary.

S. v. Sanders, 84 N. C., 728; *S. v. Christy,* 170 N. C., 772. But every confession must be voluntary. The test is whether it was made under circumstances that would reasonably lead the person charged to believe that it would be better to confess himself guilty of a crime he had not committed. It is expressed in various ways. The confession is inadmissible if "the defendant was influenced by any threat or promise," or if it is "induced by hope or extorted by fear," or if "fear is excited by a direct charge or hope is suggested by assurance," or if extorted by "threats, promises, or any undue influence," or if "wrung from the mind by the flattery of hope or the torture of despair," or by "actual force" or the "hope of escape," or the statement, "it will be lighter on you." *S. v. Roberts, supra; S. v. Lowhorne, supra; S. v. Howard, supra; S. v. Whitfield,* 70 N. C., 356; *S. v. Myers,* 202 N. C., 351; *S. v. Livingston, ibid.,* 809. The confession excepted to in the present case was not characterized by any of these or similar circumstances and was not, therefore, incompetent.

The prisoner excepted to the admission of a statement made by Clyde Smith as taken by the stenographer in which he denied being with Grier on the night the deceased was killed. The court plainly charged the jury that any statement made by Smith and denied by Grier was not competent against Grier. The court's ruling was correct. The point was made in *S. v. Christy, supra,* and the Court said: "The prisoners except that the court did not warn the jury that any statement made by one of the prisoners not in the presence of the others could not be considered except against the one making it, and was no evidence against the others. It is not necessary in this case to recall the rule of practice set out by this Court, 164 N. C., 548: 'It will not be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks at the time of the admission that its purpose shall be restricted,' for the record shows that the judge, on the admission of the evidence, and again in the charge, called the attention of the jury to the fact that the admission or statements of one of the prisoners was competent only against the party making it and should not be considered as against the others."

It may be observed that a part of the evidence points to the prisoner as the actual perpetrator of the homicide, but upon the present record we are not concerned with the jury's divergent findings as to the degree of murder. We find

No error.

LAURA BETTS, ADMINISTRATRIX OF EDDIE PEARL BETTS, *v.* WILSON JONES, SHEPHERD JONES, LUTHER BROOM, AND RICHARD CROWDER.

(Filed 30 November, 1932.)

Public Officers C d—Public officer may be personally liable to third person for official act done maliciously and corruptly.

A public officer is not ordinarily personally liable for the exercise of his official discretion or his judgment in matters within the scope of his authority, but he may be personally liable if he acts in such matters corruptly or maliciously, and where in an action against the individual members of a school committee the complaint alleges that the defendants in the selection of a driver of a school bus acted wilfully, wrongfully, maliciously and corruptly, and seeks to recover damages caused by the negligence of the driver so selected in an action against the members of the board in their individual capacity, a demurrer to the complaint is properly overruled, the allegations being taken as true upon the demurrer.

APPEAL by defendants from *Oglesby, J.*, at September Term, 1932, of ANSON.

This is an action against the individual defendants to recover damages for personal injury resulting in the death of the plaintiff's intestate. Shepherd Jones, Luther Brown, and Richard Crowder are the school committeemen of Peachland high school, to and from which pupils are carried in a motor school bus. The committeemen elected Wilson Jones, a son of Shepherd Jones, as the driver of the bus over the protest of many of the patrons of the school who regarded him as reckless and unfit for the position. It is alleged "that on or about 10 March, 1932, at 8:00 a.m. while the said Wilson Jones was driving said school bus, transporting children forty in number on said bus on the way to Peachland high school on a sand-clay road known as Mineral Springs, about 3 miles from Peachland, and while operating said bus at a high and reckless rate of speed, to wit, about fifty miles per hour or more, he lost control of said bus, causing it to plunge from the road into a wide ditch full of water in Brown Creek swamps, turning the bus over in said ditch in water six feet deep, partially submerging the bus in the water and throwing Eddie Pearl Betts into water, injuring her painfully and to such extent that she died in a few hours after she was rescued from the water."

Among the several alleged acts of negligence is this: that the conduct of the committeemen in the selection of Wilson Jones as driver of the bus was wilful, wrongful, malicious, and corrupt.

All the defendants demurred—the school committee on the ground that in employing a driver for the bus they exercised a governmental function and performed a public duty as an agency of the State for which they are not liable in damages; and the defendant Wilson Jones, on the ground that in driving the bus he was acting for the committee and was likewise in the exercise of a governmental function for which he cannot be held liable.

The trial court overruled the demurrer and the defendants appealed.

Carswell & Ervin and F. O. Clarkson for plaintiff.
McLendon & Covington for defendants.

ADAMS, J. The plaintiff alleges that the school committeemen, disregarding known facts and the repeated protests of many patrons of Peachland high school, in employing Wilson Jones "secured a driver known to them to be unfit, unsafe, nondependable, and reckless," and that they acted wilfully, wrongfully, maliciously, and corruptly. By demurring the defendants admit these allegations. *Andrews v. R. R.,* 200 N. C., 483; *Yarborough v. Park Commission,* 196 N. C., 284; *Sandlin v. Wilmington,* 185 N. C., 257.

The law as generally administered recognizes a distinction between public duties which are ministerial in character and those which require the exercise of judgment or discretion. This Court has held that as a rule a private action for tort cannot be maintained against an agency of the State, but for the negligent breach of a public duty which is administrative and imposed entirely for the public benefit an officer may be held individually liable to a person who has been injured by his negligence if the statute creating the office or imposing the duty makes provision for such liability. It has also been held that where the powers conferred upon a public officer involve the exercise of judgment or discretion he is not liable to a private person for neglect to exercise such powers or for the consequences of the lawful exercise of them if he acts within the scope of his authority and without malice or corruption. *Hipp v. Farrell,* 169 N. C., 551; *S. c.,* 173 N. C., 167; *Carpenter v. R. R.,* 184 N. C., 400. If, however, his act is corrupt or malicious he may be liable in his personal capacity for the injury inflicted by him. *Spruill v. Davenport,* 178 N. C., 364.

We may assume that a school committee in the discharge of the duties imposed by law generally acts as an agency of the State; but this action is not prosecuted against the committee in its representative capacity as such agency, and in this respect it differs materially from *Benton v. Board of Education,* 201 N. C., 653, *Cathey v. Charlotte,* 197 N. C.,

309, *Scales v. Winston-Salem,* 189 N. C., 469, and similar cases. In *Hyder v. Henderson County,* 190 N. C., 663 and in *Lassiter v. Adams,* 196 N. C., 711, the Court was careful to observe that there was no allegation that the defendants had acted corruptly or maliciously. Here the committeemen are sued in their personal capacity; and while it is true that if a person is doing a lawful thing in a lawful way his conduct is not actionable though it may result in damage to another, still, as said in *Spruill v. Davenport, supra,* when a person goes outside of his line of duty and acts corruptly or with malice he becomes personally liable for consequent damages. This is the question which the complaint and the demurrer present. Did the defendants act maliciously or corruptly, as alleged? We do not understand the inquiry to be merely whether disregard of the patrons' protests was a corrupt or malicious act, because the language of the complaint is susceptible of a broader construction. What the proof, if any, may be we have no means of knowing. If the committeemen were not actuated by malice or corruption there can be no recovery; but we are now dealing with the allegations of the complaint and the admissions of the demurrer. When an answer is filed issues will be raised for determination by a jury. It will be noted that the demurrer of Wilson Jones is substantially the same as that of his codefendants. Judgment

Affirmed.

S. R. MOORE v. THE MUTUAL BUILDING AND LOAN ASSOCIATION.

(Filed 30 November, 1932.)

Usury A a: Building and Loan Associations C d—Fine imposed for delinquency in paying for stock is not charge of interest on loan.

A borrowing stockholder in a building and loan association sustains a dual relation to the association, and where the association charges him certain fines authorized by its by-laws for the failure of the stockholder to pay his installments on his stock when due, such fines cannot be alleged as interest paid on the loan from the corporation, and where the amount of interest paid on the loan is not greater than six per centum, not counting the fines paid as a stockholder, the borrowing stockholder is not entitled to recover for usury against the association, the by-laws imposing the fine being expressly authorized by valid statute, C. S., 5178; C. S., 2306.

APPEAL by plaintiff from *Finley, J.,* at May Term, 1932, of MECKLENBURG. Affirmed.

This is an action to recover the statutory penalty for usury. C. S., 2306.

The action was tried on defendant's demurrer to the complaint on the ground that the facts stated therein are not sufficient to constitute a cause of action.

The facts alleged in the complaint, and appearing from the exhibits attached thereto, are as follows:

1. On 22 March, 1930, the plaintiff was a stockholder of the defendant, Building and Loan Association, and as such stockholder had undertaken to make weekly payments to the defendant of a stipulated amount for the purpose of maturing his stock in accordance with the by-laws of the defendant. It was provided in said by-laws that upon default by a stockholder in the payment of the amount which he had undertaken to pay to defendant weekly for the purpose of maturing his stock, the defendant should impose upon and collect from such defaulting stockholder a fine. From time to time, while he was a stockholder of the defendant, the plaintiff failed to pay the amount which he had undertaken to pay weekly, and which was required by the by-laws of the defendant for the purpose of maturing his stock. By reason of such defaults, and as authorized by its by-laws, the defendant imposed upon and collected from the plaintiff fines aggregating in amount the sum of $10.26.

2. On 22 March, 1930, the plaintiff borrowed from the defendant the sum of $1,800, and agreed to pay the interest on said sum at the rate of six per centum per annum in equal weekly installments. It was agreed in accordance with the by-laws of the defendant, that the weekly installment of interest should be added to the amount which plaintiff had undertaken to pay to defendant weekly for the purpose of maturing his stock. The indebtedness of plaintiff to defendant by reason of the loan was secured by a deed of trust executed by the plaintiff, and also by an assignment of the certificates for the shares of stock in defendant, Building and Loan Association, owned by the plaintiff. Plaintiff has paid to defendant as interest on the loan at the rate of six per centum per annum the sum of $133.12.

3. The land conveyed by the deed of trust executed by the plaintiff to secure his indebtedness to the defendants was sold on 21 December, 1931, under the power of sale contained in a mortgage executed by plaintiff on 24 March, 1930, and registered subsequent to the registration of the deed of trust. The purchaser at this sale has assumed plaintiff's indebtedness to defendant for the balance due on the loan of $1,800. With the consent of plaintiff, his stock in the defendant has been transferred and assigned to said purchaser. As the result of these transac-

tions, plaintiff's indebtedness to defendant by reason of the loan has been paid and plaintiff is not now a stockholder of the defendant, Building and Loan Association.

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

William Milton Hood for plaintiff.

H. L. Taylor, Chase Brenizer and J. M. Shannonhouse for defendant.

CONNOR, J. Plaintiff contends that on the facts alleged in the complaint and admitted by the demurrer he is entitled to recover of the defendant the sum of $287.76, this sum being twice the amount of interest charged by the defendant and paid by the plaintiff on the loan of money made by the defendant to the plaintiff, to wit: $143.38. It appears, however, from the complaint that the defendant charged and the plaintiff paid only the sum of $133.12, as interest on the loan, and that this sum is the interest on the loan at the rate of six per centum per annum, from the date of the loan to its payment; and that the sum of $10.26 was charged by defendant and paid by plaintiff as fines for the defaults of plaintiff in the payment of the amounts which he had undertaken to pay weekly, and which were required to mature his stock, in accordance with the by-laws of the defendant.

The plaintiff during the time of the transactions alleged in the complaint sustained a dual relation to the defendant. He was both a stockholder and a borrower of the defendant. *Rendleman v. Stoessel,* 195 N. C., 640, 143 S. E., 219. He was charged and paid the fines aggregating the sum of $10.26, as a stockholder, while he paid the interest, to wit, $133.12, as a borrower. Only the latter sum was paid as interest, and as this sum did not exceed the interest on the loan at the rate of six per centum per annum, the defendant did not charge, and the plaintiff did not pay usury. Plaintiff is not entitled, therefore, to recover the statutory penalty for usury in this action, and there was no error in the judgment sustaining the demurrer and dismissing the action.

The fines collected by the defendant from the plaintiff were authorized by the by-laws of the defendant. These by-laws were expressly authorized by statute. C. S., 5178. This is a valid statute, and was enacted by the General Assembly, doubtless in consequence of decisions of this Court rendered prior to its enactment. The judgment is

Affirmed.

LAQUE RICHEY v. ERLANGER COTTON MILLS AND ÆTNA LIFE INSURANCE COMPANY.

(Filed 30 November, 1932.)

Master and Servant F i—Whether facts necessary for compensation for hernia are satisfactorily proven is for Commission and not for Court.

The North Carolina Compensation Act provides that no compensation shall be allowed for hernia unless the evidence offered at the hearing before the Industrial Commission is sufficient in the opinion of the Commission to prove definitely to the satisfaction of the Commission the five requisite facts set out in the statute, and where the Industrial Commission has denied compensation upon the evidence because the requisite facts were not proven to its satisfaction it is error for the Superior Court on appeal to remand the case for compensation on the ground that the requisite facts were proven to the satisfaction of the trial judge.

APPEAL by defendants from *Sink, J.*, at April Term, 1932, of DAVIDSON. Reversed.

This is a proceeding begun and prosecuted before the North Carolina Industrial Commission for an award under the provisions of the North Carolina Workmen's Compensation Act of compensation for a hernia suffered by the claimant and resulting from an injury by accident which arose out of and in the course of his employment by the respondent, Erlanger Cotton Mills. The Ætna Life Insurance Company is the carrier for said respondent.

The proceedings was heard by the Commission on the appeal of the claimant from an award made by Commissioner Dorsett, who denied compensation. The Commission was of opinion that the evidence offered by the claimant was not sufficient to show by its greater weight the facts with respect to the hernia which are required by the statute for an award of compensation, and for that reason approved the award of Commissioner Dorsett, and denied compensation. The claimant appealed from the award of the Commission to the Superior Court of Davidson County. At the hearing of this appeal judgment was rendered as follows:

"This cause coming on to be heard and being heard before the Honorable H. Hoyle Sink, judge presiding at the April Civil Term, 1932, of the Superior Court of Davidson County, on an appeal from an award of the North Carolina Industrial Commission, affirming an award of the Industrial Commissioner dismissing this claim for compensation for a hernia on the ground that the requirements of section two(r) of the Workmen's Compensation Act were not complied with, and the court,

after hearing the evidence and the argument of counsel, being of the opinion that the five requirements for compensation have been met, it is, therefore, upon motion of A. J. Newton and Walser & Walser, attorneys, ordered, adjudged and decreed that the case be remanded to the North Carolina Industrial Commission, and that an award be entered by the said Commission in accordance with the evidence, and the judgment of this court."

From this judgment, respondents appealed to the Supreme Court.

A. J. Newton and Walser & Walser for claimant.
Sapp & Sapp for respondents.

CONNOR, J. It is provided by the North Carolina Workmen's Compensation Act that "in all claims for compensation for hernia, or rupture, resulting from injury by accident arising out of and in the course of the employee's employment," certain facts must be definitely proven to the satisfaction of the Industrial Commission; otherwise, compensation cannot be awarded. In the instant case, these facts were not so proven to the satisfaction of the Commission, and for that reason compensation was denied. On respondent's appeal from the award of the Commission to the Superior Court, the judge heard the evidence, and concluded therefrom that the five requisite facts were so proven to his satisfaction. He thereupon remanded the proceedings to the Commission, with direction that the Commission allow compensation. In this there was error.

In *Ussery v. Cotton Mills,* 201 N. C., 688, 161 S. E., 307, it is said: "Of course, neither this Court nor the Superior Court, upon appeal from the award of the Industrial Commission, can consider the evidence and determine therefrom what the facts are. This is a matter exclusively for the Industrial Commission."

The statute in express language provides that no compensation shall be allowed for a hernia, unless the evidence offered at the hearing before the Industrial Commission is sufficient in the opinion of the Commission to prove definitely to the satisfaction of the Commission the five requisite facts set out in the statute. In view of this language, the judge of the Superior Court was without power to find the facts contrary to the conclusions of the Commission, and upon such findings set aside the award of the Commission in the instant case. The award should be affirmed. The judgment is

Reversed.

C. P. SLATE v. THOMASVILLE FAMILY LAUNDRY AND LONDON GUARANTEE AND ACCIDENT COMPANY.

(Filed 30 November, 1932.)

(For digest see *Richey v. Cotton Mills, ante,* 595.)

APPEAL by defendants from *Harding, J.,* at July Term, 1932, of DAVIDSON. Reversed.

This is a proceeding begun and prosecuted before the North Carolina Industrial Commission for an award under the provisions of the North Carolina Workmen's Compensation Act of compensation for a hernia suffered by the claimant and resulting from an injury by accident which arose out of and in the course of his employment by the respondent, Thomasville Family Laundry. The London Guarantee and Accident Company is the carrier for the said respondent.

The proceeding was heard by the Commission on the appeal of respondents from an award made by Commissioner Dorsett, who awarded compensation. The Commission was of the opinion that the evidence offered by the claimant was not sufficient to show by its greater weight the facts with respect to the hernia which are required by the statute for an award of compensation for a hernia, and for that reason reversed the award of Commissioner Dorsett and denied compensation. The claimant appealed from the award of the Commission to the Superior Court of Davidson County. At the hearing of this appeal before Harding, J., the award of the Commission was set aside and vacated upon the ground that there was error of law in said award. It was ordered that the proceeding be remanded to the North Carolina Industrial Commission, with direction that said Commission award compensation to the claimant.

From the judgment, the respondents appealed to the Supreme Court.

F. M. Myers and H. R. Kyser for claimant.
Dalton & Pickens for respondents.

CONNOR, J. The judgment of the Superior Court in this proceeding is reversed on the authority of *Richey v. Erlanger Cotton Mills, ante,* 595.

The statutory provisions with respect to compensation for a hernia are to the effect that no compensation can be allowed unless the five requisite facts are definitely proven to the satisfaction of the Industrial Commission. Whether or not, the evidence at the hearing of a proceed-

ing for compensation for a hernia meets the statutory requirement is a question addressed exclusively to the Commission. Where there is evidence tending to prove these facts, an award of compensation made by the Commission must be affirmed on an appeal to the Superior Court; if compensation is not allowed because the evidence in the opinion of the Commission does not meet the statutory requirement, the award denying compensation must be affirmed. It is only when there was no evidence at the hearing before the Commission to support an award of compensation for a hernia, that the judge of the Superior Court has the power to set aside and vacate the award. It is only in such cases that a matter of law is involved, which may be passed upon by the judge on an appeal from the award of the Commission. The judgment in this proceeding must be

Reversed.

GURNEY P. HOOD, COMMISSIONER OF BANKS, v. HENRY B. HOOD.

(Filed 30 November, 1932.)

1. **Banks and Banking H a—Where defendant is guilty of laches in not repudiating stock subscription he may not escape statutory liability.**

   Where upon appeal from the assessment of the statutory liability on bank stock the trial court finds the facts under agreement of the parties, and the court finds from the evidence that the stockholder was guilty of laches in failing to repudiate his stock subscription, the judgment of the court affirming the assessment will be upheld on appeal.

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

   Where the trial court finds as a fact from competent evidence that a party was guilty of laches in failing to repudiate his subscription to stock in a bank, such finding is conclusive on the Supreme Court on appeal.

APPEAL by defendant from *Sink, J.*, at February Term, 1932, of BUNCOMBE. Affirmed.

This is an appeal by the defendant, Henry B. Hood, from an assessment made and docketed in the office of the clerk of the Superior Court of Buncombe County, on 16 February, 1931, by the Corporation Commission of North Carolina, as authorized by statute, to enforce the statutory liability of the said Henry B. Hood, as a stockholder of the Central Bank and Trust Company, an insolvent banking corporation, organized under the laws of this State, and prior to 20 November, 1930, doing business at Asheville, N. C.

Since the docketing of said assessment, Gurney P. Hood, Commissioner of Banks, has succeeded to the rights of the Corporation Commission, under and by virtue of said assessment, chapter 243, Public Laws of North Carolina, 1931.

The appeal was tried at February Term, 1932, of the Superior Court of Buncombe County on the issues raised by the pleadings.

From judgment affirming the assessment docketed in the office of the clerk of the Superior Court of Buncombe County, by the Corporation Commission on 16 February, 1931, against the defendant he appealed to the Supreme Court.

Johnson, Smathers & Rollins for plaintiff.
Harkins, Van Winkle & Walton for defendant.

CLARKSON, J. On the question of laches to bar a recovery in actions of this kind, the following observation is made, citing numerous authorities, in *Chamberlain v. Trogden,* 148 N. C., at p. 141: "All the authorities, however, are to the effect that, in order to do so, the subscriber must act with promptness and due diligence, both in ascertaining the fraud and taking steps to repudiate his obligation."

The record discloses that "the parties have consented to waive a jury trial and that his Honor find the facts and his conclusions of law, and after hearing the testimony for the plaintiff and the defendant, the court finds the following facts," (setting same forth). . . . Upon the foregoing facts, the court found the following conclusions of law: That the defendant, Henry B. Hood, was guilty of laches in not repudiating the stock purchase transactions between 2 May, 1928, and 19 November, 1930," etc.

If there is sufficient competent evidence to support this finding of fact by the court, in regard to laches, this Court is bound by the findings as in a jury trial. There was competent evidence on the record for the court below to have found the facts either way. The court below found the facts that defendant was guilty of laches, and we are bound by the finding. See *Hood v. Martin, post,* 620. The judgment of the court below is

Affirmed.

CORPORATION COMMISSION OF NORTH CAROLINA v. WILLIAM SCHOENHEIT.

(Filed 30 November, 1932.)

(For digest see *Hood, Comr., v. Martin, post,* 620.)

APPEAL by defendant from *MacRae, J.*, at April Term, 1932, of BUNCOMBE. Reversed.

This is an appeal by the defendant, William Schoenheit, from an assessment made and docketed in the office of the clerk of the Superior Court of Buncombe County, on 16 February, 1931, by the Corporation Commission of North Carolina as authorized by statute, to enforce the statutory liability of the said William Schoenheit as a stockholder of the Central Bank and Trust Company, an insolvent banking corporation organized under the laws of this State, and prior to 20 November, 1930, doing business at Asheville, N. C.

The appeal was tried at April Term, 1932, of the Superior Court of Buncombe County, on the issues raised by the pleading.

From judgment affirming the assessment docketed in the office of the clerk of the Superior Court of Buncombe County, on 16 February, 1931, against the defendant he appealed to the Supreme Court.

Johnson, Smathers & Rollins for plaintiff.
Martin & Martin for defendant.

CLARKSON, J. The record discloses "It further appearing to the court that all parties consented to waive a jury trial and agreed that his Honor might find the facts and make his conclusions of law thereon and after considering the evidence and the argument of counsel, the court finds the following facts (setting same forth). . . . From the foregoing facts the court finds the following conclusions of law: That the defendant was guilty of no laches or negligence in not repudiating the purchase of said stock between 2 May, 1928, and 19 November, 1930. That the defendant was not guilty of laches after the failure of said Central Bank and Trust Company on 19 November, 1930, and that he took prompt action to repudiate the stock assessment against him, employed counsel, filed an answer denying liability for said stock assessment on the grounds set out in said answer and on the basis of testimony offered on the trial of this cause."

The question presented by this appeal is identical with that this day decided in *Hood v. Martin, post,* 620, and is governed in all respects by the principles therein set forth. The judgment of the court below is

Reversed.

CONNOR, J., dissents.

STATE v. JOE STAFFORD.

(Filed 30 November, 1932.)

1. **Criminal Law B c—Burden of proving defense of insanity is on defendant.**

Where insanity is set up as a defense in a criminal prosecution the burden of proving the defense to the satisfaction of the jury is upon the defendant, and where upon the evidence the jury has rejected this plea or found it unsatisfactory the verdict will not be disturbed on appeal.

2. **Criminal Law I c—Held: trial court satisfactorily dealt with unusual circumstance during trial in his discretion.**

Where a witness kneels in prayer while approaching the witness stand, and the court immediately upon observing her orders her to arise and retire to her room if she so desired, whereupon the witness arises and takes the stand: *Held*, an exception thereto by the defendant will not be sustained, the defendant having made no motion for a new trial and not having asked the court to do more, and the court having acted in his discretion and having satisfactorily dealt with the circumstance.

3. **Criminal Law L d—Record must show organization of the court.**

Where the transcript fails to show the organization of the court or that the court was held by an authorized judge at a prescribed time and place the appeal will be dismissed, the matters being jurisdictional.

4. **Criminal Law L b—Affidavit required by C. S., 4651, is jurisdictional and may not be waived by solicitor.**

In order for a defendant to be entitled to appeal *in forma pauperis* he must file an affidavit that he is wholly unable to give security for costs, that he is advised by counsel that he has reasonable cause for the appeal, and that the application is made in good faith, and the affidavit is jurisdictional and may not be waived by the solicitor, and where the record does not contain the required affidavit, but contains only an order allowing the defendant to appeal *in forma pauperis* upon a finding from the defendant's petition that he is unable to pay the cost or to enter bond with sufficient sureties, it is insufficient to raise a presumption that the affidavit had been properly filed, and the appeal will be dismissed, in this case after an examination of the record, the defendant having been convicted of a capital offense.

APPEAL by prisoner from *Moore, Special Judge,* at August Term, 1932, of WAYNE.

Criminal prosecution tried upon an indictment charging the prisoner with the murder of his wife, Dorothy Smith Stafford.

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.

Walter G. Shepherd and John D. Langston for defendant.

STACY, C. J. The evidence on behalf of the State tends to show that in the early afternoon of 4 April, 1932, the prisoner shot and killed his wife under circumstances indicative of a mind fatally bent on mischief and a heart devoid of social duties. The deceased left her sick bed, in her mother's home, bare-footed, dressed only in her night clothes, and fled for her life a distance of about 580 yards down the hill to a spring and there hid herself in a ditch. The prisoner in pursuit, discovering her here in hiding, commanded her to come out of the ditch, which she did, falling at his feet and pleading that her life be spared. While in this position, the prisoner shot the deceased three times and killed her. He then turned the pistol upon himself and fired the fourth and last bullet into his own head, inflicting a wound which proved less than fatal.

The homicide is not denied. The defense interposed on behalf of the prisoner was that of mental irresponsibility or insanity. The evidence tending to support this plea was submitted to the jury and rejected or found to be unsatisfactory. *S. v. Jones, ante,* 374; *S. v. Campbell,* 184 N. C., 765, 114 S. E., 927; *S. v. Terry,* 173 N. C., 761, 92 S. E., 154. In this jurisdiction, as well as in many others, when insanity is interposed as a defense in a criminal prosecution, the burden rests with the defendant, who sets it up, to prove such insanity, not beyond a reasonable doubt, but to the satisfaction of the jury. *S. v. Wilson,* 197 N. C., 547, 149 S. E., 845; *S. v. Walker,* 193 N. C., 489, 137 S. E., 429; *S. v. Jones,* 191 N. C., 753, 133 S. E., 81.

The prisoner complains that Mrs. Dora Smith, a witness for the State, of her own volition and without notice or warning, knelt in an attitude of prayer as she approached the witness stand. "As soon as this was observed, the court ordered the witness to arise and if she desired to retire to her room, opportunity was given her to do so." Immediately following this injunction, she arose and took the witness stand. The prisoner noted an exception.

The conduct of the witness was unusual, to say the least, but the court seems to have dealt with it in a manner satisfactory at the time. The prisoner did not move for a mistrial, nor did he request the court to do more. Indeed, the prisoner might have pleaded former jeopardy had a mistrial been ordered *ex mero motu. S. v. McKeithan, ante,* 494; *S. v. Ellis,* 200 N. C., 77; *S. v. Beal,* 199 N. C., 278, 154 S. E., 604. The situation was one calling for the exercise of the sound discre-

tion of the trial court. *S. v. Lea, ante,* 13. "The judge is not a mere moderator, and it would detract very much from the efficiency and economy of the administration of justice if he were hampered with arbitrary rules as to matters which have always been committed to his sound discretion." *S. v. Southerland,* 178 N. C., 676, 100 S. E., 187. The case of *S. v. Wilcox,* 131 N. C., 707, 42 S. E., 536, where a new trial was ordered for improper demonstration, cited and relied upon by the prisoner, is not in point. Furthermore, the testimony of this witness was inconsequential. She only identified the night gown which the deceased had on at the time of the shooting, and described the blood stains appearing thereon. The homicide had already been established by other witnesses.

The record contains a number of exceptions, all of which have been examined, and none discovered of sufficient merit to warrant a new trial, but for jurisdictional reasons, the appeal must be dismissed. *S. v. Golden, ante,* 440.

First, the transcript fails to show the organization of the court (*S. v. May,* 118 N. C., 1204, 24 S. E., 118), or that the "court was held by judge authorized to hold it, and at the time and place prescribed by law." *S. v. Butts,* 91 N. C., 524.

In *Spence v. Tapscott,* 92 N. C., 576, it was held (as stated in first head-note): "In order for the Supreme Court to acquire jurisdiction, it must appear in the transcript of the record that an action was instituted, that proceedings were had and a judgment rendered from which an appeal could be taken, and that an appeal was taken from such judgment."

To like effect are the decisions in *S. v. Preston,* 104 N. C., 733, 10 S. E., 841, *S. v. Farrar,* 103 N. C., 411, 9 S. E., 449, *S. v. Johnston,* 93 N. C., 559, *S. v. McDowell,* 93 N. C., 541, *Jones v. Hoggard,* 107 N. C., 349, 12 S. E., 286. See, also, *Walton v. McKesson,* 101 N. C., 428, on the point that entry of appeal must appear on the record.

Second, the attempted appeal is *in forma pauperis,* and the order allowing the prisoner to appeal without giving security for costs, while "finding from the petition filed herein on behalf of the defendant that he is unable to pay the costs of appeal or to enter into a bond with sufficient sureties for the payment of such costs," was apparently made without supporting affidavit as required by C. S., 4651. In response to request for such record, the clerk of the Superior Court of Wayne County reports: "I do not find affidavit of the defendant or certificate of his counsel in the papers." It was said in *S. v. Moore,* 93 N. C., 500, that the court has no authority to grant an appeal "without security for

costs" in the absence of the required affidavit, nor can the sufficiency of such affidavit be waived by the solicitor.

It was suggested in this same case, *S. v. Moore, supra,* and repeated in *S. v. Jackson,* 112 N. C., 849, 16 S. E., 906, that if the recital had been simply "the defendant is permitted to appeal *in forma pauperis* upon affidavit filed," perhaps a presumption would arise as to the sufficiency of the affidavit on the principle of *omnia rite acta praesumuntur,* but where the insufficiency of the affidavit, or the lack of it, as here, is made to appear, no presumption of regularity or sufficiency can arise (*S. v. Jones,* 93 N. C., 617), and the appeal will be dismissed, not as a matter of discretion, but because it was improvidently granted. *S. v. Marion,* 200 N. C., 715, 158 S. E., 406; *S. v. Brumfield,* 198 N. C., 613, 152 S. E., 926; *S. v. Smith,* 152 N. C., 842, 67 S. E., 965; *S. v. Atkinson,* 141 N. C., 734, 53 S. E., 228; *S. v. Wylde,* 110 N. C., 500, 15 S. E., 5; *S. v. Duncan,* 107 N. C., 818, 12 S. E., 382; *S. v. Morgan,* 77 N. C., 510; *S. v. Payne,* 93 N. C., 612.

Speaking to the subject in *S. v. Divine,* 69 N. C., 390, *Settle, J.,* delivering the opinion of the Court, said: "The insolvency of the party is not alone sufficient to entitle him to the benefits of this act; it must also appear by the affidavit, which must be filed before the judge can grant the appeal, that the defendant is advised by counsel that he has reasonable cause for the appeal prayed for, and that the application is in good faith. Both of these essential requisites are wanting in the record before us. We think that the affidavit should set forth the name of the counsel who advises that there is reasonable cause of the appeal. Otherwise it would be in the power of a defendant to commit a fraud upon the court, for it does not follow that the counsel upon whom he relies is an attorney of the court or anyone learned in the law. This construction is reasonable and can work no hardship upon insolvent defendants whose cases have merits."

Again, in *S. v. Parish,* 151 N. C., 659, in a *per curiam* opinion, the Court said: "Unless the requirements of the statute, both as to time and manner, are complied with, the appeal is not in this Court. The defect is jurisdictional, and we have no power to allow amendments, and the appellee has a right to have the appeal dismissed. *S. v. Bramble,* 121 N. C., 603; *S. v. Gatewood,* 125 N. C., 695, and numerous cases there cited."

It is not the policy of our law to deny to any litigant his right of appeal, but inasmuch as he has no new trial in the Supreme Court, but only questions of law are to be determined, when a defendant in a criminal prosecution is unable to give security for costs, he is reasonably required to make affidavit (1) that he is wholly unable to give security

for the costs, (2) that he is advised by counsel he has reasonable cause for the appeal prayed, and (3) that the application is in good faith. *S. v. Marion, supra; S. v. Moore, supra; S. v. Martin,* 172 N. C., 977, 90 S. E., 502. The requirements of the statute are mandatory and not directory. *Hanna v. Timberlake, ante,* 557; *McIntire v. McIntire, post,* 631. If the General Assembly had contemplated an appeal merely for the purpose of delay, such trouble and expense might have been obviated simply by providing that no person convicted in a criminal prosecution should be punished until some fixed time after conviction, *e. g.,* six months. *S. v. Morgan,* 77 N. C., 510.

The seriousness of the offense in the instant case has caused us to examine the record, upon which we find no error. Judgment

Affirmed. Appeal dismissed.

J. C. GRIMES AND ANNIE G. GRIMES, ADMINISTRATORS OF W. T. GRIMES, DECEASED, v. CAROLINA COACH COMPANY.

(Filed 30 November, 1932.)

1. Highways B a — Failure to drive on right side of highway must proximately cause injury to be actionable negligence.

The violation of the statute requiring drivers of motor vehicles to drive on the right side of the highway is negligence *per se,* but is not actionable unless the proximate cause of injury. C. S., 2621(51).

2. Highways B n—Evidence held insufficient to be submitted to jury in action for damages from negligent driving on highway.

The evidence tended to show that the car driven by A. had pulled the car driven by G. out of a ditch at the side of a much traveled highway at an intersection of another road, that a bus was seen approaching and that A. drove his car into the intersecting road to let the bus pass, leaving G.'s car standing across the highway, facing toward the intersecting road and G. standing in the highway, that after a collision the bus was found with its right wheels in the ditch on the right of the highway facing the direction in which it was traveling, and that G. was found, mortally wounded, on the hard surface on the other side of the highway, and his car found on the same side with its rear wheels in the ditch, that the highway was straight and unobstructed for a distance of nine hundred feet in the direction from which the bus approached, and that it was eighteen feet wide and that G.'s car was fourteen feet long, that large tire tracks similar to the ones made by the bus were found several feet over the center of the highway and had swerved to the right at the point of the collision, but that other vehicles making similar tracks constantly

used the highway, and there was no evidence as to whether the lights on G.'s car were burning or whether the bus hit him or his car: *Held*, in an action by G.'s administrator to recover damages for his wrongful death the evidence was insufficient to be submitted to the jury on the issue of the bus company's negligence in failing to keep to the right of the highway and to keep a proper lookout.

3. Negligence D b—Burden is on plaintiff to establish that defendant's negligence proximately caused injury in suit.

In a negligent personal injury action the burden is on the plaintiff to show that the injury was proximately caused by the defendant's negligence, and evidence raising merely a conjecture as to negligence and proximate cause is insufficient to be submitted to the jury.

CIVIL ACTION, before *Harding, J.*, at September Civil Term, 1932, of DAVIDSON.

This is an action for damages for the wrongful death of W. T. Grimes due to the alleged negligence of the defendant. On the night of 4 July, 1931, between Salisbury and Lexington, at a point on Route No. 10, known as the airport road, plaintiff's intestate was killed. Highway No. 10, at the intersection of the airport road, runs approximately north and south. The pavement on the main highway is eighteen feet wide, and on each side thereof are dirt shoulders, approximately nine feet in width. Trench ditches border the shoulders on each side of the highway. Rain was falling and the pavement was wet and slick.

A traveler, named Meeks, was driving a Ford touring car from Salisbury to Lexington, that is from west to east along No. 10. In the car with him as passengers were his wife and three children, a man named McKinney, and a Mrs. Trant and her baby. The narrative of the traveler is substantially as follows: "When I got around this curve . . . I noticed head lights that seemed to be from an automobile directed across the highway or at an angle toward Charlotte, and at about the left front fender was a man waiving his arm, and I pulled up to where he was and he asked me would I give him a lift and said he had slipped into the side ditch." The man referred to by Meeks was the plaintiff's intestate, and at the time the rear wheels of his Buick car were in the ditch, bordering the shoulder on the south side of Highway No. 10 or on the right-hand side of the road as you face Lexington. The car was approximately fourteen feet in length. Plaintiff's intestate had a towing chain in his hand and Meeks consented to pull the car of plaintiff's intestate out of the ditch. Meeks thereupon headed his car to the north up the airport road or across the north side of No. 10, said north side being the right-hand side of the highway as you face west toward Salisbury. Meeks then backed up toward the car of plain-

tiff's intestate. Continuing his narrative, Meeks said: "He went to hook the chain on our Ford and I asked him was he hooking it to the housing and he said 'No.' So after he hitched the chain he got in his car and started the motor and I went to pulling and I think my motor choked once. About the third time we pulled I felt the slack from his car and I realized he was out of the ditch. He hollored and told me that was all right, so I stopped and heard him unhitching the chain from our car. He then came up to where I could talk to him over my left shoulder and asked me what he owed me. I told him not a cent in the world. He then thanked me and about this time McKinney says, 'look out, here comes a bus.' . . . I think he advised me the second time before I moved and then I pulled up in the airport road . . . out of the way of the bus, so the bus could pass, and while we were waiting, motor running and lights burning, I heard the crash, sounded like glass . . . and I looked around to my left and saw the bus going over there toward the side ditch where it stopped. I got out of the Ford and about that time I noticed some men getting out of the bus and we all went over there where this man was lying in a puddle of water along the edge of the highway. He was lying some feet from his car toward Salisbury . . . on the right-hand side of the highway going toward Lexington about two feet on the hard surface." Soon an ambulance, in response to call, came to the scene, picked up plaintiff's intestate, carried him to a hospital in Lexington, where he died, about two minutes after reaching the hospital.

From the intersection of the airport road to a point 927 feet therefrom toward Lexington the highway is straight and the view unobstructed. A bus, owned by the defendant, was proceeding westward from Lexington toward Salisbury, and therefore traveling along the north side of Highway No. 10, or the right-hand side as you face Salisbury. A witness for plaintiff passed the car of plaintiff's intestate while it was in the ditch. He said that he "drove to the other side of the road to my left on the road to get around the car and pass the car. . . . I met the bus, I would say, around four hundred yards toward Lexington from the intersection of the airport road . . . we were traveling in opposite directions, . . . and I pulled off the hard surface on to the shoulder of the road and the bus passed me while I was on the shoulder. . . . In my opinion the bus was traveling from thirty-five to forty miles an hour. . . . When I said I went off on the shoulder I meant my right wheel went off and my left wheel stayed on. My wheel went only slightly off the hard surface. . . . I am not positive I pulled off on the shoulder."

There was evidence tending to show that there were large wheel tracks approaching the scene of the accident, extending over the center of the line of the highway about three and a half feet south of the center line as you face Salisbury, and that these tracks, near the point of collision, turned abruptly to the right on the north side of the highway and into the ditch on said north side or right-hand side of the highway facing Salisbury, and that after the collision the bus was found with the right wheels in this ditch. There was other evidence tending to show that trucks and automobiles, including an ambulance, were present at the scene shortly after the collision.

Motions of nonsuit were duly made and sustained at the conclusion of the evidence, from which judgment plaintiff appealed.

Don A. Walser, Phillips & Bower and Martin, Brinkley & Stoner for plaintiffs.

Willis Smith and Spruill & Olive for defendant.

BROGDEN, J. The plaintiff bases the right to recover upon two aspects of negligence, to wit:

(a) That the bus owned and operated by the defendant was traveling westward near the center of the road with its left wheels over the center line of the highway about three and one half or four feet, thus placing the bus partially on the wrong side of the road and that such negligent operation was the proximate cause of the injury complained of;

(b) That the driver of the bus was not maintaining a careful and proper lookout, for that the road was straight for a distance of approximately 900 feet.

C. S., 2621(51) provides that "upon all highways of sufficient width . . . the driver of a vehicle shall drive the same upon the right half of the highway," etc. Undoubtedly a violation of the statute is negligence *per se,* but such negligence is not actionable unless there is a causal relation between the breach and the injury. *Burke v. Coach Co.,* 198 N. C., 8, 150 S. E., 636.

Plaintiff offered evidence to the effect that there were large tire tracks at the scene of the killing, extending to the left of the center of the road and that these tracks apparently turned to the right toward the ditch on the right side of the road as you face westward, and the right wheels of the bus were in the ditch on its right after the collision. Hence, it is inferred that the bus was traveling on the wrong side of the road.

The evidence discloses that Highway Number 10 is one of the main arteries of travel through the State, and that trucks of various types and automobiles use this road at all hours of the day and night. A

witness for plaintiff said: "It (No. 10) is a heavily traveled highway. It is heavily traveled by freight trucks at night. Freight trucks use substantially the same tires that buses use." Consequently the track evidence is vague and uncertain, and is susceptible of highly speculative interpretation. Where was the plaintiff's intestate when the fatal blow was struck? What struck him? Did the bus strike him or did the bus strike his car, standing approximately across the road? Meeks, a witness for plaintiff, said: "The direction I had pulled him from the position of my car, this car was crossways of the hard surface road and was leading in the airport road, and that was the direction we were pulling."

Were the lights burning on the car of plaintiff's intestate at the time of the impact? Meeks said that his attention was not directed to the lights before the crash, but "after the crash when I got out and came back to where his car was standing there were no lights on it." Were the lights extinguished by the blow? Nobody knows or undertakes to testify with reference thereto.

In the final analysis the evidence flashes upon the screen substantially the following picture: A large passenger bus is traveling in the night time from Lexington to Salisbury, that is from east to west, along Number 10. The driver swings into a straight stretch of approximately 900 feet. Ahead of him is a lighted Ford touring car across the road. He blows his horn and the Ford car pulls across the highway into an intersecting road known as the airport road, on the bus driver's right. But the car of plaintiff's intestate is also "cross-ways" the highway, manifestly near the center. The evidence does not disclose whether or not this car was lighted. The plaintiff's intestate is somewhere in the road near his car. There is a crash. After the crash the right wheels of the bus are in the ditch on the right side of the road, facing west, and the rear wheels of the car of plaintiff's intestate are in the ditch on the right side of the road facing east. The body of the fatally injured man is found on the right side of the hard surface facing east.

The law imposes upon the plaintiff the burden of offering evidence tending to show that the injury was proximately caused by the negligence of the defendant.

In the present case, deductions, inferences, theories and hypotheses rise and run with the shifting turns of interpretation, but proof of negligence must rest upon a more solid foundation than bare conjecture.

Therefore, the court is of the opinion that the ruling of the trial judge was correct.

Affirmed.

STATE v. MRS. M. M. EVERHARDT.

(Filed 30 November, 1932.)

1. Indictment B b—Indictment is sufficient if it charges all elements of the crime in a plain, explicit manner.

An indictment is sufficient if it charges in appropriate terms all the necessary elements of the offense in a plain, intelligible and explicit manner. C. S., 4623.

2. Nuisances B d—Indictment for public nuisance need not specifically set out profane language alleged to have been used on premises.

An indictment for the maintenance of a public nuisance charging that the defendant permitted a large number of people to assemble at a dwelling under her control and there to drink, holler, and use all kinds of vulgar, loud and profane language, etc., to such an extent as to be a common nuisance to the general community it is not demurrable on the ground that the objectionable language alleged to have been used by the occupants of the house was not specifically set out.

3. Indictment D d—Bill of particulars may be requested where indictment charges elements of crime but more particularity is desired.

Where the criminal indictment sufficiently charges all the elements of the offense but is not as definite as the defendant may desire the defendant's remedy is by a motion for a bill of particulars, which is addressed to the sound discretion of the trial court, C. S., 4613, and not by a motion to quash, but a bill of particulars cannot supply the failure of the bill of indictment to sufficiently charge a necessary element of the offense.

4. Courts A a—Concurrent jurisdiction of Superior courts with county courts was re-established by C. S., 1437.

Exception to the jurisdiction of the Superior Court to try an indictment charging the maintenance of a public nuisance on the ground that the county court had exclusive original jurisdiction of the offense is not tenable, since the provisions of C. S., 1437, takes from the inferior courts the exclusive jurisdiction and provides that the jurisdiction shall be concurrent and exercised by the court first taking cognizance thereof, except for certain enumerated counties exempt from its provisions.

5. Criminal Law I j—Only evidence favorable to State is considered on motion of nonsuit.

Upon a motion as of nonsuit in a criminal action only the evidence favorable to the State will be considered.

6. Nuisances B a—Instruction as to distinction between public and private nuisance held correct.

A public nuisance is one which affects the local community generally and a private nuisance is one which affects the separate rights of individuals, and in this prosecution for the maintenance of a public nuisance upon evidence that the defendant kept a public place where a large number of people were allowed to congregate at night and to drink, fight

and use loud and profane language to the great annoyance of those living in the neighborhood and those passing upon a nearby public highway, the instruction of the court defining the difference between a public and private nuisance is held correct.

7. Criminal Law C a—Person aiding and abetting in maintenance of nuisance is guilty as principal.

One who aids and abets in the maintenance of a public nuisance is guilty of the offense, and where the lessee of a dwelling maintains and runs it in such a way as to make it a public nuisance the lessor is also liable to the charge if she aids and abets therein, the burden of proving the necessary elements beyond a reasonable doubt being upon the State.

APPEAL by defendant from *Schenck, J.*, and a jury, at May Term, 1932, of ROWAN. No error.

The defendant was indicted and convicted under the following bill of indictment:

"The jurors for the State upon their oath present, that Mrs. M. M. Everhardt, late of the county of Rowan, on 1 December, in the year of our Lord one thousand nine hundred and thirty-one, with force and arms, at and on various other times, both before and since the taking of this inquisition, and in the county aforesaid, unlawfully, wilfully did create, maintain, permit and allow a common nuisance at and in a certain building then and there owned and controlled by her, said building being situate on State Highway No. 15, in North Carolina and in Rowan County, and near the town of Landis, in State and county aforesaid, by causing, allowing and permitting great concourse and promiscuous crowds of people, men and women, to congregate and assemble in said building, and then and there, in the presence, and in the hearing of divers other good citizens there living and assembled, and in the presence and in the hearing of divers other good citizens then and there passing and repassing, in the night-time, and into the late and unreasonable hours of the night-time, the said crowd of promiscuous people would assemble and congregate, and there riotously and boisterously dance, sing, holler, and use all kinds of vulgar, loud and profane language when and while many of the said crowd so congregated and assembled in the aforesaid building then and there belonging to and controlled by the said Mrs. M. M. Everhardt, would be highly intoxicated, hilarious, rowdy and drunk, and the said unlawful conduct then and there continued for 15 minutes and more at the time and for many hours at the time and all such conduct would continue for hours at the time in the presence of and in the hearing of divers good citizens living near to the said building and in the hearing of good citizens then and there passing and repassing, all to the great disturb-

ance and annoyances and to the common nuisance of the said good citizens then and there being and passing and repassing, against the form of the statute in such case made and provided, and against the peace and dignity of the State. ZEB. V. LONG, *Solicitor.*"

The evidence on the part of the State was to the effect that about 15 or 20 yards from State Highway No. 15, between the towns of China Grove and Landis, defendant operated a "Dance Hall" most every night. On several occasions Mrs. Everhardt "had charge of the dances; she collected the fees at the door." On another occasion "there was a young man selling the tickets, but Mrs. Everhardt was taking the money over." Five or six families live in the immediate neighborhood. At times there was noisy and boisterous conduct of those present in regard to drinking, immorality, cursing, scrapping, etc. The cursing was so loud as to be heard on the highway. On several occasions women were seen to "go on the outside just outside and just back of the dance hall and expose themselves in the presence of men"; also as to cursing "this was loud enough to be heard by those passing upon the highway, there have been times it could be heard probably a quarter of a mile. Prior to 1 December the dances were held twice a week, in the night-time, since that time they have been once a week—Saturday nights."

The testimony of one of the witnesses as to the conduct of the "overflow" on his premises is unmentionable. He also said, in part: "Yes, sir, the noises I heard were very loud; they could be easily understood in my study, two or three blocks off, if it was blocked off. It was more the nature of cursing, swearing, loud, boisterous noise in general that disturbed me. . . . Yes, sir. The general reputation of this house in the community is bad."

D. C. Pethel, testified, in part: "I have observed the conduct at the place. I have been down there on a few occasions and I would see parties come out of the dance hall; they would hardly get out of the light until they would begin to drink, get out their bottles. It was a few feet off the highway when I saw that. People on the highway could observe these things if they had been walking or going real slow, if looking over that way. Just to the rear of the dance hall, I would say not over 10 or 12 feet from the back end of the dance hall, I have seen immoral conduct. Also, I have heard profane language used in front of the dance hall. It was loud enough to be heard by persons upon the highway. I have seen immoral conduct by the side of the highway, just this side of it, 10 or 12 feet from the hard surface."

J. P. Linn testified, in part: "That he lives at Landis, is a business man. I stopped at the dance hall one night. The dance was going on.

It was possibly 11 o'clock. We parked in about 20 steps of the door, off the highway. I didn't see any misconduct while I was there, but just between dances quite a crowd came out of the door and they called on a fellow by the name of Buffalo. One fellow said 'Buffalo, bring me a pint'; another fellow said 'Buffalo, bring me one.' The other fellow took the order for five pints. He went off in his car and came back in three to five minutes and went around the building and the crowd rushed around. I know the general reputation of this place in the community of Landis; it is bad. The place is about two blocks from the outside of the corporate limits of Landis. The population of Landis is 1,500; 500 school children."

J. R. Beaver, police officer at Landis, testified, in part: "I have seen drunks on the outside there about every night they have had a dance. I have seen girls expose themselves before men back of the dance hall. I have seen drunks on the highway and outside of the dance hall; men drunk, and I have seen girls drunk. I have seen fights. I have heard cursing. The majority of the cursing and drinking and drunks has been from on the highway to 10 or 15 feet back. The crowd stays in front of the dance hall. It aint over thirty feet from the hard surface to the dance hall door."

It was in evidence that one Brown was shot by one Wyche there. People came to the dances from Albemarle, Taylorsville, Kannapolis, High Point, Salisbury and other places.

There was other evidence of like tenor. The sheriff of Rowan testified: "I know the general reputation in the community of this dance hall; it is bad." The police officer of China Grove testified, in part: "I am familiar with the general reputation of this house in the community. The general reputation, the people I hear talk about it, claim it is a *mighty bad place.*" There was other evidence as to the general reputation of the place being bad.

Defendant, on the other hand, denied her guilt and proved by several witnesses her good character. It was in evidence that the premises were lighted up, 25 or 30 lights in the grove, about 30 lights in the filling station. A part of the time complained of the "Dance Hall" was rented to and run by one Murphy, Z. S. Carson, Bud Goodman, C. E. Jordan and Z. V. Widenhouse. There was evidence in denial of the State's evidence. There was evidence on the part of defendant that "Jordan, Widenhouse and Mrs. Everhardt had charge."

The jury brought in a verdict of "guilty," with recommendation for mercy. Judgment: "The judgment of the court is that the defendant pay a fine of $50.00 and the costs of this action." The defendant made

numerous exceptions and assignments of error and appealed to the Supreme Court. The material exceptions and assignments of error will be considered in the opinion.

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

R. Lee Wright for defendant.

CLARKSON, J. In apt time and before pleading to the bill of indictment and before the jury was empaneled, the defendant made a motion (1) to quash the bill of indictment; (2) plea in abatement and to jurisdiction. *S. v. Oliver,* 186 N. C., 329; *S. v. Mitchem,* 188 N. C., 608; *S. v. Ritter,* 199 N. C., 116; *S. v. Ellis,* 200 N. C., 77.

One of the material contentions of the defendant is that the bill of indictment is defective "for the reason that the law requires the bill of indictment to set out in detail the profanity charged to have been used, the words, the acts, the conduct and the matters and things which the State contends constituted a nuisance."

C. S., 4613, is as follows: "In all indictments when further information not required to be set out therein is desirable for the better defense of the accused, the court, upon motion, may, in its discretion, require the solicitor to furnish a bill of particulars of such matters."

C. S., 4623: "Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment."

In *S. v. Beal,* 199 N. C., at p. 294, is the following: "The office of a bill of particulars is to advise the court, and more particularly the accused, of the specific occurrences intended to be investigated on the trial, and to regulate the course of the evidence by limiting it to the matters and things stated therein. C. S., 4613; *McDonald v. People,* 126 Ill., 150, 31 C. J., 752. The demurrer to the bill on the grounds of duplicity and indefiniteness, was likewise properly overruled. *S. v. Knotts,* 168 N. C., 173, 83 S. E., 972. C. S., 4623, provides against quashal for informality if the charge be plain, intelligible and explicit, and sufficient matter appear in the bill to enable the court to proceed to judgment. *S. v. Haney,* 19 N. C., 390." *S. v. Wadford,* 194 N. C., 336.

A bill of particulars will not supply any matter required to be charged in the indictment, *as an ingredient of the offense, S. v. Long,* 143 N. C., 670.

The whole object of a bill of particulars is to enable the defendant to properly prepare his defense in cases where the bill of indictment, though correct in form and sufficient to apprise the defendant, in general terms, of the "accusation" against him, is yet so indefinite in its statements, as to the particular charge or occurrence referred to, that it does not afford defendant a fair opportunity to procure his witnesses or prepare his defense. *S. v. R. R.,* 149 N. C., 508.

As far back as *S. v. Moses,* 13 N. C., at p. 464, *Ruffin, C. J.,* speaking to this subject says: "This law was certainly designed to uphold the execution of public justice by freeing the courts from those fetters of forms, technicality and refinement which do not concern the substance of the charge and the proof to support it. Many of the sages of the law had before called nice objections, of this sort, a disease of the law and a reproach to the Bench, and lamented that they were bound down to strict and precise precedents," etc. *S. v. Caylor,* 178 N. C., at p. 809.

The current is all one way, sweeping away by degrees "informalities and refinements," until a plain, intelligible and explicit charge is all that is now required to any criminal proceeding. The indictment is sufficient if it includes, in appropriate charging terms, the essential elements of the offense. "A disorderly house is a house kept in such a way as to disturb, annoy, or scandalize the public generally, or the inhabitants of a particular vicinity, or the passers in a particular highway, and is indictable at common law. . . . A house kept for promiscuous and noisy tippling, promoting drunkenness in a community; or when unlawful sales are made to all parties applying" is a disorderly house and a public nuisance, even though the riots and disorder is not heard beyond the walls of the building. Wharton Crim. Law (11th ed.), sec. 1720. *S. v. Black,* 94 N. C., 810.

In the Black case, supra, a kindred common law offense of nuisance, but a gaming house where poker was played for money, and Black acted as banker, selling chips, etc. It was said in that case, at pp. 812-13: "One might turn his dwelling-house his sleeping chamber, his office, building, or business house, into a gambling house, by inducing or allowing persons to resort thither, from time to time, for gaming purposes."

S. v. Cainan, 94 N. C., 880, is a warrant under a city ordinance, it is there said (at p. 882): "Nor was it necessary to set forth in the warrant, the exact words used by the defendant. If he boisterously cursed and swore, no matter what were the precise words used, he was guilty. The words 'boisterous cursing and swearing' have such distinc-

tive signification, as necessarily implied a violation of the ordinance, and gave the defendant to understand with sufficient certainty, how he had violated it. The charge was simple and easily understood, without nice precision in making it. The court could see that an offense was charged, and the defendant had sufficient notice and information to enable him to make his defense."

In *S. v. Barham,* 79 N. C., at p. 647, where a common law nuisance is charged against the individual: "It is necessary to set out the profane words in order that the court may decide as to their quality."

In *S. v. Toole,* 106 N. C., at p. 738: "The use of the vulgar stanza set out, if uttered as part of a longer song of similar tenor, extending over a period of ten minutes along a public street, would be a nuisance, even though the identical words set out may not have been repeated. If this were not so, the perpetrators of such conduct could not be punished, unless the hearers are quick enough of ear to catch, and tenacious of memory to retain, the whole of a vile song which disgusts them, and not even then, unless there was repetition. The nuisance complained of, in effect, is the loud and boisterous singing for ten minutes of an obscene song, containing the stanza charged, on a public street, in the hearing of divers persons then and there present. This, though done only on a *single occasion,* may be a nuisance. *S. v. Chrisp.* 85 N. C., 528." In the *Chrisp case, supra,* the language was profane on a single occasion, but for a period of five minutes, and in the *Toole case, supra,* it was vulgar and obscene.

It will be noted that vulgar and obscene language was set forth in the indictment in the *Barham* and *Toole cases, supra. These were indictments against the individuals for their use of profane, vulgar and obscene language for a certain period of time.* The present indictment is a common-law offense, where defendant is charged with a nuisance, keeping a disorderly house like in *Black's case, supra,* keeping a gambling house. See *S. v. Burke,* 199 N. C., 458; *S. v. Cole,* 202 N. C., 592.

We think the motion to quash and plea in abatement to the bill of indictment cannot be sustained, for the reasons above set forth. A bill of particulars was permissible in the discretion of the court below. *Power Co. v. Elizabeth City,* 188 N. C., at p. 285-6. The plea to the jurisdiction cannot be sustained. If it be admitted that the jurisdiction of the recorder's or county court of Rowan County is exclusive by operation of chapter 386, Public Laws, 1909 (which, however, is not the case), the evidence is quite sufficient to cover a period of time prior to the finding of the indictment, and outside of the one year period prescribed by the statute during which the jurisdiction of the county court is made exclusive.

Subsection 3, chapter 386, of the above act, provides: "Nothing in this act shall prevent the Superior Court of Rowan County from assuming jurisdiction of all offenses whereof exclusive original jurisdiction is given the said Rowan County Court, if within twelve months after the commission of the offense said Rowan County Court shall not have proceeded to take official cognizance of the same." However, the Public-Local Law, under which the county court of Rowan has jurisdiction, is repealed, so far as the exclusiveness of its jurisdiction is concerned in cases of this sort, by the 1923 act, which is found in C. S., 1437, as follows: "In all cases in which by any statute original jurisdiction of criminal actions has been taken from the Superior Court and vested exclusively in courts of inferior jurisdiction, such exclusive jurisdiction is hereby divested, and jurisdiction of such actions shall be concurrent and exercised by the court first taking cognizance thereof. Appeals shall be, as heretofore, to the Superior Court from all judgments of such inferior courts: Provided that this section shall not apply to the counties of Cabarrus, Forsyth, Gaston, Mecklenburg, Surry and Union." See *Jones v. Oil Co.*, 202 N. C., 328; *Hendrix v. R. R.*, 202 N. C., 579; *Lewellyn v. Lewellyn, ante*, 575.

At the close of the State's evidence and at the close of all the evidence, the defendant made motions to dismiss the actions or for judgment of nonsuit. C. S., 4643. The evidence favorable to the State alone is considered, defendant's evidence is discarded. *S. v. Lawrence*, 196 N. C., at p. 564. The court below overruled the motions and in this we can see no error.

In 20 R. C. L. (Nuisances), part sec. 7, p. 384, we find: "A public nuisance exists wherever acts or conditions are subversive of public order, decency, or morals, or constitute an obstruction of public rights. Such nuisances always arise out of unlawful acts. According to Blackstone (4 Com., 166) 'common or public nuisances are offenses against the public order or economical regimen of the State, being either the doing of a thing to the annoyance of the king's subjects or the neglecting to do a thing which the common good requires! . . . The difference between a public nuisance and a private nuisance does not consist in any difference in the nature or character of the thing itself. It is public because of the danger to the public. It is private only because the individual as distinguished from the public has been or may be injured. Public nuisances are indictable. Private nuisances are actionable, either for their abatement or for damages, or both. . . . (p. 385, sec. 8). In a general way, the courts frequently say that the injury from a nuisance, in order to constitute the nuisance a public one, must affect 'the public.' But it is admittedly a difficult question to tell whether a

nuisance is so general in its character—that is, affects a sufficient number of persons—to justify its characterization as a 'public nuisance.' Of course in one sense, the public is everybody; but manifestly that is not the sense in which the word is used in the law relating to nuisances. No doubt a nuisance is public if it affects the entire community or neighborhood, or any considerable number of persons. Furthermore, it undoubtedly is true that a nuisance is a public one if it occurs in a public place, or where the public frequently congregate, or where numbers of the public are likely to come within the range of its influence; and it seems to be sufficient to constitute acts or conditions a public nuisance, if injury and annoyance are occasioned to such part of the public as come in contact therewith."

In Clark's Criminal Law (2d ed.), Hornbook Series, part sec. 115, at p. 345, we find: "To constitute a public nuisance, the condition of things must be such as injuriously affects the community at large, and not merely one or even a very few individuals. . . . (p. 346.) Whatever tends to endanger life, or generate disease, and affect the health of the community; whatever shocks the public morals and sense of decency; whatever shocks the religious feelings of the community, or tends to its discomfort—is generally, at common law, a public nuisance, and a crime. . . . (p. 348.) Disorderly houses, including houses of ill fame and drinking or tippling houses, kept in such a way as to annoy and scandalize the public, are nuisances at common law."

In *S. v. Wilson,* 93 N. C., at p. 609, speaking to the subject: "A disorderly house is defined by Mr. Wharton, as one 'kept in such a way as to disturb, annoy or scandalize the public generally, or the inhabitants of a particular vicinity, or the passers by in the particular highway.' 2 Whar. Cr. Law, sec. 2392. . . . The instruction asked for defendant, that all the evidence adduced did not establish the character of the house as disorderly within the meaning of the law, nor prove the offense imputed to the accused, was properly refused, and the substituted instruction 'that if the defendant permitted disorderly conduct, lewd behavior, shooting and other loud noises to be carried on at his house, and these acts disturbed the neighborhood and the passers by, the defendant would be guilty,' was unexceptionable and appropriate."

In *S. v. Robertson,* 86 N. C., at p. 631: "For when the illegal character of the house is established by sufficient proof it becomes indictable for the reason that no one has a right to keep a disorderly house when people passing may be disturbed and some are disturbed." These cases are distinguishable from *S. v. Calley,* 104 N. C., 858.

The defendant requested many special prayers for instructions. Applying the law, as above set forth, applicable to the facts of this case

we think the special prayers that were correct were substantially given in the charge of the court below.

The defendant excepted and assigned errors to the following portions of the charge below: "The court charges you that a common nuisance is an offense against the public order and economy of the State, by unlawfully doing any act or by omitting to perform any duty, which the common good, public decency or morals, or the public right to life, health and the use of property requires, and which at the same time annoys, injures, endangers, renders insecure, interferes with or distracts the rights or property of the whole community or neighborhood, or any considerable number of persons. . . . A nuisance is not a public nuisance though it may injure a great many persons, if the injury is only to the individual property of each. Common nuisances are such inconveniences or troublesome offenses as annoy the whole community in general and not merely some particular person. So, gentlemen, you will immediately see that your inquiry is whether this defendant committed offenses or maintained such a place as would annoy the community in which the place was maintained or the neighborhood in which it was maintained; that is, annoyed such community or neighborhood in general and not annoyed some particular person here and there. If it only annoyed one person or two persons or in any way interfered with their happiness or destroyed the value of their property, that would be a private nuisance and they would have a redress by way of a civil action against the party, possibly by way of a restraining order; but we are trying this defendant in a criminal court, wherein she is charged with criminal offense of maintaining a nuisance and in order to constitute the criminal offense or common law nuisance there must be a disturbance to the whole community in general or the neighborhood in general and not disturbance to a person in his individual rights here and there." This exception and assignment of error cannot be sustained from the law before quoted bearing on the subject.

The defendant also excepted and assigned errors to the following portion of the charge below, which we cannot sustain: "If you find, and find beyond a reasonable doubt, that any time within two years prior to the finding of the bill of indictment she aided and abetted, that is, assisted and encouraged some one else in maintaining a common law nuisance, as that term has been defined to you, you would likewise return a verdict of guilty. . . . Now there is further evidence tending to show, gentlemen, that this defendant at that time had no control over the property at all, that she was simply the lessor, the owner of the property, and that these other persons were the lessees and the operators of the dance hall. Now, gentlemen of the jury, if she had no control

whatsoever over the operation of the dance hall, nothing else appearing, and even if the dance hall was operated in such a way as to constitute a nuisance, you could not return a verdict of guilty against her. However, if you find, and find beyond a reasonable doubt, that the hall at those times when rented by some one else was operated in such a way as to constitute a common nuisance, and further find beyond a reasonable doubt that during these times she aided and abetted, that is, assisted and encouraged her lessee, the person in charge, in operating it in a way as to constitute a nuisance, then, gentlemen of the jury, it would be your duty to return a verdict of guilty. But, before she can be convicted, gentlemen of the jury, by way of being an aider and abettor, it first must be established beyond a reasonable doubt by the State that the property was operated in a way so as to constitute a common nuisance, and, further, it must be so established beyond a reasonable doubt that this defendant aided and abetted, that is, assisted and encouraged, such operator in operating it in such a way as to constitute a common law nuisance."

In 46 C. J., at p. 744, it is said: "One who aids in maintaining a public nuisance is guilty of the offense."

We think there is no error in the charge as to aider and abettor. *S. v. Jarrell,* 141 N. C., 725; *S. v. Cloninger,* 149 N. C., at p. 572; *S. v. Baldwin,* 193 N. C., 566; *S. v. Lambert,* 196 N. C., 524; *S. v. Beal,* 199 N. C., 278; *S. v. Hoffman,* 199 N. C., 328.

We think the charge is full, plenary, explicit and does not impinge on C. S., 564. The jury passed on the facts, and, according to the State's evidence, was merciful—no doubt on account of the fact that others were also involved who go unpunished—the judge in the sentence was merciful. In law we find no error on the record.

No error.

GURNEY P. HOOD, COMMISSIONER OF BANKS, v. J. C. MARTIN.

(Filed 30 November, 1932.)

1. Banks and Banking H a—Statutory liability of stockholders is asset of bank repayable to them pro rata in event of surplus.

Under chapter 113, section 13(d), Public Laws of 1927, amending C. S., 218, the statutory liability of stockholders of an insolvent bank is made a part of the general assets of the bank, for the payment of the expenses of liquidation and liabilities of the bank to depositors and all other creditors, and the statute requires that any surplus remaining shall be applied pro rata to the repayment of the amounts paid in by the stockholders. N. C. Code, 218(c), 13(d).

2. Same—Purchaser of stock from bank held entitled to repudiate purchase for fraud of bank and officer in inducing its purchase.

Where a bank increases its capitalization and offers additional stock to the holders of its capital stock, and a holder of such capital stock is induced to purchase from the bank a number of shares of the increased capitalization upon false and fraudulent representations of the condition of the bank by its president, and thereafter the bank becomes insolvent, and the stockholder is assessed the statutory liability upon all the stock owned by him: *Held,* upon appeal from the assessment the stockholder may avoid liability on the increased capitalization stock purchased by him from the bank upon repayment of the dividends received thereon when the stockholder is not guilty of laches in repudiating the purchase for such fraud, since the statutory liability on the stock is a general asset of the bank procured by the fraud of the corporation itself, and the money derived therefrom is payable, in the event there is a surplus, to the stockholders pro rata, which would allow the president of the bank to receive, as a depositor, creditor and stockholder, a part of the fund derived from his own fraud.

3. Same—Provisions for statutory liability on bank stock enter into contract for its purchase.

When bank stock is purchased the statutory provisions in force at the time in respect to the statutory liability on such stock enter into and become a part of the contract.

4. Cancellation of Instruments B c—Party will not be allowed to profit by his fraud, but party defrauded must act with due diligence.

Ordinarily fraud will vitiate any contract, and the perpetrator of the fraud will not be allowed to retain the fruits of his own wrongdoing, but the defrauded party must act within a reasonable time from the discovery of the fraud in order to be entitled to rescission.

CONNOR, J., dissenting.

APPEAL by defendant from *MacRae, Special Judge,* at April Term, 1932, of BUNCOMBE. Reversed.

The judgment of the court below is as follows:

"This cause coming on to be heard at the April Term, 1932, of this court before his Honor, Cameron F. MacRae, judge, presiding, and the parties having consented to waive a jury trial and agreed that his Honor find the facts and make his conclusions of law thereon, and after considering the evidence offered filed herein, the court finds the following facts:

1. That on 20 March, 1928, the directors of the Central Bank and Trust Company at a meeting duly called and held for that purpose, voted to increase the capital stock of said bank in the sum of five hundred thousand dollars ($500,000), and to increase the surplus of said bank in the sum of five hundred thousand dollars ($500,000) by

issuing and selling five thousand (5,000) shares of additional capital stock at the price of two hundred dollars ($200) per share, and provided by a resolution duly passed at said time that the then stockholders of said bank should be allowed to purchase as many shares of the new capital stock as they then already held in said bank at the price of two hundred dollars ($200) per share, but fixed the price to be paid by all other purchasers who were not then stockholders at two hundred and seventy-five dollars ($275) per share; that pursuant to said resolution duly passed by the board of directors, the defendant, J. C. Martin, on 2 May, 1928, being then a stockholder in said bank and holding sixty (60) shares of its capital stock, subscribed for, purchased and paid for, sixty (60) additional shares of the new stock of said bank of the par value of one hundred dollars ($100) each, at the price of two hundred dollars ($200) per share, which amount was duly paid by said Martin at said time.

2. That the defendant, J. C. Martin, was induced to subscribe for, purchase and pay for said sixty (60) shares of capital stock by the false and fraudulent representations of W. B. Davis, president of Central Bank and Trust Company, acting on behalf of said bank, to the effect that said bank was solvent, prosperous and a successful banking institution engaged in the legitimate banking business in the city of Asheville and making large dividends; that it was honestly and conservatively managed, and was perfectly solvent and in splendid financial condition.

3. That said representations, and each of them, were untrue, false and fraudulent to the knowledge of the said W. B. Davis, acting for said bank, and were made by him with the intent to wrong, cheat and defraud the defendant, the said J. C. Martin, who on account of his long and intimate acquaintance with the said Davis and with his high standing in the community, was induced to rely upon such representations and did, in fact, rely upon the same, and on account thereof subscribed to and paid for said stock.

4. That at the time the defendant subscribed and paid for said stock, and on the date the resolution was passed by the board of directors, to wit, 20 March, 1928, and at all times thereafter, up to and including 19 November, 1930, said Central Bank and Trust Company was insolvent, and during all of said period said W. B. Davis either knew said bank was insolvent or had knowledge of such facts as would put a reasonably prudent man on notice that the bank was insolvent.

5. That during the year 1929 the defendant heard a rumor to the effect that the condition of the Central Bank and Trust Company was not good, and immediately came to Asheville and went to see said

W. B. Davis, president of said bank; P. R. Moale, one of its directors and a member of the finance committee, and Canie N. Brown, one of its directors and chairman of the finance committee, and told said officers and directors that he had heard this rumor from a person living in Statesville, North Carolina, and asked them, and each of them, as to the then condition of the bank; that he was assured by each of them that the rumor was untrue; that the bank was in splendid financial condition and that there was no reason to be in the least bit disturbed or uneasy as to that condition, and, relying upon the said statement of said officers of said bank, the defendant was satisfied that the bank was in no financial trouble and in no danger of any financial trouble; that the defendant relied upon the statements of said officers and was justified in relying upon said statements on account of their previous high character, business ability and reputation in the community; that again in July, 1930, the defendant, while in Asheville, had a conversation with the said W. B. Davis, who again assured him that the bank was in excellent condition and that it was in no danger whatsoever of insolvency; that the defendant received the several financial statements as to the condition of the bank issued on 30 June, 1928, 3 October, 1928, 23 March, 1930, and 24 September, 1930, set out in the statement of facts filed herein, and relied upon said statements as being correct statements of the financial condition and progress of said bank, *and that the defendant exercised due diligence and care at all times to keep in touch with the financial condition of said bank and was guilty of no negligence or laches or other fault in connection with the receipt or the continued holding of the stock in said bank up until the time of its failure, and was guilty of no negligence or laches in his failure, to repudiate the purchase of said stock prior to the failure of said bank.*

6. That the defendant did not, prior to the docketing of the stock assessment judgment against him herein, repudiate his subscription to the purchase of said stock, nor did he offer to return the dividends received thereon, but that immediately after the docketing of said judgment he engaged counsel, gave notice of appeal, and attempted to repudiate the purchase of said stock, as appears from the record herein, and shortly thereafter and prior to the trial of this action offered to return the dividends which he had theretofore received on said stock, which offer and tender were declined by the plaintiff.

7. That on or about ..... February, 1931, the predecessor of the plaintiff in this action docketed against the said J. C. Martin in the Superior Court of Buncombe County, North Carolina, an assessment on the entire stock standing in his name of the Central Bank and Trust Com-

pany at the time of its failure, the total amount of said judgment being twelve thousand dollars ($12,000), which assessment included the sum of six thousand dollars ($6,000) assessed on the 60 shares of stock purchased by the defendant on 2 May, 1928. That the said Martin on 6 June, 1930, by virtue of an order of the court made in this cause, paid into the office of the clerk of this court, without prejudice to his rights, the amount of said assessment levied upon the 60 shares of stock owned by him prior to 2 May, 1928, together with interest thereon, as provided by the said order of the court.

8. That at the time of the failure of the said Central Bank and Trust Company, to wit, 19 November, 1930, the defendant, J. C. Martin, was the owner of one hundred twenty (120) shares of the capital stock of the said Central Bank and Trust Company of Asheville, North Carolina, of the par value of $100.00 per share.

9. That during the entire period that the defendant owned the aforesaid stock, it paid dividends aggregating 12 per cent per annum, which dividends were received by the defendant and appropriated to his own use.

From the foregoing facts the court finds the following conclusions of law: (1) *That the defendant, J. C. Martin, was guilty of no laches or negligence in not repudiating the purchase of said stock between 2 May, 1928, and 19 November, 1930.* (2) That the defendant, J. C. Martin, was not guilty of laches after the failure of said Central Bank and Trust Company on 19 November, 1930, and that he took prompt action to repudiate the stock assessment against him, employed counsel, filed an answer denying liability for said stock assessment on the grounds set out in said answer and on the basis of testimony offered on the trial of this cause. (3) That it appearing from the records that the Central Bank and Trust Company, and it being admitted in open court by both parties, that defendant was a stockholder of record of one hundred twenty (120) shares of the capital stock of the Central Bank and Trust Company when said bank closed its doors on 19 November, 1930, which included sixty (60) shares of stock subscribed and paid for by him on 2 May, 1928, and that the said Martin has duly paid and discharged that portion of said assessment which was based upon the capital stock in said bank owned by him prior to 2 May, 1928. (4) The court being of the opinion that the fraudulent representations of W. B. Davis, president of the Central Bank and Trust Company, which were relied upon by the defendant at the time he purchased and paid for said stock and the other evidence and circumstances relied upon by the defendant, do not as a matter of law

relieve said defendant from his liability for an assessment for the stock standing in his name at the time of the failure of said Central Bank and Trust Company.

It is thereupon ordered, adjudged and decreed, that the judgment heretofore docketed in the office of the clerk of the Superior Court of Buncombe County be and the same is hereby ratified and affirmed, and it is adjudged that the plaintiff recover of the defendant the sum of six thousand dollars ($6,000), with interest thereon from 16 February, 1931.

It is further considered and adjudged by the court that the plaintiff recover of the defendant the cost of this action to be taxed by the clerk."

Johnson, Smathers & Rollins for plaintiff.
Martin & Martin for defendant.

CLARKSON, J. The questions in this case are: (1) whether or not a stockholder in a bank who has been induced to purchase the stock from the bank through the fraud of its president can set up such fraud as a defense against the statutory liability for an assessment after the insolvency of the bank, under the North Carolina statute, amendment 1927, on the subject, the stockholder being guilty of no laches. (2) Could this be done prior to the amendment of 1927? We think so.

N. C. Code of 1931 (Anno.), Michie, C. S., 218(c), 13(d), is as follows: "All sums collected under the levy shall become immediately available as general assets of the bank for distribution as other assets. Provided, however, that whenever the expenses of liquidation have been paid and all of the liabilities to depositors, and other creditors shall have been discharged, *the money then remaining in the hands of the commissioner of banks shall be applied pro rata to the repayment of the amounts paid in by the stockholders.*" (Italics ours.) Public Laws 1927, chap. 113, sec. 13(d).

In tracing this provision of the banking laws, in reference to the subject, we find, in Public Laws, 1911, chap. 25, part sec. 2: "All indebtedness due from such shareholders, or any of them, their representatives or estates, shall be payable to the said receiver as corporate assets, and the title thereto shall be vested in such receiver, to be by him applied for the equal benefit of all persons entitled to share in the distribution of the fund and disbursed ratably under the orders of the court." C. S., 240.

Public Laws 1921, chap. 4, part sec. 17, is as follows: "All expenses on account of any receivership and all wages or salaries due officers or

employees shall be paid out of the assets of such bank before distribution of the proceeds thereof; and such receiver may, on order of the court, make a ratable dividend of the money in his hands on all such claims as may have been proved to his satisfaction or adjudication in a court of competent jurisdiction, and as the proceeds of the assets of such bank are paid to the receiver, he shall on like orders make any further dividends, upon all claims previously proved or adjudicated, and the remainder of the proceeds, if any, shall be paid to the stockholders of such bank, or their legal representatives, in proportion to the stock respectively held by them." 3 C. S., part sec. 218(c).

The decision in *Hill v. Smathers,* 173 N. C., 642, is to the effect that the statutory liability of the stockholders is created exclusively *for the benefit of corporate creditors.* It is not to be numbered among the assets of the corporation, and the corporation has no right or interest in it. *Corporation Commission v. Bank,* 193 N. C., 113. This is not so under the amended statute of 1927. When the bank stock was purchased the present statute in relation to the subject, entered into and formed a part of the contract. *Bateman v. Sterrett,* 201 N. C., at p. 62; *Hamilton v. R. R., ante,* at p. 472.

Michie, *supra,* 218(c), 13, provides an *easy method of assessment* of stock liability which, in part, is as follows: "After the expiration of thirty days from the date of the filing of the notice of the taking possession of any bank, in the office of the clerk of the Superior Court, the Commissioner of Banks may levy an assessment equal to the stock liability of each stockholder in the bank, and shall file a copy of such levy in the office of the clerk of the Superior Court, which shall be recorded and indexed as judgments, and shall have the force and effect of a judgment of the Superior Courts of this State; and the same shall become due and payable immediately," etc. Public Laws 1927, chap. 113, sec. 13, 1931, chaps. 243, 385, 405. This statute was held constitutional in *Corporation Commission v. Murphey,* 197 N. C., 42.

Under the amended statute of 1927, *supra,* we have a new provision "the money then remaining in the hands of the Commissioner of Banks *shall be applied pro rata to the repayment of the amounts paid in by the stockholders.*"

Ordinarily fraud will vitiate any contract, but it has been frequently asserted that fraud cannot be precisely defined as its ramifications are so hydra-like. It is axiomatic that one who perpetrates a fraud and is enriched thereby cannot retain the fruits of his wrongdoing. So by analogy the very officer, W. B. Davis, president of the bank, who perpetrated the fraud, could, as depositor or creditor, and finally as stock-

holder, upon the payment of this assessment, be entitled to profit by his own wrong. This is the egg which spoils the omelet. It is not possible to separate the good from the bad.

In *Lee and others v. Pearce,* 68 N. C., at p. 78, quoting from Adams Eq., 176, we find: "The innocence of a party who has profited by a fraud will not entitle him to retain the fruit of another man's misconduct, or exempt him from the duty of restitution."

"The beautiful character, pervading excellence, if one may say so, of Equity Jurisprudence," says *Story, J.,* "is that it varies its adjustments and proportions so as to meet the very form and posture of each case in all its complex hibitudes." *Massey v. Alston,* 173 N. C., at p. 223.

The contrariety of the decisions are mainly premised on the language of the different acts, but prior to the bank act, *supra;* in regard to ordinary corporations this jurisdiction has settled the law contrary to plaintiff's contention.

In *Chamberlain v. Trogden,* 148 N. C., at p. 140-1 (1908), citing numerous authorities, speaking to the subject, the following is said: "There is some conflict of authority as to the right of a subscriber to rescind his subscription or maintain a defense to his obligation therefor on the ground of fraud after the corporation has become insolvent and its affairs have passed into the possession and control of a receiver of the bankruptcy court, or other method of general adjustment, primarily for the benefit of creditors. The English cases and some courts in this country have held that, under conditions indicated, it is no longer open to the subscriber to maintain such a defense. These English decisions, however, are said to be based to some extent on the construction given to certain legislation on the subject, and the weight of authority in this country seems to establish that, under exceptional circumstances, the subscriber may avail himself of the position suggested even after insolvency." The *Chamberlain case, supra,* was cited and approved in *Corporation Commission v. Bank,* 193 N. C., 113.

Even if it be conceded that the amendment to the Banking Act of 1927 undertook to deal solely and exclusively with the method of distribution of special funds arising from stockholder assessments, nevertheless the *Trogden case, supra,* recognizes and sanctions the right of a stockholder to repudiate his stock subscription procured through the fraud of his own corporation, even after insolvency, or bankruptcy. The fact that a bank stockholder may be assessed in the event of insolvency does not alter his essential rights or obligations as a stockholder. That is to say, a bank stockholder stands upon the same footing as

stockholders in other ordinary business corporations except that the statute hangs a liability around his neck if his bank fails.

In *Commissioner of Banks v. Cosmopolitan Trust Co.*, 41 A. L. R., 658, a Massachusetts case (253 Mass., 205, 143 N. E., 609), takes the view: "One subscribing to an increase of stock of a trust company cannot avoid his statutory liability to stockholders when the company becomes insolvent, because he was induced by fraud to make his subscription." In the annotation, at p. 689, citing a wealth of authorities, speaking to the subject, is the following: "The great majority of the American cases either hold directly that insolvency of the corporation does not, in and of itself, cut off the right of a defrauded stockholder to escape his liabilities as such, or else impliedly support the same rule by basing the stockholder's loss of his right to rescind for fraud upon laches or some other element of estoppel in combination with the insolvency of the corporation." *People v. Cal. Safe Dep. & Trust Co.* (rehearing denied) (Cal.), 126 Pac. Rep., 516; *Gress v. Knight*, 31 L. R. A. (N. S.), p. 900, and the note there referred to; *Smith v. Jones*, L. R. A., 1917C., 890, 191 S. W., 500; *Shufflebaum v. DeLashmutt*, 83 Fed., p. 449; *Newton Nat. Bank v. Newbigin*, 74 Fed., p. 137; *Fla. Land & Improvement Co. v. Merrill*, 52 Fed., 77.

Under the majority rule, the *Chamberlain case, supra,* is cited. In *State Bank of Portland v. Gotshall*, 51 A. L. R., 1200, (Oregon case, 254 Pac., 800), the Oregon Court holds: "Fraud inducing one to purchase bank stock cannot be urged as a defense in an action under a double liability statute against the stockholders by the state superintendent of banks, upon the insolvency of the bank, since *the purpose of the statute is to protect depositors and creditors.*" (Italics ours.) See Michie on Banks and Banking, Vol. 2, sec. 42(i), p. 124.

It is well settled that the injured party to rescind must act promptly and within a reasonable time after the discovery of the fraud or after he should have discovered same by due diligence. *Willis v. Willis, ante,* 517.

It will be observed that the question of laches, a differentiating feature in most of the cases, plays no part in the present decision. The court below found no laches on the part of defendant. The authorities on the subject are collated in a valuable annotation reported in 41 A. L. R., 674. In *Commissioner of Banks v. Carrier*, 202 N. C., 850, there were laches—"She should have acted with promptness and diligence."

The case of *Corporation Commission v. McLean*, 202 N. C., p. 77, is not decisive of this case. In the *McLean case* the stock sold to McLean upon which the assessment was levied was not sold him by the

bank, and the bank received no part of the proceeds of the purchase price. McLean bought the stock from individuals, and the fact that they happened to be officers of the bank should certainly in no way render the bank liable for the fraud which they perpetrated upon him, if any.

The court below by agreement found the facts (1) all the necessary elements that constitute fraud and deceit were practiced on the defendant to obtain the stock subscription; (2) that defendant was not guilty of laches. The record discloses that "while the defendant received certain sums as dividends on the stock referred to, he has offered to return such dividends and still stands ready to do so."

Under the amendment of 1927, if the defrauding officer be a depositor or creditor, he would participate in the distribution of the general assets, and the amendment makes specific provision for pro rata repayment to stockholders of the residue of their assessments after the payment of expenses and creditors. Hence the collection of the present assessment would swell the refund, in case of any, to the defrauding officer. This was not the intent of the Legislature. Nor was the statute amended idly or to no purpose.

The fraud perpetrated by W. B. Davis, president of the bank, on defendant under the present statute would indirectly enure to his own benefit. The Commissioner of Banks cannot recover, for by so doing it would be enriched by the perfidy of the president of the bank, it being the liquidating agent of the bank, and it would thus allow the president to take advantage of his nefarious conduct. The defendant is entitled, under the facts and circumstances of this case, to recover the $6,000, less dividends received. The judgment of the court below is

Reversed.

CONNOR, J., dissenting. I think the judgment rendered in this action should be affirmed. It has been uniformly held by this Court, as appears from the cases cited in the opinion in this case, that the individual liability of stockholders of a banking corporation organized under the laws of this State, imposed by statute, is assumed by such stockholders for the protection of depositors and other creditors of the corporation, in the event of its insolvency. Such depositors and creditors heretofore have relied upon the statute, and have been assured by the decisions of this Court, that in the event of the insolvency of the corporation, each of its stockholders was liable for its contracts, debts and engagements to the extent of the par value of the stock owned by him at the date of the insolvency. This principle, in my opinion, has not been abrogated or modified by the provisions now appearing in subsection 13,

of chapter 113, Public Laws of North Carolina, 1927. This provision does not purport to amend the statute by which the liability is imposed, but affects only the distribution of sums collected from stockholders by reason of their statutory liability.

I do not think that the instant case can be distinguished from *Corporation Commission v. McLean,* 202 N. C., 77, 161 S. E., 854. In that case it is said that the only issues of fact which may be raised by an appeal to the Superior Court from the assessment upon the stockholder, 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 the corporation did appellant own at said date?"

It was held in that case upon facts which are almost identical with the facts in the instant case, that the defendants could not rescind the contract by which they became stockholders of the bank, and thus become creditors with the right to share with depositors and other creditors in the distribution of its assets. The contrary is held in the instant case. It follows, therefore, that a stockholder of a banking corporation, organized under the laws of this State, although he has enjoyed the rights and privileges of a stockholder, may be relieved of liabilities imposed by statute for the protection of depositors and creditors, by showing that he was induced to become and remain a stockholder by the false and fraudulent representations of officers of the corporation, with respect to its financial condition. The result of this holding must be that depositors and creditors cannot rely upon the capital stock of a banking corporation as a trust fund for the payment of its liabilities, nor upon the statute which provides that "stockholders of every bank organized under the laws of North Carolina, whether under the general law or by special act, 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 amount of their stock therein at par value thereof, in addition to the amount invested in such shares." In the instant case, the plaintiff is not only relieved of his assessment in the sum of $6,000; he becomes a creditor of the Central Bank and Trust Company in the sum of $12,000, and as such is entitled to share with depositors and other creditors of the bank in the distribution of its assets, including sums collected from its stockholders by reason of their individual liability under the statute. I do not concur in the decision of the question presented by this appeal, and must therefore, dissent.

NORA McINTIRE v. J. J. McINTIRE AND Z. V. McINTIRE.

(Filed 30 November, 1932.)

Appeal and Error F g—Statutory affidavit is mandatory in order for defendant to be allowed to appeal in forma pauperis.

Where the defendant does not file the bond required by C. S., 646, it is required that he strictly follow the requirements of C. S., 649, in order to be allowed to appeal *in forma pauperis*, and where no affidavit as required by the statute appears in the record and no order therein appears reciting that the affidavit had been filed, the appeal must be dismissed, the requirements of the statute being mandatory and jurisdictional.

APPEAL by plaintiff from *Schenck, J.*, at February Special Term, 1932, of MECKLENBURG. Appeal dismissed.

This is an action to recover on a bond executed by the defendants, and payable to the State of North Carolina. The plaintiff is the beneficiary named in the bond. No summons was served on the defendant, J. J. McIntire, who is a nonresident of this State.

The issue submitted to the jury was answered as follows:

"What amount, if any, is the plaintiff entitled to recover of the defendant, Z. V. McIntire? Answer: Nothing."

From judgment that plaintiff recover nothing of the defendant and that defendant recover of the plaintiff his costs, the plaintiff appealed to the Supreme Court, assigning errors at the trial.

Geo. W. Wilson for plaintiff.

J. Laurence Jones for defendant.

PER CURIAM. At the trial of this action the plaintiff gave notice in open court of her appeal from the judgment of the Superior Court to the Supreme Court. An appeal bond in the sum of $50.00 was adjudged sufficient by the judge. No application was made by the plaintiff to the judge, during the term or within five days after the adjournment of the court, for an order allowing her to appeal without filing the undertaking required by statute. C. S., 646. After the adjournment of the court, and within ten days thereafter, the assistant clerk of the Superior Court made an order which appears in the record. This order is in words as follows:

"In the above entitled case, the plaintiff is allowed to maintain her appeal *in forma pauperis*, without giving bond for costs as required by the court in the entries of appeal."

No affidavits as required by C. S., 649, appear in the record. In the absence of such affidavits, or at least of recitals in the order showing that the affidavits were duly filed, and the requisite facts found therefrom, the order, even if otherwise sufficient, was not sufficient to allow the plaintiff to appeal to this Court, without complying with the order of the judge. *S. v. Harris,* 114 N. C., 830, 19 S. E., 154.

Where a party to a civil action which has been tried in the Superior Court, desires to appeal from a judgment rendered at such trial to this Court, without giving security as required by C. S., 646, he must comply strictly with the provisions of C. S., 649, which are mandatory. Otherwise this Court is without jurisdiction of the appeal, and of its own motion must dismiss the appeal. In the instant case the appeal is dismissed, for the reason that the appellant has not filed the bond required by the judge, or procured a valid order allowing her to appeal without bond.

Appeal dismissed.

STATE v. MRS. W. E. FRENCH.

(Filed 7 December, 1932.)

1. **Conspiracy B b: Assault B c—Evidence of conspiracy and secret assault pursuant thereto held sufficient in this case.**

   Upon the trial of a wife and another for a secret assault upon her husband with malice and intent to kill, evidence that her codefendant and her husband had violently quarreled and had agreed to meet each other and settle their differences by violence if necessary, that the relationship between the defendant and her husband was hostile, that they violently quarreled and that she had predicted his early death, that she had remitted premiums on his life insurance policy in which she was beneficiary, and that on the night of the crime she suggested the direction in which he should drive her car, and that they thus came upon her codefendant sitting in his parked car, and that she suggested they stop, and that the husband was then assaulted by her codefendant with a pistol and seriously wounded, and that she immediately deserted him is *held* sufficient to establish a conspiracy between the wife and her codefendant, rendering the evidence competent against her, and the evidence is held sufficient to overrule her demurrer to the evidence on the charge of secret assault.

2. **Criminal Law G q—Rule that husband or wife may not testify against each other does not apply to proof of assault.**

   The rule that neither the husband nor wife is competent to testify against the other in criminal cases does not apply to proof of assault by the one upon the other. C. S., 1802.

3. Assault B c—Evidence held competent and material in this prosecution for secret assault pursuant to conspiracy.

Upon the trial of the wife for a secret assault upon her husband pursuant to a conspiracy between her and her codefendant, who actually committed the assault and inflicted serious injury, testimony by the husband relating to animosity existing between them is competent as tending to show motive, purpose, and the extent of the conspiracy, and evidence that the wife failed to visit the husband in the hospital after the assault is also competent and material.

4. Criminal Law I c—Court's refusal to allow questioning of jury during trial for purpose of showing prejudice held not error.

Where the defendant's attorney upon the trial of a criminal offense requests the court to permit him to ask the jurors whether they had read a certain newspaper article, and offers neither affidavit nor evidence as a basis for the motion, it is not error for the trial judge in the exercise of his discretion to decline to stay the trial and embark upon the proposed exploration, the defendant having the right to have the question investigated upon a motion to set aside the verdict.

5. Criminal Law L e—Objection to evidence held harmless and discussion academic in view of admissions of defendant.

Upon the trial of the wife for a secret assault upon her husband with intent to kill, pursuant to a conspiracy between her and her codefendant, parol testimony by the husband as to the contents of a policy of insurance on his life in which the wife was beneficiary and her payment of the premiums shortly before the assault is admissible, the matter being entirely collateral to the charge in the indictment, and *held further*, the question becomes academic under her admissions in this case.

APPEAL by defendant from *Shaw, Emergency Judge,* at July Special Term, 1932, of GUILFORD. No error.

The defendant and B. B. Owens were indicted for a secret assault upon W. E. French in breach of section 4213 of the North Carolina Code of 1931, and were convicted. From the judgment pronounced the above named defendant appealed to the Supreme Court.

W. E. French and the defendant were husband and wife, residing at 2419 Camden Road in the city of Greensboro. They were married in Greensboro in 1926 and have two children, one six years of age, the other not quite two. In the evening of 1 February, 1932, between 6:30 and 7:30 W. E. French was shot with a pistol and seriously injured. The evidence is voluminous. Such parts of it as are necessary to an explanation of the exceptions are set out in the opinion; but the circumstances immediately connected with the assault are given here as related by W. E. French, Mrs. W. E. French, and B. B. Owens.

W. E. French testified: "I knew Bert Owens prior to 1 February, 1932, and had known him about three years. I was at home during the

afternoon of 1 February, 1932, with my wife's brother and her. In the late afternoon my wife and my wife's brother drove down town. I had a hat in a hat cleaning shop and we drove down town after which we drove towards Sedgefield, stopping at the Dixie Pig Barbecue stand where I got two sandwiches and three coca-colas and a pack of cigarettes, after which we drove on to Sedgefield and drove on around there for a while and on back home. Mrs. French's brother, who is about 19 or 20 years of age and Mrs. French were traveling with me in the Chrysler sedan. After we drove back home we had dinner. I imagine it was around six or six-fifteen, I wouldn't be exact. During that time my wife asked me to drive her out in the Starmount section, said she had three friends out there she wanted to see and after dinner we started out, leaving her brother at home, and drove out West Market Street. That was during the time it was under repair. We got to the end of West Market Street and she asked me to turn there to my right. I had never been in that section, never had occasion to go. I turned to my right and had gone down the road a very short distance and passed a car with a man standing on the outside and after passing the car a few feet my wife said, 'that is Bert Owens' and asked me to stop and back up which I did. I backed up some few feet back of the car on the opposite side of the road and he walked over on my side of the car and we were standing talking. The car he was standing by was headed towards Friendly Road and my car was headed the same way. When I backed back I backed beyond him. I was sitting under the wheel in my car on the left. He walked around to my side of the car and I asked him what was the trouble and he said he was having motor trouble and he said that his motor was running some and that he thought it would get better. I made the offer to get behind him and push him down this little grade. We were right on a little grade. He said he would wait a few minutes, maybe his car would get all right, and my wife spoke too and said, 'I hope you boys have forgotten your little difficulty.' She was on the right side next to me and Mr. Owens spoke up and said he had forgotten his and I explained I could not hold malice, and when I said that he started to shooting and shot me here first, and I fell out of the car on my back. My wife jumped out of the car through the right side front door and I fell out and over on my back and by the time I hit the ground he was over me still shooting and he shot, I don't know how many times, I imagine until he emptied his gun, and walked off a little ways and stopped and hesitated for a second, then he got in my car and left but in the meantime my wife had already gotten in his car and left. The minute I hit the ground I saw her running to his car. He shot me when I was on the ground and I said, 'for God's

sake and for my mother's sake, don't shoot me any more.' He shot me right here after I was on the ground. The bullet entered on my right side. He hesitated a minute and got in my car and drove off. After that I lay there for a second or two, I don't know how long, and started to get up. I saw a car coming toward me and I don't know why I thought so, I thought it was coming back and I lay back down and the car came up within 75 or 100 yards and played the lights on the place where I was lying and turned around and went back off. Then I got up and I saw a house, you could see the dim front of a house on over towards Holden's Filling Station, and tried to get up that way and I went several yards and began feeling blood coming out of my throat and staggered over and fell in a kindo' ditch or place excavated and finally got out of that and got on the road and by that time the blood was pouring out of my mouth and I lay down on my back and kept adjusting myself to where I was more comfortable. I had on a blue suit and overcoat. The coat had just been cleaned and pressed before I was shot. There was one hole in it and, too, there was a little hole in the back of it. There are some holes in it now. I don't know how many times he shot me. I am able to locate the bullet hole in that vest. When I felt blood coming up into my throat I thought I was going to die. Three boys picked me up and took me away from there. They were Mr. Parker, Mr. Farlow and another. I was lying right on the road close to that intersection when they got to me. I attempted to get help before they came up. A car passed, a Ford of some kind, I imagine, looked like three people in it, and they slowed down real slow and I told them I was shot and asked for help and they slowed like they were going to stop, but didn't and kept on going. After some little time these other boys came and brought me in. They were traveling in an Essex I think. They brought me to St. Leo's Hospital and Dr. Harden treated me after I got there. . . . After I saw I couldn't get out to this filling station, I had a match folder in my pocket and I wrote on it, 'Bert Owens killed me.' I didn't think I would get away from there. I got the match folder at the barbecue stand where we bought the barbecue and cigarettes. The object you handed me is the match folder I had in my pocket. The words written on it are 'Bert Owens killed me,' signed French. When I wrote that I thought there wasn't any hopes of ever getting away and thinking about my two children and wanting somebody to know who did it, I took this match folder out of my pocket and laid it on this arm with my hand and struck a match and left it on the ground and wrote it and put it in my vest pocket, this part of the folder. I wrote it with my fountain pen. I put this part of the match folder in my vest pocket after writing on it."

Mrs. W. E. French testified in part as follows: "On Monday, 1 February, my husband, my brother and myself left home somewhere around four o'clock. We drove directly to the parking lot back of the Jefferson Standard Life Insurance Company building. Mr. French parked the car and asked me to go to Stratford-Weatherly Drug Company and get him two or three ounces of paregoric. I got out of the car and went in the drug store. I had just a few cents. I had bought some gas and I think I had three or four cents, I didn't have enough to buy the paregoric. I had the paper which you hand me, which purports to be a check, with me that afternoon. It had been mailed to our house on Camden Road. I had this check cashed when I went in Stratford-Weatherly's, and bought the paregoric. From there we drove toward Patterson's Grocery Store on South Elm Street. Mr. French stopped the car and asked me to get his hat at a little dry cleaning place if I am not mistaken next door to Patterson's and asked me to go to the Postal Telegraph Company and wire his insurance premium to the Acacia Life Insurance Company. I did that. I wired them $9.50. From there we drove to Sedgefield and drove home around five o'clock or five-fifteen. My brother, Mr. French and myself drove to Sedgefield. Mr. French suggested that we go out there. We were just riding. We got home about five o'clock, I don't recall the exact time. We had supper after we returned home. That evening before supper my brother and I went to a grocery store. As we were getting ready to leave home my brother went back into the house. He did not make any statement at that time. I don't recall how long he was gone, it was just a minute or two. Then we went to the grocery store and came back home. After that we had dinner and Mr. French asked if I would like to go riding in the evening. I told him I wanted to go to my sister's and he told me he would drive me over there after we went to ride. About six-thirty he asked me to dress so that we could go to ride. I dressed and fed the baby and we drove out toward Starmount Golf Club. When I was putting on my hat in the bath room Mr. French went to his desk in the living room and I saw him writing at his desk. I did not see what he was writing. After he finished writing he put the article upon which he had written in his pocket. Immediately after that we left to go to ride. Mr. French was driving. We started up Camden Road. Mr. French decided he would back up and go down the other way, which he did, to the intersection of Greenway and West Market, and turned to the left and drove out west of town on West Market Street to what I now know as the Holden Road. When we got to the intersection of West Market Street and Holden Road he stopped and looked both ways and then turned to the right and went several yards and I saw the rear light of a car. He drove up almost parallel

with this car and stopped and Mr. Owens stepped out of his car around to Mr. French's side of the car in which he was riding. I knew Mr. Bert Owens prior to 1 February. He came from his car in front of ours. He walked around to Mr. French's side of the car, Mr. French was driving, and when he saw me sitting in the car he asked Mr. French what this meant. I asked him if he couldn't forget his difficulties and let bygones be bygones and be friends. When Mr. French said if I didn't get out of the car and shut my mouth he would kill me too. I got out through the right hand front door and fell on the ground. While I was getting out of the car there was a shot fired. I ran and jumped in Mr. Owen's car and the reason I did this was because I was excited. Then I drove away and drove several hundred yards I suppose, some little distance, and decided to turn around and go back, because in the meantime I heard several shots fired. I tried to turn the car around and fainted and I don't remember. I went home that night. The next thing I remember after I fainted I was in Mr. Owen's car and he was driving. I went home. I also went to my sister's that night after I got home. I don't know how I got over there and don't know how long I stayed at my sister's. My sister's name is Mrs. Robert Chrisman. She lives on Percy Street in the city. The next thing I remember after I had gotten home that night and after I had gone to my sister's someone told me Mr. French was shot. The next place I remember being was at the city hall in jail. It was Thursday morning or Thursday afternoon, I don't remember which. February first was on Monday."

B. B. Owens gave the following account of the shooting: "On the afternoon of this tragedy I received a telephone call some where around 5:30. The call was from Mr. French and he wanted to know if I would meet him, as he was leaving town, and there were some things he would like to talk with me about before he left. I replied that I would be at the office until six. He said he did not care to meet me at the office, didn't care to come down town and advanced as his reason that he had been to Raleigh and just been released from jail that day. I offered to come to his house and he said he wanted to meet me privately, would meet me where the Starmount Road turns off West Market Street. I replied that I couldn't come then as my car was on the wash pit. As to the time to meet him there, I do not know whether he told me or whether it was by mutual agreement but it was settled at 6:45 or quarter to seven. I got my car and drove out W. Market Street to the intersection of the road that I knew then as the Starmount Road, and just as I got to the end of the pavement, or where the dirt road turns to the right, I saw a car go over the crest of the ridge, had a trunk rack on it the same as Mr. French's car, so I jumped to the conclusion that it was his car and rode to the top of the ridge.

When I reached the top I could see that it was a smaller car than Mr. French's car, so I stopped and looked back to see if I could see anything of him as I was a little late. I did not leave until a quarter of seven, and I was supposed to be there then. Just as I looked back I saw his car turn. As the car turned I could recognize it from the tire on the side, so I simply got out of the car and stood there, and Mr. French drove up along side of me. As he drove up I could see there was a lady in the car with him. His statement had been that he wished to see me privately, so I walked around and said: 'What is the meaning of this, Bill?' meaning why should he drag me out there in the wish to speak to me privately and then bring some one else along. As I walked up along side I recognized the lady as Mrs. French, she spoke, also, almost at the same time I did and I am not accurate as to just what Mrs. French said, but Mr. French did not answer me at all. He whipped around to her and said: 'God damn you, if you don't get out of this car and shut up I will kill you too,' and when he said, 'I will kill you, too,' I felt kind of funny and jerked the door of his car, at the same time his left hand came out of his coat pocket with a gun. I grabbed his hand with both of my hands and the gun went off. We rolled through the car struggling for the possession of the gun and continued to struggle. The gun went off several times in the struggle. We continued to struggle until Mr. French lay still and I got up, I did not stand over him and shoot him in any such manner as he described. The last I saw of Mrs. French up to the point of the struggle was her rolling out of the door of the car. I did not see what became of my car. It had been raining that day and was rather warm, this being during the warm spell in January and the 1st of February. After I had gotten out of the struggle my car and Mrs. French both were gone. It occurred to me that the first shot that was fired went square in the direction of Mrs. French. I jumped in Mr. French's car and started in the direction my car had been headed as I presumed it had gone that way. I drove between 500 and 1,000 yards and came across my car backed right square across the road. Mrs. French was slumped over the steering wheel with her arms around the steering wheel and her head on her arms. My presumption was that she was shot, and I shoved her over and started back to town. Somewhere between the scene of the shooting and Greensboro Mrs. French came to and said: 'What happened?' I said, 'Nothing. Everything will be all right.' I said, 'Are you hurt?' and she said, 'I don't think so.' She said 'What happened? Where is Bill?' I said, 'Everything will be all right. Keep still.' She was highly nervous and pulling at her hands, and I was afraid to say much to her. I said, 'I will take you home.' She said, 'How about Bill?' I said, 'I will go back and see about Bill, and if

I don't call you in a few minutes everything will be all right,' I carried Mrs. French home and put her out in front of the house. I was rather excited myself. I turned back and went back to where the shooting occurred. As I recall it my car was parked directly on the first little ridge in the road, and I drove up on top of that ridge and drove a little beyond it and came back and swung my car so the headlights would swing to and fro and couldn't find any trace of Mr. French. Then I came back down the street to Greensboro."

These inconsistent statements are the source of the various contentions in behalf of the State and of the defendant.

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

Younce & Younce, Shelby B. Caveness and Caffey & Stanley for defendant.

ADAMS, J. The statute upon which the indictment is founded provides that if any person shall in a secret manner maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise, with intent to kill such other person, although the person assaulted may be conscious of his adversary's presence, he shall be guilty of a felony. In a comprehensive analysis of the statute the trial judge accurately instructed the jury with respect to the law applicable to the various phases of the evidence, and in no aspect is the charge justly subject to the criticism that he failed plainly and correctly to state the evidence or to explain the law.

The State took the position that the defendant and Owens had contrived the assault previously to the meeting on Holden Road, and upon this theory the court submitted to the jury the question of their criminal conspiracy. The defendant contended that there was no evidence of a conspiracy between Owens and herself or of her participation in the assault, and upon this ground she demurred to the evidence and moved that as to her the action be dismissed. The denial of the motion calls for an examination of the testimony concerning the relation of the parties prior to and at the time of the assault.

It is evident that Owens bore toward French a feeling of hostility. Their estrangement, which seems to have originated in visits made by Owens to the residence of French ostensibly to attend and restrain the latter while under the influence of liquor, culminated, according to the testimony of Owens, in their agreement to meet each other at the time and place at which the assault was committed and, impliedly at least, to settle their difficulty, if need be, by violence. French denied the alleged agreement and testified that he and Owens had been friends and

that their "friendship had continued for a considerable length of time."

It is no less manifest that the relation between the defendant and her husband was not cordial. He was addicted to drink; frequently they quarreled; and in the latter part of January she told him that he "would not be living in twenty-four hours." On Sunday evening they had another contentious wrangle, following which he was arrested and imprisoned. Sometime the next day she remitted the premium on his policy or policies of insurance payable in the event of accidental death, in which she was named as beneficiary. It was in evidence that the defendant suggested the direction in which her car should be driven on Monday evening, and that immediately after the assault she abandoned her husband with pitiless unconcern and hastened away in the car of her codefendant, whom she subsequently attempted to defend against the assault. There was evidence in contradiction and explanation, but the apparent inconsistencies were appropriately referred to the jury as the final arbiters of the facts.

The first five exceptions are addressed to parts of French's testimony which was offered for the purpose of showing disagreement and antagonism between the defendant and her husband. It is argued that this testimony was admitted in breach of the statutory provision that neither husband nor wife shall be competent to give evidence against the other; but proof of an assault is an exception to the general rule. C. S., 1802; *S. v. Davidson,* 77 N. C., 522. In *S. v. Alderman,* 182 N. C., 917, this Court approved the following statement taken from Wharton's Criminal Evidence: "In all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other. Thus, the husband may be a witness against the wife when she is prosecuted for assaulting him." The evidence was competent as tending to disclose the motive, purpose, and extent of the conspiracy.

The sixth exception refers to this incident: In the Greensboro *Daily News* of 29 July appeared an article entitled, "Two other charges against Bert Owens." The defendant asked leave to inquire of the jury whether any of them had read the article. She offered neither an affidavit nor evidence of any kind as a basis for the motion and the court in the exercise of its discretion wisely declined to stay the trial and embark upon the proposed exploration. The defendant was not deprived of her right to have the question investigated upon a motion to set aside the verdict. *Banks v. Mfg. Co.,* 108 N. C., 282; *S. v. Jackson,* 112 N. C., 851.

We see no satisfactory reason for sustaining the exceptions to French's testimony in regard to the policies of insurance and the payment of

the premium. The contents of the policies were entirely collateral to the assault charged in the indictment and were therefore open to parol proof. *S. v. Ferguson,* 107 N. C., 846; *S. v. Surles,* 117 N. C., 721; *S. v. Sharp,* 125 N. C., 631; *S. v. Hayes,* 138 N. C., 660; *S. v. Neville,* 157 N. C., 591. Besides, the objection is made harmless and the discussion academic in view of the defendant's admission that she knew the policies had been issued and that she paid the premium with her husband's money. Equally competent and material was evidence offered to show the defendant's failure to visit her husband after he had entered the hospital, the agitated "arguments" in which they had often engaged, and the defendant's inclination to "go off and stay out all night."

The remaining exceptions are formal. The case was carefully tried; no competent evidence was excluded to the prejudice of the defendant; the law was accurately applied. We find

No error.

STATE v. A. H. GOSSETT.

(Filed 7 December, 1932.)

Husband and Wife A a: C c — Resumption of conjugal relationship ordinarily rescinds deed of separation.

Where the husband and wife duly execute a deed of separation stipulating that the parties had agreed to live separate and apart from each other for the remainder of their lives, and thereafter the husband visits the wife on several occasions and renews the conjugal relationship on each visit the deed of separation is rescinded by the acts of the parties themselves, and the deed of separation is no defense to a prosecution of the husband for abandonment and nonsupport of the wife.

CRIMINAL ACTION, before *Shaw, Emergency Judge,* at July Term, 1932, of GUILFORD.

The defendant was indicted for abandonment and nonsupport of his wife. At the trial in the Superior Court he pleaded not guilty. The wife of defendant testified that they were married in 1927 and lived together until 30 January, 1932. She said: "Mr. Gossett was out at another house with another girl. I saw him when he came out with the girl and got in the car. He came home and of course he was mad with me, and we could not agree for three weeks after that, and he asked me to give him separation papers. In fact, he said he was not ever going to live with me any more . . . and I might as well give him separation papers, and I asked him just what would become of me and

the baby, and he said he would take care of us." The State's witness further testified that the defendant came after her and took her to the office of an attorney in Greensboro. After the separation agreement was completed it was submitted to Mrs. Gossett and she said: "I started reading mine, and I was crying, of course, and I got down to something about some kind of support. I really do not understand the papers."

After the agreement was signed the wife sold her living-room suit for $10.00 and used the money to pay house rent. At the time of signing the defendant gave his wife $2.00, and afterwards bought groceries amounting to $2.25. He also gave her $4.00 with which to buy a pair of shoes. The separation agreement was dated 30 January, 1932, and recites the marriage and the birth of a child named Harold Gossett, who was then four years of age, and continues as follows: "Whereas, the parties hereto have mutually agreed upon an immediate separation and do hereby agree to live separate and apart during the remainder of their lives, being moved so to do for adequate reasons and not for mere volition or caprice, but because it is essential to their health and happiness as aforesaid," etc. Each party released the other from all interest in real or personal property, and the mother was to have the care, custody and control of the child, and the father was to have the privilege of visiting the child. The separation agreement was duly executed as provided by law.

The wife testified that after the separation agreement was signed that the defendant, her husband, visited her and had sexual intercourse with her on the occasion of each visit. She said: "I did that because I knew if I did not submit to him he would not come back and he would not give me anything." There was further evidence that the wife was a woman of good character, and that neighbors and friends had contributed to her support, as she was destitute. The warrant was issued on 22 February, 1932. At the trial the defendant relied upon the separation agreement as a defense to the crime charged. There was a verdict of guilty, and from judgment pronounced thereon, sentencing the defendant to the roads for a period of twelve months, he appealed.

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

A. C. Davis and Shelley B. Caveness for defendant.

BROGDEN, J. If a separation agreement is duly executed by a husband and wife, and thereafter the husband visits the wife from time to time, and upon each visit resumes the conjugal relationship, does such conduct invalidate the agreement?

Separation agreements, while not favored by our law, have been generally upheld when properly executed. The general principle governing the validity of such agreements, is thus expressed in *Taylor v. Taylor,* 197 N. C., 197, 148 S. E., 174: "It seems to be unquestioned that a separation agreement must be untainted by fraud, must be in all respects fair, reasonable and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties." Moreover, the effect of the resumption of the conjugal relationship between the parties after an agreement has been duly executed, has been discussed in several decisions, notably: *Smith v. King,* 107 N. C., 273, 12 S. E., 57; *Archbell v. Archbell,* 158 N. C., 408, 74 S. E., 327; *Moore v. Moore,* 185 N. C., 332, 117 S. E., 12; *S. v. McKay,* 202 N. C., 470, 163 S. E., 586.

In the *Smith case, supra,* it was said: "The law, if it recognizes, does not favor, articles of separation, and will not so construe them as to be valid after the parties have themselves canceled the agreement to separate by cohabiting together, unless it appear in the deed plainly that such separate support is to be continued, notwithstanding any future reconciliation and cohabitation." In the *Archbell case* the Court declared: "It is further established that if the parties resume the conjugal relations the agreement will be rescinded." The same general assertion appears in the *Moore case* in these words: "We need not discuss this proposition, however, for it has been definitely decided that if the parties resume the conjugal relation the agreement is thereby rescinded."

The heart of the separation contract is contained in the declaration therein: "And do hereby agree to live separate and apart during the remainder of our lives." Notwithstanding, the defendant continued to visit the wife, to contribute pittances to her support, and upon each visit, to resume sexual relationship. The trial judge, upon this aspect of the case, charged the jury as follows: "The court instructs you, gentlemen of the jury, that if the defendant did that, if after this deed of separation was entered into and before this warrant was sworn out, if he came back to see his wife and on each occasion had sexual intercourse with her, as testified by his wife, then the court instructs you, gentlemen of the jury, that this deed of separation became of no validity at all. When a husband and wife enter into a deed of separation the policy of the law is that they are to live separate, that they are not to keep up the sexual relation and continue that, but that they are to live separate and apart, and if after the deed of separation is entered into a man goes to see his wife and child, and every time he goes to see her he has sexual intercourse with her, the deed of separation is of no

validity at all, it becomes set aside, and the court instructs you, if you find the facts to be true, that this man visited his wife and child after this deed of separation was entered into and before this indictment or warrant was taken out, if you find that to be true, that he came to see her, and that every time he came to see her they had sexual intercourse, then the court instructs you to disregard entirely the evidence about the deed of separation, because, if that would be true, the parties themselves would disregard it and cannot expect the court to regard it if they did not regard it, and the obligations assumed in the contract would all be released from the parties and the rights of the husband and wife and the duties and obligations would be reimposed upon the parties."

The defendant assigns the foregoing instruction for error, contending that the law therein contained was stated too broadly, for that it has never been held that the mere resumption of sexual relation is sufficient to invalidate a deed of separation. There is ample support in the books justifying the defendant's exception, but this Court is constrained to uphold the view of the law so expressed by the trial judge; otherwise, the separation agreement would degenerate into a mere cloak or device by means of which the husband would escape the responsibilities imposed by the marital status and yet be free to partake of such privileges as he chose to enjoy. Manifestly it is not to be assumed that the law would protect the integrity of the agreement and yet thereby sanction and approve, for all practical purposes, illicit intercourse and promiscuous assignation.

The separation agreement constituted the sole defense to the crime charged in the warrant, and it necessarily follows that after the agreement has been treated by the parties as a "mere scrap of paper" and set at naught by their conduct, then it no longer avails.

No error.

UNAKA AND CITY NATIONAL BANK OF JOHNSTON CITY, ET AL., V. JOHN P. LEWIS ET AL.

(Filed 7 December, 1932.)

Attachment H b—Court has discretionary power to allow intervener to claim property while it is still in custodia legis.

Where the plaintiff sues the defendant for debt, asks that a deed be set aside as fraudulent, and attaches certain personal property, and both parties appeal from the judgment: *Held*, the trial court has the power if not as a matter of right, then as a matter in his discretion, to allow a claimant of certain of the personal property to intervene at the next

succeeding term of the court after affirmance of the judgment on appeal, the personal property claimed still being *in custodia legis*, and the judgment that the personal property claimed by the intervener was the property of the defendant may not be pleaded as *res judicata* in bar of the intervener's claim. C. S., 460, 840.

APPEAL by plaintiff from *Schenck, J.*, at June Special Term, 1932, of WATAUGA.

Civil action for debts, and to have deed set aside as fraudulent, with ancillary remedy of attachment.

Intervention by J. C. Donnelly who set up title to a part of the property attached, to wit, the "Major Donnelly horse."

From a verdict and judgment in favor of the intervener, plaintiff appeals, assigning errors.

T. C. Bowie for plaintiffs.
Ervin & Ervin for intervener.

STACY, C. J. Plaintiff sued the defendants, John P. Lewis and Madge M. Lewis, for debt, asked that a deed be set aside as fraudulent, and attached certain personal property including the "Major Donnelly horse." It was contended by Mrs. Lewis on the trial that she held said horse only as bailee. Both sides appealed from the verdict and judgment entered at the September Term, 1930, Watauga Superior Court, which was affirmed 27 June, 1931. *Bank v. Lewis,* 201 N. C., 148, 159 S. E., 312.

At the next succeeding term following affirmance of the judgment on appeal, J. C. Donnelly was allowed to come in as intervener, over objection of plaintiff, and set up title to the "Major Donnelly horse," which was still in the possession of the sheriff or in *custodia legis. Glenn v. Bank,* 84 N. C., 631. This was a matter resting in the sound discretion of the trial court, if it be conceded the intervener was not entitled to come in as a matter of right. C. S., 460 and 840; *Sanders v. May,* 173 N. C., 47, 91 S. E., 526; *Washington v. Hodges,* 200 N. C., 364, 15 S. E., 626.

Speaking to the subject in *Dodson v. Bush,* 4 N. C., 18, the Court said: "No time is limited by the act of Assembly when the party claiming the property attached shall interplead. We think he may do so on the return of the writ of attachment, or at any time afterwards, so that it is done before final judgment in the cause." This was quoted with approval in *Evans v. Transportation Co.,* 50 N. C., 332.

It follows, therefore, as the court had the discretion to allow the intervener to come in and set up his claim to a part of the property

attached, which was exercised in intervener's favor, the former judgment in the action could not be pleaded by the plaintiff as *res judicata.* 34 C. J., 1024. The case of *Ladany v. Assad,* 91 Conn., 316, 99 Atl., 762, cited and relied upon by plaintiff, is not controlling, for there the claimant undertook to assert his right in an independent action rather than by intervention in the original cause as the intervener has done here.

As no reversible error has been made to appear, the verdict and judgment will be upheld.

No error.

STATE v. CLAY SHEPHERD.

(Filed 7 December, 1932.)

1. Criminal Law I j—Directed verdict on conflicting evidence is error.

Where in a criminal prosecution the evidence is conflicting or equivocal a charge directing a verdict against the defendant is error.

2. Criminal Law L e.

Where a new trial is granted on appeal for error in the charge an exception to the form of the judgment need not be considered.

APPEAL by defendant from *Moore, J.,* at March Term, 1932, of WILKES.

Criminal prosecution tried upon an indictment charging the defendant with forcible trespass.

The prosecuting witness and the father of the defendant are adjoining landowners, the true dividing line between the properties being in dispute. The prosecuting witness set a number of posts preparatory to erecting a fence along the dividing line. These were removed by the defendant, at the instance of his father, under a claim of right—both parties claiming to be in the rightful possession of the property where the posts were erected.

The court charged the jury that if they believed the evidence to return a verdict of guilty. Exception.

Verdict: Guilty.

Judgment: "That defendant pay a fine of $25.00 and costs, and pay R. F. Brown $5.00 for damage to the fence."

Defendant appeals, assigning errors.

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

A. H. Casey for defendant.

STACY, C. J. It is conceded by the Attorney-General that error was committed in directing a verdict on conflicting or equivocal evidence. *S. v. Singleton,* 183 N. C., 738, 110 S. E., 846; *S. v. Estes,* 185 N. C., 752, 117 S. E., 581. Belief in the defendant's guilt is not enough. This must be established beyond a reasonable doubt. *S. v. Boswell,* 194 N. C., 260, 139 S. E., 374.

The defendant also excepts to the form of the judgment, but as a new trial must be awarded for error in the charge, which necessarily vacates the judgment, consideration of this exception is omitted.

New trial.

STATE EX REL. BEATRICE PARKS, v. A. G. SEAGRAVES.

(Filed 7 December, 1932.)

Appeal and Error E a—Judgment is necessary part of record proper.

It is the duty of the appellant to see that the record is properly made up and transmitted, and it is required that the pleadings, the issues and the judgment be a part of the transcript in all cases, and where the record does not contain these necessary parts the appeal will be dismissed.

APPEAL by defendant from *Moore, J.,* at May Term, 1932, of WILKES.

Proceeding in bastardy (civil action, *S. v. Liles,* 134 N. C., 735, 47 S. E., 750).

From "judgment signed," the defendant appeals.

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

J. H. Whicker for defendant.

STACY, C. J. The record recites "judgment signed," but we are not advised as to its contents. The proceeding was denominated a criminal action in the justice's court, and a civil action in the Superior Court. In the absence of the judgment, we cannot know whether it purports to be one rendered in a civil action or in a criminal prosecution.

Rule 19, sec. 1, provides that "the pleadings on which the case is tried, the issues, and the judgment appealed from shall be a part of the transcript in all cases." The judgment of the Superior Court is not in the record. *Everett v. Fair Association,* 202 N. C., 838, 162 S. E., 896. It is the uniform practice to dismiss the appeal for failure to send up necessary parts of the record proper. *Riggan v. Harrison, ante,* 191; *Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126. It is the duty of appellant to see that the record is properly made up and transmitted. *S. v. Frizell,* 111 N. C., 722, 16 S. E., 409.

Appeal dismissed.

STATE v. JOE STAFFORD.

(Filed 7 December, 1932.)

Criminal Law L a—Motion to reinstate appeal will not be allowed where appeal, although dismissed, was considered on its merits.

Where an appeal, dismissed for a defect in the record, is considered on its merits notwithstanding the defect, the prisoner's motion to reinstate his appeal will be disallowed, since reinstatement could serve no useful purpose.

MOTION by prisoner to reinstate appeal, to the end that record may be completed and case considered on its merits.

Walter G. Sheppard and John D. Langston for movant.

STACY, C. J. Even if it were permissible for the prisoner to supply the defect in the record by filing affidavit of insolvency here, which it is not (*S. v. Parish,* 151 N. C., 659, 65 S. E., 762), or if we should regard the present motion as an application for writ of *certiorari* to bring up the appeal, it would avail the prisoner nothing, for, as previously stated, the case was considered on its merits, notwithstanding the defects in the record, and no reversible error discovered.

The reasons assigned by counsel for the condition of the record are quite sufficient to acquit them of any neglect, but it would serve no useful purpose to redocket the case only to affirm it again.

Motion disallowed.

MRS. R. A. CHILD v. GURNEY P. HOOD, COMMISSIONER OF BANKS OF THE STATE OF NORTH CAROLINA, EX REL. FIRST BANK AND TRUST COMPANY OF HENDERSONVILLE, N. C.

(Filed 7 December, 1932.)

Banks and Banking H d—Claim against insolvent bank must be first presented to Commissioner of Banks before he may be sued thereon.

In order to bring an action against the Commissioner of Banks to recover on a claim against an insolvent bank whose assets have been taken over by him, the plaintiff must allege that the claim had been presented to the Commissioner and that he had refused payment. N. C. Code, 218(c).

CHILD *v.* HOOD, COMR. OF BANKS.

APPEAL by defendant from *Schenck, J.*, at May Civil Term, 1932, of HENDERSON. Reversed.

This is an action for actionable fraud instituted by plaintiff against the First Bank and Trust Company of Hendersonville, N. C., now being liquidated by Gurney P. Hood, Commissioner of Banks, alleging damage. The plaintiff contends that she was defrauded out of $3,476.70 by the First Bank and Trust Company of Hendersonville, N. C., through its cashier J. Mack Rhodes. She also alleges "That the said sum of $3,476.70 so wrongfully and fraudulently obtained from the petitioner as hereinbefore alleged augmented the cash assets of the said First Bank and Trust Company, in the said sum of $3,476.70, and that at all times from 13 September, 1928, to 19 November, 1930, the said bank had on hand cash assets largely in excess of said sum and that the respondent Commissioner and his liquidating agent received from the said bank cash largely in excess of the sum sued for in this action."

Gurney P. Hood, Commissioner of Banks of the State of North Carolina, has been duly made a party defendant, in accordance with the statute. The defendant demurred to the complaint on several grounds, the one we are now considering is: "The defendant demurs *ore tenus* to the complaint, for that said complaint fails to state any cause of action, in that it appears: That the plaintiff failed to allege that the claimant, Mrs. R. A. Child, has presented her claim to the liquidating agent, or Commissioner of Banks, and that same has been rejected, as required by section 218(c), subsections (10) and (11), Consolidated Statutes: That as a prerequisite to the right to maintain this action, the plaintiff was required to present her claim to the liquidating agent."

Sheldon M. Roper, Lincolnton, N. C., and C. D. Weeks, Hendersonville, N. C., for plaintiff.

Redden & Redden for defendant.

PER CURIAM. In *Buncombe County v. Hood, Commissioner of Banks*, 202 N. C., at p. 795, speaking to the subject, is the following: "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(c), until such claim has first been presented to said Commissioner and rejected by him." The decision, *supra*, was filed 15 June, 1932, and the demurrer in the present action was heard at May Civil Term, 1932, of Henderson

County Superior Court. The learned judge who decided the present action did so before the above decision was rendered. On authority of the above decision, the demurrer in the present action is sustained. The judgment overruling the demurrer in the court below is

Reversed.

W. D. KENNEDY, ADMINISTRATOR OF CHARLES CRAIGE KENNEDY, v. R. P. LOOKADOO AND EVANS CONTRACTING COMPANY.

(Filed 7 December, 1932.)

Highways B n: Master and Servant D c—Negligence of truck driver was not established and question of whether he was employee is immaterial.

Where in an action for wrongful death the evidence is to the effect that the plaintiff's intestate, a child about four years old, ran suddenly into a public street and into the side of a truck and was struck and killed by its rear wheels, and that the truck was being driven in a careful manner at a lawful rate of speed, and that the truck driver could not have seen the child in the exercise of due care, the action will be dismissed on motion of nonsuit, the plaintiff having failed to establish negligence, and the question of whether the truck driver was an employee of his codefendant or was an independent contractor need not be considered.

APPEAL by plaintiff from *MacRae, Special Judge,* at March Term, 1932, of ROWAN. Affirmed.

This is an action to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of the defendant, R. P. Lookadoo, an employee of the defendant, Evans Contracting Company, while engaged in the performance of the duties of his employment.

From judgment dismissing the action as of nonsuit, at the close of the evidence for the plaintiff, plaintiff appealed to the Supreme Court.

R. Lee Wright for plaintiff.
Quinn, Hamrick & Harris for defendant, R. P. Lookadoo.
Rendleman & Rendleman for defendant, Evans Contracting Company.

PER CURIAM. All the evidence at the trial of this action showed that plaintiff's intestate, a child about four years of age, ran into a public street in the city of Salisbury, N. C., as a truck heavily loaded with stone and cement, and driven by the defendant, R. P. Lookadoo, was passing. The child ran into the truck, and was injured by the rear wheels which struck and passed over him. His death resulted almost immediately

from his injuries. There was no evidence tending to show that the child was injured and killed by the negligence of the defendant, R. P. Lookadoo. On the contrary the evidence showed that the defendant, R. P. Lookadoo, was driving the truck slowly and in a lawful manner, and that he did not see, and because another truck had stopped immediately ahead of him, making it necessary for him to pass around this truck, could not by the exercise of reasonable care have seen the child as he ran suddenly from the sidewalk into the street.

As there was no evidence from which the jury could have found that plaintiff's intestate was killed by the negligence of the defendant, R. P. Lookadoo, it is immaterial whether he was an employee of his codefendant, Evans Contracting Company, as alleged by the plaintiff, or an independent contractor as alleged by said company.

There was no error in the judgment dismissing the action for the reason that plaintiff failed to offer at the trial any evidence tending to sustain the allegations which constitute his cause of action. The judgment is

Affirmed.

W. H. HUGHES ET AL. v. M. G. TEASTER ET AL.

(Filed 7 December, 1932.)

Cancellation of Instruments B b—Plaintiff must show his interest in land and right to sue in order to maintain action.

Semble: The county commissioners are necessary parties to declare a deed to the county void, and where there are no allegations in the complaint showing the right of the plaintiffs to bring the suit, or that they were taxpayers or residents of the county or have an interest authorizing them to bring suit, the case will be dismissed. In this case there was no allegation of a demand upon and refusal of the commissioners to bring suit. *Waddill v. Masten*, 172 N. C., 582.

APPEAL by plaintiffs from *Moore, J.*, at April Term, 1932, of AVERY.

Civil action to declare void deed made to board of commissioners of Avery County for county-home site.

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

Watson & Fouts for plaintiffs.
Ervin & Ervin for defendants.

STACY, C. J. The purpose of the suit being to divest the county of its property, or to set aside a conveyance already made to the board of

commissioners, it would seem that the grantee in said deed is a necessary party to a complete determination of the rights of those claiming an interest therein. *Le Duc v. Brandt,* 110 N. C., 289, 14 S. E., 778. Avery County is not a party to the action.

It does not appear from the complaint who the plaintiffs are or what interest they may have in the litigation. It is not alleged that they are taxpayers or residents of Avery County. This is gleaned, if at all, from the title of the cause. 44 C. J., 1430.

It not appearing that the plaintiffs have such interest as to authorize them to bring the action, or that they are in position to do so, the motion to dismiss was properly allowed. *Hines v. Vann,* 118 N. C., 3, 23 S. E., 932.

There is no allegation of demand and refusal on the part of the county commissioners to bring suit, as was the case in *Waddill v. Masten,* 172 N. C., 582, 90 S. E., 694.

Affirmed.

E. ST. CLAIR THOMPSON v. THE WHITEHALL COMPANY, J. C. PITMAN AND S. D. McKINNEY.

(Filed 14 December, 1932.)

Taxation H g—Owner may redeem property within one year by paying taxes with interest and may rely on sheriff's statement of amount due.

Under the provisions of 2 C. S., 8038, the owner or one having an interest in the title to lands which have been sold by the sheriff for taxes may redeem the lands thus sold within one year from the date of sale upon paying to the sheriff for the use of the purchaser the sum mentioned in the certificate with interest at the rate of 20 per cent per annum, etc., and where the owner or his agent inquires of the sheriff, or his deputy in charge, the amount to be paid for the redemption, such owner or his agent has a right to regard the amount so stated as correct, and upon the payment thereof within the time stated the tax lien will cease and the deed made to the purchaser will be avoided and an error of a few cents made by the sheriff in fixing the amount will not be held fatal under the doctrine of *de minimis non curat lex.*

APPEAL by plaintiff from *McElroy, J.,* at July Term, 1932, of MITCHELL. No error.

This is an action brought by plaintiff against defendants for the possession of a tract of land (describing same) containing 104 acres on the waters of Crabtree Creek, in Mitchell County, North Carolina.

The prayer is as follows: "Wherefore plaintiff prays judgment against the defendants for the sum of twenty-five hundred dollars

damages on account of defendants' unlawful and wrongful entry and trespass upon said lands and for feldspar and other minerals removed from said lands of the plaintiff herein; and for a restraining order restraining and enjoining the defendants from trespassing upon said lands and from mining and removing the minerals and feldspar therefrom; and for a judgment declaring the plaintiff the owner of said lands described in the first paragraph hereof; and for the cost of said action; and for such other and further relief as to the court may seem right and just."

An order was made as follows: "This cause coming on to be heard and being heard upon the defendants' motion to dissolve the temporary restraining order heretofore issued in this cause, and being heard, it is ordered, adjudged and decreed by the court that the said restraining order be dissolved upon the defendants executing a bond payable to the plaintiff in the sum of five thousand ($5,000) dollars conditioned that the defendants pay the plaintiff such damages as the plaintiff may recover of the defendants in this action," etc.

The defendant, the Whitehall Company, in its answer denied the material allegations of the complaint and claimed fee-simple title to the land in controversy, more accurately describing same under recent survey. J. C. Pitman and S. D. McKinney disclaimed any interest in the land in controversy.

The defendants' prayer: "Wherefore, the defendants pray the court that the Whitehall Company be declared by judgment to be the owners of the lands described in the answer, and that the plaintiff own no interest therein; and further, that the plaintiff's pretended title be declared void and removed as cloud of title upon the defendant Whitehall Company's land, as well as for the costs in this cause incurred; together with such other and further relief as to the court may seem equitable and just."

"By consent of the parties both plaintiff and defendants and their counsel, it is agreed that a trial by jury shall be waived by the parties, and that the cause shall be submitted to the presiding judge to find the facts and declare the law and the rights of the parties upon such issues as the court deems material in the ascertaining of the rights of the parties."

The trial judge found all the issues in favor of defendant, the Whitehall Company. The court below rendered judgment on the verdict. The plaintiff made numerous exceptions and assignments of error and appealed to the Supreme Court.

Ervin & Ervin for plaintiff.
Watson & Fouts for defendants.

CLARKSON, J. The land in controversy was owned by one J. L. Barnes, who left Mitchell County in 1901 and from 1902 until 1927 it was returned for taxes by his agent each year. On 3 June, 1927, J. L. Barnes conveyed the property in controversy to the Whitehall Company, the defendant, for the sum of $10,000. On 7 October, 1918, L. F. Burleson, sheriff and tax collector of Mitchell County, North Carolina, sold the property in controversy for taxes for the year 1917, at which time the property was bid in for E. St. Clair Thompson, the plaintiff.

The only legal controversy is over the sale for the taxes of 1917. Many issues were set forth and answered by the trial judge, by consent, a jury trial being waived.

One of the defendants', the Whitehall Company's, defense in this action is that the tax was paid by J. L. Barnes, or his agent, within the time allowed for the redemption of the property from sale. The tax receipt shows that the 1917 tax was paid on 7 November, 1918, precisely thirty days after the property had been sold for taxes.

2 C. S., 1919, sec. 8038, provides: "The owner or occupant of any land sold for taxes, or any person having a lien thereon, or any interest or estate therein, may redeem the same at any time within one year after the day of such sale, by paying the sheriff for the use of such purchaser, his heirs or assigns, the sum mentioned in his certificate, with interest thereon at the rate of twenty per cent per annum," etc.

The receipt is as follows: "Grassy Creek Township, Mitchell County, North Carolina, No. 561. 7 November, 1918. Received of J. L. Barnes his taxes for the year 1917, as follows: For State and pension tax $1.20, poll tax ....., county tax $1.42, school tax .81c, road tax $2.03, courthouse tax .49c, special school tax .61c, cost .70c, total $7.18—L. E. Burleson, per C. C. G.—D. S." The "C. C. G.—D. S." is C. C. Garland, deputy sheriff.

Garland testified, in part: "That is my signature on the receipt and the number corresponds with the stub. I tore this receipt out of this book and gave it to him. I turned over the money I collected to the sheriff. It was settled by these stubs." Defendants offered in evidence the tax book, and stub from which receipt was torn—showing No. 561 on the stub and No. 561 on the receipt.

A letter was written from Bakersville, Mitchell County, North Carolina, dated 8 January, 1920, by L. F. Burleson, ex-sheriff, to D. E. Hudgins, attorney, Marion, N. C., which is in part: "I have discovered that there was an error in the tax of Mr. Barnes, the land was sold when the tax had been paid." There was other evidence sustaining defendant, the Whitehall Company's, contention.

The issues on this aspect, which were answered by the trial court "yes," were as follows: "Did J. L. Barnes, the owner of the lands in controversy, within one year from the date of the sale thereof pay or cause to be paid to the sheriff of Mitchell County for the use of the purchaser or his assignees the sum mentioned in the certificate of sale, with interest thereon at the rate prescribed by statute, together with all costs and expenditures? Answer: Yes. Did J. L. Barnes pay or cause to be paid the amount of the tax on the lands in controversy for the year 1917, within twelve months from the day of the sale of the said property by the tax collector of Mitchell County, as represented to be due by said tax collector, together with costs and interest? Answer: Yes."

There is no necessity to consider other issues, these issues are sufficient to sustain the judgment of the court below. *Sams v. Cochran,* 188 N. C., at p. 734.

We think there was abundant competent evidence for the court to answer the above issues "Yes." The cost collected by the deputy sheriff Garland was 70c, it was contended that it should have been 12c more. Be that as it may, the evidence is that the land was sold in 1927 to defendants for $10,000—*de minimis non curat lex.* The deputy seemed to have given a receipt in full. We are not now concerned in this action with plaintiff's loss in returning and paying tax on this land after he had acquired a void deed. The sheriff, in January, 1920, after his deputy had been paid the back tax and cost, etc., wrote attorney Hudgins in regard to the error. It goes without saying that plaintiff knew this contention and in returning the land under his alleged tax title took chances.

In *Beck v. Meroney,* 135 N. C., at p. 534, is the following: "If the taxes, therefore, and the costs and interest had been paid by the plaintiff, tax debtor, within the year allowed for redemption, then the deed, being valid on its face, constituted a cloud on the plaintiff's title. When land is sold for taxes in this State the purchaser, during the time allowed for redemption, has a statutory lien upon the land for the taxes, costs and interest; but when the taxes and charges are paid within the year allowed for redemption the lien is discharged by the payment. The agent of the plaintiff approached the defendants for the purpose of redeeming the land and upon their refusal to receive payment he paid the amount to the sheriff of the county, who himself made out the amount estimated to be due. Because the sheriff made a mistake in the calculation of about fifty cents, the defendants insist that redemption did not follow the payment of the amount due by the sheriff's calculation. There can be nothing in that contention in reason, justice, or law. A taxpayer in this State has the right to rely, in redeeming his land

from sale for taxes upon the statement of the tax collector, the officer of the State for the collection of its revenue."

In the present action the taxpayer relied on the deputy sheriff, who had the tax book and had all the indicia of office, which Barnes' agent relied on and paid the back tax and cost, etc. See *Harnett County v. Reardon, ante,* at p. 272.

There was some discrepancy in the acreage of the land in controversy, but it is correctly set forth in the defendant's, the Whitehall Company's, answer and in the judgment of the court below. In the judgment of the court below, we find

No error.

CAROLINA COACH COMPANY v. BESSIE BEGNELL, AND E. G. BELVIN, SHERIFF OF DURHAM COUNTY.

(Filed 14 December, 1932.)

1. Corporations G d—Absolute sale of personal property by corporation is not required to be in writing or registered.

There is no statutory requirement that a sale or conveyance of personal property by a corporation shall be in writing or shall be registered for any purpose when such sale is absolute and delivery of the property is made to the purchaser, C. S., 3311, applying only to sales of real estate and transfers of personal property by chattel mortgage or conditional sale.

2. Same—Transfer of personal property by corporation held not void as to torts under the facts of this case.

Construing N. C. Code of 1927, 1138 with C. S., 3309, 3311, the amendments to N. C. Code, 1138, not applying in the instant case, it is held that an absolute sale by a corporation of its personal property, accompanied by delivery to the purchaser, is not void as to a judgment creditor of the corporation on a judgment obtained against the corporation for a tort committed before the transfer, when the sale was not made with the purpose of hindering, defrauding, etc., the creditors of the corporation, the provisions of the statute not applying to such transfer, and upon a verdict of a jury in his favor on the question of fraud the purchaser of the property from the corporation is entitled to an order restraining the judgment creditor from issuing execution on the property in his hands.

APPEAL by defendants from *Cowper, Special Judge,* at May Special Term, 1932, of WAKE. No error.

This is an action to enjoin the defendant, E. G. Belvin, sheriff of Durham County, from levying on and selling certain personal property now in the possession of and owned by the plaintiff, Carolina Coach Company, under an execution in his hands, issued by the clerk of the Superior Court of Durham County. The execution was issued at the

request of the defendant, Bessie Begnell, to satisfy a judgment in favor of the said Bessie Begnell and against the Safety Coach Lines, Incorporated. This judgment is duly docketed in the office of the clerk of the Superior Court, and has not been paid or satisfied.

The facts as stipulated by the parties and as found by the jury, at the trial, are as follows:

1. On 19 March, 1925, the defendant, Bessie Begnell, instituted an action in the Superior Court of Durham County against the Safety Coach Lines, Incorporated, a corporation organized and doing business under the laws of the State of North Carolina, to recover damages sustained by the said Bessie Begnell, and resulting from personal injuries caused by the negligence of the Safety Coach Lines, Incorporated, on 23 October, 1924.

2. While said action was pending in the Superior Court of Durham County, to wit: on 24 November, 1925, the defendant therein, Safety Coach Lines, Incorporated, for and in consideration of the sum of $80,000, paid to it in cash by the Carolina Coach Company, sold, transferred and delivered to said Carolina Coach Company, all its property, except certain accounts receivable. The Safety Coach Company duly executed a bill of sale, dated 24 November, 1925, by which the said company sold and transferred the personal property described therein to the Carolina Coach Company. This bill of sale was duly probated and registered in the office of the register of deeds of Wake County, on 29 December, 1925. Among other articles of personal property described in the bill of sale, are certain buses theretofore used by the Safety Coach Lines, Incorporated, in carrying on its business. These buses were delivered to the plaintiff, Carolina Coach Company, and are now in its possession, and used by it in carrying on its business.

3. At the date of the sale, transfer and delivery of the property described in the bill of sale, by the Safety Coach Lines, Incorporated, to the plaintiff, Carolina Coach Company, the Safety Coach Lines, Incorporated, was solvent. The said sale was not made by the Safety Coach Lines, Incorporated, with intent to hinder, delay, or defraud the defendant, Bessie Begnell, or other creditors of the Safety Coach Lines, Incorporated. The sum of $80,000 paid by the Carolina Coach Company to the Safety Coach Lines, Incorporated, as the purchase price for said property, was its fair market value. The plaintiff, Carolina Coach Company, knew at the time it paid the said purchase price for said property to the Safety Coach Lines, Incorporated, that the action instituted by the defendant, Bessie Begnell against the Safety Coach Lines, Incorporated, was then pending in the Superior Court of Durham County. Since the dissolution of the Safety Coach Lines, In-

corporated, as a corporation, on 16 August, 1926, the sum of $80,000 received by it from the Carolina Coach Company, as the purchase price for its property, has been distributed among its creditors and stockholders. No part of said sum was reserved for or applied as a payment on the judgment which Bessie Begnell recovered against the Safety Coach Lines, Incorporated, in the action in the Superior Court of Durham County.

4. On 20 May, 1926, the Carolina Coach Company was made a party defendant in the action entitled "Bessie Begnell *v.* Safety Coach Lines, Incorporated," pending in the Superior Court of Durham County, on the motion of the said Bessie Begnell, plaintiff therein. The demurrer of the Carolina Coach Company was subsequently sustained, and the action dismissed as to the said Carolina Coach Company. See 198 N. C., 688, 153 S. E., 264.

5. The action entitled "Bessie Begnell *v.* Safety Coach Lines, Incorporated," was tried at September Term, 1929, of the Superior Court of Durham County. This trial resulted in a judgment in favor of Bessie Begnell and against the Safety Coach Lines, Incorporated, for the sum of $4,400, with interest and costs. Executions on this judgment have been returned unsatisfied. An execution issued on said judgment, dated 18 September, 1930, is now in the hands of the defendant, E. G. Belvin, sheriff of Durham County. Under this execution, the said defendant was about to levy on and sell the buses described in the bill of sale from Safety Coach Lines, Incorporated, to the plaintiff, Carolina Coach Company, at the request of the defendant, Bessie Begnell, on their contention that said bill of sale is void, and that the buses described therein, although now in the possession of the plaintiff, are the property of the Safety Coach Lines, Incorporated, and not the property of the plaintiff, Carolina Coach Company, and are therefore subject to sale under execution to satisfy the judgment in favor of Bessie Begnell and against the Safety Coach Lines, Incorporated.

From judgment enjoining the defendants from levying on and selling the property described in the bill of sale from Safety Coach Lines, Incorporated, to the Carolina Coach Company, or any part thereof, the defendants appealed to the Supreme Court.

Smith & Joyner for plaintiff.
Pou & Pou and Bryant & Jones for defendants.

CONNOR, J. The bill of sale under which the plaintiff, Carolina Coach Company, claims title to the buses now in its possession; and on which the defendant, E. G. Belvin, sheriff of Durham County, proposes to levy

as directed in the execution now in his hands, and issued at the request of the defendant, Bessie Begnell, to satisfy her judgment against the Safety Coach Lines, Incorporated, is not void, for the reason that said bill of sale was executed by the Safety Coach Lines, Incorporated, with intent to hinder, delay or defraud the said Bessie Begnell, or other creditors of the Safety Coach Lines, Incorporated. The jury by its answer to the third issue has negatived the contention of the defendants to that effect. There is no contention on this appeal that there was error at the trial with respect to the answer to the third issue.

The only question presented by this appeal is whether the bill of sale is void as to the defendant, Bessie Begnell, under the provisions of the statute in force at the date of said bill of sale. See N. C. Code of 1927, section 1138. The subsequent amendments to this statute are not applicable to the instant case. The statute involved in this action is in words as follows:

"Any corporation may convey lands, and other property which is transferable by deed, by deed sealed with the common seal and signed in its name by the president, a vice-president, presiding member or trustee, and two other members of the corporation, and attested by a witness, or by deed sealed with the common seal and signed in its name by the president, a vice-president, presiding member or trustee, and attested by the secretary or assistant secretary of the company.

But any conveyance of its property, whether absolutely or upon condition, executed by a corporation, is void as to torts committed by such corporation prior to the execution of said deed, if persons injured, or their representatives, commence proceedings or actions to enforce their claims against said corporation within sixty days after the registration of said deed as required by law."

It is provided by statute in this State that "no conveyance of land, or contract to convey, or lease of land for more than three years, shall be valid to pass any property as against creditors or purchasers for a valuable consideration, from the donor, bargainor, or lessor, but from the registration thereof within the county where the land lies." C. S., 3309.

There is no statute, however, in this State which requires that a sale and transfer, or conveyance, of personal property by a person or corporation, where such sale and transfer or conveyance is absolute, shall be in writing or shall be registered for any purpose.

It is provided by statute, however, that "no deed of trust, mortgage for real or personal estate shall be valid in law to pass any property as against creditors or purchasers for a valuable consideration, from the donor, bargainor or mortgagor, but from the registration of such deed

of trust or mortgage in the county where the land lies, or in case of personal estate, when the donor, bargainor, or mortgagor resides." C. S., 3311.

The statute involved in the instant case must be construed in connection with the foregoing statutes, from which it appears that a distinction is made in the law in this State, with respect to requirements for registration, between conveyances of personal property upon condition, as by deeds of trust or mortgages, and conveyances by bills of sale by which the title to such property passes absolutely. In the latter case, not only the title but the possession passes with the bill of sale, while in the former, ordinarily, only the title passes. Possession is usually retained by the grantor or mortgagor.

It is only where personal property is sold and transferred, or conveyed, by a corporation, upon condition, as by deed of trust or mortgage, that the conveyance is void as to torts committed by the corporation prior to such conveyance, where the person or persons injured by such torts commence proceedings or actions to enforce his or their claim against the corporation for damages resulting from such torts, within sixty days after the registration of the deed of trust or mortgage, or other conveyance upon condition, as required by law.

Where, as in the instant case, personal property is sold and transferred, or conveyed by a corporation, absolutely, and accompanied by delivery, the statute is not applicable, and for that reason the conveyance is not void under the provisions of the statute. The vendee or grantee acquires title to the property free from the claim or claims of creditors, whether such claims arise out of torts or out of contracts. The judgment in the instant case must be affirmed.

No error.

C. R. ALLMAN, ADMINISTRATOR OF THE ESTATE OF JOSEPH ALLMAN, JR., DECEASED, v. SOUTHERN RAILWAY COMPANY.

(Filed 14 December, 1932.)

1. Trial D a—

On a motion of nonsuit the evidence must be taken in the light most favorable to plaintiff.

2. Negligence D b—Proposed testimony held properly excluded as irrelevant.

In an action for actionable negligence testimony of an understanding between the injured person and another as to meeting each other at a time subsequent to the happening of the injury *is held* not relevant to the manner in which the injury occurred, and an exception to its exclusion is not sustained.

3. 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 what the excluded testimony would have been in order for the exception to be considered on appeal.

4. Railroads D c—Evidence held insufficient to overrule railroad's nonsuit in action for death of pedestrian killed on track.

Evidence disclosing that the body of the plaintiff's intestate was found on a straight track where it was crossed by a path, that the headlight on the train which struck the intestate was burning and could have been seen for some distance, and there is no evidence that the intestate was down on the track in a helpless condition and should have been seen by the engineer and his condition appreciated in time to have avoided the injury, the railroad company's motion as of nonsuit is properly sustained.

APPEAL by plaintiff from *McElroy, J.*, at March Term, 1932, of BURKE. Affirmed.

This was an action for actionable negligence brought by plaintiff against defendant alleging damage. Plaintiff's evidence was to the effect: Ben Carswell was the last person to see plaintiff's intestate, Joe Allman, Jr., alive, so far as the record discloses. On the night he was killed, Joe Allman, Jr., his sister Allie Bell Allman, his first cousin Elsie Walker, and Carswell left the home of Carswell at 12:30 or 1:00 a.m., on 20 April, 1931. Joe Allman, Jr., left the party, the others taking the road to take Elsie Walker home and he taking a customary path towards the culvert under a fill of defendant's railroad. After the path reached the railroad it went with the railroad some 300 or 400 yards and hit another road which led to Allman's home. It was nearer to go the path than the road.

Ben Carswell testified, in part: "After we took Elsie Walker home we came back on the railroad and headed up this way, facing west. It was about forty minutes from the time we last heard Joe's voice until we got back to the railroad where the path crossed the culvert. After we got back on the railroad from the Walker home we met a freight train about half way from where the path comes up to her house from the railroad and where the boy got killed. The train was traveling east. It is about 300 yards from this crossing to the culvert. We had traveled west about 150 yards with the track when we met the train. *The train had headlights.* When I first saw the train it was coming out of the cut about four or five hundred yards from me; *it was pretty light atmosphere; no fog to amount to anything.* Going towards Bridgewater the track curves to the left. *When I saw the train coming I stopped and got out of the way.* I did not see anything except

the telegraph posts, about 12 inches across, I suppose—some of them as large as a man's body—all the way up to the cut with the lights of the train shining on them. I did not see Joe Allman there. . . . At the point where I met the train, the fill was 15 or 20 feet high and got higher going west. I didn't pay any attention to how long the train was; it was going at pretty well full tilt at full speed. I would say it was going about thirty miles an hour. I saw Joe's body after the train passed lying in between the railroad tracks at the culvert—I saw him from three to five minutes after it passed. I was standing about 150 yards from where we found his body when the train passed; the train did not stop. His body was pretty much at the edge of the culvert about two rails from the path, where it come on the track. The path comes upon the railroad, crosses the culvert, comes up on one side and down on the other. After the train passed there was no light there and I couldn't tell much about his body except that it was cut in two. The body was lying in between the rails and the head lay out on the end of the ties on the north side going west. . . . From the point where the body was on the fill and culvert the track was straight about 250 yards looking west. . . . (The court) He can say whether he heard any. Answer: No sir, I didn't hear any bell or signal. . . . The grade is a gradual grade all the way from Bridgewater to the top of that Linwood Hill. I didn't count the cars on that train but I would say the train was three or four hundred yards long. . . . I never saw him alive after that, closer than a half mile from the track. . . . The public crossing is about four hundred yards or maybe more east of the culvert. . . . That cut to the west was where we first noticed the train and *we could see the headlights of the train shining down the track about four or five hundred yards;* we could see the telegraph poles on the opposite side where the light reflected around. After the train passed we walked on up the track until we found Joe's body."

Mull & Patton for plaintiff.
Ervin & Ervin for defendant.

PER CURIAM. 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 court below sustained the motion, and in this we can see no error. The evidence must be taken in the light most favorable to plaintiff. The exceptions and assignments of error to the exclusion of certain evidence, as follows, cannot be sustained: (1) In regard to Ben Carswell having an understanding that the deceased, Joe Allman, Jr., would meet him *near the culvert.* This throws no light on the controversy as to how

plaintiff's intestate was killed. (2) "If he had been standing on track could you have seen him?" was a question propounded to Carswell. (3) "Were you expecting anyone there at that time?" Question propounded to Carswell. Conceding, but not deciding, that the above questions were competent, the record does not disclose what the answers of the witness would have been, so that this Court could determine their relevancy, competency and materiality. *S. v. Brewer,* 202 N. C., at p. 193. There is no evidence sufficient to be submitted to the jury that the plaintiff's intestate was asleep or drunk on the track, or in a helpless condition on the track, or oblivious or otherwise insensible of danger. The plaintiff's intestate was not at a crossing. The headlight of defendant's engine was burning, throwing the light a far distance.

In *Davis v. R. R.,* 187 N. C., at p. 148, citing many authorities, speaking to the subject: "The decisions in this State have been insistent upon the principle that a pedestrian voluntarily using a live railroad track as a walkway for his own convenience is required at all time to look and to listen, and to take note of dangers that naturally threaten and which such action on his part would have disclosed, and if in breach of this duty and by reason of it he fails to avoid a train moving along the track and is run upon and killed or injured, his default will be imputed to him for contributory negligence and recovery is ordinarily barred." *Henry v. R. R., ante,* 277.

In *Denny v. Snow,* 199 N. C., at p. 774, it is written: "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. 51-2; *S. v. Johnson,* 199 N. C., 429; *Shuford v. Scruggs,* 201 N. C., at p. 687.

The death of plaintiff's intestate was a deplorable tragedy, but there is no sufficient evidence to show that plaintiff's intestate was in such a condition, on or near the track, that it was the duty of defendant's engineer, in the exercise of due care, to have seen him and to have resolved all doubts in favor of life and limb, short of imperiling the lives of persons on the train, and to use every reasonable means necessary to stop and avoid the injury. The material allegations of the complaint are not supported by the evidence. The evidence is not sufficient to bring plaintiff within the principle laid down in *Hill v. R. R.,* 169 N. C., 740. The judgment of the court below is

Affirmed.

BIRDIE L. VALLEY, ADMINISTRATRIX OF ESTATE OF C. J. VALLEY, V. CITY OF GASTONIA.

(Filed 14 December, 1932.)

Municipal Corporation E c—Maintenance of properly constructed, sufficiently lighted traffic post at street intersection is not negligence.

A traffic post or signal about three feet around at its base and about ten feet high, with the base sufficiently lighted at night, placed by a city at the center of the intersection of two of its streets is not such an obstruction as to amount to negligence in its maintenance, and where the evidence tends only to show that the plaintiff drove his automobile down the center of the street and struck the traffic light structure causing an injury resulting in his death, and that the signal post was lighted and could have been seen several blocks, the evidence is insufficient to be submitted to the jury, but where this result has been obtained by the jury's answering the issue of negligence in defendant's favor the judgment will be affirmed.

CIVIL ACTION, before *Finley, J.*, at January Term, 1932, of GASTON.

This was an action for wrongful death resulting from a collision of an automobile, driven by plaintiff's intestate, with a traffic post or silent policeman placed in the intersection of two streets of defendant city. An eye witness introduced by plaintiff narrates the events substantially as follows: "It was close to six o'clock in the morning when I would leave my work, it was dark, was not daylight. . . . As I backed out of the garage and got headed east on Franklin Street an automobile drove up behind me and followed me on down to my home, and as I stopped in front of my house he pulled around me over to the center of the street and never did get back out of the center, drove straight into the stop signal. It was about two hundred and fifty feet from my home. I saw him hit the structure. He was running about twenty miles an hour. He had followed me seven blocks down the street before I stopped at this place and had stayed behind me all the time. He passed me when I stopped at my front. The lights on his car were burning. When I heard the collision I went to him. I found the gentleman sitting under the steering wheel bent over the steering wheel. Nobody was there with him. I pulled him out of the automobile from under the steering wheel. He never spoke. . . . I did not notice particularly how the automobile was damaged, but it was pretty well torn up, the front end of it. . . . I did not notice any cars on Franklin Avenue going east or west at the time of the collision. . . . I could see the signal light from where I was. I could not recall right at the time if the light was burning. It was burning afterwards. I went up to it. I could not tell the

exact lights burning on this signal light. I guess the lights changed two or three times while I was there. You enter up to the light with the light red, and there will come the caution light before the green light comes on. There are three globes in the signal tower—red, caution and green, and those signal lights are four-way signals. There was a signal inside of both sides of the signal block on Franklin Avenue and on both sides of Church Street. . . . There was a little light that shone down toward the base of the signal, and that light was burning when I went up to take the man out. There was a street light on the corner. . . . I suppose you could get under that street light and read. . . . You could see the stop light from the top of the hill out here at Broad as far as that is concerned. That is seven blocks back. You could see the light that far. This particular signal light burned night and day. . . . I never see the signal lights out at Church and Franklin."

The evidence tended to show that the traffic post or signal structure with which plaintiff's intestate collided was about three feet around at the base and ten feet high, and on each side of the base were the words "drive to the right." This signal device was erected in the center of the intersection of Church and Franklin streets. It carried four iron bars which supported on the top thereof a four-way three-color electric traffic signal light. The lights at other street intersections in the vicinity were swinging street lights suspended above the intersection, and the plaintiff contended that the base of the traffic signal was substantially the same color as the ground, and further, that the fact that other street lights at intersections were suspended above the intersection tended to put the plaintiff's intestate off his guard as he approached the signal or traffic post at the intersection of Church and Franklin streets.

Issues of negligence, contributory negligence and damages were submitted to the jury, and the issue of negligence was answered in the negative.

From judgment upon the verdict plaintiff appealed.

Clyde R. Hoey, John M. Robinson and A. Y. Arledge for plaintiff.
E. R. Warren and Cherry & Hollowell for defendant.

BROGDEN, J. Is it a negligent act for a municipality to maintain in the center of a populous street intersection a traffic post or silent policeman properly constructed and sufficiently lighted?

The decided cases discussing the question now under consideration are *Aaronson v. City of New Haven,* 110 Atlantic, 872; *Riley v. City of Ronceverte,* 151 S. E., 174; *Vicksburg v. Harralson,* 101 Southern, 713;

Town of Hobart v. Casbon, 142 N. E., 138; *Titus v. Town of Bloomfield,* 141 N. E., 360. See Annotations, 12 A. L. R., 328, 39 A. L. R., 777. The *Hobart* and *Titus cases, supra,* were decided by the Indiana Court. The *Hobart case* involved a broken traffic post upon which no light was burning and around which there was no barricade at the time of the injury. It was held in the *Titus case* that a concrete post, without guard or light, or other means of notifying persons traveling upon the street, constituted a defect or obstruction of the street. The *Vicksburg case* decided by the Mississippi Court involved injuries sustained by reason of certain bumpers put in the street for slowing up traffic at intersections. Obviously, none of these cases are decisive of the principle involved in the case at bar.

The general principle governing liability of a municipality in such cases was stated by the Connecticut Court in the *Aaronson case, supra.* The Court said: "But, irrespective of the allegations of this complaint, it cannot be said that a sufficiently conspicuous guidepost for traffic placed at the intersection of two streets makes the highway defective. We take judicial notice of the common use of such devices at such locations, and that they do serve a useful purpose in directing traffic and promoting obedience to the law." The syllabus of the Court in the *Riley case* declares that: "The presence of a sufficiently conspicuous silent policeman, although not painted or equipped with a warning light, is not a defect in the highway within the meaning of the statute giving a right of action for injury caused by such defects (Code, chap. 43, sec. 167), if the city maintains, with reasonable diligence, lights in the vicinity thereof sufficient to inform travelers exercising ordinary care in the use of the way by night of its presence."

The plaintiff relies upon *Graham v. Charlotte,* 186 N. C., 649, 120 S. E., 466, and *Swinson v. Realty Co.,* 200 N. C., 276, 156 S. E., 545. The *Swinson case* involved the right of an individual to make permanent use of a portion of a public street, and the *Graham case* involved the encroachment of concrete posts beyond the curb line and in the line of travel, a distance of from one foot to three inches. These cases have no particular legal bearing upon the principle involved in the case now under consideration.

In the final analysis, the defendant properly installed a traffic post in the center of a populous intersection. Ample space for the use of travelers was provided on each side of the post. The post carried a small light designed to shine upon the base, and a four-way signal light at the top. These lights were all burning at the time of the unfortunate injury. The intestate of plaintiff drove down the center of the street, turning neither to the right nor to the left, but headed straight into

a lighted post and lost his life. The traffic signal was properly installed, and free from defect of any kind. Manifestly, such signal posts serve both a useful and necessary purpose in safeguarding human life. Consequently it was not a negligent act to properly install and maintain such a signal device at a dangerous intersection, and as the correct result has been attained the judgment is affirmed, *Rankin v. Oates,* 183 N. C., 517.

No error.

IRA VANCE AND S. C. VANCE, ADMINISTRATORS OF T. B. VANCE, v. ERNEST VANCE AND OTHERS, HEIRS AT LAW OF T. B. VANCE, DECEASED.

(Filed 14 December, 1932.)

Executors and Administrators F d—Within twenty days from sale of land to make assets clerk may order resale under statutory provisions.

Where in a special proceeding before the clerk the intestate's lands have been sold to make assets, the statute requires the clerk to order a resale if an increased bid according to the provisions of the statute is made within ten days, and after the expiration of the ten days and before the expiration of the twenty days which must elapse before confirmation, the question of resale is one within the clerk's discretion, C. S., 763, 2591, and the last and highest bidder at the sale being merely a proposed purchaser prior to confirmation, is not a party and has no right to object to the clerk's discretionary order of resale.

APPEAL by plaintiffs from *Moore, J.,* at April Term, 1932, of AVERY. Reversed.

This is a special proceeding for the sale of land for assets, begun and pending before the clerk of the Superior Court of Avery County.

On 21 December, 1931, the commissioner appointed by the court in an order theretofore made in the proceeding, filed his report of a sale made by him pursuant to an order for the resale of the lands described in the petition, at which E. C. Guy was the last and highest bidder in the sum of $5,000.

On 1 January, 1932, an order was made in the proceeding in words as follows:

"Whereas Faucette Company, Incorporated, has filed a five per cent bid on the purchase money, paid for the above described land, and has paid the same to me,

Now, therefore, it is ordered, considered and adjudged that J. W. Ragland, commissioner, advertise said land for resale fifteen days in some newspaper published in Avery County, as provided by law.

This 1 January, 1932. EUGENE ELLER, *clerk Superior Court.*"

E. C. Guy, the last and highest bidder at the sale reported by the commissioner, objected to said order, and upon his objection being overruled, appealed therefrom to the judge of the Superior Court.

Thereafter, at April Term, 1932, judgment was entered in the proceeding, in words as follows:

"The above entitled action coming on for hearing at the present term upon appeal from an order of the clerk made herein, refusing to confirm the sale of the lands involved made by the commissioner appointed herein, and directing a resale of said land by said commissioner; and it appearing to the court, and the court finding as a fact that the sale of said land was duly made and reported; that no raised bid was made and filed within the time provided by law, to wit: Said raised bid was not made ten days after said sale:

It is, therefore, on motion of W. C. Berry, attorney, considered, ordered and adjudged by the court that the order of the clerk, refusing to confirm said sale and ordering a resale of said lands, be and the same is hereby overruled; and the commissioner is hereby ordered and directed to make, execute and deliver a deed for said land to the purchaser upon his compliance with the terms of his bid.

WALTER E. MOORE, *Judge Presiding.*"

From the foregoing judgment the plaintiffs appealed to the Supreme Court.

Charles Hughes for plaintiffs.
W. C. Berry for E. C. Guy.

CONNOR, J. In *Parker v. Dickinson,* 196 N. C., 242, 145 S. E., 231, it is said: "Until a judicial sale has been confirmed, the purchaser is a mere preferred proposer. Confirmation is an act of consent and approval which the court gives to the sale, and for all practical purposes, the court is the vendor in such cases, and within the limitations prescribed by law, may give or withhold its consent in its discretion. *Harrell v. Blythe,* 140 N. C., 415, 53 S. E., 232."

In the instant case, the clerk had no power to confirm the sale reported by the commissioner until the expiration of twenty days from the date on which the report was filed. C. S., 763. If within ten days from the date of the sale, the bid had been increased five per cent, and this amount paid to the clerk, it would have been the duty of the clerk to order a resale. The clerk would have had no discretion, in that case, as to whether he should make the order. C. S., 2591. But notwithstanding ten days had elapsed from the date of the sale, at the time the increased bid was made, the clerk had the power, in his discretion, to

order a resale, without waiting for the expiration of twenty days within which parties to the proceeding might file exceptions to the sale. During this time E. C. Guy, the purchaser at the sale was not a party to the proceeding, and therefore had no right to appear and object to the order of resale. He had no right to appear and move in the proceeding until the expiration of twenty days. *Upchurch v. Upchurch,* 173 N. C., 88, 91 S. E., 702. His appeal from the order of the clerk should have been dismissed.

There is error in the judgment reversing the order of the clerk, and directing the commissioner to execute a deed to the purchaser at the sale reported by the commissioner on 21 December, 1931. The judgment is

Reversed.

ATLANTIC JOINT STOCK LAND BANK OF RALEIGH, NORTH CAROLINA, v. THE FARMERS MUTUAL FIRE INSURANCE ASSOCIATION OF NORTH CAROLINA, AND E. P. HAGER AND HIS WIFE, IOLA C. HAGER.

(Filed 14 December, 1932.)

1. Appeal and Error J c—Where correct result has been reached in judgment new trial will not be awarded for alleged errors.

Where one party is not entitled to any recovery against another party to the action on the cause of action alleged, a judgment to this effect will be affirmed on appeal even though there may have been error committed in the trial of the action.

2. Insurance N c—Insurer is liable to mortgagee named in loss payable clause by separate and distinct contract.

The insurer of mortgaged premises is directly liable to the mortgagee under a separate and distinct contract where the policy of insurance contains or has attached thereto a standard loss payable clause in the mortgagee's favor, and such liability is not dependent upon or determined by the insurer's liability to the mortgagor.

3. Same—Where mortgagee recovers against insurer on loss payable clause, insurer is not entitled to subrogation as against mortgagor.

Where a mortgagee has recovered judgment against the insurer under a loss payable clause in a policy of fire insurance, the insurer is not entitled to subrogation to the rights of the mortgagee against the mortgagor to the amount of the judgment, the insurer not being a surety on the debt from the mortgagor to the mortgagee, and the insurer's liability to the mortgagee being by separate contract unaffected by the rights and liabilities between it and the mortgagor.

BANK *v.* INSURANCE ASSOCIATION.

APPEAL by defendant, the Farmers Mutual Fire Insurance Association, from *Finley, J.*, at August Term, 1932, of IREDELL. No error.

This action was instituted by the plaintiff, on 29 July, 1931, to recover of the defendant, the Farmers Mutual Fire Insurance Association, the amount of the loss and damage resulting from the destruction by fire, on 24 December, 1930, of certain buildings covered by a policy of insurance issued by said defendant to its codefendant, E. P. Hager. Attached to and forming a part of said policy, was a rider, known as "Mortgage Clause with Contribution," by which the amount of the loss and damage covered by the policy, if any, was payable to the plaintiff.

The action was first tried at March Term, 1932, of the Superior Court of Iredell County, on issues involving the liability of the defendant, the Farmers Mutual Fire Insurance Association, to the plaintiff, under the provisions of the mortgage clause attached to and forming a part of the policy. This trial resulted in a judgment that plaintiff recover of the defendant, the Farmers Mutual Fire Insurance Association, the sum of $2,400, with interest and costs. It was ordered that the action be and the same was continued to a subsequent term of said court, for trial of the issues involving the liability of the defendants, E. P. Hager and his wife, Iola C. Hager, to the defendant, the Farmers Mutual Fire Insurance Association, on the principle of subrogation. There was no appeal from this judgment and order.

The action was again tried at August Term, 1932, of the Superior Court of Iredell County, on issues involving the liability of the defendants, E. P. Hager and his wife, Iola C. Hager, to the defendant, the Farmers Mutual Fire Insurance Association. At this trial, issues were submitted to the jury and answered favorably to the contention of the defendants, E. P. Hager and his wife, Iola C. Hager.

From judgment that the defendant, the Farmers Mutual Fire Insurance Association, recover nothing of its codefendants, E. P. Hager and his wife, Iola C. Hager, the said defendant appealed to the Supreme Court.

Buren Jurney and J. W. Van Hoy for defendant, Farmers Mutual Fire Insurance Association.

Neil S. Sowers and E. M. Land for defendants, E. P. Hager and his wife, Iola C. Hager.

CONNOR, J. It may be conceded, without deciding, that there were errors in the trial of the issues involving the alleged liability of the defendants, E. P. Hager and his wife, Iola C. Hager, to the defendant, the Farmers Mutual Fire Insurance Association. Such errors, if any,

were not prejudicial to the appellant, for there was no error in the judgment that the defendant, the Farmers Mutual Fire Insurance Association, recover nothing of the defendants, E. P. Hager and his wife, Iola C. Hager. This judgment is affirmed.

The Farmers Mutual Fire Insurance Association was liable to the plaintiff, Atlantic Joint Stock Land Bank of Raleigh, N. C., under the provisions of the mortgage clause, attached to and forming a part of the policy of insurance which was issued by said defendant to its codefendant, E. P. Hager. This clause constituted a separate and distinct contract between the said defendant and the plaintiff. The liability of the defendant to the plaintiff was not dependent upon or determined by its liability to the defendant, E. P. Hager, under the policy of insurance issued to him. *Bank v. Assurance Co.,* 188 N. C., 747, 125 S. E., 631.

The defendant, the Farmers Mutual Fire Insurance Association, was not a surety for the defendants, E. P. Hager and his wife, Iola C. Hager, on their indebtedness to the plaintiff. The said defendant is not entitled to be subrogated *pro tanto* to the rights of the plaintiff against the defendants, E. P. Hager and his wife, Iola C. Hager, and for that reason cannot recover of said defendants the amount of the judgment which the plaintiff has recovered in this action of the said defendant, by reason of its separate and distinct liability to plaintiff under the provisions of the mortgage clause.

No error.

JONATHAN OLLIS v. C. R. RICKER AND THEO. JOHNSON.

(Filed 14 December, 1932.)

1. Mortgages H r—Agreement to purchase land at foreclosure sale for mortgagor constitutes purchaser trustee for mortgagor.

An agreement to purchase lands at a foreclosure sale for the mortgagor at an agreed price and account to the mortgagor for the difference between the price agreed and the indebtedness secured constitutes the purchaser a trustee of the equity of redemption for the benefit of the mortgagor.

2. Frauds, Statute of E d—Verbal contract relating to purchase of land is voidable and not void.

Verbal contracts relating to the sale or purchase of land are voidable and not void, and the defense of the statute of frauds must be pleaded and such defense may not be set up by demurrer.

OLLIS *v.* RICKER.

APPEAL by plaintiff from *McElroy, J.*, at October Term, 1932, of AVERY. Reversed.

This is an action to recover damages for the breach of a contract entered into by and between plaintiff and the defendants by which the defendants agreed to purchase at a mortgagee's sale lands owned by the plaintiff at an agreed price, and to account to plaintiff for the difference between said agreed price and the indebtedness secured by the mortgage.

The action was heard on defendants' demurrer *ore tenus* to the complaint, on the ground that the facts stated therein are not sufficient to constitute a cause of action. The demurrer was sustained.

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

Watson & Fouts for plaintiff.

W. C. Berry and J. W. Ragland for defendants.

CONNOR, J. On the allegations of his complaint, the plaintiff was the owner of an equity in the lands described therein, at the time he and defendants entered into the contract alleged in the complaint. R. N. Huskins, who had executed the mortgage to the Avery County Bank, under which the lands were advertised for sale, owned the equity of redemption in said lands, but by reason of his agreement with the plaintiff at the time he purchased the lands at the sale under the mortgage executed by the plaintiff, he held said equity of redemption in trust for the plaintiff. See *Peterson v. Taylor, post,* 673. The plaintiff did not convey the lands to R. N. Huskins. For that reason *Gaylord v. Gaylord,* 150 N. C., 222, 63 S. E., 1028, has no application to this case. This aspect of the case is controlled by the principle on which *Avery v. Stewart,* 136 N. C., 426, 48 S. E., 775, was decided. See, also, *McNinch v. Trust Co.,* 183 N. C., 33, 110 S. E., 663.

Conceding that the contract between the plaintiff and the defendants, as alleged in the complaint, is subject to the statute of frauds, there was error in sustaining the demurrer. In *Real Estate Co. v. Fowler,* 191 N. C., 616, 132 S. E., 575, it is said: "Verbal contracts relating to the sale and conveyance of lands are not void, but voidable, and the statute of frauds must be pleaded. It cannot be set up by demurrer." The judgment dismissing the action is

Reversed.

JAMES A. PETERSON AND E. F. WATSON, TRUSTEE FOR J. G. WILSON AND JAMES A. PETERSON, v. CLYDE TAYLOR, ROBERT RANDOLPH, AND ELIZABETH ENGLISH.

(Filed 14 December, 1932.)

Evidence C e: J c—Parol trust does not come within statute of frauds and may be established by clear, strong and convincing proof.

The creation of a parol trust in the sale of land is not within the statute of frauds and may be established by evidence that is clear, strong and convincing, but an instruction that the preponderance of the evidence would be sufficient constitutes reversible error.

APPEAL by plaintiffs from *Clement, J.*, at February Term, 1932, of YANCEY.

Certain judgments were recovered against several defendants, one of whom was S. L. (or Louis) English, and were entered upon the judgment docket in 1919 and 1923 respectively of the Superior Court of Yancey County. These judgments were satisfied by some of the defendants and, in order to preserve the lien against the others, were assigned by the payees to E. F. Watson, as trustee.

Ashbury Jamerson executed and delivered to S. L. Sparks a mortgage deed on real estate, and on 13 March, 1926, the mortgagee exposed the land to public sale under the power contained in the mortgage and conveyed the land to S. L. English.

Frank Hensley executed to the Citizens Bank of Yancey a mortgage on land, which was foreclosed under the power, and on 1 October, 1923, the mortgagee conveyed this land to S. L. English. English afterwards conveyed a part of the land to Clyde Taylor and a part to Robert Randolph.

The plaintiffs claimed that the land was subject to the lien of the judgments, the defendants claiming on the other hand that Louis English took a conveyance of the land under a parol trust to convey it to the defendants, and that he did not acquire and could not convey the property free from the trust. Elizabeth English is the widow of Louis English.

The jury returned the following verdict:

1. Did S. L. Sparks, mortgagee, convey the land described in the complaint to Louis English as trustee for Clyde Taylor? Answer: Yes.

2. Did the Citizens Bank of Yancey convey the lands described in the complaint to Louis English as trustee for Robert Randolph and wife? Answer: Yes.

Judgment for defendants; appeal by plaintiffs.

Watson & Fouts for appellants.
Charles Hutchins and R. W. Wilson for appellees.

ADAMS, J. The creation of a parol trust in the sale of real property is not within the statute of frauds but it must be established by evidence which is clear, strong, and convincing, a mere preponderance being insufficient. *Hemphill v. Hemphill,* 99 N. C., 436; *McNair v. Pope.* 100 N. C., 404; *Harding v. Long,* 103 N. C., 1; *Summers v. Moore,* 113 N. C., 394; *Cobb v. Edwards,* 117 N. C., 245; *Kelly v. McNeill,* 118 N. C., 349; *Avery v. Stewart,* 136 N. C., 426; *Jones v. Jones,* 164 N. C., 320; *Gillespie v. Gillespie,* 187 N. C., 40.

The issues submitted necessarily implied the existence of a trust. The instruction that the question of a trust should be determined by a preponderance of evidence entitles the appellant to a new trial.

The defendants contend that the judgments are paid and canceled and there seems to be ground for this position, but there is also evidence that they were assigned to a trustee. The facts may be more fully developed in another trial. We think there is sufficient evidence of the trust to call for the intervention of the jury. *Gillespie v. Gillespie, supra.* For error in the instruction there must be a

New trial.

RALPH CARSWELL, BY HIS NEXT FRIEND, W. A. CARSWELL, v. PHIFER WHISENANT, S. D. OLLIS, W. E. HEAVENER, AND TOWN OF MORGANTON.

(Filed 14 December, 1932.)

Pleadings D b—Where there is a misjoinder of parties and causes of action a demurrer to the complaint will be sustained.

Where one of the defendants in a civil action demurs to the complaint and its demurrer is sustained, and on appeal it appears that there was a misjoinder of parties and causes of action as alleged in the complaint the judgment will be affirmed.

APPEAL by plaintiff from *Sinclair, J.,* at September Term, 1932, of BURKE. Affirmed.

This is an action to recover of the defendants, jointly and severally, on the causes of action alleged in the complaint.

The action was tried on the demurrer to the complaint filed by the defendant, town of Morganton. The demurrer was sustained.

From judgment dismissing the action as to the defendant, town of Morganton, the plaintiff appealed to the Supreme Court.

Avery & Riddle for plaintiff.
Mull & Patton for defendant.

CONNOR, J. Conceding without deciding that a cause of action is alleged in the complaint against the defendant, town of Morganton, for damages resulting from the failure of said defendant to discharge the duties imposed by law upon said defendant, while the plaintiff was confined in the county jail of Burke County, we are of opinion that nevertheless, the demurrer was properly sustained for the reason that there is a misjoinder in the complaint of both parties and causes of action. In such case, the decisions of this Court are to the effect that the demurrer should be sustained and the action dismissed. *Sasser v. Bullard,* 199 N. C., 562, 155 S. E., 248, and cases cited in the opinion in that case. The judgment is

Affirmed.

ROBERT E. HUBBARD v. SOUTHERN RAILWAY COMPANY.

(Filed 14 December, 1932.)

1. **Master and Servant E a: E b—This action held governed by Federal Employers' Liability Act, and evidence of negligence was sufficient.**

   An action for injuries sustained by the plaintiff while engaged in interstate commerce as an employee of the defendant, a common carrier by rail, arises under the Federal Employers' Liability Act, and in this case *held,* the evidence tested by the Federal rule was sufficient to take the case to the jury on the issue of the defendant's negligence.

2. **Evidence D a—Declaration of past occurrences is inadmissible as substantive evidence but may be competent to impeach witness.**

   A declaration of an agent which is merely a narration of a past occurrence is not admissible for or against the principal even though the act referred to was within the scope of the agent's authority and his agency was continued, such declaration not coming within the *res gestæ* rule, but such declaration may be admissible for the purpose of contradicting and impeaching the testimony of the agent given upon the trial.

3. **Trial E d—Charge stating evidence admitted solely to impeach witness as substantive evidence on material point in reversible error.**

   Where testimony of a declaration by an agent of a past occurrence is admitted in evidence solely for the purpose of contradicting and impeaching the testimony of the agent given upon the trial, it is error for the court in his charge to recount such evidence as an admission of negligence by the agent, but whether the error is cured by a later instruction, given after the jury was recalled from deliberation, correctly limiting the evidence but not retracting the prior instruction, need not be considered where a new trial is awarded upon other grounds.

4. Trial E g—

Where the charge of the court contains conflicting instructions on a material point it will be held for reversible error upon exception.

5. Master and Servant E c—Rule of assumption of risk under Federal Employers' Liability Act.

Except in cases where the employer's violation of a statute enacted by Congress for the safety of employees contributes to the injury, an employee assumes under the Federal Employers' Liability Act the risks normally incident to the employment, but he does not assume extraordinary risks or those resulting from the employer's negligence unless and until he is made aware of such special risks or they become so obvious that a man of ordinary prudence would observe and appreciate them, but he will not be held to assume such special risks even under these circumstances if the employer assures him the matter will be remedied and the danger is not so imminent that a man of ordinary prudence would refuse to rely upon the employer's assurances.

6. Same—Matters to be proven by defendant upon plea of assumption of risk under Federal Employers' Liability Act.

Where assumption of risk is available to a defendant in an action under the Federal Employers' Liability Act it is required that the defendant plead the defense, and the burden of proof on the issue is upon him, but it is necessary only that he prove that the injury resulted from an ordinary risk incident to the employment, or, if the injury resulted from a special risk, that such risk was fully known to the employee and appreciated by him or was so obvious that a man of ordinary prudence would have observed and appreciated it, and an instruction that the burden is on the employer to prove that the employee assumed all risk of any dangers which were inherently incident to the employment is inexact, the employee being conclusively presumed to have knowledge of the risks ordinarily incident to the employment.

7. Damages F a—Mortuary table is evidentiary only, and health and earning power of plaintiff must be considered in fixing damages.

The statutory mortuary tables are evidentiary only, and the expectancy therein given for a particular age must be considered by the jury together with evidence of the health, constitution and habits of the plaintiff and his earning power in determining the amount of damages to which he is entitled as a result of a negligent injury totally and permanently disabling him.

APPEAL by defendant from *Sinclair, J.*, at March Term, 1932, of SAMPSON.

Civil action to recover damages for an alleged negligent injury.

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

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

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

"3rd. Did plaintiff assume the risk as alleged in the answer? Answer: No.

"4th. What damages, if any, is plaintiff entitled to recover? Answer: Forty-five thousand dollars ($45,000)."

Judgment on the verdict for plaintiff, from which the defendant appeals, assigning errors.

H. H. Hubbard and A. McL. Graham for plaintiff.

Richard C. Kelly, Butler & Butler and H. E. Powers for defendant.

STACY, C. J. The defendant is a common carrier by railroad, engaged in interstate commerce, and the plaintiff was employed by the defendant in such commerce at the time of his injury. The case, therefore, is one arising under the Federal Employers' Liability Act. *Cobia v. R. R.*, 188 N. C., 487, 125 S. E., 18; *Soles v. R. R.*, 184 N. C., 283, 114 S. E., 305.

Plaintiff was injured 13 June, 1930, near Charlotte, N. C., while engaged in the discharge of his duties as helper to C. R. McClure, signal maintainer and foreman over a section of road twelve or fourteen miles in length. The plaintiff had completed his third year at the University of North Carolina as a student in the engineering department, and needed some practical experience for graduation. He was 21 years old and in good health.

On the morning in question, while undertaking to raise or set a heavy pole in the transmission line, which pole was approximately 35 feet long and weighed about 1,000 pounds, it "turned" or "careened" and fell upon the plaintiff, injuring him severely.

The allegations of negligence are: (1) failure to warn plaintiff of dangers, (2) insufficient help, (3) failure to furnish necessary tools and appliances, (4) carelessness of fellow employees. The defendant denies any negligence on its part and pleads contributory negligence and assumption of risk on the part of the plaintiff.

The evidence is conflicting on the issue of liability, but, tested by the Federal rule, as announced in *Western & Atl. Ry. Co. v. Hughes*, 278 U. S., 497, that "more than a scintilla of evidence" must be offered to carry the case to the jury, we think it is sufficient to say, without detailing the testimony of the several witnesses, the motions to nonsuit were properly overruled.

C. R. McClure, a witness for the defendant, was asked by the plaintiff, on cross-examination, if he did not tell plaintiff's father at the hospital,

in discussing the injury, that it was his fault, in that, he pushed the pole out of line causing it to fall on the plaintiff. The witness denied making this statement.

The testimony of R. H. Hubbard, father of plaintiff, was then offered in reply to contradict the witness McClure. He said: "Mr. McClure came to the hospital the first night I was in Charlotte, Saturday night (following the injury on Friday), and introduced himself to my wife and me and had with him two young men, Mr. Burnette and Mr. Walker. I asked him how my son got hurt and he said that the three of them were with him; said that they were trying to raise this pole and it was in a bad place, and the pole was so heavy that they could not raise it and it fell on him. Mr. McClure told me that he was very much hurt and worried over it; that he felt like he was the cause of the boy being injured." Objection; exception. Burnette and Walker said they did not hear this alleged conversation.

It is the rule with us that what an agent or employee says relative to an act presently being done by him within the scope of his agency or employment, is admissible as a part of the *res gestæ*, and may be offered in evidence, either for or against the principal or employer, but what the agent or employee says afterwards, and merely narrative of a past occurrence, though his agency or employment may continue as to other matters, or generally, is only hearsay and is not competent as against the principal or employer. *Pangle v. Appalachian Hall,* 190 N. C., 833, 131 S. E., 42; *Johnson v. Ins. Co.,* 172 N. C., 142, 90 S. E., 124; *Scales v. Lewellyn, ibid.,* 494, 90 S. E., 521; *Southerland v. R. R.,* 106 N. C., 100, 11 S. E., 189; *Morgan v. Benefit Society,* 167 N. C., 262, 83 S. E., 479; *Hamrick v. Tel. Co.,* 140 N. C., 151, 52 S. E., 232; *Hill v. Ins. Co.,* 150 N. C., 1, 63 S. E., 124; *Bumgardner v. R. R.,* 132 N. C., 438; 43 S. E., 948; *Rumbough v. Imp. Co.,* 112 N. C., 751, 17 S. E., 536; *Smith v. R. R.,* 68 N. C., 115; 22 C. J., 467; 10 R. C. L., 990.

Notwithstanding the rule just stated, it has been held in a number of cases that what an agent or employee says, even though narrative of a past occurrence, may be offered in evidence, not for the purpose of fixing liability upon the principal or employer, but to contradict or to impeach the agent or employee, when his previous statement is at variance with his testimony given on the trial. *Wilkins v. R. R.,* 174 N. C., 278, 93 S. E., 777; *Morton v. Water Co.,* 168 N. C., 582, 84 S. E., 1019; *Pate v. Steamboat Co.,* 148 N. C., 571, 62 S. E., 614.

However, as such statements, narrative of past occurrences, are competent only for purpose of contradiction or impeachment, it is error to

admit them as substantive evidence or to give them the force of such evidence in the charge. *Johnson v. Ins. Co., supra.*

The court at first instructed the jury in regard to the evidence, now under consideration, as follows:

"The plaintiff contends that you ought to find that Mr. McClure, superior over Mr. Hubbard, on Saturday night after the injury, went to Charlotte and went to Mr. Hubbard's father and mother and told them that he regarded it as his own fault that his son was injured, and that it happened because the pole was too heavy for them to raise, the plaintiff contends that you ought to find that that happened in attempting to raise a heavy pole of that character with insufficient help."

This was erroneous under the decision in *Johnson's case, supra.*

But immediately after the jury had retired to consider the case, it was recalled and given the following instruction:

"In referring to the evidence of Mr. Hubbard, Sr., of Mr. McClure telling him on Saturday after the injury that he regarded it his fault that it happened, because the pole was too heavy to raise, I told you at the time that the evidence was admitted merely for the purpose of contradicting Mr. McClure's testimony, and for no other purpose. It is also proper to say that when Mr. McClure went on the stand, he testified that the conversation did not occur. Mr. Hubbard's testimony was merely for the purpose of contradicting Mr. McClure. It was offered merely for the purpose of contradiction. The weight of it is entirely with you."

We are not now under the necessity of deciding whether this was sufficient to cure the error, without specifically withdrawing the previous instruction, as a new trial must be awarded on other grounds.

Of course, it is elementary that where there are conflicting instructions with respect to a material matter—one correct and the other not—a new trial must be granted, as the jurors are not supposed to know which one is correct, and we cannot say they did not follow the erroneous instruction. *Edwards v. R. R.*, 132 N. C., 99, 43 S. E., 585; *Tillett v. R. R.*, 115 N. C., 662, 20 S. E., 480; *S. v. Falkner*, 182 N. C., 793, 108 S. E., 756.

The following instruction on the issue of assumption of risk forms the basis of one of defendant's exceptive assignments of error:

"The contention is made by the defendant that the plaintiff assumed all risks of dangers naturally incident to the employment in which he was engaged. And the burden is upon the defendant to satisfy you that he assumed it himself—that the plaintiff assumed all risk of any dangers which were inherently incident to the kind of employment in which he was engaged."

The Federal rule is that except in cases where the violation of a statute enacted by Congress for the safety of employees has contributed to the injury, the employee assumes the risks normally incident to the occupation in which he voluntarily engages; other and extraordinary risks, and those due to the employer's negligence, he does not assume until made aware of them, or until they become so obvious and immediately dangerous that an ordinarily prudent man would observe and appreciate them; in either or both of which cases he does assume them if he continue in the employment, without objection or without obtaining from the employer an assurance that the matter will be remedied; but if he receive such an assurance (the dangers being both obvious and imminent), then, pending the performance of the promise, the employee, in ordinary cases, does not assume the special risk. Of course, if the dangers be so *imminent* that no ordinarily prudent man, under the circumstances, would rely upon such promise, then he would assume the risk, even pending the performance of such promise. *Cent. Vt. Ry. v. White,* 238 U. S., 507; *Seaboard v. Horton,* 233 U. S., 492; *Gila Valley, etc. Ry. v. Hall,* 232 U. S., 94; *Gaddy v. R. R.*, 175 N. C., 515, 95 S. E., 925.

"Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this Court. (Citing authorities.) When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance or until the particular time specified for its performance, the employee relying upon the promise does not assume the risk unless at

least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise"—*Mr. Justice Pitney* in *Seaboard Air Line v. Horton,* 233 U. S., 492.

Speaking to the subject in the recent case of *Del. L. & W. R. Co. v. Koske,* 279 U. S., 7, *Mr. Justice Butler,* delivering the opinion of the Court, said: "And, except as provided in section 4 of the act, the employee assumes the ordinary risks of his employment; and when obvious, or fully known and appreciated, he assumes the extraordinary risks and those due to negligence of his employer and fellow employees."

The following concise statement of the rule is to be found in *Director General of Railroads v. Templin* (Third Circuit), 268 Fed., 483: "It is recognized that under the Federal Employers' Liability Act an employee assumes the risks normally and necessarily incident to his employment, and also the extraordinary risks, or risks caused by his master's negligence; yet he assumes the latter only when they are obvious or fully known by him and are such as would under the circumstances be seen and appreciated by an ordinarily prudent person."

In this jurisdiction, as well as in the Federal Courts, in cases where the plea of assumption of risk is available to the defendant, he must set it up or plead it, and he also has the burden of proof on the issue raised by this plea. *Kanawha & M. R. Co. v. Kerse,* 239 U. S., 581, 60 L. Ed., 448; *Cobia v. R. R., supra; Lloyd v. R. R.,* 166 N. C., 24, 81 S. E., 1003, affirmed, 239 U. S., 496; *Eplee v. R. R.,* 155 N. C., 293, 71 S. E., 325; *Dorsett v. Mfg. Co.,* 131 N. C., 254, 42 S. E., 612; *West v. Mining Corp.,* 198 N. C., 150, 150 S. E., 884.

But in cases where the defense of assumption of risk is open to the defendant, and is set up, it is inexact to say the defendant has the burden of proving that "the plaintiff assumed all risks of danger which were inherently incident to the kind of employment in which he was engaged." This, the law declares. An employee is conclusively presumed to have knowledge of the hazards normally incident to the occupation in which he voluntarily engages, and he assumes the risk of injuries arising therefrom. *C. R. I. & P. Ry. Co. v. Ward,* 252 U. S., 18; *Gila Valley, etc. R. Co. v. Hall,* 232 U. S., 94. The burden which the defendant must carry on the issue of assumption of risk is to show that the injury which the plaintiff sustained resulted from one of the ordinary risks of the occupation, or from some defect which was obvious and fully known to the plaintiff and appreciated by him, or so plainly observable that he must be presumed to have known it. *C. R. I. & P. Ry. Co. v. Ward, supra; Cent. Vt. Ry. v. White,* 238 U. S., 507; *Pyatt v. R. R.,* 199 N. C., 397, 154 S. E., 847; *Strunks v. Payne,* 184 N. C.,

582, 114 S. E., 840; *Looney v. N. & W. Ry. Co.*, 102 W. Va., 40, 135 S. E., 262, 48 A. L. R., 806.

In other words, except in cases where the violation of a statute enacted by Congress for the safety of employees has contributed to the injury, two classes of risks are assumed by the employee under the Federal rule: First, ordinary risks, or those normally incident to the occupation, of which the employee is conclusively presumed to have knowledge, thus requiring no proof of such knowledge on the issue of assumption of risk; Second, extraordinary risks, or those not normally incident to the occupation, which the defendant must show were either plainly observable, or known to the employee and the dangers appreciated by him. *Oglesby v. St. Louis-San Fran. Ry. Co.*, 1 S. W. (2d), 172.

Speaking to the subject in *National Steel Co. v. Hore*, 155 Fed., 62, *Lurton, Circuit Judge*, delivering the opinion of the Court, said:

"To defeat an action by the defense of assumption of risk, the employer must show not only that the servant knew of the negligence of which he complains, but that he knew and understood, or ought to have known and appreciated, the increased danger to which he voluntarily exposed himself. There is a distinction between knowledge of defects or knowledge of alleged negligent acts, and knowledge of the risks resulting from such defects or acts. In Cooley on Torts (3d ed.), 1048, the rule is stated in these words: 'It is essential to the assumption of risk, not only that the servant shall know the defect out of which the danger arises, but that he should appreciate the danger, or that the danger should be manifest to a man of ordinary intelligence and experience in the line of work in which the servant is engaged.'"

To like effect are the decisions in *Oglesby v. St. Louis-San Fran. Ry. Co., supra*, and *McIntyre v. St. Louis-San Fran. Ry. Co.*, 227 S. W., 1047.

Again, on the issue of damages, the jury was instructed as follows:

"If you come to the issue of damages, it would be your duty to take into consideration the evidence as to his injury, as to the loss of voice, as to what his prospects in life were, and what his life expectancy, the law gives forty and a fraction years. . . . The table of life expectancy says forty and a fraction. You are not bound by that however."

In cases arising under the Federal Employers Liability Act, the proper measure of damages and the method of ascertaining such damages are to be determined according to the general principles of law as administered in the Federal Courts. *C. & O. R. Co. v. Kelly*, 241 U. S., 485.

Speaking of the use of mortuary tables in personal injury and wrongful death cases, *Mr. Justice Gray*, delivering the opinion of the Court

in *Vicksburg & M. R. Co. v. Putnam,* 118 U. S., 545, said that, as an aid to the jury in arriving at a fair estimate of what compensation should be awarded the plaintiff, "standard life and annuity tables, showing at any age the probable duration of life, and the present value of a life annuity, are competent evidence. (Citing authorities.) But it has never been held that the rules to be derived from such tables or computations must be the absolute guides of the judgment and the conscience of the jury. On the contrary, in the important and much-considered case of *Phillips v. London & Southwestern Railway,* 4 Q. B. D., 406, 5 Q. B. D., 78, the judges strongly approved the usual practice of instructing the jury in general terms to award a fair and reasonable compensation, taking into consideration what the plaintiff's income would probably have been, how long it would have lasted, and all the contingencies to which it was liable; and as strongly deprecated undertaking to bind them by precise mathematical rules in deciding a question involving so many contingencies incapable of exact estimate or proof."

Our own decisions are to the effect, and, in fact the statute provides, that in cases where it is necessary to establish the expectancy of continued life of any person, the mortuary tables appended to C. S., 1790 "shall be received in all courts and by all persons having power to determine litigation, as evidence with other evidence as to the health, constitution and habits of such person." *Young v. Wood,* 196 N. C., 435, 146 S. E., 70; *Odom v. Lumber Co.,* 173 N. C., 134, 91 S. E., 716; *Sledge v. Lumber Co.,* 140 N. C., 459, 53 S. E., 295. The tables, it will be observed, are not conclusive, but evidentiary only, and are to be considered in connection "with other evidence as to the health, constitution and habits of such person." *Russell v. Steamboat Co.,* 126 N. C., 961, 36 S. E., 191. Compare *Canfield v. C. R. I. & P. R. Co.,* 142 Iowa, 658, 121 N. W., 186, and *Howell v. Lansing City Electric R. Co.,* 136 Mich., 432, 99 N. W., 406.

It was error, therefore, to say "the law gives forty and a fraction years" as the expectancy of the continued life of plaintiff in the instant case. This instruction was calculated appreciably to augment the recovery, which it undoubtedly did.

The case is an important one. Plaintiff's injuries are great; the recovery is large; both sides are acutely interested in the result. A painstaking investigation of the record leaves us with the impression that the above instructions, assigned as errors, weighed too heavily against the defendant.

New trial.

J. W. PUCKETT v. JIM DYER AND ORKIN EXTERMINATING COMPANY, A CORPORATION.

(Filed 14 December, 1932.)

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

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

2. Highways B n—Evidence of negligent driving and that such negligence proximately caused plaintiff's injuries held sufficient.

Evidence that the individual defendant drove his car in a negligent manner in violation of statute and that such negligence proximately caused injury to the plaintiff *is held* sufficient to have been submitted to the jury, and the evidence of contributory negligence was properly submitted to the jury under instructions which were free from error. N. C. Code, 2621(45), (51), (54), (55), (7, a).

3. Master and Servant D b—Evidence held to make out prima facie case that employee was acting within scope of employment.

Evidence that the individual defendant was employed by the corporate defendant as a traveling salesman covering North and South Carolina, that the corporation furnished him a car and that it paid for the gas and oil used therein, including the gas and oil on the night of the plaintiff's injury, that the car at the time of the injury contained merchandise belonging to the corporate defendant and was being driven by the salesman as he was returning to his home late at night, together with other evidence for the plaintiff, *is held* sufficient to make out a prima facie case that the salesman was acting within the scope of his authority at the time of the injury, and the evidence, together with the corporate defendant's evidence to the contrary, was properly submitted to the jury under instructions which were free from error.

4. Torts C b—Evidence that release was procured by fraud held sufficient to be submitted to the jury.

Evidence that the plaintiff, while in a hospital where he had been taken following the injury in suit, had signed a release prepared by an agent of the defendant and witnessed by two agents of the hospital whose bill was paid by the defendant, that at the time of signing the release the plaintiff was in a weak condition and suffering from head injuries and had been unconscious for a long period of time and was not in his right mind, that he did not remember signing the release, that the consideration therefor was grossly inadequate and was left with the hospital and doled out to the plaintiff, and that the release recited that it covered all injuries from the accident, past, present and future, even including permanent injury and possible death, together with the fact that the agent procuring the release did not take the stand although present in court and having peculiar knowledge of the plaintiff's condition at the time of signing the

release, *is held* sufficient to show a peculiar relationship between the plaintiff and defendant's agents enabling them to take advantage of him, and is sufficient to be submitted to the jury upon the issue of whether the release was obtained by fraud.

5. Same—Question of ratification of release by plaintiff held properly submitted to the jury under the evidence in this case.

In order to constitute a valid ratification the party charged with ratification must act with knowledge of the material facts or have reasonable grounds for such knowledge, and where in a personal injury action the plaintiff contends that the release set up by the defendant was procured by fraud, and the defendant contends that the plaintiff ratified the release by accepting its benefits, evidence on the part of the plaintiff that his signature was procured when he was woefully incapacitated by parties in a peculiar position to take advantage of him, that he had no further dealing with the defendant relative to the release, that he did not remember signing it and that no copy of the release was left with him, and it appears that the release covered all injuries resulting from the accident, past, present and future, even to the extent of death, is held properly submitted to the jury under instructions which were free from error, and the jury's verdict on the issue in plaintiff's favor is upheld on appeal.

6. Evidence K d—Form of hypothetical questions in this case held not prejudicial error.

The form of the hypothetical questions propounded to an expert witness in this case are not held for reversible error under authority of *In re Peterson*, 136 N. C., 14.

APPEAL by defendant from *Cowper, Special Judge,* and a jury, at October Term, 1932, of MECKLENBURG. No error.

This is an action for actionable negligence brought by plaintiff against defendants, alleging damage. The defendant denied liability and set up the defense (1) "It is admitted that the defendant corporation furnished a car to the individual defendant to be used by him for the business of the defendant corporation and it is alleged by the defendants that the individual defendant, James Dyer, was not on business for the defendant corporation at the times complained of in the complaint"; (2) That the plaintiff was guilty of contributory negligence; (3) A release for $350.00 and payment of hospital and doctor's bill.

The plaintiff in reply contends: "The plaintiff was unconscious for 6 days; he had a severe injury to his head, causing concussion of the brain; that his leg was broken in two places, he was confined to the hospital for 4 weeks and was in such condition physically and mentally that he was unable to pass upon any important matter. That the defendants' doctor and agent calculated what his wages would amount to while he would be in the hospital and wrote it upon the plaster cast upon his leg. He suggested no amount; they told him what he owed

him and asked him to sign a paper they had. They did not read the release and if they had plaintiff did not have sufficient mind because of his injury to know the importance of it. Under said circumstances this plaintiff signed something. That the plaintiff further alleges that he was a sick man when he was approached by the defendants in the hospital; that he was under the care of a physician; he was confined to his bed; that he was unable to transact any business, his judgment was impaired by his weakened body and injury to his head, that his signature was procured by the fraud of the defendant's agent and took advantage of plaintiff's distress in the manner above stated. That they also well knew that plaintiff was only a watchman, he got small wage, he had a family to support, he was then disabled, could not earn anything, his family were in distress, he did not know the extent of his injury or the importance of his claim against the defendants, that the $350.00 in no way compensated him for his injury, it was an inconsequential sum compared with his injuries; that the defendants well knew this fact, for it was their doctor treating this plaintiff. That the defendants, by artifice, devices, schemes and plans of fraud procured this plaintiff's signature to said release."

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

"1. Did the plaintiff, at the time of signing the release, introduced in evidence as defendant's Exhibit No. 2, have sufficient mental capacity to understand the nature and legal effect of said release? Answer: No.

2. Did the plaintiff ratify the said release by accepting and retaining the consideration therefor after having knowledge of the nature and contents of said release? Answer: No.

3. Was the plaintiff injured by the negligence of the defendant, James Dyer, as alleged in the complaint? Answer: Yes.

4. If so, was the said James Dyer, at the time, acting within the scope of his employment with the defendant, Orkin Exterminator Company? Answer: Yes.

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

6. What damages, if any, is the plaintiff entitled to recover? Answer: $4,150."

The court below rendered judgment on the verdict. The defendants made numerous exceptions and assignments of error, and appealed to the Supreme Court. The material ones will be considered in the opinion.

G. T. Carswell, Joe W. Ervin, Enos T. Edwards and Morgan Gilreath for plaintiff.

John M. Robinson and Hunter M. Jones for defendant.

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence, the defendants 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. It is the well settled rule of practice and the accepted position in this jurisdiction that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim and which tends to support his cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

The evidence on the part of plaintiff was to the effect: That he was a night watchman at certain plants in Charlotte, N. C., and in going from one plant to another, on the early morning of 22 July, 1931, about 1:30 o'clock, walking east towards the city, 6 or 12 inches from the left-hand curb of Wilkinson Boulevard (West Morehead Street), a paved street, about 40 feet wide, he was struck from behind and the signs indicated he was dragged some 60 to 70 feet, about 5 or 6 feet from the left-hand curb, and when found was 2 or 3 feet off the Boulevard. He was picked up for dead and taken to and placed in the sanatorium where he remained some 27 days. He was unconscious from Wednesday until Saturday. Plaintiff testified in part: "I don't remember signing a release. I have a vague memory of something being said about a settlement and signing a paper and that is all. I was just conscious enough to know that some one was in there talking about signing a paper. It is just like a dream to me. I don't remember what was said. . . . I must have stayed in the hospital two or three weeks after the date of the release. Doctor treated me up until after I came home. . . . I do not remember anything having been said about how much the doctor's bill would be."

As to his injury, plaintiff testified, in part: "When I came to my senses enough to know, I was in so much pain and misery I prayed to die. I felt like I'd rather be dead than to suffer that way. The pain was all over me practically, in my left leg, right shoulder and head and I had some trouble with my side. I had a plaster cast on my leg. The cast was on my leg when I left the hospital and stayed there for some time after I left the hospital. I think I wore it four or five weeks after leaving the hospital. . . . I got around on crutches. I used the crutches about three months. After I left the hospital and went home, I had no money to amount to anything. . . . I worked for four or five months at the rate of three or four hours a day on up until the spring of the year." The night was damp, fog like, kind of cloudy. The

pavement was wet. Plaintiff when picked up was kind of drawn up "lying there still . . . he was not moving." Plaintiff's leg was broken in two places.

It was contended by plaintiff that defendant Dyer, at the time of the collision, was violating the following statutes:

N. C. Code, 1931 (Michie), section 2621(45): "Any person who drives any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving and upon conviction shall be punished as provided in section 2621(102)."

Section 2621(51): "Upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall drive the same upon the right half of the highway and shall drive a slow-moving vehicle as closely as possible to the right-hand edge or curb of such highway, unless it is impracticable to travel on such side of the highway and except when overtaking and passing another vehicle subject to the limitation applicable in overtaking and passing set forth in sections 2621(54) and 2621 (55)." Public Laws, 1927, chap. 148, sec. 9.

It was contended by plaintiff that the violation of these statutes was negligence *per se* and the proximate cause of plaintiff's injury.

This action was brought in the spring of 1932, 26 March. In 15 or 20 minutes after a car had struck plaintiff, Dyer was arrested by a detective of the city of Charlotte, at the home of his brother, and was prosecuted and pleaded guilty as a "hit-and-run driver."

N. C. Code, 1931 (Michie), section 2621(71) a; *S. v. Durham*, 201 N. C., 724. The evidence was plenary as to negligence on the part of defendant Dyer, which was properly submitted to the jury. In fact, defendants in their brief say: "It is conceded that there is abundant evidence upon the third issue as to the negligence of the said Dyer, and, as none of our exceptions relate to this issue, we will not further discuss the facts in reference thereto." The evidence, under proper instructions by the court below was submitted to the jury as to contributory negligence, who found for the plaintiff.

As to the liability of defendant Orkin Exterminating Company, "It is stipulated that the corporate defendant in July, 1931, was engaged in the business of exterminating rats, insects, and bugs. It is also stipulated that in July, 1931, Jim Dyer was an employee of the corporate defendant, was such an employee prior to that time, and has been such an employee since." A car, a Ford roadster, model 30, driven by Dyer belonged to the defendant company. It was driven by Dyer for the

company, over North and South Carolina, and the night of the injury to plaintiff, the detective found a whole lot of stuff in the back end of the car that was used for exterminating purposes by the defendant company. Dyer testified, in part: "The company paid for all the gasoline that I used, all the time. They were paying for my gasoline on this night that this injury took place. That was the terms of my employment, they agreed to do that. They furnished me with a car and furnished my oil and gasoline for the use of the car. When I gave them a bill for expenses of gasoline and oil, I included gasoline and oil expended that night." On the night in question he said he was out riding with a girl. Dyer was on his way home when plaintiff was struck. The record discloses other evidence favorable to plaintiff's contentions on this aspect. We think, under the facts and circumstances of this case, there was sufficient evidence to make a prima facie case for plaintiff to be submitted to the jury. *Jeffrey v. Mfg. Co.*, 197 N. C., 724; *Lazarus v. Grocery Co.*, 201 N. C., 817.

The court below on this aspect charged the jury, to which there was no exception, and in which we see no error: "The court charges you that the rule known as 'scope of authority'—means that one is in the scope of authority of his employer if he is acting in furtherance of his master's business, or is doing something necessary to accomplish the purpose of employment, or connected with some mission, or performance of some service for the principal, in this case the employer. That is, he is doing some work in and about his employer's business. If, gentlemen, the purpose is purely personal then he is not, if the motive is to serve the employer he is, and there has been no unreasonable deviation from the employer's method of service, then he is acting in the scope of his authority. The court lays down this, which is taken from our highest Court as the criterion by which you are to be guided when you come to consider that issue. (*Grier v. Grier*, 192 N. C., at p. 764; *Cotton v. Transportation Co.*, 197 N. C., 709.) The court instructs you as to the fourth issue: If the jury should find from the evidence and by its greater weight, the burden being on the plaintiff, that Dyer was at the time of the collision of the automobile with plaintiff acting within the scope of his authority, under his employment with Orkin Exterminating Company, and in furtherance of the business of the codefendant, as I have just defined and explained that to you, that if you find that from the evidence, and by its greater weight, it will be your duty to answer the fourth issue Yes."

As to the validity of the alleged release: The minister and pastor of the plaintiff visited plaintiff while in the sanatorium. His testimony was, in substance: "I visited the plaintiff three times while he was in

the hospital, first on Saturday after he was injured on Tuesday night. He did not have possession of his right mind; I visited him about eight or nine days after he entered the hospital. The day he signed the release, he thought he had gotten $1,000 in a settlement and he did not know what he was talking about. Visited him the third time just before he left the hospital and he did not have possession of his full mental faculties." There was abundant evidence by plaintiff and others to corroborate his minister and pastor.

The situation of plaintiff was peculiar—unconscious for a long period in the sanatorium. The physician fixing his charges, the agent of the hospital fixing its charges up to 15 August, 1931. The agent of defendant company preparing the alleged release, taking it to the hospital and getting it signed in the presence of two agents of the hospital, yet this agent of defendant company was present in court and he gave no evidence in the case. The contention made by plaintiff as to his mental condition when the alleged release was signed in the sanatorium, was peculiarly within the knowledge of defendant's agent, who procured the alleged release. He did not go on the stand, although in court, as the record discloses, to refute plaintiff's evidence. It may be that this was a silent admission of the contentions made by plaintiff, or at least, as in *Hudson v. Jordan,* 108 N. C., at p. 13, it was regarded as a "pregnant circumstance." *Walker v. Walker,* 201 N. C., at p. 184.

The small consideration was left with one of the agents of the sanatorium, who witnessed the alleged release, and was doled out to plaintiff. A copy of the alleged release, according to plaintiff, was not given him, as he was unconscious as to signing same. In the alleged release is the following: "It being further agreed and understood, that this release is intended to cover all claims, demands, damages, losses, or injuries which may be traced either directly or indirectly to the aforesaid injuries which appear now, *or do not appear at the present time, but which may appear at any time in the future, no matter how remotely they may be related to the aforesaid accident.* It being further agreed and understood, that this release is executed with the full knowledge and understanding on my part that there is likely to be, or may be, more serious consequences, damages, or injuries, as the result of the accident aforementioned than now appear *and that more serious and permanent injuries, even to the extent of death may result due to the injuries sustained in the accident aforementioned.*" (Italics ours.) The agent of the defendant company was there with the alleged release when the agents of the sanatorium, who witnessed the alleged release, got there.

Battle, J., in *Futrill v. Futrill,* 58 N. C., at p. 65, says this: "But it was held upon a great principle of public policy that, without any

proof of actual fraud, such conveyances, obtained by one, whose position gave him power and influence over the other, should not stand at all if entirely voluntary, or should stand only as a security for what was actually paid or advanced upon them, where there was a partial consideration."

By analogy: In *Abbitt v. Gregory,* 201 N. C., at p. 598, is the following: "The courts generally have declined to define the term 'fiduciary relation' and thereby exclude from this broad term any relation that may exist between two or more persons with respect to the rights of persons or property or either. In this, the courts have acted upon the same principle and for the same reason as that assigned for declining to define the term 'fraud.' The relation may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Butler v. Fertilizer Works,* 193 N. C., 632.

In *King v. R. R.,* 157 N. C., at p. 65-66, is the following: "The settled rule, which is applicable not only to awards, but to other transactions, is that mere inadequacy alone is not sufficient to set aside the award; but if the inadequacy be so gross and palpable as to shock the moral sense, it is sufficient evidence to be submitted to the jury on the issues relating to fraud and corruption or partiality and bias.' Where there is inadequacy of consideration, but it is not gross, it may be considered in connection with other evidence upon the issue of fraud, but will not, standing alone, justify setting aside a contract or other paper-writing on the ground of fraud.' . . . If the issue of fraud or undue influence is found in favor of the employer, and he has been injured by the negligence of the railroad, he may recover damages, without returning what he has received as benefits, but this will be allowed in reduction of the damages. *Hayes v. R. R.,* 143 N. C., 125." *Hill v. Ins. Co.,* 200 N. C., 502. The court below charged in regard to reduction of damages as to amount paid plaintiff.

In *Mangum v. Brown,* 200 N. C., at p. 299, it is said: "There was evidence that before the injury the plaintiff's mind had been normal; that at the time of the trial and previously he had become very much like a child; that he frequently acted and talked as a child; that his memory had failed; that his capacity to transact business had become impaired; that his mind did not seem to function. In these circumstances we cannot conclude as a matter of law that the matters involved in the second issue should have been withheld from the jury."

We think the combination of facts and circumstances in this case is such that the matter was rightly submitted to the jury.

At the close of all the evidence, and after overruling the motion for judgment as of nonsuit, the court, in its discretion, permitted defendants to make the following amendment to their answer: "Defendants allege that subsequent to the execution of the release, copy of which is attached to the answer, plaintiff fully ratified and approved said release by accepting and retaining the benefits of said release and thereby in all respects, recognized and approved the validity of said release and ratified the same."

The question of ratification is the most serious aspect of this case. After giving the contentions fairly on both sides of this question, the court below charged the jury as follows: "The court in reference to this issue desires to lay down certain principles of law in the language of our highest Court, and I charge it to you as the law: 'A release originally invalid or avoidable for any reasons, may be ratified and affirmed by the subsequent acts of the person interested. Thus, if one, while his reason is temporarily dethroned, executes a release, and after being restored to his proper faculties, knowingly takes the benefit of his contract, he thereby ratifies and gives it force and effect. There can be no ratification or affirmance unless the plaintiff knew or ought to have known, all the facts and circumstances attending the act to be ratified. Ratification presumes the existence of the knowledge of all of the facts, and one not informed of the whole transaction, is not in a position to ratify the same,' (*Sherrill v. Little*, 193 N. C., at p. 740). The court charges you that those principles of law are applicable to this case, in reference to the second issue, and applying the principles of law which the court had laid down. The court instructs you, that even if you should, from the evidence and under instructions of the court, answer the first issue No, yet if the defendant has satisfied you from the evidence and by its greater weight, the burden being upon the defendants, that after signing the alleged release in question, the plaintiff was restored to his proper faculties, that is, when he had sufficient mind to understand what he was doing, as I have already explained the meaning of that, that he knowingly took the benefits, made use of or entered into transactions, disposing of such funds arising out of the alleged settlement, and did so in accordance with the explanation which I have given you of ratification, then it will be your duty to answer the second issue Yes. The court further charges you on that issue, at the request of the defendants, which the court adopts as the law, 'Even though you should find from the evidence, that at the time the plaintiff signed the alleged release, which has been introduced as plaintiff's Exhibit No. 2, he did not have sufficient mental capacity to know what he was doing, yet if you should find from the evidence, and by its greater weight, that

at the time he took the money at the hospital, he knew that he had signed the alleged release, and knew that the money had been left at the hospital as a consideration of said release, and with this knowledge, accepted the money and retained it, this would be a ratification of the release by the plaintiff, and you should answer the second issue Yes. If the defendant has failed to satisfy you from the evidence, and by its greater weight, that the plaintiff did ratify the said release, as I have explained ratification, then it will be your duty to answer the second issue No."

In 12 R. C. L. (Fraud and Deceit), part sec. 157, p. 411-12, we find: "One may waive the right to sue for damages for fraud, by conduct inconsistent with an intention to do so. To constitute such a waiver in any case, however, the defrauded party must act with full knowledge of his rights, and of the material facts constituting the fraud. There can be no waiver where he did not know of the fraud, and had no means of discovering it. But knowledge of all the evidence tending to prove the fraud is not necessary. It is sufficient if the material facts which go to make it up are known. A failure sooner to discover the fraud may be excused by the existence of confidential relations between the parties, or by reason of the fact that he was misled by further false representations made by the other party."

There is no evidence on this record that plaintiff after the alleged release was signed, when he was woefully incapacitated, had any conversation directly or indirectly, or dealing of any kind in reference to this alleged release, with defendant Dyer or the agent of defendant corporation who procured same, in regard to the alleged settlement. A copy of the alleged release was not left with plaintiff at the time it was alleged he signed same, and his mental condition was such that he was unaware of what took place. Surrounded by those who had peculiar relationship with him, his mental condition and the other facts connected with the transaction, we think the evidence on this aspect was sufficient to be left to the jury. The alleged release says *"even to the extent of death."* In the language of the *Sherrill case, supra, "One not informed of the whole transaction is not in a position to ratify the same,"* and in R. C. L., *supra, "The defrauded party must act with full knowledge of his rights."* It was proper in the court below to have left the question of ratification to the jury.

The hypothetical questions propounded to the two doctors are similar to those approved *In re Peterson,* 136 N. C., 14, at least on this record it could not be held for prejudicial or reversible error. In the judgment below we find

No error.

LOUISE CARPENTER LITTLE v. GAITHER LITTLE.

(Filed 14 December, 1932.)

Divorce E d—Judgment holding defendant in contempt for failing to obey order to pay alimony under C. S., 1667, is upheld in this case.

Where upon a hearing upon a rule directing the defendant to show cause why he should not be held in contempt for disobedience of the court's order for him to pay certain weekly sums to his wife under C. S., 1667, the court finds that the defendant's refusal to obey the order was wilful, with utter contempt, and characterized by an absence of any effort by the defendant to obey the order, judgment that the defendant was in contempt and that he be imprisoned will be upheld on appeal, it being manifest that the defendant was financially able to comply with the order.

APPEAL by defendant from an order of *Warlick, J.*, made at Chambers in CATAWBA County on 30 April, 1932.

The cause was heard upon a rule directing the defendant to appear and show cause why he should not be held in contempt for disobedience of the court's order requiring him to pay to the plaintiff a stated sum each week for her support, doctor's bills, and fees for counsel, under C. S., 1667.

The plaintiff and the defendant are married to each other but are living in a state of separation through the fault of the defendant. At the hearing the court in substance found as a fact that the defendant was able to comply with the order and that "wilfully, with utter contempt," he had failed and refused to do so, or to make any effort to do so; also, that the plaintiff was not able to work, and had no means out of which to support herself or to provide for the birth of her child, of whom the defendant is the father. The court thereupon adjudged that the defendant was in contempt and that he be imprisoned. The defendant excepted and appealed.

John C. Stroupe and Theodore F. Cummings for plaintiff.
J. L. Murphy and L. A. Whitener for defendant.

PER CURIAM. It is manifest from the findings of fact that the defendant is financially able to comply with the order of the court. The case of *West v. West,* 199 N. C., 12, is therefore not in point. The court found, moreover, that the defendant's refusal to obey the order was wilful, "with utter contempt," and characterized by an absence of any effort to respect the court's direction. He alone is responsible for the consequences of his contemptuous conduct. Judgment

Affirmed.

S. G. MORRIS AND MAGGIE MORRIS, HIS WIFE, v. R. L. LAMBETH.

(Filed 14 December, 1932.)

Evidence K b—Admission of opinion, based on observation, as to cause of break in dam held not error in this case.

In this case the question involved was whether the defendant's dam had been negligently constructed and maintained, and the defendant offered as a witness the foreman who had constructed the dam who testified as to its construction and that he had examined it after the break, the witness was then allowed to testify that he had an opinion satisfactory to himself as to the cause of the break and that the break was caused by some manner of explosion: *Held*, the opinion evidence was competent under the rule that common observers may testify to the results of their observations made at the time in regard to common appearances, conditions, etc., which cannot be reproduced and made palpable to a jury.

CIVIL ACTION, before *Finley, J.*, at July Term, 1932, of RANDOLPH.

The plaintiffs alleged and offered evidence tending to show that on 28 February, 1929, they were owners of certain lands, and that on said date a dam, erected by the defendant on lands owned by him and adjoining the lands of plaintiff, broke, flooding about forty acres of bottom land and otherwise damaging the property of plaintiffs. It was alleged that the dam was negligently constructed and maintained, and that by reason thereof the break resulted, occasioning the injury complained of.

The defendant alleged and offered evidence tending to show that the dam was properly constructed and maintained.

The issue of negligence was answered in favor of defendant, and from judgment upon the verdict the plaintiff appealed.

H. M. Robins for plaintiff.
I. C. Moser for defendant.

PER CURIAM. The defendant offered the testimony of a witness who was the foreman in charge of the work of constructing the dam. He testified in detail as to the construction of the dam, and that on the day after the break he examined it. Thereupon he was asked if he had an opinion, satisfactory to himself, as to the cause of the break, and replying in the affirmative, stated that the break was caused by some "manner of explosion." The witness further testified as to the facts observable in and about the broken dam upon which his opinion was based. The plaintiff objected to the testimony, and assigned the admission thereof by the trial judge, for error. This testimony is within

the principle approved in *Britt v. R. R.*, 148 N. C., 37, 61 S. E., 601, as follows: "The exception to the general rule that witnesses cannot give opinions is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill or learning, but it includes the evidence of common observers testifying the results of their observations made at the time in regard to common appearances, facts and conditions which cannot be reproduced and made palpable to a jury." This statement of law was approved in *Marshall v. Tel. Co.*, 181 N. C., 292, 106 S. E., 818.

The merits of the controversy involve an issue of fact, and the verdict is determinative.

Affirmed.

STATE v. R. T. PARDUE.

(Filed 14 December, 1932.)

Embezzlement B d—Directed verdict against defendant held error, question of fraudulent intent being for the jury.

Under the evidence in this prosecution for embezzlement a charge directing a verdict against the defendant was error, the question of fraudulent intent being for the jury.

APPEAL by defendant from *Moore, J.*, at March Term, 1932, of WILKES.

Criminal prosecution tried upon an indictment charging the defendant with embezzlement.

The State's evidence tends to show that W. C. Pierce had a contract with the Delco Light Company to sell their products in certain territory on a 20 per cent commission basis. A portion of the territory was "sublet," as it were, to the defendant on equal division of commissions. Collections were made on a number of sales and the entire proceeds thereof used by the defendant.

The testimony of the defendant is to the effect that the lighting plants and fixtures were sold to him by Pierce to be paid for as and when collections were made from customers. Certain collections were made and used by the defendant, but he says: "It was not Mr. Pierce's money. It was my money. In a way it was my money and in a way it was his. I bought the stuff and gave Mr. Pierce a check. It was understood that when I collected this money I was to pay him, and I tendered him what I had collected."

At the close of the evidence, the court instructed the jury as follows: "Gentlemen of the jury, I will have to charge you that if you believe

the evidence in this case, beyond a reasonable doubt, even the defendant's own testimony beyond a reasonable doubt, you will return a verdict of guilty." Exception.

From an adverse verdict and judgment thereon the defendant appeals, assigning errors.

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

J. H. Whicker for defendant.

PER CURIAM. The case is controlled by *S. v. Rawls,* 202 N. C., 397, 162 S. E., 899, where a similar instruction, which failed to include the element of fraudulent intent, was held for error.

New trial.

CAROLINE DEMPSTER v. JOHN FITE.

(Filed 14 December, 1932.)

1. Appeal and Error G b—Exceptions not set out in brief are deemed abandoned.

Exceptions not set out in appellant's brief, or in support of which no reason is stated or authority cited, are deemed abandoned.

2. Damages C b—Evidence held not to show causal connection between prior injury and injury in suit.

In an action to recover damages for a negligent personal injury the plaintiff testified that prior to the injury in suit she had been injured in another accident in which her pelvic bone had been broken in three places, but there was evidence that after the first injury she had returned to work and that the injury had gotten well, that upon returning to work she had no symptom of pain in her back, that she continued to work until the date of the injury in suit, some eight months later, that immediately after the injury in suit she complained of pain in her back, together with medical expert testimony based on X-ray pictures taken after the injury in suit that two vertebræ of plaintiff's backbone were fractured and that the injury resulted from the accident in suit, that after the injury in suit the plaintiff had not suffered pain in the region of the former injury, *is held* not to establish a causal connection between the prior injury and the injury in suit.

3. Evidence K d—Facts assumed in hypothetical question need not be stated upon finding by jury from "greater weight" of evidence.

A hypothetical question asked the plaintiff's medical expert witness upon the assumption that the jury find from the evidence the facts to be as

therein stated will not be held for error for its failure to state the burden of proof on the facts assumed, and the defendant's contention that the question should have been stated "if the jury should find from the greater weight of the evidence, that . . . ," and not "if the jury should find from the evidence, that . . . " cannot be sustained, the court having correctly stated the burden of proof on the issue in his charge to the jury.

4. Evidence K b—Testimony of expert that injury resulted from accident held not reversible error under facts of this case.

Where in a personal injury action all the nonexpert evidence is to the effect that the plaintiff was injured to some extent by the accident in question, and the plaintiff offers a medical expert witness who had taken X-ray pictures of the plaintiff's spine who testified on cross-examination that two vertebræ had been fractured, the testimony of the witness on redirect examination that in his opinion the accident caused the injury to the vertebræ will not be held for prejudicial error as invading the province of the jury when the testimony is based upon the expert's examination of the X-ray picture and a proper hypothetical question assuming the facts as contended by the plaintiff, the question being addressed to the issue of damages and not to the issue of negligence, and the question not calling for an opinion as to the existence of a controverted fact, and such expert is also competent to testify as to whether the injury suffered by the plaintiff was, in his opinion permanent.

5. Evidence K d—Form of hypothetical question in this case held not to constitute reversible error.

The testimony of an expert witness must be based upon facts within his knowledge or upon the assumption that the jury shall find certain facts to be as recited in a hypothetical question, but in this case the form of the hypothetical questions propounded to the plaintiff's expert witnesses is not held for reversible error under the facts of this case although the form of the questions was not, perhaps, technically correct, there being two expert witnesses for the plaintiff testifying that two vertebræ of the plaintiff's backbone had been fractured, and three expert witnesses for the defendant testifying to the contrary, and it appearing that no prejudice had resulted to the defendant from the form of the questions excepted to.

APPEAL by defendant from *MacRae, Special Judge,* and a jury, at April Term, 1932, of MECKLENBURG. No error.

This was an action for actionable negligence, brought by plaintiff against defendant alleging damage. Plaintiff was a telephone operator in the employ of the Southern Bell Telephone and Telegraph Company, and worked until 9 o'clock the night of her injury—25 July, 1931. After working hours, she and a lady friend went to Gastonia, N. C., with two young men, over the Wilkinson Boulevard. On the return trip she was riding in the rear seat of the automobile. Plaintiff testified, in part: "Our car was struck in the rear and was torn completely up. It knocked it a long distance down the highway. The car that hit us, when I got out, was jammed into the back of our car. They were locked to-

gether. We were struck right in the middle of the back seat. I was knocked against the front seat almost unconscious. Inez McLendon helped me out of the car. . . . I went to bed. I went to the hospital a week afterwards. Dr. Alonzo Myers put me there. I stayed in the hospital two weeks. He put me in a plaster cast the first day I went to see him. I have the cast on now. I have been wearing the cast for nine months. After I left the hospital I went to my apartment on East Fifth Street and stayed there about two months or a little over. I was unable to be up and have not worked since. I tried to do a little house work, but when I do I get completely worn out. I have to go to bed and rest. I was in bed two months at home and two weeks in the hospital and after that I stayed in bed the best part of the day. . . . My back pains me a lot. I was not hurt in any other part of the body but I am nervous. I was terribly bruised on the night of the accident. My arms were black and blue all over. The seat I was in was pushed up to the front and the front seat broken out. I am twenty-two years old. . . . The accident happened a little after twelve. . . . We did not stop any place—from the time we left home until the accident happened except to change drivers. We were running about twenty-five or thirty miles an hour when we were struck. It must have knocked us about fifty yards. His car was hooked up with ours. I spoke to Mr. Fite when I got out and then I collapsed after he said he was going to do all the damage he could. He deliberately backed his car back and came forward and hit our car again. I fainted but in a few minutes I came to. They pushed Mr. Fite's car back from our car to clear the road. Mr. Fite said 'I am going to complete this thing.' . . . I live with my parents in Spartanburg, the first I told them of this accident was when I was taken to the hospital. My mother came but my father is an invalid." On cross-examination, the plaintiff testified that she had filed a complaint for injury by collision, which occurred 4 July, 1930, whereby her pelvic bones had been broken in three places, that she had been placed in and remained in a plaster cast for a period of four months. Plaintiff, after defendant's evidence was introduced, was recalled and testified: "I remember the date of my first injury when the pelvic bones were cracked—4 July, 1930. I went to work after that injury about 15 November. I worked steadily after that until the night of this accident."

The car plaintiff was riding in, when hit from the rear, was on the right-hand side, in compliance with the law of the road. No obstruction to prevent anyone in the rear from seeing the car plaintiff was riding in. It was a straight road, and was a clear night. It was a hard lick, the car plaintiff was in was knocked 50 to 60 feet. Defendant denied

negligence, and contended that the rear light of the car in which plaintiff was riding was not burning.

Dennis Deal, witness for plaintiff, testified in part: "The center of his (Fite's) radiator hit the spare tire on my car, it was a steel wheel on the back of my car. His car was jammed in the back of my car. . . . Mr. Fite got in his car to drive it out of the road and ran into the back end of us again. Our car was torn up as much as possibly could be done to it. The rear seat was broken in two. The rear seat was knocked part of the way towards the front of the car. The front seats were broken off too. Mr. Fite's car hit my spare wheel and tore it up. . . . Mr. Fite told me everything would be all right—that he would fix everything up and not let the sheriff lock him up."

L. N. Warren, witness for plaintiff, testified in part; speaking of defendant: "I could not say who passed me before I got to where the wreck was but he was driving a yellow Ford cabriolet. The next time I saw it, it was in back of Mr. Deal's car. I will say it must have been doing sixty or sixty-five miles an hour. . . . The road was straight there. I found Mr. Fite's car in the rear end of Mr. Deal's car, it was fastened to the car. They were both in bad condition. The seats of Deal's car on the inside looked like dynamite had turned loose inside. The front seat was broken off. . . . Miss Dempster said she would rather come on to Charlotte and have her own doctor. While we were coming home, every time we would hit a little bump, she would holler with her back until she came to herself. She was unconscious until we got to Belmont. We went to the doctor's house and talked with him and she decided to come on home. We came from Belmont to Charlotte. We took her to her apartment on Fifth Street."

A. D. Nixon, witness for plaintiff, testified in part: "Before this we walked across the road. Mr. Deal called the deputy sheriff off and they were talking and I heard Mr. Fite say 'Don't have me arrested, Dennis. I understand it was my fault, but I will fix everything up.'"

Sam T. Reid, witness for plaintiff, testified in part: "My home is in Gastonia—I am engaged in the automobile repair business. . . . I repaired the two automobiles but did not tow them in. . . . The body of the Deal car was damaged a great deal and the front of the Fite car was damaged a great deal. The rear panel of the Deal car caved in. Spare tire was shoved through the rear panel for a good ways. Far enough to break the back of the back seat in two, the woodwork was broken in half. The front seats were broken off, the rear part of the frame was bent. The radiator, hood, and front axle and frame of the Fite car was damaged. The radiator, the frame, the hood and the front axle of the Fite car were damaged, the radiator was pushed back into the fan. Mr. Fite's car was a yellow Ford coupe." . . .

Inez McLendon, witness for plaintiff, testified in part: "We left the apartment about fifteen of ten, or probably ten. Miss Dempster, Mr. Deal, Mr. Lineberger and myself. We got in the automobile—I rode in the back seat with Mr. Lineberger. We started to Gastonia and turned at fair ground and changed, I got in the front seat with Mr. Lineberger and Miss Dempster and Mr. Deal got in the back seat. We started back to Charlotte—we had not stopped on the road. Just on this side of the Hatch Hosiery Mill we were coming back to Charlotte, and all of a sudden we heard a terrific crash, we didn't know what had happened, I thought a train had hit us. We were shocked for a moment, I couldn't realize what had happened. The first thing I realized someone was flashing a light in the car. Three men were standing outside, later I found it was the sheriff, Mr. Warren and Mr. Nixon. I got out first on the outside of the road and helped Miss Dempster out. I was holding both arms around her to hold her up, she could not stand up by herself. She was complaining 'Oh my back' and I couldn't do anything for her. . . . After talking with him (defendant) she crumpled down on the highway. That was back of our car, I couldn't help lift her, I called to some of the men to help me."

The defendant testified, in part: "I was coming from Lowell on the Wilkinson Boulevard, I was on the right-hand side of the road making a speed around forty-five miles an hour. When this car all of a sudden loomed up ahead of me without a tail light. I attempted to miss it and stop, but I failed. I hit the car, but I did all in my power to prevent it. . . . I broke three of my front teeth off and broke my nose. I had two black eyes and several gashes about the neck, body and a sprained ankle." The defendant denied the material allegations of plaintiff and her witnesses.

A. B. Roberson, for defendant, testified in part: "I saw the Deal car pass. The big glass door in front of the mill, as I walked up there and looked out they were coming on right slow, the front light was out and it attracted my attention. Then I went out, I kept watching them on until they went out of light of the mill which shined on the road. There was no light in the rear of their car. I saw the yellow car pass. I didn't pay much attention to it, it seemed that neither one were breaking any speed. He didn't attract my attention very much. His lights were burning. Immediately after that, I heard the noise and broke and ran up there. . . . The mill is about fifty feet from the road. I was on the inside of the mill looking out of the big glass door when the Deal car passed. I was attracted to the car because it was running so slow and because it didn't have any lights. The right-hand light was burning on the outside, the left-hand light next to me was

out. I also watched the tail light. It attracted my attention and I noticed it, I was coming out of the door at that time. I had done made my round and I was due to come out. I stay in the boiler room. Mr. Fite's car couldn't be very far because I just came out of the door, about the time I cleared the door and started to push it back, his car came along. I didn't see the Fite car until the crash happened. . . . I don't think either car was running at a reckless rate of speed in my opinion. . . . Q. Was there anything to hinder him from seeing the Deal car? Answer: I guess he could at that time. It was a straight road one and one-half miles. Q. There was nothing to keep Mr. Fite from seeing the Deal car if his lights were burning? Answer: . . . There was nothing between them."

W. K. Mingus, a policeman in Belmont, witness for defendant, testified in part: "I am a policeman in Belmont, I know Mr. Deal—he was driving a Ford coach. I am familiar with the car, I remember about the time this accident happened. I stopped Mr. Deal the day before this incident, because of headlight. Always when we stop a man, we examine his headlight and rear light. It had been sometime previous to this one headlight and one tail light was out. Said just the same as we tell any of them to have them fixed."

J. C. Reed, witness for defendant, testified in part: "Just about dark Mr. Deal came into the service station, bought some gas and started out and went toward Belmont and didn't have any tail light. Later on those cars came back there. He wanted to call a doctor and call a wrecker."

Dennis Deal recalled, denied what this witness testified to in part.

Dr. C. C. Phillips, witness for defendant, testified in part: "I am a physician and specialist in X-ray examination treatment. I have been in that class of business for thirteen years. I had occasion to take X-ray pictures of Miss Dempster. . . . This is the plate made on 24 September, 1931, of Miss Dempster's dorsal spine. . . . Taking the sixth and seventh dorsal, I find this deviation in the seventh and eighth, as to my count of the vertebræ. Here is the eighth showing a very slight deviation from this one, for instance. This one is a little hollowed out at the front part of the body of the vertebra. We find above that a projection downward of the lower surface of the body, which compensates for that little depression. We find the same thing in the bodies of the vertebræ a little below, that lead us to believe that was not due to injury, but result of the condition of the individual, her posture as she grew up, that caused the bone to develop in that way. That was our opinion in that case, and in our opinion there is no fracture. We examined her

at the request of Dr. Myers and gave this report. The condition of the dorsal spine is the same as at previous examination which we made on 24 September, 1931. It is our opinion that the condition of the vertebræ is normal in this individual, and not a result of injury."

Dr. O. L. Miller, witness for defendant, testified in part: "My profession is bone joint surgery. I do some surgery at Orthopedic Hospital in Gastonia. I have an office in Charlotte. I have been specializing in orthopedic surgery for about fifteen years. I have a good X-ray in my place here. I had occasion to take X-ray pictures of the back of Miss Dempster the latter part of September, about the 20th of September, 1931. I have those plates with me. One is from the side and one from the front. I will put the front X-ray plate up here first placing same in the light on the judge's desk. I don't see any fracture in this plate. If they were there I think they would be evident. She has rather narrow inter spaces between the vertebræ up in the dorsal section. I took another picture. I don't think I would want to satisfy myself without another view. This one is lateral view of the lady's spine, taken through the side. No evidence of fracture there, no evidence that there has ever been any fracture."

Dr. Stephen Gaul, witness for defendant, testified in part: "I do bone joint surgery. I have been doing that since 1915. I graduated in Philadelphia. I had two years internship and after that I was at the Walter Reid Hospital. This picture is anterior posture view of the spine of Miss Dempster. She has narrowing of the spaces between various vertebræ, and also some narrowing along these vertebræ and a lipping here, otherwise it is nothing else. I am not satisfied from this view to give an opinion on that. In the picture taken by Dr. Phillips she has a posterior condition—round back, narrows at these spaces, she has narrowing in this vetebral space and this one. That condition exists in a number of vertebræ in the dorsal region. I have looked at these before and seen no fracture, particularly in the seventh and eighth dorsal vertebræ there is no fracture. . . . I don't see anything that would disturb the functional use of the spine in its ordinary movements. I don't see anything that would cause pain."

The plaintiff in rebuttal recalled Dr. J. Rush Shull, an expert, who without objection testified contrary to the expert testimony of defendant's witnesses. Both plaintiff and defendant proved their characters were good.

The usual issues of negligence and damage were submitted to the jury, who answered in favor of plaintiff. Defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and other material facts will be considered in the opinion.

J. D. McCall and A. M. Butler for plaintiff.
L. Lawrence Jones for defendant.

CLARKSON, J. There can be no question that the evidence was abundant to have been submitted to the jury on the question of negligence and damage. In fact, there are no exceptions or assignments of error as to the charge of the court below in defendant's brief. Part Rule 28 (200 N. C., at p. 831), is as follows: "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 by him."

Plaintiff testified that on 4 July, 1930, she had received an injury in an automobile collision and that her pelvic bones had been broken in three places. She went to work after this injury, on 15 November, 1930, and worked steadily thereafter until the collision and injury for which this action was instituted.

On the question of injury, Dr. J. Rush Shull, a witness for plaintiff, an expert X-ray specialist, who took X-ray pictures of plaintiff many times and on different occasions, testified in part: "We found in both examinations—30 and 31 July—the compression fracture of the bodies of the sixth and seventh thoracic vertebræ." On cross-examination: "*This was the only place she complained of—I did not take an X-ray of the pelvic region.* . . . I am confident that there has been a fracture because the vertebræ has come closer together in those two places. Ordinarily the X-ray takes nothing but the bony tissue—does not take the nerves."

Dr. Alonzo Myers, an expert bone surgeon, witness for plaintiff, testified in part: "All of these findings with history, indicated to me that she was having severe pain in her back. . . . I felt she must have some injury in the vertebræ and warned her to go to the hospital and have an X-ray made. . . . In a few days I got her there and had X-ray made, it showed that she had a fracture of the seventh and eighth dorsal vertebræ. I applied plaster paris cast from her waist to axilla in order to take the motion out of the back. I have kept her under observation since then. Seen her from time to time; had her rechecked by X-ray about every two months. . . . In my opinion, based upon experience and study, to mobilize or keep it straight with a cast for a period of a year, and often longer, even though the symptoms have disappeared you will be afraid of reoccurrence, which will make it worse. She has not been able to work since the injury. She will not be able to do anything which will require the use of her spine—certainly not now."

The defendant introduced Dr. C. C. Phillips, an expert, who testified: "The condition of the dorsal spine is the same as at previous examina-

tion which we made on 24 September, 1931. It is my opinion that the condition of the vertebræ is normal in this individual, and not a result of injury." Also Dr. O. L. Miller, an expert in orthopedic surgery, who testified: "No evidence of fracture there, no evidence that there has ever been any fracture." Also Dr. Stephen Gaul, expert, testified: "I have looked at these before and seen no fracture, particularly in the seventh and eighth dorsal vertebræ there is no fracture. . . . I don't see anything that would disturb the functional use of the spine in its ordinary movements. I don't see anything that would cause pain."

There was no objection on either side to the above opinion evidence. The plaintiff's expert testifying that there was a fracture of her spine in two of the vetebræ. Defendant's experts testifying "the condition of the vertebræ is normal, in this individual and not a result of injury"—"no evidence that there has ever been any fracture"—"there is no fracture."

The pelvic bones of plaintiff, which had been broken more than a year before in a collision, before the collision for which this action is brought, the record discloses had gotten well and plaintiff had gone to work. Dr. Myers testified "She had no indication or symptom of pain in her back then, she returned to work after that." From the evidence we can see no causal relation between the pelvic bone injury and the present alleged injury.

Defendant contends that three points are involved: (1) Hypothetical question to medical expert by plaintiff without placing burden on plaintiff to show by greater weight of evidence, the assumed state of facts. (2) Allowing medical expert to testify that certain condition was caused by the accident. (3) Form of hypothetical question propounded to medical expert.

On the first aspect defendant contends: "The hypothetical questions propounded by the plaintiff are fatally defective in that they were not based on the hypothesis that the jury should find the facts to be *true by the greater weight of the evidence.* The burden was on the plaintiff and she must carry the burden continuously throughout the trial." The defendant cites no authority as to the *greater weight of the evidence* necessary in the hypothetical questions.

On the two issues submitted to the jury in the action, the court below charged correctly, as follows: "The first issue is: 'Was the plaintiff injured by reason of negligence of the defendant, as alleged in the complaint?' *The burden of that issue is upon the plaintiff.* It is encumbent upon plaintiff to satisfy you by the greater weight of the evidence, that is evidence which outweighs or preponderates all other evidence in this case; whether introduced by plaintiff or defendant, that

plaintiff was injured by reason of negligence of defendant as alleged in the complaint. Second issue: 'What damages, if any, is the plaintiff entitled to recover of defendant?' *The burden of that issue is upon plaintiff to satisfy you by the greater weight of the evidence, as to what damage she is entitled to recover.*"

In *Parrish v. R. R.,* 146 N. C., at p. 126, the hypothetical question begins practically like the ones objected to in the present action: "If the jury find the facts to be from the evidence, that the plaintiff was injured by falling back against the arm of a seat in the train," etc. The Court found no error as to the form of the hypothetical question in the *Parrish case, supra.*

As to the second aspect "Allowing medical expert to testify that certain condition was caused by the accident": All the evidence, other than that of the defendant's expert witnesses, indicated that the impact was such as to cause injury to plaintiff and her condition thereafter. The general principle in regard to expert testimony is laid down in the *Parrish case, supra,* at pp. 127-8: "We cannot agree with the learned counsel of the defendant that this case bears any resemblance to *Summerlin v. R. R.,* 133 N. C., 550. In that case the questions excluded by the court were so framed as to require the witnesses to *express an opinion as to the existence of a fact which was controverted,* and it was there said by the Court that this was not the proper form for the question to take, but that the expert's opinion should be founded *upon a hypothetical question containing a statement of facts which the jury might find from the evidence,* and supposing, of course, that they will find them to be as stated in the question. (Italics ours.) . . . (p. 128.) The question was not so put to the witness 'as to require him to draw a conclusion of fact nor to pass upon the effect of the evidence in proving controverted facts,' but merely to express his opinion upon the facts stated in the question, leaving them to be found exclusively by the jury." *Hill v. R. R.,* 186 N. C., 475.

In the present case, following the precedent in the *Parrish case, supra,* the hypothetical questions were premised on the jury finding the facts to be from the evidence. Dr. Lewis, in the *Parrish case, supra,* answered: "In my opinion, the kidney was dislocated by the fall, and the dislocation is permanent, and the plaintiff will be disabled for life, unless he has the kidney removed by an operation."

In the present action Dr. Shull, an expert witness for plaintiff, testified *on cross-examination by defendant:* "I am confident that there has been a fracture because the vertebræ have come closer together in those two places. Ordinarily, the X-ray takes nothing but the bony tissue—

does not take the nerves." On redirect examination, the proper hypothetical question was propounded by plaintiff, as follows: "If the jury should find from the evidence that this young lady on 25 July, 1931, was riding in the rear seat of an automobile on Wilkinson Boulevard, in Mecklenburg County, and should further find that an automobile traveling at the rate of sixty or sixty-five miles an hour should strike the rear of the car in which she was sitting, breaking the seat in two and throwing plaintiff forward, and if the jury should further find that she immediately complained of her back and should further find in a few minutes thereafter she fainted, and if they should further find that she was taken to the hospital and that since that time she has been unable to perform manual labor, and has been in a plaster cast for the last eight or nine months, have you an opinion, satisfactory to yourself as to what caused the condition you find in the vertebræ as disclosed by the X-ray pictures? Answer: Yes, I have an opinion. Q. What is it? Answer: The accident caused the injury." *Lynch v. Mfg. Co.*, 167 N. C., at p. 100; *Riggs v. R. R.*, 188 N. C., 366; *Shaw v. Handle Co.*, 188 N. C., 222; *Buckner v. R. R.*, 195 N. C., 654; *S. v. Fox*, 197 N. C., at p. 486.

It must be noted that all the evidence, except that of defendant's expert witnesses, was to the effect that plaintiff was to some extent injured in the collision. The hypothetical questions were not addressed to the issue of negligence, but on the issue as to the extent of the injury. The answer of the doctor "The accident caused the injury." Taking the question and answer together, on the question of damages, we do not think the answer impinged the jury rule to such an extent that it should be held for prejudicial or reversible error.

In the *Parrish case, supra,* the cause and extent of the injury was stated and this was not held to be error. We can see no error in the question propounded to the expert Dr. Shull, and his answer thereto: "Yes, I have an opinion from my examinations and X-ray as to whether this girl's injury is permanent. Q. What is that? Answer: It is total and permanent."

In *Martin v. Hanes Co.*, 189 N. C., at p. 646, *Adams, J.*, we find: "These cases enunciate the principle that, while a medical expert may not express an opinion as a controverted fact, he may, upon the assumption that the jury shall find certain facts to be as recited in a hypothetical question, express his scientific opinion as to the probable effect of such facts or conditions."

On the third aspect: "Form of hypothetical question propounded to medical expert"—The form and answers to the hypothetical questions

may not be as technical as perhaps they should be. In N. C. Handbook on Evidence (Lockhart) 2d ed., p. 240, part sec. 203, the following observations are made: "The general rule is that opinion evidence is inadmissible, and the triers of a matter in dispute—the judge or the jury as the case may be—draw their conclusions from facts testified to before them, and not from opinions expressed by others. There are three classes of exceptions to the above rule. The court will admit (1) opinions of experts, (2) opinions on the question of identity, and (3) opinions which, from necessity, must be received. . . . (Sec. 204.) An expert may express an opinion, but he must base his opinion upon facts within his own knowledge, or upon the hypothesis of the finding by the jury of certain facts recited in the hypothetical question. . . . (Sec. 209.) As pointed out, the exceptions to the opinion rule as based upon the justification that the ends of justice may be more readily met by assisting the jury with the opinion testimony. Assuming that the requirement of relevancy is taken care of, the court is then confronted with two queries: (1) Is the province of the jury invaded? (2) Will the opinion materially assist the jury? In the application of the queries to the particular case, while the courts have attributed various reasons for the exclusion or admission of the testimony, it is submitted that no rules, nor formulas, can be satisfactorily deducted from the results reached."

In *Cochran v. Mills Co.*, 169 N. C., at p. 64, *Walker, J.*, said: "The questions to the expert were properly framed and were supported by evidence. *Summerlin v. R. R.*, 133 N. C., 554; *Parrish v. R. R.*, 146 N. C., 125; *Shaw v. Public-Service Corp.* (168 N. C., 611), *supra*. Besides, it appears that upon striking a general balance the advantage of all the questions and answers was largely in favor of defendant. If there has been error, no harm would have resulted to defendant."

In the present action plaintiff had two experts and defendant three, testifying in regard to the injury. The defendant's three experts testified there was no injury, the plaintiff's that there was. On all the facts and circumstances of this case; conceding, but not deciding there was error, we cannot hold it as prejudicial or reversible. In the legal battle as to opinion evidence between the able counsel in this action, it seems as if "honors were easy." The questions of fact were decided by the jury in favor of the plaintiff. We find in law

No error.

SAM HOLMES v. MRS. DELLA YORK, MRS. LOIS E. COOK, AND HUSBAND A. S. COOK, MRS. OLA SHOEMAKER, AND HUSBAND RUEL SHOEMAKER, AND ATHIA YORK.

(Filed 21 December, 1932.)

1. **Wills E i—Parol evidence of testator's intention is not admissible in action involving construction of will.**

In an action involving the construction of a will testimony of a witness of a declaration of the testatrix as to her intention of how the property in controversy should be disposed of under her will is incompetent and is properly excluded.

2. **Wills E a—There is a presumption against partial intestacy.**

Where a will is susceptible to two reasonable constructions, one disposing of all of the testator's property, and the other leaving part of the property undisposed of, the former construction will be adopted and the latter rejected, there being a presumption against partial intestacy.

3. **Wills E f—All of testatrix's real property held devised to named devisee, the will otherwise leaving the property undisposed of.**

The testatrix was seized of two tracts of land at the time of her death, one containing about twenty-six acres and the other five, the smaller tract adjoining the larger and the larger tract adjoining the lands of Y., H. and B. Her will contained a devise to "Y. of all my real property adjoining the lands of Y., H. and B., containing twenty-six acres, more or less." The will contained no residuary clause and made no other disposition of the real property, and Y. appeared to be the chief object of the testatrix's bounty. *Held*, Y. took both tracts of land in fee simple under the will, the will being construed to avoid partial intestacy. C. S., 4164.

APPEAL by plaintiff from *Barnhill, J.*, at March Special Term, 1932, of IREDELL. Affirmed.

This is an action brought by plaintiff against defendants to recover two pieces of land, described as follows: "(1st tract) Beginning in Hudson's and Tharpe's line on a double pine tree, near the road leading to Troy, running east 36 rods to a rock; thence south by side of a hedge row 19 rods to a rock; thence west 36 rods to a black gum in the old field on the west side of the road leading south to the church; thence north 19¾ rods to the beginning, containing four acres, more or less. (2nd tract) Beginning at a double pine in Hudson's and C. V. Tharpe's line; running west 8 rods to a stone in Tharpe's and Hudson's line; thence south 19¾ rods to a stone in Z. R. Tharpe's line; thence east 8 rods to a black gum, Frank Brown's corner; thence north 19¾ rods to the beginning, containing one acre, more or less."

The record is as follows: "It is agreed that only the question of title and ownership to the land be tried at this time, reserving the right to

try the question of damages for wrongful detention and on the question of damages on defendant's counterclaim to some future term of court. It is admitted that both the plaintiff and defendants claim under the same common source, it being admitted by all parties that Miss L. C. Hodgson was the owner and seized in fee simple of the lands in controversy at the time of her death, and acquired same prior to the execution of her will. It is further admitted that at the time of the death of Miss L. C. Hodgson, who was the owner in fee simple of a 26-acre tract of land, and of the land described in the complaint, to wit: Four acres and one acre, making a total number of acres of land owned by her at her death, thirty-one, and that she owned same at the date of the execution of her will. It is further admitted that the 26-acre tract of land owned by her at her death adjoined the lands of O. C. York, D. A. Holmes and Curtis Barnard. It is further admitted that the four-acre tract of land and one-acre tract, for which this suit was brought to recover, did not adjoin the lands of O. C. York, D. A. Holmes, or Curtis Barnard, but did adjoin the above 26-acre tract of land on the south side. It is further admitted that O. C. York mentioned in the will of Miss L. C. Hodgson is now dead, and left surviving him, his widow, Mrs. Della York, one of the defendants, and the following children: Mrs. Lois E. Cook, Mrs. Ola Shoemaker and Athia York, as his sole heirs at law, he having died intestate. It is further admitted that the said Miss L. C. Hodgson died leaving the following paper-writing as her last will and testament:

'North Carolina—Iredell County.

I, L. C. Hodgson, of said county and State being of sound mind but considering the uncertainty of my earthly existence do make and declare this my last will and testament: First, my executor hereinafter named shall give my body a decent burial, erect a nice white slab to my grave and pay all my funeral expenses, together with all my just debts out of the first money which may come into his hands belonging to my estate. Second, *I give and devise to O. C. York all my real property adjoining the lands of O. C. York, B. A. Holmes, Curtis Barnhard and others, containing 26 acres, more or less.* Third, *I give and bequeath to O. C. York all my personal property of whatsoever nature.* Fourth, I hereby constitute and appoint L. Ellis Hayes my lawful executor to all intents and purposes to execute this my last will and testament according to the 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, L. C. Hodgson, do hereunto set my hand and seal, this 15 June, 1926.' (The above will was introduced in evidence, read to the jury and marked 'Exhibit A.')

L. Ellis Hayes, witness for the plaintiff, on direct examination, testified as follows: That he lives in Iredell County, North Carolina, and was acquainted with Miss L. C. Hodgson during her life time, and stated that he had talked to Miss Hodgson in regard to the lands in controversy passing under her will. The witness was then asked What did Miss L. C. Hodgson tell you, if anything, in regard to the five acres of land now in controversy? Defendants object. Objection sustained. Plaintiff excepts. Had the witness been allowed to answer the question, he would have stated that Miss L. C. Hodgson told him she did not intend this land to go to O. C. York under her will. It is further admitted that had the said Miss L. C. Hodgson died intestate as to the lands in controversy, as contended by the plaintiff, Creed Hale, Flem Hale, S. T. Hale, L. W. Phillippie, Gid Harrington, J. J. Harrington, G. C. Harrington, and Creed Sutherland were her sole heirs at law, and would have inherited the lands in controversy. It is further admitted that the said heirs at law conveyed the lands in controversy to the plaintiff, Sam Holmes, by deed recorded in Book 103, at pages 73 and 74 in the office of the register of deeds of Iredell County."

Lewis & Lewis for plaintiff.
J. W. Sharpe and J. W. VanHoy for defendants.

CLARKSON, J. The only question involved in this appeal is whether or not the devisor died intestate as to the lands in controversy? We think not.

L. Ellis Hayes, a witness for plaintiff was asked: "What did Miss L. C. Hodgson tell you, if anything, in regard to the five acres of land now in controversy? Defendants objected, objection sustained. Had the witness been allowed to answer the question, he would have stated that Miss L. C. Hodgson told him she did not intend this land to go to O. C. York under her will." This exception and assignments of error cannot be sustained.

The matter has been recently fully discussed and authorities cited in *Reynolds v. Trust Co.*, 201 N. C., at p. 278 (quoting from Jarman on Wills) as follows: "As the law requires wills both of real and personal estate (with an inconsiderable exception) to be in writing, it cannot, consistently with this doctrine, permit parol evidence to be adduced, either to contradict, add to, or explain the contents of such will; and the principle of this rule evidently demands an inflexible adherence to it, even where the consequence is the partial or total failure of the testator's intended disposition; for it would have been of little avail to require that a will *ab origine* should be in writing, or to fence a testator round with a guard of attesting witnesses, if, when the written instru-

ment failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied, or its inaccuracies corrected, from extrinsic sources. No principle connected with the law of wills is more firmly established or more familiar in its application than this; and it seems to have been acted upon by the judges, as well as of early as of later times, with a cordiality and steadiness which show how entirely it coincided with their own views." Page on Wills (2d ed.), Vol. 2, sec. 1422, p. 2389.

Presumption is against partial intestacy, where person undertakes to make a will. *Kidder v. Bailey*, 187 N. C., 505; *Gordon v. Ehringhaus*, 190 N. C., 147; *McCullen v. Daughtry*, 190 N. C., 215; *Mangum v. Trust Co.*, 195 N. C., 469.

Page on Wills (2d ed.), Vol. 1, sec. 815, at p. 1383-4, is in part: "Under ordinary circumstances a man makes a will to dispose of his entire estate, or, at least, of his estate as it exists at the time he makes his will. If, therefore, a will is susceptible of two constructions, by one of which testator disposes of the whole of his estate, and by the other of which he disposes of a part of his estate only, and dies intestate as to the remainder, the courts will prefer the construction by which the whole of the testator's estate is disposed of, if this construction is reasonable and consistent with the general scope and provisions of the will. A construction which results in partial intestacy will not be used unless such intention appears clearly. It is said that the courts will prefer any reasonable construction, or any construction which does not do violence to testator's language, to a construction which results in partial intestacy."

The plaintiff in his brief cites no authorities to sustain his contention. The presumption is against partial intestacy. There is nothing in testatrix's will to show the land in controversy was not a part of "*all my real property.*" There is no residuary clause in the will. O. C. York seems to have been the special object of testatrix's bounty, she bequeathed to him *all her personal property of whatsoever nature.* She conveyed her real estate as containing 26 acres *more or less*, and the land in controversy is 5 acres, adjoining the 26-acre tract of land on the south side. Then again, she says "all my real property." To be sure she says who it adjoins, but this 5 acres is adjoining the 26 acres and it is well known, as a matter of common knowledge, that frequently adjoining land is purchased and tacked on the main tract. We think the "tail must go with the hide." C. S., 4164, 4165; *Brown v. Hamilton*, 135 N. C., 10. The judgment of the court below is

Affirmed.

MARY E. HOLLOWAY v. J. W. BARBEE, VIRGINIA FIRE AND MARINE INSURANCE COMPANY AND CITIZENS NATIONAL BANK OF DURHAM, NORTH CAROLINA.

(Filed 21 December, 1932.)

Bills and Notes C a—Bank endorsing draft with guaranty of prior endorsements held not liable for want of authority of prior endorser.

Where a fire insurance company draws a draft on itself payable to the insured to cover loss sustained by the insured on a policy of fire insurance, and the insurer stipulates that if the draft is endorsed for the insured by his agent or attorney that properly certified evidence of authority must be filed with the insurer, and the draft is delivered by the insurer's agent to an attorney who endorses the draft and attaches thereto a certificate of a deputy clerk of the Superior Court that he is the attorney for the insured, and deposits the draft for collection in a bank which endorses it with guaranty of all prior endorsements, and the draft is paid by the insurer after it had examined the endorsements and passed thereon, and the proceeds remitted to the collecting bank and drawn out by the attorney by checks without paying any part thereof to the insured, and it is made to appear as a fact that the attorney was without power to endorse the draft or receive the proceeds thereof: *Held*, the loss was sustained by reason of want of authority by the attorney to endorse and not by want of genuineness in the endorsement, and the bank guaranteeing prior endorsements and furnishing the insurer in good faith evidence of the attorney's authority, is not liable to the insurer on its endorsement, the insurer expressly reserving the right in itself to pass upon the attorney's endorsement.

APPEAL by defendant, Virginia Fire and Marine Insurance Company, from *Midyette, J.*, at January Term, 1932, of DURHAM. Affirmed.

The defendant, J. W. Barbee, is primarily, and his codefendants are secondarily liable to the plaintiff on the cause of action alleged in the complaint in this action. Each of said codefendants, however, alleges in its answer that the other defendant is liable to it for such sum as the plaintiff may recover in this action of said defendant.

Judgment was rendered by default that the plaintiff recover of the defendant, J. W. Barbee, the sum of $4,118.50, this sum being double the amount of damages which the plaintiff is entitled to recover of said defendant on the cause of action alleged against him. C. S., 202. No sum has been paid on this judgment. It was admitted by both his codefendants that the said J. W. Barbee is insolvent, and that no sum can be collected by execution on said judgment.

While the action was pending in the Superior Court of Durham County, and after the judgment by default had been rendered in her favor and against the defendant, J. W. Barbee, the plaintiff agreed with the defendants, Virginia Fire and Marine Insurance Company, and

Citizens National Bank of Durham, N. C., that she would accept the sum of $1,500, in full settlement and discharge of the liability of both said defendants to her in this action. It was thereupon agreed by and between said defendants, that the defendant, Citizens National Bank of Durham, N. C., should pay said sum of $1,500 to the plaintiff, in full settlement and discharge of the liability of both said defendants to her, and that such payment by said defendant should be without prejudice to its contention that the defendant, Virginia Fire and Marine Insurance Company was primarily liable to plaintiff for said sum, and that for that reason, the defendant, Citizens National Bank of Durham, N. C., having paid said sum to the plaintiff, was entitled to recover of the defendant, Virginia Fire and Marine Insurance Company, in this action, the sum of $1,500. Both these contentions were denied by the defendant, Virginia Fire and Marine Insurance Company.

At the trial of the issue raised by these opposing contentions, on the facts agreed by the defendants, it was ordered, considered, and adjudged by the court that the defendant, Citizens National Bank of Durham, N. C., recover of the defendant, Virginia Fire and Marine Insurance Company, the sum of $1,500, with interest and costs.

From this judgment, the defendant, Virginia Fire and Marine Insurance Company, appealed to the Supreme Court.

Fuller, Reade & Fuller for defendant, Virginia Fire and Marine Insurance Company.

McLendon & Hedrick for defendant, Citizens National Bank of Durham, N. C.

CONNOR, J. On 9 March, 1929, the defendant, Virginia Fire and Marine Insurance Company, of Richmond, Va., caused its general manager, J. M. Leake, to draw a draft on said company, for the sum of $2,054.25. This draft was drawn at Richmond, Va., and was payable, at sight, to the order of Mary E. Holloway, administratrix of W. P. Holloway, when presented for payment to the State-Planters Bank and Trust Company, Richmond, Va. On its face there is a recital to the effect that payment of the draft, when properly endorsed, would constitute full satisfaction of all claims and demands for loss and damage by fire which occurred on 12 November, 1928, to property described in policy No. 25338, which was issued by said company through its local agent at Durham, N. C. On the back of the draft, there was a notice in words as follows:

"Notice: If endorsement of draft is made by an attorney or other representative, properly certified evidence of authority must be filed with this company."

The draft was sent by the defendant, Virginia Fire and Marine Insurance Company, by mail, to its local agent at Durham, N. C., with instructions to deliver same to the payee named therein, Mary E. Holloway, administratrix of W. P. Holloway. The local agent of said defendant received the said draft at Durham, N. C., and delivered the same to the defendant, J. W. Barbee, attorney for Mary E. Holloway, administratrix of W. P. Holloway. A few days thereafter, the said J. W. Barbee deposited said draft with the defendant, Citizens National Bank of Durham, N. C., for collection. At the time of said deposit, the draft was endorsed in the handwriting of J. W. Barbee, as follows:

"Mary E. Holloway, administratrix of W. P. Holloway, by J. W. Barbee, Atty." "J. W. Barbee."

Attached to the draft, when same was received by the defendant, Citizens National Bank of Durham, N. C., for collection, was a certificate in words as follows:

"To the Virginia Fire and Marine Insurance Company:
This is to certify that J. W. Barbee is the acting attorney for Mary E. Holloway, administratrix of W. P. Holloway, deceased.
Annie Bell High, deputy."

Seal of the clerk of the Superior Court of Durham County.

The defendant, Citizens National Bank of Durham, N. C., thereupon endorsed the draft as follows:

"Pay any bank or banker or order, all prior endorsements guaranteed.
11 March, 1929. Citizens National Bank, Durham, N. C.
D. P. Campbell, cashier."

The defendant, Citizens National Bank of Durham, N. C., forwarded said draft, with endorsements and certificate attached as aforesaid, by mail, to the State-Planters Bank and Trust Company, Richmond, Va., for presentment and payment. Upon its receipt of said draft, with endorsements and certificate attached as aforesaid, the State-Planters Bank and Trust Company, duly presented same to the defendant, Virginia Fire and Marine Insurance Company, and after said endorsements and certificate had been examined and approved by said company, pursuant to the instruction of said company, charged the amount of said draft to the account of said defendant, and remitted said amount to the defendant, Citizens National Bank of Durham, N. C. The said defendant,

upon its receipt of said amount, credited the defendant, J. W. Barbee, attorney, with said amount, and thereafter paid out the same upon checks drawn on it by the said J. W. Barbee, attorney. No part of said amount was paid by the said defendant, J. W. Barbee, to the plaintiff in this action, either as administratrix of W. P. Holloway, deceased, or individually.

It was admitted at the trial that the defendant, J. W. Barbee, had no authority, express or implied, to endorse the draft in the name of Mary E. Holloway, administratrix of W. P. Holloway, or to receive the proceeds of said draft, as her attorney. It was not denied, however, that the signatures on the back of said draft are in the genuine handwriting of the said J. W. Barbee.

On the foregoing facts agreed, there was no error in the judgment that the defendant, Citizens National Bank of Durham, N. C., recover of the defendant, Virginia Fire and Marine Insurance Company, the sum of $1,500, with interest and costs.

The defendant, Citizens National Bank of Durham, N. C., by its endorsement of the draft, and its guaranty of all prior endorsements, did not assume liability to the defendant, Virginia Fire and Marine Insurance Company, the drawee of the draft, for loss which the said company might sustain by payment of the draft to a subsequent holder, if such loss should be caused by the insufficiency of a prior endorsement to pass title to the draft, or to authorize payment by the drawee to a subsequent holder. In this case, the Virginia Fire and Marine Insurance Company by the notice which it had caused to be printed on the back of the draft before it was issued, had reserved the right to pass upon and determine the sufficiency of an endorsement when it appeared that such endorsement was made by an attorney for the payee, to pass title to the draft, and to authorize its payment when duly presented to the drawee. The defendant, Virginia Fire and Marine Insurance Company exercised this right at its own risk, and not at the risk of the defendant, Citizens National Bank of Durham, N. C. The last named defendant, as required by the notice printed on the back of the draft, in good faith, furnished to the Virginia Fire and Marine Insurance Company, evidence of the authority of J. W. Barbee to endorse the draft as attorney for the payee, and assumed liability for all loss which the drawee might sustain, should the endorsement of J. W. Barbee as attorney be not genuine. The loss sustained by the defendant, Virginia Fire and Marine Insurance Company was caused by the want of authority to endorse, and not by the want of genuineness in the endorsement. The judgment is supported by the decision of this Court in *Bank v. Trust Co.*, 168 N. C., 605, 85 S. E., 5, and is

Affirmed.

MELVIN WILLIAMS, EMPLOYEE, *v.* J. MARVIN THOMPSON, EMPLOYER, AND NATIONAL CASUALTY COMPANY, INSURANCE CARRIER.

(Filed 21 December, 1932.)

1. Master and Servant F h—Application to Industrial Commission for review of award for changed condition held made within time.

Where the Industrial Commission in a hearing before it awards compensation to an injured employee for total loss of his right eye, and directs that the award in respect to injury to the employee's left eye be held *in fieri* until an examination could be made by a specialist to determine the extent of injury to that eye, and thereafter a final award is made for such injury upon report of the specialist: *Held*, an application by the employee for a review of the award in respect to the injury to his left eye made within twelve months from the final award for injury to his left eye is within the limitation prescribed by section 46, chapter 120, Public Laws of 1929, although such application is made more than twelve months after the final award for injury to the right eye, and even though it be conceded that the amendment by section 6, chapter 274, Public Laws of 1931, does not apply.

2. Master and Servant F k—Order of trial court that insurer pay reasonable attorney's fee held authorized by statute.

Where the insurer appeals from an award of the Industrial Commission made upon application of the employee for a review of the award for changed condition, and at the time of such application by the employee and appeal by the insurer the provision of section 62, chapter 120, Public Laws of 1931, had become effective, an order by the judge of the Superior Court, included in the judgment affirming the award, that the insurer pay the cost of the proceedings in the Superior Court, including reasonable attorneys' fees to be determined by the Industrial Commission, is without error. N. C. Code of 1931, sec. 8081(rrr).

APPEAL by defendants from *Sinclair, J.*, at September 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, for injuries suffered by the plaintiff on 4 July, 1929.

At a hearing before the full Commission on 30 May, 1930, the findings of fact and conclusions of law made by Commissioner Wilson at a hearing before him on 9 November, 1929, were adopted and approved. An award was thereupon made by the full Commission in words as follows:

"That the defendants pay to the plaintiff compensation for total disability from 12 July to 5 September, 1929, inclusive, at the rate of $9.90 per week; that the defendants pay to the plaintiff compensation

for a period of one hundred (100) weeks at the rate of $9.90 per week for total loss of right eye, payments to begin on 6 September, 1929; that the defendants pay to the plaintiff compensation for partial loss of vision of left eye, at the rate of $9.90 per week for period beginning upon expiration of one hundred (100) week period above referred to, for such time as the percentage of loss of vision of plaintiff's left eye bears to the total of one hundred (100) weeks, the percentage to be determined by a specialist to be named by the Commission."

The defendants appealed from this award to the Superior Court of Wake County. This appeal was heard at February Term, 1931, of said court. The award of the Industrial Commission was affirmed by Moore, special judge, presiding at said term. The defendants appealed from the judgment of the Superior Court, affirming the award of the Industrial Commission, to the Supreme Court. This appeal was heard at Spring Term, 1931, of the Supreme Court. The judgment of the Superior Court was affirmed on 18 March, 1931.

After the judgment of the Supreme Court had been certified to the Superior Court of Wake County, the Industrial Commission, on the report of Dr. Gibson, the specialist named by said Commission as provided in its award dated 30 May, 1930, made a final award in this proceeding. This award is dated 24 April, 1931, and is in words as follows:

"The defendants will pay to the plaintiff compensation for temporary total disability from 12 July to 5 September, 1929, inclusive, at the rate of $9.90 per week, and in addition thereto, the defendants shall pay to the plaintiff compensation at the same rate for a period of one hundred (100) weeks, for total loss of the right eye, and pay compensation at the same rate for thirty-six (36) weeks, for thirty-six per cent (36%) loss of vision in the left eye as found by Dr. Gibson in his report to the Commission dated 21 March, 1931."

On 29 April, 1931, the plaintiff caused notices to be served on the defendants and on the Industrial Commission, that he would apply to said Commission for a review of its award dated 24 April, 1931, and for an increase in the amount of compensation to be paid him by defendants, because of a change in his condition. This application was duly made.

Plaintiff's application for review was heard by Commissioner Wilson on 3 August, 1931. Upon the facts found by him, and in accordance with his conclusions of law, Commissioner Wilson made an award on 8 August, 1931, which was reported to the full Commission, and certified by the full Commission to the parties to the proceeding, on 2 September, 1931. This award was in words as follows:

"Upon the finding that the plaintiff is industrially blind and permanently totally disabled, the award of 24 April, 1931, is vacated, and set aside, and the defendants will pay to plaintiff compensation at the rate of $9.90 per week from 11 July, 1929, for a period of four hundred (400) weeks, credit allowed for payments made. Defendants will pay costs of medical and hospital treatment. Defendants to pay costs of hearing."

The award was affirmed by the full Commission, at a hearing held on 15 September, 1932, and defendants appealed to the Superior Court of Wake County. This appeal was heard by Sinclair, J., at September Term, 1932, of said court. At said hearing, it was ordered and adjudged "that the judgment rendered by the North Carolina Industrial Commission be, and it is hereby, affirmed, and it is further ordered and adjudged that the costs of this hearing shall be paid by the defendants and under and by authority of section 8081(rrr) of the North Carolina Code of 1931, it is further ordered and adjudged that such costs shall include reasonable attorneys' fees to be determined by the North Carolina Industrial Commission."

From this judgment, the defendants appealed to the Supreme Court.

R. L. McMillan and C. A. Douglass for plaintiff.
Willis Smith and John H. Anderson, Jr., for defendants.

CONNOR, J. Section 46 of chapter 120, Public Laws of North Carolina, 1929, known as "The North Carolina Workmen's Compensation Act," prior to its amendment by section 6 of chapter 274, Public Laws of North Carolina, 1931, is in words as follows:

Section 46. Upon its own motion, or upon application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this act, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys paid but no such review shall be made after twelve months from the date of the first award."

By the amendment the words "first award" are stricken from the section, and in lieu thereof the words "last payment of compensation pursuant to an award under this chapter," inserted.

The defendants contend that the foregoing section as it appeared prior to the amendment is applicable to this proceeding, for the reason that the proceeding was begun before the date of the amendment. Conceding without deciding that this contention is well founded, the de-

terminative question presented by this appeal is, what is the date of the first award in this proceeding, which the Industrial Commission, on the application of the plaintiff, has reviewed?

The Industrial Commission awarded full compensation for the loss of plaintiff's right eye on 30 May, 1930. In the award of that date, the Commission held that the plaintiff was entitled to compensation also for the injury to his left eye. It did not determine in said award the amount of compensation for the injury to the left eye, but directed that the award be held *in fieri,* until an examination could be made by a specialist to determine the extent of the injury to the left eye. The Commission had the power to make this award. *Williams v. Thompson,* 200 N. C., 463, 157 S. E., 430.

The first award of compensation for injury to the left eye was made by the Commission on 24 April, 1931. The application for a review of this award was made by the plaintiff on 29 April, 1931. The award was finally made by the Commission on 15 September, 1932, but as the application for review of this award was made within twelve months from its date, the Industrial Commission had the power, under section 46, chapter 120, Public Laws of 1929, to review its award of compensation for the injury to the left eye, and upon the facts found by it, to increase such compensation. There was no error in the judgment of the Superior Court affirming the award of the Industrial Commission.

Section 62 of chapter 120, Public Laws of 1929, was amended by section 11 of chapter 274, Public Laws of 1931, which became effective on 13 April, 1931. As amended, this section is as follows:

"SEC. 62. If the Industrial Commission at a hearing on review, or any court before which any proceedings are brought on appeal under this act, shall find that such hearing or proceedings were brought by the insurer, and the commission or court by its decision orders the insurer to make, or to continue, payments of compensation to the injured employee, the commission or court may further order that the cost to the injured employee of such hearing or proceedings, including therein reasonable attorneys' fee to be determined by the commission, shall be paid by the insurer as a part of the bill of costs."

The order included in the judgment of the Superior Court with respect to the costs of the hearing in said court of defendant's appeal, is expressly authorized by the provisions of this section. This section was in full force and effect at the date of the hearing, and for that reason was applicable to said hearing. There was no error in such order.

The judgment is

Affirmed.

M. F. RITCHIE v. THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA.

(Filed 21 December, 1932.)

Insurance R a—Policy held not to cover injuries sustained by insured while under influence of intoxicants, regardless of causal relation.

Where a policy of accident insurance provides that the insurer should not be liable for an injury to the insured which occurs "(1) when or while a member is in any degree under the influence of intoxicating liquor . . . (2) when caused wholly or in part by reason of or in consequence of the use of intoxicating liquor": *Held*, the insurer would not be liable under the terms of the policy for an injury occurring while the insured was in any degree under the influence of intoxicating liquor, regardless of whether such intoxication was a causal element in the injury or not, and an instruction in an action on the policy which requires the jury to find that such causal relation existed in order to defeat recovery entitles the insurer to a new trial.

APPEAL by defendant from *Finley, J.*, at August Term, 1932, of CABARRUS.

The plaintiff brought suit to recover on an accident policy. He alleged that on 8 October, 1930, while the policy was in full force, he received personal injury while driving an automobile on Highway 15, near the corporate limits of the city of Salisbury, for which he is entitled to compensation. His certificate provided that he should be entitled to the benefits of Class A members, as set out in the constitution, by-laws and articles of incorporation.

Article 12, section 1, of the constitution is as follows: "This association shall not be liable to a member or his beneficiary for any disability benefits, special loss benefits or death benefits when the disability, special loss or death of a member occurs under any of the following conditions or circumstances: When inflicted by a member on himself while sane or insane; when there are no visible marks of injury upon the body (the body itself not being deemed such a mark in case of death); when or while a member is in any degree under the influence of intoxicating liquor or liquors or of any narcotic or narcotics; when caused wholly or in part by reason of or in consequence of the use of intoxicating liquor or liquors or the use of any narcotic or narcotics; when the result of voluntary or unnecessary exposure to danger or to obvious risk of injury; when or while a member is fighting, resisting arrest, violating the law."

The defendant filed an answer and at the trial the jury returned the following verdict:

1. Did the accident and alleged injury to the plaintiff occur while the plaintiff was, in any degree, under the influence of intoxicating liquor or liquors, as alleged in the answer? Answer: No.

2. Was the plaintiff unlawfully transporting intoxicating liquor at the time of his alleged injury, as alleged in the answer? Answer: No.

3. Did the plaintiff violate the terms of his contract with the defendant in any other respect, as alleged in the answer? Answer: No.

4. What amount, if any, is the plaintiff entitled to recover in this action? Answer: $712.50.

Judgment was thereupon rendered for the plaintiff in the sum of $712.50 and costs. The defendant excepted and appealed, assigning error.

J. L. Crowell, Jr., and J. Lee Crowell, Sr., for appellant.
Hartsell & Hartsell for appellee.

ADAMS, J. The court gave the jury the following instruction: "If the defendant has satisfied you by the greater weight of the evidence that the plaintiff was driving the car while intoxicated or while under the influence of intoxicating liquors, or that he was driving it recklessly, contrary to law, and that this was the cause of the impact, then it would be your duty to answer this issue Yes. If it does not so satisfy you, it will be your duty to answer it No." To this instruction the defendant excepted.

It will be observed that section 1 of article 12 contains the following clauses: "This association shall not be liable to a member or his beneficiary for any disability benefits, special loss benefits, or death benefits when the disability, special loss, or death of a member occurs under any of the following conditions or circumstances: (1) When or while a member is in any degree under the influence of intoxicating liquor or liquors or of any narcotic or narcotics; (2) when caused wholly or in part by reason of or in consequence of the use of intoxicating liquor or liquors or the use of any narcotic or narcotics."

The objection to the instruction is that the court failed to explain the distinction between the two clauses above set out, and told the jury that although the plaintiff may have been intoxicated or under the influence of intoxicating liquor at the time of his injury the defendant would nevertheless be liable unless the plaintiff's condition was the cause of the injury. The instruction is applicable to the second clause but not to the first. The question arose in *Mossop v. Continental Casualty Co.*, 118 S. W. (Mo.), 680, in reference to which the Court used this language: "The effect of the instructions on the issue of intoxication was to hold the company liable for indemnity at $15 a week, even though plaintiff was hurt while under the influence of intoxicating liquor, unless

the injury was the result of his condition. This construction of the contract expunges an express proviso against liability for an injury received by the insured while under the influence of an intoxicant or narcotic. By virtue of said proviso, the company was as much exempt from liability for plaintiff's loss of time, if the loss was due to an injury received while he was intoxicated, but not in consequence of intoxication, as if the latter brought about the injury. Counsel argue that if the intention was to exclude liability for an injury received while plaintiff was intoxicated, regardless of a causal connection between his state and the injury, it was useless to insert the exemption for an injury resulting from intoxication, as the first proviso would embrace the latter. So it would; but we take the purpose to have been to word the contract so no doubt could arise about the nonliability of defendant in either event. Again, it is said to be unreasonable to excuse defendant merely because plaintiff was intoxicated, if the accident would have happened anyhow. An illustration is brought forward of this kind: Suppose he had been hurt while intoxicated and on a street car in a collision of the car with another, would defendant be exempt? We answer that any insurance company has the right to refuse to insure men against accidental injury while they are intoxicated, and there are good reasons why they should refuse to do so, to wit, when a man is drunk, he is less able to take care of himself, is more quarrelsome, and hence more likely to get hurt than when he is sober, and, if hurt, he may believe and testify his conduct had nothing to do with the accident, and obtain a verdict on that theory when, in truth, intoxication led to the injury."

In *Flannagan v. Provident Life and Accident Co.*, 22 Fed. (2nd), 136, 139, concerning a similar provision, the Circuit Court of Appeals said: "It is argued that, even if there were intoxication and violation of law as contended by defendant, these would not defeat recovery, unless there was a causative connection between these and the death of insured, and that whether such causative connection existed or not was a question for the jury to determine. We think, however, that by their express provisions the policies do not cover injuries received while the insured was intoxicated or under the influence of liquor, as he clearly was at the time when he received the injuries resulting in his death, and that it was not necessary to show any causative connection between the intoxicated condition and the injuries. 1 C. J., 457; *Standard Life Ins. Co. v. Jones*, 94 Ala., 434, 10 So. 530; *Shader v. Ry. Passenger Assur. Co.*, 66 N. Y., 441, 23 Am. Rep., 65; *Furry v. Gen. Accident Ins. Co.*, 80 Vt., 526, 68 A., 655, 15 L. R. A. (N. S.), 206, 130 Am. St. Rep., 1012, 13 Ann. Cas., 515; notes, 9 Am. St. Rep., 176, 13 Ann. Cas., 516."

For error in the instruction a new trial is granted.

New trial.

STATE v. ROBERT LEDFORD.

(Filed 21 December, 1932.)

1. Criminal Law L d—Record should contain verdict of the jury.

The record in a criminal action should contain the verdict of the jury, and under the facts of this case the cause would be remanded for correction of the record, but for the fact that the defendant is entitled to a quashal of the bill of indictment.

2. Indictment C c—In this case held: defendant's motion to quash for improper proceedings before grand jury should have been allowed.

Our constitutional requirement that "no person shall be put to answer any criminal charge, except as hereinafter allowed, but by indictment, . . ." section 12 of the Declaration of Rights, means action by the grand jury according to the practice at common law, and does not permit open hearings before the grand jury, and where the court sends for the grand jury and permits the solicitor to examine a State's witness in open court before the grand jury after the grand jury had returned two identical bills of indictment against the defendant, submitted on successive days, "not a true bill," and thereafter the solicitor submits another identical bill to the grand jury which is returned "a true bill": *Held*, the defendant's verified plea in abatement and motion to quash, made before pleading, should have been allowed, and upon appeal from the court's denial of the motion the judgment will be reversed, with leave to the solicitor to send another bill before a different grand jury, if so advised.

APPEAL by defendant from *Stack, J.*, at April-May Term, 1932, of CLAY.

Criminal prosecution, tried upon indictment in which it is charged the defendant "wilfully and feloniously did kill and slay William Kitchens."

The deceased, a 12-year-old lad, was injured 30 October, 1931, and died nine days thereafter. He was riding home from school in a school bus, when he stepped from the bus and ran in front of the defendant's car and was injured. The evidence is in conflict as to whether the bus had stopped at the time the deceased left it. All agree that the defendant swerved his car into the ditch in order to avoid striking the deceased, who jumped from the bus, either before (according to the defendant) or after (according to the State) it had come to a stop.

Verdict: The minutes of the Superior Court fail to show what verdict was rendered by the jury. (Counsel for defendant say the verdict actually returned by the jury was: "Guilty of manslaughter.")

Judgment: Imprisonment in the State's prison for a term of not less than 18 months nor more than 3 years. (To be suspended upon payment within 10 days of costs and $1,000 to father of deceased.)

The defendant appeals, assigning errors.

STATE *v.* LEDFORD.

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

D. Witherspoon, Gray & Christopher and T. C. Gray for defendant.

STACY, C. J. As the verdict of the jury was not recorded in the Superior Court, though conceded by counsel for defendant to have been returned "Guilty of manslaughter," it would be necessary to remand the cause for correction of the record (*S. v. Brown, ante,* 513), but for an error, presently appearing, which requires that the bill of indictment be quashed or the action abated. *S. v. Crowder,* 193 N. C., 130, 136 S. E., 337; *S. v. Branch,* 68 N. C., 186.

It appears from the record that on 2 May, 1932, the solicitor sent a bill to the grand jury, in which it was charged the defendant "wilfully and feloniously did kill and slay one William Kitchens." This was returned "Not a true bill."

On the next day, the solicitor sent another bill to the grand jury, identical with the first one, which was likewise returned "Not a true bill."

Thereupon, the court sent for the grand jury, and the solicitor was permitted to examine Neal Rogers, the driver of the bus, in open court, before the grand jury, relative to the charge against the defendant. Counsel for defendant asked permission to cross-examine the witness, which was granted, but he was soon stopped by the court with the statement "a trial before the grand jury" is not desired. The solicitor announced that he would send another bill before the same grand jury, which he did in terms identical with the first two, and this bill was shortly thereafter returned "A true bill."

When the case was called for trial later in the term, the defendant, before pleading, filed verified plea in abatement and motion to quash the indictment for and on account of the proceeding had before the grand jury. These were denied and the defendant ruled to trial.

It is not perceived upon what ground the instant case can be distinguished from *S. v. Branch, supra,* where a similar proceeding before the grand jury was held to invalidate "its finding," because violative of section 12 of the Declaration of Rights: "No person shall be put to answer any criminal charge, except as hereinafter allowed, but by indictment, presentment or impeachment." Note, "information," which resulted in one of the abuses of the Crown, is purposely omitted from this section. And "by indictment" is meant action by the grand jury according to the practice at common law, and as sanctioned by immemorial usage. This did not permit open hearings before the grand jury. The sessions of the grand jury are to be held inviolate, under the oath of the

foreman, "the State's counsel, your fellows' and your own, you shall keep secret." C. S., 3199.

It is true that in the *Branch case* the court refused to receive the bill which was proposed to be returned "Not a true bill," and the grand jury was directed to consider it further, while here, a new bill was sent to the grand jury, but the difference between the same bill and a new bill is regarded as a distinction without a difference on the facts of the present record. All three of the bills sent to the grand jury in the instant case were identical in character. They were sent at the same term of court and to the same grand jury. Compare *S. v. Harris,* 91 N. C., 658; *S. v. Brown,* 81 N. C., 568.

The plea in abatement should have been sustained. *S. v. Crowder, supra.*

The solicitor will be permitted to send another bill before a different grand jury, if so advised.

Reversed.

JOHN L. POPLIN v. THOMAS W. ADICKES.

(Filed 21 December, 1932.)

Highways B i—Evidence of contributory negligence held insufficient to bar plaintiff's recovery as a matter of law.

Evidence in this case that the plaintiff, while standing near the west rail of a street-car track in the middle of a city street, first saw the defendant's car approaching from the south at a rapid rate of speed when forty or fifty feet away, under circumstances from which it appeared that the defendant had lost control of the car, that the plaintiff attempted to cross the street to the west side thereof, and was struck by the right front fender of the defendant's car, causing the injury in suit, is held not to establish contributory negligence barring plaintiff's recovery as a matter of law, the question of proximate cause being for the jury under the circumstances.

APPEAL by defendant from *Devin, J.,* June Term, 1932, of WAKE.

Civil action to recover damages for an alleged negligent injury caused by defendant's automobile striking plaintiff, a pedestrian on one of the public streets in the city of Raleigh.

The scene of the accident was on Dawson Street, between Martin and Hargett; the time about 9:00 p.m., 30 June, 1931. The plaintiff came out of the Union Station and walked northward on the adjacent sidewalk until he reached a point about midway between Martin and Hargett streets, when he turned to his right intending to cross Dawson Street in a slightly diagonal line bearing north for the purpose of entering his

daughter's automobile, which was parked against the curb on the east side of Dawson Street.

There is on this street just south of the point where plaintiff attempted to cross a pass track for street cars, and a street car was standing on this pass track in front of the Union Station at the time. Another street car was moving west on Martin Street, either approaching or having just entered the intersection of Martin and Dawson, where the track turns north on Dawson.

The defendant came from the south on Dawson Street, cut in between these two street cars, first swerving his automobile to the left to avoid the street car making its turn north, from Martin into Dawson, then to the right to miss the street car standing on the pass track, and back again to the left to escape the taxis and automobiles parked on the east side of the street and to keep from striking the plaintiff. "I am sure the defendant's car was traveling in advance of 40 miles per hour and he appeared to be picking up speed in an attempt to right his car," just before he struck the plaintiff and injured him. The lights on defendant's automobile were burning.

The plaintiff testified that he stopped at or about the west rail of the street car track and saw the defendant's car coming at a rapid speed when it was 40 or 50 feet away—"and he did not look like he had control of the car."

It is the contention of the defendant that the plaintiff, a man 62 years of age, negligently walked in front of his moving automobile. "When I first saw Mr. Poplin he was running or walking very fast, coming out from behind an automobile right in front of me, 12 or 15 feet away. I tried my best to dodge the man, and pulled to the left in an effort to dodge him. I was too close to stop." The defendant struck the plaintiff with his right front fender or bumper.

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of the plaintiff. From the judgment rendered thereon, the defendant appeals, assigning errors.

R. L. McMillan, R. Roy Carter, and C. A. Douglass for plaintiff.
Ruark & Ruark for defendant.

STACY, C. J. The case turns, not upon the negligence of the defendant, which is conceded, but upon the alleged contributory negligence of the plaintiff, which is almost, but not quite, established in the opinion of the majority. At any rate, the thought has prevailed that the question of proximate cause, under the circumstances, is one for the jury. *Construction Co. v. R. R.*, 184 N. C., 179, 113 S. E., 672; *Taylor v. Lumber Co.*, 173 N. C., 112, 91 S. E., 719. The view of the minority

is, that the plaintiff took a chance in the presence of obvious danger and lost. *Lea v. Utility Co.*, 175 N. C., 459, 95 S. E., 894; *Hamilton v. Lumber Co.*, 160 N. C., 47, 75 S. E., 1087; *Royster v. R. R.*, 147 N. C., 347, 61 S. E., 179. He almost escaped injury as he was struck by the defendant's right front fender or bumper, but fell short of his purpose by a step or two.

The suggestion is advanced that while the plaintiff may not have pursued the safest course or acted with the best judgment or the wisest prudence, in the light of what occurred, still this ought not to be imputed to him for contributory negligence because he was faced with an emergency which required instant action without opportunity for reflection or deliberation. *Smith v. R. R.*, 200 N. C., 177, 156 S. E., 508; *Parker v. R. R.*, 181 N. C., 95, 106 S. E., 755; *Norris v. R. R.*, 152 N. C., 505, 67 S. E., 1017.

In answer to this suggestion, it is said the same principle applies with equal force in favor of the defendant, for he likewise was confronted with a situation of peril and did his best to avoid striking the plaintiff. *Patterson v. Ritchie*, 202 N. C., 725.

It would serve no useful purpose to debate the question; the pertinent principles of law are well settled; the divergence of opinion arises from a different interpretation of the record. The majority voting in favor of affirmance, the verdict and judgment will be upheld.

No error.

STATE v. JIM BRYSON AND ANZEL LEOPARD.

(Filed 21 December, 1932.)

Homicide E a—Instruction in this case relating to self-defense held not to contain prejudicial error.

Where two persons engage in a fight and one of them quits the combat and leaves the immediate vicinity of the other, but returns about ten minutes later and is assaulted by the other under circumstances which would put a reasonably prudent man in fear of his life or great bodily harm, and he repells the assault with that degree of force which would seem reasonably necessary under the circumstances, resulting in the death of the other, the one repelling the assault and causing the death of the other would be entitled to his discharge under the doctrine of justifiable homicide if the second assault was not provoked by him and he participated in no wrong therein, even though he was at fault in bringing on the first assault, but where the second assault is a continuation of the first, and is provoked by and participated in by the one inflicting the injury causing death, he would not be entitled to his discharge, but the instruction in this case is held not to contain prejudicial error, and the appellant's exception thereto is not sustained.

STATE *v.* BRYSON.

APPEAL by defendant, Jim Bryson, from *Stack, J.*, at February Term, 1932, of JACKSON.

Criminal prosecution, tried upon indictment charging the defendant, Jim Bryson, with the murder of one Wiley Galloway, and the defendant, Anzel Leopard, with being an accessory before and after the fact to said murder.

Anzel Leopard took dinner with Wiley Galloway and his wife in their apartment in Glenville, Jackson County, on Sunday, 15 March, 1931. Between 4 and 5 o'clock that afternoon, Jim Bryson and Bob McCall came to the home of the Galloways, bringing with them a quart of liquor. They got into a tussle or fight over the liquor. Galloway ordered them out of his home. In his effort to put Bryson out, Galloway struck him over the head with an iron car tool, causing his face to become bloody. Leopard went with Bryson to the spring, some 75 yards away, to wash his face. As they returned, ten or fifteen minutes later, the appealing defendant picked up a rock, "the size of a man's fist," and threw it at Galloway, striking him on the side of the head just above the ear, from which he died four days later. Leopard drove Bryson away in his truck, thinking Galloway had only been stunned, and anticipating that he would pursue the fight immediately upon his recovery.

Leopard was acquitted. Bryson was convicted of murder in the second degree and sentenced, from which he appeals, assigning errors.

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

Jones & Ward, Dan K. Moore, and Alley & Alley for defendant.

STACY, C. J. The case turns on the correctness of the following instruction to the jury:

"If the defendant was not in the wrong in the first trouble and did not provoke it or enter into the fight willingly, and Galloway was assaulting him, or making a threatened assault, I mean in the second trouble, when he came back from the spring, if Galloway was assaulting him or making a threatened assault on him, and the defendant reasonably feared and had reasonable grounds for such fear, and used no more force than reasonably appeared to him at the time to be necessary to protect his life or his body from great bodily harm, then he could use force even to taking the life of his assailant, and in this connection you may consider the conduct of Galloway, in the first fight, as well as the conduct of the defendant, in so far as it may throw light upon their conduct in the second trouble."

The position of the defendant is, that this instruction took from him the right of self-defense, as ten or fifteen minutes elapsed between the first and second encounters. *S. v. Bryson,* 200 N. C., 50, 156 S. E., 143; *S. v. Glenn,* 198 N. C., 79, 150 S. E., 663; *S. v. Crisp,* 170 N. C., 785, 87 S. E., 511; *S. v. Pollard,* 168 N. C., 116, 83 S. E., 167; *S. v. Baldwin,* 155 N. C., 494, 71 S. E., 212.

The defendant says, even if he did give the deceased cause to order him away from his premises, and willingly engage in a fight about it, this would not deny him the right to defend himself against an assault some ten or fifteen minutes later when he came back from the spring. Defendant's testimony was to the effect that the deceased approached him in a threatening manner, with uplifted hand, upon his return from the spring, and that he threw the rock to repel this attack, which he reasonably believed to be felonious.

The State, on the other hand, contends that there was but one fight, and that the throwing of the rock was a continuation of the original difficulty; that the defendant returned from the spring with the rock concealed about his person; that the deceased was not looking at the defendant when he threw the rock; that he did not know who hit him, and that, at all events, the defendant had not "quitted the combat" and signified such fact to the deceased. *S. v. Finch,* 177 N. C., 599, 99 S. E., 409; *S. v. Bost,* 189 N. C., 639, 127 S. E., 689; *S. v. Kennedy,* 169 N. C., 326, 85 S. E., 42; *S. v. Pollard, supra.*

Without regard to the exactitude of the instruction, conceding it may be subject to some slight criticism from the defendant's standpoint, taking the charge as a whole, we are constrained to believe that no prejudicial effect was produced on the minds of the jurors by this instruction.

On the whole, the record would seem to be free from reversible error. The verdict and judgment will be upheld.

No error.

MACE L. WADSWORTH AND HUSBAND, J. C. WADSWORTH, JR., v. NATIONAL CONVOY AND TRUCKING COMPANY.

(Filed 21 December, 1932.)

Negligence D c—Nonsuit for contributory negligence should be denied when more than one inference as to proximate cause can be drawn from evidence.

In an action to recover for a negligent personal injury a motion as of nonsuit based upon contributory negligence of the plaintiff will not be granted unless there is but one reasonable inference that may be drawn from the evidence in regard to the proximate result of plaintiff's con-

tributory negligence, but where more than one inference can be drawn from the evidence the question of proximate cause must ordinarily be submitted to the jury, and in this case the defendant's motion as of nonsuit should have been denied.

APPEAL by plaintiffs from a judgment of nonsuit rendered by *MacRae, Special Judge,* at February Term, 1932, of CABARRUS. Reversed.

B. W. Blackwelder for appellants.
J. Laurence Jones and Hartsell & Hartsell for appellee.

ADAMS, J. This is an action for damages suffered by the *feme* plaintiff to her person and her property by reason of a collision of her car with a truck operated by the defendant. The case is here on appeal from a nonsuit granted at the close of the plaintiff's evidence.

The collision occurred on 8 May, 1931, at seven-fifteen in the evening. The plaintiffs were in a Buick coupe going on Highway 15 from Concord to Charlotte. Four hundred yards south of the Jackson Training School the road curves to the right—"a long sweeping curve." The coupe was moving at the rate of forty miles an hour. The defendant's truck traveling in the direction of Concord came around the curve. It was about sixty-two feet long and was loaded with four new Ford cars; its head and tail lights were burning; as to whether there were side lights at the time of the accident the testimony is conflicting. The driver of the coupe thought it was an ordinary car.

In the center of the hard surface there was a black line six or seven inches wide. The evidence tended to show that the rear wheel of the truck was eighteen inches over the line on the wrong side of the road, and that the trailer extended from twelve to fifteen feet behind the rear wheel. The driver of the coupe testified that he could not "pull over and miss the rear end of the truck on account of a bad shoulder on the right"; also, that if he had been looking he could not have seen that the wheel was over the line.

The defendant admits its own negligence, but contends that the contributory negligence of the plaintiffs bars recovery and that this position should be sustained as a matter of law. For the purpose of supporting its contention the defendant cites *Davis v. Jeffreys,* 197 N. C., 712, *Scott v. Tel. Co.,* 198 N. C., 795, and other cases of similar import. The argument applies when only one reasonable conclusion can be drawn from the plaintiff's evidence in regard to the proximate result of his concurring negligence and he proves himself out of court. The failure to discharge an affirmative duty may be a negligent act, but if more than one inference may be drawn from the evidence, the question of proximate

cause must as a rule be determined by the jury. *Stultz v. Thomas,* 182 N. C., 470; *Fox v. Texas Co.,* 180 N. C., 543; *Ridge v. High Point,* 176 N. C., 421.

This is the principle to be applied in the case before us. The judgment is

Reversed.

THE DAYTON RUBBER MANUFACTURING COMPANY v. P. W. HORN AND J. A. NEWELL.

(Filed 21 December, 1932.)

Reference A a—Order for compulsory reference is affirmed in this case.

An order for a compulsory reference of an action involving a course of dealing between the parties for a substantial period and containing a statement of account in excess of two hundred and fifty items is affirmed under the provisions of C. S., 573, the answer filed by the defendant not constituting a plea in bar in that it does not destroy or defeat the entire claim or demand.

CIVIL ACTION, before *Cowper, Special J.,* at September Term, 1932, of MECKLENBURG.

The plaintiff alleged that it sold and delivered, at various times, tires, tubes, and advertising materials to the defendant, Horn, and that the defendant, Newell, is liable for the payment of said amount by reason of a contract of guaranty executed by said Horn and Newell, dated 19 November, 1930. The amount claimed to be due was $4,772.31, and attached to the complaint was an itemized statement of the account running from September, 1930, to July, 1931. Newell filed an answer admitting that he executed the guaranty agreement, but alleged that the plaintiff was indebted to Horn in a sum greatly in excess of the amount claimed by the plaintiff. Horn filed an answer admitting that he purchased tires, tubes, and advertising materials from the plaintiff between 19 November, 1930, and February, 1931, but he set up counterclaims against the plaintiff, alleging in substance that there were three contracts between the parties, and that the plaintiff had breached these contracts, resulting in damage aggregating $26,671.42. The plaintiff filed a reply to the counterclaims, admitting the signing of a letter, dated 3 October, 1928, attached to Horn's answer, and of other letters and agreements dated 12 March, 1929, 14 April, 1930, and 17 July, 1930, with reference to the transactions between the parties.

When the cause came on for hearing the trial judge referred the action to Hon. C. D. Talliaferro "to report the evidence and his findings of fact and law to this court as provided by statute." The defendants excepted and appealed.

Tillett, Tillett & Kennedy and F. Grainger Pierce for plaintiff.
Cochran & McCleneghan and W. C. Davis for defendants.

BROGDEN, J. The defendants assert that the trial judge had no power to order a compulsory reference by virtue of C. S., 573, for that:

(a) The reply constituted a plea in bar.

(b) The account was not long or complicated.

The pleadings disclosed a course of dealing between the parties for a substantial period. These transactions involve many items, and, while the methods of doing business and of computing the profit or compensation of plaintiff were changed from time to time, the course of dealing was practically continuous. Consequently, the action, in its essential features, involved an accounting. There is no plea in bar, which pulls up the case by the roots, and this is necessary, for the reason that such plea must destroy or defeat the entire claim or demand. *Bank v. Evans,* 191 N. C., 535, 132 S. E., 563; *Bank v. McCormick,* 192 N. C., 42, 133 S. E., 183.

The statute empowers a trial judge to order a compulsory reference in cases requiring "the examination of a long account on either side." The statement of account constitutes approximately twenty pages of the record, made up of thirty invoices, containing in excess of two hundred and fifty items. There is no statutory or judicial definition of a "long account." Indeed, the expression is perhaps less complicated than any definition thereof. Obviously a correct conclusion as to whether an account was "long" would depend upon the facts and circumstances of a given case. The tendency of Appellate Courts generally is to construe liberally the Reference Statute, and the Court is of the opinion that the account in controversy was correctly classified by the trial judge.

Affirmed.

BESSIE PENLAND v. FRENCH BROAD HOSPITAL, INCORPORATED.

(Filed 21 December, 1932.)

Appeal and Error L c—Judgment in this case is affirmed, the sufficiency of the evidence having been passed upon on former appeal.

Where upon a former appeal the Supreme Court has ordered a new trial for error in the trial court's refusal to direct a verdict in defendant's favor for the reason that the plaintiff's evidence was insufficient to entitle her to recover, and upon a subsequent trial the evidence is substantially the same, a judgment as of nonsuit entered upon the second trial will be affirmed on appeal in accordance with the decision on the former appeal.

PENLAND *v.* HOSPITAL.

APPEAL by plaintiff from *Clement, J.*, at February Term, 1932, of YANCEY. Affirmed.

This is an action to recover damages alleged to have been caused by the negligent performance of an operation on the person of the plaintiff by a surgeon employed by the defendant to perform the operation.

All the allegations in the complaint, which constitute the cause of action alleged therein, are denied in the answer.

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. C. S., 567.

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

J. W. Pless, Charles Hutchins, and G. D. Bailey for plaintiff.
Harkins, Van Winkle & Walton for defendant.

CONNOR, J. This action was first tried at January Term, 1930, of the Superior Court of Yancey County. From the judgment at said trial, the defendant appealed to the Supreme Court. This appeal was heard at Spring Term, 1930, of this Court. Defendant's contention on said appeal that there was error in the refusal of the trial court to allow its motion for judgment as of nonsuit was not considered for the reason that this contention was not duly presented by exceptions taken at the trial. Its contention that there was error in the refusal of the court to instruct the jury in accordance with its request to answer the first issue "No" was sustained and a new trial ordered. We were of opinion that upon all the evidence introduced at the trial, plaintiff was not entitled to recover in this action. *Penland v. Hospital,* 199 N. C., 314, 154 S. E., 406.

This appeal is from the judgment rendered at February Term, 1932, of the Superior Court of Yancey County, dismissing the action as of nonsuit. Plaintiff contends that there was error in the judgment for that the evidence introduced by her was sufficient to show the facts to be as alleged in her complaint, and that this evidence should have been submitted to the jury. The evidence was substantially the same as that offered by the plaintiff at the former trial. For this reason, plaintiff's contention cannot be sustained. In accordance with the decision on the former appeal, the judgment dismissing the action as of nonsuit is

Affirmed.

SAMUEL C. WINCHESTER v. GRAND LODGE OF THE BROTHERHOOD OF RAILROAD TRAINMEN.

(Filed 21 December, 1932.)

1. **Appeal and Error C a—Motion to dismiss appeal for failure of appellant to serve statement of case is denied under facts of this case.**

In this case it appeared that only one exception was taken upon the trial of the action and that the exception was to the final judgment as signed, and that at the time appeal entries were made the court stated that "the summons, complaint, judgment, and these findings of fact and conclusions of law shall be and constitute the case on appeal to the Supreme Court," and the trial court further found that the only question for determination was whether valid service of summons was made on the defendant. The plaintiff, appellee, moved in the Supreme Court to dismiss the appeal for that no statement of case on appeal was ever served on or accepted by the appellee, and no case on appeal had ever been presented to any Superior Court judge to be settled, and for that the record was incomplete: *Held*, although the requirements in this particular case are ambiguous from the record, the motion to dismiss the appeal is denied under the principle that an appeal is of itself an exception to the judgment, which appears to be the only question sought to be presented, the parties having the right to move for *certiorari* to supply any missing parts of the record. Rules of Practice in the Supreme Court, 16, 34.

2. **Process B f—Personal service on resident secretary of fraternal insurance association held valid service on the association in action on policy.**

Unincorporated fraternal associations and lodges, etc., confining their membership to one hazardous occupation, are allowed by statute to do business in North Carolina without a license, N. C. Code, 6274, 6479, 6518, and where such association or mutual benefit society has virtually carried on an insurance business in this State and has collected through its resident secretary and treasurer of a local lodge large sums of money which such secretary remits to the central lodge in another State, service of process in an action on one of the association's benefit certificates on such resident secretary who had issued and countersigned large numbers of the association's benefit certificates in this State is held a valid service of summons on the association, even though the association is not incorporated.

APPEAL by defendant from *Warlick, J.*, at June Term, 1932, of ANSON. Affirmed.

This is an action brought by plaintiff against the defendant to recover $1,875, in which he alleges: "That the defendant is now and was at the time hereinafter mentioned an organization doing business and owning property within the State of North Carolina. That the defendant, at the time herein mentioned, was engaged in the business of

issuing, within the State of North Carolina and elsewhere, policies of insurance designated as 'Beneficiary Certificates.' "

That while employed by the Seaboard Air Line Railroad Company as switchman at Monroe, N. C., the defendant issued its so-called Beneficiary Certificate, No. C-437525 (copy of which is set out in the record), in the sum of $1,875. That the treasurer and secretary of Monroe Lodge, No. 643, of the Brotherhood of Railroad Trainmen, on 20 June, 1926, delivered to him said certificate. "That from the issuance to him of the certificate referred to in the preceding paragraph, to 1 December, 1929, the plaintiff paid to the defendant all dues and assessments upon said certificate as required by the defendant, and as provided by the terms of the certificate, through the treasurer and secretary of Monroe Lodge, No. 643; that on 1 December, 1929, plaintiff mailed to B. W. Snyder, treasurer and secretary of the aforesaid lodge, his check, dated 1 December, 1929, in the sum of $3.45 in full payment of his dues and assessments upon the aforesaid certificate for the month of December, 1929; that thereafter, on 23 December, 1929, the aforesaid B. W. Snyder returned to the plaintiff the aforesaid check, together with a letter stating that the defendant refused to accept payment of plaintiff's dues for the month of December, 1929, and that plaintiff had been expelled from membership in the Brotherhood of Railroad Trainmen."

Plaintiff alleges that this was entirely unjustified, without valid excuse, and was a concocted scheme to deprive him of certain rights he had under the policy that he had, and was ready, able and willing at all times to pay his monthly dues and assessments. That at the time of the issuance of the policy "he was in good physical condition, and his eyesight was normal and unimpaired." That while the beneficiary certificate was in full force and effect the plaintiff, in the month of September, 1926, discovered he was losing the sight of his left eye; that his eyesight had suddenly become impaired. That he went to see a reputable and skilled oculist and notwithstanding the best treatment of modern and up-to-date science known to a most reputable oculist, within one month he completely and permanently lost the sight of his left eye. That he is now blind in said eye and will remain so.

That about 14 February, 1927, on account of the loss of his left eye, he was unable to perform his duties and was forced to resign as railroad trainman from the Seaboard Air Line Railroad Company. "That section sixty-eight of the Constitution of the Brotherhood of Railroad Trainmen, upon which constitution Beneficiary Certificate, No. C-437525, was issued by the defendant to the plaintiff, provides that in the event any beneficiary member shall suffer the complete and perma-

nent loss of sight of one or both eyes he shall be considered totally and permanently disabled, and shall thereby be entitled to receive the full amount of his beneficiary certificate—$1,875. That the plaintiff has furnished to the defendant abundant and creditable evidence to establish the fact that he has completely and permanently lost the sight of his left eye, and that he is totally and permanently disabled to perform work for a railroad; that he has furnished to the defendant statements from oculists of unquestionable character and ability, establishing this fact, and that he has voluntarily presented himself to the defendant for examination by oculists of its own selection; that, in spite of this overwhelming and uncontradicted evidence to the fact that plaintiff is completely and permanently blind in his left eye, except unfounded and unjustified contradictions on the part of the defendant itself, the defendant has arbitrarily and unreasonably and without any valid explanation or excuse, refused to pay plaintiff's claim or any part thereof, and has arbitrarily and unreasonably rejected said claim and refused to carry out and perform its contract and agreement with this plaintiff, pursuant to the terms and conditions of plaintiff's beneficiary certificate. That the plaintiff absolutely relied upon the terms, provisions and conditions of section 68 of the Constitution of the Brotherhood of Railroad Trainmen, upon which constitution his beneficiary certificate was issued to him, and that he absolutely relied upon the statements and representations made to him by the defendant, its agents and representatives, as to the contents, construction, interpretation and meaning of said policy or certificate, and that he was positively assured by the defendant, its agents and representatives that in the event he should lose the sight of one eye he would be entitled to the full amount of his certificate; that said representations were well known to the defendant, and that they were being made under the direction of the defendant, and that, relying thereon, he took said policy or certificate and kept up the payments thereon. . . . That prior to the institution of this action, the plaintiff duly performed all the conditions and obligations to be performed by him under the terms and provisions of said certificate, entitling him to institute action thereon. That on account of the things hereinbefore set forth, the defendant is indebted to the plaintiff in the sum of $1,875, with interest thereon from 17 March, 1928, until paid; that often and repeated demands have been made to the defendant that it pay to the plaintiff the above amount, and defendant has, and still does, refuse to pay the above amount, or any part thereof, and the same still remains due and unpaid. Wherefore, the plaintiff prays judgment against the defendant:

"1. For the sum of $1,875, together with interest thereon from 17 March, 1928, until paid.

"2. For the costs of this action, to be taxed by the clerk of the Superior Court.

"3. For such other and further relief as to the court may seem just and proper and to which he may be entitled in the premises."

This action was instituted on 8 January, 1931, and on Monday, 23 February, 1931, a judgment by default final was entered in favor of plaintiff against the defendant for the sum sued for in the complaint. On 4 April, 1932, through their attorneys, the defendant entered a special appearance and filed a petition and motion to set aside and vacate the judgment and recall execution: "The Grand Lodge of the Brotherhood of Railroad Trainmen, defendant above named, through its attorneys, McLendon & Covington, enters a special appearance in the above entitled cause and petitions the court to vacate and set aside the default judgment entered in this cause on 23 February, 1931, and to recall the execution issued on 3 March, 1932, and in support of said motion says and alleges," etc. (setting forth the reasons).

The judgment and findings of fact by the court below are as follows: "This cause coming on to be heard at the June Term, 1932, of the Superior Court of Anson County, and being heard upon motion of Messrs. McLendon & Covington under the style of a special appearance to vacate a judgment hereinbefore rendered by the clerk of the Superior Court of Anson County of date of Monday, 23 February, 1931, which judgment was a judgment by default final on account of the failure of the defendant to file an answer, and being heard, the court thereupon, after hearing the reading of the pleadings and affidavits submitted and on file and the evidence of W. E. McNair, sheriff of Richmond County, which is made a part of the findings of fact of the court, and the argument of counsel, the court finds the following facts:

"1. That the plaintiff, Samuel C. Winchester, was an employee of the Seaboard Air Line Railroad Company and as such employee became a member of the Brotherhood of Railroad Trainmen, and in the course of said membership had issued to him on 21 May, 1926, a beneficiary certificate or policy of insurance, No. C-437525, which is hereto attached and made a part of the findings of fact by the court, and is transmitted for the information of the Supreme Court.

"2. That said policy above referred to appears to have been signed in pen and ink by B. W. Snyder, at one place listed as secretary and at another place listed as treasurer, and thus signed with pen and ink, together with such other statements thereon regarding the Monroe Lodge, No. 643, and the name of Samuel C. Winchester and the proper signature of Samuel C. Winchester, the assured, appear to be the only signatures in pen and ink, the officers of the Grand Lodge having had their names printed on the policy when it was made out in blank;

"3. That said policy was in due course of business delivered to and became the property and was in the possession of the assured, Samuel C. Winchester.

"4. That the court finds as a fact from the evidence submitted that the Brotherhood of Railroad Trainmen is not incorporated, but is a fraternal, beneficiary association, of which plaintiff was a member.

"5. That the motion made by the defendant through its counsel, Messrs. McLendon & Covington, is to set aside the judgment for failure of service of summons and is a motion in the original cause which is admitted by counsel for plaintiff and defendant to be proper, the original of which was made before the clerk of the Superior Court of Anson County, and was heard and passed upon by said clerk on 18 April, 1932, and from such findings of fact as made by the clerk and his judgment thereon the defendant appealed to the Superior Court in term;

"6. That on 8 January, 1931, summons issued out of the Superior Court of Anson County entitled as herein, and said summons was, on 17 January, 1931, served by W. E. McNair, sheriff of Richmond County, on W. D. Pait, the service appearing as follows: 'By reading the within summons to W. D. Pait, the secretary-treasurer of Shakespeare Lodge, 794, Hamlet, N. C., of the Grand Lodge of Brotherhood of Railroad Trainmen and by delivering to him as an officer of the defendant a copy of the within summons, together with copy of the verified complaint in this action.'

"7. That the court finds as a fact from the evidence offered in the testimony of Sheriff McNair that the sheriff was then unaware, and so states, that he is now unaware as to whether or not W. D. Pait was an officer of the defendant.

"8. And the court finds as a fact that the Grand Lodge of the Brotherhood of Railroad Trainmen is an association or organization of railway men of America, with its principal place of business in the city of Cleveland, Ohio, and that in the conducting of its business it has subordinate lodges or orders located over the entire United States.

"9. That it has one subordinate lodge located in the city of Salisbury, in the county of Rowan, and another located in the city of Hamlet in Richmond County, and that at the time the plaintiff became a member of the defendant organization, the defendant had and maintained a subordinate lodge in the city of Monroe in Union County, but that the Monroe lodge is now and has been for some years disbanded, and at the time of the institution of this action herein was not existing.

"10. The court finds as a fact that W. D. Pait is secretary-treasurer of the Shakespeare Lodge, 794, Hamlet, N. C., and was on 17 January

such secretary and treasurer, and that as such secretary and treasurer the said W. D. Pait countersigned policies like the one introduced in evidence in this hearing as secretary and treasurer, signed at two identical places on said policy, and that he delivered said policy to the assureds and received from them such payments, if any, as were demanded by the Grand Lodge of Brotherhood of Railroad Trainmen, and thereafter and subsequently collected such dues as were due to be collected by him under said policies and from said membership, and in turn remitted said amounts received to the defendant at its principal place of business in the city of Cleveland, Ohio, as aforesaid.

"11. The court further finds as a fact that at some time subsequent to the service of the summons on the defendant W. D. Pait, as aforesaid, and which was, to wit, 17 January, 1931, that a copy of the summons together with a copy of the complaint filed in the cause was produced from among the personal effects of the said W. D. Pait and that said copy of summons and complaint is on exhibition before the court through counsel representing the defendant in this investigation, but the copy of the summons does not bear the date as set down as served by the sheriff, neither does it bear the signature of the sheriff, but does have filled therein the name of W. D. Pait in the handwriting of the sheriff of Richmond County.

"12. And the court finds as a fact that counsel for the plaintiff received in the due course of mail a letter from Hon. Dan C. Boney, Insurance Commissioner of the State of North Carolina, which letter is made a part of these findings of fact and is incorporated herein for information.

"13. The court further finds as a fact from a certified copy of the record in the case of *Welch v. Brotherhood of Railroad Trainmen,* reported in 200 N. C., on page 184, that summons served upon the defendant was in the following words: 'Grand Lodge of Brotherhood of Railroad Trainmen, B. W. Snyder, secretary and treasurer,' and that said summons in that case has the following service appearing thereon: 'By reading and delivering copy of summons together with copy of complaint to B. W. Snyder, secretary and treasurer of the Grand Lodge of Brotherhood of Railroad Trainmen,' and is signed by the sheriff of Union County, and that the defendant under such service thereupon came into court, filed answer and made contest to the controversy.

"14. The court further finds as a fact that the defendant company, acting by and through its subordinate lodges in North Carolina, has come into the State and is doing business therein, and that it is not licensed as such as provided by law if such license should be necessary

and mandatory under the statutes and in pursuance of its doing business in North Carolina it maintains the aforesaid subordinate lodges and has over a period of years issued insurance policies as herein and otherwise to different members of these organizations and has collected thereon by way of dues and assessments considerable sums of money under the policies hereinbefore issued to its members, and that it is now and has been and will continue to do business as above within the boundaries of the State of North Carolina;

"15. That moneys collected by W. D. Pait as aforesaid are deposited by him in the Page Trust Company at Hamlet, N. C., and that in turn portions of such funds as theretofore deposited are forwarded to the Grand Lodge at its principal office in Cleveland, Ohio, such being the amounts as due to the Grand Lodge;

"16. The court finds as a fact that the defendant filed no answer, and that on 23 February, 1931, under the statute prevailing in North Carolina, the plaintiff was entitled to judgment final under his complaint filed in this cause, and that said judgment was regular.

"17. That the constitution and general rules of the Grand Lodge of Brotherhood of Railroad Trainmen for subordinate bodies, at pages 119-120, makes provision to the effect that the treasurer of subordinate lodges shall collect the dues and insurance premiums from the members in good standing and remit same to their grand treasurer in Cleveland, Ohio.

"18. The court finds as a fact that the summons served on W. D. Pait was in all respects regular and proper and that it imports verity and is found as a fact to have been a proper service of summons on W. D. Pait.

"19. The court is of the opinion that under a motion of this character, not made under section 600, but being a motion made in the original cause, that it is not necessary for the defendant to show a meritorious defense, but the court is of opinion that if a meritorious defense is necessary to be shown from evidence submitted the defendant, had it been permitted to file answer, would have alleged facts and introduced proof to combat the allegations of the plaintiff, indicating a meritorious defense on its part, but the entire point presented by this motion, as the court understands the contending parties, being whether or not service on W. D. Pait as herein set forth is service on the defendant, it being found as a fact that defendant is not an incorporated body.

"20. The court further finds as a fact that the service in this case was in all respects proper and regular, and was such service as would bring the defendant into court, necessitating on its part the filing of an answer and contest of the issuable facts.

"21. It is therefore ordered, adjudged and decreed that the judgment heretofore rendered by the clerk of the Superior Court of Anson County be and it is hereby affirmed, and that said judgment is a valid, outstanding and subsisting judgment, recognized and enforceable by the provisions of the statute of North Carolina.

"22. That defendant maintains no listed process agent in North Carolina, but that W. D. Pait is a proper person on whom process may be served."

The only exception and assignment of error taken was to the final judgment and findings of fact of the court below, denying the defendant's motion to set aside and vacate the default judgment theretofore rendered by the clerk of the Superior Court of Anson County.

Taylor & Thomas for plaintiff.
McLendon & Covington for defendant.

CLARKSON, J. The plaintiff, on 25 October, 1932, made a motion in this Court to dismiss the appeal of defendant and that judgment of the lower court be affirmed. Consideration of the motion was continued until the hearing of the cause.

The plaintiff sets forth the following reasons: (1) That no statement of case on appeal has ever been served on or accepted by the plaintiff, appellee, or his counsel, nor has any case on appeal or record been presented to any Superior Court judge to be settled. (2) That, as the plaintiff, appellee, and his counsel are advised, informed and believe, the purported record in the case, which has been presented to the clerk of the Superior Court for Anson County for certification, is not a true, perfect and complete record.

It was contended by plaintiff that the record of the court below discloses that the defendant, appellant, have sixty (60) days within which to make up and serve its case on appeal, and that plaintiff, appellee, have thirty (30) days thereafter to serve countercase or file exceptions. That no statement of case on appeal has been served on plaintiff and no disagreement been presented to the trial judge for settlement. That if the case had been properly made up, certain testimony of witnesses and exhibits would have been set forth bearing on the finding of facts by the court below.

"A motion to dismiss an appeal for noncompliance with the requirements of the statute in perfecting an appeal must be made at or before entering upon the trial of the appeal upon its merits, and such motion will be allowed unless such compliance be shown in the record, or a waiver thereof appear therein, or such compliance is dispensed with by a writing signed by the appellee or his counsel, to that effect, or unless

the court shall allow appropriate amendments." Rule 16, 200 N. C., at p. 821; *Pruitt v. Wood,* 199 N. C., 788.

"If any part of the affidavits or pleadings is not sent up either party can always move for *certiorari* to supply the missing part of the record." Rule 34, 200 N. C., at pp. 833-34; *Wallace v. Salisbury,* 147 N. C., 59.

In *S. v. Shipman et al., ante,* at p. 327, the record being here, this Court held: "Hence, it becomes our duty to take cognizance of the matter; and this irrespective of how the case is brought before us, whether by appeal, *habeas corpus, certiorari,* or motion to docket and dismiss appeal. *S. v. Satterwhite,* 182 N. C., 892; *S. v. Beasley,* 196 N. C., 797." In the *Shipman case, supra,* the defendants were *both fined and imprisoned,* whereas for the offense of which they were convicted it was only permissible to impose fine or imprisonment.

The defendant contends that no statement of case on appeal has been prepared or served on the appellee for the reason that only one exception was taken and that was to the final judgment as signed by the court below; that by reference to said judgment in the record it will be seen that the case on appeal was fixed by the court below at the time the appeal entries were made, having stated therein that "The summons, complaint, judgment, motion, affidavits filed and exhibits, policy of insurance, and these findings of fact and conclusions of law shall be and constitute the case on appeal to the Supreme Court." The defendant further says: "The Court's attention is called to finding of fact reading as follows: 'But the entire point presented by this motion, as the court understands the contending parties, being whether or not service on W. D. Pait as herein set forth is service on the defendant, it being found as a fact that the defendant is not an incorporated body." Defendant further contends that the plaintiff's contention is not applicable to the facts in the present cause. *Wallace v. Salisbury,* 147 N. C., 58, and cases cited.

In *Comrs. v. Scales,* 171 N. C., at p. 525, the following observation is made: "There was a motion to dismiss the appeal, as no case on appeal had been served by the appellant, but we do not think a case was required, as there is only one exception to the judgment, and that was taken at the trial. There are assignments of error, but they all turn upon the one question whether the last judgment was a proper one. No case was necessary to present this question, as it is done by the exception, and, even without it, by the appeal from the judgment." *Bessemer Co. v. Hardware Co.,* 171 N. C., 729; *Parker Co. v. Bank,* 200 N. C., 441.

In the *Parker case, supra,* at p. 442, it is said: "As the record contains no statement of case on appeal, we are limited to the question

whether there is error in the judgment, the appeal itself being an exception thereto," citing numerous authorities.

Taking the record as set forth by both sides, it is ambiguous as to the requirements in this particular case. The general principle as set forth by defendant is ordinarily applicable. The motion to dismiss the appeal is overruled.

The record discloses: "The Grand Lodge of the Brotherhood of Railroad Trainmen, appellant in the above entitled action, begs leave to file the following answer in connection with the purported motion which the appellee has indicated he would make before the Court on Tuesday, 25 October, 1932," etc. . . . "The defendant, by his general appearance in the action, waived all defects with respect to service of summons. The statute provides that a voluntary appearance by a defendant is equivalent to personal service of summons. C. S., 490." *Reel v. Boyd,* 195 N. C., at pp. 273-74; *Burton v. Smith,* 191 N. C., 599; *Abbitt v. Gregory,* 195 N. C., at p. 209; *Crafford v. Ins. Co.,* 198 N. C., 269.

We come now to consider the case on its merits: Was the service on W. D. Pait, secretary-treasurer of the Shakespeare Lodge, 794, Hamlet, N. C., a service on defendant, it being found as a fact that the defendant is not an incorporated body? We think so.

N. C. Code of 1931 (Michie), section 6274, is as follows: "Every insurance company, association, or order, as well as every bond, investment, dividend, guarantee, registry, title guarantee, debenture, or such other like company (not strictly an insurance company as defined in the general insurance laws), must be licensed and supervised by the insurance commissioner, and must pay all licenses, taxes, and fees prescribed in the insurance laws of the State for the class of company, association, or order to which it belongs. No provision in any statute, public or private, may relieve any company, association, or order from the supervision prescribed for the class of companies, associations, or orders of like character, or release it from the payment of the licenses, taxes, and fees prescribed for companies, associations, and orders of the same class; and all such special provisions or exemptions are hereby repealed. It is unlawful for the insurance commissioner to grant or issue a license to any company, association, or order, or agent for them, claiming such exemption from supervision by his department and release for the payment of license, fees and taxes."

The "Order of Owls" was an *unincorporated fraternal order.* The "Home Nest" was South Bend, Ind. It appears that under the constitution these local nests, having the insurance feature of death and sick benefits, were organized in all portions of the country, doing busi-

ness under by-laws furnished by the *home nest,* and in its scheme of government the authority of the *home nest* seems to be absolute and all-prevailing. Cards were issued setting forth ten "Reasons Why You Should Join the Order of Owls," the first as follows: "Order of Owls has sick and accident benefit of $6 per week."—"Be a Leader"—"Join Now"—"Jolliest and Best Fellows on Earth."

A little "Owl's Nest" was organized in Charlotte, N. C. The agent, J. J. Arlington, did business and paid no license under the insurance law. (C. S., 6274, before it was amended.) He was convicted and on appeal to this Court the conviction was sustained. *Hoke, J.,* speaking for the Court in *S. v. Arlington,* 157 N. C., at p. 648, says: "Throughout the statute, in sections relevant to the inquiry, the words used are insurance companies, associations, and orders, and clearly contemplates both incorporated and unincorporated companies. This business of insurance and insurance companies has become of such great interest and importance that our statutes, as stated, have made extended regulations for its supervision and control. The department established for the especial purpose, under the direction of its active and capable commissioner, has done much valuable work in the protection of the people of the State, and in cases permitting constructions that interpretation should be adopted which is best promotive of the public policy and beneficent purpose of the law." *Robinson v. Brotherhood of Locomotive Firemen and Engineers,* 170 N. C., 545.

N. C. Code of 1931 (Michie), section 6274, *supra,* as it now reads and amended, is taken from Vol. 2, Revisal of 1905, sec. 4691; Laws 1903, ch. 594, secs. 1, 2, 3; Laws 1913, ch. 89, "An act for the regulation and control of *fraternal benefit societies.*" Sec. 1. "Any corporation, society, order or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit and having a lodge system with ritualistic form of work and representative form of government, and which shall make provisions for the payment of benefits in accordance with section four hereof, is hereby declared to be a fraternal benefit society." (Vol. 2, C. S., 6497.) Sec. 26, in part, is as follows: "Nothing contained in this act shall be construed to affect or apply to *societies* which limit their membership *to any one hazardous occupation,*" etc.

This section, 26, *supra,* is now 6518, Vol. 2 (1919). Public Laws of N. C., 1925, ch. 70, sec. 2, is as follows: "Amend section C. S., 6518, by striking out, in lines three and four, the following: 'nor to similar societies which do not issue insurance certificates.'" Since the decision in the *Owl case,* N. C. Code, 1931 (Michie), section 6274, is the same except

as above amended. The "any one hazardous occupation" applies to trainmen and exempts it from license.

The Insurance Commissioner, writing to plaintiff's attorney on 22 July, 1930, said: "I have your letter of 17 July in regard to the Brotherhood of Railroad Trainmen. This organization is a fraternal relief association that is not subject to the supervision of this department, being specifically exempt under the provisions of C. S., 6518. In view of this, I hold no power of attorney to accept service of process upon them, but assume that valid service can be had upon the secretary of the organization or the Secretary of State under the provisions of C. S., 1137."

From the statutes on the subject, it may be noted that the Insurance Commissioner says "assume that valid service can be had upon the *secretary of the organization.*" Under findings of fact 13 by the court below in the *Welch case,* defendant did not make the contention as is now made that the defendant was not properly served. Of course, the Insurance Commissioner's contention and the defendant's conduct in the *Welch case* are persuasive but not binding. From the findings of fact by the court below, defendant is an organization doing an insurance business in this State and to all intents and purposes a going insurance concern, limited to the Brotherhood of Railroad Trainmen and exempt from license tax under the Laws of 1913.

In Vol. 2, C. S., Art. 25, under the head of Insurance, sub-ch. 6, is *Fraternal Orders and Societies.* Art. 26, *Fraternal Benefit Societies.* The statute laws of this State recognize *"Every insurance company, association or order."* C. S., 6274, *"Every incorporated* association, order or society." C. S., 6492, "Any corporation, society, order or voluntary association." C. S., 6497. *"Societies* which limit their membership to any one hazardous occupation." C. S., 6518. It may be noted that the statutory law permits all sorts of unincorporated associations to do certain kinds of insurance business in this State. To be sure they are now exempt from license tax, but are allowed to do business in this State, collect money and issue certain forms of insurance. It would be an anomaly to say that these voluntary unincorporated insurance companies and the one in this case that issues policies of insurance, designated as "Beneficiary Certificates," with all these privileges granted them in this State, are not subject to an action in this State by a member who has complied with the terms and provisions of the beneficiary certificate or insurance policy, and has suffered disability within the terms of the policy.

It would be a travesty on justice to say that the secretary and treasurer of defendant association, who countersigned policies, collected

dues and remitted same to the home office and performed other duties for defendant, that defendant could not be brought into the courts of this State, by service of summons on the secretary and treasurer, as was done in the present action.

In *Clark v. Grand Lodge,* 328 Mo., 1084 (S. W. Rep., 2d Series, 404). (The facts in the *Clark case, supra,* are analogous to the instant case and the defendant the same as in the present case.) At p. 1090 we find: "It is apparent, therefore, that the 'clear-cut issue' on which defendant rests its demurrer is that the defendant, Grand Lodge of the Brotherhood of Railroad Trainmen, being, as stated in the petition, a voluntary unincorporated association, is not capable of being sued at law, or as defendant asserts, is not a suable entity (p. 1098). Contracts are not contracts unless they are enforceable. To say that an association like defendant can make contracts necessarily means valid contracts—contracts that are binding on the parties and enforceable against them. It is an absurdity to say that defendant can make contracts of insurance, but cannot be sued thereon. If defendant has legal capacity to make a contract of insurance, it has legal capacity to be sued thereon. If it is a legal entity when making such contracts, it retains such legal entity when sued thereon. . . . (p. 1104). We think, also, that the doctrine of estoppel might well be applied to a case like this. This association, having over one hundred thousand members with regularly constituted officers and a perfect working organization, has the appearance, form and method of doing business of a corporation or legal entity. It has chosen a name and does business as a legal entity under and by use of that name. It holds itself out as capable of contracting in that name and by that name does enter into insurance contracts and in that name collects the premiums and accumulates funds to meet such contract obligations. When sued on such contracts in the name which it has used in making same, it ought not to be allowed to say that it is a mere myth—an intangible nonentity, incapable of being sued."

5 Corpus Juris, "Associations," sec. 8, at p. 1336, reads as follows: "One who deals with an association as a legal entity capable of transacting business, and in consequence receives from it money or other things of value, is estopped from denying the legality of its existence." *Petty v. Brunswick, etc., R. Co.,* 109 Ga., 666.

The cases cited by defendant are distinguishable from those unincorporated organizations or insurance companies that issue "Beneficiary Certificates."

In *Nelson v. Atlantic Coast Line Ry. Co., Relief Department,* 147 N. C., 103, it was held that while a suit could not be maintained to

recover insurance against the Relief Department, that being a bureau of the railroad. "If the contract is valid the liability is that of said railroad company." In the other cases relied upon as authority for the doctrine that unincorporated associations, no matter what their nature or business, cannot be sued, the questions involved were distinctly different. In *Tucker v. Eatough,* 186 N. C., 505, it was held that an unincorporated foreign association, United Textile Workers of America, could not be sued for an alleged libel by one of its agents in this State. In *Citizens Co. v. Typographical Union,* 187 N. C., 42, it was held that an injunction would not lie against an association, restraining its members from certain activities. In *Jinkins v. Carraway, Trustee of Excelsior Household of Ruth,* 187 N. C., 405, it was held that *mandamus* would not lie to compel a fraternal order to reinstate a member. See sec. 248, pp. 232 and 233, N. C. Practice and Procedure in Civil Cases (McIntosh), N. C. Law Review, Vol. 10, p. 313.

In the present case the plaintiff paid his dues regularly out of his monthly earnings, and was not in arrears to defendant's secretary and treasurer, who collected same in this State on his insurance policy or beneficiary certificate, made and delivered in this State. The defendant, an unincorporated organization, under the statute law of this State, was conducting an insurance business and was exempted from paying license. Its beneficiary certificate provided for the payment of $1,875 on the loss of an eye. Plaintiff lost his left eye and on that account had to resign from his position on the railroad, as trainman, as he had become unfit on that account to perform his duty to earn his daily bread. If plaintiff could not sue and have service of process on the secretary and treasurer of defendant company, under the facts and circumstances in this action, he would practically be remediless—a right without a remedy—this was never contemplated by law or equity, or the statute on the subject in this State that allowed defendant to do an insurance business, without paying license. We think the statutes in this State allowing unincorporated organizations or insurance companies to do business without license are enabling statutes. There are no enabling statutes in regard to such unincorporated associations like in the cases cited by defendant. Defendant is in an insurance business or organization and different. There is a "straight line" (an expression by *Brogden, J.*) between these different kinds of unincorporated associations—one business, the other fraternal or social.

The judgment of the court below is

Affirmed.

THOMAS W. ELLIOTT ET AL. *v.* STATE BOARD OF EQUALIZATION ET AL.

(Filed 21 December, 1932.)

1. **Constitutional Law A a—Constitution should generally be given interpretation based on broad and liberal principles.**

   A constitution should generally be given an interpretation based upon broad and liberal principles designed to ascertain the purpose and scope of its provisions, and if the meaning is clearly expressed it should be adopted, but if doubtful the intention of those who adopted the constitution must be sought, the words to be taken in their ordinary significance if not resulting in absurdity or contradiction, and recourse may be had to former decisions of the Court construing the provisions.

2. **Schools and School Districts A c—County Boards may create and consolidate districts, but elementary school must be maintained in each.**

   Under the provisions of our Constitution, Art. IX, secs. 2, 3, the counties are made the governmental agencies of the State in the maintenance of the constitutional six-month term of public school, and the county boards of education are given power to create, divide, abolish and consolidate school districts in accordance with a county-wide plan, C. S., 5473, and the Constitution requires by mandatory provision that at least one elementary school be maintained in each district, C. S., 5481, 5483, 5489, but no authority is given the county boards to consolidate taxing and nontaxing districts.

3. **Same—*It is not required that high school be maintained in each* school district.**

   The county boards of education are given discretionary power to locate high schools within the county on the recommendation of the county superintendent in order to make them available to all the children of the county, but it is not required that a high school should be maintained in each school district of the county and the county board of education may, in the exercise of its discretion, transfer a high school from one district to another.

4. **Same—State Board of Equalization held without authority to discontinue funds for school districts not abolished by county boards.**

   Where a county board of education has refused to consolidate several school districts with one in which a high school is maintained, the one containing the high school being a special tax district and the others nontaxing districts, the State Board of Equalization is within authority under the provisions of chapter 430, section 6, Public Laws of 1931, to refuse to provide general control, instructional service, operation of plant, and auxiliary agencies for such nontaxing districts, the statute failing to include "districts" within the powers of the Board of Equalization, and the Constitution requiring that at least one elementary school shall be maintained in each school district.

APPEAL by defendants from a judgment of *Schenck, J.*, rendered at Chambers in Raleigh, on 27 September, 1932.

This was an application for a writ of *mandamus* to compel the defendants to provide general control, instructional service, operation of plant and auxiliary agencies for a term of six months during 1932-33 for children in certain school districts in Chowan County, known as River View, Ryland, and Ward's.

The parties agreed that the court should find the facts and give judgment thereon; and after considering the complaint, the answer, and the certified minutes of the board of commissioners, the court found the facts to be as alleged in the following paragraphs of the complaint:

2. During the year 1930-31 there were in Chowan County, among other special tax and nontax school districts, the following special tax districts, to wit: Chowan High School, having an authorized tax rate of 30c. on the $100.00 valuation for maintenance and an additional authorized tax rate for bonds, and an actual tax rate of 30c. for maintenance and 20c. for bonds, in which a school with 11 grades was conducted for 8 months with an average daily attendance of 223 2/10, of whom 111 were in the high school grades; River View, having an authorized rate of 30c. and an actual rate of 15c. for maintenance only, in which a school with 7 grades was conducted for 8 months, with an average daily attendance of 43; Ryland, having an authorized rate of 30c. and an actual rate of 15c. for maintenance only, in which a school with 7 grades was conducted for 8 months, with an average daily attendance of 43; Ward's, having an authorized rate of 30c. and an actual rate of 9c. for maintenance only, in which a school with 7 grades was conducted for 8 months, with an average daily attendance of 38.

3. In the May budget of 1931, the plaintiffs requested of the defendants an allotment of teachers and funds for said schools based upon the foregoing facts, but the defendants, being of opinion that River View, Ryland, and Ward's districts should be consolidated with Chowan High School District, refused to allot teachers to said districts or to include them in the budget for participation in State funds, but did allot additional teachers to Chowan High School District. The plaintiff, County Board of Education, being of opinion, however, that such proposed consolidation was impractical and undesirable, refused to consolidate said school district with Chowan High School and no school facilities were furnished by the defendants in River View, Ryland, and Ward's districts during the year 1931-32.

4. On 7 May, 1932, elections were held in River View, Ryland, and Ward's districts which resulted in revoking the special taxes theretofore authorized in said districts making them nontax districts, while Chowan High School remained a local tax district, operating an eight-month term and levying a tax of 14c. for maintenance and 20c. for bonds, and

will in 1932-33 operate an eight-month term and require a special tax of 21c. for maintenance and 8c. for bonds.

5. The plaintiffs being advised that under such circumstances said nontax districts could not lawfully be consolidated with Chowan High School Special Tax District for the ensuing year, and being of opinion that there was no other lawful, equitable, or practical way of handling the situation made no provision for the children of said nontax districts except within the territory comprising said districts, and again requested in the 1932 May budget that teachers and funds be allotted by the defendants to the schools in said district for the six-month term during the year 1932-33, and, upon the refusal of the defendants to do so, again presented the matter to the defendants and demanded that provision be made by the defendants for the operation of a six-month school term for the children of said districts as required by law in such manner as might seem best to the defendants within the limits of the discretion and authority conferred and in accordance with the obligations legally imposed upon them, which demand defendants also refused.

The court further found as facts that in 1931 and 1932 the defendants made a thorough examination into the circumstances affecting the organization of the public schools of Chowan County and found that the schools would be operated more efficiently and economically by assigning additional teachers to Chowan High School and disallowing teachers for River View, Ryland, and Ward's, and in the exercise of their best judgment declined to assign teachers to these schools, but did allow additional teachers for Chowan High School and provided necessary funds for them and for the transportation of the children resident within the other districts. The court was of opinion that River View, Ryland, and Ward's are not of the same type and class as the Chowan High School District, and rendered judgment granting the plaintiff's prayer for relief. The defendants excepted and appealed.

Attorney-General Brummitt and Assistant Attorneys-General Seawell and Siler for appellants.

W. D. Pruden for appellees.

ADAMS, J. Upon the facts as found by the court the plaintiffs requested the defendants to provide funds and teachers for supporting and conducting a public school in each of the three nontax districts. The defendants declined this request, assigned additional teachers to Chowan High School, and arranged for the transportation thereto of eligible children residing in the other districts. As a consequence, no school is maintained within the boundaries of River View, Ryland, or Ward's District.

The plaintiffs contest the legal right of the defendants to make this order, and the defendants rest their authority upon the following statute: "The State Board of Equalization may refuse to include in the State budget all or a part of the teachers in any school or schools which may be operated in close proximity to another school of the same type and class, when in the opinion of said board such school could be operated more economically and efficiently if consolidated in whole or in part; but in all such cases said board shall designate the school or schools from which teachers are disallowed." Public Laws 1931, ch. 430, sec. 6. Whether this statute justifies the order made by the State Board of Equalization is the question for decision. It will be observed that the section does not contain the word "district," and that it makes no distinction between school districts and schools. It must, therefore, be considered in connection with the facts set out in the judgment of the court.

The Constitution, Article IX, has the following provisions:

SEC. 2. The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one years.

SEC. 3. Each county of the State shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least six months in every year; and if the commissioners of any county shall fail to comply with the aforesaid requirements of this section, they shall be liable to indictment.

These sections have been a part of the Constitution since its adoption in 1868—the second amended in 1875 by providing separate public schools for the white and colored races, and the third afterwards amended by providing a school term of six instead of four months pursuant to ratification by the people of the proposed change. Public Laws 1917, ch. 192; Public Laws 1919, ch. 102.

It has been held that these constitutional provisions were intended to establish a system of public education adequate to the needs of the people, affording school facilities to all the children of the State, and that the term "uniform" as used in the second section does not relate to schools so as to require that all schools shall be of the same grade, regardless of the age or attainment of the pupils, but that the term qualifies the word "system," the provision contemplating the establishment of schools of like kind and available generally to the school population. *Board of Education v. Board of Commissioners,* 174 N. C., 469. It has been held, also, that the legislative grant of power to make a division of school districts refers to the establishment or consolidation

of districts as territorial or geographical units and not to the classification or segregation of pupils apart from the land on which they live. *Woosley v. Comrs.*, 182 N. C., 429. These sections are mandatory, *Julian v. Ward*, 198 N. C., 480; *Board of Education v. Board of Comrs., supra*, and for disregard of the mandate in section three the county commissioners are liable to indictment.

Each county shall have a convenient number of districts in which one or more public schools shall be maintained for at least six months in every year. The language is plain, and it is asserted that there is no room for doubt. We are advertent to the doctrine that a constitution should generally be given, not essentially a literal, narrow, or technical interpretation, but one based upon broad and liberal principles designed to ascertain the purpose and scope of its provisions. If the meaning is clearly expressed it should be adopted; if doubtful, the intention must be sought, *McLeod v. Comrs.*, 148 N. C., 77, and the intention to be ascertained is the intention of those by whom the constitution was adopted. *Collie v. Comrs.*, 145 N. C., 170. In the attainment of this end we may resort to the natural significance of the words employed and if they embody a definite meaning and involve no absurdity or contradiction we are at liberty to say that the meaning apparent on the face of the instrument is the one intended to be conveyed. Black on Interpretation of Laws, 17 *et seq.* Likewise, we may have recourse to former decisions, among which are several dealing with the subject under consideration.

Among the earlier decisions are some which were made upon the implied assumption that a school must be maintained in each district; and in *Collie v. Comrs., supra*, it was definitely said: "Article IX of the Constitution, after declaring that religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged, commands in section 3 thereof, that one or more public schools shall be maintained at least four months (now six) in every year in each school district in each county of the State." This interpretation was approved in *Board of Education v. Board of Commissioners*, 178 N. C., 305, and in *Lacy v. Bank*, 183 N. C., 373, the Court again observed: "A proper consideration of the article (Constitution, Art. IX) will clearly disclose that its provisions are mandatory, imposing on the Legislature the duty of providing 'by taxation and otherwise for a general and uniform system of public education, free of charge, to all the children of the State from six to twenty-one years,' that the school term in the various districts shall continue for at least six months in each and every year, and that the counties of the State are recognized and

designated as the governmental agencies through which the Legislature may act in the performance of this duty and in making its measures effective. In various decisions of the Court the importance and imperative nature of these constitutional provisions have been upheld and emphasized." These expositions are positive and unequivocal, and as was said in *Collie's case,* "When the people have clearly ordained what shall be done, we, as judges, have nothing to do but to obey and to execute their will."

The third section of Article IX as heretofore construed contemplated at the time of its adoption the maintenance for the required period of a public school in each district. As the means of travel were limited, it was necessary to bring the schools to the pupils instead of transporting the pupils to the schools. Under this system many of the schools were wholly inadequate. It was thought that the combination of the weaker districts could afford relief from some of the evils without disregard of the constitutional mandate, and the county boards of education were authorized to consolidate school districts whenever in their judgment consolidation would better subserve the educational interest of the community. C. S., 5473; *Scroggs v. Board of Education,* 189 N. C., 110. The statutes were amended upon the basis of a county-wide plan of organization, but no authority was given for consolidating taxing and nontaxing districts. *Bivens v. Board of Education,* 187 N. C., 769.

Under the existing law the power to create, divide, or abolish districts is vested in the county board of education, who must exercise the power in accordance with the county-wide plan. C. S., 5481, 5483. When this plan is adopted and two or more school districts are consolidated into one the county board may make provision for transportation of pupils in the consolidated district who reside too far from the schoolhouse to attend without transportation. C. S., 5489. In the present case, however, the four districts have not been consolidated. This is admitted. Indeed, the county board of education refused to consolidate any of them. The several districts are therefore separate entities, in each of which it is ordained that "one or more public schools shall be maintained."

Elementary and high schools are given a statutory definition. In each county the school system shall consist of eleven years or grades and shall be graded on the basis of a school year of not less than 160 days. The first seven years or grades constitute the elementary school and the last four years or grades, the high school. C. S., 5386. An elementary school is classified as a district school that embraces a part or all of the seven elementary grades, but is without a sufficient number of high school pupils or sufficient length of term to become a union

school. C. S., 5388. The number of teachers apportioned to elementary schools differs from the number permitted in the high schools, and in the former specified subjects must be taught. C. S., 5438, 5439, 5440.

The location of high schools is thus provided for: "It is the duty of the county board of education, on recommendation of the county superintendent, to locate high schools in the county or to arrange for high school instruction in special charter districts, so as to provide good high school instruction for all the children. Since the cost of good high school instruction is too great to permit the location of small high schools close together, it shall be the duty of the county board, wherever the needs demand it, to locate not more than one standard high school in each township or its equivalent: *Provided,* it shall be discretionary with county boards of education to continue standard high schools now in existence contrary to the provisions of this section, and to establish such high schools in townships in which city schools are already located." C. S., 5437.

This statute was framed in recognition of the difficulty, if not the impossibility, of maintaining a high school in each district, and for this reason it was provided that with reference to the districts the high schools should be located so that instruction in them, as well as in the elementary schools, should be available for all the children of the county —that is, that pupils who have gone through the seven grades constituting the elementary schools shall have the advantage of instruction in the last four grades of the high school. C. S., 5428. The question of locating high schools is a matter within the discretion of the county board of education, and in the exercise of such discretion the board may transfer a high school from one district to another. *Clark v. McQueen,* 195 N. C., 714. It is manifest that the public school law does not contemplate the creation of a high school in every school district of the State.

The term "high school" is not mentioned in Article IX; the title is of statutory origin. Still, when high schools are established as the law provides they are made a component part of the public school system to be maintained in like manner with the other public schools and made available to all members of the school population who "are qualified to enter." This was expressly held in *Board of Education v. Board of Comrs., supra.*

Herein is the marked distinction between the elementary and the high school. In obedience to the explicit command of the organic law the proper authorities must maintain in every district at least six months in every year one or more schools affording the advantages of the elementary grades. As indicated by the statutes and the decisions

heretofore cited the constitutional mandate does not extend to the high schools, and we see no reason why adequate provision may not be made for transporting pupils who have completed the elementary grades from the district in which they reside to a high school situated in another which is conveniently proximate.

From what has been written we are led to the conclusion that the section above cited (Laws 1931, ch. 430, sec. 6) did not confer upon the State Board of Equalization the power to discontinue the public schools in River View, Ryland, and Ward's districts and to require the children residing in these districts to be transported to the Chowan High School for elementary instruction. We must, therefore, affirm the judgment directing the defendants to provide general control, instructional service, operation of plant, and auxiliary agencies for these districts in the manner provided by law.

If the provisions of Article IX are obsolete or ill-adapted to existing conditions, this Court is without power to devise a remedy. However liberally we may be inclined to interpret the fundamental law, we should offend every canon of construction and transgress the limitations of our jurisdiction to review decisions upon matters of law or legal inference if we undertook to extend the function of the Court to a judicial amendment of the Constitution.

In concluding, we may suggest that the Report of the Constitutional Commission contains an article on Education which is designed to supersede the present law and to meet the demands of modern educational thought.

The judgment is

Affirmed.

LEIGHTON GRAY, JUNE GRAY, EMMA SPENCER, AND SUSAN V. GRAY, v. CITY OF HIGH POINT.

(Filed 21 December, 1932.)

1. Municipal Corporations E f—City is liable for depreciation to private land resulting from sewage disposal plant.

To the extent that the land of a private owner is depreciated in value by reason of noxious gases and odors given off by the sewage disposal plant of a city, the city is liable for such depreciation as a taking of private property for a public use, although the plant was erected in accordance with plans approved by the State Board of Health and the maintenance of such plant is a governmental function of the city.

2. Same—Evidence that plaintiff's land was depreciated in value because of odors from sewage plant held sufficient.

In an action by a private owner of lands to recover damages caused his land by noxious gases and odors emanating from the sewage disposal plant of a city located contiguous to such land, the testimony of several witnesses that odors from the plant were strong and extremely objectionable on the plaintiff's land whenever the wind was from the plant is held sufficient to take the case to the jury, and defendant's motion as of nonsuit was properly denied. C. S., 567.

3. Trial C d—Trial court in his discretion may allow jury to visit plaintiff's land for purpose of understanding testimony in the case.

With the consent of the parties it is not error for the trial judge in his discretion to permit the jury to view the plaintiff's land for the purpose of understanding the evidence in the case respecting damages to the land by the maintenance of a city sewage disposal plant when he correctly charges the jury that it must not regard the information so obtained as substantive evidence.

4. Trial B e—Admission of incompetent evidence held not prejudicial where it has been withdrawn and jury instructed not to consider it.

Where incompetent evidence relating to the question of damages is admitted during the trial, but thereafter the court withdraws the evidence and instructs the jury not to consider it, and competent evidence based on proper questions is later admitted upon the issue, the admission of the incompetent evidence is rendered harmless, and an exception thereto will not be sustained.

5. Appeal and Error J e—Where same evidence objected to is later admitted without objection appellant ordinarily loses exception.

Where incompetent evidence is admitted over objection and the same evidence is theretofore or thereafter admitted without objection, the appellant ordinarily loses the benefit of his exception.

6. Municipal Corporations E f—Measure of damages in action for injury to land caused by noxious odors from sewage disposal plant.

Where the maintenance of a sewage disposal plant by a city causes depreciation in value to the plaintiff's land by reason of emanation of noxious odors therefrom, the measure of damages is the difference between the fair market value of the land immediately before and immediately after the injury to the plaintiff's land by reason of the emanation of such odors, and includes its value for all practical purposes to which a reasonably prudent man could have put it.

7. Evidence K b—Witnesses may testify from their own knowledge as to depreciation in value of land from odors from sewage plant.

In an action against a city for the depreciation of the value of the plaintiff's land caused by the emanation of noxious odors from the defendant city's sewage disposal plant it is competent for witnesses who resided nearby to testify from their knowledge and observation as to the difference in value of the plaintiff's land immediately before and immediately after the emanation of such odors.

8. Municipal Corporations E f—Owner of lands may recover for depreciation of land's value from odors from sewage disposal plant.

The owner of land has a right that the air over his land shall come in its natural purity, and although he may not recover damages for occasional pollution of the air resulting in mere inconvenience or annoyance, he may recover damages sustained by reason of the emanation of noxious odors from a city's sewage disposal plant when such odors are strong and frequent and cause substantial depreciation of the value of the land.

9. Same—Owner of land is entitled to recover for damage to land from sewage disposal plant from time of first substantial injury.

Where odors emanating from a city's sewage disposal plant amount to a taking of contiguous private property for a public use the owner of such contiguous land is entitled to damages from the time of the first substantial taking.

10. Same: Nuisance A a—Owner of land damaged by odors from sewage disposal plant may maintain action for private nuisance.

The fact that a city's sewage disposal plant causes injury to the lands of several owners in the vicinity by reason of the emanation of noxious gases and odors will not prevent one of such owners from maintaining an action against the city to recover for the injury to his land alone.

APPEAL by defendant from *Oglesby, J.*, and a jury, at February 8th Term, 1932, of GUILFORD. No error.

The plaintiffs allege that they are the owners of a certain tract or parcel of land (describing same) containing about 200 acres; that the sewage disposal plant of the defendant adjoins the lands of the plaintiffs; that sewage from the disposal plant has overflowed and seeped onto the lands of the plaintiffs, and a noxious and violent odor emanating from said disposal plant contaminates the atmosphere adjoining the plaintiffs' lands, and that the defendant has placed certain manholes in the said sewer line and that these noxious odors emanate from the said manholes also. The seepage and overflow and discharge of raw sewage and the emanation of noxious odors, has rendered the lands of plaintiffs unfit for use and unfit for habitation, causing and creating a permanent and continuing nuisance upon the lands of the plaintiffs, as the result thereof they have suffered damage and loss in the sum of seventy-five hundred dollars ($7,500). Plaintiffs' allegations are denied by defendant, and upon the issues there was a verdict for the plaintiffs.

The court below rendered the following judgment: "This cause coming on to be heard and being heard before his Honor, Judge John M. Oglesby and a jury and the jury having answered the issues submitted by the court as follows: (1) Are the plaintiffs the owners of the land described in the complaint? Answer: Yes. (2) Has plaintiffs' land as described in the complaint been wrongfully taken by the defendant through noxious odors from the operation of defendant's sewage plant, as alleged

in the complaint? Answer: Yes. (3) If so, what permanent damage, if any, is plaintiff entitled to recover? Answer: $2,000.

It is, therefore, ordered, adjudged and decreed that the plaintiffs, Leighton Gray, June Gray, Emma Spencer, John B. Spencer and Susan V. Gray, recover of the defendant, city of High Point, the sum of two thousand dollars ($2,000), as permanent damages to the following described lands of the plaintiffs, to wit: Beginning at a post oak on David Frazier's line; running thence W. 164 poles to a hickory; thence S. 175 poles to a stone; thence E. 164 poles to a red oak; thence N. to the first station, containing 200 acres.

It is further ordered, adjudged and decreed that upon the payment by the defendant city of High Point to the plaintiffs of the said sum of two thousand dollars ($2,000), the payment of the same shall be in full satisfaction and settlement of all damages, claims or demands of the said plaintiffs, their heirs, administrators, executors or assigns and that the plaintiffs, their heirs, administrators, executors or assigns are hereby forever barred from asserting any claim or demand for damages of any nature, kind or description whatsoever for and on account of all damages to the lands of the said plaintiffs above described due to, because of and on account of the construction, location of, maintenance and operation of the sewage disposal plant of the city of High Point on the Mary Wiley land situate in Jamestown Township, Guilford County, North Carolina, and on account of the maintenance of the sewage outfall pipe line, through, over and across the lands of the plaintiffs above described, the said sum of $2,000 being in full settlement and satisfaction of all damages past, present and prospective. It is further ordered that the costs of this action be taxed against the city of High Point. It is further ordered that this judgment be registered in the office of the register of deeds of Guilford County, North Carolina, and the same shall operate as a conveyance of a perpetual easement to the city of High Point in and to the lands of the plaintiffs herein described for the purposes herein set forth."

The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones will be considered in the opinion.

Gold, McAnally & Gold for plaintiffs.
Grover H. Jones and Sapp & Sapp for defendant.

CLARKSON, J. At the close of plaintiffs' evidence and at the close of all the evidence the defendant made motions for judgment as in case of nonsuit, C. S., 567. The court below overruled the motions and in this we can see no error. We think the evidence, taken in the light most

favorable to plaintiffs, sufficient to be submitted to a jury on "taking or appropriation."

The plaintiffs owned about 200 acres of land, about 6 miles from the defendant city of High Point. The defendant, within about 10 to 15 feet of plaintiffs' land, on the east side of the farm, erected a sewage disposal plant. The city of High Point has a population, according to the last census (1930) of 36,745 inhabitants. The sewage disposal plant cost $460,000. The plans and the plant as constructed were approved by the State Board of Health. The capacity of the plant was designed for a little less than five million gallons of sewage per 24 hours. The amount of sewage that has been going into it for the 24 hours is on an average of less than half of that. The capacity of the plant is double the amount of sewage it is now receiving. The plant was completed and put into operation about 1 June, 1929. On plaintiffs' farm were good buildings, good home, two-story house, chimney at each end, good well of water, good barn and double crib.

The principle has been long settled in this jurisdiction and so clearly stated in *Donnell v. Greensboro,* 164 N. C., at p. 334, that we again repeat it: "The decisions of this State are in approval of the principle that the owner can recover such damage for a wrong of this character, and that the right is not affected by the fact that the acts complained of were done in the exercise of governmental functions or by express municipal or legislative authority, the position being that the damage arising from the impaired value of the property is to be considered and dealt with to that extent as a 'taking or appropriation,' and brings the claim within the constitutional principle that a man's property may not be taken from him even for the public benefit except upon compensation duly made," citing many authorities. *Cook v. Mebane,* 191 N. C., 1.

In fact, in *Jones v. High Point,* 202 N. C., 722, the defendant in this action, the principle is tersely stated: "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. . . . (p. 723.) 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."

The plaintiff introduced the following witnesses:

C. L. Gray testified, in part: That the land had been in the family nearly 100 years, since 1836, and quite a portion subject to cultivation

and free from liens. "Certain refuse from the city goes through the sewer pipes into these receptacles, from the toilets in the city. . . . I have been on that farm during the last three years. I drop there some three or four times a year. I live in High Point. . . . There are 5 manholes in this 3300-foot line. I have been to this city sewage disposal plant and around it. *Well, it is a pretty severe odor of human excrement.* . . . The sewage plant is on the east side of our farm, and when the wind is from the east you can smell it then, of course. . . . When I smell that odor, I would be on the north side of the place about half way, from the middle of it I could smell it. . . . *It is very nauseating.* It turns your stomach if you don't move about and get some good fresh air mighty quick."

Mayfield Hoover: "I live from the Gray place about half a mile, I suppose. I have been at the city disposal plant a time or two, two or three times, I suppose, since it was built. I know about where Mr. Gray's line is. It is right at 10 or 15 feet from the sewage disposal plant, runs right up to it. *There is an odor that arises from this sewage plant that you can smell on this property that is in controversy.* This odor is a hard odor to describe. It has a gas and dye odor connected with it and all, an odor that arises, and the weather conditions has a good deal to do with when you smell it, and where you are at in regard to the wind. *It is a very obnoxious odor, awful bad odor at times.* . . . I have been around the Gray place, the Gray home, since the installation of this sewage disposal plant. You can smell this odor that smells the same as at the plant on the farm there, on the Gray farm, and also on my farm, as far as that is concerned. . . . I smelled it five or ten minutes at a time, when there was a breeze blowing in your path, you smelled it. *I smelled it practically every two or three hours in the day.* In freezing weather we don't smell it. The point is, in sultry weather is our trouble with those odors. That starts in the spring of the year, of course. . . . I have lived where I am now all my life. . . . I haven't objection to the location where the plant is, if they will eliminate the odor. . . . Seems to me we have been smelling this practically ever since the plant was erected there."

Will Leonard: "Have been on the Gray farm about once every week for six years. I farm. I know where this High Point sewage disposal plant is. . . . I smell it when I am at home. I live about 200 feet from Mr. Gray's place. I have smelled it on the Gray place. *Down there around his feed barn, down on the creek.* I couldn't say anything else I didn't like to smell it. *It smelled bad.* . . . *The odor was detected after the plant was built. I didn't smell it before.* That odor was not there as I know of before. I was there on that place before

the time it was built time and time again, and didn't smell any odor. . . . The place I cultivate is about three-quarters of a mile from this sewage disposal plant. A little further than the Gray farm is, I have been tending that piece of property I am on now for two years. . . . I live about three-quarters of a mile from the disposal plant. I know about when that odor is going to come. *I close my windows.*"

M. A. Mitchell: "I have smelled the odor. I was sitting on my front porch, two and a half miles from the plant. Well, if it is a warm sultry time and the breeze is coming from the south you can smell it."

H. S. Jones: "I know where the High Point city sewage disposal plant is. I have been there. My land is located about half a mile west of the plant. I have been living there 32 years. That Gray land is the adjoining farm to my home. . . . Q. Where have you been when you smelled those odors? Answer: Well, I have been at my own home and on the Gray farm both, at both places. . . . *It is a very bad odor.* It is a mixture of all kinds, and it has gas that forms from this substance that comes from High Point, from cafes, from hotels, from hospitals, from all of the toilets everywhere, almost, and it is put there in one hole and stands there for months, for months at a time. It has gas from that. I smelled that on the Gray farm. . . . *It is a sickly musty smell.* I don't know of anything else that is the same, that has the same smell, very unpleasant. I have been on both sides of the Gray farm. Been on this side, the north side, and the south side. I have smelled it mostly on the north side. Same kind of odor I have been smelling all the time. *Very bad odor, sickly. It smells gasey, just like escaping gas to me.*"

Leighton Cruthis: "I live on the Gray farm. Am married, and have a family. I know where the city sewage disposal plant is. I would say I live between 800 to 900 yards from the disposal plant. I have smelled it ever since it has been there. *The odors are bad.* . . . I cultivate the Gray farm, have been there about two years."

There were many other witnesses introduced by plaintiffs who testified to like effect.

The defendant's witnesses testified to the effect that the sewage disposal plant was erected in conformity to the plans, and approved by the State Board of Health, and the witnesses, engineers, went into minute detail as to the manner and method of construction and operation. The defendant's witnesses denied the material allegations of plaintiffs' witnesses.

The following is in the record, unobjected to: "The court further instructs you that the court permitted you to view the premises in question, and that the court exercised its discretion in permitting you to do so.

Counsel have agreed—both counsel for the plaintiffs and the defendant—that they had no objection to you going to the plant and investigating and looking at the condition there. The court did this so that you might have a better impression of the whole situation. The court further instructs you that it charges you now that you are not to consider anything that you saw as substantive evidence; that what you saw upon a visit to the premises is to be considered by you only to enable you to understand the testimony of the witnesses." *S. v. Stewart,* 189 N. C., at p. 345.

The defendant contends that it was "prejudiced by the testimony admitted over appellant's objection in which witnesses were allowed to testify as to the value of plaintiffs' land before and after the erection of defendant's sewage disposal plant, notwithstanding his Honor on the second day of the trial instructed the jury not to consider the evidence." This contention cannot be sustained.

In *S. v. Stewart, supra,* at pp. 344-5, citing a wealth of authorities, is the observation: "The power of the court to withdraw incompetent evidence and to instruct the jury not to consider it has long been recognized in this State." *Parrott v. R. R.,* 140 N. C., at p. 548; *Baker v. International Shoe Co.,* 199 N. C., at p. 385; *Nance v. Fertilizer Co.,* 200 N. C., at p. 708.

The court below, after calling attention to certain evidence of plaintiffs' witnesses, who testified as to value of the property, instructed the jury not to consider it, and clearly instructed the jury "If it made any impression upon your mind disabuse your mind of that impression." We can see no prejudicial error. Certain witnesses testified as to the odor, and, if objectionable, the questions of value or damage was thereafter properly propounded to the witnesses, the following being substantially the questions and answers thereto: "Q. Do you have an opinion satisfactory to yourself as to the fair market value of this Gray land immediately prior to the emanation of these odors? Answer: Yes, sir. Q. Do you have an opinion satisfactory to yourself as to the fair market value of the Gray land after the odors had begun to emanate? I have. I am familiar with land value in that vicinity, the market value of land in that vicinity. Q. What in your opinion was the fair market value of the Gray land immediately prior to the emanation of those odors from this plant? Answer: Well, I think the place would be cheap at $50 an acre. Q. Do you have an opinion satisfactory to yourself as to whether or not the market value of this land has been impaired by virtue of the odors which you have described? Answer: Yes, sir. Q. What is that opinion, and what is the impairment, if any? Answer: That it has been impaired, and I would state that to be practically $20 per acre."

The witnesses examined were familiar with land values in that vicinity. Defendant propounded similar questions to many of its own witnesses, who stated the land was not damaged.

On this aspect the principle has long been settled in this jurisdiction. "In *Moser v. Burlington,* 162 N. C., at p. 144, we find: 'On the question of damages, his Honor correctly applied the rule as it obtains with us, that the damages are confined to the diminished pecuniary value of the property incident to the wrong. *Metz v. Asheville,* 150 N. C., 748; *Williams v. Greenville,* 130 N. C., 93; the evidence as to specific cases of sickness in plaintiff's family having been admitted and its consideration allowed only as it tended to establish the existence of the nuisance and the amount of damage done to the property." *Wagner v. Conover,* 200 N. C., 84; *Greensboro v. Garrison,* 190 N. C., at p. 578; *Construction Co. v. R. R.,* 185 N. C., at pp. 45-6; 46 C. J., p. 829.

In fact, unobjected to, J. E. Leonard, a witness for plaintiff, in rebuttal testified, in part: "I am a farmer. I have been to this city disposal plant. I certainly did observe odors emanating from that plant during those years I spoke of. I observed those odors while on the Gray farm. Several times. I have been at the house on the Gray farm. The odors are pretty severe; very unpleasant to me. I have an opinion satisfactory to myself as to the fair market value of the Gray property, the Gray farm, immediately prior to the emanation of those odors from this plant, immediately before the odors began to emanate. I think I am familiar with land values in that section." The witness then stated his opinion as to the fair market value immediately prior to the emanation of the odors—"I have an opinion satisfactory to myself as to the extent this land has been impaired, if any. I would say it has been cut down as much as $25 an acre."

In *Shelton v. R. R.,* 193 N. C., at p. 674; citing numerous authorities, the following observation is made: "It is thoroughly established in this State that if incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been given in other parts of the examination without objection, the benefit of the exception is ordinarily lost." *Nance v. Fertilizer Co.,* 200 N. C., at p. 708.

The court below charged the jury: "The court further instructs you that the owner of land has a right that the air which comes upon his premises shall come in its natural purity, free from artificial impurities. This right, the court further instructs you, has its correlative obligation, which is that one must not use his own premises in such a manner as to discharge into the atmosphere of his neighbor noxious gases and odors which substantially affect its wholesomeness. The court further instructs you, that this right of the air in its natural condition is one

of the rights that attach to the freehold, and that if it is denied the owner by being substantially invaded by the defendant, as alleged in the complaint, that is, by discharging noxious odors upon the Gray land, the defendant would be liable. The court further instructs you that the invasion or denial of the right must be a substantial invasion or denial. The noxious odors, if any, must permeate or pass over the plaintiffs' land in such volume and with such frequency or to such an extent as to constitute a taking. The court repeats that occasional odors merely causing inconvenience or annoyance will not constitute a taking as contemplated under the law. Therefore, gentlemen of the jury, the question presented for you to determine in your deliberations is, have the plaintiffs established by the greater weight of the evidence or preponderance of the evidence that the plaintiffs' land has been wrongfully taken by the defendant through noxious odors from the operation of defendant's sewage disposal plant? If so, the court instructs you that liability would attach; otherwise it would not." We can see no error in the charge above, and defendant's exceptions and assignments of error must be overruled.

In *Cook v. Mebane,* 191 N. C., at p. 10, we find: "In *Rhodes v. Durham,* 165 N. C., p. 681, *Hoke, J.,* speaking to the subject, says: 'It is contended for defendant that damages of this character should not be allowed, because the property of plaintiff does not abut directly upon the stream, and there has been no physical invasion of plaintiff's rights in the same; but this position, in our opinion, cannot be sustained. The property injured extends to within 50 yards of the stream, and the evidence tends to show and the jury has established that defendant wrongfully maintains there permanent conditions amounting to a nuisance, bringing plaintiff's property directly within the harmful effects and sensibly impairing its value. In *Donnell v. Greensboro, supra* (164 N. C., 330), the Court, in speaking to a similar suggestion, said: 'In such case, and except as affected by the existence of certain rights peculiar to reparian ownership, a recovery does not seem to depend (at all) on whether the damage is carried through the medium of *polluted water or noxious air;* the injury is considered a taking or appropriation of the property to that extent, and compensation may be awarded.' . . . And 1 Lewis on Eminent Domain (3 ed.), sec. 230, says: 'The owner of land has a right that the air which comes upon his premises shall come in its natural condition, *free from artificial impurities.* This right has its correlative obligation, which is that one must not use his own premises in such a manner as to discharge into the atmosphere of his neighbor dust, smoke, noxious gases, or other foreign matter which substantially affects its wholesomeness,' etc.' *Moser v. Burlington,* 162 N. C., p. 144." *Surratt v. Dennis,* 199 N. C., 757.

The court below further instructed the jury: "A nuisance, gentlemen of the jury, the court finds is anything that worketh hurt, inconvenience or damage to another, and the fact that the act done may be otherwise lawful does not keep it from being a nuisance. The inconvenience complained of must not be fanciful or such as would affect only one of fastidious taste, but it must be such as would affect an ordinarily reasonable man. The court instructs you, gentlemen of the jury, that the plaintiffs cannot recover for occasional odors whereby the plaintiffs on their land would experience annoyance and inconvenience."

The defendant contends that the decision in *Holton v. Oil Co.*, 201 N. C., 744, is contrary to the charge of the court below. We think not. The above charge is an epitome of the holding in the *Holton case*, and cases therein cited. In that case it was said, at p. 748: "The law only deals with real, substantial injuries—*de minimis non curat lex*. The law does not recognize nervous particularity."

The court further charged the jury: "The court repeats that the plaintiffs, if entitled to recover at all, would be entitled to recover only for the impairment of the market value of the property by noxious odors as alleged in the complaint. These odors must be sufficient to constitute a taking, and must directly and proximately cause a wrongful taking by the defendant through the operation of the sewage disposal plant. The court further instructs you that if you find there was a taking, then it would be for you to determine in your deliberations when the taking occurred and what date damages, if any, would occur. The court instructs you that the plaintiffs would be entitled to recover, if entitled to recover at all, from the time the first substantial taking occurred." We can see no error in the charge, objected to by defendant, as we think the evidence sufficient to be submitted to the jury on "taking or appropriation."

It was agreed that an issue as to permanent damage should be submitted to the jury, which was done. *Wagner v. Conover*, 200 N. C., at p. 85.

The court further charged the jury: "The court further charges you that in estimating the value of property that has been taken, all the capabilities of the property and all the uses to which it may be applied or for which it is adapted are to be considered, and not merely the condition it was in at the time or the use to which it was then applied by the owner. That is, you determine whether or not there has been a taking and what damage, if any, the taking would result to the property in the use to which it may be applied by a person of ordinary prudence. The court further instructs you the particular use to which land is applied at the time of the taking is not the test of its value, but its availability for any valuable or beneficial use to which it would likely

be put by a man of ordinary prudence should be taken into account by you." *Ayden v. Lancaster,* 197 N. C., 556. To this there was no exception, and we think it well states the law.

As to defendant's discussion in regard to the right of action by an individual to recover for a public nuisance. In *McManus v. R. R.,* 150 N. C., at p. 662, we find: "As we have heretofore endeavored to show, the nuisance alleged in the complaint, and established by the verdict on the first issue, is of a kind and character which involves the invasion of the rights of all owners or lawful occupants of adjacent property whose individual rights are injuriously affected, and a right of action on any one of them is in no way impaired because the injury done him is the same or similar in kind to that of all others in like circumstances, however numerous. Such owner is not required to establish the existence of damage or injury special and peculiar in reference to the injury generally suffered by other adjacent owners who are similarly situated."

"A nuisance may be both public and private." *Swinson v. Realty Co.,* 200 N. C., at p. 279, citing *McManus v. R. R., supra.*

The court below ably and clearly set forth the law applicable to the facts and plumbed the decisions of this Court, and in no wise impinged C. S., 564. It looks like thrashing over old straw—the matters in this appeal, it seems to us, have been so long settled in this jurisdiction. We will repeat, as was said by *Hoke, J.,* in the *Donnell case, supra,* at p. 337: "Recognizing the importance of the principle involved and the practical effect of its application in the present instance, we have given the cause our most careful consideration, and, having done this, we must administer the law as we are enabled to see it, and trust to the moderation and good sense of our juries to make fair and righteous adjustment of the conflicting interests involved." In the judgment below, we find

No error.

ANDREW GREEN v. INTER-OCEAN CASUALTY COMPANY OF CINCINNATI, OHIO.

(Filed 21 December, 1932.)

1. Insurance R c—Ability to do odd jobs of trifling nature will not prevent recovery under disability clause in life insurance policy.

The ability to do odd jobs of a comparatively trifling nature will not prevent an insured from recovering under the provisions in a life insurance policy for the payment of a certain sum monthly in case the insured should become "wholly and continuously disabled and prevented from performing each and every duty pertaining to any business or occupation

by reason of sickness," and in this case the insured's evidence of such disability was sufficient to be submitted to the jury, it being for the jury to determine under proper instructions from the court whether the insured had suffered such disability as to entitle him to recover under the terms of the policy.

2. Same: Evidence K b—Testimony of expert that insured would not be able to again perform his regular employment held competent.

In an action to recover on a disability clause in a policy of life insurance, testimony by a medical expert who had examined the insured that in his opinion the insured would never be able to again perform his regular employment as a section hand is held competent, and testimony by the insured that he did not know how to perform any work other than manual labor *is held* not prejudicial, there being sufficient evidence to go to the jury on the question as to whether the insured had suffered a disability within the meaning of the policy.

3. Trial F a—Issues presenting all essential matters in dispute are sufficient.

Issues are sufficient if they present for the determination of the jury all essential matters or determinative facts in dispute.

4. Insurance P b—Issue tendered as to matter of defense in policy held properly refused under the pleadings and evidence.

In an action on an insurance policy the plaintiff is not bound to anticipate defenses which the insurer may set up, it being sufficient if the complaint contains a statement of the policy contract and alleges facts upon which the insurer is liable thereunder, and the insurer's failure to make payment in accordance therewith, and where in an action on a disability clause in a life insurance policy the plaintiff alleges the contract and his disability covered thereby, and the insured fails to set up in its answer that disability was payable under the terms of the policy only in case the plaintiff was regularly attended by a physician, and the insurer introduces no evidence: *Held*, the provision as to attendance by a physician can be waived by the insurer, and the insurer's contention that it was error for the trial court to refuse to submit an issue as to whether the insured had been so attended by a physician cannot be sustained.

5. Appeal and Error E b—Matters not set out in record are deemed correct.

Where the charge of the trial court is not contained in the record it is presumed that the court correctly charged the law on every material aspect, and charged the law applicable to the facts.

6. Insurance P g: Action B g—Judgment may not order insurer to pay monthly disability payments to insured subsequent to date of summons.

Where in an action to recover under a disability clause in a life insurance policy the insured is entitled to judgment upon the verdict of the jury, the recovery should be limited in the judgment for the period of disability up to the time of the issuance of summons, but judgment that the insured also recover the monthly disability payments "so long as he shall live" is error, the alleged cause of action having already accrued,

and the judgment not coming within the provisions of the Declaratory Judgment Act which was designed to set controversies at rest before they led to repudiation of obligations, the invasion of rights, and the commission of wrongs.

APPEAL by defendant from *Clement, J.*, at February Term, 1932, of RUTHERFORD. Modified and affirmed.

This is an action brought by plaintiff against defendant to recover on an insurance policy. The defendant, Andrew Green, was working as a section hand for the Southern Railroad Company, and had been for the past 26 years off and on, and lived near Forest City, N. C. He testified, in part: "Prior to February, 1931, I worked as section hand for about 7 years putting in service tracks tile on the Southern Railroad. The Southern Railroad Company deducted from my wages each month premiums on the insurance policy involved in this suit. In February, 1931, I took sick and had a smothering in my heart. It affected my back and my stomach swelled up. I could not lay down and had to set up in a chair part of the time. My arms swelled and my stomach and ankles swelled. My heart and back and stomach swell yet. I am unable to work. When I attempt to work I have a smothering in my heart. My stomach swells up and I cannot eat anything and cannot rest at night. My back gets to drawing and throws my stomach out of fix and creates a smothering around my heart. Since February, 1931, I have been unable to do any work except walking around and piddling about. I also have a shortness of breath, . . . I cannot read and write. (On cross-examination.) I raked up a little hay or oats for Mr. Grover McDaniel. He put us in there to pull oats but I couldn't do that and I did not help cut oats. I piddle around at Mrs. Cole's a little bit," etc.

Andrew Green plaintiff, recalled, testified as follows: "Q. Andrew, state to the jury whether you know how to do anything except manual labor or *not*? Objection by defendant. Overruled. Exception. Answer: No, sir."

Dr. A. C. Duncan, witness for plaintiff, admitted to be an expert, testified, in part: "I know Andrew Green and examined him, I guess, some six or eight times in the last two years. *He has organic heart lesions and some nephritis — kidney trouble — they call it Bright's Disease.* That condition incapacitates him from work so far as hard manual labor is concerned. He is totally disabled from performing hard manual labor. In my opinion, he is permanently disabled from performing hard manual labor. As a rule, his condition would get worse as time goes on. (Cross-examination.) The first time I examined Andrew was probably a little more than a year ago. He was in my office for an examination last week. That was the first time I had seen him

in a long time. I don't think he could do hard manual work. I think he could do light work but do not know how long he could keep it up. This heart trouble under proper conditions will get a little better, and a little worse. (Redirect examination.) Q. State whether or not in your opinion he will ever be able to do the work of a section hand? Objection by defendant. Overruled. Exception. Answer: I don't think he will be able to do that kind of work any more."

The issues submitted to the jury and the judgment of the court below indicate the controversy. The judgment is as follows:

"This cause coming on to be heard at the February Term, 1932, of the Superior Court of Rutherford County, before his Honor, J. H. Clement, judge holding the courts of the Eighteenth Judicial District, and a jury, and being heard and it appearing to the court that the jury have answered the issues submitted to them, as follows:

1. Is the plaintiff permanently disabled on account of sickness, as alleged in the complaint? Answer: Yes.

2. Was plaintiff's policy of insurance in force at the time he became disabled, as alleged in the complaint? Answer: Yes.

3. Does the disability of plaintiff wholly and continuously disable him from performing any and every duty pertaining to any business or occupation by reason of such sickness? Answer: Yes.

4. How long has plaintiff's disability continued? Answer: 28 February, 1931.

It is, therefore, ordered, adjudged and decreed that the insurance policy referred to in the complaint is in full force and effect, and that the plaintiff have and recover of the defendant the sum of $288.76, being the amount due under and by virtue of the provisions of said policy for the first year of disability. And it further appearing to the court that the jury have found that the plaintiff is permanently and continuously disabled from performing any and every duty connected with any business or occupation and that under and by virtue of the provisions of said policy the plaintiff is entitled to recover the sum of $7.50 per month during such disability; It is, therefore, ordered, adjudged and decreed that the plaintiff have and recover, in addition to the sum hereinabove mentioned, the sum of $7.50 per month so long as he shall live, and the costs of this action." The defendant excepted and assigned error to the judgment as signed, made other exceptions and assignments of error and appealed to the Supreme Court. The material ones will be considered in the opinion.

Quinn, Hamrick & Harris for plaintiff.
Stover P. Dunagan for defendant.

CLARKSON, J. The defendant introduced no evidence, and at the close of plaintiff's evidence the defendant made a motion for judgment as in case of nonsuit. C. S., 567. The court below overruled the motion and in this we can see no error.

On 27 October, 1923, the defendant insurance company issued to plaintiff its insurance policy, which appears in the printed record. This controversy is over the following provision: "Monthly Sickness Indemnity. Part X, sec. (a). The company will pay said monthly sickness indemnity for the period not exceeding one year during which the *insured shall be wholly and continuously disabled and prevented from performing any and every duty pertaining to any business or occupation by reason of sickness,* and if such disability shall continue for more than one year, the company thereafter will pay one-fourth of said monthly sickness indemnity for so long as it shall continue; but no indemnity shall be payable under this part for any period during which the insured is not regularly treated by a licensed physician; nor for disability not common to both sexes." (Italics ours.) Defendant contends that the plaintiff failed to show that under the terms and conditions of the policy he is entitled to sick benefits. We cannot so hold. There is no uncertainty or ambiguity in the language of the policy. *Underwood v. Insurance Co.,* 185 N. C., 538; *Gant v. Ins. Co.,* 197 N. C., at p. 124.

In *Lee v. Ins., Co.,* 188 N. C., at p. 541, the following is the provision in the policy, similar to that in the present action: "Wholly incapacitated and thereby permanently and continuously prevented from engaging in any avocation whatsoever for remuneration or profit."

The facts were in many respects like those in the present action and the conflicting evidence was left to the jury, and the verdict of the jury for the plaintiff was upheld. This Court sustained the charge of the court below, the latter part is as follows: (p. 542) "But as I have said, if, upon a fair consideration of all the evidence, the physician's evidence and the evidence of the laymen and of the plaintiff and the defendant and their witnesses, you should be satisfied by the greater weight of the evidence that during this year he has been wholly incapacitated by disease so that he was thereby continuously and permanently prevented from engaging in any avocation for remuneration or profit, then you would answer the issue 'Yes:'" *Buckner v. Ins. Co.,* 172 N. C., 762; *Brinson v. Ins., Co.,* 195 N. C., 332; *Fields v. Assurance Co.,* 195 N. C., 262; *Metts v. Ins. Co.,* 198 N. C., 197.

In *Bulluck v. Ins. Co.,* 200 N. C., at p. 646, in regard to the policy, the provisions and facts similar in many respects to this case, this Court said: "The reasoning of the opinions seems to indicate that engaging

in a gainful occupation is the ability of the insured to work with reasonable continuity in his usual occupation or in such an occupation as he is qualified physically and mentally, under all the circumstances, to perform substantially the reasonable and essential duties incident thereto. Hence, the ability to do odd jobs of comparatively trifling nature does not preclude recovery. Furthermore, our decisions and the decisions of courts generally, have established the principle that the jury, under proper instructions from the trial judge, must determine whether the insured has suffered such total disability as to render it 'impossible to follow a gainful occupation.' "

Exceptions and assignments of error made by defendant cannot be sustained, which were as follows: Dr. A. C. Duncan (an expert) Question: State whether or not in your opinion he will ever be able to do the work of a section hand? Answer: I don't think he will be able to do that kind of work any more. Andrew, (Green the plaintiff), state to the jury whether you know how to do anything except manual labor or not? Answer: No, sir." The defendant contends that "Neither of these questions nor answers were pertinent to the questions to be decided by the jury. It was not a question of whether the plaintiff was able to perform the duty of a section hand, nor was it a question as to whether or not the plaintiff knew how to perform any kind of work except manual labor, and these questions and answers were bound to create sympathy in the minds of the jury for the plaintiff and were prejudicial to the rights of this defendant to such an extent that for these errors the defendant should be granted a new trial." The defendant cites no authority to support its contention. We think the testimony of the expert physician competent. *S. v. Hightower,* 187 N. C., 300; *Shaw v. Handle Co.,* 188 N. C., 222; *Godfrey v. Power Co.,* 190 N. C., 24; *Eaker v. International Shoe Co.,* 199 N. C., at p. 385. As regards the testimony of plaintiff, we see no prejudicial error in its admission.

In *C. & O. R. R. Co. v. Hoffman,* 109 Va., 44, 63 S. E., 432, 439, the Virginia Court says: "The ruling of the Court was, we think, correct. It would be straining to an unreasonable extent the doctrine which limits opinion evidence to say that a witness should not be allowed to express an opinion as to the extent and effect of an injury received upon his capacity to labor. Certain it is that he is in a better position to know than anyone else can be and, as he testifies in the presence of the jury and is subject to cross-examination as to all the conditions upon which his opinion is founded, we cannot think that it was error to permit him to testify."

We think the issues sufficient. "In *Mann v. Archbell,* 186 N. C., at p. 74, it is said: 'Issues are sufficient when they present to the jury

proper inquiries as to all the essential matters or determinative facts in dispute.' C. S., 584"; *Wright v. Cain,* 93 N. C., at p. 300; *Bailey v. Hassell,* 184 N. C., at p. 459; *Erskine v. Motor Co.,* 187 N. C., at p. 832.

In *Britt v. Ins. Co.,* 105 N. C., at p. 178, it is said: "We are aware that a contrary opinion on this point has been held in *Bobbitt v. Ins. Co.,* 66 N. C., 70, but in that case it seems to have been purely an *obiter dictum.* . . . (p. 179.) A careful examination of the reports of our sister states shows only one case in which it is held that the application must be set out in the complaint and in that instance *Bobbitt v. Ins. Co.,* is cited for the ruling, and no reasoning nor other authority is given. On the contrary, the rule seems to be as stated, 1 Boone on Code Pleading, sec. 156: 'All that is necessary in the complaint to make out a cause of action upon a policy of life insurance is a statement of the contract, the death of the assured, and the failure to pay as agreed (*Murray v. Ins. Co.,* 85 N. Y., 236); an allegation that the death of the assured was not caused by the breaking of any of the conditions of the policy is unnecessary; the plaintiff is not bound to anticipate in the complaint the defense which the defendant may set up, and has a right to rely in complaining upon such averments as state a cause of action, leaving matter which would meet a defense for proof or argument at the trial. *Cohen v. Ins. Co.,* 96 N. Y., 300.' *Piedmont Ins. Co. v. Ewing,* 93 U. S., 377."

In *Kendrick v. Life Ins. Co.,* 124 N. C., at p. 317, we find: "The plaintiff, to whom the policy was payable, was in possession of the policy, and the death of the insured being admitted, this made out a prima facie case. In the absence of evidence, the policy is presumed to have been delivered at the time it bears date. *Meadows v. Cozart,* 76 N. C., 450; *Lyerly v. Wheeler,* 34 N. C., 290. The authorities are numerous and quite uniform that the acknowledgment in the policy of the receipt of the premium estops the company to test the validity of the policy on the ground of nonpayment of the premium. . . . (p. 318.) *Chancellor Kent* says (3 Com., 260): 'the receipt of the premium in the policy is conclusive of payment and binds the insurer unless there is fraud on the part of the insured.'" *Rayburn v. Casualty Co.,* 141 N. C., 425; *Murphy v. Ins. Co.,* 167 N. C., at p. 336.

The defendant introduced no evidence. In its answer it did not set up part 10 of the policy, as follows: "But no indemnity shall be payable under this part for any period during which the insured is not regularly treated by a licensed physician." Of course this can be waived by defendant.

The defendant excepted to the issues and tendered certain issues, the 4th as follows: "Has the plaintiff during said period been regularly

treated by a licensed physician?" The defendant's contention cannot be sustained for the reasons given in the above authorities.

The charge of the court below is not in the record, the presumption of law is that the court below charged the law correctly on every material aspect and charged the law applicable to the facts.

In *Rayburn v. Casualty Co.*, 141 N. C., at p. 435-6, is the following: "While this disposes of the appeal, an interesting, and in view of the large number of such policies in existence, an important question is presented by defendant's request to his Honor to instruct the jury that only fifty-two weeks having elapsed between the injury and the date of summons, plaintiff could not, in any point of view, in this action recover for more than that time. At the time of the trial the entire period had elapsed. It will be noted that the contract is to pay 'five dollars per week.' We presume that after the proofs are in, the insured is entitled to demand the weekly indemnity at the end of each week, and upon failure to pay may sue therefor. However this may be, we do not think that a recovery may be had any time subsequent to the date of the writ. In certain well defined cases, sounding in damages the plaintiff may have his damages assessed up to the time of the trial and in some, as for personal injuries, damages may be assessed for future suffering and incapacity. We find no authority for permitting a recovery upon an express contract for any other amount than that due at the date of the writ. *Jarrett v. Self*, 90 N. C., 478; *Smith v. Lumber Co.*, 140 N. C., 375."

Under the above authority, the plaintiff could not, as stated in the latter part of the judgment, "have and recover, in addition to the sum hereinabove mentioned, the sum of $7.50 per month so long as he shall live."

The plaintiff mistakes the purpose of the Declaratory Judgment Act, Public Laws, 1931, chap. 102, in assuming that a judgment, in an ordinary controversy like the present one, comes within the provisions of said act. It is quite obvious from the complaint that this is an action to recover under an insurance policy, that the alleged cause of action had already accrued and that the plaintiff had not contemplated a proceeding under the Declaratory Judgment Act. As was stated in *Post v. Metropolitan Casualty Ins. Co.*, 237 N. Y. S., 64, at p. 68: "It (Declaratory Judgment Act) was designed to supply the need of a form of action that would set controversies at rest before they led to repudiation of obligations, the invasion of rights, and the commission of wrongs." See, also, *Etna Life Ins. Co. v. Richmond*, 129 Atl., 702; 12 A. L. R., 52; 50 A. L. R., 43; 68 A. L. R., 110; R. C. L., Permanent Supplement, p.

3956; Freeman on Judgments (5th ed.), Vol. 3, chap. 25, pages 2780-92; Van Hecke: "The North Carolina Declaratory Judgment Act," in North Carolina Law Review, Vol. 10, p. 1.

The briefs of the parties were able and helpful. For the reasons given, the judgment of the court below is

Modified and affirmed.

BESSIE HUGHES, WIDOW OF EVERETT HUGHES, AND EVERETT HUGHES, JR., v. FRANK LEWIS, EMPLOYER, AND AMERICAN CASUALTY COMPANY, CARRIER.

(Filed 21 December, 1932.)

1. **Insurance H c—Return of unearned premium to employer is not prerequisite to cancellation of policy of compensation insurance.**

The return of the unearned premium to the employer is not a prerequisite to the insurer's right to cancel a Standard Workmen's Compensation policy of insurance for nonpayment of premium, the policy providing that the insurer shall have the right to examine the books of the employer with respect to the amount paid by him to employees during the period in determining the amount of unearned premium, and where a standard policy of compensation insurance has been canceled for nonpayment of premium and notice of cancellation has been given to and received by employer prior to an injury to or death of an employee resulting from an accident arising out of and in the course of his employment, the insurer is not liable to the employee or his dependents for an award of the Industrial Commission for such injury or death.

2. **Insurance H d—Insurer is liable to employer for amount of unearned premium after cancellation of policy of compensation insurance.**

Where the insurer has canceled a standard policy of compensation insurance it is liable to the employer for the amount of unearned premium thereon, and where the insurer has credited the amount of the unearned premium to its broker's account, who in turn has credited the amount to account of the broker who had procured the employer's application for the insurance, the insurer is liable to the employer for the amount of the unearned premium not actually paid to the employer by the broker, since, if the broker is the agent of the employer, the insurer would have no right to credit the broker's account therewith, or if the broker is the agent of the insurer it would be liable for its agent's failure to pay the amount. C. S., 6304.

APPEAL by American Casualty Company from *Moore, J.*, at April Term, 1932, of MITCHELL.

This was a proceeding before the North Carolina Industrial Commission for compensation for the death of Everett Hughes.

The cause was heard by Wilson, Commissioner, who found the following facts:

The plaintiff's deceased, Everett Hughes, was injured by accident 7 November, 1930, while regularly employed by Frank Lewis, an independent contractor, while cutting timber, said accident being the proximate cause of his death. Frank Lewis had five or more regular employees. The widow of the deceased and one child, Everett J. Hughes, were wholly dependent upon the deceased at the time of his injury by accident and subsequent death. The real question in this case is one of insurance coverage. Upon all the evidence in this case the Commission makes the following findings of fact:

1. That the plaintiff's deceased, Everett Hughes, had accepted the provisions of the compensation act, and was regularly employed by Frank Lewis, defendant employer, on 7 November, 1930, when the said deceased sustained an injury by accident which arose out of and in the course of his regular employment while cutting timber; that said deceased died the same day from said injuries.

2. That the widow of the plaintiff's deceased, Mrs. Bessie Hughes, and their only child, Everett J. Hughes, age one year, were the only persons wholly dependent upon said deceased at the time of his injury by accident and subsequent death, and that the said deceased's average weekly wage was $13.50 per week.

3. That Frank Lewis, the defendant employer, was an independent contractor, employing regularly five or more employees.

4. That the American Casualty Company issued a policy effective 12 March, 1930, covering the logging and lumbering operations of the defendant employer, Frank Lewis, and also his portable saw mill; that said policy was duly canceled 30 September, 1930, and the defendant employer was so notified.

5. That at the time of the injury and death of Everett Hughes, 7 November, 1930, the defendant employer had no compensation insurance.

6. That the defendant employer purchased his insurance from Joseph A. Rowland, an insurance broker, who, in turn, brokered the policy through Forester-Prevett Insurance Company, agents of the American Casualty Company.

7. That the initial premium was $400 on the compensation policy covering the operations of Frank Lewis; that at the time of the cancellation there was an unearned premium of $261 which the American Casualty Company credited to the account of the Forester-Prevett Company as agent, who, in turn, credited Joseph A. Rowland, the broker, with said amount.

8. That the broker, Joseph A. Rowland, has only returned $25 of said unearned premium to the defendant employer, Frank Lewis.

9. That said notice of cancellation was received by the defendant employer prior to the injury and death of the deceased.

10. That the American Casualty Company is not liable.

11. That the J. Walter Wright Lumber Company, and its insurance carrier, Southern Surety Company, is not liable.

From these facts the Commissioner deduced certain conclusions of law and made the following award:

"The Commission awards compensation to the widow of the deceased, Mrs. Bessie Hughes, and Everett J. Hughes, age one year, son of said deceased, at the rate of $8.10 per week for a period of 350 weeks, said compensation to be paid by the defendant employer, Frank Lewis. Said defendant employer shall also pay the burial expense, not to exceed $200, and also any medical or hospital expense incurred during the last illness, subject to the approval of the Industrial Commission. Each party will pay its own costs."

This award was affirmed on appeal to the full Commission and the plaintiffs appealed to the Superior Court. Judge Moore modified the award of the Commission and adjudged that the plaintiffs are entitled to recover of the defendants $8.10 a week for a period of 350 weeks and burial expenses not to exceed $200, together with medical and hospital expenses, for which the employer and the carrier are liable.

The American Casualty Company excepted and appealed.

J. Laurence Jones and J. L. DeLaney for appellant.
Berry & Greene for appellees.

ADAMS, J. Frank Lewis, an independent contractor, was the employer, Everett Hughes, the deceased, was his employee, and the American Casualty Company was the carrier of insurance. The employer applied to Joseph A. Rowland, an insurance agent of West Jefferson, for a Workmen's Compensation policy, and Rowland made application for the policy to the Forester-Prevett Insurance Company of North Wilkesboro, agent of the American Casualty Company. On 12 March, 1930, the American Casualty Company issued in the name of the employer a Universal Standard Workmen's Compensation Policy and sent it to the Forester-Prevett Company. The latter delivered it to Rowland and Rowland to the employer. Rowland received the usual broker's commission from the Forester-Prevett Company with whom he had an account. On 30 September, 1930, the American Casualty Company canceled the policy for nonpayment of the premium and notified the insured. Sometime thereafter it returned the unearned estimated premium to the Forester-Prevett Company, who credited Rowland's account with this

sum. Of the unearned premium Rowland returned to the insured the sum of twenty-five dollars only, in part payment of the amount to which he was entitled.

The plaintiffs contend that the policy is in effect because the whole amount of the unearned premium was never returned to the insured. The contract of insurance contains the following provisions: "This policy may be canceled at any time by either of the parties upon written notice to the other party stating when, not less than ten days thereafter, the cancellation shall be effective. The effective date of such cancellation shall then be the end of the policy period. . . . Notice of cancellation shall be served upon the employer as the law requires, but if no different requirement, notice mailed to the address of the employer herein given shall be a sufficient notice and the check of the company, similarly mailed, a sufficient tender of any unearned premium."

It is further provided that at the end of the policy period the actual amount of the remuneration earned by employees shall be exhibited to the company, as provided in condition C, and the earned premium adjusted in accordance therewith; also, that if the earned premium thus computed is greater than the advance premium paid, the employer shall pay the additional amount to the company, and if less, that the company shall return to the employer the unearned portion.

Condition C is as follows: "The company shall be permitted, at all reasonable times during the policy period, to inspect the plants, works, machinery and appliances covered by this policy, and to examine this employer's books at any time during the policy period, and any extension thereof, and within one year after its final expiration, so far as they relate to the remuneration earned by any employees of this employer while this policy was in force."

The plaintiffs assert that by virtue of these provisions payment or tender to the employer of the unearned premium was a condition precedent to the cancellation of the policy, and it may be conceded that the principle is frequently enforced in determining the liability of insurance companies on certain classes of policies. 5 Cooley's Brief on Insurance, 4669; 3 Couch's Cyclopedia of Insurance, 2347, sec. 707. In a life or fire insurance policy, for example, the amount of the unearned premium is fixed or may be ascertained at the time of cancellation and remitted to the insured with the notice. It is otherwise in the Standard Workmen's Compensation Policy. Under its provisions the insurance carrier has the privilege of calling for an audit of the payroll as prerequisite to the calculation of the amount due the insured as unearned premium, the return of which is not a condition precedent to the cancellation of the policy. The employer admitted that the policy in question had been

canceled prior to the occurrence of the injury resulting in the death of the plaintiff's intestate and that he had received notice of the cancellation.

We are of opinion, however, that the appellant is liable for that portion of the unearned premium which has not been actually paid to the employer. The policy was procured through Joseph A. Rowland. It is provided by statute that an insurance agent or broker who acts for a person other than himself in negotiating a contract of insurance is, for the purpose of receiving a premium therefor, the company's agent, whatever conditions or stipulations may be contained in the policies or contracts. C. S., 6304. It is unnecessary to inquire whether such agent or broker is the company's agent for the return to the insured of the unearned premium. If Rowland was the company's agent for this purpose, the company is liable to the employer for so much of the unearned premium as has not been paid to the employer. The same result follows if the broker was the agent of the employer. The company's agent at North Wilkesboro had no legal right to credit Rowland's account with the unearned premium, which in fact was the property of the employer, the evidence being that Rowland was indebted to the Forester-Prevett Company at that time; and Rowland had no right to accept the credit without the consent of his principal. *Turlington v. Ins. Co.*, 193 N. C., 481.

The award of the Superior Court against the American Casualty Company is reversed, and as modified the judgment is affirmed.

Modified and affirmed.

STATE v. HARRY BURLESON, ROY WELD AND PARKER HUSKINS.

(Filed 21 December, 1932.)

Jury A d—Each defendant in joint prosecution for crime not a capital felony is entitled to four peremptory challenges.

Where several defendants are tried together for a crime other than a capital felony each is entitled to four peremptory challenges to the jury, and where the court has ruled that the defense was a joint defense and has allowed but four peremptory challenges for all the defendants, a new trial will be granted upon appeal. C. S., 4633.

APPEAL by defendants from *Moore, J.*, and a jury, at April Term, 1932, of MITCHELL. New trial.

In the statement of the case on appeal is the following: "Defendant, Harry Burleson, was represented by Judge John Ragland, Roy Weld,

by Messrs. Berry & Greene, and Parker Huskins, by Charles Hutchins. It was agreed by the solicitor for the State and counsel for the defendants that the two bills of indictment against the defendants, one for breaking and entering into the Spruce Pine Cash and Carry Grocery Company, Incorporated, and one for breaking and entering Princess Rock Filling Station might be consolidated. Whereupon, his Honor, Judge Moore, made an order for consolidation of the two bills and ruled that the defense was a joint defense, and defendants are entitled to four (4) peremptory challenges.

After several jurors had been examined, and the State passed the jury, Harry Burleson, through his counsel, proceeded to the examination and selection of the jury, stood aside four of the jurors peremptorily, and at that stage of the proceeding to select the jury, the trial court held: 'I am ruling that it is a joint defense and the defendants entitled to only four challenges—peremptory challenges.' To which ruling defendants except.

Thereupon, Mr. Berry, for Roy Weld, challenged the juror, Ayres, and asked to be permitted to stand him aside peremptorily. The court overruled the challenge, and the defendant, Roy Weld, excepted.

Thereupon, defendant Parker Huskins, challenged the juror Ayres peremptorily and requested the court to stand the juror aside. Denied by the court. Exception by Parker Huskins.

The court: 'I hold that it is a joint defense, and all defendants entitled to only four peremptory challenges,' and to this ruling all of the defendants except.' "

The defendants duly excepted and assigned error to the above rulings of the court below. The defendants were convicted and judgment pronounced on the verdict, and they appealed to the Supreme Court.

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

W. C. Berry and Charles Hutchins for defendants.

PER CURIAM. C. S., 4633, is as follows: "Every person on joint or several trial for his life may make a peremptory challenge of twelve jurors and no more; and in all joint or several trials for crimes and misdemeanors, other than capital, every person on trial shall have the right of challenging peremptorily, and without showing cause, four jurors and no more. And to enable defendants to exercise this right, the clerk in all such trials shall read over the names of the jurors on the panel, in the presence and hearing of the defendants and their counsel,

and before the jury shall be impaneled to try the issue; and the judge or other presiding officer of the court shall decide all questions as to the competency of jurors."

The above statute in clear and unmistakable language for the offenses for which defendants were indicted, says *"in all joint or several trials for crimes* and misdemeanors other than capital, *every person on trial* shall have the right of challenging peremptorily and without showing cause *four jurors* and no more."

In *S. v. Ashburn,* 187 N. C., at p. 721, this Court said: "The intent of the law is to secure a jury that will render a fair and impartial verdict." The General Assembly has seen fit to give *every person* on trial *on a joint or several* bill of indictment for the crimes as herein charged four peremptory challenges. We can only construe the law as written. In the record there is no waiver of the above provisions of the law. The other matters in the record are not necessary to be considered. For the reasons given, there must be a

New trial.

MYRTLE HICKS ANDERSON v. W. P. THORNBURG, ADMINISTRATOR OF J. A. HICKS, DECEASED.

(Filed 21 December, 1932.)

Executors and Administrators D a — In this action to recover upon quantum meruit for services rendered deceased the evidence is held insufficient.

Evidence tending only to show that the plaintiff, after separation from her husband, voluntarily returned to her father's house and performed regular housework therein and nursed her father until his death, without any evidence that she expected compensation or that her father intended to pay for services so rendered, *is held* insufficient to be submitted to the jury in an action to recover for such services upon a *quantum meruit,* it being manifest that the daughter performed such services as a member of the family after the family relationship had been reëstablished.

CIVIL ACTION, before *Clement, J.,* at March Term, 1932, of RANDOLPH.

The plaintiff is the daughter of J. A. Hicks, the deceased, who died intestate on or about 14 April, 1928. The defendant, Thornburg, duly qualified as administrator of said J. A. Hicks on or about 30 April, 1928, and duly published notice for creditors as prescribed by law. Thereafter, on 14 May, 1930, the administrator filed a final account in the office of the clerk of the Superior Court showing receipts aggregating

$1,212.28, the payment of all debts, and that the children and distributees of J. A. Hicks, deceased, including plaintiff, had received the sum of $85.92 each in full payment of the distributive share in said estate. The evidence further disclosed that the plaintiff had married and moved away from the home of her father, but that on or about 1 December, 1927, she returned to the home of her father and remained in his home until his death. The plaintiff alleges that she left her home and returned to her father's home at his request and because he was in need of someone to care for him. She further alleged that she remained in the home of her father, doing all the house work, and waited upon him until his death, and that the reasonable value of her services so rendered was $1,000. The suit was instituted on 14 November, 1930. The defendant denied that any agreement existed between the deceased and the plaintiff, his daughter, and alleged that plaintiff had returned to the home of her father after a separation between herself and her husband, taking her infant child with her, and that the family relationship was reëstablished.

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

W. C. York and Brittain & Brittain for plaintiff.
A. I. Ferree and H. M. Robins for defendant.

PER CURIAM. There is no evidence of an express contract. Consequently the right to recover rests upon *quantum meruit*. The testimony is not set forth in full. Hence the plaintiff must rely upon certain generalizations of evidence as contained in the record. These may be summarized as follows:

(a) "There was evidence that the plaintiff had married and moved away from her parents and lived with her husband in different places and at different times, and when she and her husband separated she came back to her father."

(b) "That on 1 December, 1927, she came back to her father's home and lived there continuously until his death, and that during the time she was there she did all kinds of housework, chopped wood, washed, and did everything a housewife does, and waited on them until the time of his death."

(c) "There was evidence that the entire family consisted of J. A. Hicks and his wife, Christine Hicks, the plaintiff and her boy."

Manifestly the foregoing evidence demonstrates that an adult daughter, after separation from her husband, voluntarily returned to the home, thus reëstablishing the one family relationship. She worked faithfully in the home, but apparently as a member of the family. There is no

evidence that she expected compensation or that her father intended to pay for services so rendered. Therefore, the judgment of nonsuit is in full accord with the principles heretofore declared. *Winkler v. Killian,* 141 N. C., 575, 54 S. E., 540; and *Staley v. Lowe,* 197 N. C., 243, 148 S. E., 240.

Affirmed.

A. L. LUFF v. JOSEPH LEVEY, RACHEL LEVEY, SADIE GOLDMAN, I. M. GOLDMAN AND UNITED TALC AND CRAYON MANUFACTURING COMPANY, JOSEPH ROGEN AND FULLER WISHART, AND UNITED TALC AND CRAYON COMPANY.

(Filed 21 December, 1932.)

1. **Attachment G a—Defendant whose property has been attached held party with sufficient interest to move to vacate attachment.**

   Any one of several defendants whose property has been attached has such an interest in the action as to maintain a motion to vacate the attachment.

2. **Attachment C d—Judge may order plaintiff to file increased bond, but may not order attachment vacated if bond is not filed within time.**

   On appeal by both parties from an order of the clerk requiring the plaintiff in attachment to file an increased bond, the judge of the Superior Court has the power to order the plaintiff to give further security or an increased bond, C. S., 827, but he may not add a condition to the order that the attachment be vacated *ipso facto* if the increased bond is not filed by a certain time, and on appeal to the Supreme Court the order for an increased bond will be affirmed and the condition stricken out, and it appearing that the time set by the court for filing the increased bond has expired, the plaintiff will be given a reasonable time for filing the bond.

CIVIL ACTION, before *Warlick, J.,* at February Term, 1932, of MOORE.

The plaintiff instituted this action against the defendants, Joseph Levey and Rachel Levey, to recover damages for malicious prosecution and malicious abuse of process. The Leveys had conveyed certain property owned by them to their codefendants, Sadie Goldman, Fuller Wishart, I. M. Goldman and Jos. Rogen. A warrant of attachment was duly issued against Jos. Levey and Rachel Levey, running against all their property, and also, all property transferred by them to other parties above mentioned. A notice of *lis pendens* was also filed. The defendants moved to vacate the attachment, and motion was denied by the clerk. The Leveys filed an answer and thereafter lodged a motion under C. S., 827 for the purpose of requiring the plaintiff to increase the bond given

in the original action. It appeared that the plaintiff was seeking to recover the sum of $75,000, and had given a $200.00 attachment bond. The clerk heard the motion and required the plaintiff to enter into a bond in the sum of $1,000. From this order both the plaintiff and the defendants appealed to the judge. When the cause was heard by the trial judge he decreed that the plaintiff should give a bond in the sum of $5,000, "conditioned as by the statute provided, to be approved by the clerk of this court, the same to be duly executed, approved and filed with the clerk of this court by or before twelve o'clock m., on Monday, 7 March, 1932. Upon failure of the plaintiff to comply with this order, within the above time specified, the attachment heretofore issued in this cause shall be vacated and discharged *ipso facto*, without further action by the court."

From the foregoing judgment the plaintiff appealed.

K. R. Hoyle for plaintiff.

H. F. Seawell, Jr., C. A. Douglass, J. A. Spence and H. M. Robins for defendants.

PER CURIAM. The warrant of attachment expressly operated upon "all of the property of defendants, Joseph Levey and Rachel Levey, both real and personal," together with such property as they had transferred to their codefendants. Consequently the Leveys were parties to the action with sufficient interest in the subject-matter thereof to enable them to make and maintain a motion for vacating the attachment. Moreover, when the clerk of the Superior Court required the bond of the plaintiff to be increased, both parties appealed to the judge, and he had the power to require the plaintiff to give further security or an increased bond. *Power Co. v. Lessem*, 174 N. C., 358, 93 S. E., 836. However, that part of the order of the judge providing that upon failure to give the increased bond "the attachment heretofore issued in this cause shall be vacated and discharged *ipso facto*, without further action by the court," constitutes a condition which the law does not permit. *Lloyd v. Lumber Co.*, 167 N. C., 97, 83 S. E., 248; *Flinchum v. Doughton*, 200 N. C., 770, 158 S. E., 486. Hence, while the order requiring an increased bond, is wholly valid, the condition annexed thereto is invalid. Therefore, the plaintiff is required to give a $5,000 bond to be approved by the clerk of the county in which the action is pending. As it appears upon the face of the record that the time for giving said bond has expired, plaintiff is permitted to file a bond in compliance with the order within a reasonable time.

Modified and affirmed.

C. J. YELTON v. E. E. McKINNEY.

(Filed 4 January, 1933.)

1. **Arbitration and Award E b—Where award is ambiguous parties may introduce evidence as to items covered therein.**

   The substance and form of an award must conform to the submission to arbitration, and the particular matters specified in the agreement to arbitrate may alone be included in the award, but where there is no written submission and the award is ambiguous, the parties may introduce evidence *aliunde* as to whether a disputed item was considered by the arbitrators and included in the award.

2. **Appeal and Error J e—**

   It must appear of record what the excluded testimony would have been in order for an exception to its exclusion to be considered on appeal.

3. **Appeal and Error K c — Newly discovered evidence held merely cumulative, and motion for new trial is denied.**

   Where a dispute has arisen between the parties as to whether a certain item was included in the award under an agreement to arbitrate, and upon the trial of an action on the item one of the arbitrators has testified that the item was not included in making the award, affidavits that he had found since the trial certain figures and data conclusively showing that the item had not been included, without showing that the other party or his arbitrator had signed the papers or admitted their correctness either directly or by implication is held insufficient to support a motion for a new trial for newly discovered evidence, the proposed evidence being merely cumulative and corroborative of the arbitrator's testimony upon the trial.

CIVIL ACTION, before *Hill, Special Judge,* at September Term, 1932, of CLEVELAND.

The plaintiff instituted this action against the defendant upon a promissory note for $2,038.77, payable to the First National Bank of Shelby, and signed by the plaintiff and the defendant. The plaintiff alleged that he signed the same as surety for the defendant and had been compelled to pay the same. The defendant admitted the execution of the note and alleged that he and the plaintiff had been engaged in operating the Elmore Hosiery Mill, and that in 1920, it was decided to discontinue the enterprise, and that thereafter on or about 1 February, 1928, the plaintiff and the defendant orally agreed to arbitrate differences then existing, and in pursuance of such agreement, plaintiff selected C. S. Lee for his arbitrator, and the defendant C. A. Burrus for his arbitrator, and that said arbitrators so selected considered all matters in controversy, including the note described in the complaint, and that subsequently said arbitrators filed a written report or award direct-

ing that the plaintiff should pay to the defendant the sum of $125.00. This award was dated 30 December, 1929, and signed by both arbitrators. The plaintiff filed a reply admitting the oral submission to arbitration, but denied "that the note, as set out in the complaint, was to be considered or was considered by said persons." Burrus, the arbitrator, selected by the defendant said: "My best impression is that this note was considered by us as arbitrators. . . . I could not say beyond a doubt or all doubt that it was included, but that is my best impression and recollection. We considered just what referred to the Elmore Hosiery Mill, and it was not supposed to include any individual indebtedness of Mr. McKinney to the bank. . . . Mr. Yelton and Mr. McKinney had an argument in the presence of Mr. Lee and myself as to whether or not the note in question here was a part of the hosiery mill transaction, and they almost came to blows about it, or rather they came to harsh words about it, and my recollection is and my impression about the matter is that it was all included in our award. It has been a long time ago, but that is the way I remember it." Lee, the arbitrator selected by the plaintiff, said: "My understanding of what was submitted to us was just the matters concerning the corporation . . . and did not include any individual indebtedness of either Mr. McKinney or Mr. Yelton. To the best of my recollection this note here, dated 22 December, 1927, was not included in the arbitration. . . . We went down to the bank and Mr. George Blanton brought out this note, and we could not find that it had any connection whatsoever with the hosiery mill, so we never mentioned the note any more. The note was not taken in consideration in the arbitration."

The award declared: "Know all men by these presents that we, C. S. Lee and Chas. A. Burrus, arbitrators to whom the matters in controversy existing between E. E. McKinney and C. J. Yelton concerning the Elmore Hosiery Mill, of Lawndale, N. C., were submitted by an oral agreement of the parties in question in the presence of the said arbitrators on or about the first day of February, 1928, having heard the proofs and allegations of the parties, and examined the matters in controversy submitted by them, do award and order as follows, namely: that the said C. J. Yelton shall pay, or cause to be paid, to the said E. E. McKinney the sum of one hundred and twenty-five dollars, in full payment and discharge of the debt, demand, or claim of the said E. E. McKinney against the said C. J. Yelton," etc.

The following issues were submitted to the jury:

1. "What amount, if any, is the plaintiff entitled to recover of defendant on the note set out in the complaint?"

2. "What amount, if any, is the defendant entitled to recover of plaintiff by reason of the matters set up in the answer?"

The jury answered the first issue "$2,038.77, with interest," and the second issue "$125.00 with interest."

From judgment upon the verdict the defendant appealed.

D. Z. Newton for plaintiff.

B. T. Falls for defendant.

BROGDEN, J. The primary question in dispute between the parties was whether the note was intended to be included in the deliberation of the arbitrators and thereafter merged in the written award. There was no written submission, but the award recites that the matters in controversy were "concerning the Elmore Hosiery Mill of Lawndale, N. C.," nor does the award undertake in express terms to declare the relationship of the parties to the note in controversy or undertake to establish any liability by virtue thereof. This Court has heretofore declared that "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." *Geiger v. Caldwell,* 184 N. C., 387, 114 S. E., 497. Many years ago it was held that a party may offer evidence as to whether a particular item was considered by arbitrators in the event the submission and award was not clear or explicit, touching the controverted items. *Osborne v. Colvert,* 86 N. C., 170; *Farmer v. Wilson,* 202 N. C., 775, 164 S. E., 356.

The evidence was conflicting upon whether the note was considered by the arbitrators or included in the award. Hence, it was proper to submit this phase of the case to the jury in order to ascertain the amount of the indebtedness. The trial judge clearly presented to the jury the issue of fact in the following instruction: "If you are satisfied from the evidence, and by its greater weight, that the plaintiff and the defendant entered into an arbitration agreement, appointed arbitrators, offered testimony with respect to their claims one against the other, that included in these claims was this note for $2,038.77, and that the arbitrators took the note into consideration in rendering their award, then the court charges you that it would be your duty to answer the first issue 'No,' because there would have been an accord and satisfaction."

The defendant assigns for error exceptions to certain questions propounded witnesses, but the answers the witnesses would have given to the questions do not appear in the record. Therefore, such exceptions cannot avail. *Rawls v. Lupton,* 193 N. C., 428, 139 S. E., 835.

The defendant makes a motion for a new trial for newly discovered evidence. This motion is based upon the affidavit duly made by Mr.

Burrus, one of the arbitrators, who states therein that since the trial he has made an exhaustive search and has "found the original statements of claims by both parties, and data used by him, and sheets upon which calculations were made, in stating the account and contentions of the parties and the conclusions of the arbiters, and now has same in his possession available to the defendant appellant, and that said data shows conclusively that the note sued on by the plaintiff in this case was considered by the arbiters and included in their statement," etc. There appears a statement of the account of the parties, but the affidavit does not disclose whether any of the data or papers referred to were signed by the plaintiff or the other arbitrator, or that either of them at any time admitted their correctness, expressly or by implication. Consequently, we must assume that these papers are *ex parte* memoranda, made by the arbitrator Burrus. If so, they merely corroborate his testimony as a witness and are, therefore, necessarily cumulative in character. A new trial is not warranted by this showing. *Brown v. Sheets,* 197 N. C., 268, 148 S. E., 233; *S. v. Casey,* 201 N. C., 620; *Pridgen v. R. R., ante,* 62.

No error.

E. H. PATTERSON v. H. WALTER FULLER AND ALICE H. FULLER.

(Filed 4 January, 1933.)

1. Estoppel C b—Knowledge of prior mortgage held not to estop purchaser from setting up failure of consideration for purchase money notes.

A land corporation through its president executed a warranty deed to certain lands, and the grantee therein thereafter conveyed the lands by warranty deed to the president of the corporation personally, the latter giving purchase money notes secured by a mortgage for the balance of the purchase price. The lands were foreclosed and sold to a third person under a mortgage on the lands outstanding at the time of the conveyance by the corporation and the conveyance by the grantee in the corporation's deed. Action was instituted against the president on the purchase money notes executed by him in his private capacity, and the defense of total failure of consideration was set up by him: *Held,* the president was not estopped by his knowledge of the prior mortgage from setting up the defense of failure of consideration for the notes, the principle that a person will be estopped from asserting his lien on lands where he knowingly permits another, without objection, to purchase the lands, not applying, since the defense related to the consideration for the notes and did not assert any interest in the lands.

2. Bills and Notes A a: Evidence J a—Failure of consideration for note under seal may be shown by parol as between the parties.

The presumption that a note under seal is supported by a legal consideration is rebuttable as between the parties, C. S., 3008, and total failure of consideration constitutes a complete defense in an action on the note.

CIVIL ACTION, before *Schenck, J.*, at May Term, 1932, of HENDERSON.

On or about 20 September, 1926, the Laurel Park Estates, Incorporated, conveyed to J. B. Patterson certain land, and on 30 September, 1926, conveyed to E. H. Patterson certain lands owned by said corporation. The deeds contained a warranty clause to the effect that the grantor, to wit, the corporation, was "the owner and lawfully seized of said premises; that it has good right to convey the same; that the same are free from all encumbrances whatever . . . and that it will warrant and defend the title to the same against all lawful claims." These deeds were executed in the name of the corporation by H. Walter Fuller, president. Thereafter, on 6 January, 1927, J. B. Patterson conveyed to H. Walter Fuller and Alice H. Fuller the same land which the Laurel Park Estates had theretofore conveyed to said Patterson. Patterson inserted covenants in his deed to the effect that he was the owner of the land and had good right to convey the same, and "that the same are free from all encumbrances whatever," and that he would warrant the title against all claims except certain indebtedness held by the Central Bank and Trust Company. Fuller and wife executed a deed of trust upon the land to Crowell, trustee for J. B. Patterson, securing nine notes, amounting to $2,925. The deed of trust contained covenants of seisin, right to convey, warranty, and that the premises were free from all encumbrances. On 26 February, 1927, E. H. Patterson and wife conveyed to Alice H. Fuller the same lands theretofore conveyed by Laurel Park Estates, Incorporated, to E. H. Patterson. This deed contained covenants of seisin, right to convey, and "that the same are free from all encumbrances whatever." Fuller and wife executed a deed of trust to Arledge, trustee, for E. H. Patterson, securing note for the purchase price of said land, said deed of trust containing the usual covenants. Thereafter, on 2 January, 1931, E. H. Patterson brought this suit against H. Walter Fuller and Alice H. Fuller upon certain promissory notes executed by the defendants to E. H. Patterson and J. B. Patterson, aggregating $6,487.50. The Fullers filed an answer alleging certain transactions with the Pattersons, and that the said notes were delivered in payment of the purchase price of the land aforesaid and with the understanding and agreement that they were not to become valid and binding obligations of defendants until the lien of certain deeds of trust upon the land had been removed.

The evidence tended to show that at the time the Laurel Park Estates, Incorporated, had conveyed the land to the Pattersons that there were outstanding deeds of trust securing the payment of notes aggregating $1,500,000. There was evidence further tending to show that at the time the Pattersons conveyed the land to H. Walter Fuller and his wife, Alice H. Fuller, that said notes secured by said deeds of trust were still outstanding and unpaid. The Fullers in their answer alleged that the notes given the Pattersons were for the purchase price of the lands which the Pattersons had conveyed to them in deeds containing the warranties above recited, and that by reason of the breach of said warranties there was an absolute failure of title to the property resulting in a total failure of consideration for said notes.

Ten issues were submitted to the jury. The jury found by its verdict:

(a) That there was an agreement between E. H. Patterson and the Fullers that three notes given by the defendants, aggregating $3,562.50, represented one-half the purchase price of certain lots conveyed by Laurel Park Estates, Incorporated, to said Patterson and conveyed by said Patterson to the Fullers.

(b) That at the time said notes were signed and delivered the land was encumbered with deeds of trust aggregating $1,500,000.

(c) That the nine promissory notes, executed and delivered by the Fullers to J. B. Patterson, represented one-half the purchase price of the lots conveyed by Laurel Park Estates, Incorporated, to said J. B. Patterson and conveyed by him to Alice H. Fuller.

(d) That the lien of said deeds of trust has never been removed.

(e) That warranties of title were contained in the deeds from the Pattersons to the Fullers; that one of said deeds of trust, securing a note for $250,000 had been foreclosed and the land purchased by Model Homes Corporation.

(f) That there was no agreement between the Fullers and the Pattersons at the time the Fullers delivered the notes in controversy that they should not become valid and binding obligations until the lien of the deed of trust had been removed.

From judgment upon the verdict in favor of defendants the plaintiff appealed.

Thos. H. Franks for plaintiffs.
Shipman & Arledge for defendants.

BRODGEN, J. The evidence established the fact that the notes in controversy were executed and delivered by the Fullers in consideration of the purchase price of certain land conveyed to them by the Pattersons,

and further, that by reason of outstanding deeds of trust upon the property securing notes for more than $1,000,000, and the subsequent foreclosure that there was a total failure of consideration for the purchase money notes given by the Fullers to the Pattersons. However, the Pattersons assert that the Fullers are not in a position to plead the failure of consideration for the reason that H. Walter Fuller, president of Laurel Park Estates, Incorporated, executed on behalf of the corporation the deed to the Pattersons for the identical land, in which said deed it was covenanted that the land was free from encumbrance. They further contend that the encumbrance was known to Fuller as president of the corporation when the deed was executed, and that hence Fuller is now estopped thereby.

Plaintiffs rely upon *Bank v. Bank,* 138 N. C., 468, 50 S. E., 848. The controlling proposition in that case was that a person holding a lien upon land could not lawfully conceal the fact and knowingly suffer another to purchase the property, to go in possession thereof under a claim of ownership and occupy it for more than seven years, and then undertake to enforce his claim. The Court said: "It is familiar learning that where one knowingly suffers another in his presence to purchase property in which he has a claim or title which he wilfully conceals, he will be deemed under such circumstances to have waived his claim, and will not afterwards be permitted to assert it against a purchaser." See, also, *Hallyburton v. Slagle,* 132 N. C., 947, 44 S. E., 655; 64 A. L. R., 1550 and note; *Trust Co. v. Collins,* 194 N. C., 363, 139 S. E., 593. The defendants claim no interest in the land, but merely assert as a defense the failure of consideration of the notes. Consequently the salutary principle applied in the *Bank case, supra,* is not controlling.

The plaintiffs in the brief also contend that failure of consideration is not a valid defense to a note under seal by reason of the fact that the seal imports consideration, and rely upon the case of *Burriss v. Starr,* 165 N. C., 657, 81 S. E., 929. C. S., 3008 recognizes and sanctions in proper cases the defense of failure of consideration. The presumption arising from a seal upon a negotiable instrument is rebuttable. This was determined in *Farrington v. McNeill,* 174 N. C., 420, 93 S. E., 957, in which the Court said: "It is true, the note in this case is under seal, which purports a consideration, but such presumption is rebuttable as between the parties thereto." *Taft v. Covington,* 199 N. C., 51, 153 S. E., 597; *Chemical Co. v. Griffin,* 202 N. C., 812, 164 S. E., 577.

While the jury found against the defendants on the issue of conditional delivery of the notes, the verdict establishing the failure of consideration warranted the judgment rendered.

No error.

W. M. REEVES v. ETHEL REEVES.

(Filed 4 January, 1933.)

Divorce A d—Action for divorce for separation can be maintained only by injured party where it is not alleged there are no children.

An action for divorce on the ground of five years separation can be maintained only by the injured party under the provisions of N. C. Code of 1931, 1659(4), while under N. C. Code, 1659(a) it may be maintained by either party but it is required that there be allegation and proof that "no children have been born to the marriage," and where the complaint for divorce on the ground of five years separation does not contain the allegation required by section 1659(a), it is founded upon 1659(4) and where all the evidence is to the effect that the defendant is the injured party the action is properly dismissed as of nonsuit.

APPEAL by plaintiff from *Clement, J.*, at October Term, 1932, of BUNCOMBE. Affirmed.

This is an action for divorce from the bonds of matrimony, which at the conclusion of all the evidence was dismissed as in case of nonsuit.

W. A. Sullivan, R. R. Williams and Hal W. Blackstock for plaintiff.
No counsel contra.

ADAMS, J. In his complaint the plaintiff alleges that he is a resident of Buncombe County and had been for more than five years next preceding the beginning of his action; that the defendant is a resident of Madison County; that they were married on 28 November, 1926; that they have never since lived together as man and wife; that they lived separate and apart from each other for more than five years next preceding the beginning of the action; and that the separation was due to no fault on the part of the plaintiff. The defendant in her answer denies that the plaintiff is a resident of Buncombe County, and alleges that immediately after the marriage the plaintiff abandoned her without just cause, has never provided for her support, and for several years has contributed nothing for the support of their child.

The trial court was of opinion that the plaintiff is not entitled to the relief demanded. In the judgment no specific reason is given for dismissing the action but it may probably be found in the court's conclusion that the plaintiff is not the injured party. The appellant says, however, that his action is based upon the Public Laws of 1931, chap. 72, North Carolina Code of 1931, sec. 1659(a), and that it may be maintained by "either party,"—not merely by the "party injured." It

is therefore necessary to compare sections 1659(4) and 1659(a), and to consider them in connection with the allegations in the complaint.

Section 1659(4) provides that the bonds of matrimony may be dissolved on application of the party injured if there has been a voluntary separation of husband and wife, or an involuntary separation in consequence of a criminal act committed by the defendant prior to the proceedings for divorce, and they have lived separate and apart for five successive years, and the plaintiff in the suit for divorce has resided in this State for that period.

In *Cooke v. Cooke,* 164 N. C., 272, the Court in construing the statute as it then stood remarked that there was nothing in the law to indicate that the right conferred was dependent on the blame which might attach to the one party or the other; but in the later case of *Sanderson v. Sanderson,* 178 N. C., 339, the decision in the earlier one was explained in these words: "An examination of the opinions in the *Cooke case* demonstrates that it does not question the correctness of the principle that one who is in the wrong cannot procure a divorce under a statute which gives the right of action to the injured party alone, and that the decision rests upon the ground that the cause for divorce on account of separation for ten years (now five), as it then stood, was provided for in a separate statute, which did not have in it the condition, on application of the 'injured party.'" It was held that under section 1659(4) an action can be maintained only by the party injured. To the same effect is the decision in *Lee v. Lee,* 182 N. C., 61.

It will be observed, then, that the elements of an action under this section are a voluntary separation of husband and wife, or an involuntary separation in consequence of crime previously committed by the defendant, living separate and apart from each other for five successive years, and the residence of the plaintiff in this State for that period—the words, "and no children be born of the marriage and living," having been taken out of the original statute. Public Laws, 1917, chap. 57.

Other provisions are embraced in section 1659(a): "Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of either party, if and when there has been a separation of husband and wife, either under deed of separation or otherwise, and they have lived separate and apart for five years, and no children have been born to the marriage, and the plaintiff in the suit for divorce has resided in the State for that period. This section shall be in addition to other acts and not construed as repealing other laws on the subject of divorce."

The two statutes have substantially the same provisions with respect to the period of separation and of the plaintiff's residence in the State;

on other points they materially differ. If brought under section 1659(4) the action can be maintained only by the party injured; if under section 1659(a), it can be maintained by either party. Since the adoption of the amendment which we have cited, section 1659(4) has made no reference to children born of the marriage, but requisite to an action under section 1659(a) are both allegation and proof that "no children have been born to the marriage." The complaint does not contain this allegation. The omission is impressive because the answer puts the matter at issue. So, it is manifest that the complaint is founded upon the provisions of section 1659(4), and as an action can be maintained under this section only by the party injured and all the evidence is to the effect that the defendant is the injured party, we must affirm the judgment dismissing the action.

Affirmed.

BELLE FLOOD v. DESCHAMPS MOTOR COMPANY, T. A. LIDE, G. B. TROXLER AND J. T. STEWART AND JESSE FLOOD v. DESCHAMPS MOTOR COMPANY, T. A. LIDE, G. B. TROXLER AND J. T. STEWART.

(Filed 4 January, 1933.)

Evidence K d—Form of hypothetical questions in this case held not to constitute reversible error.

Facts not warranted by the testimony offered at the trial may not be assumed in a hypothetical question to an expert witness, but in this case it is held there was not such a departure from the rule as to constitute reversible error.

CIVIL ACTION, before *Harding, J.*, at February Term, 1932, of ROCKINGHAM.

Plaintiff alleged that on or about 15 June, 1929, the defendants, Lide and Troxler, were employees, agents and representatives of the Deschamps Motor Company, which said corporation was engaged in the business of buying and selling automobiles, and that the defendant, J. T. Stewart, was a prospective purchaser of a Ford automobile from the defendant corporation. The place of business of defendant Motor Company was on Scales Street in the city of Reidsville, opposite the home of plaintiff. It was further alleged that on said date the defendant, Stewart, was driving an automobile belonging to the Motor Company for the purpose of testing it with the view of becoming a purchaser thereof, and that the defendants, Lide and Troxler, were in the car with Stewart for the purpose of assisting in the demonstration. It was

averred that Stewart was an incompetent driver and not familiar with the mechanical operation of the car, and that as a result he drove the car out of the place of business of the Motor Company "at an excessive and unlawful rate of speed across said public highway into the front yard of plaintiff where the plaintiff's children were at play and narrowly averted running over said children, and would have struck said children except for the quick action of L. A. Lide in taking hold of the steering wheel of said car and running said automobile against the church adjacent" to the home of the plaintiff. The complaint further declared that by reason of such driving of said automobile across the edge of her lot "in close proximity to said house the said plaintiff was overcome with fright, and the child with which the plaintiff was pregnant, was killed from terror occasioned by its mother and the great shock sustained by her nervous system."

The second suit brought by Jesse Flood against the said defendants alleged substantially the same state of facts as contained in the complaint of plaintiff, Belle Flood. The two cases were consolidated at the trial.

The plaintiff offered evidence tending to show that she was injured on 15 June, and that she was in a state of advanced pregnancy, and thereafter a child was born dead on or about 1 July, 1929. The evidence offered by the defendant tended to show that the occurrence took place on 1 June, 1929, and that while Stewart lost control of the car and it ran against the edge of plaintiff's yard that she was not in the yard at the time, and consequently the subsequent abortion was in nowise attributable to any act of defendants or either of them.

Issues of negligence and damages were submitted in each case. The jury answered the issues of negligence in favor of defendant, and from judgment upon the verdict the plaintiff appealed.

P. T. Stiers for plaintiff.
Glidewell & Gwynn for defendant.

PER CURIAM. A perusal of the record demonstrates that evidence was offered by both parties in an effort to solve the outstanding issue of fact, to wit: What was the cause of the abortion? The testimony offered by the plaintiffs was designed to demonstrate that the abortion was caused by the fright of the mother when she observed the danger to her children playing in the yard, brought about by the negligence of defendants in permitting the automobile to get beyond their control. While she did not allege in the complaint that she fell in an effort to snatch one of her young children out of the path of the oncoming automobile, she offered evidence to that effect. The defendants offered testimony

tending to show that the injury happened on 1 June, and that the child was born on 1 July. There was medical testimony to the effect that a physical injury sufficient to produce abortion would have become operative in a much shorter period than thirty days. Medical testimony was also introduced tending to show that fright alone would not produce an abortion.

The main group of exceptions deals with the admission of the opinions of medical men, touching the causes, symptoms and progress of abortion. It is asserted that these opinions are in response to hypothetical questions not based upon evidence. True it is, that the principle determining the competency of hypothetical questions and the answers thereto, forbids the assumption of facts or states of fact not warranted by the testimony offered at the trial. *S. v. Holly,* 155 N. C., 485, 71 S. E., 450. Hypothetical questions were propounded by counsel for both parties upon various aspects of the testimony, and it does not appear that there was a departure from the rule, of sufficient moment to upset the judgment. Physicians testified that syphilis was one of the causes of abortion, but no witness said that the plaintiff suffered or had ever suffered with such disease. Indeed, the questions with respect to such malady occurred in developing the various causes of abortion.

An examination of the entire record and of all exceptions does not produce the conclusion that error of law occurred in the trial of the cause.

Affirmed.

EX PARTE DOLLIE J. HUFFSTETLER, WIDOW; CLYDE WALLEN AND WIFE, NANCY B. WALLEN; CHARLES R. JONES AND WIFE, MARJORIE R. JONES; AND JAMES M. HUFFSTETLER, SAVILLA HUFFSTETLER, PEARL HUFFSTETLER, CLARA HUFFSTETLER, AND KANSAS HUFFSTETLER, THE LAST NAMED FIVE BEING INFANTS, APPEARING BY THEIR GUARDIAN, J. W. JACKSON.

(Filed 4 January, 1933.)

1. Partition A a—Fact that representative of minors in partition proceedings was designated as guardian held immaterial.

Where proceedings are instituted before the clerk of the Superior Court for the sale of lands held by the petitioners as tenants in common and for division of the proceeds, and all persons interested are made parties, the minor petitioners being represented by their uncle appointed by the court upon his finding that he was a suitable person: *Held,* the clerk had jurisdiction of both the subject-matter and the parties to the proceeding, and the fact that the uncle was designated as guardian *ad litem* instead of next friend is immaterial, he having acted in the capacity of next friend only. C. S., 450.

2. Partition A b—Sale for partition held not void although order did not provide for disbursement, and minors' funds were paid to mother.

Where an order confirming a sale of lands for partition does not provide for the disbursement of the funds, C. S., 2180, but the sale is made under order of the clerk of the Superior Court having jurisdiction of both the subject-matter and parties, the minor petitioners being represented by a person appointed by order of court, and the sale is made part for cash and part for purchase money notes, and the sum received in cash is properly paid into court and properly disbursed to the parties, the share of the minors therein being less than one hundred dollars and being paid to their mother for their benefit, C. S., 962: *Held*, the sale was not void, and a subsequent petition to set aside the sale is properly refused.

APPEAL by the infant petitioners from *Sink, J.*, at June Term, 1932, of BUNCOMBE. Affirmed.

The above entitled special proceeding was begun by a petition filed before the clerk of the Superior Court of Buncombe County, on 31 May, 1926.

It was alleged in the petition that the petitioner, Dollie J. Huffstetler, widow of W. T. Huffstetler, was entitled to dower in the land described in the petition; that the petitioners, other than the said Dollie J. Huffstetler, and Clyde Wallen and Charles R. Jones, were each entitled to an undivided one-seventh interest in said land; that the said petitioners, other than Nancy B. Wallen and Marjorie R. Jones, were each under the age of 21, and that the petitioner, J. W. Jackson, had been duly appointed by the court as guardian of said infant petitioners, and authorized to represent them in the proceeding; and that it was to the best interest of all the petitioners that the land described in the petition, which is located in the city of Asheville, and contains 1.74 acres, be sold for division.

In accordance with the prayer of the petition, an order was made by the clerk and approved by the judge of the Superior Court of Buncombe County, authorizing and directing the petitioner, J. W. Jackson, as guardian of the infant petitioners, to join with the other petitioners in the sale of the land to Charlotte P. Sealey, for the sum of $6,740, payable $1,000 in cash, and the balance in notes to be secured by a deed of trust. The land was sold and conveyed by deed executed by the adult petitioners and J. W. Jackson, as guardian for the infant petitioners, to Charlotte P. Sealey, who paid the sum of $1,000, in cash, and executed notes and deed of trust for the balance of the purchase price.

The sum of $1,000 was paid into the office of the clerk of the Superior Court, and disbursed by him in the payment of the costs of the proceeding, and of the shares of the petitioners in said sum. The sums due to the infant petitioners were paid by the clerk to their mother, with

whom they resided. The notes executed by Charlotte P. Sealey were not paid, and the deed of trust securing said notes was foreclosed. The land described in the petition, and sold and conveyed pursuant to the orders in the proceeding, is now owned by certain persons, who claim title to said land under said orders.

On 12 April, 1932, a petition was filed in the proceeding in behalf of the infant petitioners, by Marjorie R. Jones, who has since been appointed by the clerk of the Superior Court of Buncombe County as their general guardian, praying that the orders of sale be set aside and vacated, for the reason that said orders are void. After notice to the persons who now claim title to the land described in the petition under the said orders of sale, the petition was heard by Judge Sink, and on the facts found by him the prayer of the petition was denied.

From the order denying the prayer of their petition, the infant petitioners appealed to the Supreme Court.

Zeb. V. Curtis and Braxton Miller for petitioners.
Alfred S. Barnard and Carter & Carter for respondents.

CONNOR, J. The clerk of the Superior Court of Buncombe County had jurisdiction both of the subject-matter and of the parties to this proceeding.

The proceeding was instituted before the said clerk for the sale of the land described in the petition, and for the division of the proceeds of the sale among the petitioners according to their respective interests in the land.

The parties are the widow of W. T. Huffstetler, who was entitled to dower in the land, and his heirs at law, who owned the land as tenants in common, subject to the dower of the widow.

Certain of the tenants in common were infants, without general or testamentary guardian. For that reason, upon application duly made, their uncle, J. W. Jackson, who was found by the court to be a suitable person to represent said infants in the proceeding, was appointed as their guardian. He was not appointed general guardian of said infants, and did not purport to act as such in the proceeding. It would have been more regular if he had been designated in the proceeding as next friend, rather than as guardian, but as he did not undertake to represent said infants otherwise than as next friend, it is immaterial that he was designated as guardian and not as next friend. C. S., 450.

There was no provision in the order confirming the sale of the land, directing how the proceeds of said sale should be applied. C. S., 2180. However, the sum paid by the purchaser in cash, was paid into court,

and properly disbursed. The sum due to each of the infant petitioners, was paid by the clerk to his or her mother. This sum was less than $100.00. C. S., 962. It does not appear in the record what sums, if any, were collected on the purchase money notes. Whether or not any sums were collected on said notes, or what disposition was made of such sums as were collected, if any, does not affect the validity of the orders made in the proceeding. These orders were not void, and there was no error in the denial of the prayer of the petition that said orders be set aside and vacated. The order is

Affirmed.

ROY PRICE v. WALTER PYATT, ADMINISTRATOR.

(Filed 4 January, 1933.)

1. **Evidence D b—Testimony held incompetent under C. S., 1795.**

   In an action to recover for services rendered deceased testimony by the plaintiff that the deceased lived with plaintiff, that plaintiff boarded him and took care of him for sixteen months, etc., is held incompetent under the provisions of C. S., 1795.

2. **Appeal and Error J e—Held, exceptions to testimony were not waived by testimony later entered without objection in this case.**

   Exceptions were properly and aptly entered to the admission of testimony by plaintiff as to a transaction with a deceased relative to services rendered deceased by plaintiff. On redirect examination plaintiff testified without objection "I was living with deceased and fulfilled all agreements with him." *Held*, the plaintiff's statement on redirect examination was not sufficient to overthrow the exceptions theretofore entered.

APPEAL by defendant from *Sink, J.*, at July Term, 1932, of McDOWELL.

Civil action to recover for "board and washing, special nursing, care and keep" of J. T. Pyatt during sixteen months next immediately preceding his death.

From a verdict and judgment in favor of plaintiff for $400, the defendant appeals, assigning errors.

J. Will Pless, Jr., and D. F. Giles for plaintiff.
Morgan & Gardner for defendant.

STACY, C. J. The appeal presents the competency of plaintiff's testimony, admitted over objection, of which the following may be taken as

typical: "Mr. Pyatt lived with me 16 months prior to his death. . . . I boarded him, taken care of him during that time. . . . We prepared vegetables, cereals, and such foods as a sick person needed. . . . He got worse as he continued to live with me. I got $10 a month from him with which to pay his bills. . . . After my wife died, I arranged with my sister-in-law, who had been boarding with us for sometime, to care for Mr. Pyatt. He was living with me at the time of his death."

This evidence offends against C. S., 1795, which disqualifies a party or person interested in the event, or a person under whom such party or person interested derives his interest, from testifying as a witness in his own behalf against the executor, administrator or survivor of a deceased person, concerning a personal transaction or communication between the witness and the deceased, except where the executor, administrator or survivor, is examined in his own behalf, or the testimony of the deceased person is given in evidence concerning the same transaction or communication. *In re Will of Brown, ante,* 347.

Testimony of a similar nature was held incompetent in the following cases: *Pulliam v. Hege,* 192 N. C., 459, 135 S. E., 288 ("I had to wait on her; 'tote' meals to her"); *Knight v. Everett,* 152 N. C., 118, 67 S. E., 328 (Plaintiff, a physician, not competent to prove "that he attended the deceased; the number of visits made; had an account against him therefor; the amount due"); *Dunn v. Currie,* 141 N. C., 123, 53 S. E., 533 ("My family cultivated the land; took care of intestate's house and stock; nursed him in his last illness"); *Stocks v. Cannon,* 139 N. C., 60, 51 S. E., 802 ("I worked for the deceased on the road and in the field"); *Davis v. Evans,* 139 N. C., 440, 51 S. E., 956 (Plaintiff not permitted to testify "that he demanded payment of note from deceased in his life time"); *Davidson v. Bardin,* 139 N. C., 1, 51 S. E., 779 (*Feme* plaintiff "gave deceased medicine, kept him clean and cared for him generally; he was helpless; we had to do all the services and wait on him"); *Brown v. Adams,* 174 N. C., 490, 93 S. E., 989 ("Mother cooked for them, nursed them and sat up with them, read for them, and did everything she could think of that would comfort him"); *Witty v. Barham,* 147 N. C., 479, 61 S. E., 372 ("She told me she would give me a horse if I would leave and stay. I took the horse"); *Kirk v. Barnhart,* 74 N. C., 653 ("Mother was old and infirm; we moved to her home to aid in taking care of her and in nursing and supporting her"); *Blake v. Blake,* 120 N. C., 177, 26 S. E., 816 (Plaintiff and other heirs "agreed with mother (the deceased) that she was to take same interest in land purchased from Andrews that she had in the land they sold").

But it is contended that, on redirect examination, the plaintiff testified, without objection, "I was living with Mr. Pyatt and fulfilled all agreements with him," which rendered the admission of the previous incompetent evidence harmless as the facts thereby sought to be shown were otherwise fully established. As supporting this position, either directly or in tendency, the following authorities are cited: *Eaves v. Cox, ante,* 173, 165 S. E., 345; *Ingle v. Green,* 202 N. C., 116, 162 S. E., 476; *Shelton v. R. R.,* 193 N. C., 670, 139 S. E., 232; *Ledford v. Lumber Co.,* 183 N. C., 614, 112 S. E., 421; *Hamilton v. Lumber Co.,* 160 N. C., 47, 75 S. E., 1087; *Smith v. Moore,* 149 N. C., 185, 62 S. E., 892; *Blake v. Broughton,* 107 N. C., 220, 12 S. E., 127.

This more or less casual statement of plaintiff, made without objection on redirect examination, was neither intended nor sufficient to overthrow the 19 or 20 objections entered to his testimony during his examination in chief.

We are aware of the criticism leveled against this statute, C. S., 1795 as "a lingering remnant of a discredited antiquity" (North Carolina Law Review, December, 1932, p. 61), but it is the law as written, and we must enforce it.

New trial.

WALTER WALKER v. NANTAHALA POWER AND LIGHT COMPANY.

(Filed 4 January, 1933.)

Negligence C a—Evidence held not to disclose contributory negligence barring plaintiff's recovery as matter of law.

The defendant power company dug a hole in a public street and threw the red clay therefrom upon the sidewalk of the town. Rain wet the clay and caused it to become slippery. The plaintiff, while walking along the sidewalk before day, slipped on the mud and fell into the hole, resulting in serious injury. There was evidence that plaintiff knew all the conditions of the street and sidewalk at the place in question. *Held,* the defendant's motion as of nonsuit on the ground of contributory negligence was properly refused, the plaintiff having no reason to foresee that he would slip and fall into the hole, and the conditions of the sidewalk not being sufficient to require the plaintiff to leave it and walk in the street for his own safety.

APPEAL by defendant from *Sink, J.,* at August Term, 1932, of CHEROKEE. No error.

This is an action to recover damages for personal injuries suffered by the plaintiff, and caused, as alleged in the complaint, by the negligence of the defendant. The defendant denied liability, chiefly on the ground

that plaintiff, by his own negligence, as alleged in the answer, contributed to his injuries.

At the close of the evidence for the plaintiff, the defendant moved for judgment as of nonsuit. The motion was denied, and the defendant excepted.

The evidence was submitted to the jury. The issues were answered as follows:

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

2. If so, was said injury contributed to by his own negligence, as alleged in the answer? Answer: No.

3. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: $4,000."

From judgment on the verdict that plaintiff recover of the defendant the sum of four thousand dollars, with interest and costs, the defendant appealed to the Supreme Court.

W. Witherspoon and Johnston & Horner for plaintiff.

Moody & Moody, J. B. Gray and S. W. Black for defendant.

CONNOR, J. Sometime early in December, 1931, the defendant dug a hole in a public street, at the edge of the sidewalk along said street, in the town of Andrews, N. C. The earth taken from the hole was thrown on the sidewalk, and remained there. Following a rain, mud accumulated on the sidewalk opposite the hole. The sidewalk was five or six feet wide, and had been covered with saw-dust. Neither the street nor the sidewalk was paved.

Plaintiff, a resident of the town of Andrews, while walking along the sidewalk, before daylight on the morning of 15 December, 1931, slipped because of the mud on the sidewalk, and fell into the hole, which was five or six feet deep. As the result of his fall into the hole, plaintiff's left hip was dislocated, and badly injured. At the time of the trial, in August, 1932, plaintiff could not walk without the aid of crutches. He is now about 49 years of age. He is a merchant. His injuries are permanent.

The hole in the street, at the edge of the sidewalk, was dug by the defendant about seven days before the plaintiff was injured. He knew the location of the hole, and knew that it was not covered or enclosed. He had passed along the sidewalk opposite the hole, at least three times a day since the hole was dug by the defendant. He also knew that earth taken from the hole had been thrown on the sidewalk, and that mud had accumulated on the sidewalk, as the result of rain falling on this earth.

He was walking on the sidewalk, and not on the street, at the time he slipped and fell in the hole. There was no evidence tending to show that plaintiff was temporarily inadvertent to the location of the hole, or to the presence of mud on the sidewalk, at the time he slipped and fell into the hole.

The defendant, conceding that there was evidence at the trial tending to show that it was negligent as alleged in the complaint, and that plaintiff's injuries were caused by such negligence, contends that the evidence introduced by the plaintiff, shows that he contributed by his own negligence to his injuries, and that for this reason there was error in the refusal of the trial court to allow its motion for judgment as of nonsuit. This contention cannot be sustained.

There was no evidence tending to show that plaintiff was negligent as alleged in the answer. He was walking on the sidewalk as he had a right to do. There were no conditions confronting him which required him to leave the sidewalk, and walk on the street, for his own safety. He had no reason to foresee that he would slip, and fall into the hole at the edge of the sidewalk. But for the negligence of the defendant as alleged in the complaint, plaintiff would not have been injured. There was no error in the refusal of the trial court to allow defendant's motion, and in submitting the evidence to the jury. *Goldstein v. R. R.*, 188 N. C., 636, 125 S. E., 177; *Seagraves v. Winston*, 170 N. C., 618, 87 S. E., 507; *Carrick v. Power Co.*, 157 N. C., 378, 72 S. E., 1065.

Other assignments of error which were discussed on the argument and in the briefs for defendant, have been considered. They cannot be sustained. The judgment is affirmed.

No error.

JAMES F. STEPP v. R. P. ROBINSON ET AL.

(Filed 4 January, 1933.)

Bail B e—Defendant was amenable to process of court upon appearance on motion against surety, and judgment against surety was error.

Upon motion against the surety on a bail bond the defendant, in response to notice served upon the surety, C. S., 794, appeared in open court. The surety was not present upon the hearing of the motion. The defendant was given opportunity to voluntarily surrender himself, which he refused upon his contention that he was not liable to be taken in arrest. Judgment was entered against the surety, C. S., 778, 792. *Held*, upon the defendant's appearance in open court he was "amenable to the process of the court" and the judge should have ordered execution against the person of the defendant, the defendant's contention that he was not

liable to be taken in arrest notwithstanding, and the judgment against the surety was erroneous, the primary object in taking bail being to keep the defendant within the jurisdiction and call of the court and not to recover the penalty on the bail bond.

APPEAL by surety on bail bond, from *Schenck, J.*, at May-June Term, 1932, of HENDERSON.

Civil action for damages, arising out of fraud, tried upon issues set out in 201 N. C., 848, with ancillary remedy of arrest and bail.

Upon the arrest of the defendant, he gave undertaking, or bail-piece, with his wife as surety, conditioned, as provided by C. S., 778, "that if the defendant, R. P. Robinson, is discharged from arrest he shall, at all times, render himself amenable to the process of the court during the pendency of this action, and to such process as may be issued to enforce judgment thereon."

There was a verdict and judgment for the plaintiff. Execution issued against defendant's property was returned *"Nulla bona"*; and execution against the person of the defendant was returned *"non est inventus."* Whereupon, after notice to the surety or bail, as required by C. S. 794, there was judgment, as we understand the record, against the surety, Dora Robinson.

It appears that upon the final hearing of said motion, "the defendant, R. P. Robinson, who was present in court, was given opportunity to surrender himself to the process of the court, and the defendant, Dora Robinson, who did not appear in person, was given opportunity to surrender the defendant to the process of the court, as provided by C. S., 792, which opportunity was refused at the time."

From judgment against the surety, she appeals.

W. R. Sheppard for plaintiff.
R. L. Whitmire for defendant, Dora Robinson.

STACY, C. J., after stating the case: When the defendant, R. P. Robinson, appeared in open court, in response to notice served upon his surety or bail, he was then "amenable to the process of the court," notwithstanding his refusal thus to surrender himself. It was the contention of the defendant and his surety, upon the hearing of said motion, that the defendant had theretofore been discharged from liability to arrest, and for this reason, voluntary surrender was refused. Upon rejection of this contention, the court should have ordered execution against the person of the defendant, rather than hold the surety or bail, who was not present, for failure to surrender him. *Pickelsimer v. Glazener,* 173 N. C., 630, 92 S. E., 700; *Ledford v. Emerson,* 143 N. C., 527, 55 S. E., 969.

The condition of the undertaking is, that the defendant shall, at all times during the pendency of the action, render himself amenable to the process of the court. This condition was met when the defendant voluntarily appeared in court upon the hearing of the motion against his surety. It is true, he contended that he was not liable to be taken in arrest, but this was not a matter for him to decide. *S. v. Lingerfelt*, 109 N. C., 775, 14 S. E., 75.

The primary object in taking bail in such cases is, not to recover the penalty of the bond upon default, but to keep the defendant within the jurisdiction and call of the court. *Pickelsimer v. Glazener, supra.*

There was error in entering judgment against the surety when the condition of the bond had been met by the defendant voluntarily appearing in court and thus rendering himself "amenable to the process of the court." *Watson v. Willis*, 24 N. C., 17; *Mears v. Speight*, 49 N. C., 420; *Sedberry v. Carver*, 77 N. C., 319; *Dick v. Stoker*, 12 N. C., 91, 3 R. C. L., 49.

Error.

E. H. McMAHAN, ADMINISTRATOR, v. SOUTHERN RAILWAY COMPANY.

(Filed 4 January, 1933.)

1. Appeal and Error C a—Case on appeal from county court is not case on appeal from Superior Court, and new case must be settled.

Except in rare instances the case on appeal to the Superior Court from the county court ought not to be made the case on appeal to the Supreme Court, and in those cases where the case on appeal to the Superior Court is permissible or desirable to be used on appeal to the Supreme Court it must be settled in some accredited way. C. S., 643, 644.

2. Appeal and Error C g—On motion in Superior Court to dismiss appeal movant should ask that appeal should be adjudged abandoned.

Where the appellee moves in the Superior Court that the appeal be dismissed for appellant's failure to serve statement of case on appeal within the time allowed, the appellee should ask the court to ascertain and adjudge that the appeal had been abandoned, and where this has not been done the Superior Court is technically without authority to dismiss the appeal.

3. Appeal and Error E h—In absence of proper statement of case on appeal Supreme Court is confined to consideration of record proper.

Where there is no proper statement of case on appeal due to the appellant's failure to serve it on appellee within the time prescribed, and the appellee's motion in the Superior Court to dismiss the appeal is erroneously granted in that the appellee failed to request the court to ascertain and adjudge that the appeal had been abandoned, on appeal

from the judgment of the Superior Court the Supreme Court is limited to a consideration of the record proper, there being no proper statement of case on appeal, and where no error appears on the face thereof the judgment will be affirmed.

APPEAL by defendant from *Sink, J.*, at March and June Terms, 1932, of BUNCOMBE.

Civil action, arising under Federal Employers Liability Act, to recover damages for death of plaintiff's intestate, alleged to have been caused by the wrongful act, neglect or default of the defendant.

Plaintiff's intestate was fatally injured 16 October, 1930, while engaged in lifting hand car from track, preparatory to clearing it for oncoming train. He was member of a track repair crew. Suit was instituted in the General County Court of Buncombe County, 10 July, 1931, which resulted in judgment of nonsuit on the hearing. Plaintiff appealed, the "case on appeal to the Superior Court" being settled by agreement of counsel. From judgment reversing the nonsuit in the General County Court and remanding the cause for trial in accordance with said reversal, the defendant excepted and gave notice of appeal to the Supreme Court. "Appellant allowed 30 days (from 19 March, 1932) in which to make and serve case on appeal to the Supreme Court, and appellee 10 days thereafter in which to serve countercase or exceptions." No statement of case on appeal from the judgment of the Superior Court to the Supreme Court having been served on plaintiff or his counsel within the 30 days allowed therefor, judgment was entered at the June Term, 1932, Buncombe Superior Court, after notice, dismissing the appeal and remanding the case to the General County Court for trial in accordance with the former judgment. Defendant again gave notice of appeal, and on its appeal from this judgment duly served statement of case.

Carl W. Greene and J. W. Pless for plaintiff.
R. C. Kelly and Jones & Ward for defendant.

STACY, C. J., after stating the case: If the judgment, entered at the June Term, Buncombe Superior Court, dismissing defendant's appeal, be correct, the sufficiency of the evidence under the Federal rule (*Hubbard v. R. R., ante,* 675) to carry the case to the jury would not reach us for decision on this appeal.

Defendant says that as only one question was presented or passed upon in the Superior Court on its appeal from the judgment of nonsuit entered in the General County Court, to wit, the sufficiency of the evidence to carry the case to the jury, no statement of case on appeal to the Supreme Court was necessary; and, for this position, the decision

in *Baker v. Clayton,* 202 N. C., 741, 164 S. E., 233, is cited as authority. But the *Baker case* holds otherwise. There, it was said: "The record on appeal to the Superior Court from a 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." And in those cases where it is permissible or desirable to use the record on appeal to the Superior Court as the record on appeal to the Supreme Court, it must be made such, or "settled as the case on appeal," in some accredited way, either by agreement of counsel or as provided by C. S., 643 and 644.

Technically, however, the plaintiff was not entitled to have the appeal dismissed. *Wallace v. Salisbury,* 147 N. C., 58, 60 S. E., 713; *Roberts v. Bus Co.,* 198 N. C., 779, 153 S. E., 398; *Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126. *Non constat* that error may not appear on the face of the judgment. The Court was not asked to ascertain and adjudge that the appeal had been abandoned. *Pentuff v. Park,* 195 N. C., 609, 143 S. E., 139; *Dunbar v. Tobacco Growers,* 190 N. C., 608, 130 S. E., 505; *Avery v. Pritchard,* 93 N. C., 266.

But as no reversible error appears on the face of the record proper, to which we are now limited in our consideration—there being no proper statement of case on appeal—the judgment will be upheld.

Affirmed.

H. W. KINDLER v. HUNSDON CARY AND R. H. BOYER.

(Filed 4 January, 1933.)

1. **Appeal and Error E c—Record on appeal from county court is not proper record on further appeal from Superior Court.**

   It is neither essential nor desirable that the record on appeal from a county court should be made the record on appeal from the Superior Court, upon the further appeal it being advisable that the record should be limited to those matters related to the questions sought to be presented upon exceptions to the judgment of the Superior Court.

2. **Appeal and Error F d—Only rights of appealing parties can be considered in Supreme Court.**

   Where in an action in a county court against two defendants the jury finds that one of them was not liable to the plaintiff and the plaintiff does not appeal from the verdict, and the other defendant appeals to the Superior Court from a verdict against him, and in the Superior Court the appealing defendant's demurrer to the evidence is sustained, upon further appeal to the Supreme Court the judgment will be affirmed where the record fails to show sufficient evidence to carry the case to the jury as against the appealing defendant.

KINDLER *v.* CARY.

APPEAL by plaintiff from *Clement, J.,* at August Term, 1932, of BUNCOMBE.

Civil action to recover for plumbing repairs.

Plaintiff is engaged in the plumbing business in Asheville. The defendant, Hunsdon Cary, a resident of Richmond, Virginia, is the owner of Mountain Meadows Inn. This hostelry was leased, through R. H. Boyer, real estate agent, to one Frank Plummer. The lessee was to make all repairs. Plaintiff did the repair work in question under an alleged guarantee from Boyer that the bill would be paid. Plummer left Asheville without paying plaintiff for his work.

Suit was brought in the General County Court where the following verdict was rendered:

"1. Is the defendant, Hunsdon Cary, indebted to the plaintiff, and if so, in what amount? Answer: Yes, $237.92.

"2. Is the defendant, R. H. Boyer, indebted to the plaintiff, and if so, in what amount? Answer: No, nothing."

Judgment on the verdict, from which the defendant, Hunsdon Cary, appealed to the Superior Court of Buncombe County, assigning seventeen errors on said appeal. The plaintiff did not appeal from the judgment acquitting R. H. Boyer of liability.

In the Superior Court defendant's demurrer to the evidence was sustained, and the case remanded with direction that it be nonsuited as to Hunsdon Cary. From this ruling, the plaintiff appeals, and the record on appeal to the Superior Court from the judgment of the General County Court has been adopted as the statement of case on appeal to the Supreme Court.

Anderson & Howell for plaintiff.

Bourne, Parker, Bernard & DuBose for defendant.

STACY, C. J. This case affords a striking illustration of the wisdom of the decision in *Baker v. Clayton,* 202 N. C., 741, 164 S. E., 233, wherein it is suggested as neither essential nor desirable that the record on appeal to the Superior Court from the General County Court be made the record on appeal to the Supreme Court. Compare, also, *McMahan v. R. R., ante,* 805. The only question presented for our consideration is the sufficiency of the evidence to carry the case to the jury on plaintiff's alleged right to recover from the owner for plumbing repairs done at the instance of the lessee, yet twenty pages of the record are taken up with the trial court's charge to the jury and the seventeen assignments of error made on defendant's appeal to the Superior Court. The size of the record might well have been reduced to this extent, at least.

While the testimony adduced on the hearing would seem to justify a recovery against R. H. Boyer (*Chemical Co. v. Griffin,* 202 N. C., 812,

164 S. E., 577, *Newbern v. Fisher,* 198 N. C., 385, 151 S. E., 875) had the jury not decided otherwise, nevertheless the plaintiff did not appeal from the verdict in Boyer's favor, and we have found no evidence on the record sufficient to carry the case to the jury as against the owner, Hunsdon Cary. *McMichem v. Brown,* 73 S. E. (Ga. App.), 691. This seems to work an unfortunate result so far as the plaintiff is concerned, but in the present state of the record, we are powerless to help him. On the other hand, it is possible that the correct result has been reached. We do not say that it has not.

Affirmed.

R. H. THEILING v. GEORGE B. WILSON ET AL.

(Filed 4 January, 1933.)

1. Master and Servant B d—Employee due salary cannot recover of third person upon allegation that third person owed employer.

A complaint in an action against the plaintiff's employer and a third person alleging that the employer was insolvent and was indebted to the plaintiff and that the third person was indebted to the employer for the work for which the plaintiff was due the salary, fails to state a cause of action against such third person.

2. Appeal and Error G a—

Where the appellant fails to file printed or mimeographed copies of brief as required by Rule 27, the appeal will be dismissed.

APPEAL by plaintiff from *MacRae, Special Judge,* at June Term, 1932, of MECKLENBURG.

Civil action to recover for services rendered as an accountant.

The complaint alleges:

1. That the defendant, George B. Wilson, trading as George B. Wilson and Company, was employed by the board of commissioners of Mecklenburg County to audit the books of the clerk of the Superior Court of said county.

2. That the plaintiff, an employee of the said George B. Wilson and Company, is now due the sum of $781.21 for salary and commissions earned in connection with the auditing of the books of the said clerk's office.

3. That the plaintiff's employer, George B. Wilson and Company, is insolvent and that notice has been given to the defendant, board of county commissioners, of plaintiff's claim; wherefore, demand is made that plaintiff have judgment against both defendant, his employer and the board of county commissioners.

Demurrer interposed by the board of county commissioners on the ground that the complaint fails to state facts sufficient to constitute a cause of action against said board; demurrer sustained; plaintiff appeals.

William Milton Hood for plaintiff.
H. C. Dockery and Jos. H. McConnell for defendant, commissioners.

STACY, C. J. No cause of action is stated against the board of commissioners of Mecklenburg County. The plaintiff simply alleges that his employer is indebted to him and that the board of county commissioners is indebted to his employer. The demurrer was properly sustained. *Aman v. Walker,* 165 N. C., 224, 81 S. E., 162.

But for a different reason, the appeal must be dismissed. Plaintiff has failed to file printed or mimeographed copies of brief as required by Rule 27. To dispense with the rule in this case would require its abrogation. *Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126; *Byrd v. Southerland,* 186 N. C., 384, 119 S. E., 2.

Appeal dismissed.

CLYDE F. FLEMMING ET AL. v. THE CITY OF ASHEVILLE ET AL.

(Filed 4 January, 1933.)

Injunctions D b—Facts upon which temporary restraining order is dissolved should be set out in the judgment.

Where a temporary order restraining a municipal corporation from enforcing an ordinance is dissolved without findings of fact in the judgment or record so that the Supreme Court can ascertain the grounds upon which the restraining order was dissolved, the judgment will be reversed and the case remanded to the end that another hearing may be had and that the facts may be set out in the judgment.

APPEAL by plaintiffs from *Clement, J.,* at August Term, 1932, of BUNCOMBE. Reversed and remanded.

This is an action to restrain and enjoin the defendants from enforcing against the plaintiffs, an ordinance of the city of Asheville, on the ground (1) that plaintiffs are not included within the terms and provisions of the ordinance; and (2) that if plaintiffs are included within the terms and provisions of the ordinance, the said ordinance is void, for that it contravenes certain provisions of the Constitution of North Carolina, and of the United States.

From judgment dissolving a temporary restraining order issued in the action, the plaintiff appealed to the Supreme Court.

Edward H. McMahan for plaintiffs.
J. G. Merrimon and Devere Lentz for defendants.

CONNOR, J. Issues of fact are sharply raised by the pleadings in this action. The evidence at the hearing of the motion of plaintiffs that the temporary restraining order be made permanent, was contradictory as to material facts. No findings of fact appear in the judgment or in the record. We are unable to determine in the present state of the record upon what ground the temporary restraining order was dissolved.

A city ordinance dealing with a matter of great importance to the public as well as to operators of motor buses on the streets of the towns and cities of this State, is involved in this action. The validity of the ordinance is challenged on the ground that some of its terms and provisions are unconstitutional. It does not now appear that the validity of the ordinance is necessarily presented by this appeal. *Goldsboro v. Supply Co.*, 200 N. C., 405, 157 S. E., 58, and cases cited.

The judgment is reversed and the action remanded to the Superior Court of Buncombe County, to the end that another hearing may be had. The facts on which the judgment is rendered should be found, and set out in the judgment.

Reversed and remanded.

CAROLINA POWER AND LIGHT COMPANY v. GEORGE A. ISELEY, MAYOR, AND C. C. PAGE AND CARL L. WILLIAMSON, COMMISSIONERS OF THE CITY OF RALEIGH, N. C., THE CITY OF RALEIGH, N. C., CAROLINA COUNTRY CLUB, C. A. GOSNEY AND M. A. RUSHTON; AND ALL OTHER CITIZENS, RESIDENTS AND FREEHOLDERS OF THE CITY OF RALEIGH, N. C., THE COUNTY OF WAKE, N. C., AND ELSEWHERE, WHO CONSTITUTE THE PUBLIC IN GENERAL, WHO HAVE, OR MAY CLAIM TO HAVE, AN INTEREST IN THE CONTROVERSIAL MATTERS INVOLVED IN THIS ACTION, EITHER GENERALLY AS CITIZENS, AND/OR SPECIALLY AS INDIVIDUAL PROPERTY OWNERS, ALL OF WHOM ARE SO NUMEROUS THAT THEIR NAMES, CONTENTIONS, AND SPECIAL INTERESTS, IF ANY, ARE UNKNOWN TO THE PLAINTIFF, AND CANNOT, BY THE EXERCISE OF DUE DILIGENCE, BE ASCERTAINED; AND T. LACY WILLIAMS, GUARDIAN AD LITEM, FOR SUCH OF SAID UNKNOWN CITIZENS, RESIDENTS AND FREEHOLDERS, AS ARE OR MAY BE INCAPACITATED, OR UNDER LEGAL DISABILITY.

(Filed 4 January, 1933.)

1. Actions B g—Action in this case held to come under provisions of Declaratory Judgment Act.

The Declaratory Judgment Act, chapter 102, Public Laws of 1931, is a remedial statute and should be liberally construed, and the act applies to an action by a power company against a city and the residents thereof

to determine the validity of a written contract between the power company and the city whereunder the power company was to change its electric cars to gasoline buses along some of the streets of the city under a municipal franchise, the controversy being in good faith and substantive rights being involved, and it further appearing that the parties have legal rights or legal obligations that may be determined by a judgment or decree in the action. The Declaratory Judgment Act differs from the submission of a controversy under C. S., 626 in that under the former statute it is not necessary that the question involved might be the subject of a civil action at the time the proceeding is instituted.

2. Municipal Corporation F a—Contract relating to change in method of transportation under franchise held not to involve new franchise.

A power company operated electric street cars upon certain of the streets of a city under a municipal franchise, its lines extending to certain streets beyond the city limits. The power company and the city, some years after the franchise was granted, entered into a contract whereby the power company was to substitute, on certain streets, gasoline autobuses upon certain conditions for the electrically driven cars, and the contract was approved by the Corporation Commission. It further appeared that the change in the method of transportation was for the public benefit: *Held*, the proposed change from electric cars to auto-buses along the designated streets does not involve the granting of a new franchise, requiring a vote of the residents of the city under the provisions of its charter, but relates only to the method of transportation under the old franchise, and where the controversy has been made the subject of an action by the power company under the Declaratory Judgment Act in which all interests were represented, and judgment has been signed sustaining the validity of the contract, exceptions based on contentions that the contract amounted to a new franchise and that the Corporation Commission was without authority to approve the contract cannot be sustained on appeal.

3. Appeal and Error F b—Only matters raised by exceptions duly taken will be considered on appeal.

On appeal to the Supreme Court only questions of law properly presented by exceptions and in conformity with the rules of practice in the Supreme Court will be considered.

APPEAL by the defendants, C. A. Gosney, M. A. Rushton and T. Lacy Williams, guardian ad litem, from *Sinclair, J.*, at November Term, 1932, of WAKE. Affirmed.

The facts which constitute the cause of action alleged in the complaint in this action, and on which the plaintiff, Carolina Power and Light Company prays for relief, are admitted in the pleadings. These facts are set out in the judgment, which is as follows:

"This cause coming on to be heard by his Honor, N. A. Sinclair, at the November Term, 1932, of the Superior Court of Wake County, there being present W. H. Weatherspoon, Pou & Pou and A. Y. Arledge.

attorneys for the plaintiff, Carolina Power and Light Company; Clem B. Holding, attorney for the defendants, George A. Iseley, mayor, and C. C. Page and Carl L. Williamson, commissioners of the city of Raleigh, N. C., and the city of Raleigh, N. C.; S. Brown Shepherd, attorney for the defendant, Carolina Country Club; Murray Allen, attorney for the defendants, C. A. Gosney and M. A. Rushton; and T. Lacy Williams, *in personam*, as guardian ad litem for such of the defendants, citizens, residents and freeholders of the city of Raleigh, N. C., the county of Wake, N. C., and elsewhere, as are incapacitated or for any reason under legal disability, and the cause being heard, the court finds the following facts, to wit:

1. That this is an action instituted by the plaintiff, Carolina Power and Light Company, under chapter 102, of the Public Laws enacted by the General Assembly of North Carolina at its regular session, 1931, and known as 'The Uniform Declaratory Judgment Act.'

2. That the defendants, George A. Iseley, mayor, and C. C. Page and Carl L. Williamson, commissioners of the city of Raleigh, and the city of Raleigh, N. C., have been duly served with summons, and have jointly filed an answer to the plaintiff's complaint; that the defendant, C. A. Gosney, has been duly served with summons and has filed an answer to the plaintiff's complaint; that the defendant, M. A. Rushton, has been duly served with summons, and has filed an answer to the plaintiff's complaint; that the defendant, Carolina Country Club, has been duly served with summons, and has filed an answer to the plaintiff's complaint; that all other citizens, residents and freeholders of the city of Raleigh, N. C., the county of Wake, N. C., and elsewhere, who constitute the public in general who have, or may claim to have, an interest in the controversial matters involved in this action, either generally as citizens, and/or specially as individual property owners, all of whom are so numerous that their names, contentions and special interests, if any, were unknown to the plaintiff, and could not, by the exercise of due diligence, be ascertained, were also duly made parties defendant in this action, and were invited to come in and set up any rights which they may have, or claim to have, involved in the subject-matter of this action, and that all of said unknown persons have been duly served with summons by publication, as required by law, by publication of notice in the *News and Observer* and *Raleigh Times*, both being daily newspapers published, and of general circulation, in Wake County; that the time for filing answers has expired and none of said unknown defendants has filed an answer to the plaintiff's complaint, except that the defendant, T. Lacy Williams, who has been duly appointed guardian ad litem for all unknown defendants who are incapacitated, or under

legal disability, has filed an answer for such defendants as he was appointed to represent.

3. That the plaintiff, Carolina Power and Light Company, a public service corporation, engaged in the business of distributing, and otherwise dealing in electric current, and in operating a street railway system in the city of Raleigh under a franchise granted by the city of Raleigh, dated 24 May, 1905, to the Raleigh Electric Company, which said franchise has been duly conveyed and assigned to said Carolina Power and Light Company, and that under said franchise said Carolina Power and Light Company, a number of years ago, constructed and has since continued to operate, as a part of its street railway system, a street car line out Glenwood Avenue to the limits of the city of Raleigh, and extending beyond the said city limits to the old Bloomsbury Park property at or near the Carolina Country Club Company's property.

4. That the Carolina Power and Light Company and the city of Raleigh entered into the contract, a copy of which is attached, as 'Exhibit B' to and made a part of the complaint, dated 28 November, 1931, providing at the expense of the Carolina Power and Light Company:

(1) For the discontinuance of the Glenwood Avenue street railway cars, which are operated over and along Glenwood Avenue, South West Street, Hargett Street, Dawson Street, and that part of Martin Street between Dawson and Fayetteville streets, and

(2) For the substitution of motor buses over and along the route within the city of Raleigh now traversed by said Glenwood Avenue line,

(3) For the removal of certain trackage and overhead equipment used exclusively for the operation of said street cars, and

(4) For certain construction work, including street paving and street surfacing.

That said contract was upon the further condition that the obligation imposed upon the plaintiff, Carolina Power and Light Company, under the terms and provisions of said contract were not to be performed by, or enforced against, said Carolina Power and Light Company unless and until a lawful order, duly issued by the North Carolina Corporation Commission, authorized and empowered the plaintiff to discontinue the operation of that portion of its said Glenwood Avenue street car line within the city, as provided for in said contract with the city of Raleigh, and that said order further duly authorized and empowered the plaintiff to discontinue that portion of its said Glenwood Avenue street car line beyond the city limits, and to substitute motor-bus transportation therefor, extending to the point of intersection of Glenwood Avenue, Ridgecrest Road, and Lassiter's Mill Road.

5. That the Carolina Power and Light Company filed a petition with the North Carolina Corporation Commission on 8 December, 1931, seeking authority to discontinue the operation of certain of its street car lines and substituting motor buses therefor along and over its Glenwood Avenue line, for the purpose of acquiring authority from said Corporation Commission to perform its agreement entered into with the city of Raleigh, North Carolina, all as will more fully appear by reference to said petition on file with the Corporation Commission, a copy of which is attached to the complaint, marked 'Exhibit C.'

That upon the filing of said petition, and after due notices were issued and served, a hearing was had whereupon the said Corporation Commission of North Carolina issued its order, dated 7 January, 1932, as will appear amongst the records of said Corporation Commission, and a copy of which is attached to the complaint, marked 'Exhibit F,' which said order, among other things, authorized and empowered the plaintiff, Carolina Power and Light Company 'to permanently discontinue the operation of street cars over and along Glenwood Avenue, South West Street, Hargett Street, Dawson Street, and that portion of Martin Street between Dawson and Fayetteville streets, and to remove such of the trackage and overhead equipment used exclusively in the operation of said street railway cars, as provided for in the aforesaid contract between Carolina Power and Light Company and the city of Raleigh; and it is further authorized and empowered to discontinue the operation of electric street railway cars over and along that portion of Glenwood Avenue line which extends from the limits of the city of Raleigh to the vicinity of the Carolina Country Club, and to remove its trackage and overhead equipment used exclusively in the operation of said electric street railway cars, provided the Carolina Power and Light Company shall substitute buses for electric railway cars, which are to be discontinued over and along Glenwood Avenue within the city of Raleigh, South West Street, Hargett Street, Dawson Street, and that portion of Martin Street between Dawson Street and Fayetteville Street, and over and along the remainder of the route traversed by the Glenwood Avenue electric railway cars, and provided it shall substitute motor buses over and along Glenwood Avenue between the limits of the city of Raleigh and the point of intersection of Glenwood Avenue, Ridgecrest Road and Lassiter's Mill Road.

6. That the defendant, M. A. Rushton, excepted to and appealed from the Commission's said order, as will appear by reference to copies of said exceptions and notice of appeal attached to and made a part of the complaint in this action. That the appeal of the said M. A. Rushton to this court was never heard, and is now withdrawn and abandoned as hereinafter set forth.

7. That with the consent of M. A. Rushton and Carolina Power and Light Company, the Corporation Commission of North Carolina has amended its order of 7 January, 1932, so as to provide that bus service is to be established along Lassiter's Mill Road between said roads crossing at Glenwood Avenue and at Lakeside Drive in lieu of the street cars now operated in the vicinity of the Carolina Country Club, said bus service to be maintained upon such schedules and under such conditions set forth in the order of the North Carolina Corporation Commission dated 4 November, 1932, a certified copy of which has been offered and filed as a part of the record in this action;

That the said M. A. Rushton, through his counsel, has withdrawn and abandoned the demurrer to plaintiff's complaint heretofore filed by him, and has filed an answer, now appearing in the record; that the said Rushton has withdrawn and abandoned his appeal from the said Corporation Commission's order of 7 January, 1932, in consideration of the Carolina Power and Light Company's consent to the amended order of the Corporation Commission above mentioned, thereby eliminating from this action the legal questions arising in reference to that part of the Corporation Commission's order of 7 January, 1932, providing for a discontinuance of the operation of the Carolina Power and Light Company's street cars from a point at or near Lassiter's Mill Road crossing to the end of the line, at or near the Carolina Country Club, without the substituted operation of motor buses thereover, so that the court now considers the legal questions arising upon said order of 7 January, 1932, as amended by the consent order of 4 November, 1932.

8. That counsel for all parties in attendance upon this hearing have admitted in open court that the substituted bus service, in lieu of said street car line, as provided for in said Corporation Commission's order and said contract with the city of Raleigh, will more adequately and conveniently serve the public transportation needs in the territory affected thereby than would the continued operation of the said electric street railway cars, and the court finds such to be the fact.

Upon the foregoing findings of fact, the court concludes the law to be as follows:

I. That all of the persons specifically named as defendants in this action have been duly served and are now properly before this court; that all the other citizens, residents and freeholders of the city of Raleigh and the county of Wake, and elsewhere, who constitute the public in general and who have or may claim to have an interest in the controversial matters involved in this action, either generally as citizens and/or specifically as individual property owners, have been lawfully and properly made parties to this action, and have been duly served

with summons by publication, and are now properly before this court, including all such above described persons as may be incapacitated or under other disability, and who are represented by T. Lacy Williams, guardian ad litem, and said persons, therefore, are bound by this decree.

II. That the court has jurisdiction of this action and all the parties defendant, by reason of the power conferred upon it by chapter 102, of the Public Laws enacted by the General Assembly of North Carolina at its regular session in 1931, and known as 'The Uniform Declaratory Judgment Act.'

III. That the plaintiff, Carolina Power and Light Company, and the defendant, city of Raleigh, were lawfully authorized to enter into the contract hereinbefore referred to dated 28 November, 1931, in reference to substituting motor buses for electric street cars, and that said contract for substitution, and all its provisions, do not in any way constitute a new franchise between the contracting parties, but is a mere detail as to the method and mode of conducting the portions of the public transportation system affected by said contract for the best interests of the public, all under the authority, and without any impairment of the other rights contained in the franchise issued by the city of Raleigh on 24 May, 1905, to the Raleigh Electric Company, and under which the plaintiff, Carolina Power and Light Company is now operating. That said contract is a valid, binding and subsisting obligation between the city of Raleigh and the Carolina Power and Light Company, and as such is fully binding upon the contracting parties, and as well, also, upon all citizens and property owners of the city of Raleigh, subject to the conditions for the performance on the part of the Carolina Power and Light Company as alleged in the complaint, and as set forth in finding of fact No. 4.

IV. That the Corporation Commission of North Carolina is now, and at the time of the institution of the proceeding before it in reference to the matter in controversy, was duly vested with power and authority to hear and determine said matters, and to issue the order of 7 January, 1932, and the amendment to said order dated 4 November, 1932, under which said orders all of the defendants specifically named in this action, and all unknown defendants are bound. That all the residents of the city of Raleigh and the county of Wake, and all property owners residing in said city, county or elsewhere, have neither the right to restrain the Carolina Power and Light Company from abandoning and/or removing its street car line in question; nor have they any right, after the same is abandoned, and/or removed, to obtain a mandamus or mandatory injunction requiring its reëstablishment and a resumption of operations; nor have they any right to recover of the said Carolina Power and Light

Company any damages of any nature whatsoever on account of the abandonment and/or removal of said street car line.

V. That there is no appeal now pending by M. A. Rushton from the Corporation Commission's said order, and all the rights and interests of the said Rushton are now before the court in this action.

It is, therefore, ordered and adjudged that the contract entered into by and between the Carolina Power and Light Company and the city of Raleigh, dated 28 November, 1931, is a valid, binding and subsisting obligation between the city of Raleigh and Carolina Power and Light Company, and as such is binding upon the contracting parties, as well, also, as the citizens and property owners of the city of Raleigh, subject to the conditions of performance on the part of the Carolina Power and Light Company as alleged in the complaint and as set forth in finding of fact No. 4. That the orders of the Corporation Commission are in all respects lawful and are binding upon all citizens, residents and property owners, both within and without the city of Raleigh.

It is further ordered and adjudged that the Carolina Power and Light Company be, and it is hereby, permitted to comply with the terms of said contract entered into by and between it and the city of Raleigh, dated 28 November, 1931, and with the order of the Corporation Commission dated 7 January, 1932, as amended by the order of November, 1932.

It is further ordered and adjudged that none of the defendants have any right to, in any manner, either to interfere with the Carolina Power and Light Company in the removal and/or abandonment of its said Glenwood Avenue street car line, and the substitution of motor bus transportation therefor, in accordance with the terms of said contract and said orders of the Corporation Commission; or to procure an injunction restraining said Carolina Power and Light Company in the performance of said acts; or to obtain a mandamus or mandatory injunction to compel said Carolina Power and Light Company to reestablish and/or resume operation of said Glenwood Avenue street car line after its abandonment and/or removal; or to recover damages of any nature on account of a compliance with said contract and orders.

It is further ordered and adjudged that the said contract of 28 November, 1931, between the city of Raleigh and Carolina Power and Light Company, and all rights, powers and duties arising thereunder, is only an amendment to the franchise granted by the city of Raleigh on 24 May, 1905, to the Raleigh Electric Company and now being operated under and by Carolina Power and Light Company, and that said contract is in no particular a new franchise either within the meaning of the charter of the city of Raleigh, or within the laws of the State of

North Carolina, and is not a matter requiring approval by a vote of the people under the charter of the city of Raleigh enacted by the Legislature of 1913; that the rights, powers, and duties provided for in said contract only involve details as to the method and manner of operating the affected portion of the public transportation system for the best interests of the public, and in no other way changes or impairs any rights under said franchise as to either party hereto, other than as provided for in said contract of 28 November, 1931.

It is further ordered that the costs of this action be taxed against Carolina Power and Light Company, by the clerk.

This 4 November, 1932. N. A. SINCLAIR, *Judge Presiding.*"

From the foregoing judgment, the defendants, C. A. Gosney, M. A. Rushton, and T. Lacy Williams, guardian ad litem, appealed to the Supreme Court.

A. Y. Arledge, Pou & Pou and W. H. Weatherspoon for plaintiff.
Murray Allen for defendants, C. A. Gosney and M. A. Rushton.
T. Lacy Williams in personam.

CONNOR, J. This action was instituted in the Superior Court of Wake County under the authority and pursuant to the provisions of chapter 102, Public Laws of North Carolina, 1931, which is entitled, "An act to authorize declaratory judgments."

In *Walker v. Phelps,* 202 N. C., 344, 163 S. E., 726, speaking of this act, we said: "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." A liberal construction of the act to the end that its purpose may be accomplished, is manifestly desirable; otherwise, the courts, in its administration, may not be able to afford the relief contemplated by its enactment. However, there are well settled and inherent limitations upon judicial power, which the courts may not transcend.

An *ex parte* proceeding in which the petitioner alone seeks to have his social status only determined by judicial decree is not within the scope of the act. *In re Eubanks,* 202 N. C., 357, 162 S. E., 759. Nor can an action instituted under the authority and pursuant to the provisions of the act be maintained, when only a theoretical problem is presented for judicial solution. *Poore v. Poore,* 201 N. C., 791, 161 S. E., 532. In the opinion in the last cited case it is said that "it is no part of the functions of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions, or to answer moot

questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of an academic matter."

Where, however, it appears from the allegations of the complaint in an action instituted under the authority and pursuant to the provisions of the act, (1) that a real controversy exists between or among the parties to the action; (2) that such controversy arises out of opposing contentions of the parties, made in good faith, as to the validity or construction of a deed, will or contract in writing, or as to the validity or construction of a statute, or municipal ordinance, contract or franchise; and (3) that the parties to the action have or may have legal rights, or are or may be under legal liabilities which are involved in the controversy, and may be determined by a judgment or decree in the action, the court has jurisdiction, and on the facts admitted in the pleadings or established at the trial, may render judgment, declaring the rights and liabilities of the respective parties, as between or among themselves, and affording the relief to which the parties are entitled under the judgment.

The distinction between the statute which authorizes the submission of a controversy without action (C. S., 626) and the statute under which this action was instituted, is obvious. It need not be alleged in the complaint or shown at the trial, in order that the court shall have jurisdiction of an action instituted under the authority and pursuant to the provisions of chapter 102, Public Laws of North Carolina, 1931, that the question in difference between the parties, is one which might be the subject of a civil action, at the time the action was instituted. It is not required for purposes of jurisdiction that the plaintiff shall allege or show that his rights have been invaded or violated by the defendants, or that the defendants have incurred liability to him, prior to the commencement of the action. It is required only that the plaintiff shall allege in his complaint and show at the trial, that a real controversy, arising out of their opposing contentions as to their respective legal rights and liabilities under a deed, will or contract in writing, or under a statute, municipal ordinance, contract or franchise, exists between or among the parties, and that the relief prayed for will make certain that which is uncertain and secure that which is insecure. See *Walker v. Phelps,* 202 N. C., 344, 163 S. E., 727. In that case, a declaratory judgment rendered in the action which was instituted in the Superior Court of Washington County under the authority and pursuant to the provisions of chapter 102, Public Laws of North Carolina, 1931, was affirmed by this Court.

It appears from the allegations of the complaint in this action that the plaintiff, a public service corporation, interested not only in the preserva-

tion, without impairment, of its rights under its franchise, granted by the defendant, city of Raleigh, but also in the means and methods by which it may render transportation service to the public, as it is required to do by its franchise, is entitled to the relief provided by chapter 102, Public Laws of North Carolina, 1931. There is a real controversy between the plaintiff and the defendants as to their respective rights and liabilities, which grows out of their opposing contentions as to the validity and construction of the contract entered into by and between the plaintiff and the defendant, city of Raleigh, and of the orders made by the Corporation Commission of North Carolina, both the said contract and the said orders providing for the substitution by the plaintiff of its street cars, operated by means of electricity over and along its tracks on Glenwood Avenue in the city of Raleigh, and beyond the city limits, by motor buses to be operated over Glenwood Avenue, and beyond the city limits, by means of gasoline engines. It was admitted by the parties to the action, both in the pleadings filed, and at the trial, and was found by the court as a fact, that "the substituted bus service, in lieu of said street car line, as provided for in said Corporation Commission's orders and in said contract with the city of Raleigh, will more adequately and conveniently serve the public transportation needs in the territory affected thereby than would the continued operation of said electric railway cars."

The plaintiff, Carolina Power and Light Company, has heretofore constructed, and now maintains, over and along certain streets of the city of Raleigh, and beyond the corporate limits of said city to a point at or near the property of the defendant, Carolina Country Club, street car tracks, over which the said plaintiff operates cars propelled by electricity, which is transmitted to said cars by means of overhead trolley wires strung on poles erected on said streets, for the transportation, for hire, of passengers and freight. It carries on its business in that respect as a common carrier by means of its electric street railway system, under a franchise granted by the defendant, city of Raleigh, on 24 May, 1905. It is now proposed, in the interest of better service to the public, that the plaintiff shall discontinue the operation of its electric street cars on Glenwood Avenue, one of the streets of the city of Raleigh, and beyond the corporate limits of the said city to the Carolina Country Club, and shall abandon and/or remove its tracks, wires, and poles from Glenwood Avenue, and certain streets leading into said avenue, and that upon so doing the said plaintiff shall substitute for said electric street cars, motor buses which it shall maintain and operate within the city of Raleigh under its franchise, and beyond the corporate limits of said city, under the orders of the Corporation Commission. To that end,

a contract was entered into by and between the plaintiff and the defendant, city of Raleigh, on 28 November, 1931, and an order was made in a proceeding instituted by the plaintiff by the Corporation Commission of North Carolina, on or about 7 January, 1932, which was amended by a subsequent order made on or about 4 November, 1932.

The opposing contentions of the plaintiff and the defendants, with respect to the validity and proper construction of said contract and orders, are alleged in the complaint, and admitted in the answers filed. At the trial, on the facts admitted, and in accordance with its conclusions of law, the court adjudged "that the contract entered into by and between the Carolina Power and Light Company and the city of Raleigh, dated 28 November, 1931, is a valid, binding and subsisting obligation between the city of Raleigh and the Carolina Power and Light Company, and as such is binding upon the contracting parties, as well, also, upon the citizens and property owners of the city of Raleigh, subject to the conditions of performance on the part of the Carolina Power and Light Company as alleged in the complaint, and as set forth in finding of fact No. 4."

The court further adjudged "that the orders of the Corporation Commission are in all respects lawful, and are binding upon all citizens, residents and property owners, both within and without the city of Raleigh."

The court further ordered and adjudged "that the Carolina Power and Light Company, be and it is permitted to comply with the terms of said contract entered into between it and the city of Raleigh, dated 28 November, 1931, and with the order of the Corporation Commission dated 7 January, 1932, as amended by the order dated 4 November, 1932," and that "none of the defendants has any right to, in any manner, either to interfere with the Carolina Power and Light Company in the removal and/or abandonment of its said Glenwood Avenue street car line, and the substitution of motor bus transportation therefor, in accordance with the terms of said contract and said orders of the Corporation Commission; or to procure an injunction restraining said Carolina Power and Light Company in the performance of said acts; or to obtain a mandamus or mandatory injunction to compel said Carolina Power and Light Company to reëstablish and/or resume operation of said Glenwood Avenue street car line, after its abandonment and/or removal; or to recover damages of any nature, on account of a compliance with said contract and orders."

The defendant, C. A. Gosney, who is a resident and freeholder of the city of Raleigh, residing within said city, and as such a representative of all other residents and freeholders of said city, residing therein; the

defendant, M. A. Rushton, who is a resident and freeholder of Wake County, residing without the city of Raleigh, and in the vicinity of Carolina Country Club, and as such a representative of all other residents and freeholders of Wake County, residing without the city of Raleigh, and in the vicinity of the Carolina Country Club; and the defendant, T. Lacy Williams, guardian ad litem for all citizens, residents, and freeholders of the city of Raleigh or of Wake County, not specifically named in the complaint, for the reason that their names were unknown to the plaintiff, who are or may be under legal disability, excepted to the judgment, and on their appeal to this Court, contend that there is error therein. There was no exception to the judgment or appeal therefrom on behalf of the other defendants, either of those who are specifically named, or of those who are not so named in the complaint.

The appealing defendants contend (1) that the contract entered into by and between the Carolina Power and Light Company, and the city of Raleigh, dated 28 November, 1931, is void, and that no rights conferred by said contract can be lawfully exercised by the plaintiff, Carolina Power and Light Company, for the reason that said contract on its face purports to be and is a franchise and has not been approved by the qualified voters of the city of Raleigh, as required by a provision in the charter of said city; and (2) that the order of the Corporation Commission of North Carolina, dated 7 January, 1932, and amended by the order dated 4 November, 1932, is void, for the reason that said Corporation Commission had no power, by said orders, to authorize the Carolina Power and Light Company to abandon the operation, within or without the city of Raleigh, of its electric street railway cars, and to substitute therefor the operation of motor buses.

These are the only contentions made in this Court by which the validity of the judgment of the Superior Court of Wake County in this action is brought in question. Neither of these contentions can be sustained. There is no error in the judgment adjudging in effect, (1) that the contract entered into by and between the Carolina Power and Light Company and the city of Raleigh, and the orders of the Corporation Commission, are valid; (2) that as authorized by said contract and orders, and subject to their provisions, the plaintiff, Carolina Power and Light Company has the right to abandon, without impairment of its present franchise rights, the operation of its electric street railway on Glenwood Avenue in the city of Raleigh, and beyond the limits of said city to a point at or near the property of the Carolina Country Club, and to substitute therefor motor buses, which the plaintiff shall maintain and operate within the city of Raleigh, under its present franchise, and beyond the city limits under the orders of the Corporation

Commission; and (3) that the defendants have no right to interfere with the lawful exercise by the plaintiff of its rights conferred by said contract and said orders.

The situation presented by this case is novel—at least in this State. We have no decisions of this Court which may be cited in support of the judgment, but the principle on which the judgment was rendered is well stated in *Russell v. Kentucky Utilities Company,* 231 Ky., 820, 22 S. W. (2d) 289, 66 A. L. R., 1238. The fact situation and the questions of law involved in that case are almost identical with those presented and involved in the instant case. In the opinion in that case, it is said:

"The purpose and object of the franchise involved in this case was to provide for the rapid and convenient transportation of the public. That was the basic right granted. The motive power or method of propulsion of the vehicle is subordinate or subsidiary. It is but the means of making the franchise effective. Is the substitution of cars running on rubber tires, free from limitations of steel rails and trolley wires, and propelled by internal combustion engines, in place of cars with metal wheels without tires on fixed rails, and propelled by electric motors supplied with power through overhead wires, such a radical departure from the purposes and objects and terms of the original franchise as to preclude the change? If buses be used for the transportation of passengers, there is no additional servitude on the streets or obstructions to the free and safe use of the streets by other vehicles. On the contrary, the streets are relieved of trolly poles and wires and the imbedded rails, more or less dangerous. It can hardly be said that the operation of the buses is more dangerous or obstructive than the operation of electric street cars on the thoroughfares. The problem is one of distinction between the essence in which the permanent value lies—the use of streets for transportation of passengers for hire—and the incidents of that franchisal right which are subject to change by agreement, viz., the facilities to be used."

Interesting questions as to the binding effect of the judgment of the Superior Court, in the event of certain contingencies which may hereafter arise, were suggested by counsel during the argument of this appeal, and are discussed in briefs filed in this Court by counsel for the appellee. We cannot now consider these questions for the purpose of undertaking to answer them, for the reason that they are not presented by exceptions to the judgment. It is sufficient to say that the assignments of error presented by the appellants on their appeal to this Court, have been considered, and that they are not sustained. The judgment is

Affirmed.

HENRY BAUCOM AND ALVIS BAUCOM v. FIRST NATIONAL BANK OF MONROE, INCORPORATED, TOWN OF BENTON HEIGHTS AND JOEL MYERS, JONAH WILLIAMS, J. WALTER HELMS, J. F. HELMS AND HOMER BAUCOM.

(Filed 4 January, 1933.)

1. Frauds, Statute of B a—Agreement relating to paving assessments held not contract affecting lands, and statute of frauds did not apply.

Lot owners in an incorporated town paid assessments for improvements on abutting streets, and afterwards sold their lots by warranty deeds to purchasers. Thereafter the State Highway Commission adopted this street as a part of the State Highway system and under authority of statute the Commission paid the town the value of the street improvements for the benefit of those who had paid the assessment or who had obligated themselves therefor. The town paid to the purchasers of the lots their proportionate share of the funds, and the original owners brought action to recover the amount. The defendants offered evidence of a parol agreement between the original owners and the purchasers, executed contemporaneously with the deeds, that should such reimbursement be made by the Highway Commission the amount should be paid to the purchasers: *Held*, the parol contemporaneous agreement did not pass, or purport to pass, any interest in land, and the statute of frauds is not applicable thereto, and testimony of the oral agreement was competent, the land trade being an executed contract.

2. Parties A c—Parties joined by order of court held not interveners.

Where parties are joined in an action by order of court they are not interveners, and are not subject to the principles of law applicable to interveners.

CIVIL ACTION, before *Warlick, J.*, at February Term, 1932, of UNION.

The plaintiffs owned certain lots in the town of Benton Heights. Prior to 1925, the town paved the street or road upon which the property of plaintiffs fronted, and levied an assessment amounting to $857.94. The plaintiffs paid said sum to the town. Thereafter the State Highway Commission adopted this paved street or road as a part of the State highway system, and it was rumored that the said Highway Commission would repay to the property owners the sums which they had previously paid to the town of Benton Heights for said improvements. On 14 May, 1925, plaintiffs agreed to convey to Walter Helms and Homer Baucom said land, and executed and delivered a deed for 196 feet thereof to said Helms and Baucom, and also, on the same date executed and delivered a deed to Thomas C. Griffin for 146½ feet of said land. The grantees in the deed of plaintiffs, to wit, Homer Baucom and Walter Helms, conveyed certain portions of the land to other parties, who are defendants in this suit. The agreement between the plaintiffs and Henry Bau-

com and J. Walter Helms, as narrated by said Helms, is substantially as follows: "There was an agreement between us and Mr. Baucom (plaintiff) whenever we purchased the land. He asked us $2,500 for the land, and I said, 'that is too much for the land,' and he said, 'Well, we have got $858.00 in paving,' and says, 'If you all will pay us $2,500 for the land you all can have the paving if it is ever paid back by the State, or if you sell it you can sell it to the parties you sell it to with the understanding they get it,' and that is the way we bought the land. We paid for the whole amount of land that they had over there, which was 412 feet less 50 feet that had already been sold to Homer Baucom before that." There was evidence that the defendants, Baucom and Helms, sold and conveyed portions of the land to other parties with the assurance that if the Highway Commission reimbursed the property owners for the amounts advanced in paving the street or road that the parties owning the land at the time of the repayment would be entitled thereto. There was also evidence to the contrary. The deeds were all warranty deeds and contained no mention or reference to the refund of the paving assessment.

Thereafter, the General Assembly of North Carolina enacted chapter 191, Private Laws, session 1927. This act in the preamble refers to "certain public spirited citizens of the town of Benton Heights," who obligated themselves "for the construction of a paved highway," etc., and section 1 of the act authorizes and directs the State Highway Commission "to pay over to the First National Bank of Monroe as treasurer of Union County from the allocated highway funds due Union County such amount as they may find to be the present value of the present paved highway. . . . And the said First National Bank of Monroe as treasurer of Union County is directed to disburse the sum so paid by the State Highway Commission to those citizens who pay or obligated themselves to pay for the construction of said paved highway, to be prorated among said citizens according to the amount so paid or obligated to be paid by them. The act went into effect 7 March, 1927. Thereafter, the First National Bank of Monroe received the money and paid the same to the town of Benton Heights, and the town of Benton Heights paid the money in controversy to the defendants, Myers, Williams, J. F. Helms, J. Walter Helms, and Homer Baucom.

Subsequently, on 21 August, 1931, the plaintiffs, who were the owners of the land at the time of the improvement, brought this suit against the First National Bank of Monroe, alleging that the money in controversy had been paid by the Highway Commission by authority of the act of the General Assembly above referred to, and that by virtue thereof the said bank was liable to them for said money, amounting to $706.43. The bank filed an answer admitting the receipt of the money, but alleged

that by virtue of order of the board of county commissioners of Union County it had turned the money over to the town of Benton Heights, and that said town had disbursed the same to the parties entitled thereto. The bank further alleged that if the plaintiffs ever owned any property facing on said paved highway, "that they had sold and transferred the same to parties unknown to this defendant and were no longer interested or entitled to any part of the funds paid to the First National Bank of Monroe as treasurer of Union County, . . . and that plaintiffs "were not the owners of the property and had made deed conveying all of their right, title, interest, and estate in said property to other parties." Thereupon, the bank made a motion that the town of Benton Heights and the defendants, Homer Baucom, J. F. Helms, Jonah Williams, J. Walter Helms and J. H. Myers, be made parties defendant. The motion of the bank having been granted and said defendants having been brought into court, filed answers. The town adopted the answer filed by the individual defendants as far as applicable. The individual defendants alleged, among other things, as a defense that the plaintiffs on 14 May, 1925, had sold the land to certain of the individual defendants and had agreed at the time of the sale that the amount expended by them for street paving, if the same should ever be refunded by the State, should belong to the grantees named in said deeds.

The following issues were submitted to the jury:

1. "Did the plaintiffs at the time of execution and delivery of deeds enter into a contemporaneous parol agreement with their grantees that any refunds on account of pavement should belong to the purchasers of the lands described in the deeds?"

2. "If not, in what amount is First National Bank indebted to plaintiffs?"

3. "Is plaintiffs' cause of action barred by the two-year statute of limitations?"

The jury answered the first issue "Yes," and did not answer the other issues.

From judgment upon the verdict plaintiffs appealed.

W. O. Lemmond and H. B. Adams for plaintiffs.

Vann & Milliken, Love & Parker and John C. Sikes for defendants.

BROGDEN, J. This is the case: The vendors conveyed certain land by warranty deed to the vendees and received from the latter the agreed price. The vendors at the time of the sale made an oral agreement with the vendees that if a certain sum of money theretofore paid by the vendors for paving a street or road abutting the property, was thereafter refunded by the State Highway Commission, in such event said money

should belong to the vendees or owners of the land at the time of the refund. The fact status, consequently produces the vital question of law, and that is: Was the oral agreement with respect to the paving money within the statute of frauds? The plaintiffs objected to all testimony tending to prove the oral agreement as aforesaid, and assigned the admission thereof by the trial judge for error.

A correct conclusion with respect to the applicability of the statute of frauds must be reached by determining whether the oral agreement was a land trade or a contract affecting the disposition of money not then in existence, but which the parties hoped would eventually come into existence by act of the General Assembly of North Carolina. Obviously, the land trade was a completed transaction. The parties had agreed upon the purchase price. The deeds were executed and delivered, and the purchase price paid by the vendees and accepted by the vendors. No further act was contemplated by either of the parties with reference to the land. It was a closed transaction. Indeed, the plaintiffs are not attacking the deeds or challenging in any manner the sale of the land. They are suing for money, and that alone. The principle of law applicable to the facts was stated in *Michael v. Foil,* 100 N. C., 178, 6 S. E., 264, where it is written: "If the contract of sale was made subject to this agreement, as an inducement to the contract, the agreement, though in parol, may be enforced. The agreement did not pass, or purport to pass, any interest in land, and does not fall within the statute of frauds." See *Sprague v. Bond,* 108 N. C., 382, 135 S. E., 143; *Buie v. Kennedy,* 164 N. C., 290, 80 S. E., 445; *Newby v. Realty Co.,* 182 N. C., 34, 108 S. E., 323; *Stack v. Stack,* 202 N. C., 461, 163 S. E., 589. Moreover, the statute of frauds does not apply to executed contracts, and the land trade disclosed by this appeal was an executed contract. *Brinkley v. Brinkley,* 128 N. C., 503, 39 S. E., 38; *Rogers v. Lumber Co.,* 154 N. C., 108, 69 S. E., 788; *Keith v. Kennedy,* 194 N. C., 784, 140 S. E., 721.

The plaintiffs rely upon *Hall v. Fisher,* 126 N. C., 205, 35 S. E., 425. The consideration for the agreement in the *Hall case* was the procurement of an easement. An easement is in itself an interest in land, and hence the principle announced in that case does not control the present appeal.

The plaintiffs insist that the defendants other than the First National Bank of Monroe were interveners, but the record discloses that they were brought into the case by order of court, and hence the principles of law with respect to the interveners is not applicable. McIntosh North Carolina Practice & Procedure, page 246, section 260; *Guthrie v. Durham,* 168 N. C., 573, 84 S. E., 859.

No error.

STATE v. C. D. STINNETT.

(Filed 4 January, 1933.)

1. Larceny A a—Agent of finance company repossessing truck without knowledge or consent of defaulting purchaser held not guilty of larceny.

A finance company owned and held a conditional sales contract on a truck, which contract provided for repossession by the company upon default of the purchaser in making any of the monthly installments on the purchase price. The purchaser defaulted in some of his payments, and an agent of the finance company saw the truck standing in the street, and without the knowledge of the purchaser drove it to a garage to be held until payment was made in accordance with the terms of the contract: *Held,* the agent of the finance company was not guilty of larceny.

2. Trespass C a—Finance company agent's repossession of truck in absence of owner held not to constitute criminal trespass.

A criminal trespass involves a breach of the peace or circumstances manifestly and directly tending to it, and evidence tending to show that the agent of a finance company, which owned and held a conditional sales contract on a truck, saw the truck parked on the street, and, the owner being in default, drove the truck away in the absence of the owner and without his knowledge or consent, and took the truck to a garage to be held until payment according to the terms of the conditional sales contract, is held insufficient to establish criminal trespass on the part of the agent, and an instruction to the contrary is held for reversible error.

3. Sales I d—Owner and holder of conditional sales contract held entitled to repossess property if taking does not involve trespass.

A title retaining contract of sale of a truck which gives the seller or his assignee the right to repossess the truck upon default of the purchaser to make the monthly payments in accordance with its terms, is in effect a chattel mortgage, giving the owner and holder of the conditional sales contract the right to take the property if such taking does not involve a trespass as defined by the decisions.

4. Indictment E c—Indictment for larceny and receiving will not support conviction of driving car without knowledge or consent of owner.

An indictment charging larceny and receiving does not include a charge of driving a motor vehicle without the knowledge or consent of the owner, C. S., 2621(32), and a defendant charged in the indictment only with larceny and receiving may not be convicted under C. S., 2621(32).

CRIMINAL ACTION, before *Barnhill, J.,* at August Term, 1932, of ORANGE.

On 23 June, 1931, O. D. Neville purchased from the McMillan Motor Company a truck, paying therefor $150.00 in cash, and securing the

balance by the execution and delivery of a conditional sales contract providing monthly payments of $42.00 each. This contract, among other clauses, contains the following: "Time is of the essence of this contract, and if the purchaser default in complying with the terms hereof, or the seller deems the property in danger of misuse or confiscation, the seller or any sheriff or other officer of the law may take immediate possession of said property without demand (possession after default being unlawful), including any equipment, and for this purpose the seller may enter upon the premises where said property may be and remove same," etc. The contract was assigned to the General Motors Acceptance Corporation, and on 30 May, 1932, payments were in default in the sum of $84.00 as provided in the contract. On said date Neville parked the truck on a street in the town of Carrboro, N. C., in front of his residence and left the switch key in the switch. On the same day the defendant "a field representative of General Motors Acceptance Corporation," was looking for the said O. D. Neville, did not find the said Neville, but did find the said truck on the street in Carrboro in front of said Neville's home. The said Stinnett got in said truck, drove it to McMillan Motor Company's garage and there stored it. There was no one present other than the said Stinnett at the time the said truck was moved, . . . and no violence was used. The said Stinnett instructed the Motor Company to deliver the said truck to the said Neville upon payment of balance due on said contract of $159.00. On 31 May, 1932, a warrant charging the said Stinnett with the larceny of the truck was issued, and the sheriff of Orange County also took possession of the truck. The car was taken "without the knowledge or consent of Neville and driven by Stinnett from Neville's house to McMillan Motor Company's place of business, a distance of about a mile. It was taken for the purpose of enforcing the lien." The bill of indictment charged the defendant with larceny and receiving.

The trial judge instructed the jury that "you cannot return a verdict of guilty against the defendant as charged in the bill of indictment." The jury was further instructed: "However, every larceny includes and embraces a trespass, and the court charges you that if you believe the facts agreed upon, and find therefrom beyond a reasonable doubt that the prosecuting witness parked his car upon the streets of Chapel Hill, and that the defendant in the absence of the prosecuting witness, without notice to him and without his knowledge and consent, took the said car and drove it away with intent to deprive the owner of the use thereof and to have the same applied to the satisfaction of the lien of defendant's employer held thereon, the defendant would be guilty of a trespass and it would be your duty to so find."

The jury returned a verdict "guilty of trespass and operating a motor vehicle without the consent of the owner."

From judgment, imposing a fine of $25.00, the defendant appealed.

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

Basil M. Watkins for defendant.

BROGDEN, J. The agent of an automobile finance corporation, the owner and holder of a conditional sales contract covering a truck, observes the purchaser of the truck, who is in default, leave the truck in a public street in front of his residence and go into his home. Thereupon the agent steps into the truck and drives it away to a garage and proposes to hold the same for the finance company until the balance in default is paid. The foregoing fact-status produces this question of law: Does such act of the agent constitute larceny or criminal trespass as defined and contemplated by law?

The trial judge ruled correctly in holding that the facts did not constitute larceny. The bill of indictment charged larceny and receiving, and nothing more. The case proceeded to judgment upon the theory of a criminal trespass. It was said in *S. v. Woodward,* 119 N. C., 836, 25 S. E., 868: "It is sometimes not easy to draw the line of demarcation between what are criminal trespasses and what are only civil trespasses. It is said that to make a forcible trespass (criminal and indictable) 'there must be actual violence used, or such demonstration of force as is calculated to intimidate or tend to a breach of the peace. It is not necessary that the party be actually put in fear.'" The distinction between the two gave frequent concern to the judges of a former generation. For instance, *Ruffin, J.,* writing in *S. v. Mills,* 13 N. C., 420, said: "The objection to the indictment is founded on the position that at common law no trespass either on lands or chattels was indictable without breach of the peace; and that as to chattels, so the law now remains. I do not suppose, that an actual breach of the peace is necessary to make a trespass a crime. But certainly it must be something more than a mere civil injury, or that degree of force, which is expressed by the terms *vi et armis.*" *Pearson, J.,* in *S. v. McCauless,* 31 N. C., 375, said: "The gist of the offense of forcible trespass is a high-handed invasion of the actual possession of another, he being present—title is not drawn in question." *Ruffin, C. J.,* commenting upon *S. v. Mills, supra,* in *S. v. Love,* 19 N. C., 267, declared: "The Court consequently held, in *S. v. Mills,* 2 Dev., 420, that an actual breach of the peace was not necessary to render such a trespass a crime. But we held at the same time, that

to constitute it a public offense, it must appear to involve a breach of the peace, or manifestly and directly tend to it; and therefore, that at the least, the taking must be in the presence of the owner, to his terror, or against his will. The Court is unwilling to extend the principle which has been adopted, and which must as yet be called new; or to weaken the limitation upon it which has just been mentioned, and was also acted on in the case of *McDowell and Gray,* 1 Hawks, 449. A further relaxation would render it difficult to discriminate between a civil trespass and a criminal one." Subsequent decisions adopt and sanction the view expressed by former judges. *S. v. McAdden,* 71 N. C., 207; *S. v. Laney,* 87 N. C., 535; *S. v. Conder,* 126 N. C., 985, 35 S. E., 249; *S. v. Holder,* 188 N. C., 561, 125 S. E., 113.

Moreover, it has been definitely determined that a title retaining contract of the type disclosed by the present record, is in effect a chattel mortgage. *Harris v. R. R.,* 190 N. C., 480, 130 S. E., 319. The law confers upon a mortgagee the right of possession which he may exercise before or after default, provided, of course, the taking of the property does not involve a trespass as defined by the decisions. This view was expressed in *Jackson v. Hall,* 84 N. C., 490. In that case a mortgagee seized a mule, harness and carry-all in the street without the knowledge or consent of the mortgagor. The Court said: "While the defendant invaded no right of the mortgagor in taking and keeping possession until the day of default, whether the property was or was not in danger of being lost or injured, yet he was, meanwhile, acting as trustee, bound to exercise that diligence and care expected of one in the preservation and management of his own property, and to account not only for profits actually received, but for the value of any reasonable and prudent use to which it could have been put without detriment to the property itself," etc. An examination of the foregoing decisions and others of like tenor leads to the conclusion that the instruction given by the trial judge was erroneous.

A perusal of the entire charge discloses that the jury was instructed also to consider the statute "which makes it unlawful for a person to operate a motor vehicle of another person without the knowledge and consent of the owner," etc. However, a violation of this statute, which is C. S., 2621, subsection 32, was not laid in the bill of indictment, and no person can be convicted of crime unless such crime is included in the bill. While our statute affords ample protection to purchasers of trucks and automobiles from seizure by stealth and lying in wait by agents of finance corporations, notwithstanding a defendant charged with crime in our courts, must be tried upon a proper charge properly laid and preferred.

Reversed.

J. S. ARMSTRONG v. JULIAN PRICE, TRUSTEE, AND JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 4 January, 1933.)

1. Judgments G a—Judgment creditor has lien on lands of judgment debtor, but no interest in insurance policies on the property.

A judgment creditor has only a lien on the lands of the judgment debtor which lien is subject to prior registered encumbrances, and where the judgment debtor has taken out policies of fire insurance on his property for the benefit of the mortgagee in a prior registered encumbrance, the judgment creditor has no right, title or interest in such policies or the proceeds thereof.

2. Mortgages G a—Payment of insurance does not cancel mortgage when parties agree that proceeds should be used to rebuild property.

Where a mortgagor takes out a policy of fire insurance on his property in accordance with an agreement in the mortgage that insurance should be taken out on the property and assigned to the mortgagee, and that the proceeds thereof, in case of loss, should be used to pay the mortgage bond, and thereafter the property is destroyed by fire and the amount of loss paid by the insurance company by drafts payable to the mortgagee and mortgagor, and by agreement of the parties the proceeds of the policies are not used to pay off the bond secured by the mortgage, but are used in the erection of another building upon the land: *Held*, a judgment creditor of the mortgagor under a judgment docketed subsequent to the registration of the mortgage has no right, title or interest in the proceeds of the policies, and the prior mortgage remains outstanding under the agreement of the mortgagee and mortgagor, and is superior to the lien of the judgment, and a purchaser of the property at an execution sale under the judgment may not maintain that he is entitled to the cancellation of the mortgage as a cloud on his title.

APPEAL by plaintiff from *Harris, J.*, at July Special Term, 1932, of LINCOLN. Affirmed.

This is an action to have a deed of trust, dated 23 December, 1925, and executed by W. E. Grigg and others to the defendant, Julian Price, trustee, adjudged a cloud on the title of plaintiff to the land described in the complaint, and conveyed to the plaintiff by deed dated 31 July, 1931, and ordered canceled, on the ground that the bond secured by said deed of trust and payable to the defendant, Jefferson Standard Life Insurance Company, has been paid and satisfied, as alleged in the complaint.

The defendants in their answer deny that the bond secured in the deed of trust has been paid and satisfied. They allege that said bond is now owned by the defendant, Jefferson Standard Life Insurance Company, and that said defendant by virtue of the deed of trust executed

to the defendant, Julian Price, trustee, has a lien on the land described in the complaint, which is prior to any right, title or estate which the plaintiff may have acquired to said land by the deed dated 31 July, 1931.

At the close of all the evidence, the defendants renewed their motion for judgment as of nonsuit, which was first made at the close of the evidence for the plaintiff, and then denied. The motion was allowed, and plaintiff duly excepted.

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

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

Brooks, Parker, Smith & Wharton, Kemp B. Nixon and A. L. Quickle for defendants.

CONNOR, J. On 23 December, 1925, W. E. Grigg and his wife, Kenneth Grigg and his wife, and Harold Grigg executed a deed of trust by which they conveyed to Julian Price, trustee, the land described in the complaint, for the purpose, as recited in said deed of trust, of securing the payment of their bond in the sum of $12,000, of even date therewith, payable to the Jefferson Standard Life Insurance Company. The consideration for said bond was money loaned by the said Jefferson Standard Life Insurance Company to the said W. E. Grigg, Kenneth Grigg and Harold Grigg. The bond bears interest from its date at the rate of six per cent per annum, payable semiannually. The principal of the bond is payable in installments, on 23 June and 23 December, of each year, the last installment being due on 23 December, 1935. The deed of trust was duly registered in the office of the register of deeds of Lincoln County on 21 January, 1926.

The land conveyed by the deed of trust is situated in the town of Lincolnton, Lincoln County, North Carolina. At the date of the execution of the deed of trust, there was located on this land a three-story brick building, which was well known as the Grigg store building.

It is stipulated and agreed in the deed of trust, that the parties of the first part "will effect and keep in force with a fire insurance company approved by the party of the third part, such amount of insurance against loss by fire upon the premises herein described as will be satisfactory to the party of the third part; and will keep the policy or policies therefor constantly assigned and delivered to the party of the third part as further security for the indebtedness hereby secured, with the right and power in said party of the third part to demand, receive and collect any and all money becoming payable thereunder, and to

apply the same toward the payment of the indebtedness hereby secured, unless same is otherwise paid."

Pursuant to the foregoing stipulation, policies of insurance, in the aggregate amount of $10,000, insuring the three-story brick building located on the land described in the deed of trust, against damage or destruction by fire, were procured by W. E. Grigg, Kenneth Grigg and Harold Grigg, and duly assigned and delivered to the Jefferson Standard Life Insurance Company.

On 31 June, 1927, Harold Grigg conveyed all his right, title and interest in the land described in the deed of trust, to Kenneth Grigg, who thereby became the owner in fee simple of said land, subject to the life estate of W. E. Grigg.

On 16 September, 1929, a judgment in favor of J. W. Armstrong and against W. E. Grigg and Kenneth Grigg, for the sum of $2,748, was duly docketed in the office of the clerk of the Superior Court of Lincoln County.

On 2 March, 1930, the three-story brick building located on the land described in the deed of trust, and covered by the policies of insurance procured pursuant to the stipulation contained therein, was destroyed by fire, resulting in a total loss. At the date of the fire, the amount due on the bond secured by the deed of trust was $9,268, with interest from 23 December, 1929. The money due under the policies on insurance, to wit: $10,000, was paid by drafts, payable to the order of W. E. Grigg and Kenneth Grigg, and the Jefferson Standard Life Insurance Company. These drafts were duly endorsed, and paid by the insurance companies.

It was agreed by and between W. E. Grigg and Kenneth Grigg, and the Jefferson Standard Life Insurance Company that the money paid to cover the loss by fire on the three-story building, should not be applied to the payment of the bond, but should be expended by W. E. Grigg and Kenneth Grigg, under the supervision of the Jefferson Standard Life Insurance Company, in the erection of another brick building on the land described in the deed of trust. Pursuant to this agreement, the total amount of money collected from the fire insurance companies was expended in the erection of a two-story brick building on said land.

Sometime prior to 31 July, 1931, an execution was issued on the judgment in favor of J. W. Armstrong and against W. E. Grigg and Kenneth Grigg, which had been docketed in the office of the clerk of the Superior Court of Lincoln County on 16 September, 1929. Under this execution, the land described in the deed of trust from W. E. Grigg and others to Julian Price, trustee, was sold by the sheriff of Lincoln County, and on 31 July, 1931, all the right, title and interest of W. E. Grigg and

Kenneth Grigg in and to said land, was conveyed by the sheriff of Lincoln County to J. S. Armstrong, who was the last and highest bidder at the sale in the sum of $10.00.

On the foregoing facts, shown by all the evidence at the trial, the jury could not have found that the money collected from the insurance companies to cover the loss resulting from the destruction by fire of the three-story brick building, was, in fact, or should have been, as a matter of law, applied to the payment of the bond secured by the deed of trust executed by W. E. Grigg and others to Julian Price, trustee.

J. W. Armstrong, whose judgment against W. E. Grigg and Kenneth Grigg, was docketed subsequent to the registration of the deed of trust, had only a lien on the land conveyed by the deed of trust. This lien was subject to the provisions of the deed of trust. He had no right, title or interest in the policies of fire insurance, or in the proceeds of said policies. *Byrd v. Insurance Co.*, 201 N. C., 407, 610 S. E., 458; *Street v. Oil Co.*, 201 N. C., 410, 160 S. E., 460. Such proceeds, when collected from the fire insurance companies, were subject to the agreement entered into by and between W. E. Grigg and Kenneth Grigg, and the Jefferson Standard Life Insurance Company, that they should not be applied to the payment of the bond secured by the deed of trust, but should be expended in the construction of a new building to take the place of the building which had been destroyed by fire. Jones on Mortgages, 8th ed., Vol. 1, sec. 503.

The plaintiff, J. S. Armstrong, as purchaser of the land described in the complaint, at the sale by the sheriff of Lincoln County under an execution to satisfy the judgment, is not entitled to the relief sought by him in this action. There was no error in the judgment dismissing the action as of nonsuit. The judgment is

Affirmed.

STATE v. TOM ELLIS, JR.

(Filed 4 January, 1933.)

1. Criminal Law L e—Admission of nonexpert testimony as to cause of death held harmless, there being expert testimony to same effect.

Where a nonexpert witness, after describing the wound, testifies that the deceased's death was caused by the "bullet that went through his head": *Held*, conceding that the testimony was technically within the exclusive field of experts, its admission was rendered harmless by the admission of subsequent testimony of a medical expert to the same effect.

2. Criminal Law G r — Admission of written statement of eye witness held not error although witness had previously made inconsistent statements.

Where an eye witness's narration of the circumstances of the killing of the deceased contains material variations or contradictions, and later he makes and signs a written statement and explains that his previous contradictions were due to fear of the defendant and that he wished to make a clean breast of it to the sheriff: *Held*, the written statement was competent evidence for the consideration of the jury.

3. Criminal Law I g—Instruction will be construed as a whole.

An instruction that the jury might consider the credibility of the witnesses, their prejudices, their means of knowing the facts, "or any other circumstances," will not be held for error for the use of the words "or any other circumstances" when construing the charge as a whole the other circumstances referred to were confined to the related evidence on the trial.

4. Same—Statement of contentions held supported by evidence.

Upon the trial for a homicide the judge's statement of the contention of the State, in his charge to the jury, relating to finding the body of the deceased at the instance of the defendant was excepted to on the ground that there was no evidence to support the contention: *Held*, under the facts of this case the evidence was sufficient to sustain the judge's statement of the contention.

5. Same—Charge held to sufficiently explain substantial features of this case.

In this case *held:* the charge of the court sufficiently pointed out and explained the substantive features of the case, and as to the subordinate features the prisoner should have aptly tendered prayers for special instructions, and an exception to the charge on the ground that it failed to comply with C. S., 564 is not sustained.

APPEAL by defendant from *Moore, J.*, at March Term, 1932, of DAVIE. No error.

The defendant was indicted for the murder of Willie Beauchamp and was convicted of murder in the second degree.

According to the State's evidence the defendant, the deceased, and Richmond Bailey were together when the homicide occurred. Bailey, testifying for the State, related the circumstances. He met the deceased at Advance about 8 o'clock Friday night, 19 February, 1932. At 11 o'clock they went to the home of the deceased for a short time and thence about midnight to one Hudson's. They stayed at Hudson's until one o'clock the next day when they started in the direction of Advance. They got some liquor at Hudson's and were drinking Friday night and Saturday morning. When they left there they had a quart in a bottle. They walked up the road and turning to the right near Ward's got a gallon of liquor in a straw stack. The deceased hid the liquor behind

a log in the woods. They walked on to a sawmill site and saw the defendant coming down the road in a Chrysler coupe. The car stopped; the defendant wanted some liquor; the deceased said he had a gallon in the woods. They went to the log and the defendant took a drink. He and the deceased had an argument about its being "copper liquor" and about his getting some of it "on what the deceased owed him." They went back through the woods, the defendant following the deceased and cursing. In his hand the defendant had a pistol, blue steel, black handle. They stopped among some pines. The deceased had the liquor and the defendant claimed it. The jug was on the ground; the deceased stooped to pick it up; the defendant said if he took it he would kill him. Beauchamp stooped again and the defendant shot him with the pistol. The ball entered the left side of the face, ranged downward and backward, and went out on the back of his head near the right ear. The defendant took the liquor and turning to Bailey said, "Let's take this and pull a big one tonight."

The defendant did not testify, but he offered evidence in explanation and contradiction, and insisted that he was not guilty of the crime. He introduced evidence of several inconsistent statements made by Bailey implicating others and exonerating the defendant. Bailey admitted having made a number of written statements and having refused to give the name of the defendant "until he told the truth about it," but said he was afraid of the defendant because he had threatened his life.

The deceased was killed in the late afternoon of 20 February. The body was found on the following Thursday.

From the judgment pronounced upon the verdict the defendant appealed, assigning error.

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

A. C. Bernard and B. C. Brock for defendant.

ADAMS, J. After describing the wound the first witness for the State testified that Beauchamp's death had been caused by "the bullet that went through his head." He had not qualified as an expert witness and for this reason the defendant excepted to the testimony. Considered in the light of all the evidence the conclusion of the witness seems to be self-evident; but conceding for the moment that his opinion is technically within the domain of expert evidence (*S. v. Jones*, 68 N. C., 443), we think the error, if any, was cured by testimony subsequently offered by the defendant. Dr. Greene, a witness for the defendant, made an examination of the dead body. He said the caliber of the pistol was

38 or 44, the diameter of the wound as large as that of a lead pencil, and the place of exit the size of a nickel. This wound, he asserted, could have produced instant death and the only other wound he found was not sufficient to kill. This is the defendant's evidence and from it only one deduction can be made: death was caused by the pistol shot. The first, second and thirteenth exceptions are therefore overruled. *S. v. Bowman,* 78 N. C., 509; *S. v. Stewart,* 156 N. C., 636.

Before the ninth day of March, Richmond Bailey, the principal witness for the State, had made several statements in regard to the homicide which were inconsistent, if not positively contradictory. He urged as a reason his fear of the defendant, who "with an anathema in the corner of his eye" had repeatedly stressed such reminders as these: "If you ever tell it, you have told your last" . . . "If you ever tell this, off goes your head." At the time mentioned Bailey told the sheriff he wanted to take back what he had previously said "in some particulars" and to make a clean breast of the whole matter. He then gave the officer a written, signed, and corrected statement of the facts which was read to the jury. The defendant excepted. The question arose in *S. v. Grier, ante,* 586, and was resolved against the contention of the appellant, the decision in that case disposing of the eighth and ninth exceptions.

The court instructed the jury that they were at liberty to consider the credibility of the witnesses, their interest in the result of the verdict, their sympathy, their prejudice, their means of knowing the facts, "or any other circumstances." The defendant excepted to the last clause on the ground that it includes all circumstances whether in evidence or not; but the objection is removed by other instructions restricting the deliberation of the jury to circumstances which, having been offered in evidence, tended to "throw light upon the matter." An exception of this sort must be considered in connection with the entire charge and is not to be determined by detaching clauses from their appropriate setting. *S. v. Exum,* 138 N. C., 600; *S. v. Tate,* 161 N. C., 280; *S. v. Lee,* 192 N. C., 225.

The twenty-second exception relates to the court's statement of a contention made by the State in reference to the finding of the dead body several days after the commission of the homicide. The basis of the exception is the alleged want of evidence upon which to rest the contention. The crucial point is whether there is evidence tending to show that the body was "discovered" at the instance of the defendant. Bailey testified: "We didn't have a conversation about the body going on, but we had one coming back. I don't know how he (the defendant) brought it up now, but he asked me a good one to tell to go in and find the body and keep him out of it; go in there and find it and say nothing about it,

and I told him I didn't know." Dr. Greene said: "I was one of the first ones to get to the scene where the dead body was found. Mr. Thomas Ellis, Sr., told me that there was a dead man up there in the woods. I was at Mr. Ellis's. Mrs. Charlie Ward and Mrs. Samuel Hege found the body. Mrs. Hege is Mr. Ellis's daughter." Upon consideration of all the evidence on this subject we are unable to say that there is none in support of the contention, at least so far as it concerns the defendant.

It is argued that the trial court disregarded the provisions of C. S., 564, particularly in failing to refer to an alleged combat between the deceased and the defendant before the shot was fired and in failing to apply the law to certain phases of the evidence. With respect to the evidence the charge is sufficient, and as to the instruction relating to manslaughter the defendant has no just cause of complaint. The charge points out and explains the substantive features of the case and in reference to those which were subordinate it was incumbent upon the defendant to make proper request for special instructions. *S. v. Merrick*, 171 N. C., 795; *S. v. O'Neal*, 187 N. C., 22; *S. v. Johnson*, 193 N. C., 701.

There are other exceptions, either formal or taken as a matter of precaution, which call for no special comment. We find

No error.

IN RE ASSESSMENT BY THE CORPORATION COMMISSION AGAINST THE STOCKHOLDERS OF THE BANK OF ROSE HILL, GURNEY P. HOOD, COMMISSIONER OF BANKS, BANK OF ROSE HILL, THE BANK OF DUPLIN, J. C. WILLIAMS, CHARLES TEACHEY, MAURY WARD, D. W. FUSSELL, HENRY FUSSELL, D. B. HERRING, G. W. BONEY, ET AL.

(Filed 29 June, 1932.)

APPEAL by stockholders, petitioners, from *Grady, J.*, at December Term, 1931, of DUPLIN. Reversed.

Geo. R. Ward for Gurney P. Hood, Commissioner of Banks, ex rel. Bank of Rose Hill and Bank of Duplin.

Butler & Butler for appealing stockholders.

PER CURIAM. The only exception and assignment of error on the part of the appealing stockholders, is to the judgment sustaining the demurrers and dismissing the stockholders' appeal and declaring the assessment on the stockholders valid. We think this is error and the

judgment should be reversed. From the pleadings as they now appear of record, we think that all matters in controversy should be settled in this action and all the rights of the appealing stockholders heard and determined. Such amendments to the pleadings as are necessary to the complete determination of this action, should be allowed. As to the question of jurisdiction, see *Corporation Commission v. Bank,* 199 N. C., 586. The judgment below is

Reversed.

ESTELLA SILER, ADMINISTRATRIX OF ELMINA SILER, v. JEFFERSON MOTORS, INCORPORATED.

(Filed 29 June, 1932.)

CIVIL ACTION, before *Harwood, Special Judge,* at November Term, 1931, of GUILFORD.

The defendant is engaged in the business of selling automobiles. On 1 March, 1930, a colored man named John Britton, came to the place of business of defendant and requested the use of a Hudson coupe belonging to defendant. Witness for plaintiff said: "He took it out to drive it just out on the road and back . . . to see how it would drive. He was going to see how it would drive to buy it. He had already made up his mind to buy it." . . .

In driving the car west on the Friendly road the said Britton negligently struck and killed plaintiff's intestate. All the evidence tended to show that the car was in good condition and there is no evidence to show that Britton was a careless or reckless driver. No agent of defendant was present in the car at the time of the injury.

At the conclusion of evidence for plaintiff judgment of nonsuit was entered, and the plaintiff appealed.

Frazier & Frazier for plaintiff.
Sapp & Sapp for defendant.

PER CURIAM. This case is governed and determined by the principles of law heretofore announced by this Court in *Holton v. Indemnity Co.,* 196 N. C., 348, 145 S. E., 679, and *Harts v. Chevrolet Co.,* 202 N. C., 807.

Affirmed.

MRS. JANE TABOR v. LABORERS BUILDING AND LOAN ASSOCIATION.

(Filed 29 June, 1932.)

APPEAL by defendant from *Sink, J.*, at November Term, 1931, of HENDERSON. No error.

This is an action by an aged widow who could not read or write, to recover of defendant $4,000 and interest from 1 July, 1930.

The following judgment was rendered on the verdict in the court below: "This cause coming on to be heard before his Honor, Judge H. Hoyle Sink, judge presiding, and a jury at the November Term, 1931, of the Superior Court of Henderson County, the following issues were submitted to the jury and answered as therein set out, to wit: (1) Was A. O. Jones, cashier of the First Bank and Trust Company at East Flat Rock, authorized by the defendant to solicit applications for stock in its association, and collect dues and act as its duly authorized agent as alleged in the complaint? Answer: Yes. (2) Did the plaintiff, Jane Tabor, authorize or instruct A. O. Jones to convert her Building and Loan stock and buy for her a certificate of deposit in the First Bank and Trust Company? Answer: No. (3) In what amount, if anything, is the plaintiff entitled to recover? Answer: $4,000, with interest from 20 February, 1930, at 5 per cent, less any interest payments made since that time. It is therefore ordered, adjudged and decreed that the plaintiff, Jane Tabor, have and recover of the defendant, Laborers Building and Loan Association the sum of four thousand dollars ($4,000) with interest thereon at 5 per cent from 20 February, 1930, less any interest payments in the sum of $150.00 made to plaintiff, Jane Tabor, since 20 February, 1930, until paid, together with the costs of this action to be taxed by the clerk. It is further ordered and adjudged that execution issue for the satisfaction of said debt, interest and costs."

Ewbank, Whitmire & Weeks and J. Robt. Martin for plaintiff.
G. H. Valentine and Shipman & Arledge for defendant.

PER CURIAM. From a careful reading of the record and the able briefs of the litigants, we can see no prejudicial or reversible error in the trial of this action in the court below. We think the evidence was of sufficient probative force to have been submitted to the jury, to support the issues which were submitted and the issues were material and determinative of the controversy. We see no error in law in the trial in the court below. The matter was one of fact for the jury to decide. In the judgment we find

No error.

ROY R. WINSTEAD v. I. D. THORP.

(Filed 14 September, 1932.)

APPEAL by defendant from *Cranmer, J.*, at February Term, 1932, of NASH.

Civil action to recover damages for an alleged negligent injury arising out of a collision between defendant's automobile, driven at the time by defendant's wife, and a truck, owned by John C. Cobb and operated by the plaintiff.

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of the plaintiff.

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

Alexander & Gold and Cooley & Bone for plaintiff.
Spruill & Spruill for defendant.

PER CURIAM. Although it appears that the truck, operated by the plaintiff, and the defendant's automobile approached an intersection at right angles, and the truck ran into the side of the defendant's car, striking it with considerable force, nevertheless, on conflicting evidence, the jury has exculpated the plaintiff from blame and found the defendant guilty of negligence which resulted in the collision. A different verdict might well have been rendered. Indeed, the owner of the truck, after investigating the matter, was satisfied of his liability, and has settled with the defendant for the injury done to his car. But it is not pleaded that the plaintiff participated in this settlement so as to bar his right of action. The record contains no valid exceptive assignment of error.

No error.

STATE v. KENNETH BATEMAN.

(Filed 14 September, 1932.)

APPEAL by defendant from *Cowper, Special Judge,* at February Term, 1932, of PASQUOTANK. No error.

This is a criminal action in which the defendant was convicted of an assault with a deadly weapon.

From judgment that he be confined in the county jail for a term of eight months, and assigned to work on the public roads, the defendant appealed to the Supreme Court.

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

Thomas J. Markham for the defendant.

PER CURIAM. The evidence at the trial of this action was properly submitted to the jury. It tended to show not only that the crime, as charged in the indictment, was committed, but also that the defendant is the person who assaulted the State's witnesses by shooting them with a gun. There was no error in the refusal of defendant's motion for judgment as of nonsuit. The judgment is affirmed.

No error.

BUXTON WHITE SEED COMPANY v. ROBERT T. COCHRAN AND COMPANY.

(Filed 14 September, 1932.)

Appeal and Error F c—Assignments of error in this case held defective. Assignments of error which do not indicate their relevancy to the controversy or show their pertinency to the questions sought to be presented are defective.

APPEAL by defendant from *Daniels, J.*, at February Term, 1932, of PASQUOTANK.

Civil action to recover damages for alleged breach of contract. Denial of liability interposed and counterclaim set up by defendant.

It appearing that an accounting was necessary, on motion of defendant, and over objection of plaintiff, a reference was ordered under the statute.

Both sides filed exceptions to the report of the referee, both tendered issues, and the plaintiff demanded a jury trial.

A jury trial was ordered, and upon the hearing, the plaintiff prevailed.

From the judgment on the verdict, the defendant appeals, assigning errors.

Ehringhaus & Hall for plaintiff.

J. H. LeRoy, Jr., for defendant.

PER CURIAM. The record contains eleven assignments of error of which the second and sixth may be taken as illustrative:

Defendant assigns error:

"2. For that the court admitted the evidence over defendant's objection as preserved in exceptions Nos. 2 and 3 (R. pp. 3 and 6)."

"6. For that the court excluded the competent and material evidence important to the defendant as specifically set out in each exception, as preserved by defendant's exceptions Nos. 24, 25, 26, 27, 29 and 30 (R. pp. 43, 44, 45, 46, 48, 49 and 50)."

These assignments of error are defective in that they give no indication of relevancy to the controversy; nor do they show any signs of pertinency to the questions sought to be presented. *Greene v. Dishman,* 202 N. C., 811; *Baker v. Clayton,* 202 N. C., 741. But notwithstanding their deficiency, a careful perusal of the record leaves us with the impression that the case has been tried in substantial conformity to the decisions on the subject.

No error.

KINGAN AND COMPANY, INCORPORATED, v. J. L. WILLIAMS.

(Filed 28 September, 1932.)

APPEAL by defendant from *Cranmer, J.,* at May Term, 1932, of PITT. No error.

Julius Brown for appellant.
W. A. Darden for appellee.

PER CURIAM. This is a civil action to recover an amount alleged to be due the plaintiff for goods sold and delivered to the defendant. The jury returned a verdict for the plaintiff in the sum of $193.24, with interest from 1 January, 1928.

We have considered the exceptions taken by the appellant and find none which entitles him to a new trial.

No error.

L. W. GODWIN, ADMINISTRATOR, v. BANK OF AURORA ET AL.

(Filed 5 October, 1932.)

APPEAL by plaintiff from *Cranmer, J.,* at May Term, 1932, of PITT.

Civil action by L. W. Godwin, administrator of the estate of Mary Gaskins, to recover $251.00, the amount on deposit in the Bank of Aurora to the credit of the deceased at the time of her death.

The defense was, that the money on deposit had been paid to W. A. Thompson, administrator.

John Hill Paylor and John B. Lewis for plaintiff.
J. B. James and MacLean & Rodman for defendants.

PER CURIAM. Mary Gaskins was the personal representative of her deceased husband, W. H. Gaskins, but died before completing the administration of his estate. W. A. Thompson was appointed administrator, *d. b. n.* of W. H. Gaskins' estate, and was paid the deposit in question. The case turns on whether the money on deposit with the defendant bank at the time of Mary Gaskins' death belonged to her individually or was held by her as the personal representative of her husband's estate. The evidence is equivocal, and requires the intervention of a jury to determine the issue.

Reversed.

LILLIE T. OETTINGER ET AL. v. CITY OF KINSTON.

(Filed 12 October, 1932.)

APPEAL by defendant from *Sinclair, J.*, at February Term, 1932, of LENOIR.

Civil action tried upon the following issues:

"1. Was the injury and damage to plaintiffs' property caused by the unlawful acts or omissions of the defendant, as alleged in the complaint? Answer: Yes.

2. What damage, if any, have the plaintiffs sustained by reason of such unlawful acts or omissions? Answer: $2,000."

From judgment on the verdict, the defendant appeals, assigning errors.

Wallace & White and Dawson & Jones for plaintiffs.
Sutton & Greene for defendant.

PER CURIAM. A careful perusal of the record leaves us with the impression that the case has been tried in substantial conformity to the decisions apposite, and that no reversible error has been made to appear.

The law on the subject has been settled in a number of cases, notably *Gore v. Wilmington,* 194 N. C., 450, 140 S. E., 71, and *Yowmans v. Hendersonville,* 175 N. C., 574, 96 S. E., 45.

No error.

BANK OF WAKE v. CLAUD SANDERS, AND EDGAR DUNSTON, ADMINISTRATOR OF C. D. DUNSTON, DECEASED.

(Filed 12 October, 1932.)

APPEAL by plaintiff from *Devin, J.*, at May Term, 1932, of WAKE. Affirmed.

This is an action on a note for $175.00, executed by defendant, Claud Sanders, and C. D. Dunston, intestate of the defendant, Edgar Dunston, administrator. The note is payable to the order of J. W. Mangum, and was negotiated to the plaintiff, by the endorsement of the payee, prior to its maturity. The allegation in the complaint that plaintiff is the holder in due course of the note is denied in the answer.

At the close of the evidence the court instructed the jury as follows: "Gentlemen of the jury, if you believe all the evidence as has been testified in this case, you will answer the issue, '$175.00 with interest from 26 April, 1929.'" The defendants excepted to this instruction.

The jury answered the issue, to wit: "In what amount, if any, are the defendants indebted to the plaintiff," as follows: "$175.00 with interest."

On motion of defendants, the judge, in his discretion, set aside the verdict, and ordered a new trial. Plaintiff appealed to the Supreme Court.

I. Beverly Lake for plaintiff.

J. B. Saintsing, Jr., and Clyde A. Douglass for defendants.

PER CURIAM. The question as to whether there was error in the instruction of the court to the jury, to which defendants duly excepted, is not presented on this appeal by plaintiff.

The power of the judge to set aside the verdict and order a new trial, in his discretion, is expressly recognized by statute. C. S., 591. The exercise of this power in the instant case is not subject to review by this Court.

"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. The power is an inherent one, and is regarded as essential to the proper administration of the law. It is not limited to cases where the verdict is found to be against the weight of the evidence, but extends to many others. While the necessity for exercising this discretion, in any given case, is not to be determined by the

mere inclination of the judge, but by a sound and enlightened judgment in an effort to attain the end of all law, namely, the doing of even and exact justice, we will yet not supervise it, except, perhaps, in extreme circumstances, not at all likely to arise; and it is therefore practically unlimited." *Settee v. R. R.*, 170 N. C., 365, 86 S. E., 1050, and quoted with approval in *Wolf v. Goldstein*, 192 N. C., 818, 135 S. E., 39. The order is

Affirmed.

CLAUDE B. WILLIAMS, ADMINISTRATOR OF THE ESTATE OF D. C. WILLIAMS, DECEASED, v. ROCKFISH MILLS, INCORPORATED, EMPLOYER, AND MARYLAND CASUALTY COMPANY, CARRIER.

(Filed 19 October, 1932.)

APPEAL by defendants from *Grady, J.*, at May Term, 1932, of CUMBERLAND. Affirmed.

Thos. A. Banks and S. Warren Bailey for appellants.
Edward S. Cook and E. C. Robinson for appellee.

PER CURIAM. This is an appeal from a judgment of the Superior Court sustaining an award of the Industrial Commission in behalf of the plaintiff. The intestate, D. C. Williams, in a collision of automobiles suffered injury which caused his death. The Industrial Commission found that his injury arose out of and in the course of his employment. This finding is contested by the appellant. There is evidence tending to sustain the findings upon which the award was based. The judgment of the Superior Court is

Affirmed.

STACY, C. J., and BROGDEN, J., dissenting.

THE CONSOLIDATED BANK OF McCOLL ET AL. v. SILAS N. McCALL ET AL.

(Filed 26 October, 1932.)

APPEAL by defendants from *Barnhill, J.*, at May Term, 1932, of ROBESON.

Civil action to recover on a promissory note executed by the defendants.

The defendants set up a counterclaim alleging usury and asked for an accounting.

There was a reference under the statute, and on exceptions to the referee's report, judgment was entered for the plaintiff. Defendants appeal, assigning errors.

John G. Proctor and W. H. Humphrey, Jr., for plaintiffs.
J. E. Carpenter for defendants.

PER CURIAM. No reversible error has been made to appear on the record, hence the judgment will be upheld.

Affirmed.

F. T. COLLINS v. J. A. VEAZY ET AL.

(Filed 26 October, 1932.)

APPEAL by plaintiff from *Small, J.*, at August Term, 1932, of HOKE. Affirmed.

This action involves an accounting between the plaintiff, a landlord, and the defendant, his tenant, and the intervener, who claims under an agricultural lien executed by the tenant, and a release by the landlord of his lien upon certain crops.

From judgment on the facts admitted in the pleadings and at the trial, the plaintiff appealed to the Supreme Court.

Arthur D. Gore and H. W. B. Whitley for plaintiff.
Lutterloh & Lilly for intervener.

PER CURIAM. We find no error in the trial of this action. The judgment is

Affirmed.

D. J. EVERETT v. NORTH CAROLINA STATE FAIR ASSOCIATION.

(Filed 26 October, 1932.)

APPEAL by plaintiff from *Devin, J.*, at February Term, 1932, of WAKE.

Proceeding under Workmen's Compensation Act to determine liability of defendant, as self-insurer, to plaintiff for injury by accident arising out of and in the course of his employment.

There was an award which was subsequently reduced, and from this subsequent ruling, the plaintiff appealed to the Superior Court, where the judgment of the Commission was affirmed. Plaintiff appeals.

Nimocks & Nimocks for plaintiff.
Attorney-General Brummitt and Assistant Attorney-General Siler for defendant.

PER CURIAM. The appeal was dismissed at the Spring Term, 202 N. C., 838, but reinstated on motion of plaintiff.

We find no error upon the merits of the appeal, hence the judgment will be upheld.

Affirmed.

F. A. HAYES v. CAROLINA AUTO SUPPLY HOUSE, INCORPORATED.

(Filed 2 November, 1932.)

APPEAL by defendant from *Daniels*, J., at March Term, 1932, of WAYNE.

Civil action to recover for alleged breach of exclusive right, granted the plaintiff by the defendant, to distribute Pennzoil products in certain counties of North Carolina.

From a verdict and judgment in favor of plaintiff, the defendant appeals, assigning errors.

B. F. Aycock and Kenneth C. Royall for plaintiff.
E. McA. Currie and Langston, Allen & Taylor for defendant.

PER CURIAM. On controverted issues of fact, involving different understanding and opposite contentions of the parties, the jury has found in favor of the plaintiff. A careful perusal of the record leaves us with the impression that the case has been tried in substantial conformity to the principles of law applicable and the authoritative decisions on the questions raised by the defendant's 207 exceptions and assignments of error. It is not to be expected that we should discuss the assignments *seriatim*, for, to do so, would require an opinion of intolerable length. *S. v. Lea, ante*, 13.

No error.

W. E. THOMPSON v. GURNEY P. HOOD, COMMISSIONER OF BANKS.

(Filed 2 November, 1932.)

Appeal and Error J c—Findings of fact are conclusive when supported by evidence.

The findings of fact by the referee, approved by the trial court, and supported by the evidence are conclusive on appeal.

APPEAL by plaintiff from *Barnhill, J.*, at August Term, 1932, of ORANGE. Affirmed.

This is an action to recover judgment for the amount due plaintiff by the Bank of Efland, which is now insolvent and in the hands of defendant for liquidation. The action was heard upon plaintiff's exceptions to the report of the referee. These exceptions were not sustained. The report was confirmed in all respects.

From judgment in accordance with the report of the referee, the plaintiff appealed to the Supreme Court.

S. M. Gattis, Jr., for plaintiff.
Graham & Sawyer for defendant.

PER CURIAM. There was sufficient evidence at the trial of this action to support the findings of fact made by the referee, and approved by the judge. These findings of fact are, therefore, conclusive.

"It is settled by all the decisions on the subject, with none to the contrary, that the findings of fact, made by a referee, and approved by the trial judge, are not subject to review on appeal, if they are supported by any competent evidence." *Kenney v. Hotel Co.*, 194 N. C., 44, 138 S. E., 349.

The judgment upon the facts set out in the report of the referee, is Affirmed.

IN THE MATTER OF H. C. SCALES, RESPONDENT.

(Filed 9 November, 1932.)

APPEAL by respondent from *Shaw, Emergency Judge,* at June Term, 1932, of FORSYTH. Affirmed.

Joe W. Johnson and S. E. Hall for respondent.
Attorney-General Brummitt and Assistant Attorney-General Seawell for the State.

PER CURIAM. In the Forsyth County Court it was adjudged that the respondent be attached for contempt growing out of his disobedience of a restraining order. In the Superior Court the appeal was dismissed and the respondent was committed to the custody of the sheriff. The judgment is

Affirmed.

NATIONAL DRUG COMPANY v. J. B. McCREARY, SHERIFF, AND CASEY MYERS, DEPUTY SHERIFF AND A. R. MYERS, SURETY.

(Filed 9 November, 1932.)

APPEAL by defendants from *Harding, J.*, at February Term, 1932, of FORSYTH. No error.

Judgment was rendered upon the following verdict and the defendants appealed:

Was the plaintiff injured by the negligence of the defendants in failing to serve the execution upon the Eureka Drug Company and levy upon the property of the Eureka Drug Company as alleged? Answer: Yes.

What damage, if any, is the plaintiff entitled to recover? Answer: $263.72.

Manly, Hendren & Womble for plaintiff.

Ellege & Wells and Fred S. Hutchins for defendants.

PER CURIAM. We find no error that would entitle the defendants to a nonsuit or a new trial.

No error.

MINNIE McKAMEY v. ANDREW BLAIR.

(Filed 23 November, 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.

CLARKSON, J., not sitting.

APPEAL by plaintiff from *Schenck, J.*, at February Special Term, 1932, of MECKLENBURG.

Civil action to recover damages for alleged negligent injury.

There was a verdict and judgment for the defendant, from which the plaintiff appeals, assigning errors.

G. T. Carswell and Joe W. Ervin for plaintiff.
Cansler & Cansler for defendant.

PER CURIAM. The Court being evenly divided in opinion, *Clarkson, J.*, not sitting, the judgment of the Superior Court is affirmed and stands as the decision in this case without becoming a precedent. *Nebel v. Nebel,* 201 N. C., 840, 161 S. E., 223; *Durham v. Lloyd,* 200 N. C., 803, 157 S. E., 136; *Gooch v. Tel. Co.,* 196 N. C., 823, 146 S. E., 803.

Affirmed.

CLARKSON, J., not sitting.

T. E. COX v. THE ATLANTIC JOINT STOCK LAND BANK OF RALEIGH.

(Filed 23 November, 1932.)

APPEAL by plaintiff from *Warlick, J.*, at June Term, 1932, of RICHMOND.

Civil action to recover $350.07 for lumber sold and delivered the defendant. The defendant set up in defense that a check for $340.52, drawn on the Commercial National Bank of Raleigh, N. C., was sent to the plaintiff 20 November, 1931, and was not deposited in time to be paid before the failure of said bank on 16 December following. A credit for this amount was thereafter demanded.

There was a verdict and judgment in favor of plaintiff for $9.55, from which the plaintiff appeals, assigning errors.

J. C. Sedberry for plaintiff.
J. L. Cockerham and McLean & Stacy for defendant.

PER CURIAM. The case seems to have been tried agreeably to the principles of law applicable and the decisions apposite. The record discloses no reversible error. Hence, the verdict and judgment will be upheld.

No error.

LEWIS PERRY v. CAROLINA BOTTLING COMPANY.

(Filed 30 November, 1932.)

APPEAL by defendant from *Barnhill, J.*, at March Term, 1932, of IREDELL. No error.

Grier, Grier & Joyner and E. M. Land for appellant.
Zeb V. Turlington and Hugh G. Mitchell for appellee.

PER CURIAM. The controversy between the parties involves issues of fact determinable by settled principles of law, in the application of which we find no error. *Perry v. Bottling Co.*, 196 N. C., 175; *S. c., ibid.*, 690; *Broom v. Bottling Co.*, 200 N. C., 55.

No error.

VENETTA BARBER, ADMINISTRATRIX OF ADAM BARBER, DECEASED, v. C. N. STEED.

(Filed 30 November, 1932.)

APPEAL by plaintiff from *MacRae, Special Judge,* at May Term, 1932, of MECKLENBURG.

Hiram P. Whitacre and Ralph V. Kidd for appellant.
W. G. Ginter and Uhlman S. Alexander for appellee.

PER CURIAM. The plaintiff's intestate was killed by the impact of an automobile driven by the defendant in an easterly direction between Charlotte and Albemarle on Highway 27 near its intersection with Highway 151 in Cabarrus County. Garman's Filling Station is situated west of the intersection and on the right-hand side of Highway 27 as one goes in the direction of Albemarle. The lights from the station shone out into the highway and across the intersection. The intestate was standing near the station on the edge of Highway 27 awaiting the arrival of a bus from Raleigh on which he intended to return to Charlotte. As the bus approached he waived his handkerchief as a signal for the driver to stop. There was evidence tending to show that he "got on the highway about two feet"; that while waving his handkerchief he was looking in the direction of the bus; that he did not look toward the west or in the direction from which the defendant's car was coming, and that

he had almost come to a stop when the defendant's car struck him and inflicted injuries causing his death.

There was evidence of the defendant's negligence and of the contributory negligence of the intestate, and the verdict established the negligence both of the defendant and of the intestate. The exceptions are addressed principally to alleged error relating to contributory negligence.

After due consideration of the oral argument and of the exhaustive briefs filed in behalf of the parties we have discovered no error which calls for interference with the verdict or the judgment.

No error.

MRS. MARY SPENCER v. W. T. HASSELL.

(Filed 30 November, 1932.)

APPEAL by plaintiff from *MacRae, Special Judge,* at May Special Term, 1932, of MECKLENBURG. No error.

This is an action to recover damages for personal injuries sustained by plaintiff, as the result of a rear-end collision between an automobile driven by the defendant, and the automobile in which plaintiff was riding with her husband.

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

From judgment that plaintiff take nothing by her action, and taxing her with the costs, the plaintiff appealed to the Supreme Court.

Cochran & McClenaghan and J. Laurence Jones for plaintiff.
Ralph V. Kidd for defendant.

PER CURIAM. There was evidence at the trial of this action tending to show, as contended by the plaintiff, that the collision which resulted in injuries to the plaintiff, was caused by the negligence of the defendant. There was evidence, on the other hand, tending to show, as contended by the defendant, that the collision was caused by the negligence of plaintiff's husband, who was driving the automobile in which she was riding. All the evidence was submitted to the jury under instructions which are free from reversible error. The instructions with respect to the proximate cause of plaintiff's injuries were in substantial accord with the law as applied in numerous cases decided by this Court. The plaintiff is not entitled to a new trial, as a matter of law. The judgment is affirmed.

No error.

JOB RAMSEY v. THOMASON HARDWOOD LUMBER COMPANY, INCORPORATED.

(Filed 7 December, 1932.)

APPEAL by defendant from *Moore, J.*, at August Term, 1932, of YANCEY. Affirmed.

Charles Hutchins and Watson & Fouts for plaintiff.
O. B. Crowell for defendant.

PER CURIAM. In the Superior Court the plaintiff recovered judgment against the defendant for breach of contract. Afterwards the defendant made a motion to set aside the judgment for excusable neglect. Affidavits were filed and considered and Judge Moore held that the defendant's neglect was inexcusable, and in the exercise of his discretion he refused to set aside the judgment. The judgment of the Superior Court is

Affirmed.

STATE v. CHICK STEWART AND WALTER RICKMAN.

(Filed 7 December, 1932.)

CRIMINAL ACTION, before *Shaw, Emergency Judge,* at April Term, 1932, of SURRY.

The defendants were indicted for "breaking and entering a store house and stealing and carrying away certain personal property, to wit, two electric drills of the value of $120.00, and receiving the same," etc. At the trial a witness for the State, named Flinchum, testified that on the night of 15 October he closed his shop and at that time certain electric drills were in the tool box under the work bench. When he went back to the shop on the next morning, 16 October, the two Black and Decker one-half inch electric drills were missing, together with some bits. The witness said: "I went back and opened the shop the morning of the 16th at seven o'clock, and they had been taken then. Entrance had been made through the back window. . . . I left a quarter inch bit in the drill." There was further evidence that the drills were thereafter identified in the office of the sheriff of Forsyth County.

The sheriff of Forsyth County testified that on the morning of 16 October he investigated an automobile accident where a car had turned over the night before about seven or eight miles north of Winston-

Salem. He said: The wrecked car was a Chrysler sedan. The car was completely demolished, just the top and body was all crushed in. I arrived at the scene of the wreck on the morning of 16 October. . . . I saw Walter Rickman there that morning and heard him say that he and Chick Stewart were in the car at the time it was wrecked. The car turned over on the south side of the highway and on the south side of the highway there had been a last year's wheat field, and it had grown up in stubble and crab grass, and going out from the car into the field there were some men's tracks, and out something like as far as from here to the corner of the court room there were two electric drills lying there in the grass. Under the car where it had turned over I found an electric bit that fitted one of these drills lying there in the grass. It was right under where the car had turned over. The tracks went right out to the drills. . . . It looked to be where one person went out to the drills and probably came back to the car. I could not say there was more than one track. I carried the drills to the sheriff's office in Winston-Salem. . . . They were finally turned over to Mr. Inman. . . . I did not have any conversation with Chick Stewart until afterwards about the wreck. I went to his home and found he was in the hospital and went to the hospital but did not see him then. He was a patient in the City Hospital. The car belonged to Chick Stewart's father. . . . The drills were found on the same side of the road the car was on and a little further down the road toward Winston-Salem than the car was, I will say probably thirty or forty feet. . . . The tracks in the field looked fresh."

The defendant offered testimony tending to show that the defendant, Chick Stewart, went to his father around eleven o'clock on the night of 15 October, and asked for permission to use the car for the purpose of going to a dance, and that permission was given. There was evidence offered by defendants tending to show that they were seen by various parties together at a pool room until about eleven o'clock. A witness for the defendants testified that Rickman came to his house next morning and asked where the garage man lived, and that at that time "he was cut up pretty badly, and I carried him to Clyde's house and then went with him out to the wreck and found the car in between the wire and telephone post, leaning against the wire. . . . We pulled the car in, and I carried Mr. Rickman on up town. I did not see Stewart at that time, but went to the hospital to see him that morning. Rickman came to my house about four o'clock next morning and said he had been in a wreck."

A witness, named Stultz, testified that at about twelve o'clock on the night of 15 October, he heard that there was a wreck on the road.

The witness said: "It was just thirty-five steps from my residence to the wreck. When I got there Chick Stewart was hollering for an ambulance or a doctor. . . . There was no one in the car, and in a few minutes, five or ten minutes, Rickman came down the road from toward Rural Hall and said he was looking for a damn house. I told him there was a house down there but it wasn't no damn house, I didn't think. I took hold of him and led him to the porch and the women folks washed the blood off of him and Chick Stewart. Chick was as bloody as a hog. . . . I found the drills down the field between my house and Burgess's house, in a ditch, sixty steps straight down from the highway and ninety-four steps from where the wreck occurred."

There was a verdict of guilty of housebreaking and larceny, and it was adjudged that the defendants be confined in the State's prison at hard labor for a term of not less than three years, nor more than five years, from which judgment the defendants appealed.

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

John D. Slawter for defendants.

PER CURIAM. Certain exceptions are assigned to the charge of the trial judge. A careful examination of these exceptions discloses that none of them warrants a new trial. In all essential aspects the case involves issues of fact and such issues have been determined by the verdict of the jury.

No error.

IN THE MATTER OF THE APPOINTMENT OF TRUSTEES OF NORTH WILKESBORO ACADEMICAL AND INDUSTRIAL INSTITUTE.

(Filed 14 December, 1932.)

APPEAL from *Cowper, Special Judge,* at August Term, 1932, of WILKES. Affirmed.

This was an *ex parte* application made on 18 August, 1932, to the Superior Court of Wilkes County, North Carolina, before Hon. G. V. Cowper, at that time holding a term of court in Wilkes County, in which the petition herein prayed the appointment of twelve persons therein named as trustees of North Wilkesboro Academical and Industrial Institute.

The court below made the following order: "On the morning of 18 August, 1932, pursuant to a phone message, Cecil A. McCoy called

upon the undersigned judge (who was then holding the August Term, 1932, of Wilkes Superior Court) in his room in the hotel and presented to him the attached petition, together with the attached affidavit of W. F. Trogden, and the two sheets marked 'Resolutions,' and the paper purporting to be a copy of an act of the General Assembly of North Carolina, ratified on 23 February, 1895, all of which papers are hereto attached and filed with the clerk. Counsel thereupon moved and requested the court to sign an order which is also hereto attached. Upon consideration of all the foregoing papers the court being of the opinion that there was no proper proceeding before him nor was he authorized to sign the order presented to him upon the papers above referred to in court, declined to sign such order, and dismissed the purported proceeding."

Cecil A. McCoy for petitioners.

PER CURIAM. Section 1, in part, of the act of incorporation (chapter 58, Private Laws N. C., 1895, ratified 23 February, 1895), is as follows: "That (naming them) and their associates and successors, be and they are hereby created and constituted a body politic and corporate under the name and style of 'The North Wilkesboro Academical and Industrial Institute,' for the purpose of erecting, owning, operating and conducting at or near Wilkesboro an academical, industrial and manual training school for colored people," etc.

Section 3, of the charter, is as follows: "That said board of trustees shall have power to employ a superintendent or headmaster of said school and such aids, assistants and employees as they think necessary, to prescribe courses of study and work, provide and furnish farms and workshops for the manual training of pupils and the support of the school, to grant diplomas and certificates to graduates of any department, to charge and collect compensation and fees for the tuition, board and charges of pupils, and for the use of tools and shops."

The brief of petitioner says: "The school has not given instructions at all since about the year 1903. . . . The institute is the owner of 15.18 acres of land situated in Wilkes County with two buildings erected thereon for the education of colored youth."

It goes without saying that all good citizens should be sympathetic with the laudable purposes that the incorporators attempted to promote—an industrial training school for colored people.

Under the facts appearing on the present record, we think there is no error in the order made by the court below. The order of the court below is

Affirmed.

STATE v. C. G. CALL.

(Filed 14 December, 1932.)

APPEAL by defendant from *McElroy, J.*, at August Term, 1932, of DAVIE. No error.

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

B. C. Brock for defendant.

PER CURIAM. The defendant was indicted in six counts for a violation of the liquor law. The jury returned this verdict: "We find the defendant guilty." We have considered the exceptions and have found no error in the trial.

No error.

BANK OF MONTGOMERY AND GURNEY P. HOOD, COMMISSIONER OF BANKS, v. S. Q. MCCRAW, C. C. HOWELL AND UNION INDEMNITY COMPANY.

(Filed 14 December, 1932.)

Appeal and Error A d—Appeal from order joining party upon finding that he was proper party to action held premature.

An appeal from an order of the trial court that a party be joined as a defendant upon a finding that such party was a proper and necessary party to the action will be dismissed as premature.

APPEAL by plaintiff, Gurney P. Hood, Commissioner of Banks, and defendant Union Indemnity Company, from *Finley, J.*, at September Term, 1932, of MONTGOMERY. Appeal dismissed.

On motion of the defendant, C. C. Howell, it appearing to the court that Union Indemnity Company was a proper and necessary party to this action, it was ordered by the court that said Union Indemnity Company be made a party defendant, with leave to the defendant, C. C. Howell, and the said Union Indemnity Company to file pleadings.

From said order both the plaintiff, Gurney P. Hood, Commissioner of Banks, and the defendant, Union Indemnity Company, appealed to the Supreme Court.

Armstrong & Armstrong for plaintiff, Gurney P. Hood, Commissioner.

C. H. Gover for defendant, Union Indemnity Company.

PER CURIAM. The order that the Union Indemnity Company be made a party defendant in this action, upon the facts found by Judge Finley, is not reviewable by this Court at this time. The appeal is dismissed for that same is premature. *Spruill v. Bank,* 163 N. C., 43, 79 S. E., 262.

Appeal dismissed.

MRS. SUE HANEY, GUARDIAN OF WILLIAM HANEY, MINOR, v. WESTLEY BAILEY.

(Filed 14 December, 1932.)

Negligence A b—Although law is swift to afford remedy to injured child, negligent action must ordinarily be based on want of due care.

The law is swift to afford a remedy for a wrong suffered by a child, but where there is no evidence that the injury to a child was caused by the negligence of the plaintiff a nonsuit is properly granted.

APPEAL by plaintiff from *Sink, J.,* at July Term, 1932, of MCDOWELL. Affirmed.

This is an action to recover damages for a personal injury suffered by plaintiff's ward, a child about eight years of age, and alleged to have been caused by the negligence of the defendant.

From judgment dismissing the action at the close of the evidence, plaintiff appealed to the Supreme Court.

Roy W. Davis and Pless & Pless for plaintiff.

W. C. Newland, McBee & McBee and Winborne & Proctor for defendant.

PER CURIAM. The law which is always jealous of the rights of a child, and ever swift to afford a remedy for a wrong suffered by him, is also just to one who is sought to be held liable in damages for an injury suffered by a child. Ordinarily, liability for the consequences of an injury, even where the injury was suffered by a child, arises only where the injury was caused by the failure of the defendant to perform a duty which was imposed by law under the circumstances. Even the law must be just, before it is generous.

In the instant case, there was no evidence at the trial tending to show the injury suffered by plaintiff's ward, was caused by the negligence of the defendant. For that reason the judgment dismissing the action is

Affirmed.

LETISHA BUTNER RAMSAY v. FEDERAL LIFE INSURANCE COMPANY.

(Filed 14 December, 1932.)

APPEAL by defendant from *Clement, J.*, at January Term, 1932, of YANCEY. No error.

This is an action to recover on certain policies of insurance issued by the defendant. In its answer, the defendant denied liability, chiefly, on its allegations that the issuance of the policies was procured by false and fraudulent representations made by the plaintiff in her applications for said policies. These allegations were denied in the reply filed by the plaintiff.

The issues raised by the pleadings were submitted to the jury, and were answered in accordance with the contentions of the plaintiff.

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

Charles Hutchins and Watson & Fouts for plaintiff.
Bourne, Parker, Bernard & DuBose for defendant.

PER CURIAM. On its appeal to this Court, the defendant relies solely on its contention that there was error in the refusal of the trial court to allow its motions (1) that the action be dismissed as of nonsuit, and (2) that the verdict be set aside, upon the ground that all the evidence showed that the policies sued on were procured by false and fraudulent representations as alleged in the answer of the defendant. This contention cannot be sustained. There was conflict in the evidence as to whether or not plaintiff had appendicitis eight or nine years prior to the commencement of the action. The evidence was properly submitted to the jury under instructions to which there were no exceptions. The judgment was in accordance with the verdict and the stipulation of the parties. It is affirmed.

No error.

CONSOLIDATED TEXTILE CORPORATION, ELLA DIVISION, v. M. L. PATTERSON ET AL.

(Filed 21 December, 1932.)

APPEAL by plaintiff from *Schenck, J.*, at July Term, 1932, of CLEVELAND. No error.

The plaintiff operated a cotton mill at Shelby, in which the defendant Patterson was employed as overseer of spinning. It is alleged in the

complaint that Patterson fraudulently issued invoices of cotton and caused fraudulent sales thereof to be made to the plaintiff by Jim Camp and Griff Borders, who paid the proceeds to him less the amount agreed on as their compensation, and that Patterson deposited the funds in the United States Postal Savings Depository at Shelby. Patterson filed an answer and at the trial the jury returned the following verdict:

1. Did the defendant M. L. Patterson, by false and fraudulent representations and tokens obtain funds from the plaintiff, Consolidated Textile Corporation, as alleged in the complaint? Answer: Yes.

2. If so, in what amount, if any, is the defendant M. L. Patterson indebted to the plaintiff, Consolidated Textile Corporation, by reason of funds so fraudulently obtained? Answer: $973.75.

3. Are the funds deposited in the United States Postal Savings depository in Shelby, N. C., by the defendant M. L. Patterson the proceeds of the funds fraudulently obtained by him from the plaintiff, Consolidated Textile Corporation? Answer: No.

Judgment was given for the plaintiff in accordance with the verdict and upon exceptions entered of record the plaintiff appealed.

B. T. Falls for plaintiff.

D. Z. Newton and Weathers & Kennedy for defendant Patterson.

PER CURIAM. The first two exceptions were taken to the rejection of evidence and the third, fourth, and fifth to the admission of proof that the defendant had in his possession $800 or $900 in 1917 and $2,340 in August, 1930. These exceptions present no satisfactory cause for a new trial; and so as to the sixth.

Exceptions 7, 8, 9, relate to the charge on the second and third issues, but in these instructions we find no error. As stated by the court the burden of these issues was on the plaintiff and was not necessarily affected by the principle applicable to property recently stolen. That Campbell deposited the money he received from Camp and Borders in the Postal Savings Account is not a necessary or presumptive deduction from his recent receipt of it.

We find no error upon the merits without passing on the question whether the appeal should be dismissed for the reason that the appellant elected to abide by the judgment and issued execution against the person as well as against the property of the defendant, and caused him to be imprisoned. If the plaintiff received no benefit the defendant at least suffered personal detriment.

No error.

O. G. THOMAS v. THE CHERRYVILLE NATIONAL BANK OF CHERRYVILLE, NORTH CAROLINA.

(Filed 4 January, 1933.)

APPEAL by plaintiff from *MacRae, Special Judge,* at June Special Term, 1932, of MECKLENBURG.

Civil action to recover damages, arising *ex contractu,* and tried upon the following issue:

"Did the plaintiff and defendant enter into an agreement for the sale of the property described in the complaint, as alleged in the complaint? Answer: No (by direction of the court)."

From judgment on the verdict, the plaintiff appeals, assigning errors.

Scarborough & Boyd and Fred. H. Hasty for plaintiff.
A. L. Quickel for defendant.

PER CURIAM. In addition to being somewhat involved, the plaintiff's testimony falls short of establishing the contract as alleged, which would entitle him to recover for its breach. The case presents a simple question of the sufficiency of the evidence to warrant a recovery.

No error.

GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. BANK OF STOKES COUNTY, v. J. W. NEAL ET AL.

(Filed 4 January, 1933.)

APPEAL by defendants from *Clement, J.,* at April Term, 1932, of STOKES.

Civil action instituted against the living officers and directors of the Bank of Stokes County, and against the executors and administrators of the officers and directors since deceased, for alleged misconduct and mismanagement on the part of said officers and directors during their respective administrations, and in which it is alleged they all participated under a general course of dealing or systematic policy of mismanagement, negligent waste and unlawful diversion of funds, commencing in the year 1921 and ending 8 November, 1930, when the bank was closed because of insolvency.

In the second cause of action, set out in the complaint, a large number of deeds and conveyances are sought to be set aside as fraudulent,

alleged to have been given without consideration and with intent to hinder and delay the plaintiff in the collection of funds due by reason of the matters and things set out in the first cause of action.

Demurrer interposed on the ground of misjoinder of parties and causes of action. Overruled; exception; appeal by defendants.

Brown & Trotter for plaintiff.

Spruill & Olive, W. R. Dalton, Folger & Folger, S. Porter Graves, Benbow & Hall and Gilmer Sparger for defendants.

PER CURIAM. Affirmed on authority of *Hood, Commissioner, v. Love, ante,* 583, *Trust Co. v. Peirce,* 195 N. C., 717, 143 S. E., 524, *Bank v. Moseley,* 202 N. C., 836, 162 S. E., 923, *Carswell v. Talley,* 192 N. C., 37, 135 S. E., 181.

Affirmed.

APPEALS FROM THE SUPREME COURT OF NORTH CAROLINA

TO THE SUPREME COURT OF THE UNITED STATES

Mary B. Heavner *v.* Town of Lincolnton and Maryland Casualty Company (202 N. C., 400). Appeal dismissed.

State *v.* Wallace B. Davis (203 N. C., 47). *Writ of certiorari* denied.

State *v.* Luke Lea, Luke Lea, Jr., and Wallace B. Davis (203 N. C., 13). *Writ of certiorari* denied.

J. M. Edgerton *v.* Southern Railway Company (203 N. C., 281.) *Writ of certiorari* denied.

AMENDMENTS TO RULES

It is ordered by the Court that the following amendments to Rules 5, 6, 7, 8, and 10, effective 1 July, 1933, be published in the 203rd Report:

1. The Districts mentioned in the proviso, paragraph three of Rule 5, shall be changed from "First, Second, Third and Fourth" to First, Second, Nineteenth and Twentieth."

2. The words "Twentieth District" in line five of Rule 6, shall be amended to read "Eleventh District."

3. The Call of the Judicial Districts, Rule 7, shall be amended to read as follows:

"7. Call of Judicial Districts.

"Appeals from the several districts will be called for hearing in the following order:

"From the First and Twentieth Districts, the first week of the term.

"From the Second and Nineteenth Districts, the second week of the term.

"From the Third and Eighteenth Districts, the fourth week of the term.

"From the Fourth and Seventeenth Districts, the fifth week of the term.

"From the Fifth and Sixteenth Districts, the seventh week of the term.

"From the Sixth and Fifteenth Districts, the eighth week of the term.

"From the Seventh District, the tenth week of the term.

"From the Fourteenth District, the eleventh week of the term.

"From the Eighth and Thirteenth Districts, the thirteenth week of the term.

"From the Ninth and Twelfth Districts, the fourteenth week of the term.

"From the Tenth and Eleventh Districts, the sixteenth week of the term.

"In making up the calendar for the two districts allotted to the same week, the appeals will be docketed in the order in which they are received by the clerk, but only those from the district first named will be called on Tuesday of the week to which the district is allotted, and those from the district last named will not be called before Wednesday of said week, but appeals from the district last named must nevertheless be docketed not later than 14 days preceding the call for the week."

4. The words "Twentieth District" in line four of Rule 8 shall be amended to read "Eleventh District."

5. The words "Nineteenth District," in the second line of the second paragraph, Rule 10, shall be amended to read "Ninth District."

The purpose of these amendments is to facilitate the disposition of cases during the term, by hearing arguments for two weeks, followed by a week given to the writing of opinions, and to reverse the order in which the districts from the Western division have previously been called.

It is also ordered that the last sentence in Rule 45 be stricken out.

Approved 25 January, 1933.

BROGDEN, J., *for the Court.*

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ACCOUNT STATED.

A Nature and Essentials.

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1. Lapse of time before objecting to account held not to render it an account stated. *Richardson v. Satterwhite*, 113.

ACKNOWLEDGMENT see Chattel Mortgages A b.

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B Forms of Action. (Distinction between criminal action and action for penalty see Penalties A; between action for usury and for cancellation of instrument see Pleadings D a 1.)

g Declaratory Judgment Act

1. A judgment in an action upon a disability clause of a life insurance policy that the plaintiff should recover the monthly disability benefits "so long as he should live" is error, the action not coming within the provisions of the Declaratory Judgment Act which was designed to set controversies at rest before they led to repudiation of obligations, the invasion of rights, and the commission of wrongs. *Green v. Casualty Co.*, 767.

2. The Declaratory Judgment Act, chapter 102, Public Laws of 1931, is a remedial statute and should be liberally construed, and the act applies to an action by a power company against a city and the residents thereof to determine the validity of a written contract between the power company and the city whereunder the power company was to change its electric cars to gasoline buses along some of the streets of the city under a municipal franchise, the controversy being in good faith and substantive rights being involved, and it further appearing that the parties have legal rights or legal obligations that may be determined by a judgment or decree

ACTIONS B g—*Continued.*

in the action. The Declaratory Judgment Act differs from the submission of a controversy under C. S., 626 in that under the former statute it is not necessary that the question involved might be the subject of a civil action at the time the proceeding is instituted. *Light Co. v. Iseley*, 811.

C Joinder, Consolidation and Severance. (Consolidation of actions by trial court see Trial C a; demurrer for misjoinder of parties and causes see Pleadings D b.)

b What Causes May Be Joined

1. The right to recover damages for prior injury is not essentially inconsistent with injunctive relief to prevent future injury. *Anderson v. Waynesville*, 37.

ADOPTION.

A Proceedings.

a Parties

1. An order of adoption of a minor child when the mother of the child is not a party to the proceeding is void as to such mother notwithstanding the amendment to C. S., 185 by chap. 171, Public Laws of 1927. *In re Shelton*, 75.

AGENCY see Principal and Agent.

AGRICULTURE.

D Agricultural Liens. (Judgment that laborer's claim of crop lien was too indefinite affirmed see Appeal and Error J d 1.)

b Landlord's Lien for Rents and Advancements

1. Where a landlord makes arrangements with a bank to lend the tenant money for the purpose of making a crop, and which is used for that purpose, and the landlord signs the note therefor and receives from the tenant the latter's note as security, and the bank charges a commission which it deducts from the amount of the loan, but there is no evidence that the landlord received any interest or commission in lieu thereof, and the landlord pays the bank the amount of the loan at maturity: *Held*, the landlord acquires a lien on the crops for advancements which is superior to all other liens, and he may recover the amount thereof from a third person who acquired possession of the crops from the tenant under a crop lien if the value of the crops is sufficient therefor. C. S., 2355, 2485. *Ransom v. Oil Co.*, 193.

ALIMONY see Divorce E.

APPEAL AND ERROR. (In criminal cases see Criminal Law L; from Industrial Commission see Master and Servant F i; supersedeas bonds see Supersedeas Bonds.)

A Nature and Grounds of Appellate Jurisdiction of Supreme Court.

d Final Judgment and Premature Appeals

1. An appeal before final judgment which an appeal from the final judgment would include and protect is premature and will be dismissed. *Smith v. Matthews*, 218.

APPEAL AND ERROR A d—*Continued.*

2. An appeal from a proper order for an examination of the corporate defendant's officers and agents and for an inspection of its books and records is premature and will be dismissed, but in this case the appeal is dismissed without prejudice to the defendant to move for a modification of the order so that it should include only such books and records as are pertinent to the inquiry. *Brown v. Clement Co.*, 508.

3. An appeal from an order of the trial court that a party be joined as a defendant upon a finding that such party was a proper and necessary party to the action will be dismissed as premature. *Bank v. McCraw*, 860.

C Requisites and Proceedings for Appeal.

a Making, Filing and Service of Statement of Case on Appeal

1. In this case it appeared that only one exception was taken upon the trial of the action and that the exception was to the final judgment as signed, and that at the time appeal entries were made the court stated that "the summons, complaint, judgment, and these findings of fact and conclusions of law shall be and constitute the case on appeal to the Supreme Court," and the trial court further found that the only question for determination was whether valid service of summons was made on the defendant. The plaintiff, appellee, moved in the Supreme Court to dismiss the appeal for that no statement of case on appeal was ever served on or accepted by the appellee, and no case on appeal had ever been presented to any Superior Court judge to be settled, and for that the record was incomplete: *Held*, although the requirements in this particular case are ambiguous from the record, the motion to dismiss the appeal is denied under the principle that an appeal is of itself an exception to the judgment, which appears to be the only question sought to be presented, the parties having the right to move for *certiorari* to supply any missing parts of the record. Rules of Practice in the Supreme Court, 16, 34. *Winchester v. Brotherhood of Railroad Trainmen*, 735.

2. Except in rare instances the case on appeal to the Superior Court from the county court ought not to be made the case on appeal to the Supreme Court, and in those cases where the case on appeal to the Superior Court is permissible or desirable to be used on appeal to the Supreme Court it must be settled in some accredited way. C. S., 643, 644. *McMahan v. R. R.*, 805.

g Dismissal of Appeal in Superior Court

1. Where the appellee moves in the Superior Court that the appeal be dismissed for appellant's failure to serve statement of case on appeal within the time allowed, the appellee should ask the court to ascertain and adjudge that the appeal had been abandoned, and where this has not been done the Superior Court is technically without authority to dismiss the appeal. *McMahan v. R. R.*, 805.

E Record Proper.

a Necessary Parts of Record

1. The pleadings on which a case is tried, the issues, and the judgment appealed from are necessary parts of the record, Rule 19, sec. 1, and

APPEAL AND ERROR E a—*Continued.*

where the record does not contain these necessary parts the appeal will be dismissed. *Riggan v. Harrison*, 191; *Armstrong v. Service Stores*, 231.

2. It is the duty of the appellant to see that the record is properly made up and transmitted, and it is required that the pleadings, the issues and the judgment be a part of the transcript in all cases, and where the record does not contain these necessary parts the appeal will be dismissed. *Parks v. Seagraves*, 647.

b Matters Not Set Out in Record Deemed Correct

1. Where the charge of the trial court is not contained in the record it is presumed that the court correctly charged the law on every material aspect, and charged the law applicable to the facts. *Green v. Casualty Co.*, 767.

c Form and Requisites of Transcript

1. It is neither essential nor desirable that the record on appeal from a county court should be made the record on appeal from the Superior Court, upon the further appeal it being advisable that the record should be limited to those matters related to the questions sought to be presented upon exceptions to the judgment of the Superior Court. *Kindler v. Cary*, 807.

h Questions Presented for Review

1. Where there is no proper statement of case on appeal due to the appellant's failure to serve it on appellee within the time prescribed, and the appellee's motion in the Superior Court to dismiss the appeal is erroneously granted in that the appellee failed to request the court to ascertain and adjudge that the appeal had been abandoned, on appeal from the judgment of the Superior Court the Supreme Court is limited to a consideration of the record proper, there being no proper statement of case on appeal, and where no error appears on the face thereof the judgment will be affirmed. *McMahan v. R. R.*, 805.

F Exceptions and Assignments of Error and Procedure Necessary to Right to Review.

a In General

1. In this case the contention of the appellant in regard to the legal tender of delinquent taxes within the time agreed upon with the tax collector was not supported by a finding of the court or jury, and no evidence thereof appeared from the record, and the appellant's contention in this respect is not considered on appeal. *Street v. McCabe*, 80.

b Necessity for Exceptions and Assignments of Error

1. An assignment of error to the trial court's failure to find additional facts is without merit when not based upon an exception taken during the trial, it being required that the appellant request such additional findings and except to the court's refusal of the request. *Anderson v. Waynesville*, 37.

APPEAL AND ERROR F b—*Continued.*

2. The refusal of the court to strike out evidence admitted on the trial will not be considered on appeal where the refusal to grant the motion to strike out has not been assigned as error by the appellant. *Hunt v. R. R.*, 106.

3. On appeal to the Supreme Court only questions of law properly presented by exceptions and in conformity with the rules of practice in the Supreme Court will be considered. *Light Co. v. Iseley*, 811.

c Form and Requisites of Exceptions and Assignments

1. Assignments of error which do not indicate their relevancy to the controversy or show their pertinency to the questions sought to be presented are defective. *Seed Co. v. Cochran and Co.*, 844.

d Appeal

1. Where in an action in a county court against two defendants the jury finds that one of them was not liable to the plaintiff and the plaintiff does not appeal from the verdict, and the other defendant appeals to the Superior Court from a verdict against him, and in the Superior Court the appealing defendant's demurrer to the evidence is sustained, upon further appeal to the Supreme Court the judgment will be affirmed where the record fails to show sufficient evidence to carry the case to the jury as against the appealing defendant. *Kindler v. Cary*, 807.

g Appeals in Forma Pauperis

1. The affidavit for appeal *in forma pauperis* must contain an averment that appellant is advised by counsel that there is error of law in the decision appealed from, C. S., 649, and the matter is jurisdictional and may not be cured by consent of counsel. *Riggan v. Harrison*, 191.

2. The affidavit for appeal *in forma pauperis* must contain an averment that appellant is advised by counsel learned in the law that there is error of law in the decision appealed from, C. S., 649, and the matter is jurisdictional and where the affidavit is defective in this respect the appeal will be dismissed. As to whether the clerk may authorize an appeal *in forma pauperis* where the trial court has fixed appeal bond, *quære? Hanna v. Timberlake*, 556.

G Briefs.

a Form and Filing of Briefs

1. Where the appellant fails to file printed or mimeographed copies of brief as required by Rule 27, the appeal will be dismissed. *Theiling v. Wilson*, 809.

b Abandonment of Exceptions by Failure to Discuss in Brief

1. Exceptions which are not brought forward and discussed in appellant's brief are deemed abandoned. Rule 28. *Riggan v. Harrison*, 191; *Dempster v. Fite*, 697.

J Review.

b Of Matters in Discretion of Court

1. A motion for leave to amend a complaint under C. S., 515 is addressed to the sound discretion of the trial court, and his order denying the

APPEAL AND ERROR J b—*Continued.*

motion is not subject to review on appeal in the absence of gross abuse of this discretion. *McKeel v. Latham*, 246.

2. Court's refusal, in his discretion, to set aside verdict awarding damages upon finding that both plaintiff and defendant were negligent, held not reviewable. *Crane v. Carswell*, 555.

3. Where the trial judge refuses a motion to set aside a verdict as a matter of discretion and later grants a motion to set aside on the ground that the verdict was against the weight and credibility of the evidence, also as a matter of his discretion, and later refuses a motion to make the record show that he had set it aside as a matter of law, the entry to that effect necessarily implies that the verdict was set aside as a matter of discretion, and no appeal will lie from his order. *Anderson v. Morris*, 577.

c Of Findings of Fact

1. Where the court below finds the facts under an agreement of the parties his findings are conclusive on appeal when supported by sufficient competent evidence. *Lawson v. Bank*, 368.

2. Upon appeal in injunction suits the Supreme Court has the power to find and review the findings of fact, but the burden of showing error is on the appellant. *Castle v. Threadgill*, 441.

3. Where the trial court finds as a fact from competent evidence that a party was guilty of laches in failing to repudiate his subscription to stock in a bank, such finding is conclusive on the Supreme Court on appeal. *Hood v. Hood*, 598.

4. The findings of fact by the referee, approved by the trial court, and supported by the evidence are conclusive on appeal. *Thompson v. Hood, Comr. of Banks*, 851.

d Presumptions and Burden of Showing Error

1. Where the plaintiff's claim for a crop lien for labor done in its production is denied in the Superior Court on the ground that the claim of lien was not sufficiently specific in regard to the wages to be paid and the time and amount of work, etc., C. S., 2469, and on appeal to the Supreme Court it is not made to appear that there was error in the ruling, the judgment will be affirmed, the burden of showing error being on the appellant. *Gainey v. Gainey*, 190.

2. The burden is on appellant to show prejudicial or reversible error amounting to a denial of substantial justice. *Thigpen v. Trust Co.*, 291; *In re Fowler*, 409.

3. Where on appeal the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment will be affirmed without becoming a precedent. *McKamey v. Blair*, 852.

e Harmless and Cured Error

1. The exclusion of evidence which, if competent, would not be sufficient to take the case to the jury when considered with the other evidence in the case, will not be held for error. *Tuttle v. Bell*, 154.

2. Where the trial judge excludes competent testimony of a witness the admission, without objection, of testimony of other witnesses to

APPEAL AND ERROR J e—*Continued.*

the same effect does not cure the error, the excepting party having the right to have the jury pass upon the weight and credibility of the testimony of the particular witness. The distinction is noted where the same witness is later allowed to testify to the same import as the excluded testimony. *Eaves v. Coxe*, 173.

3. The exclusion of evidence, which if competent, is not material, will not be held for reversible error. *Williams v. Forrest*, 273.

4. Where the relevancy of proposed testimony excluded upon the trial is not made to appear on appeal an exception to its exclusion will not be sustained. *Phipps v. Indemnity Co.*, 420.

5. In an action against the surety on a guardianship bond executed by an assistant clerk who had been appointed guardian by the clerk: *Held*, exception to testimony by the clerk that he knew the amount due the wards will not be sustained on appeal when the clerk has identified a record in his office showing the amount the guardian had received and the amounts lawfully paid out by the guardian are not in dispute. *Ibid.*

6. Where on appeal from the court's refusal to grant a written motion to strike certain allegations from the complaint on the ground of irrelevancy, it appears that the plaintiff is to file a bill of particulars and that no substantial injury has or is likely to result to the defendant on account of the refusal of the motion and that the matter can better be determined upon the filing of the bill of particulars, the order denying defendant's motion will not be disturbed. C. S., 537. *Pemberton v. Greensboro*, 514.

7. Where an exception is entered to the exclusion of certain testimony it must appear of record what the excluded testimony would have been in order for the exception to be considered on appeal. *Allman v. R. R.*, 660; *Yelton v. McKinney*, 785.

8. Where one party is not entitled to any recovery against another party to the action on the cause of action alleged, a judgment to this effect will be affirmed on appeal even though there may have been error committed in the trial of the action. *Bank v. Ins. Co.*, 669.

9. Admission of incompetent evidence held not prejudicial where it has been withdrawn and jury instructed not to consider it. *Gray v. High Point*, 756.

10. Where incompetent evidence is admitted over objection and the same evidence is theretofore or thereafter admitted without objection, the appellant ordinarily loses the benefit of his exception. *Ibid.*

11. Exceptions were properly and aptly entered to the admission of testimony by plaintiff as to a transaction with a deceased relative to services rendered deceased by plaintiff. On redirect examination plaintiff testified without objection "I was living with deceased and fulfilled all agreements with him." *Held*, the plaintiff's statement on redirect examination was not sufficient to overthrow the exceptions theretofore entered. *Price v. Pyatt*, 799.

g Questions Necessary to Determination of Cause

1. The trial court has the power at any time during the term to set aside the verdict and grant a new trial in the exercise of his sound

APPEAL AND ERROR J g—*Continued.*

legal discretion, and no appeal will lie therefrom. C. S., 591, and where the court has so set aside a verdict in defendant's favor and the defendant appeals, the defendant's assignments of error in the admission of evidence and the refusal of his motion as of nonsuit are not properly presented for review, and the appeal will be dismissed. *Strayhorn v. Bank*, 383.

2. Where an order of the court setting aside the verdict is not disturbed on appeal, exceptions relating to the court's instructions to the jury and to a motion of nonsuit will not be considered, no final judgment having been rendered. *Anderson v. Morris*, 577.

K Determination and Disposition of Cause.

c Petition for New Trial and Rehearing

1. Newly discovered evidence on appeal is not sufficient for the granting of a petition for a new trial when such evidence tends only to establish a contradiction by a witness of his own testimony given upon the trial and there is other testimony to the same effect from other witnesses. *Pridgen v. R. R.*, 62.

2. A petition for a new trial for newly discovered evidence will not be granted where the evidence is merely corroborative of plaintiff's witnesses and contradictory of defendant's testimony. *Garris v. Hines Bros.*, 148.

3. Where an examination of the evidence set out in the case on appeal sustains the petitioner's contention that the Court inadvertently overlooked in deciding the case the contentions presented by his petition, his petition to rehear will be allowed. *Minnis v. Sharpe*, 110.

4. Where a petition to rehear a case is based upon the insufficiency of the evidence of defendant's title to the lands in controversy, and the matter has been considered on the appeal and it appears from the admissions of the parties, the manner of trial, and the evidence that the petition should be dismissed it will be so ordered. *Transportation Advisory Commission v. Canady*, 195.

5. Where a dispute has arisen between the parties as to whether a certain item was included in the award under an agreement to arbitrate, and upon the trial of an action on the item one of the arbitrators has testified that the item was not included in making the award, affidavits that he had found since the trial certain figures and data conclusively showing that the item had not been included, without showing that the other party or his arbitrator had signed the papers or admitted their correctness either directly or by implication is held insufficient to support a motion for a new trial for newly discovered evidence, the proposed evidence being merely cumulative and corroborative of the arbitrator's testimony upon the trial. *Yelton v. McKinney*, 785.

L Proceedings After Remand or Reversal.

a Matters and Questions Open for Further Litigation

1. Where the rights of a devisee under a will have been determined in a former appeal to the Supreme Court, the decision becomes a rule

APPEAL AND ERROR L a—*Continued.*

of property and is determinative of the rights of the parties, and in a later action brought by those claiming under the parties to the former action the former judgment is conclusive. *Boyette v. Barnes*, 145.

2. Where, in an action on a note, the defendant sets up the defense that the plaintiff acquired the note as agent and could not maintain the action, and the defendant contends that nevertheless, under the statutes, he could maintain the action in his own name, C. S., 2976, 3015, 3032, 446, and seeks to present his contention by an exception to the refusal of the trial judge to direct a verdict on one of the issues: *Held*, although the court's refusal to direct a verdict on the issue was not erroneous under the evidence, a new trial being granted for error in another part of the charge, the defendant will have opportunity to present his contentions upon the subsequent trial. *Wellons v. Warren*, 178.

3. Where on a former appeal the Supreme Court has adjudicated that the evidence was sufficient to overrule a motion of nonsuit and on the subsequent trial the evidence is substantially the same as on the first the plaintiff's exception to the court's refusal to nonsuit the second action will be overruled. *Madrin v. R. R.*, 245.

4. Where upon a former appeal the Supreme Court has ordered a new trial for error in the trial court's refusal to direct a verdict in defendant's favor for the reason that the plaintiff's evidence was insufficient to entitle her to recover, and upon a subsequent trial the evidence is substantially the same, a judgment as of nonsuit entered upon the second trial will be affirmed on appeal in accordance with the decision on the former appeal. *Penland v. Hospital*, 733.

ARBITRATION AND AWARD.

E Award as Defense to Action.

b Effect and Conclusiveness of Award

1. The substance and form of an award must conform to the submission to arbitration, and the particular matters specified in the agreement to arbitrate may alone be included in the award, but where there is no written submission and the award is ambiguous, the parties may introduce evidence *aliunde* as to whether a disputed item was considered by the arbitrators and included in the award. *Yelton v. McKinney*, 785.

ARREST AND BAIL see Bail.

ARSON.

C Prosecution and Punishment.

a Indictment

1. In a prosecution for arson under C. S., 4175, 4245, an indictment stating that the defendant procured another to burn a certain house owned by the defendant and another as tenants in common is held sufficient, and the fact that the same parties owned other houses in like capacity is not ground for demurrer or *quashal*, the indictment containing sufficient matter to enable the court to proceed to

ARSON C a—*Continued.*

judgment, and a conviction on the charge being sufficient to sustain a plea of former jeopardy in case of a second prosecution. C. S., 4623. *S. v. McKeithan*, 494.

ASSAULT. (Punitive damages in action for assault see Damages E c 1.)

B Criminal Prosecutions.

a Elements and Degrees of Assault

1. In a prosecution under C. S., 4213, for a secret assault and battery with a deadly weapon with malice and intent to kill, evidence that there had been ill-feeling between the prosecuting witness and the defendant, that the prosecuting witness had seen and recognized the defendant standing outside a window in the witness's home, that the defendant appeared there suddenly at night and shot the prosecuting witness before he could do anything, and seriously wounded him, *is held* sufficient to overrule defendant's motion as of nonsuit, C. S., 4643, and to show that the assault was done in a secret manner. *S. v. McLamb*, 442.

c Evidence

1. Upon the trial of a wife and another for a secret assault upon her husband with malice and intent to kill, evidence that her codefendant and her husband had violently quarreled and had agreed to meet each other and settle their differences by violence if necessary, that the relationship between the defendant and her husband was hostile, that they violently quarreled and that she had predicted his early death, that she had remitted premiums on his life insurance policy in which she was beneficiary, and that on the night of the crime she suggested the direction in which he should drive her car, and that they thus came upon her codefendant sitting in his parked car, and that she suggested they stop, and that the husband was then assaulted by her codefendant with a pistol and seriously wounded, and that she immediately deserted him *is held* sufficient to establish a conspiracy between the wife and her codefendant, rendering the evidence competent against her, and the evidence is held sufficient to overrule her demurrer to the evidence on the charge of secret assault. *S. v. French*, 632.

2. Upon the trial of the wife for a secret assault upon her husband pursuant to a conspiracy between her and her codefendant, who actually committed the assault and inflicted serious injury, testimony by the husband relating to animosity existing between them is competent as tending to show motive, purpose, and the extent of the conspiracy, and evidence that the wife failed to visit the husband in the hospital after the assault is also competent and material. *Ibid.*

ASSIGNMENTS.

A Requisites and Validity.

a Rights and Interests Assignable

1. The statutory lien of a laborer or materialman under the provisions of C. S., 2440, is assignable as in case of ordinary business contracts, C. S., 446, and where the debt has been assigned it esablishes the relation of debtor and creditor between the owner of the build-

ASSIGNMENTS A a—*Continued.*

ing and the assignee of the debt, and the assignment of the debt carries with it the security therefor, and the assignee may enforce the statutory lien in an action brought in his own name. *Horne-Wilson Co. v. Wiggins Bros.*, 85.

C Rights and Liabilities of Parties Upon Assignment.

a Liability of Party Accepting Assignment

1. Where a contractor assigns all moneys to become due under his contract for certain municipal construction to a bank to secure loans made to him, and directs that out of the funds the bank should first repay itself and then pay another bank the balance to the extent of the contractor's loans from such other bank, and the governing body of the city, upon the request of the contractor, orders the city manager to forward all checks due the contractor to the assignee bank for deposit to the credit of the contractor: *Held*, the acceptance of the assignment by the city did not constitute an unconditional promise to pay the assignee the total contract price, and upon default by the contractor and the completion of the work by another an action on the assignment by the second bank is properly nonsuited, it not appearing that the assignee bank had failed to receive an amount sufficient to repay itself and the plaintiff bank, and the assignee bank not being a party to the action. *Bank v. Construction Co.*, 100.

ATTACHMENT. (Garnishment see Garnishment.)

A Nature of Remedy and Grounds for Attachment.

c Property Subject to Attachment

1. Under our statute all property in this State, real or personal, tangible or intangible, owned by a nonresident defendant in an action to recover on any of the causes of action included within C. S., 798, is liable to attachment. C. S., 816. *Newberry v. Fertilizer Co.*, 330.

C Proceedings to Secure.

b Form and Contents of Affidavit

1. In order to be a valid attachment against a resident defendant it is necessary for the plaintiff to show by his affidavit the facts from which he draws his conclusion that the defendant is about to assign, dispose of, or secrete his property, and where the affidavit does not so show it is fatally defective. *Howard Co. v. Baer*, 355.

d Security and Bonds

1. On appeal by both parties from an order of the clerk requiring the plaintiff in attachment to file an increased bond, the judge of the Superior Court has the power to order the plaintiff to give further security or an increased bond, C. S., 827, but he may not add a condition to the order that the attachment be vacated *ipso facto* if the increased bond is not filed by a certain time, and on appeal to the Supreme Court the order for an increased bond will be affirmed and the condition stricken out, and it appearing that the time set by the court for filing the increased bond has expired, the plaintiff will be given a reasonable time for filing the bond. *Luff v. Levey*, 783.

ATTACHMENT—*Continued.*

E Levy, Lien, Custody and Disposition of Property.

b Notice, Lien and Priority

1. Where the officer has served a writ of attachment by taking into his possession tangible personal property or by collecting debts due the defendant under orders of court, or by levying on the real estate of the defendant, and has complied with the applicable provisions of the statute, the plaintiff has a lien on such property which is enforceable against all subsequent purchasers from the defendant. C. S., 807. *Newberry v. Fertilizer Co.*, 330.

G Vacating and Dissolving.

a Parties Who May Move to Vacate

1. Any one of several defendants whose property has been attached has such an interest in the action as to maintain a motion to vacate the attachment. *Luff v. Levey*, 783.

H Claims by Third Persons.

b Time in Which Intervention Will be Allowed

1. Where the plaintiff sues the defendant for debt, asks that a deed be set aside as fraudulent, and attaches certain personal property, and both parties appeal from the judgment: *Held*, the trial court has the power if not as a matter of right, then as a matter in his discretion, to allow a claimant of certain of the personal property to intervene at the next succeeding term of the court after affirmance of the judgment on appeal, the personal property claimed still being *in custodia legis*, and the judgment that the personal property claimed by the intervener was the property of the defendant may not be pleaded as *res judicata* in bar of the intervener's claim. C. S., 460, 840. *Bank v. Lewis*, 644.

ATTORNEYS—Admissions by, see Evidence F d 1, 2; privileged communications see Evidence D e 1.

AUTOMOBILES—Negligence in driving see Highways B; criminal negligence in driving, see Homicide C; parent's liability for child's driving, see Parent and Child A a; employer's liability for employee's driving, see Master and Servant D b 1.

BAIL.

A In Civil Actions.

d Liabilities on Bail Bonds

1. Upon motion against the surety on a bail bond the defendant, in response to notice served upon the surety, C. S., 794, appeared in open court. The surety was not present upon the hearing of the motion. The defendant was given opportunity to voluntarily surrender himself, which he refused upon his contention that he was not liable to be taken in arrest. Judgment was entered against the surety, C. S., 778, 792. *Held*, upon the defendant's appearance in open court he was "amenable to the process of the court" and the judge should have ordered execution against the person of the defendant, the defendant's contention that he was not liable to be

BAIL A d—*Continued.*

taken in arrest notwithstanding, and the judgment against the surety was erroneous, the primary object in taking bail being to keep the defendant within the jurisdiction and call of the court and not to recover the penalty on the bail bond. *Stepp v. Robinson*, 803.

BANKRUPTCY—Involuntary proceeding in bankruptcy is sufficient to support action for malicious prosecution see Malicious Prosecution A b 1.

BANKS AND BANKING.

C Functions and Dealings. (Liability in collecting checks and drafts see Bills and Notes I b, C a.)

c Deposits and Checks

1. Where a bank which is not a county depository pays in good faith the checks on county funds drawn by the county attorney acting as treasurer under authority of the duly elected treasurer, the county commissioners having authorized the bank to pay checks so drawn: *Held*, the bank is not liable to the county for the payment of the checks although the sums thereby obtained were misappropriated and were made payable to the order of persons not legally entitled to receive the county funds. *Comrs. of Brunswick v. Inman*, 542.

d Pledges Securing Deposits

1. Where a bank delivers certain of its bonds and securities to a municipal depositor in order to secure deposits, made from time to time, and the bonds and securities are delivered to the depositor by the bank's authorized officers or employees and placed in a safety deposit box in the bank by such depositor in the presence of the bank officers or employees, the depositor having an individual key and the bank a master key and the simultaneous use of both keys being necessary to open the safety deposit box: *Held*, after the placing of such securities in the depositor's safety deposit box they could not be removed therefrom by the bank or its officials, and the delivery to the depositor was unconditional and sufficient to constitute a valid pledge. *Hood v. Board of Financial Control*, 119.

2. A bank has power to pledge its notes, bonds and securities to secure deposits by a city or county, and where the power has been properly exercised and is not fraudulent as to other depositors and creditors the pledge is valid and will be upheld as against the Commissioner of Banks taking over its assets upon its later insolvency. *Ibid.*

H Insolvency and Receivership. (Guardian's liability for funds lost through insolvency of bank see Guardian and Ward C b.)

a Statutory Liability of Stockholders

1. Shares of stock in a banking corporation are usually transferable as shares of stock in other kinds of corporations, but whether the transfer is effective against creditors of the bank depends upon the facts of each particular case, the general rule of law applicable being that the transferee must be a person who is not only legally capable of holding the stock but is also legally bound to respond when an assessment is made by the Commissioner of Banks under statutory provisions, N. C. Code, 218(c), 219(a), although it is not

BANKS AND BANKING H a—*Continued.*

necessary that he should be financially able to pay the assessment, and a transfer of bank stock to an infant does not relieve the transferer of his statutory liability, an infant being incapable of making a binding contract. *In re Trust Co.*, 238.

2. Where the owner of bank stock has had the shares transferred on the books of the bank to a trustee for the benefit of a minor, and the transfer is made in good faith when the bank is solvent: *Held*, the transferer is not liable for the statutory assessment of the stock upon the bank's insolvency, the trustee being of full age and qualified to perform all the duties required of him in his fiduciary capacity. N. C. Code, 219(c), (d). *Ibid.*

3. Where upon appeal from the assessment of the statutory liability on bank stock the trial court finds the facts under agreement of the parties, and the court finds from the evidence that the stockholder was guilty of laches in failing to repudiate his stock subscription, the judgment of the court affirming the assessment will be upheld on appeal. *Hood v. Hood*, 598.

4. Under chapter 113, section 13(d), Public Laws of 1927, amending C. S., 218, the statutory liability of stockholders of an insolvent bank is made a part of the general assets of the bank, for the payment of the expenses of liquidation and liabilities of the bank to depositors and all other creditors, and the statute requires that any surplus remaining shall be applied pro rata to the repayment of the amounts paid in by the stockholders. N. C. Code, 218(c), 13(d). *Hood v. Martin*, 620.

5. Where a bank increases its capitalization and offers additional stock to the holders of its capital stock, and a holder of such capital stock is induced to purchase from the bank a number of shares of the increased capitalization upon false and fraudulent representations of the condition of the bank by its president, and thereafter the bank becomes insolvent, and the stockholder is assessed the statutory liability upon all the stock owned by him: *Held*, upon appeal from the assessment the stockholder may avoid liability on the increased capitalization stock purchased by him from the bank upon repayment of the dividends received thereon when the stockholder is not guilty of laches in repudiating the purchase for such fraud, since the statutory liability on the stock is a general asset of the bank procured by the fraud of the corporation itself, and the money derived therefrom is payable, in the event there is a surplus, to the stockholders pro rata, which would allow the president of the bank to receive, as a depositor, creditor and stockholder, a part of the fund derived from his own fraud. *Hood v. Martin*, 620.

6. When bank stock is purchased the statutory provisions in force at the time in respect to the statutory liability on such stock enter into and become a part of the contract. *Ibid.*

b Liability of Officers and Directors for Wrongful Depletion of Assets

1. Complaint against directors of bank alleging general course of dealing and systematic neglect held not demurrable. *Hood v. Love*, 583.

BANKS AND BANKING H—*Continued.*

c Management and Control of Assets

1. The Commissioner of Banks, as successor to the Corporation Commission in the liquidation of insolent banks, is a statutory receiver, and chapter 215, Public Laws of 1931, provides that C. S., 1208, relating to receivers shall apply to the liquidation of insolvent banks when not inconsistent with section 218(c), and upon the insolvency of a bank the Commissioner of Banks is given possession and the right to possession of all property, rights, etc., with certain enumerated powers together with such incidental powers as are necessary to a sale of the insolvent bank's assets, 3 C. S., secs. 218(c), (e), but the functions of the Commissioner of Banks are not limited to the provisions of section 218(c), and the courts of equity have inherent power to permit the Commissioner of Banks to exercise the functions of a chancery receiver in matters which are not inconsistent with his statutory duties. *Blades v. Hood*, 56.

2. The effort of the Federal Congress to aid closed banks in time of financial stringency has given rise to an emergency not foreseen when our State banking laws were revised, and a court of equity has inherent power to permit the Commissioner of Banks to pledge the assets of an insolvent bank to secure a loan from the Federal Reconstruction Finance Corporation, but the right to so borrow money and pledge the assets is not absolute, but must be determined by the court upon inquiry into all the facts, including those relating to the condition of the bank and the terms imposed for the proposed loan in the court's administration of justice among those having a pecuniary interest in the affairs of the bank, the court retaining control and supervision of the Commissioner with respect to all matters involved in the loan. *Ibid.*

3. The Commissioner of Banks taking over the assets of an insolvent bank as successor to the Corporation Commission, is entitled to the possession of all the assets of such insolvent bank for the purposes of liquidation. *Hood v. Board of Financial Control*, 119.

d Claims and Priorities and Distribution

1. Where a city and county deposit public funds in a bank and take from the bank as security for the deposit certain bonds, notes, etc., and there is evidence that the city and county, relying on the pledged security, made large deposits in the bank and drew thereon and that their checks were honored until a few days before the bank closed its doors, and there is no evidence tending to show that the city or county knew of or had reasonable grounds to believe that the bank was insolvent at the time the securities were pledged: *Held*, the evidence is insufficient to support a finding by the trial judge that the pledge of the securities by the bank constituted an unlawful preference and was a fraud on other creditors of the bank, and his judgment that the Commissioner of Banks was entitled to recover the pledged assets will be reversed, and the fact that the bank was insolvent at the time and that its officials knew or should have known of its insolvency would not affect this result, and the fact of continued deposits by the county and city is not evidence of fraud on their part. *Hood v. Board of Financial Control*, 119.

BANKS AND BANKING H d—*Continued.*

2. After demand by a depositor or creditor of a bank for the payment of the amount due and refusal of the bank to make payment, the bank is liable for the amount of the claim plus interest at the rate of six per centum per annum, C. S., 2305, 2309, and the institution of proceedings under the statute for its liquidation is a waiver of demand by the depositors and creditors and is equivalent to a refusal to pay on the part of the bank, and in the statutory distribution of its assets by the Commissioner of Banks all depositors and other creditors of the bank are entitled to the legal rate of interest upon their claims from the date the insolvency proceedings are begun until payment by the receiver, as against the stockholders of the bank who have paid the statutory liability on their stock. C. S., 219(a). *Hackney v. Hood*, 486.

3. In order to bring an action against the Commissioner of Banks to recover on a claim against an insolvent bank whose assets have been taken over by him, the plaintiff must allege that the claim had been presented to the Commissioner and that he had refused payment. N. C. Code, 218(c). *Child v. Hood*, 648.

I Criminal Responsibility of Officers, Agents or Employees. (Conspiracy to violate banking laws see Conspiracy B a 1.)

c Misapplication

1. Upon a charge of misapplication of funds of a bank pursuant to a conspiracy, proof of misapplication of any item charged is sufficient to support a conviction. *S. v. Lea*, 13.

d False Reports and Statements

1. In a prosecution of an officer of a bank for publishing a false report of the bank's condition in violation of N. C. Code, 1931, sec. 224(e), a variance between the allegations and proof as to some of the items of the report will not be fatal when there is no variance with respect to all the items, it being sufficient for conviction if the report as published was false in any particular as alleged in the indictment and was published with knowledge of such falsity and with a wrongful or unlawful intent, and *held further*, there was no error in the trial on the count relating to the publishing of such false report and the conviction of the defendant on that count is upheld on appeal. *S. v. Davis*, 47.

2. The verification of a report of the condition of a bank made by certain officers or directors to the Corporation Commission in response to an official call is required to be made upon the knowledge of those signing the report and not merely upon the statements by other employees of the bank, and in a prosecution for publishing a false report in a newspaper a defendant bank official who had verified the report may not escape criminal liability upon the grounds that he was busily engaged with other matters of the bank's business at the time of signing it and relied upon the assertions made to him by other employees as to its correctness, and signed it without knowledge of its falsity. *Ibid.*

BILL OF DISCOVERY.

A Nature and Extent of Remedy.

a Right Thereto in General

1. A motion for an examination of the defendant and for the inspection of records and books will not be granted for mere inability of the plaintiff to allege the exact amount claimed, but such motion may be granted where it appears that the plaintiff could not otherwise even approximately state the amount claimed, but the plaintiff is entitled to inspect only the books and records pertinent to the inquiry and the plaintiff should be required to state specifically the books and records which he contends contain such matter. *Brown v. Clement Co.*, 508.

b Affidavits and Procedure. (Appeals from order see Appeal and Error J d 2.)

1. Where it appears from the plaintiff's affidavit for an examination of the officers and agents of the defendant corporation and for an inspection of its books that the plaintiff was seeking to recover on a contract for the division of profits from the construction of a certain building by the corporation, and that the plaintiff could not approximately state the amount due thereunder without such discovery, and that the facts and records were peculiarly within the knowledge and possession of the officers and agents of the defendant, an order by the clerk granting the plaintiff's motion is not erroneous. *Brown v. Clement Co.*, 508.

BILL OF PARTICULARS see Indictment D.

BILLS AND NOTES. (Negotiable municipal bonds see Municipal Corporations K c.)

A Requisites and Validity.

a Consideration

1. Where a husband executes a note as maker for money borrowed from the bank which note is signed by another as surety, and after the death of the husband, his widow, upon request of the surety, executes a note in like amount in substitution therefor which is also signed by the surety in the same capacity: *Held*, in a suit by the bank to recover the amount borrowed an instruction that if the jury believed the evidence the widow would not be liable is correct, the action being to recover the amount of the husband's indebtedness and not on the note executed by the widow, and the widow having received no consideration for the note. *Bank v. Dickson*, 500.

2. The presumption that a note under seal is supported by a legal consideration is rebuttable as between the parties, C. S., 3008, and total failure of consideration constitutes a complete defense in an action on the note. *Patterson v. Fuller*, 788.

C Rights and Liabilities Upon Transfer.

a Unqualified Endorsement

1. Where a fire insurance company draws a draft on itself payable to the insured to cover loss sustained by the insured on a policy of fire insurance, and the insurer stipulates that if the draft is endorsed for the insured by his agent or attorney that properly

BILLS AND NOTES C a—*Continued.*

certified evidence of authority must be filed with the insurer, and the draft is delivered by the insurer's agent to an attorney who endorses the draft and attaches thereto a certificate of a deputy clerk of the Superior Court that he is the attorney for the insured, and deposits the draft for collection in a bank which endorses it with guaranty of all prior endorsements, and the draft is paid by the insurer after it had examined the endorsements and passed thereon, and the proceeds remitted to the collecting bank and drawn out by the attorney by checks without paying any part thereof to the insured, and it is made to appear as a fact that the attorney was without power to endorse the draft or receive the proceeds thereof: *Held*, the loss was sustained by reason of want of authority by the attorney to endorse and not by want of genuineness in the endorsement, and the bank guaranteeing prior endorsements and furnishing the insurer in good faith evidence of the attorney's authority, is not liable to the insurer on its endorsement, the insurer expressly reserving the right in itself to pass upon the attorney's endorsement. *Holloway v. Barbee*, 713.

d Holders in Due Course

1. A holder in due course is one who holds a negotiable instrument, complete and regular upon its face, before maturity without notice of previous dishonor, and who acquired it in good faith for value without notice of any infirmity in the instrument or defect in the title of his endorser. C. S., 3033. *Wellons v. Warren*, 178.

e Purchasers from Holders in Due Course

1. A purchaser of a negotiable note from a holder in due course takes the note free from equities which would prevent recovery by the payee if he was not a party to the fraud or illegality affecting the note, although he had notice of such equities at the time of his purchase. C. S., 3039. *Wellons v. Warren*, 178.

D Construction and Operation.

b Rights and Liabilities of Parties

1. A guaranty of the payment of a note is an obligation arising out of contract by which the guarantors assume liability for the payment of the note in case the makers thereof do not pay same upon maturity. *Trust Co. v. Clifton*, 483.

H Actions on Notes.

c Evidence

1. Where the plaintiff in an action on a note introduces evidence that the note was negotiable, duly endorsed by the payee and held by the plaintiff, the evidence is sufficient to establish prima facie ownership of the note by the plaintiff, and the defendant's demurrer to the evidence is properly overruled. *Steel Co. v. Supply Co.*, 10.

2. Where suit is entered on a note as it is written against the makers and guarantors thereof, and there is no attempt in the pleadings to enlarge the liability of the parties, and there is no plea of *nudum pactum* set up as a defense: *Held*, the exclusion of evidence tending to enlarge the liability of the guarantors to that of makers is not error. *Trust Co. v. Clifton*, 483.

BILLS AND NOTES—*Continued.*

I Checks and Drafts.

b Deposit for Collection and Rights and Liabilities of Parties

1. Where A. sells cotton to B. who in turn sells it to a cotton mill, and gives A. a draft on the mill in payment of the purchase price, and A. ships the cotton to the mill and deposits the draft with bill of lading attached in a bank which sends the draft to another bank for collection, and the collecting bank allows the mill to deduct therefrom an amount owed it by B. and remits the balance to A.: *Held*, the collecting bank was the agent of A. and is liable to him for the amount of the deduction unless A. had authorized or ratified such deduction. *Lawson v. Bank*, 368.

2. Where the collecting bank allows the drawee of a draft to deduct therefrom a certain sum due the drawee by another, and the drawer is notified of such deduction and accepts the amount collected and attempts to collect the amount of the deduction from the one who owed the sum to the drawee: *Held*, the acceptance, by the drawer of the amount collected on the draft and his attempt to collect the amount of the deduction from the third person constituted a ratification of the act of the collecting bank in allowing the deduction, and the drawer may not thereafter collect the amount of the deduction from the collecting bank. *Ibid.*

BUILDING AND LOAN ASSOCIATIONS.

C Operation.

d Fines and Penalties

1. A borrowing stockholder in a building and loan association sustains a dual relation to the association, and where the association charges him certain fines authorized by its by-laws for the failure of the stockholder to pay his installments on his stock when due, such fines cannot be alleged as interest paid on the loan from the corporation, and where the amount of interest paid on the loan is not greater than six per centum, not counting the fines paid as a stockholder, the borrowing stockholder is not entitled to recover for usury against the association, the by-laws imposing the fine being expressly authorized by valid statute, C. S., 5178; C. S., 2306. *Moore v. Building and Loan Asso.*, 592.

CANCELLATION OF INSTRUMENTS.

A Right of Action and Defenses.

b For Fraud

1. The fact that one member of a family conveys land to another or borrows money from another member is not evidence of fraud or bad faith in the transactions. *Richardson v. Satterwhite*, 113.

2. Misrepresentation must be of a past or subsisting fact in order to support an action for the rescission of a deed for fraud, and in this case, granting that the allegations in the pleadings were sufficient to support the relief of rescission, the evidence is held to be of insufficient probative force to be submitted to the jury. *Willis v. Willis*, 517.

CANCELLATION OF INSTRUMENTS—*Continued.*

B Proceedings and Relief.

b Parties and Pleadings. (Necessary parties in suit to set aside deed to county see Counties F a 1.)

1. The courts cannot grant the relief of cancellation of an instrument for fraud or mistake unless the facts constituting the fraud or mistake are distinctly alleged. *McNeill v. Thomas*, 219.

c Laches

1. The cancellation of an instrument for fraud should be sought within a reasonable time from the discovery of the fraud and where the husband deeds certain lands to his wife and thereafter obtains a divorce from her and the wife brings action for the possession of the lands, the husband may not seek to avoid his deed for alleged fraud in its procurement when such fraud occurred and was discovered more than three years prior to the commencement of the action. *Willis v. Willis*, 517.

2. Ordinarily fraud will vitiate any contract, and the perpetrator of the fraud will not be allowed to retain the fruits of his own wrongdoing, but the defrauded party must act within a reasonable time from the discovery of the fraud in order to be entitled to rescission. *Hood v. Martin*, 620.

d Evidence

1. Where the evidence discloses that a mortgage creditor of a corporation agreed to lend it more money for reorganization after its buildings were destroyed by fire, the money to be used to buy other lands and replace the buildings and a new corporation to be formed for the purpose of carrying on the business, and that during negotiations the creditor discovered that one of the organizers had had the new property conveyed to him in his own name, and upon the creditor's insistence agreed to convey the property to the new corporation if the creditor would assign to him a part of the bond to be secured by the corporation's mortgage on the property: *Held*, the evidence is insufficient to establish fraud or duress in the execution of the assignment, and the execution of a release by the assignee together with other negotiations between the parties constituted a sufficient consideration. *Luff v. Levey*, 242.

CARRIERS.

B Carriage of Goods.

f Injury in Transitu

1. In an action against a railroad company to recover damages to a shipment of mules an instruction, upon supporting evidence, that if the jury found from the greater weight of the evidence that the mules were delivered to the railroad company in a good condition and were received at destination in a sick and injured condition that the damage was not due to natural causes or innate viciousness of the animals, that such facts would be evidence against the railroad company from which the jury might or might not find that the damage was due to the negligence of the carrier is held correct. *Edgerton v. R. R.*, 281.

CARRIERS B—*Continued.*

h Limitation of Liability

1. Rule that railroad cannot limit liability for negligence applies to duties as common carrier. *Singleton v. R. R.*, 462.

2. Where a railroad company issues a revocable, nontransferable license permitting the licensee to assemble and handle baled cotton on the company's platform upon condition that the railroad would not be liable for the negligent destruction of the cotton, and this agreement is set out in a written contract which, by its terms, is applicable only to such cotton which had not been tendered or accepted by the carrier for shipment and for which no bill of lading had been issued, and the contract does not obligate the licensee to ultimately ship by rail, and it appears that a large part of the cotton was shipped by truck: *Held*, in executing the contract the licensee was not undertaking to deal with the railroad company as a common carrier, but he executed the contract for his own convenience in using a part of the platform, and the contract bars an action by the licensee to recover for the negligent destruction of the cotton. *Ibid.*

CHARITABLE TRUSTS see Wills E h 1, 2.

CHATTEL MORTGAGES. (Execution by corporations see Corporations G e: Conditional sales see Sales I.)

A Requisites and Validity.

b Acknowledgment

1. Although a grantee in a chattel mortgage is not qualified to take the acknowledgment thereof, a chattel mortgage to a bank will not be declared void because the acknowledgment thereof was taken by its cashier. *Bank v. Hall*, 570.

J Payment and Cancellation.

c Execution of Later Instrument

1. In this case prior mortgage held valid, it not being discharged by substituted mortgage. *Bank v. Hall*, 570.

CHECKS see Bills and Notes I.

CIRCUMSTANTIAL EVIDENCE see Criminal Law G n.

CLERKS OF COURT.

B Duties and Liabilities.

d Funds of Minors and Wards

1. Under the provisions of C. S., 6376, 6377, a corporation licensed by the Insurance Commissioner and having charter authority to act as guardian, may be appointed guardian without giving the statutory bond usually required, C. S., 2161, 2162, and where the clerk of the Superior Court pays to a bank so licensed and having charter authority to act as guardian, money belonging to the estate of a minor and does not require the bank to give guardianship bond, neither the clerk nor the sureties on his official bond are liable for failure to require the bond, although the ward's estate suffered loss

CLERKS OF COURT B d—*Continued.*

by reason of the bank's failure to keep the funds separate from its regular deposits, the bank later becoming insolvent. *Quinton v. Cain*, 162.

2. Payment of ward's funds to assistant clerk appointed guardian is not payment into court. *Phipps v. Indemnity Co.*, 420.

COMMERCE—Application of Federal Employers' Liability Act see Master and Servant E a.

COMPENSATION ACT see Master and Servant F.

CONFESSIONS see Criminal Law G 1.

CONSOLIDATED STATUTES AND SECTIONS OF NORTH CAROLINA CODE CONSTRUED.

SEC.

135. Suit in this case held in nature of bill to surcharge and falsify executor's account. *Thigpen v. Trust Co.*, 291.

185. Where motion of minor child is not a party to adoption proceedings order of adoption is void as to her. *In re Shelton*, 75.

218(c), (d). Statutory liability of stockholders is asset of bank repayable to them pro rata in event of surplus; and purchaser of stock held entitled to repudiate purchase under facts of this case. *Hood v. Martin*, 620.

218(c). Claim against insolvent bank must be first presented to Commissioner of Banks before he may be sued thereon. *Child v. Hood*, 648.

218(c), (e), 1208. Commissioner of Banks is statutory receiver and may be allowed to exercise certain powers not stated in statute. *Blades v. Hood*, 57.

218(c), 219(a), (c), (d). Transferee must be legally capable of holding stock in order to relieve transferer of statutory liability, but where stock is transferred in good faith to trustee for minor the transferee is relieved of statutory liability. *In re Trust Co.*, 238.

219(a), 2305, 2309. Depositors and creditors of insolvent bank are entitled to interest as against rights of stockholders. *Hackney v. Hood*, 486.

224(e). Defendant need not be officer or employee of bank in order to be convicted of conspiracy to violate this section. *S. v. Lea*, 14. Proof that any item of bank statement was false held sufficient for conviction. *S. v. Davis*, 47.

344. Treasurer's failure to sign bond held an irregularity, but such irregularity held waived under facts of this case. *Comrs. of Brunswick v. Inman*, 542.

439. Ordinarily, cause of action on official bond accrues upon breach of official duties. *Washington v. Bonner*, 250.

441. Action against guarantor on note is barred in three years. *Trust Co. v. Clifton*, 483.

441(9). Statute runs from time fraud or mistake is discovered or should have been discovered with due diligence. *Stancill v. Norville*, 457.

CONSOLIDATED STATUTES—*Continued.*

SEC.

447. Construed with chapter 449, sec. 5, Public Laws of 1891, held to impose penalty recoverable solely by civil action. *S. v. Briggs*, 158.

450. Fact that representative of minors in partition was designated as guardian held immaterial. *Ex Parte Huffstetler*, 796.

460, 840. In attachment court has discretionary power to allow intervener to claim property while it is still *in custodia legis*. *Bank v. Lewis*, 644.

463. Cause of action for pollution of stream held transitory, and motion for change of venue as a matter of right was properly denied. *Clay Co. v. Clay Co.*, 12.

470. After granting motion for removal for convenience of witnesses court may not order that jury be drawn from another county. *Eares v. Coxe*, 173.

471. Motion for change of venue is addressed to discretion of court and his order is not reviewable in absence of abuse. *S. v. Lea*, 14.

483. Statutory provisions relating to service of process on corporations must be strictly followed. *Hershey Corp. v. R. R.*, 184.

515. Motion for leave to amend complaint is addressed to discretion of trial court and his action thereon is not reviewable in absence of abuse. *McKeel v. Latham*, 246.

534, 537. Defendant desiring definiteness and certainty may, in proper instances move for bill of particulars or for amendment. *Hood v. Love*, 583.

547. Allowance of amendment to complaint by changing name of plaintiff held not error under facts of this case. *Street v. McCabe*, 80; *Investment Co. v. Gash*, 126.

564. Charge held to sufficiently explain substantial features of this case. *S. v. Ellis*, 836.

567. On motion of nonsuit all evidence is to be considered in light most favorable to plaintiff. *Tuttle v. Bell*, 154; *Pendergraft v. Royster*, 384; *Sampson v. Jackson Bros.*, 413; *Puckett v. Dyer*, 684.

573. Order for compulsory reference is upheld in this case. *Mfg. Co. v. Horn*, 732.

578. Court has power to make additional findings in consent reference. *Thigpen v. Trust Co.*, 291.

591. No appeal will lie from order of trial court setting aside verdict in his discretion. *Strayhorn v. Bank*, 383. Trial court may not set aside verdict in his discretion after term. *Acceptance Corp. v. Jones*, 523.

600. *Held:* excusable neglect was shown by defendant corporation in that process had not been properly served on it. *Hershey v. R. R.*, 184.

618, 630, 650. Joint *tort-feasor* paying judgment is entitled to contribution and supersedeas bond of other *tort-feasor* is liable. *Hamilton v. R. R.*, 468.

CONSOLIDATED STATUTES—*Continued.*

SEC.

618, 650, 659. Solvent *tort-feasor* and sureties on supersedeas bonds held not entitled to stay of execution upon insolvency of one *tort-feasor*. *Hamilton v. R. R.*, 136.

643, 644. Case on appeal from county court is not case on appeal from Superior Court. *McMahan v. R. R.*, 805. Record and brief on appeal should be narrowed to matters of substance and moment. *S. v. Lea*, 14.

646, 649. Statutory affidavit is mandatory in order for defendant to be allowed to appeal *in forma pauperis*. *McIntyre v. McIntyre*, 631.

649. Affidavit for appeal *in forma pauperis* must contain averment that counsel learned in law has advised that there is error. *Hanna v. Timberlake*, 557.

675. In this case held: sheriff did not make valid levy on personal property, acts of possession being insufficient. *Bank v. Hall*, 570.

763, 2591. Within twenty days from sale of land to make assets clerk may order resale under statutory provisions. *Vance v. Vance*, 667.

794, 778, 792. Defendant was amenable to process of court upon appearance on motion against surety, and judgment against surety of bail bond was error. *Stepp v. Robinson*, 803.

807. Plaintiff has lien on property possessed or levied on under attachment where statute has been complied with. *Newberry v. Fertilizer Co.*, 330.

816. All property in this State owned by nonresident defendant is subject to attachment in action under C. S., 798. *Newberry v. Fertilizer Co.*, 330.

819. No lien attaches to any specific property upon attachment of intangible property in hands of third person. *Newberry v. Fertilizer Co.*, 330.

827. Judge may order plaintiff to file increased bond, but may not order attachment vacated if bond is not filed within time. *Luff v. Levey*, 783.

843. Court may order garnishee not to make further payments to defendant pending final determination of action. *Newberry v. Fertilizer Co.*, 330.

865. Judgment may be entered for that part of note admitted to be due without prejudice to right of plaintiff to litigate balance. *Fertilizer Co. v. Trading Co.*, 261.

934(a). Payment of ward's funds to assistant clerk appointed guardian is not payment into court. *Phipps v. Indemnity Co.*, 420.

991. Deed held to convey life estate only, the statutory presumption of fee being rebutted by clear but inartificial expression of intent to convey only life estate. *Boomer v. Grantham*, 230.

1138, 3309, 3311. Transfer of personal property by corporation held not void as to torts under facts of this case, amendments of 1929 not applying. *Coach Co. v. Begnell*, 656.

CONSOLIDATED STATUTES—*Continued.*

SEC.

1161, 1179. Statutes held inapplicable to this suit by receiver against directors for repurchase of stock by corporation. *Thompson v. Shepherd*, 210.

1437. Concurrent jurisdiction of Superior Courts with county courts was reëstablished by this section. *S. v. Everhardt*, 610.

1654(2). Doctrine of advancements arises only where deceased leaves no will. *Prevette v. Prevette*, 89.

1658, 2495. Marriage may be attacked collaterally on ground that other party had not obtained valid decree of divorce dissolving prior marriage. *Pridgen v. Pridgen*, 533.

1659(4), (a). Action for divorce for separation can be maintained only by party injured where it is not alleged that there are no children. *Reeves v. Reeves*, 792.

1667. Allowance under this section should be based on husband's means and condition in life and may be determined by analogy to section 1665. *Kiser v. Kiser*, 428. Judgment holding defendant in contempt for failing to obey order to pay alimony under this section upheld in this case. *Little v. Little*, 694.

1795. In action to recover for services rendered deceased testimony of plaintiff that she boarded deceased held incompetent. *Price v. Pyatt*, 799.

1795. Testimony of grantor that deed was never delivered to grantee, since deceased, held competent. *Gulley v. Smith*, 274. Propounders and caveators are parties interested in event within meaning of this section. *In re Will of Brown*, 347.

1801. Complaint in this case alleges cause of action for criminal conversation and testimony of wife was incompetent. *Rouse v. Creech*, 378.

1802. Rule that husband or wife may not testify against each other does not apply to proof of assault. *S. v. French*, 632.

2161, 2162, 6376, 6377. Clerk need not require corporation licensed by Insurance Commissioner to give guardianship bond. *Quinton v. Cain*, 162.

2180, 962. Sale for partition held not void although order did not provide for disbursement and minor's funds were paid to mother. *Ex Parte Huffstetler*, 796.

2234. Upon hearing of habeas corpus in extradition proceedings court must hear allegations and proof on controverted facts. *In re Bailey*, 362.

2308. Guardianship bond is liable for loss caused by deposit as permanent investment in savings account without security. *Bane v. Nicholson*, 104.

2355, 2485. Where landlord has become responsible for supplies for crop and conforms to statute he has superior lien on crops. *Ransom v. Oil Co.*, 193.

CONSOLIDATED STATUTES—*Continued.*

SEC.

2365. Under facts of this case defendant was not estopped to deny tenancy and issue of title was raised ousting jurisdiction of justice of the peace. *Ins. Co. v. Totten*, 431.

2438, 2439, 2440, 2441. Letter in this case held not sufficient notice upon which to base materialman's lien. *Hardware Co. v. Percival*, 6.

2440. Statutory lien of laborer or materialman is assignable. *Horne-Wilson, Inc., v. Wiggins Bros, Inc.*, 85.

2469. Judgment holding that claim of lien by farm laborer was too indefinite affirmed in this case. *Gainey v. Gainey*, 190.

2469, 2470, 2471, 2473, 2474, 2442. Priority of liens of materialmen under direct contract with owner are fixed by date of filing notice. *Boykin v. Logan*, 196.

2591. Where clerk orders resale he may order allowance to trustee, and where he has approved accounting such order is presumed. *Brokerage Co. v. Trust Co.*, 182.

2617, 2618, 2621. Instruction in this case as to culpable negligence held erroneous. *S. v. Stansell*, 70.

2621(32). Indictment for larceny and receiving will not support conviction of driving car without knowledge or consent of owner. *S. v. Stinnett*, 829.

2621(45), (51), (54), (55), (7a). Evidence of negligent driving held sufficient to be submitted to jury. *Puckett v. Dyer*, 684.

2621(51). Failure to drive on right side of highway must be proximate cause of injury to be actionable negligence. *Grimes v. Coach Co.*, 605.

2982. Municipal bonds conforming to statute are negotiable instruments. *Trust Co. v. Statesville*, 299.

2997, 3033. Delivery of negotiable municipal bonds is conclusively presumed when in the hands of a holder in due course. *Trust Co. v. Statesville*, 399.

3008. Failure of consideration for note under seal may be shown by parol as between the parties. *Patterson v. Fuller*, 788.

3033, 3039. Purchaser from holder in due course takes note free from equities when not a party to fraud or illegality. *Wellons v. Warren*, 178.

3311. Absolute sale of personal property by corporation is not required to be in writing. *Coach Co. v. Bagnell*, 656.

3345. Chattel mortgage to bank is not void because acknowledgment thereof is taken by bank's cashier. *Bank v. Hall*, 570.

3465, 3467, 3470. Statutory provisions as to negligence and fellow-servant rule applies to action against logging road. *Sampson v. Jackson Bros.*, 413.

3964. Widow is subrogated to rights of mortgagee where policy in which she is named beneficiary is assigned to and paid to mortgagee. *Russell v. Owen*, 262.

CONSOLIDATED STATUTES—*Continued.*

SEC.

4033. Trust estate is not forfeited by failure of trustees to follow directions, the remedy being by statutory action against trustees. *Humphrey v. Board of Trustees*, 201.

4145. Probate of will in common form is conclusive until vacated on appeal or held void by competent tribunal. *Crowell v. Bradsher*, 492.

4164. All of testatrix's real property held devised to named devisee, the will otherwise leaving the property undisposed of. *Holmes v. York*, 709.

4175, 4245, 4623. Indictment in this case held to sufficiently identify property alleged to have been burned. *S. v. McKeithan*, 494.

4213, 4643. Evidence held sufficient to show secret assault. *S. v. McLamb*, 442.

4457(a), Vol. 3. Verdict of guilty of disorderly conduct but not of drunkenness will not support conviction under this statute. *S. v. Myrick*, 8.

4561. It is not necessary to competency of confession to officer that defendant be warned he is not compelled to answer. *S. v. Grier*, 586.

4613. Bill of particulars may be requested where indictment charges elements of crime but more particularity is desired. *S. v. Everhardt*, 610.

4623. Indictment will not be quashed for mere informality or refinement. *S. v. Lea*, 14. Motion to quash for duplicity held properly denied. *S. v. Davis*, 47. Indictment is sufficient if it charges all elements of the crime in plain, explicit manner. *S. v. Everhardt*, 610.

4625. Where jurisdiction of court is not ousted on face of indictment plea in abatement to jurisdiction is bad. *S. v. Lea*, 14.

4633. Each defendant in joint prosecution for crime not a capital felony is entitled to four peremptory challenges. *S. v. Burleson*, 779.

4651. Affidavit is jurisdictional and may not be waived by solicitor. *S. v. Stafford*, 601.

5178, 2306. Fine imposed for delinquency in paying for stock is not charge of interest on loan. *Moore v. Loan Association*, 592.

5481, 5483, 5489. Where county boards have refused to consolidate districts, State Board of Equalization may not refuse to furnish support for district. *Elliott v. Board of Equalization*, 749.

5584(a), Vol. 3. Statute applies to proof and not to pleadings. *University v. High Point*, 558.

5604, 5446. Trust estate in this case held not void for failure of its purpose. *Humphrey v. Board of Trustees*, 201.

5784. Land held by incorporated town held to escheat to University upon repeal of town charter. *University v. High Point*, 558.

6274, 6474, 6479, 6518. Fraternal insurance order allowed to do business here without license held subject to process served on resident secretary of local chapter. *Winchester v. Brotherhood of R. R. Trainmen*, 735.

CONSOLIDATED STATUTES—*Continued.*

SEC.

6304. Insurer is liable to employer for amount of unearned premium after cancellation of policy of compensation insurance. *Hughes v. Lewis*, 775.

6437. Provision inserted in accordance with statute that insurer should not be entitled to recover if not the unconditional owner of property held not waived by agreement determining amount of loss. *Sasser v. Ins. Co.*, 232.

6464. Widow takes proceeds of policy in which she is named beneficiary free from claims of creditors. *Russell v. Owen*, 262.

7986, 7971(50), 7985. Tax lien attaches to personalty only from levy, and owner is not liable for taxes for years prior to his possession. *Coltrane v. Donnell*, 515.

8038. Owner may redeem property within one year by paying taxes with interest and may rely on sheriff's statement of amount due. *Thompson v. Whitehall Co.*, 652.

8081(i), (f). Ordinarily, injury to employee while going to or returning from work is not compensable. *Bray v. Weatherly Co.*, 160.

8081(rrr). Order of trial court that insurer pay reasonable attorney's fee held authorized by statute. *Williams v. Thompson*, 717.

8081(w). Where employer files claim within statutory time the claim is not barred although employee files no claim. *Hardison v. Hampton*, 187.

8106. Grand jury held properly constituted in this case and motion to quash was properly refused. *S. v. Davis*, 47.

CONSPIRACY.

B Criminal Prosecutions. (Jurisdiction of prosecutions for, see Criminal Law D a 1; competency of testimony of coconspirator see Criminal Law G k.)

a Elements and Essentials of the Crime

1. A conspiracy is an agreement to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means, this being the crime and not its execution, and it is not necessary that all of the conspirators be physically able to carry the conspiracy into execution if one or more of them is able to do so, and it is not necessary for an indictment charging a conspiracy to violate the provisions of N. C. Code, 224(e), to allege that all of the defendants were officers or employees of the bank, although the statute applies only to misapplication, embezzlement, etc., by officers, employees, agents or directors of a bank with intent to injure or defraud it, the indictment being sufficient if it alleges that some of the defendants were officers or employees of the bank and that the other defendants conspired with them to do the unlawful act. *S. v. Lea*, 13.

b Evidence (Competency of testimony of coconspirators see Criminal Law G k.)

1. The criminal offense of unlawful conspiracy may be shown by circumstantial evidence. *S. v. Lea*, 13.

CONSPIRACY B b—*Continued.*

2. Where there is evidence that four or five men, some of them high officials of a bank, have acted in concert and have obtained wide access to the assets of the bank contrary to the ordinary rules of prudence and in violation of the banking laws of the State, and that their acts caused loss to the bank, the evidence is sufficient to be submitted to the jury on a charge of conspiracy to violate the provisions of N. C. Code, 224(e), and misapplication pursuant to the conspiracy, and to overrule the defendants' demurrer to the evidence, C. S., 4643, the question of intent to injure the bank being for the jury under conflicting evidence, and the fact that some of the funds were returned to the bank without immediate loss to it not affecting the character of the act at its inception. *Ibid.*

3. Evidence of conspiracy and secret assault pursuant thereto held sufficient in this case. *S. v. French*, 632.

CONSTITUTION, Sections Construed.

ART.

I, sec. 12. In this case prosecution should have been dismissed for want of proper indictment. *S. v. Rawls*, 436.

IV, sec. 8. Supreme Court can review only matters of law or legal inference on appeal in criminal action. *S. v. Harrell*, 210.

IX, secs. 2, 3. Elementary school must be maintained in each district. *Elliott v. Board of Equalization*, 749.

IX, sec. 7. Land held by incorporated town held to escheat upon repeal of town charter under facts of this case. *University v. High Point*, 558.

X, sec. 7. Widow takes proceeds of policy in which she is named beneficiary free from claims of creditors. *Russell v. Owen*, 262.

XIV, sec. 4. Priorities of liens of materialmen under direct contract with owner are fixed by date of filing notice. *Boykin v. Logan*, 196.

CONSTITUTIONAL LAW. (Full faith and credit see States A. b; power of General Assembly to dispose of escheated lands see Escheats A b 1; police power see Municipal Corporations H; maintenance of six-month term of public school see Schools and School Districts A c.)

A Construction and Operation.

a General Rules of Construction

1. A constitution should generally be given an interpretation based upon broad and liberal principles designed to ascertain the purpose and scope of its provisions, and if the meaning is clearly expressed it should be adopted, but if doubtful the intention of those who adopted the constitution must be sought, the words to be taken in their ordinary significance if not resulting in absurdity or contradiction, and recourse may be had to former decisions of the Court construing the provisions. *Elliott v. Board of Education*, 749.

CONTEMPT OF COURT see Divorce E d.

CONTRACTS. (Of infants see Infants B; contracts required to be in writing see Frauds, Statute of.)

A Requisites and Validity.

c Limiting Liability for Tort

1. The rule that a common carrier may not contract against liability for its negligence applies to transactions in the performance of its duties to the public as a common carrier and not to transactions involving no public duty or obligation. *Singleton v. R. R.*, 462.

D Rescission and Abandonment.

d Abandonment by Conduct of Parties

1. A valid written contract may be abandoned by agreement, conduct, or by the substitution of a new and inconsistent contract, but in order for conduct to constitute an abandonment of a contract such conduct must be positive, unequivocal, and inconsistent with the terms of the instrument. *Singleton v. R. R.*, 462.

F Actions for Breach.

c Pleadings, Evidence and Burden of Proof

1. Where the plaintiff seeks to recover on a contract alleged to have been executed between a third party and the defendant for the plaintiff's benefit, but the evidence fails to establish the alleged contract, a motion as of nonsuit is properly granted. *Construction Co. v. Bacon*, 1.

CORPORATION COMMISSION—Authority to approve municipal contract relating to franchise see Municipal Corporations F a.

CORPORATIONS. (Service of process on, see Process B d; banking corporations see Banks and Banking; building and loan association see Building and Loan Associations.)

C Directors and Officers.

c Duties and Liabilities

1. In an action against the directors of a corporation to recover the loss sustained by the plaintiff by reason of the directors' negligence in the performance of their duties, a motion as of nonsuit by one of the directors should be allowed where there is no evidence of a causal connection between his negligence and the damage to the plaintiff, such damage being sustained after the movant had ceased to be a director. *Minnis v. Sharpe*, 110.

d Transactions with Corporation

1. The dealings between a corporation and its officers and directors should be closely scrutinized by the courts to ascertain whether the transaction is free from fraud and oppression and that it is not prejudicial to the corporation or its creditors, and the burden of proof is on the officer or director to show that the transaction was open, fair, and for a valuable consideration. *Thompson v. Shepherd*, 310.

D Stock.

c Purchase by Corporation

1. The purchase of its stock by a corporation from an officer, director and attorney thereof may be valid upon resolution of all its direc-

CORPORATIONS D e—*Continued.*

tors and shareholders when done openly and fairly for a valulable consideration at a time when the corporation is prosperous and the consideration therefor is not a preëxisting debt of the corporation, in this case the consideration was the lands whereon the corporate business was done and a certain sum in cash, the transaction being without fraud or oppression, and the corporation thereafter borrowing money to supply the cash paid as a part of the consideration. *Thompson v. Shepherd,* 310.

2. Where, in an action by the receiver of a corporation to set aside the purchase by the corporation of its own stock from an officer and director thereof, the evidence tends only to show that the transaction did not affect the rights of creditors and all the directors and stockholders agreed to it at the time, that the transaction was made with a full disclosure of the facts and was free from fraud and oppression and that at the time the corporation was operating at a large profit and continued in business for several years thereafter: *Held,* the refusal of the receiver's motion for a directed verdict was not error. *Ibid.*

3. In this case a corporation purchased its own stock from an officer and director at a time when the corporation was operating at a large profit and had no preëxisting debts, and the stock was later reissued to its other stockholders, the purchase being with the unanimous consent of all its directors and stockholders: *Held,* upon the insolvency of the corporation several years after the transaction, the provisions of C. S., 1161 and 1179 are not applicable in the receiver's suit against the directors. *Ibid.*

G Functions and Dealings.

d Property and Conveyances

1. There is no statutory requirement that a sale or conveyance of personal property by a corporation shall be in writing or shall be registered for any purpose when such sale is absolute and delivery of the property is made to the purchaser, C. S., 3311, applying only to sales of real estate and transfers of personal property by chattel mortgage or conditional sale. *Coach Co. v. Begnell,* 656.

2. Construing N. C. Code of 1927, 1138 with C. S., 3309, 3311, the amendments to N. C. Code, 1138, not applying in the instant case, it is held that an absolute sale by a corporation of its personal property, accompanied by delivery to the purchaser, is not void as to a judgment creditor of the corporation on a judgment obtained against the corporation for a tort committed before the transfer, when the sale was not made with the purpose of hindering, defrauding, etc., the creditors of the corporation, the provisions of the statute not applying to such transfer, and upon a verdict of a jury in his favor on the question of fraud the purchaser of the property from the corporation is entitled to an order restraining the judgment creditor from issuing execution on the property in his hands. *Ibid.*

e Contracts and Encumbrances

1. A chattel mortgage duly executed by a corporation is not void for want of the corporate seal, but in the absence of the seal there is no

CORPORATIONS G e—*Continued.*

presumption of corporate action and the burden of proving its authenticity is on the party claiming under it, but in this case the authorization of the execution of the chattel mortgage was admitted, and the mortgagee was entitled to a preference against other creditors of the insolvent corporation. *Armstrong v. Service Stores*, 499.

COSTS.

B Persons and Property Liable.

b Special Proceedings

1. Where a transferee of a devisee asserts her right to hold the lands devised in severalty instead of as a tenant in common with other devisees, and successfully resists the claim of the other devisees that her land be charged with personal notes executed by her transferor to the executrix of the estate: *Held*, an order taxing the entire costs in the Superior Court against the transferee is erroneous. *Prevette v. Prevette*, 89.

COUNTIES. (Taxation see Taxation; schools see Schools and School Districts; treasurer's bond see Principal and Surety B c 2, 3; Register's bond see Principal and Surety B c 1.)

F Actions.

a Parties

1. *Semble:* The county commissioners are necessary parties to declare a deed to the county void, and where there are no allegations in the complaint showing the right of the plaintiffs to bring the suit, or that they were taxpayers or residents of the county or have an interest authorizing them to bring suit, the case will be dismissed. In this case there was no allegation of a demand upon and refusal of the commissioners to bring suit. *Waddill v. Masten*, 172 N. C., 582. *Hughes v. Teaster*, 651.

COURTS. (Removal of causes to Federal Court see Removal of Causes: Federal Employers' Liability Act see Master and Servant E; contempt of court see Divorce E d; Criminal jurisdiction of Superior Courts see Criminal Law D; venue see Venue.)

B County and Municipal Courts.

b Jurisdiction (Criminal jurisdiction of county courts see Indictment A c.)

1. Where the statutory jurisdiction of a city court over the parties is confined to instances in which the plaintiff lives within one mile of the city limits, the court has no jurisdiction where the plaintiff lives beyond it, nor can the parties confer jurisdiction by consent, and where the municipal court orders the case transferred to the Superior Court of another county, no jurisdiction is thereby conferred on the Superior Court, there being no statutory authority for such removal, and the judgment of the Superior Court will be treated as a nullity and an appeal therefrom will be dismissed. *Lewellyn v. Lewellyn*, 575.

CRIMINAL LAW. (Distinction between criminal prosecution and action for penalty see Penalties A; Indictment see Indictment; particular crimes see Homicide, Embezzlement, Larceny, Banks and Banking I, and particular titles of crimes.)

B Capacity to Commit and Responsibility for Crime.

c *Burden of Proof on the Plea of Insanity*

1. Where the defendant in a criminal prosecution sets up the defense of insanity the burden is on him to prove such defense to the satisfaction of the jury, and where the jury finds against the defendant on the evidence the verdict will not be disturbed on appeal. *S. v. Jones*, 374.

2. Where insanity is set up as a defense in a criminal prosecution the burden of proving the defense to the satisfaction of the jury is upon the defendant, and where upon the evidence the jury has rejected this plea or found it unsatisfactory the verdict will not be disturbed on appeal. *S. v. Stafford*, 601.

C Parties and Offenses.

a *Principals*

1. One who aids and abets in the maintenance of a public nuisance is guilty of the offense, and where the lessee of a dwelling maintains and runs it in such a way as to make it a public nuisance the lessor is also liable to the charge if she aids and abets therein, the burden of proving the necessary elements beyond a reasonable doubt being upon the State. *S. v. Everhardt*, 610.

D Jurisdiction and Venue.

a *Place of Crime*

1. An indictment for conspiracy may be laid in the county where the unlawful agreement was entered into or in which any overt act was done by any of the conspirators in furtherance of their common design. *S. v. Lea*, 13.

2. Where the evidence discloses that overt acts in furtherance of a criminal conspiracy were done in this State the Superior Court of the county in which such overt acts were done has jurisdiction of the crime and all the conspirators thereto, and the contention of some of the defendants that the action should be dismissed because the evidence showed that they were nonresidents and that they did not participate in any activity in this State cannot be maintained. *Ibid.*

3. The defense that the crime charged, if committed at all, was committed in another state is available under a general plea of not guilty, with the burden of proof on the defendant. *S. v. Golden*, 440.

c *Time and Place of Court and Commission of Judge*

1. Where a criminal action is tried at a special term of the court duly called and the trial judge holds a valid commission from the Governor a plea to the jurisdiction of the court is properly refused. *S. v. Lea*, 13.

CRIMINAL LAW D—*Continued.*

d Venue and Original Jurisdiction of Inferior Courts

1. Exception to the jurisdiction of the Superior Court to try an indictment charging the maintenance of a public nuisance on the ground that the county court had exclusive original jurisdiction of the offenses is not tenable, since the provisions of C. S., 1437, takes from the inferior courts the exclusive jurisdiction and provides that the jurisdiction shall be concurrent and exercised by the court first taking cognizance thereof, except for certain enumerated counties exempt from its provisions. *S. v. Everhardt*, 610.

e Change of Venue

1. Motion for change of venue is addressed to discretion of court and his order is not reviewable in absence of abuse. *S. v. Lea*, 13.

E Arraignment and Pleas.

d Nolle Prosequi

1. In a prosecution for homicide an announcement by the solicitor before entering upon the trial that the State would not ask for a verdict of more than murder in the second degree is tantamount to taking a *nolle prosequi* or accepting an acquittal on the capital charge. *S. v. Gregory*, 528.

e Pleas in Abatement

1. Where the jurisdiction of the court is not ousted on the face of the indictment the position that the court does not have jurisdiction is not available on a plea in abatement, C. S., 4625, it being a matter of proof upon the trial with the presumption in favor of jurisdiction and the burden upon the defendant. *S. v. Lea*, 13.

G Evidence in Criminal Cases. (In prosecutions for particular crimes see Particular Titles of Crimes, Homicides, Larceny, Banks and Banking I, etc.)

e Hearsay Evidence

1. In a prosecution for violation of the prohibition laws evidence that the defendant's garage had the reputation of selling liquor is incompetent as hearsay evidence. *S. v. Turpin*, 11.

2. Where in a criminal prosecution the defendant does not take the stand but sets up an alibi and introduces evidence that on the night the crime was committed he was in a certain store some distance from the scene of the crime, and introduces testimony of the store-owner as to the time the defendant was in the store: *Held*, the exclusion of hearsay testimony of another witness as to a conversation between the defendant and the store-owner, also relating to the time the defendant was in the store, will not be held for error. *S. v. McLamb*, 442.

i Expert and Opinion Evidence

1. Where the defense of insanity is set up by the defendant in a criminal prosecution it is competent for nonexpert witnesses to testify as to his sanity or insanity when such testimony is based upon the witnesses' knowledge and observation of the defendant, the weight and credibility of such testimony being for the jury. *S. v. Jones*, 374.

CRIMINAL LAW G—*Continued.*

j Testimony of Convicts, Accomplices and Codefendants

1. Where on the trial of two defendants for homicide the court admits in evidence the statement of one of them that he was not present at the time of the crime, but plainly charges the jury that such statement was not competent against the other defendant who denied it, the exception to its admission entered by the latter will not be sustained. *S. v. Grier*, 586.

k Testimony of or Acts and Declarations of Coconspirators

1. Upon a showing of the existence of a conspiracy, or facts from which a conspiracy may be inferred, the acts and declarations of each conspirator done or uttered in furtherance of the common design are admissible in evidence against them all. *S. v. Lea*, 13.

l Confessions

1. Only voluntary confessions are admissible in evidence, and a confession is voluntary only when it is in fact voluntarily made, but where there is no duress, threat or inducement, the mere fact that the prisoner was under arrest and that officers were present does not render his confession involuntary. *S. v. Jones*, 374.

2. In order for a confession to be admissible in evidence it must be voluntary, the test usually being whether it was induced by hope or extorted by fear, but all confessions are to be taken as voluntary unless the person making them shows facts authorizing a legal inference to the contrary. *S. v. Grier*, 586.

3. It is necessary that a defendant examined by a magistrate in relation to the offense charged should first be informed that he is not compelled to answer and that his refusal to answer shall not be used to his prejudice, C. S., 4561, the proceeding before the magistrate being judicial, but such warning is not necessary in the extrajudicial examination of the defendant by a police officer, and where the defendant has made a confession to the officer which is excluded on the ground that such warning had not been given, and there is evidence that such confession was not induced by hope or fear, his latter confession, also made without inducement of hope or fear, will not be held incompetent on the ground that the defendant might not feel at liberty to depart from the statements of the first confession which was excluded. *Ibid.*

n Circumstantial Evidence

1. Criminal conspiracy may be shown by circumstantial evidence. *S. v. Lea*, 13.

p Similar Circumstances and Demonstrative Evidence

1. Where, in a prosecution under C. S., 4213, the defendant sets up an alibi and the prosecuting witness testifies that he saw and recognized the defendant when the defendant appeared suddenly at night at a window of the prosecuting witness's home and shot him through the window: *Held*, it is competent for other witnesses to testify that when sitting at the place where the prosecuting witness was sitting when assaulted they were able to identify people appearing at night outside the window when the same light was burn-

CRIMINAL LAW G p—*Continued.*

ing in the room that was burning on the night of the crime, the circumstances and conditions on the two occasions being identical, and their answers that they could identify people coming to the window at the place where the evidence tended to show the defendant stood on the night of the crime is not an invasion of the province of the jury and an objection thereto on the ground that the witnesses were allowed to state a conclusion rather than the facts cannot be sustained. *S. v. McLamb*, 442.

q Testimony of Husband or Wife

1. The rule that neither the husband nor wife is competent to testify against the other in criminal cases does not apply to proof of assault by the one upon the other. C. S., 1802. *S. v. French*, 632.

r Impeaching, Corroborating or Contradicting Witness

1. Where in a prosecution under C. S., 4175, 4245, an accomplice testifies that the defendant procured him to burn a certain house, it is competent for other witnesses to testify as to the narration by the accomplice of the commission of the crime as corroborative evidence of the accomplice's testimony on the trial. *S. v. McKeithan*, 494.

2. Where an eye witness's narration of the circumstances of the killing of the deceased contains material variations or contradictions, and later he makes and signs a written statement and explains that his previous contradictions were due to fear of the defendant and that he wished to make a clean breast of it to the sheriff: *Held*, the written statement was competent evidence for the consideration of the jury. *S. v. Ellis*, 836.

s Documentary Evidence

1. Where letters, typewritten or otherwise, are competent as evidence upon the trial their authenticity may be proven by circumstantial evidence. *S. v. Lea*, 13.

II Time of Trial.

c Continuance

1. Motion for continuance is addressed to sound discretion of trial court. *S. v. Lea*, 13.

2. While a motion for a continuance is addressed to the sound discretion of the trial court such motion should be granted where it is necessary for the preservation of the defendant's constitutional right to a fair opportunity to confront his accusers and witnesses with other testimony, but where on appeal from the court's order refusing defendant's motion for a continuance, it is not made to appear that this right had been denied the exception to the court's refusal to grant a continuance will not be sustained. *S. v. Gardner*, 361.

I Trial. (Trial of particular crimes see Particular Titles of Crimes; peremptory challenges to jurors see Jury A d.)

c Course and Conduct of Trial

1. Where a witness kneels in prayer while approaching the witness stand, and the court immediately upon observing her orders her to arise and retire to her room if she so desired, whereupon the

CRIMINAL LAW I c—*Continued.*

witness arises and takes the stand: *Held*, an exception thereto by the defendant will not be sustained, the defendant having made no motion for a new trial and not having asked the court to do more, and the court having acted in his discretion and having satisfactorily dealt with the circumstance. *S. v. Stafford*, 601.

2. Where the defendant's attorney upon the trial of a criminal offense requests the court to permit him to ask the jurors whether they had read a certain newspaper article, and offers neither affidavit nor evidence as a basis for the motion, it is not error for the trial judge in the exercise of his discretion to decline to stay the trial and embark upon the proposed exploration, the defendant having the right to have the question investigated upon a motion to set aside the verdict. *S. v. French*, 632.

c Counsel and Argument

1. In this case the appearance of counsel for the prosecution other than the solicitor of the district is *held* a matter in the control and sound discretion of the trial court, it appearing that the solicitor remained in control of the trial, and it not appearing that the solicitor did not request or welcome the assistance of other counsel. *S. v. Lea*, 13.

2. Exceptions to the remarks of counsel should be taken before verdict. *Ibid.*

3. Where the defendant in a civil or criminal action introduces no evidence he is entitled as a matter of substantive right to conclude the argument to the jury, Rules of Practice in Superior Courts, 3, which right cannot be deprived by the exercise of judicial discretion, and the cross-examination of a State's witness by counsel for a defendant which elicits testimony that the defendant's character was good up to the time of the accusation against him does not amount to an introduction of evidence by the defendant, and where upon such testimony the defendant has been deprived of his right to conclude the argument to the jury a new trial will be granted. *S. v. Raper*, 489.

g Instructions

1. Exceptions to the statement of the contentions of a party in the judge's charge to the jury will not be considered when the alleged misstatements were not called to the court's attention in apt time to afford an opportunity to correct them, if erroneous, and the charge in this case *is held* not to contain reversible error. *S. v. Lea*, 13.

2. Statement of admissions of defendant held not to contain expression of opinion by the court. *S. v. Wallace*, 284.

3. The failure of the trial court to instruct the jury to scrutinize the testimony of an alleged accomplice will not be held for error in the absence of a request for instructions to this effect, the matter relating to a subordinate and not a substantial feature of the charge. *Ibid.*

CRIMINAL LAW I g—*Continued.*

4. Where the charge of the court correctly instructs the jury as to all substantial features of the case, a defendant desiring special explanations as to one of the features should make proper request for special instructions. *S. v. McLamb*, 442.

5. Where, in a prosecution under C. S., 4213, the court reads the bill of indictment to the jury and the charge properly instructs them as to reasonable doubt and the burden of proof, and correctly sets out the elements of the crime and contains no prejudicial error when construed as a whole, objections thereto will not be sustained on appeal. *S. v. McLamb*, 442.

6. Where the court admits certain testimony as corroborative evidence and so instructs the jury at the time of its admission, the failure of the court to again instruct the jury in his charge as to the nature of such evidence is not ground for exception in the absence of a request for such instructions, nor will the court's failure to state to the jury at the time of the admission of such evidence that it was admitted for a restricted purpose constitute ground for exception unless the appellant asks at the time of its admission that the court so state. *S. v. McKeithan*, 494.

7. Where the court modifies the defendant's prayers for instructions relative to testimony of an accomplice, but the instruction as given charges that such testimony should be accepted with care and caution in connection with the witness's admission of guilt of the crime: *Held*, the charge contained all that the defendant was entitled to as a matter of law, and the refusal to give the instructions as requested will not be held for error. *Ibid.*

8. An instruction that the jury might consider the credibility of the witnesses, their prejudices, their means of knowing the facts, "or any other circumstances," will not be held for error for the use of the words "or any other circumstances" when construing the charge as a whole the other circumstances referred to were confined to the related evidence on the trial. *S. v. Ellis*, 836.

9. Upon the trial for a homicide the judge's statement of the contention of the State, in his charge to the jury, relating to finding the body of the deceased at the instance of the defendant was excepted to on the ground that there was no evidence to support the contention: *Held*, under the facts of this case the evidence was sufficient to sustain the judge's statement of the contention. *Ibid.*

10. In this case held: the charge of the court sufficiently pointed out and explained the substantive features of the case, and as to the subordinate features the prisoner should have aptly tendered prayers for special instructions, and an exception to the charge on the ground that it failed to comply with C. S., 564 is not sustained. *Ibid.*

h Province of Court and Jury in General

1. The competency, admissibility and sufficiency of the evidence in a criminal action is for the court, the weight, effect and credibility is for the jury. *S. v. Harrell*, 210.

CRIMINAL LAW I—*Continued.*

j Nonsuit and Directed Verdict

1. Upon a motion as of nonsuit in a criminal action only the evidence favorable to the State will be considered. *S. v. Everhardt*, 610.

2. Where in a criminal prosecution the evidence is conflicting or equivocal a charge directing a verdict against the defendant is error. *S. v. Shepherd*, 646.

J Arrest of Judgment and New Trial.

d Newly Discovered Evidence

1. An application for a new trial for newly discovered evidence after the Supreme Court has affirmed the judgment is a motion after trial, and the motion should be scrutinized and allowed with caution and only for the purpose of preventing probable or manifest injustice, and it is incumbent on the defendant to overcome the presumption that the verdict is correct and he must make it appear that he has newly discovered evidence which was not procurable by him at the trial in the exercise of due diligence, and the newly discovered evidence must be more than merely cumulative or contradictory. *S. v. Lea*, 316.

f Jurisdiction of Superior Court to Hear Motions for New Trial

1. In order to make sure that no man shall be deprived of life, liberty or property but by the law of the land, the Superior Court has jurisdiction to hear and determine in its discretion a motion for a new trial for newly discovered evidence at the next succeeding term of court after affirmance of the judgment by the Supreme Court. *S. v. Lea*, 316.

2. An application for a new trial at the next succeeding term of the Superior Court after affirmance of the judgment by the Supreme Court has not been sanctioned by our decisions, on the grounds of prejudice, misconduct or attaint of jury or for any matter occurring during the trial, or for the purpose of delay, and the Superior Court has no jurisdiction to hear the motion for errors committed on the hearing, such matters being exclusively for the Supreme Court in its appellate or supervisory jurisdiction after adjournment of the trial term, and the Superior Court being without jurisdiction to hear appeals from another Superior Court or from the Supreme Court. *S. v. Lea*, 316; *S. v. Shipman*, 325.

3. After the Supreme Court has affirmed the judgment against the defendant in a criminal action, the Superior Court is without authority to hear a motion at the next succeeding term for a new trial on the grounds of jury bias, prejudice or attaint, or for errors committed on the hearing. *S. v. Davis*, 327.

K Judgment and Sentence. (Correction of erroneous judgment on appeal see hereunder L e 9.)

a Conformity to Verdict

1. Where in a prosecution under 3 C. S., 4457(a), making it a misdemeanor for "any person to be drunk and disorderly in any public place. . . ." the jury returns a verdict of guilty of disorderly conduct but not guilty of being intoxicated: *Held*, the statute con-

CRIMINAL LAW K a—*Continued.*

templates a pronouncement against a person who is both drunk and disorderly, and the defendant is entitled to be discharged. *S. v. Myrick*, 8.

f Stay of Execution

1. There is no authority under our decisions for an order by a judge of the Superior Court at chambers staying execution, *pro forma*, in criminal cases pending the hearing of an application for a new trial for newly discovered evidence. *S. v. Lea*, 316; *S. v. Davis*, 327.

h Increasing Punishment

1. Where a sentence has been imposed by the judge in a criminal action it remains in the breast of the court during the term and it is within his sound discretion to reopen the case and increase the punishment within the limitations of the statute when the prisoner has not begun to serve any part of the sentence. *S. v. McLamb*, 442.

l. Appeal and Error.

a Prosecution of Appeals Under Rules of Court

1. Where the defendant, convicted of a capital offense, is given leave to appeal *in forma pauperis* but nothing is done to perfect the appeal and the case is not docketed within the time required or motion for *certiorari* made, the appeal will be docketed and dismissed on motion of the Attorney-General, no error appearing upon the face of the record. *S. v. Rector*, 9.

b Procedure for Appeals in Forma Pauperis

1. In order for a defendant to be entitled to appeal *in forma pauperis* he must file an affidavit that he is wholly unable to give security for costs, that he is advised by counsel that he has reasonable cause for the appeal, and that the application is made in good faith, and the affidavit is jurisdictional and may not be waived by the solicitor, and where the record does not contain the required affidavit, but contains only an order allowing the defendant to appeal *in forma pauperis* upon a finding from the defendant's petition that he is unable to pay the cost or to enter bond with sufficient sureties, it is insufficient to raise a presumption that the affidavit had been properly filed, and the appeal will be dismissed, in this case after an examination of the record, the defendant having been convicted of a capital offense. *S. v. Stafford*, 601.

c Effect of Appeal

1. An attempted appeal from a discretionary ruling, which is final and not subject to appellate review, may be disregarded in the Superior Court. *S. v. Lea*, 316.

d Record and Briefs

1. Exceptions which are not brought forward and discussed by the appellant in his brief are deemed abandoned under Rule of Practice in the Supreme Court, 28. *S. v. Lea*, 13.

2. It is required that an appellant should show with conciseness in the record and his brief the material exceptions necessary to be considered in the decision of the case, C. S., 643, and all exceptions taken upon counts upon which no conviction was had should be

CRIMINAL LAW L d—*Continued.*

eliminated, and the record and brief should be narrowed to matters of substance and moment by the elimination of immaterial exceptions taken upon the trial through abundance of precaution. *Ibid.*

3. Where the defendant has been acquitted on one count in the bill of indictment, exceptions relating thereto are improperly included in the case on appeal, and will not be considered except in so far as they relate to the count upon which the defendant was convicted. *S. v. Davis*, 47.

4. When the charge of the judge of the Superior Court is not made to appear in the record on appeal the presumption is that the court correctly charged the law arising on the evidence. *S. v. Harrell*, 210.

5. It is the duty of the appellant to see that the record is properly made up and transmitted, and where the transcript on appeal in a criminal case fails to show the organization of the court or that the court was held by an authorized judge at the time and place prescribed by law, and fails to contain the indictment against one of the appellants and fails to contain the verdict of the jury, the appeal will be dismissed for failure to send up necessary parts of the record proper. *S. v. Golden*, 440.

6. The record of a case is presumed correct and the trial court should not change it unless it contains error which it is his manifest duty to correct, in which case the trial court has the power at term to correct the error to make the record speak the truth, and on this appeal the case is remanded for correction of the record, it appearing that the verdict of the jury was inadvertently recorded as "guilty of murder in the third degree" when the jury had returned a verdict of guilty of manslaughter. *S. v. Brown*, 513.

7. In this case the exceptions of record are considered although the transcript may be imperfect, there being no motion by the Attorney-General to dismiss the appeal and the defendant having been convicted of a capital offense. *S. v. Grier*, 586.

8. Where the transcript fails to show the organization of the court or that the court was held by an authorized judge at a prescribed time and place the appeal will be dismissed, the matters being jurisdictional. *S. v. Stafford*, 601.

9. The record in a criminal action should contain the verdict of the jury, and under the facts of this case the cause would be remanded for correction of the record, but for the fact that the defendant is entitled to a *quashal* of the bill of indictment. *S. v. Ledford*, 724.

e *Review*

1. A motion for a continuance is addressed to the sound discretion of the trial court, and his refusal to grant the motion is not subject to review in the absence of manifest abuse, and such abuse was not made to appear in this case. *S. v. Lea*, 13.

2. A motion for change of venue in a criminal action on the ground of local prejudice and for the purpose of securing a fair trial, C. S., 471, is a matter resting within the sound legal discretion of the trial judge and not subject to review on appeal in the absence of gross abuse of this discretion. *Ibid.*

CRIMINAL LAW I. e—*Continued.*

3. The burden of showing error on appeal is on the appellant, as the presumption is against him. *S. v. Lea*, 13; *S. v. Gardner*, 361.

4. Although the State is restricted in its proof to the items set down in a bill of particulars, where, in a trial for misapplication of funds pursuant to an unlawful conspiracy, extending over a considerable period of time the defendants' motion for a bill of particulars is "partially denied" and evidence is admitted regarding items not included in the bill of particulars, but upon request of defendants' counsel the trial court instructs the jury to consider this evidence only as circumstances bearing out the particular items included in the bill, it will be deemed that there was an understanding, acquiesced in by all, that the solicitor should furnish the defendants a list of the items upon which he expected to press for conviction but was not to be confined to this list in the introduction of evidence, and the admission of such evidence will not be held as fatal error upon the defendants' exceptions, the defendants having failed to overcome the presumption against error. *S. v. Lea*, 13.

5. Where a conviction on several counts in an indictment is upheld on appeal, the defendants' exception relating to another count need not be considered when the sentence on such count runs concurrently with and does not exceed the sentence upon the counts upon which the conviction is sustained. *Ibid.*

6. On appeal the Supreme Court can review only matters of law or legal inference. Constitution, Art. IV, sec. 8. *S. v. Harrell*, 210.

7. No appeal will lie from the discretionary determination of a motion for a new trial for newly discovered evidence made at the next succeeding term of the Superior Court after affirmance of the judgment by the Supreme Court. *S. v. Lea*, 316.

8. Under the facts of this case this appeal from an order of the Superior Court denying a motion for a new trial after affirmance of the judgment by the Supreme Court is without merit and is dismissed. *S. v. Shipman*, 325; *S. v. Rhodes*, 329.

9. Upon conviction of criminal conspiracy the defendants may be fined or imprisoned, but not both, and where through inadvertence the judgment of the Superior Court imposes both fine and imprisonment, the error will be corrected in the Supreme Court either in its appellate or supervisory jurisdiction, regardless of how the case is brought before the Court, and although the defendants are not entitled to a new trial, the judgment will be vacated and the case remanded to the Superior Court with direction that proper judgment be entered, and for the purpose of correcting such error the Supreme Court will exercise its supervisory jurisdiction on a motion to docket and dismiss an appeal from an order of the Superior Court denying application for a new trial after affirmance of the judgment by the Supreme Court, the motion to dismiss being treated as a return of a writ of *certiorari*. *S. v. Shipman*, 325.

10. Where a new trial is ordered on appeal for error of the trial court in refusing to allow the defendant to conclude the argument to the jury, other exceptions relating to the trial of the action need not be considered on appeal. *S. v. Raper*, 489.

CRIMINAL LAW L e—*Continued.*

11. Upon the trial of the wife for a secret assault upon her husband with intent to kill, pursuant to a conspiracy between her and her co-defendant, parol testimony by the husband as to the contents of a policy of insurance on his life in which the wife was beneficiary and her payment of the premiums shortly before the assault is admissible, the matter being entirely collateral to the charge in the indictment, and *held further*, the question becomes academic under her admissions in this case. *S. v. French*, 632.

12. Where a new trial is granted on appeal for error in the charge an exception to the form of the judgment need not be considered. *S. v. Shepherd*, 646.

13. Where a nonexpert witness, after describing the wound, testifies that the deceased's death was caused by the "bullet that went through his head": *Held*, conceding that the testimony was technically within the exclusive field of experts, its admission was rendered harmless by the admission of subsequent testimony of a medical expert to the same effect. *S. v. Ellis*, 836.

h Reconsideration, Rehearing, and Reinstatement of Appeals

1. A summary motion to reconsider an opinion filed in a case before it is certified down to the Superior Court is not available in ordinary cases and will be allowed only for the purpose of correcting some *patent error or to prevent a clear miscarriage of justice*, and the motion is not available as a substitute for a rehearing, and a petition to reconsider which is but a reargument of the case and a criticism of the decision will be dismissed, the Court having been fully advertent to the questions presented by all of the assignments of error at the time of rendering the decision, and its failure to specifically mention some of the assignments in the opinion does not deprive the appellant of any rights thereunder, such exceptions being necessarily overruled, but each of them being considered in the determination of the case. *S. v. Lea*, 35.

2. Where an appeal, dismissed for a defect in the record, is considered on its merits notwithstanding the defect, the prisoner's motion to reinstate his appeal will be disallowed, since reinstatement could serve no useful purpose. *S. v. Stafford*, 648.

CROP LIENS see Agriculture D.

CUSTOMS AND USAGES.

A Establishment and Proof of Customs and Usages.

a In General

1. Evidence held insufficient to establish custom or that plaintiff relied thereon. *Goldstein v. R. R.*, 166.

DAMAGES.

C Grounds for Recovery of Damages.

b Prior Injuries and Contributing Causes of Injury

1. In an action to recover damages for a negligent personal injury the plaintiff testified that prior to the injury in suit she had been injured in another accident in which her pelvic bone had been broken

DAMAGES C b—*Continued.*

in three places, but there was evidence that after the first injury she had returned to work and that the injury had gotten well, that upon returning to work she had no symptom of pain in her back, that she continued to work until the date of the injury in suit, some eight months later, that immediately after the injury in suit she complained of pain in her back, together with medical expert testimony based on X-ray pictures taken after the injury in suit that two vertebræ of plaintiff's backbone were fractured and that the injury resulted from the accident in suit, that after the injury in suit the plaintiff had not suffered pain in the region of the former injury, *is held* not to establish a causal connection between the prior injury and the injury in suit. *Dempster v. Fite*, 697.

E Punitive Damages.

c Award of Actual Damages as Prerequisite to Right to Punitive Damages

1. Where the plaintiff establishes an assault by the verdict of the jury upon supporting evidence he is entitled to nominal damages at least, and where the verdict of the jury fixes the damages at "$200 punitive" and there is evidence that the plaintiff was entitled to recover a large sum as actual or compensatory damages: *Held*, the fact that the jury did not distinguish between actual and punitive damages will not deprive the plaintiff from recovering the sum designated. The distinction is pointed out where the verdict of the jury establishes that the plaintiff is not entitled to recover any actual damages. *Walker v. Mercantile Co.*, 511.

F Measure of Damages.

a Injuries to Person

1. The statutory mortuary tables are evidentiary only, and the expectancy therein given for a particular age must be considered by the jury together with evidence of the health, constitution and habits of the plaintiff and his earning power in determining the amount of damages to which he is entitled as a result of a negligent injury totally and permanently disabling him. *Hubbard v. R. R.*, 675.

DEADLY WEAPONS see Homicide G b.

DEATH.

B Actions for Wrongful Death.

d Proof that Death Resulted from Act of Defendant

1. Where there is evidence that a mail crane used to take bags of mail aboard train without its stopping had been allowed to become in a state of disrepair, causing a mail clerk to fall therefrom while performing his duties, and there is evidence that the clerk's health was good theretofore but that subsequently he was not able to work and that he died several months thereafter, and declarations of the clerk made after the accident that his fall had injured his back are admitted in evidence: *Held*, in an action against the railroad company owning the mail crane, the evidence is sufficient to be submitted to the jury although there was evidence contra that the clerk died of pellagra and that his back was not injured in the fall. *Hunt v. R. R.*, 106.

DECLARATORY JUDGMENT ACT see Actions B g.

DEEDS AND CONVEYANCES.

A Requisites and Validity.

c Delivery and Registration

1. A deed, although signed by the grantor, is not effectual until actual or constructive delivery to the grantee, and the presumption of delivery arising from registration may be rebutted by evidence that the registration was inadvertent or fraudulent. *Gulley v. Smith*, 274.

2. Between the immediate grantor and grantee in a deed the registration of the instrument is not necessary to pass title to lands, the provisions of our registration laws applying only to the rights of subsequent purchasers and creditors of the grantor. *Bank v. Mitchell*, 339.

C Construction and Operation.

c Estates and Interests Created

1. Where by an examination of a deed it clearly appears from the many restraining expressions contained therein that the grantor intended to convey a life estate only it will be so construed although the deed does not use the language ordinarily employed to convey such an estate. C. S., 991. *Boomer v. Grantham*, 230.

g Restrictions

1. An order denying a motion for injunction against the violation of restrictive covenants in a deed by the grantee's successor in title, based upon findings that the nature of the development had so substantially changed as to render the enforcement of the restriction inequitable, is affirmed in this case. *Oldham v. McPheeters*, 141.

DEMURRER see Pleadings D.

DESCENT AND DISTRIBUTION.

C Rights and Liabilities of Heirs and Distributees.

b Advancements

1. Where the deceased leaves a will disposing of his estate the doctrine of advancements to his child or children has no application. C. S., 1654(2). *Prevette v. Prevette*, 89.

DISCOVERY see Bill of Discovery.

DIVORCE. (Annulment of marriage see Marriage C.)

A Grounds for Divorce.

d Separation

1. An action for divorce on the ground of five years separation can be maintained only by the injured party under the provisions of N. C. Code of 1931, 1659(4), while under N. C. Code, 1659(a) it may be maintained by either party but it is required that there be allegation and proof that "no children have been born to the marriage," and where the complaint for divorce on the ground of five years separation does not contain the allegation required by section 1659(a), it is founded upon 1659(4) and where all the evidence is to the effect that the defendant is the injured party the action is properly dismissed as of nonsuit. *Reeves v. Reeves*, 792.

DIVORCE—*Continued.*

D Jurisdiction and Proceedings.

a Jurisdiction of Parties or Status

1. Divorce of another state based upon service by publication on resident of this State is not valid here. *Pridgen v. Pridgen*, 533.

E Alimony.

b Alimony Without Divorce

1. While C. S., 1665, relating to alimony upon judgment for divorce *a mensa et thoro*, does not apply to an action for alimony without divorce under C. S., 1667, yet the two statutes are cognate and may be considered together, and in an action under C. S., 1667, the allowance of reasonable subsistence to the wife and children and the allowance of counsel fees should be based on the defendant's means and condition in life, etc., and where the record on appeal from an order relating to such allowance is not sufficiently definite on this question the case will be remanded. *Kiser v. Kiser*, 428.

d Enforcing Payment and Contempt Proceedings

1. Where upon a hearing upon a rule directing the defendant to show cause why he should not be held in contempt for disobedience of the court's order for him to pay certain weekly sums to his wife under C. S., 1667, the court finds that the defendant's refusal to obey the order was wilful, with utter contempt, and characterized by an absence of any effort by the defendant to obey the order, judgment that the defendant was in contempt and that he be imprisoned will be upheld on appeal, it being manifest that the defendant was financially able to comply with the order. *Little v. Little*, 694.

DRAFTS see Bills and Notes I.

DRUNKEN AND DISORDERLY CONDUCT see Criminal Law K a.

DYING DECLARATIONS see Homicide G c.

EDUCATION see Schools and School Districts.

EJECTMENT.

B Summary Ejectment.

c Fact of Tenancy

1. Where a deed of trust contains a provision that in the event the property is foreclosed the holder of the bond secured by the deed of trust should have the right to bid in the property and if the property was so bid in the person in possession of the property should be considered the tenant at will of the purchaser and the property is foreclosed under the deed of trust and bid in by the bondholder, and thereafter the bondholder brings summary action in ejectment before the justice of the peace, C. S., 2365, and the defendant sets up the defense that the bondholder bid in the property at the sale for the benefit of the defendant, etc.: *Held*, the principle that a tenant will not be allowed to dispute his landlord's title during the continuance of the tenancy applies only where the conventional relationship of landlord and tenant exists, and the title to the property being in issue, the jurisdiction of the justice of the peace was ousted, and the proceeding was properly dismissed as in case of nonsuit upon appeal to the Superior Court. *Ins. Co. v. Totten*, 431.

EJECTMENT—*Continued.*

C Pleading and Evidence.

b Evidence and Burden of Proof

1. In an action to recover lands the plaintiff introduced evidence of his title by deed containing an exception in favor of the defendant, but offered no evidence that the defendant's use of the land was not within the exception, and the defendant introduced no evidence: *Held*, a judgment of nonsuit was properly entered, the burden being upon the plaintiff to prove that the possession of the defendant was wrongful, and the rule that a party claiming under an exception in a deed has the burden of proving that his claim is within the exception does not apply, there being nothing to show that the defendant was claiming under the exception. *Peacock v. R. R.*, 216.

ELECTION OF REMEDIES.

A When Election Must or May be Made.

c Between Independent Action and Motion in the Cause

1. Where the creditors of a person file an involuntary petition in bankruptcy against him with malice and without probable cause, and the debtor has been discharged in the Federal Court, he has the right of election to have his damages assessed in an independent action for malicious prosecution or have them assessed in the bankruptcy proceedings. *Nassif v. Goodman*, 451.

ELECTRICITY.

A Duties and Liabilities of Power Companies.

c Contributory Negligence

1. In an action against a power company to collect damages for wrongful death alleged to have been caused by its negligently causing an excessive voltage of electricity to be transmitted to the home of the intestate through a defective transformer, resulting in the death of the intestate when he came in contact with a wire in his basement, the evidence tended to show that the intestate had installed an extension wire in his basement without proper insulation or connection, and that he was killed while attempting to cut the live wire with metal pliers, and that he failed to cut off the current going into the house before attempting to cut the wire, together with evidence that under the conditions of dampness in the basement an ordinary voltage for houses could have produced death: *Held*, the defendant's motion as of nonsuit should have been allowed, the evidence when viewed in the light most favorable to the plaintiff disclosing contributory negligence barring recovery as a matter of law. *Rushing v. Utilities Co.*, 434.

EMBEZZLEMENT. (By bank officers see Banks and Banking I c.)

B Prosecution and Punishment.

d Province of Court and Jury

1. Under the evidence in this prosecution for embezzlement a charge directing a verdict against the defendant was error, the question of fraudulent intent being for the jury. *S. v. Pardue*, 696.

EMINENT DOMAIN. (Injuries to lands as constituting taking see Municipal Corporations E f; charter provisions limiting time for bringing action for, see Municipal Corporations J b.)

A Nature and Extent of Power.

b Lawful Use

1. The power of eminent domain does not extend to condemnation of property for unlawful purposes, such as the creation of private nuisances, which in proper instances are subject to equitable restraint. *Anderson v. Waynesville*, 37.

EQUALIZATION FUNDS see Schools and School Districts A c.

EQUITY. (Specific equitable remedies see Particular Heads.)

B Laches. (See, also, Cancellation of Instruments B c; Banks and Banking H a 3.)

a In General

1. Ordinarily, an action will not be barred by laches unless the legal right has been lost by delay, and injury to land caused by the maintenance of a nuisance gives rise to successive causes of actions, and the right to abatement thereof will not be defeated unless the nuisance has been maintained long enough to effect a change of title by prescription. *Anderson v. Waynesville*, 37.

ESCHEATS.

A Nature and Application.

b Application of Doctrine of Escheats

1. Where an incorporated town is devised lands in fee simple unencumbered by a trust or condition subsequent, and thereafter the town charter is repealed by the General Assembly, the lands so devised to the town escheat to the State, and under the provisions of our statute to the University of North Carolina, Art. IX, sec. 7, C. S., 5784, the town having the fee simple title to the property and having no debts at the time of its dissolution, and the lands not having been purchased for other than strictly governmental purposes, and the General Assembly not having undertaken to dispose of the property. The history of escheat in the light of the doctrine of the old English feudal tenures and of its present significance discussed by *Stacy, C. J. University v. High Point*, 558.

B Proceedings.

c Pleadings and Evidence

1. The provisions of C. S., 5784(a), applies only to proof and not to pleadings, and its provisions may not be taken advantage of by a demurrer to the pleadings. *University v. High Point*, 558.

ESTOPPEL. (Tenant estopped from denying landlord's title see Ejectment B c.)

A By Deed.

a In General

1. Husband held estopped by deed to wife from denying her title to land formerly held by entirety. *Willis v. Willis*, 517.

ESTOPPEL—*Continued.*

C Equitable Estoppel.

b Acts or Conduct Constituting Estoppel

1. In this case there was a long delay by the debtor giving a note secured by mortgage on lands in settlement of an account in disputing the validity of the note and mortgage for want of consideration upon the contention that the note was given for land never conveyed: *Held*, the lapse of time and the giving of note did not bar the maker from establishing by his evidence his matter in defense. *Richardson v. Satterwhite*, 113.

2. Where a county treasurer offers his official bond executed by a surety company, but not signed by him, and the bond is accepted by the county commissioners and the treasurer enters upon his duties under the bond, and thereafter the treasurer and the surety tender another bond in a smaller penal sum in substitution of the first bond: *Held*, although the failure of the treasurer to sign the first bond was an irregularity, C. S., 344, both the treasurer and the surety recognized their liability thereon by offering the second bond in substitution, and both are estopped to deny the validity of the first bond on the ground of such irregularity. *Comrs. of Brunswick v. Inman*, 542.

3. A land corporation through its president executed a warranty deed to certain lands, and the grantee therein thereafter conveyed the lands by warranty deed to the president of the corporation personally, the latter giving purchase money notes secured by a mortgage for the balance of the purchase price. The lands were foreclosed and sold to a third person under a mortgage on the lands outstanding at the time of the conveyance by the corporation and the conveyance by the grantee in the corporation's deed. Action was instituted against the president on the purchase money notes executed by him in his private capacity, and the defense of total failure of consideration was set up by him: *Held*, the president was not estopped by his knowledge of the prior mortgage from setting up the defense of failure of consideration for the notes, the principle that a person will be estopped from asserting his lien on lands where he knowingly permits another, without objection, to purchase the lands, not applying, since the defense related to the consideration for the notes and did not assert any interest in the lands. *Patterson v. Fuller*, 788.

D Pleading, Evidence and Trial.

b Necessity of Pleading Estoppel

1. Where a husband gives a deed to his wife for lands held by them by entirety, and thereafter the husband obtains an absolute divorce from the wife: *Held*, in the wife's action for the possession of the lands it is not necessary that she specifically plead that the husband was estopped by his deed from denying her title. *Willis v. Willis*, 517.

EVIDENCE. (In criminal cases see Criminal Law G; in particular actions see Bills and Notes H c, Contracts F c; Highways B n, etc.)

C Burden of Proof. (In action for reformation see Reformation of Instruments C d, in actions in ejectment see Ejectment C, upon plea of statute of limitations see Limitation of Actions E c 1, in negligence actions see Negligence D b: to establish parol trust see Frauds, Statute of E b 1.)

a General Rules

1. The burden is on the plaintiff to offer evidence in support of all essential and material elements of its cause of action. *Bank v. Construction Co.*, 100.

D Relevancy, Materiality and Competency in General.

b Transactions or Communications with Decedent

1. *Held*, in an action to declare a deed void on the ground that it was never delivered to the grantee who died prior to the institution of the action, testimony offered by the grantor tending to show that the deed had not been delivered is properly admitted and is not incompetent under C. S., 1795. *Gulley v. Smith*, 274.

2. Under the provisions of C. S., 1795, a party or person interested in the event, or a person under whom such party or person interested derives his interest, may not testify in his own behalf against the executor, administrator or survivor of a deceased concerning transactions or communications with the deceased except where testimony of the same transaction is introduced by the representative of the deceased, and propounders and caveators are parties interested in the event within the meaning of the statute. *In re Will of Brown*, 347.

3. Heirs at law of a deceased are not excluded by reason of their interest in the event from testifying as to the mental capacity of the deceased upon the issue of mental capacity raised upon caveat of his will, and it is competent for them to testify concerning transactions or communications with the deceased for the purpose of showing the basis of their opinions relative to the mental capacity of the deceased, and where the charge of the trial court instructs the jury upon the reception of such evidence in accordance with this rule within the understanding of the jury, the charge will not be held for error in that the jury were instructed not to consider such testimony of transactions with the deceased as "substantive" evidence. *Ibid.*

4. In an action to recover for services rendered deceased testimony by the plaintiff that the deceased lived with plaintiff, that plaintiff boarded him and took care of him for sixteen months, etc., is held incompetent under the provisions of C. S., 1795. *Price v. Pyatt*, 799.

c Privileged Communications (Competency of testimony of wife see Husband and Wife F c.)

1. Where a trustee for the lender of money secured by mortgage on lands has acted as the attorney for the lender, transactions and communications between them are strictly confidential, and testimony by the attorney of a statement of the lender amounting to an

EVIDENCE D e—*Continued.*

admission of a charge of usury by the lender is incompetent in an action by the borrower to recover for usury charged and paid, and its admission constitutes reversible error. *McNeill v. Thomas*, 219.

f Impeaching or Corroborating Witness

1. Declaration of past occurrences is inadmissible as substantive evidence but may be competent to impeach witness. *Hubbard v. R. R.*, 675.

F Admissions.

b By Parties

1. Certain declarations and exclamations made by the defendant in this case are held not to constitute an admission of liability. *McLeod v. Hicks*, 130.

d By Agents or Representatives (By insurance agent see Insurance K e 2; declarations admissible under *res gestæ* rule see hereunder G b.)

1. An attorney employed to check over the accounts of his client in order to ascertain its correctness acts within his implied authority, at least, as an agent in writing a letter to the creditor the day following his examination and investigation of the books, admitting the correctness of a certain item and denying the correctness of others, and the letter is admissible against the client in an action in which the item admitted to be correct by the attorney is disputed. *Richardson v. Satterwhite*, 113.

2. Where an attorney writes a letter in the course of his employment acknowledging for his client the correctness of a certain item as it appeared upon the creditor's books, the letter is competent upon the trial as an admission of an agent on the question of the correctness of the item, but it does not have the effect of a solemn admission *in judicio* but stands upon the same footing as an admission of any other authorized agent. *Ibid.*

e Admissions in Pleadings

1. Where the complaint is verified the failure of the defendant to file answer is an admission of its contents, and the defendant is affected with notice of all proceedings pending the trial. *Harvey and Co. v. Rouse*, 296.

G Hearsay Evidence.

a In General

1. In an action against a city for trespass to private lands testimony by the plaintiff that the mayor of the town, who was not a witness, had told her that if she would defer the action for a certain time he was sure that he could get her claim approved is held incompetent as hearsay evidence and constituted prejudicial error upon the city's exception and appeal. *Moye v. Greenville*, 259.

b Declarations as Constituting Past Res Gestæ

1. A declaration of an agent which is merely a narration of a past occurrence is not admissible for or against the principal even though the act referred to was within the scope of the agent's authority and his agency was continued, such declaration not coming within

EVIDENCE G b—*Continued.*

the *res gestæ* rule, but such declaration may be admissible for the purpose of contradicting and impeaching the testimony of the agent given upon the trial. *Hubbard v. R. R.*, 675.

J Parol Evidence Affecting Writings. (In action to construe will see Wills E i 1.)

a Admissibility in General

1. Parol evidence is admissible to show a verbal agreement constituting a condition precedent to the effectiveness of a written contract when such verbal agreement does not contradict the written terms of the contract. *Wilson v. Fertilizer Co.*, 359.

2. Evidence of the intent of one of the parties to a written contract is not admissible against the other when it is contrary to the intent expressed in the contract itself under a proper interpretation of the instrument. *Singleton v. R. R.*, 462.

3. Failure of consideration for note under seal may be shown by parol as between the parties. *Patterson v. Fuller*, 788.

d Reformation of Instruments

1. In action for reformation of instrument parol evidence is admissible to establish mutual mistake or fraud. *Hubbard and Co. v. Horne*, 205.

K Expert and Opinion Evidence.

b Subjects of Expert or Opinion Testimony

1. A layman or nonexpert witness may testify to the fact and location of an incision or wound in the exterior of the body, including the eyeball. *McLeod v. Hicks*, 130.

2. Whether an operation for the removal of a cataract was performed in the correct manner by a proper incision at the correct place and with the skill required by law is exclusively a matter of expert testimony. *Ibid.*

3. It is not required that a witness be an expert in order to be qualified to testify, from observation, whether a certain person was sane or insane. *In re Will of Brown*, 347.

4. Where there is sufficient evidence that a surgeon in his operation on his patient had used certain receptacles and instrumentalities made of glass it is competent for the patient and other nonmedical experts to testify as a fact within their own knowledge that certain pieces of glass passed from the patient's body subsequent to the time of the operation. *Pendergraft v. Royster*, 384.

5. In this case the question involved was whether the defendant's dam had been negligently constructed and maintained, and the defendant offered as a witness the foreman who had constructed the dam who testified as to its construction and that he had examined it after the break, the witness was then allowed to testify that he had an opinion satisfactory to himself as to the cause of the break and that the break was caused by some manner of explosion; *Held*, the opinion evidence was competent under the rule that common observers may testify to the results of their observations made at

EVIDENCE K b—*Continued.*

the time in regard to common appearances, conditions, etc., which cannot be reproduced and made palpable to a jury. *Morris v. Lambeth*, 695.

6. Where in a personal injury action all the nonexpert evidence is to the effect that the plaintiff was injured to some extent by the accident in question, and the plaintiff offers a medical expert witness who had taken X-ray pictures of the plaintiff's spine who testified on cross-examination that two vertebræ had been fractured, the testimony of the witness on redirect examination that in his opinion the accident caused the injury to the vertebræ will not be held for prejudicial error as invading the province of the jury when the testimony is based upon the expert's examination of the X-ray picture and a proper hypothetical question assuming the facts as contended by the plaintiff, the question being addressed to the issue of damages and not to the issue of negligence, and the question not calling for an opinion as to the existence of a controverted fact, and such expert is also competent to testify as to whether the injury suffered by the plaintiff was, in his opinion permanent. *Dempster v. Fite*, 697.

7. In an action against a city for the depreciation of the value of the plaintiff's land caused by the emanation of noxious odors from the defendant city's sewage disposal plant it is competent for witnesses who resided nearby to testify from their knowledge and observation as to the difference in value of the plaintiff's land immediately before and immediately after the emanation of such odors. *Gray v. High Point*, 756.

8. Testimony of expert that insured would not be able to again perform his regular employment held competent. *Green v. Casualty Co.*, 767.

d Form of Hypothetical Question

1. The form of the hypothetical questions propounded to an expert witness in this case are not held for revesible error under authority of *In re Peterson*, 136 N. C., 14. *Puckett v. Dyer*, 684.

2. A hypothetical question asked the plaintiff's medical expert witness upon the assumption that the jury find from the evidence the facts to be as therein stated will not be held for error for its failure to state the burden of proof on the facts assumed, and the defendant's contention that the question should have been stated "if the jury should find from the greater weight of the evidence, that . . . ," and not "if the jury should find from the evidence, that . . . " cannot be sustained, the court having correctly stated the burden of proof on the issue in his charge to the jury. *Dempster v. Fite*, 697.

3. The testimony of an expert witness must be based upon facts within his knowledge or upon the assumption that the jury shall find certain facts to be as recited in a hypothetical question, but in this case the form of the hypothetical questions propounded to the plaintiff's expert witnesses is not held for reversible error under the facts of this case although the form of the questions was not, perhaps, technically correct, there being two expert witnesses for the plaintiff

EVIDENCE K d—*Continued.*

testifying that two vertebræ of the plaintiff's backbone had been fractured, and three expert witnesses for the defendant testifying to the contrary, and it appearing that no prejudice had resulted to the defendant from the form of the questions excepted to. *Ibid.*

4. Facts not warranted by the testimony offered at the trial may not be assumed in a hypothetical question to an expert witness, but in this case it is held there was not such a departure from the rule as to constitute reversible error. *Flood v. Motor Co.*, 794.

EXECUTION.

A Nature and Requisites.

b Custody and Control of Property

1. Where the sheriff into whose hands an execution on a judgment is placed returns the same with a notation that the judgment debtor having filed a stay bond the execution is returned, and attached to the return is a bond reciting that the sheriff had levied upon the personal property of the debtor and permitted it to remain in the debtor's possession: *Held*, although the return of the sheriff is prima facie evidence of a proper levy, the presumption is rebuttable, and the return failing to contain an itemized statement of the property and disclosing that the property had not been taken into the possession of the sheriff rebuts the presumption, and the levy will be held void. C. S., 675. *Bank v. Hall*, 570.

E Stay, Quashing and Vacating Execution. (Validity of corporate conveyances as against execution see Corporations G d 1, 2.)

a Right Thereto in General

1. Where judgment against two joint *tort-feasors* is affirmed by the Supreme Court and judgment against the sureties on their respective supersedeas bonds is rendered in the Superior Court upon certification of the opinion of the Supreme Court, and execution against the defendants and their sureties is ordered: *Held*, neither of the sureties is entitled to a stay of execution on the ground that one of the defendants had become insolvent and placed in receivership pending the appeal, the sureties being bound by the judgment and liable to the amount of their respective bonds, C. S., 650, and the surety on the insolvent defendant's bond cannot raise the question as against the judgment creditor of its liability to the solvent defendant upon payment of the full amount of the judgment by the solvent defendant and the transfer of the judgment to a trustee for its benefit. *Hamilton v. R. R.*, 136.

K Execution Against the Person.

b Malicious Injury

1. No execution can issue against the person of a defendant in an action for malicious prosecution in the absence of a finding of express or actual malice, and where the jury's verdict, interpreted in the light of the issues and charge, finds only implied malice, it is error for the judgment of the Superior Court to order that execution against the persons of the defendants issue upon return of execution against the property unsatisfied. *Watson v. Hilton*, 574.

EXECUTORS AND ADMINISTRATORS.

D Allowance and Payment of Claims. (Availability of insurance funds for estate's debts see Insurance N a.)

a Claims for Personal Services Rendered Deceased

1. Evidence tending only to show that the plaintiff, after separation from her husband, voluntarily returned to her father's house and performed regular housework therein and nursed her father until his death, without any evidence that she expected compensation or that her father intended to pay for services so rendered, *is held* insufficient to be submitted to the jury in an action to recover for such services upon a *quantum meruit*, it being manifest that the daughter performed such services as a member of the family after the family relationship had been reëstablished. *Anderson v. Thornburg*, 781.

c Claims Against Estate by Persons Paying Obligations of Estate (Liability of widow on note executed for estate see Bills and Notes A a 1.)

1. Where a husband and wife execute a note and mortgage on his lands for money borrowed by him from an insurance company and the husband takes out two policies of life insurance with the company and names his wife as beneficiary thereof, and the husband and wife assign the policies to the insurance company with the provision that the proceeds thereof should be used first to pay off the balance of the loan and the surplus paid to the wife as beneficiary: *Held*, upon the death of the husband the proceeds of the policy are payable to the wife free from the claim of the creditors of his estate subject to the rights of the insurance company as assignee, and where the insurance company has paid the amount of the loan out of the proceeds the wife has a claim against the estate for the amount thereof, and is subrogated to the rights of the insurance company for its payment. C. S., 3964. *Russell v. Owen*, 262.

E Sales and Distribution of Estate.

b Claims of Estate Against Devisees and Legatees (Advancements see Descent and Distribution C b.)

1. A promissory note given by a son to the executrix of his father for money borrowed from the estate long after the death of the testator are not advancements, but are binding upon the son, nothing else appearing, as his personal obligations to the estate, but such notes, although reciting that they should be regarded as advancements and should be accounted for out of the devisee's interest in the estate, do not constitute a lien on the land devised as against the devisee's transferee in the absence of registration. *Prevette v. Prevette*, 89.

2. Where, after the death of the testator, all of the beneficiaries under the will enter into a written agreement that a certain sum should be set aside for a tombstone and to pay funeral expenses of their mother, the testator's wife: *Held*, the agreement does not amount to an express promise by the beneficiaries to pay the sum if the estate was not sufficient therefor, and in the absence of such express agreement the beneficiaries would not be personally liable therefor, and the agreement does not constitute a lien on the lands of one of the devisees in the hands of his transferee. *Ibid.*

EXECUTORS AND ADMINISTRATORS—*Continued.*

F Sales Under Order of Court.

d Confirmation, Raised Bids and Resales

1. Where in a special proceeding before the clerk the intestate's lands have been sold to make assets, the statute requires the clerk to order a resale if an increased bid according to the provisions of the statute is made within ten days, and after the expiration of the ten days and before the expiration of the twenty days which must elapse before confirmation, the question of resale is one within the clerk's discretion, C. S., 763, 2591, and the last and highest bidder at the sale being merely a proposed purchaser prior to confirmation, is not a party and has no right to object to the clerk's discretionary order of resale. *Vance v. Vance*, 667.

G Rights and Liabilities of Executors and Administrators.

a Commissions

1. While there is no hard and fast rule in regard to the allowance of commissions to executors in not over 5 per cent as prescribed by statute, as a general rule the executors of small estates will be allowed a commission of 5 per cent on receipts and 5 per cent on technical disbursements, and technical disbursements exclude disbursements to beneficiaries or heirs. *Thigpen v. Trust Co.*, 291.

b Liability in General

1. A suit by the beneficiaries under a will to have the executor account for mismanagement of the estate is in the nature of a bill in equity to surcharge and falsify the executor's account. C. S., 135. *Thigpen v. Trust Co.*, 291.

2. An executor is not held to the responsibility of an insurer in carrying out the terms of a will, but he is required to exercise the care and diligence in collecting and securing the assets and managing the property that a prudent and faithful man would in the management of his own business, and where the executor has failed to exercise the required diligence he may be held liable by the beneficiaries under the will. *Ibid.*

EXEMPTIONS see Insurance N a 3, 4.

EXPERT TESTIMONY see Evidence K, Criminal Law G i.

EXTRADITION.

B Grounds Therefor and Defenses.

a Charge of Crime and Fugitive from Justice

1. Where on a hearing of a writ of *habeas corpus* in extradition proceedings the court finds upon supporting evidence that the prisoner was not a fugitive from justice and was not in the demanding state at the time of the commission of the crime, and releases the prisoner, the judgment speaks the mind of the judge, and is not affected by certain remarks of the judge in the record outside the judgment indicating that he decided the case from the standpoint of the guilt or innocence of the prisoner, and the judgment will be affirmed. *In re Bailey*, 362.

EXTRADITION B—*Continued.*

c Hearings of Writs of Habeas Corpus

1. Where a writ of *habeas corpus* has been issued in extradition proceedings it is the statutory duty of the court, if an issue is raised concerning material facts, to "proceed in a summary way to hear the allegations and proof of both sides," and the words of the statute import more than a mere perfunctory or formal hearing. C. S., 2234. *In re Bailey*, 362.

2. Upon the hearing of a writ of *habeas corpus* in extradition proceedings the hearing judge may determine from the evidence, when the fact is controverted, whether the prisoner was in the demanding state at the time of the commission of the crime upon the question of whether he is a fugitive from justice. *Ibid.*

3. Where upon a hearing of a writ of *habeas corpus* in extradition proceedings it is controverted as to whether the prisoner was in the demanding state at the time of the commission of the crime an issue of fact is raised for the determination of the hearing judge in his sound discretion, and his finding upon supporting evidence that the prisoner was not a fugitive from justice is conclusive on appeal. *Ibid.*

FAMILY CAR DOCTRINE see Parent and Child A a.

FEDERAL EMPLOYERS' LIABILITY ACT see Master and Servant E.

FRAUD—As ground for reformation see Reformation of Instruments; attacking judgment for, see Judgments K c; as affecting release see Torts C b.

FRAUDS, STATUTE OF

B Contracts Affecting Realty.

a Contracts Within Purview of Statute

1. Lot owners in an incorporated town paid assessments for improvements on abutting streets, and afterwards sold their lots by warranty deeds to purchasers. Thereafter the State Highway Commission adopted this street as a part of the State Highway system and under authority of statute the Commission paid the town the value of the street improvements for the benefit of those who had paid the assessment or who had obligated themselves therefor. The town paid to the purchasers of the lots their proportionate share of the funds, and the original owners brought action to recover the amount. The defendants offered evidence of a parol agreement between the original owners and the purchasers, executed contemporaneously with the deeds, that should such reimbursement be made by the Highway Commission the amount should be paid to the purchasers: *Held*, the parol contemporaneous agreement did not pass, or purport to pass, any interest in land, and the statute of frauds is not applicable thereto, and testimony of the oral agreement was competent, the land trade being an executed contract. *Baucom v. Bank*, 825.

E Applicability and Effect of Statute of Frauds.

b Trusts

1. The creation of a parol trust in the sale of land is not within the statute of frauds and may be established by evidence that is clear,

FRAUDS E b—*Continued.*

strong and convincing, but an instruction that the preponderance of the evidence would be sufficient constitutes reversible error. *Peterson v. Taylor*, 673.

d Effect in General

1. Verbal contracts relating to the sale or purchase of land are voidable and not void, and the defense of the statute of frauds must be pleaded and such defense may not be set up by demurrer. *Ollis v. Ricker*, 671.

FRAUDULENT CONVEYANCES.

A Validity of Transfers and Transactions.

d Insolvency and Intent of Grantor

1. Where a borrower from a bank executes a chattel mortgage on his personal property to secure the note, and thereafter gives the bank another note in substantially the same amount and another chattel mortgage on his personalty: *Held*, nothing else appearing the second note and chattel mortgage given in substitution of the first does not discharge the first in the absence of its surrender to the mortgagor and its cancellation of record, and where there is no evidence that the first mortgage covered practically all of the mortgagor's property, or that the mortgagor was insolvent at the time of its execution, the first mortgage is valid and will not be construed as an assignment for benefit of creditors. *Bank v. Hall*, 570.

GARNISHMENT.

D Lien and Liability of Garnishee.

a Liability of Garnishee

1. After a writ of garnishment is served on the garnishee it is his duty to retain possession of the property or of the debt attached or to deliver the property or pay the debt to the officer serving the writ, and the garnishee delivers the property to the owner or pays the debt to his creditor at his peril and may be held liable to the plaintiff therefor upon his recovery of judgment against the defendant. *Newberry v. Fertilizer Co.*, 330.

b Property Subject to Lien

1. Where a warrant of attachment and writ of garnishment is served on a corporation or debtor to attach shares of stock in the corporation or a debt due the defendant, such third person shall be summoned as garnishee, C. S., 819, but no lien attaches to any specific property of the garnishee until the issuance of execution on the judgment and proceedings to enforce such execution. *Newberry v. Fertilizer Co.*, 330.

E Proceedings to Enforce.

c Mandatory and Restraining Orders

1. The service of a writ of garnishment on debts due the defendant or shares of stock owned by him does not create a lien on any specific property in the hands of the garnishee, and where the garnishee has paid the debt to the defendant after the service of the writ, the court may not order that the defendant return such sum to the jurisdiction of the court. *Newberry v. Fertilizer Co.*, 330.

GARNISHMENT E c—*Continued.*

2. Where the court has found that the garnishee has paid part of the debt attached to the defendant after the service of the writ of garnishment and that there remains a part of the debt attached still due the defendant, the court may enjoin the garnishee from making further payments to the defendant until the final determination of the action. C. S., 843; but the defendant and the garnishee may move that the plaintiff's bond be increased to fully protect them against loss resulting from the injunction. *Ibid.*

GRAND JURY see Indictment.

GUARANTY—On note see Bills and Notes D b 1; limitation of actions on guaranty see Limitation of Actions B a 2.

GUARDIAN AND WARD.

B Appointment, Qualification and Tenure.

d Execution of Bond

1. Clerk need not require corporation licensed by Insurance Commissioner to give guardianship bond. *Quinton v. Cain*, 162.

C Custody and Care of Ward's Person and Estate.

b Control and Management of Estate

1. Where a guardian deposits the entire estate of his ward in the savings department of a bank at 6 per cent interest, and such deposit is not made pending investment of the funds or for current use, but is made as a permanent investment without requiring the bank to give security therefor: *Held*, the deposit in legal contemplation is a loan to the bank without security and the guardian and his bond are liable for the loss occasioned by the insolvency of the bank a number of months after the deposit was made although the guardian acted in good faith in making such investment. C. S., 2308. *Banc v. Nicholson*, 104.

H Liabilities on Bonds.

a In General

1. Bond held liable for deposit in savings account without requiring security. *Banc v. Nicholson*, 104.

2. Where the funds of minors are paid into the hands of the assistant clerk of the Superior Court as their guardian, the assistant clerk having been regularly appointed guardian by the clerk and having given bond executed by a surety company: *Held*, the funds were not paid into court, but to the assistant clerk as guardian, and the guardianship bond is liable for misapplication of the funds by the guardian, and the surety on the guardianship bond may not successfully contend that the clerk's bond was liable therefor, N. C. Code, 934(a), the commingling of the guardianship funds by the assistant clerk with deposits made by him in his official capacity, and his failure to prove payment into court, tending to establish a breach of his trust as guardian. *Phipps v. Indemnity Co.*, 420.

3. Where a guardianship bond for two wards is executed with a surety company, and the surety company claims that the bond as originally executed contained the name of one ward only and that the name of the other was later inserted, and in an action on the bond

GUARDIAN AND WARD H a—*Continued.*

to recover the amount due both wards the surety tenders evidence to this effect which is excluded: *Held*, the exclusion of such evidence does not constitute prejudicial error since the bond would be liable for the whole sum paid to the guardian under the provisions of the bond obligating the parties to the faithful performance of the guardianship and to account for the funds to the ward "or such other persons as shall be lawfully empowered to receive the same." *Ibid.*

HABEAS CORPUS see Extradition B c; Parent and Child A c.

HIGHWAYS.

B Use of Highways and Law of the Road. (Criminal responsibility for negligent driving see Homicide C; parent's liability for child's driving see Parent and Child A a.)

h Violation of Traffic Regulations in General

1. The violation of the statute requiring drivers of motor vehicles to drive on the right side of the highways is negligence *per se*, but is not actionable unless the proximate cause of injury. C. S., 2621(51). *Grimes v. Coach Co.*, 605.

k Guests and Passengers

1. Where, in an action by a guest in an automobile to recover damages from the owner thereof, the evidence tends to show that the accident in suit occurred when the defendant's car was a little beyond the middle of the intersection of two streets and that the accident was proximately caused by the negligence of the driver of another car in greatly exceeding the speed limit at the intersection and hitting the defendant's car from the right, and that the defendant's car was being driven at a moderate speed, *is held* insufficient to be submitted to the jury, and evidence that the one driving the defendant's car with his permission slowed down immediately before the impact and that the driver of the other car attempted to avoid the collision by bearing to the right is insufficient to alter this result. *Tuttle v. Bell*, 154.

n Evidence

1. In an action to recover damages for a personal injury sustained by the plaintiff, a minor, when he was struck by an automobile driven by the defendant, evidence of the dusty condition of the highway at the place and time of the injury and that the vision of the driver was much obscured thereby is competent, and its exclusion is reversible error. *Eaves v. Coxe*, 173.

o Sufficiency of Evidence and Nonsuit

1. Where in an action to recover for the negligent killing of plaintiff's intestate the evidence tends to show that the intestate was a child of about four years and lived with its mother in a house next but one to a store, that for a number of years it had been the custom for the defendant to deliver oil to the store by backing his truck up the alley between the two houses, and that the intestate was seen playing under a tree in a yard sometime before the accident, and was found mortally injured after being struck by defendant's truck as the truck driver was backing up the alley according to

HIGHWAYS B o—*Continued.*

custom, and there is no evidence of how long the child had been in the alley and nothing to show that the child had not rushed into the alley immediately in front of the truck: *Held*, the evidence is insufficient to be submitted to the jury on the issue of negligence in the driver's failure to give proper warning or in backing the truck up the alley instead of driving forward, or his failure to keep a proper lookout, or the negligence of the owner of the truck in failing to keep the mirror in the truck in repair, the evidence failing to show a causal connection between the alleged negligence and the injury in suit. *Rountree v. Fountain*, 381.

2. The evidence tended to show that the car driven by A. had pulled the car driven by G. out of a ditch at the side of a much traveled highway at an intersection of another road, that a bus was seen approaching and that A. drove his car into the intersecting road to let the bus pass, leaving G.'s car standing across the highway, facing toward the intersecting road and G. standing in the highway, that after a collision the bus was found with its right wheels in the ditch on the right of the highway facing the direction in which it was traveling, and that G. was found, mortally wounded, on the hard surface on the other side of the highway, and his car found on the same side with its rear wheels in the ditch, that the highway was straight and unobstructed for a distance of nine hundred feet in the direction from which the bus approached, and that it was eighteen feet wide and that G.'s car was fourteen feet long, that large tire tracks similar to the ones made by the bus were found several feet over the center of the highway and had swerved to the right at the point of the collision, but that other vehicles making similar tracks constantly used the highway, and there was no evidence as to whether the lights on G.'s car were burning or whether the bus hit him or his car: *Held*, in an action by G.'s administrator to recover damages for his wrongful death the evidence was insufficient to be submitted to the jury on the issue of the bus company's negligence in failing to keep to the right of the highway and to keep a proper lookout. *Grimes v. Bus Co.*, 605.

3. Where in an action for wrongful death the evidence is to the effect that the plaintiff's intestate, a child about four years old, ran suddenly into a public street and into the side of a truck and was struck and killed by its rear wheels, and that the truck was being driven in a careful manner at a lawful rate of speed, and that the truck driver could not have seen the child in the exercise of due care, the action will be dismissed on motion of nonsuit, the plaintiff having failed to establish negligence, and the question of whether the truck driver was an employee of his codefendant or was an independent contractor need not be considered. *Kennedy v. Lookadoo*, 650.

4. Evidence that the individual defendant drove his car in a negligent manner in violation of statute and that such negligence proximately caused injury to the plaintiff *is held* sufficient to have been submitted to the jury, and the evidence of contributory negligence was properly submitted to the jury under instructions which were free from error. N. C. Code, 2621(45), (51), (54), (55), (7, a). *Puckett v. Dyer*, 684.

HIGHWAYS B o—*Continued.*

5. Evidence in this case that the plaintiff, while standing near the west rail of a street-car track in the middle of a city street, first saw the defendant's car approaching from the south at a rapid rate of speed when forty or fifty feet away, under circumstances from which it appeared that the defendant had lost control of the car, that the plaintiff attempted to cross the street to the west side thereof, and was struck by the right front fender of the defendant's car, causing the injury in suit, is held not to establish contributory negligence barring plaintiff's recovery as a matter of law, the question of proximate cause being for the jury under the circumstances. *Poplin v. Adickes*, 726.

HOMICIDE. (Secret assault with intent to kill see Assault.)

C Manslaughter.

a Negligence or Culpability of Defendant

1. The breach of a statute enacted for the safety of the public is negligence *per se*, but culpable negligence implies more than a lack of precaution or the exercise of ordinary care, and in a prosecution for manslaughter an observance must be made between the intentional violation of a safety statute and negligent failure to observe its provisions, a person intentionally violating such statute resulting in death to another being guilty of manslaughter at least, or if he violates such statute with reckless disregard of the consequences or with heedless indifference to the rights of others, when injury to others might have been foreseen as a probable result, such violation would constitute culpable negligence, but where the statute is violated merely from want of due care and the violation under the circumstances is not likely to result in death or bodily harm, such violation would not constitute culpable negligence. *S. v. Stansell*, 69.

2. Where the driver of an automobile exceeds the speed limit or drives on the wrong side of the road, not intentionally or recklessly, but merely through failure to exercise due care, and thereby proximately causes the death of another, he would not be culpably negligent unless in the light of the attendant circumstances his negligence was likely to result in death or bodily harm, and where in a prosecution for manslaughter there is evidence of violation of statutes regulating such matters, N. C. Code, 2617, 2618, and that the violation proximately caused the death of another, an instruction which is susceptible of the construction that the mere violation of the statutes would be sufficient for conviction if such violation proximately caused death, is erroneous, and a new trial will be awarded on appeal, but if the defendant was driving while intoxicated or recklessly, N. C. Code, 2621(44), (45), (46), such violation in itself would constitute culpable negligence. *Ibid.*

E Justifiable or Excusable Homicide.

a Self-Defense

1. Where two persons engage in a fight and one of them quits the combat and leaves the immediate vicinity of the other, but returns about ten minutes later and is assaulted by the other under circumstances which would put a reasonably prudent man in fear of

HOMICIDE E a—*Continued.*

his life or great bodily harm, and he repells the assault with that degree of force which would seem reasonably necessary under the circumstances, resulting in the death of the other, the one repelling the assault and causing the death of the other would be entitled to his discharge under the doctrine of justifiable homicide if the second assault was not provoked by him and he participated in no wrong therein, even though he was at fault in bringing on the first assault, but where the second assault is a continuation of the first, and is provoked by and participated in by the one inflicting the injury causing death, he would not be entitled to his discharge, but the instruction in this case is held not to contain prejudicial error, and the appellant's exception thereto is not sustained. *S. v. Bryson*, 728.

G Evidence.

b Presumptions and Burden of Proof

1. The perpetration of an unlawful killing with a deadly weapon raises a presumption of malice and that the crime was murder in the first or second degree and although the defendants may rely on the State's evidence to show matters in mitigation of the offense, where the State introduces no such evidence an instruction that the burden was on the defendant to establish such matters is not error. *S. v. Wallace*, 284.

2. Although an intentional killing with a deadly weapon raises a presumption that the crime was murder in the second degree, nothing else appearing, yet where the presumption therefrom has been rebutted, from the whole evidence it is the duty of the court to instruct the jury that they should not bring in a verdict of more than manslaughter; in this case there was no evidence that the killing was intentional, and there was competent testimony of dying declarations of the deceased that the killing was accidental: *Held*, an instruction that the killing was presumed to be murder in the second degree is reversible error. *S. v. Gregory*, 528.

c Dying Declarations

1. Where there is evidence that three Negroes entered a small country store at an early hour in the morning, that several neighbors heard shots and immediately thereafter the Negroes were seen leaving the store and the owner of the store was found therein seriously wounded, that he said "I am going to die" and related that the three Negroes had entered the store and that the "tall yellow man" had done the shooting, that the store owner died about two days thereafter and that only one of the Negroes fitted the description thus given: *Held*, testimony of the declarations of the dying man were competent, the evidence showing that the declarations were made in expectancy of death and that they sufficiently described the assailant to distinguish him from the other two Negroes in the store at the time, the question of indentity being for the jury under the evidence. *S. v. Wallace*, 284.

2. In this case held: proper foundation was laid for introduction of dying declarations of deceased. *S. v. Gregory*, 528.

HOMICIDE G c—*Continued.*

d Competency and Admissibility in General

1. In a prosecution for murder evidence that the defendant, his father, and another, all armed, went to the house of the deceased, and that the father told the deceased's wife that they were and had been hunting "them men" is held competent on the issue of premeditation and deliberation, the defendant being present and acquescing therein, and there being other evidence that a feud existed between the families of the deceased and the defendant and that other threats had been made, and further, upon a verdict of the jury of guilty of second degree murder the admission of the evidence, if error, would not be prejudicial. *S. v. Posey*, 4.

H Trial.

c Instructions

1. An instruction in a prosecution for murder that "the use of a deadly weapon in the perpetration of a murder raises a presumption of malice" will not be held for prejudicial error for the use of the word "murder" where all the evidence tends to show that the crime was murder in the first or second degree and was committed with a pistol, and when the charge, construed as a whole, correctly states the presumptions arising from the use of a deadly weapon and instructs the jury to acquit the prisoner if they did not find from the evidence that he committed or participated in the crime, the defendant's exceptions thereto will not be sustained. *S. v. Wallace*, 284.

2. The court's recitation of the admissions of the defendant in a prosecution for murder and that from the admissions of the defendant the question of whether he was at the scene of the crime at the time of its commission was eliminated, will not be held for an expression of opinion by the court when supported by the testimony of the defendant in the case, recorded or established on appeal. *Ibid.*

3. Under the evidence in this case held: instruction that killing was presumed to be murder in second degree was error. *S. v. Gregory*, 528.

HUSBAND AND WIFE. (Agency of husband see Principal and Agent C f 1.)

A Abandonment.

c Defenses

1. Where the husband and wife duly execute a deed of separation stipulating that the parties had agreed to live separate and apart from each other for the remainder of their lives, and thereafter the husband visits the wife on several occasions and renews the conjugal relationship on each visit the deed of separation is rescinded by the acts of the parties themselves, and the deed of separation is no defense to a prosecution of the husband for abandonment and nonsupport of the wife. *S. v. Gossett*, 641.

C Deeds of Separation.

c Rescission and Abandonment of Agreement

1. Resumption of conjugal relationship ordinarily rescinds deed of separation. *S. v. Gossett*, 641.

HUSBAND AND WIFE—*Continued.*

F Actions.

c Competency of Wife as Witness in Husband's Civil Action Against Third Person (Competency of wife's testimony in criminal action see Criminal Law G q.)

1. Where in a civil action the complaint alleges that the defendant proposed sexual intercourse with the plaintiff's wife, and upon her refusal persisted and overcame her with the power of his personality and the force of persuasion to such an extent that she was unable to resist him, etc., without any allegation that such result was procured through physical force, violence, drugs, intoxicants or other forms of coercion: *Held*, the allegations of the complaint are insufficient to constitute rape or ravishment, but alleges only a cause of action for criminal conversation, and the testimony of the wife relating thereto is incompetent under the provisions of C. S., 1801. *Rouse v. Creech*, 378.

G Property.

a Estate by Entirety

1. Although the right of survivorship in lands held by husband and wife by entirety cannot be defeated by the deed of either one of them alone, where the husband gives the wife a fee simple deed thereto with full covenants of warranty, and thereafter the husband obtains an absolute divorce: *Held*, upon the securing of the divorce the parties became tenants in common in the lands, and the husband's deed will estop him from denying the wife's title thereto in fee simple. *Willis v. Willis*, 517.

INDICTMENT. (For nuisance see Nuisances B d.)

A Necessity for, and Formal Requisites of Indictment.

b Finding by Properly Constituted Grand Jury

1. Chapter 321, sec. 1, Public-Local Laws of 1919, providing that grand juries for Buncombe County should be drawn in July and January of each year for the fall and spring terms of that county and that no other grand juries should be drawn, is in full force and effect. C. S., 8106 (1919), not repealing the local statute either expressly or by implication, and a motion, aptly made, to quash indictments on the ground that the grand jury was not properly constituted, in that the indictment was returned by the grand jury at terms of court subsequent to the term at which it was drawn, is properly refused. *S. v. Davis*, 47.

c Misdemeanors Punishable Without Indictment

1. The statutory crime of misapplication of partnership funds by a member of the partnership, chapter 127, Public-Local Laws of 1921, is a misdemeanor, and where a county court having original criminal jurisdiction of petty misdemeanors only issues its warrant for such violation, chapter 681, Public-Local Laws of 1915, the warrant is invalid, and where the defendant has been granted a new trial on a former appeal in the Supreme Court, and upon the second trial in the Superior Court the defendant is tried without an indictment and moves to dismiss the action for want of jurisdiction, the motion should be allowed. Art. I, sec. 12. *S. v. Rawls*, 436.

INDICTMENT—*Continued.*

B Form and Sufficiency of Indictment.

b Charge of Crime

1. An indictment is sufficient if it charges in appropriate terms all the necessary elements of the offense in a plain, intelligible and explicit manner. C. S., 4623. *S. v. Everhardt*, 610.

C Motions to Quash and Demurrer.

b Duplicity, Indefiniteness or Redundancy

1. An indictment will not be quashed for mere informality or refinement, C. S., 4623, and where the indictment contains sufficient matter to enable the court to proceed to judgment a motion to quash for duplicity or indefiniteness is properly refused, and a motion to quash for redundancy or inartificiality is addressed to the sound discretion of the trial court. *S. v. Lea*, 13.

2. In a prosecution for making and publishing false reports of the condition of a bank in violation of N. C. Code, 1931, sec. 224(e), an indictment which charges the offenses in the language of the statute is not bad for duplicity, and where it charges the offense in a plain, intelligent and explicit manner it is sufficient. C. S., 4623. *S. v. Davis*, 47.

3. Indictment for arson held sufficiently definite and motion to quash was properly refused. *S. v. McKeithan*, 494.

c For Insufficient, Incompetent or Illegal Evidence or Proceedings

1. It is not error for the trial judge to permit the foreman of the grand jury, at his request, to indicate by a cross-mark against the name of the witness endorsed on the indictment that the witness had been sworn and examined before the grand jury, and where the indictment as returned and entered upon the records shows that there was evidence at the hearing by the grand jury, and the defendant offers no evidence to the contrary, his motion to quash on the grounds that there was no evidence presented in the hearing before the grand jury is properly denied. *S. v. Davis*, 47.

2. Our constitutional requirement that "no person shall be put to answer any criminal charge, except as hereinafter allowed, but by indictment, . . ." section 12 of the Declaration of Rights, means action by the grand jury according to the practice at common law, and does not permit open hearings before the grand jury, and where the court sends for the grand jury and permits the solicitor to examine a State's witness in open court before the grand jury after the grand jury had returned two identical bills of indictment against the defendant, submitted on successive days, "not a true bill," and thereafter the solicitor submits another identical bill to the grand jury which is returned "a true bill": *Held*, the defendant's verified plea in abatement and motion to quash, made before pleading, should have been allowed, and upon appeal from the court's denial of the motion the judgment will be reversed, with leave to the solicitor to send another bill before a different grand jury, if so advised. C. S., 3199. *S. v. Ledford*, 724.

INDICTMENT—*Continued.*

D Bill of Particulars and Amendment.

d Nature and Scope of Bill of Particulars

1. Where the criminal indictment sufficiently charges all the elements of the offense but is not as definite as the defendant may desire the defendant's remedy is by a motion for a bill of particulars, which is addressed to the sound discretion of the trial court, C. S., 4613, and not by a motion to quash, but a bill of particulars cannot supply the failure of the bill of indictment to sufficiently charge a necessary element of the offense. *S. v. Everhardt*, 610.

E Proof and Variance.

c Proof of Guilt of Crime Other Than One Charged or Embraced in Charge

1. An indictment charging larceny and receiving does not include a charge of driving a motor vehicle without the knowledge or consent of the owner, C. S., 2621(32), and a defendant charged in the indictment only with larceny and receiving may not be convicted under C. S., 2621(32). *S. v. Stinnett*, 829.

INFANTS. (Adoption of, see Adoption; custody of, see Parent and Child A c; transfer of bank stock to, see Banks and Banking H a 1, 2; consent judgment by, see Judgments B a.)

B Contracts of Infants.

a Validity

1. Where an infant, living with his father, is seriously injured in an automobile accident, and is rushed to a hospital and a doctor therein renders professional services in the emergency to preserve his life, and thereafter both the infant, through his next friend, and the father recover damages against the driver of the automobile, the father's damages including hospital and medical expenses incurred as a result of the injuries to the infant, and both judgments have been paid and satisfied: *Held*, although the father would be liable to the physician for such emergency services, the infant is also liable, and the physician may recover the reasonable worth of the services in an action against the infant and his guardian, and judgment directing the guardian to pay therefor out of the proceeds of the judgment recovered in the infant's behalf will be affirmed on appeal. *Bitting v. Goss*, 425.

G Actions.

a Next Friend

1. Where in a suit to recover for negligent injuries to a minor it appears that in fact a next friend appeared for the minor and was so treated by the court, it is sufficient for the court to acquire jurisdiction, and the fact that the record does not recite the appointment of such person as the next friend of the minor will not render the judgment invalid. *Oates v. Texas Co.*, 474.

2. The fact that the uncle was designated as guardian *ad litem* of minor petitioners instead of next friend is immaterial, he having acted in the capacity of next friend only. C. S., 450. *Ex Parte Huffstetler*, 796.

INFANTS G—*Continued.*

g Payment and Disbursement of Proceeds or Recovery

1. Sale for partition held not void although order did not provide for disbursement, and minors' funds were paid to mother. *Ex Parte Huffstetler*, 796.

INJUNCTIONS. (Suit for injunction may be joined with action to recover prior damages see Actions C b 1.)

B Grounds.

d Abatement of Nuisance (See, also, Municipal Corporations E f 1, 2, 3.)

1. An absolute order for the abatement of an alleged nuisance without a finding by the jury that such nuisance existed is error, the question of the existence of the nuisance being the principal matter in dispute with the burden of proof on the plaintiff. *Anderson v. Waynesville*, 37.

D Preliminary and Interlocutory Injunctions.

a Grounds Therefor and Proceedings to Secure

1. The granting of preliminary mandatory injunctions is within jurisdiction of courts of equity, but they are usually granted with caution, their purpose being to restrain the defendant from permitting his previous act to operate, or to restore conditions existing before the commission of a wrong, or to preserve the *status quo*, until a final determination, and *Held*, whether the plaintiff "came to the nuisance" has an important bearing upon the question of whether a preliminary mandatory injunction should issue in a suit for abatement, although the right to permanent abatement would not be denied for this reason. *Anderson v. Waynesville*, 37.

b Continuing, Modifying, or Dissolving

1. Where the plaintiff in an injunction suit shows probable cause or a prima facie case, or it can be reasonably seen that he may be able to make out his case at the final hearing, his temporary order will ordinarily be continued. *Castle v. Threadgill*, 441.

2. Where a temporary order restraining a municipal corporation from enforcing an ordinance is dissolved without findings of fact in the judgment or record so that the Supreme Court can ascertain the grounds upon which the restraining order was dissolved, the judgment will be reversed and the case remanded to the end that another hearing may be had and that the facts may be set out in the judgment. *Flemming v. Asheville*, 810.

INSANITY—as defense see Criminal Law B; opinion evidence of, see Evidence K b 3, Criminal Law G i 1.

INSTRUCTIONS see Trial E, Criminal Law I g.

INSURANCE. (Surety bonds see Principal and Surety; compensation insurance see Master and Servant F, cancellation of compensation insurance see hereunder H c.)

H Cancellation, Surrender or Abandonment of Policy.

c Cancellation of Group or Compensation Insurance

1. The return of the unearned premium to the employer is not a prerequisite to the insurer's right to cancel a Standard Workmen's

INSURANCE H c—*Continued.*

Compensation policy of insurance for nonpayment of premium, the policy providing that the insurer shall have the right to examine the books of the employer with respect to the amount paid by him to employees during the period in determining the amount of unearned premium, and where a standard policy of compensation insurance has been canceled for nonpayment of premium and notice of cancellation has been given to and received by employer prior to an injury to or death of an employee resulting from an accident arising out of and in the course of his employment, the insurer is not liable to the employee or his dependents for an award of the Industrial Commission for such injury or death. *Hughes v. Lewis*, 775.

d Repayment of Unearned Premium Upon Cancellation

1. Where the insurer has canceled a standard policy of compensation insurance it is liable to the employer for the amount of unearned premium thereon, and where the insurer has credited the amount of the unearned premium to its broker's account, who in turn has credited the amount to account of the broker who had procured the employer's application for the insurance, the insurer is liable to the employer for the amount of the unearned premium not actually paid to the employer by the broker, since, if the broker is the agent of the employer, the insurer would have no right to credit the broker's account therewith, or if the broker is the agent of the insurer it would be liable for its agent's failure to pay the amount. C. S., 6304. *Hughes v. Lewis*, 775.

K Estoppel, Waiver, or Agreements Affecting Conditions or Covenants.

c Agreements After Claim or Suit

1. The provision in a policy of fire insurance written in accordance with the standard statutory form, C. S., 6437, that the policy should be void if the insured was not the unconditional owner of the property in fee simple or if foreclosure proceedings were instituted against the property with knowledge of the insured is not waived by a written agrement signed by the insured and the adjuster for the insurer expressly providing that the agreement was solely for the purpose of determining the loss and to save time to the parties and that it should not operate as a waiver of any conditions or provisions of the policy. *Sasser v. Ins. Co.*, 232.

2. Where a policy of fire insurance provides that none of its conditions or provisions should be waived except those subject to agreement and then only by a written waiver attached to the policy itself, evidence that the adjuster for the insurer stated after a disclosure of the facts constituting a violation of a condition of the policy that the company would pay the claim is not sufficient to overrule the insurer's motion as of nonsuit, there being no evidence that the adjuster, a special agent, had authority to make such agreement or that the insurer had waived the violation through any authorized agent, there being evidence that the insurer denied liability immediately upon receipt of the adjuster's report. *Ibid.*

INSURANCE—*Continued.*

M Proof of Death or Loss.

c Waiver of Proof

1. By denying liability for a loss under a policy of fire insurance the insurer waives the provisions of the policy requiring the insured to file notice and proof of loss. *Sasser v. Ins. Co.*, 232.

N Persons Entitled to Proceeds.

a Life Insurance

1. Where a policy of life insurance provides that the beneficiary therein named might be changed at the option of the insured, the beneficiary has a contingent interest therein which becomes vested upon the death of the insured without having changed the beneficiary, and an assignment of the policy by the insured and beneficiary to a creditor of the insured does not change the beneficiary's interest therein, in such case upon the death of the insured the proceeds are the property of the beneficiary payable to her subject to the rights of the assignee, and where the beneficiary is the wife of the insured she takes the proceeds free from claims of all other creditors of the insured's estate, Constitution, Art. X, sec. 7, C. S., 6464. *Russell v. Owen*, 262.

2. After the death of a soldier insured under the provisions of the Federal War Risk Insurance Act and the death of the beneficiary named in the policy, the commuted value of the remaining installments is payable to the administrator of the deceased soldier as personalty belonging to his estate to be distributed among his heirs at law under the statute of distribution, such heirs to be determined as of the date of the death of the deceased soldier and not as of the date of the death of the beneficiary. *Mixon v. Mixon*, 566.

3. Where after the death of a soldier insured under the provisions of the War Risk Insurance Act his mother, as the beneficiary named in the policy, receives the monthly installments from the policy until her death, and the commuted value of the remaining installments are then paid to his administrator: *Held*, the funds in the administrator's hands are not subject to the debts of the deceased soldier nor of the distributees under the Federal Act, and neither the creditors of the mother's nor the father's estate are entitled to payment out of the funds as against the brothers and sisters of the deceased soldier who are his heirs at law and the distributees of the funds, no payment having been made to any distributee of the estate of the deceased soldier. But after the distribution of the funds in accordance with the statute the funds in the hands of the distributees would be subject to their debts. *Ibid.*

4. The World War Veteran's Act and the amendments thereto will be liberally construed to effectuate the intent of the act to provide for American soldiers and their dependents and to exempt the proceeds of the policies from the claims of creditors. 454 title 38 U. S. C. A. *Ibid.*

c Under Loss Payable Clauses

1. The insurer of mortgaged premises is directly liable to the mortgagee under a separate and distinct contract where the policy of insur-

INSURANCE N c—*Continued.*

ance contains or has attached thereto a standard loss payable clause in the mortgagee's favor, and such liability is not dependent upon or determined by the insurer's liability to the mortgagor. *Bank v. Ins. Co.*, 669.

2. Judgment creditor of mortgagor has no interest in proceeds of fire insurance policy with loss payable clause in favor of mortgagee. *Armstrong v. Price*, 833.

O Payment and Subrogation.

c Payment to Third Persons and Subrogation to Their Rights Against Insured

1. Where a mortgagee has recovered judgment against the insurer under a loss payable clause in a policy of fire insurance, the insurer is not entitled to subrogation to the rights of the mortgagee against the mortgagor to the amount of the judgment, the insurer not being a surety on the debt from the mortgagor to the mortgagee, and the insurer's liability to the mortgagee being by separate contract unaffected by the rights and liabilities between it and the mortgagor. *Bank v. Ins. Co.*, 669.

P Actions on Policies. (Service of process on unincorporated fraternal order see Process B f.)

a Parties and Pleadings

1. Where in an action on an insurance policy the policy is not attached to the complaint and there is no allegation tending to show the relationship of the plaintiffs to the cause of action or that they are the real parties in interest, and the action is for reformation of the policy and for slander: *Held*, the defendant's demurrer on the ground of misjoinder of parties and causes is properly sustained. *Simons v. Ins. Co.*, 146.

b Evidence, Issues and Trial

1. Issue tendered as to matter of defense in policy held properly refused under the pleadings and evidence. *Green v. Casualty Co.*, 767.

c Limitation of Time for Bringing Action

1. The contractual limitation in a policy of fire insurance that action thereon must be brought within twelve months after loss is valid and binding, C. S., 6437, and a demurrer is properly sustained where the complaint alleges that the suit was not brought within the prescribed period because of representations of the insurer's agent that the policy was void. *Rouse v. Ins. Co.*, 345.

g Judgment and Recovery

1. Where in an action to recover under a disability clause in a life insurance policy the insured is entitled to judgment upon the verdict of the jury, the recovery should be limited in the judgment for the period of disability up to the time of the issuance of summons, but judgment that the insured also recover the monthly disability payments "so long as he shall live" is error. *Green v. Casualty Co.*, 767.

INSURANCE—*Continued.*

R Accident and Health Insurance.

a Construction of Policy as to Risks Covered

1. Where a policy of accident insurance provides that the insurer should not be liable for an injury to the insured which occurs "(1) when or while a member is in any degree under the influence of intoxicating liquor . . . (2) when caused wholly or in part by reason of or in consequence of the use of intoxicating liquor": *Held*, the insurer would not be liable under the terms of the policy for an injury occurring while the insured was in any degree under the influence of intoxicating liquor, regardless of whether such intoxication was a causal element in the injury or not, and an instruction in an action on the policy which requires the jury to find that such causal relation existed in order to defeat recovery entitles the insurer to a new trial. *Ritchie v. Travelers Protective Asso.*, 721.

c Disability Insurance

1. The ability to do odd jobs of a comparatively trifling nature will not prevent an insured from recovering under the provisions in a life insurance policy for the payment of a certain sum monthly in case the insured should become "wholly and continuously disabled and prevented from performing each and every duty pertaining to any business or occupation by reason of sickness," and in this case the insured's evidence of such disability was sufficient to be submitted to the jury, it being for the jury to determine under proper instructions from the court whether the insured had suffered such disability as to entitle him to recover under the terms of the policy. *Green v. Casualty Co.*, 767.

2. In an action to recover on a disability clause in a policy of life insurance, testimony by a medical expert who had examined the insured that in his opinion the insured would never be able to again perform his regular employment as a section hand is held competent, and testimony by the insured that he did not know how to perform any work other than manual labor *is held* not prejudicial, there being sufficient evidence to go to the jury on the question as to whether the insured had suffered a disability within the meaning of the policy. *Ibid.*

3. In an action on an insurance policy the plaintiff is not bound to anticipate defenses which the insurer may set up, it being sufficient if the complaint contains a statement of the policy contract and alleges facts upon which the insurer is liable thereunder, and the insurer's failure to make payment in accordance therewith, and where in an action on a disability clause in a life insurance policy the plaintiff alleges the contract and his disability covered thereby, and the insured fails to set up in its answer that disability was payable under the terms of the policy only in case the plaintiff was regularly attended by a physician, and the insurer introduces no evidence: *Held*, the provision as to attendance by a physician can be waived by the insurer, and the insurer's contention that it was error for the trial court to refuse to submit an issue as to whether the insured had been so attended by a physician cannot be sustained. *Ibid.*

INTEREST see Usury.

INTERVENERS see Parties A c; interveners in attachment see Attachment H.

INTOXICATING LIQUOR. (Drunken and disorderly conduct see Criminal Law K a.)

G Prosecution and Punishment.

c Evidence

1. Evidence of reputation of defendant's garage for selling liquor held incompetent as hearsay evidence. *S. v. Turpin*, 11.

JUDGMENTS.

B Consent Judgments.

a By Minors

1. It is necessary for the court to approve and pass on a judgment by consent in a tort action in which a minor is plaintiff in order for the judgment to be binding on the minor, but where the judgment recites an investigation by the court and a finding that the compromise reached by the parties was just and reasonable such finding is conclusive in the absence of fraud, and the judgment is regular and binding until set aside in an action upon a proper showing of fraud. *Oates v. Texas Co.*, 474.

E Summary Judgments and Judgment on the Pleadings.

c On Part of Claim Admitted to be Due

1. Where in an action on a note the defendants admit liability in a certain part thereof but deny liability for the balance: *Held*, an order directing that plaintiff recover the amount admitted to be due without prejudice to plaintiff's right to litigate the balance of the note is authorized by C. S., 865, and the order will be affirmed on defendants' appeal therefrom. *Fertilizer Co. v. Trading Co.*, 261.

F On Trial of Issues.

b Form and Requisites

1. Where the jury has returned a verdict in favor of the plaintiff in an action in tort against two defendants and has awarded damages, a judgment that the plaintiff recover against the defendants and each of them will not be held for error, the judgment being merely indicative of the joint and several liability of the defendants and not entitling the plaintiff to recover the whole sum from each of them. *Watson v. Hilton*, 574.

G Entry, Recording and Docketing.

a Lien and Priority

1. A judgment creditor has only a lien on the lands of the judgment debtor which lien is subject to prior registered encumbrances, and where the judgment debtor has taken out policies of fire insurance on his property for the benefit of the mortgagee in a prior registered encumbrance, the judgment creditor has no right, title or interest in such policies or the proceeds thereof. *Armstrong v. Price*, 833.

JUDGMENTS—*Continued.*

K Attack and Setting Aside. (Attack and annulment of marriage see Marriage C; conclusiveness of foreign judgment see States A a.)

b Surprise, Excusable Neglect, etc.

1. Where, on a motion to set aside a judgment by default, the trial court finds upon supporting evidence that two railroad companies, defendants in the action, maintained a common agent upon whom service of summons might be made under C. S., 483, and that the sheriff served the process upon the agent by leaving one copy of the summons and complaint without informing the agent that the service was for both companies, leaving the clear inference that it was for one only: *Held*, the court's order setting aside the judgment by default against the corporation that had not been properly served with summons on the ground of excusable neglect was not error, the motion having been made in apt time and a meritorious defense also being found as a fact upon supporting evidence. C. S., 600. *Hershey Corp. v. R. R.*, 184.

c Attack for Fraud

1. A judgment may be attacked in an independent action for fraud, but the facts constituting such fraud must be sufficiently alleged to enable the court to pass upon the question, and a mere allegation that the plaintiff was deprived by the former judgment of a large sum to which he was entitled as damages is insufficient, there being no allegation of fraud on the part of counsel or the defendant, but in this case, for the purpose of deciding the case on its merits, the action is treated as a motion in the original cause attacking the judgment for irregularity. *Oates v. Texas Co.*, 474.

d Irregular Judgments

1. An irregular judgment is one entered contrary to the usual course and practice of the courts and may be set aside in proper instances by motion in the original cause, and where the irregularity does not go to the court's jurisdiction whether the judgment will be set aside will be determined by the promptness with which the application is made and whether the applicant was prejudiced by the irregularity. *Harnett County v. Reardon*, 267.

f Procedure

1. Irregular judgment is one entered contrary to usual course and practice and may be set aside by motion in cause. *Harnett County v. Reardon*, 267.

I. Operation of Judgment as Bar to Subsequent Action.

a Consent Judgments

1. Where in a suit brought by a minor by his next friend for a negligent personal injury the parties reach a compromise and the court enters a consent judgment for the amount of the compromise and recites in the judgment that the court had investigated the facts and that the settlement was just and reasonable: *Held*, the consent judgment is binding on the minor and constitutes a bar to a later suit against the same person on the same cause of action upon allegations that the amount of the judgment was inadequate. *Oates v. Texas Co.*, 474.

JUDGMENTS L—*Continued.*

b Matters Concluded or Embraced in Pleadings

1. A decree of foreclosure of a mortgage estops the parties as to all matters embraced therein, and where the mortgagor has failed to file answer or resist foreclosure he may not thereafter attack the validity of the mortgage for improper execution in a suit by the purchaser at the foreclosure sale to reform the instrument for mutual mistake in the description of the mortgaged premises. *Harvey and Co. v. Rouse*, 296.

2. A consent judgment stipulating that the plaintiff recover of the defendant the amount of the note secured by a mortgage and that foreclosure on the mortgage should be delayed for six months upon payment by the defendant of a certain sum per month will operate as a bar to a later action by the defendant to restrain the plaintiff from collecting on the note until it had been listed as personal property and the taxes paid thereon. *Tilley v. Lindsey*, 410.

c Foreign Judgments

1. In this case it would seem that the defendant's plea of *res judicata* on the ground that the matter had been determined in an action brought in another state is also well founded. *Construction Co. v. Bacon*, 1.

P Assignment.

a Persons Entitled to Assignment

1. Where two joint *tort-feasors* appeal from judgment rendered against them in the Superior Court and give supersedeas bonds executed by two surety companies respectively, and pending the appeal one of the defendants becomes insolvent, and the judgment appealed from is affirmed by the Supreme Court and writ of *certiorari* to the Supreme Court of the United States is denied, and the judge of the Superior Court, upon receipt of the certificate of the opinion of the Supreme Court, renders judgment against the sureties on the bonds and orders execution to issue against the defendants and their sureties in accordance with C. S., 659: *Held*, neither the solvent defendant nor either of the sureties is entitled to a stay of execution upon payment of one-half of the judgment into court by the solvent defendant, the solvent defendant being entitled to a transfer of the judgment to a trustee for its benefit upon the payment of the full amount thereof, C. S., 618, and the sureties being bound by the judgment on their bonds. *Hamilton v. R. R.*, 136.

JUDICIAL SALES.

A Requisites and Validity.

a Time and Place of Sale

1. Where in proceedings to enforce the county's lien for unpaid taxes the clerk of the court orders a resale "according to statute," and the statute applicable to judicial sales in the county prescribes that such sales be had on certain days during term of the Superior Court, and the resale is had on a day other than the days prescribed by the statute: *Held*, the resale is void, and the parties should be put *in statu quo*, and another sale for the enforcement of the tax lien may be ordered. Public Laws of 1931, chap. 23. *Johnston County v. Smith*, 255.

JURISDICTION—of criminal actions see Criminal Law D, of municipal courts see Courts B b; venue see Venue.

JURY.

A Competency of Jurors, Challenges and Objections.

d Peremptory Challenges

1. Where several defendants are tried together for a crime other than a capital felony each is entitled to four peremptory challenges to the jury, and where the court has ruled that the defense was a joint defense and has allowed but four peremptory challenges for all the defendants, a new trial will be granted upon appeal. C. S., 4633. *S. v. Burleson*, 779.

B Special Venires.

b Drawing Jury from Another County

1. After granting motion for removal for convenience of witnesses court may not order that jury be drawn from another county. *Eaves v. Coxe*, 173.

LABORERS' AND MATERIALMEN'S LIENS. (Assignability of liens see Assignments A a 1.)

A Nature, Grounds and Subject-Matter.

a In General

1. In order for the creation of a lien of a laborer or materialman the relationship of debtor and creditor must exist between him and the owner, but this relationship may be created either by express or implied contract. *Boykin v. Logan*, 196.

B Proceedings to Perfect and Form of Claim of Lien.

c Notice and Lien of Subcontractor and Materialman

1. A letter to the owner setting forth the amount of the account for materials furnished the contractor and stating that other items were being purchased on the account, and offering to furnish an itemized statement upon request is not a sufficient notice upon which to base a materialman's lien, C. S., 2438, 2439, 2440, 2441, the statute requiring that an itemized statement be furnished the owner unless the contract is entire, in which case such particularity is not essential. *Hardware House v. Percival*, 6.

2. Priority of liens of materialmen under direct contract with owner are fixed by date of filing notice. *Boykin v. Logan*, 196.

D Priorities and Enforcement of Lien.

a Date from Which Lien Attaches

1. The notice given the owner of a building for material furnished therefor and labor done thereon is alone sufficient for the creation of the statutory lien, and when the lien has been perfected under the statutory provisions the lien relates back to the time of the beginning of the furnishing the material or doing the work upon the building, and is superior to the lien or a mortgage executed thereafter. *Horne-Wilson Co. v. Wiggins Bros.*, 85.

2. Liens of materialmen and laborers are statutory, and by the clear provisions of the statute the liens of parties furnishing labor and material under direct contract with the owner have priority in

LABORERS' AND MATERIALMEN'S LIENS D a—*Continued.*

accordance with the time of filing notice of lien with the justice of the peace or clerk, C. S., 2471, 2473, and where there are several parties furnishing material under direct contract with the owner and each has complied with the requirements of the statutes, C. S., 2469, 2470, 2474, the priorities between them will be determined in accordance with the date of filing notice of lien, and the fact that one materialman started furnishing labor and material before the others does not affect this priority, nor is he entitled to insist upon payment of all liens pro rata. The right of pro rata payment on liens of subcontractors is distinguished on the basis of the statutory provisions, C. S., 2442, no notice of lien being required to be filed with the justice of the peace or clerk in the case of subcontractors, notice to the owner being sufficient under the statute. Const., Art. XIV, sec. 4. *Boykin v. Logan*, 196.

d Rights of Lienors Against Third Persons

1. The assignee of a valid laborer's or materialman's lien on property which has been sold under a superior lien of a deed of trust thereon may in his own name bring an independent action to reach the surplus proceeds brought by the sale under the mortgage. *Horne-Wilson Co. v. Wiggins*, 85.

LACHES see Equity B.

LANDLORD AND TENANT see Ejectment B c; crop liens see Agriculture.

LARCENY.

A Offenses and Responsibility.

a Elements and Essentials of the Crime

1. A finance company owned and held a conditional sales contract on a truck, which contract provided for repossession by the company upon default of the purchaser in making any of the monthly installments on the purchase price. The purchaser defaulted in some of his payments, and an agent of the finance company saw the truck standing in the street, and without the knowledge of the purchaser drove it to a garage to be held until payment was made in accordance with the terms of the contract: *Held*, the agent of the finance company was not guilty of larceny. *S. v. Stinnett*, 829.

LAST CLEAR CHANCE see Negligence B b.

LICENSE TAXES see Taxation B c.

LIMITATION OF ACTIONS.

B Computation of Period of Limitation.

a Accrual of Right of Action in General

1. Ordinarily the statute of limitations begins to run against an official bond from the time of its breach, and where the bond is given for a city sinking fund commissioner who is not reappointed at the expiration of his term, but another is appointed as his successor who refuses to accept certain notes for money lent by the former: *Held*, upon the termination of the former's term the law required him to account for funds and securities in his hands and his failure

LIMITATIONS OF ACTIONS B a—*Continued.*

or refusal to do so constituted a breach of his official bond giving rise to a cause of action thereon immediately, the city being under no disability and being at liberty to sue, and an action brought on the official bond more than six years after the principal ceased to be sinking fund commissioner is barred by the six-year statute of limitations. C. S., 439. *Washington v. Bonner*, 250.

2. The right to sue upon a guaranty on a note arises immediately upon failure of the makers to pay the note according to its tenor, and suit against the guarantors is barred by the statute of limitations after three years from the maturity of the note, C. S., 441, in the absence of evidence of an extension of time binding the guarantors, or of other matters preventing the running of the statute. *Trust Co. v. Clifton*, 483.

b Fraud or Mistake

1. While subsection 9 of C. S., 441, originally applied only to actions for relief on the ground of fraud in cases solely cognizable by courts of equity, by statutory amendments and the decisions of our courts it now applies to all actions for relief on the ground of fraud or mistake, and bars all actions therefor within three years from the discovery of the fraud or mistake or from the time such fraud or mistake should have been discovered in the exercise of due diligence. *Stancill v. Norville*, 457.

2. The owner of lands made application to plaintiff for a loan to pay off the mortgages thereon, and the application was accepted under an agreement that the loan should be secured by a mortgage which should constitute a first lien on the lands. Before the execution and registration of the plaintiff's mortgage a judgment against the mortgagor was docketed. The prior mortgages were paid out of the proceeds of the loan and canceled of record, and the plaintiff's mortgage was registered, the plaintiff having no actual knowledge of the docketing of the judgment, and thinking his mortgage constituted a first lien on the lands in accordance with the agreement. Upon issuance of execution on the judgment the plaintiff restrained the execution sale and brought this action seven years after the cancellation of the prior mortgages to revive them and to have the plaintiff declared subrogated to the rights of the beneficiaries thereunder on the ground that they were canceled through the mistake of the plaintiff in thinking his mortgage would constitute a prior lien on the lands: *Held*, the docketed judgment was a lien on the land itself which an examination of the records would have disclosed and the plaintiff's cause of action is barred by the three-year statute of limitations. C. S., 441(9). *Ibid.*

C Matters Affecting Waiver of Plea.

a Part Payment

1. The liability of a guarantor on a note is collateral to that of the maker, and the payment of interest on the note by the maker after the maturity of the note does not prevent an action against the guarantor thereon from being barred by the lapse of three years from the maturity of the note, nothing else appearing, the interest being paid on the principal debt and not on the contract of guaranty. *Trust Co. v. Clifton*, 483.

LIMITATIONS OF ACTIONS—*Continued.*

E Pleading, Evidence and Trial.

c Pleadings and Evidence

1. Where in an action for breach of contract for the conveyance of certain timber on lands the plaintiff seeks to recover on the ground that the deed executed pursuant to the contract did not convey the full acreage agreed upon, and the defendant pleads the statute of limitations and contends that the deed conveyed the timber by metes and bounds and that the plaintiff should have discovered the alleged shortage upon delivery of the deed: *Held*, upon the proper pleading of the statute the burden was upon the plaintiff to show that his claim was not barred, and where he has failed to do so the defendant is entitled to the benefit of the statute, and where this result has been reached in the trial court by judgment of nonsuit the judgment will be affirmed on appeal. *Marks v. McLeod*, 257.

LIQUOR see Intoxicating Liquor.

LOGGING ROADS see Master and Servant G.

MALICIOUS PROSECUTION.

A Right of Action and Defenses.

b Legal Process and Prosecution

1. The filing of an involuntary petition in bankruptcy is for the purpose of having the debtor's property taken by the courts for payment of all creditors according to law, and it is more than a mere civil action for debt, and where in bankruptcy proceedings the petitioning creditors have caused the court to appoint a receiver to take charge of the debtor's property and upon the hearing of the petition it is adjudicated that the debtor is solvent and had committed no act of bankruptcy, and he is discharged: *Held*, the debtor may bring an independent action for malicious prosecution, and may recover upon a showing of malice and want of probable cause. *Nassif v. Goodman*, 451.

d Termination of Prosecution

1. Where the debtor has been discharged in the Federal Court in bankruptcy proceedings upon a finding that he was not insolvent and had committed no act of bankruptcy, and the cause is retained only for the purpose of assessing damages against the bonds of the petitioning creditors: *Held*, it is a sufficient termination of the proceedings to support an action by the debtor for malicious prosecution, and he may either bring an independent action for malicious prosecution or have his damages assessed in the bankruptcy proceedings. *Nassif v. Goodman*, 451.

B Actions. (Execution against the person see Execution K b.)

c Evidence

1. Where the debtor in involuntary bankruptcy proceedings has been discharged in the Federal Court and brings independent action against the petitioning creditors for malicious prosecution: *Held*, in the action for malicious prosecution evidence that the salesman of the petitioning creditors had threatened to ruin the debtor's

MALICIOUS PROSECUTION B c—*Continued.*

credit if the debt were not paid is competent on the question of malice, and evidence of the debtor's standing in the community is competent on the question of damages. *Nassif v. Goodman*, 451.

MANDAMUS.

A Nature and Grounds of Remedy.

b Grounds in General

1. Mandamus lies only to enforce a clear legal right, and where the application therefor fails to establish such right, the writ is properly refused. *Powers v. Asheville*, 2.

MANSLAUGHTER see Homicide C.

MARRIAGE.

C Attack and Annulment.

b Parties Who May Sue

1. Where a wife attempts to marry again when no valid divorce *a vinculo* had been obtained from her living husband, such second attempted marriage is absolutely void and may be annulled by the husband of the second attempted marriage in an action instituted for that purpose. C. S., 1658, 2495. *Pridgen v. Pridgen*, 533.

c Direct and Collateral Attack

1. A voidable marriage is valid for all civil purposes until annulled by a court of competent jurisdiction in a direct proceeding, while a void marriage is a nullity and may be impeached at any time. *Pridgen v. Pridgen*, 533.

MASTER AND SERVANT.

A The Relation.

a Creation and Existence in General

1. The relation of employer and employee is usually suspended when the employee leaves the place of his actual employment and is resumed when he puts himself in a position when he can again do the work at the place where it is to be performed. *Bray v. Weatherly and Co.*, 160.

B Compensation.

d Remedies of Employee

1. A complaint in an action against the plaintiff's employer and a third person alleging that the employer was insolvent and was indebted to the plaintiff and that the third person was indebted to the employer for the work for which the plaintiff was due the salary, fails to state a cause of action against such third person. *Theiling v. Wilson*, 809.

C Master's Liability for Injuries to Servant. (Under Compensation Act see hereunder F.)

b Tools, Machinery and Appliances and Safe Place to Work

1. Where the evidence discloses that the plaintiff was employed in the defendant's composing room in a commercial printing company, that there were a number of machines in the room with alleys or walkways between them, and that in the usual method of doing the work there was a small box on wheels used for the purpose of

MASTER AND SERVANT C b—*Continued.*

carrying metal from the machines back to the melting pot, and that the truck or box was moved about the alleys as the progress of the work required, that the plaintiff was an experienced workman and knew of such conditions and that in attempting to cross the room in the performance of his duties he tripped and fell over the movable metal box which was in the walkway, and the plaintiff testifies that he saw the box after he fell over it: *Held*, the evidence is insufficient to establish the contentions of the employee that the room was improperly lighted and that the employer failed to exercise reasonable care to furnish a reasonably safe place to work, it being evident that the employee knew that the movable metal box was shifted about the room as the progress of the work required and that he could have seen it and avoided the injury in the exercise of reasonable care for his own safety. *King v. Printing Co.*, 478.

D Master's Liability for Injury to Third Person.

b Scope of Employment

1. Evidence that the individual defendant was employed by the corporate defendant as a traveling salesman covering North and South Carolina, that the corporation furnished him a car and that it paid for the gas and oil used therein, including the gas and oil on the night of the plaintiff's injury, that the car at the time of the injury contained merchandise belonging to the corporate defendant and was being driven by the salesman as he was returning to his home late at night, together with other evidence for the plaintiff, *is held* sufficient to make out a prima facie case that the salesman was acting within the scope of his authority at the time of the injury, and the evidence, together with the corporate defendant's evidence to the contrary, was properly submitted to the jury under instructions which were free from error. *Puckett v. Dyer*, 684.

c Negligence of Servant

1. Negligence of truck driver was not established and question of whether he was employee or independent contractor is immaterial. *Kennedy v. Lookadoo*, 650.

E Federal Employers' Liability Act.

a Applicability

1. An action for injuries sustained by the plaintiff while engaged in interstate commerce as an employee of the defendant, a common carrier by rail, arises under the Federal Employers' Liability Act. *Hubbard v. R. R.*, 675.

b Nature and Extent of Liability

1. A wrench furnished an employee is a simple tool requiring no inspection by the employer while in the employee's use and possession, and in the latter's action to recover damages for a personal injury alleged to have been caused by a defect therein he must introduce evidence tending to show that the defect existed at the time the wrench was given him by the employer or that the employer had notice of the defect prior to the injury. *Taylor v. R. R.*, 218.

2. In this case *held*, the evidence tested by the Federal rule was sufficient to take the case to the jury on the issue of the defendant's negligence. *Hubbard v. R. R.*, 675.

MASTER AND SERVANT E—*Continued.*

c Assumption of Risk

1. Except in cases where the employer's violation of a statute enacted by Congress for the safety of employees contributes to the injury, an employee assumes under the Federal Employers' Liability Act the risks normally incident to the employment, but he does not assume extraordinary risks or those resulting from the employer's negligence unless and until he is made aware of such special risks or they become so obvious that a man of ordinary prudence would observe and appreciate them, but he will not be held to assume such special risks even under these circumstances if the employer assures him the matter will be remedied and the danger is not so imminent that a man of ordinary prudence would refuse to rely upon the employer's assurances. *Hubbard v. R. R.*, 675.

2. Where assumption of risk is available to a defendant in an action under the Federal Employers' Liability Act it is required that the defendant plead the defense, and the burden of proof on the issue is upon him, but it is necessary only that he prove that the injury resulted from an ordinary risk incident to the employment, or, if the injury resulted from a special risk, that such risk was fully known to the employee and appreciated by him or was so obvious that a man of ordinary prudence would have observed and appreciated it, and an instruction that the burden is on the employer to prove that the employee assumed all risk of any dangers which were inherently incident to the employment is inexact, the employee being conclusively presumed to have knowledge of the risks ordinarily incident to the employment. *Ibid.*

F North Carolina Workmen's Compensation Act.

a Nature, Construction and Application

1. An insurance carrier who has paid and is continuing to pay the award to an employee under the provisions of the Workmen's Compensation Act is entitled to be subrogated to the rights of the employee against the *tort-feasor* whose negligence caused the injury to the extent of the amount paid under the award, and an action against such *tort-feasor* is maintained primarily for the benefit of the insurance carrier and the amount of the recovery should be applied to the reimbursement of the insurance carrier and the excess, if any, should be paid the injured employee. *Pridgen v. R. R.*, 62.

2. Where an action is brought against a *tort-feasor* in the name of an injured employee and the insurance carrier who had paid and was continuing to pay the award under the Compensation Act, and the complaint alleges in effect that recovery is sought by the insurance carrier for its own benefit only to the amount of the award, and by the employee for the excess, if any, and the defendant *tort-feasor* does not demur to the complaint but calls upon the insurance carrier to disclose the amount it has paid: *Held*, the defendant is deemed to acquiesce in and adopt the theory of liability set up in the complaint. *Pridgen v. R. R.*, 62.

b Injuries Compensable

1. As a general rule an injury suffered by an employee while going to or returning from his work does not arise out of and in the course

MASTER AND SERVANT F b—*Continued.*

of his employment, and where in a hearing under the Workmen's Compensation Act the admitted facts are that the employee was employed solely as a truck driver, and that he went to his employer's residence each morning to get the truck he was employed to drive in order to take it to his employer's store, and that he was injured in an accident occurring while on his way from his home to the employer's residence for the truck: *Held*, the injury was not from an accident arising out of and in the course of his employment, and compensation was properly denied by the Industrial Commission, and the fact that the employee passed the store on his way from his home to the employer's residence is immaterial, his duties at the store not commencing until he had returned there with the truck. N. C. Code, 1931, sec. 8081(i), subsec. (f). *Bray v. Weatherly and Co.*, 160.

2. Where an employee is killed in an accident occurring while he was riding to work in a conveyance furnished by the employer under the contract of employment, his death is compensable under the provisions of the Workmen's Compensation Act as an injury arising out of and in the course of the employment. *Edwards v. Loving Co.*, 189.

3. In an application for compensation under the provisions of the Workmen's Compensation Act, evidence tending to show that the employee at the time of the injury was attending a switch light on the premises of the employer in the course of his duties, and was struck and injured by a stray bullet from the gun of a third person who was shooting at sparrows across a public highway, is sufficient to sustain a finding by the Industrial Commission that the accident did not arise out of and in the course of the employment, and such finding is not reviewable by the courts. *Bain v. Mfg. Co.*, 466.

4. Where there is evidence by a medical expert witness who attended the deceased employee that from his own observation of the deceased employee his death was caused by pneumonia which was not connected with any injury sustained arising out of and in the course of the employment, such evidence is sufficient to sustain a finding of the Industrial Commission to that effect and to sustain its award denying compensation, and the decision of the Commission will be upheld on appeal although there was incompetent evidence introduced at the hearing regarding a declaration of the deceased and his wife that the deceased employee had injured his head while at home at the same place where he had received an injury arising out of and in the course of his employment, the evidence being sufficient to sustain the finding that the injury received in the course of the employment and arising out of it did not cause death. *Johnson v. Bagging Co.*, 579.

c Preliminary Proceedure and Proceedings

1. There is no provision in the North Carolina Workmen's Compensation Act requiring an injured employee to file a claim for compensation with the Industrial Commission, but he is required to notify his employer only, and the employer is required by the statute to report the accident and claim to the Commission, which is sufficient under the statute and gives the Commission jurisdiction, and the

MASTER AND SERVANT F c—*Continued.*

Commission must approve a settlement between the parties, or, if no agreement is reached, must pass upon the claim in a hearing before it, and where the claim has been thus reported by the employer to the Commission on the form provided by it and within the statutory time, the employee's right to compensation is not barred although more than one year elapses from the date of the accident to the date a hearing is requested by the employee upon disagreement of the parties. *Hardison v. Hampton*, 187.

d Hearings Before Industrial Commission

1. The fact of an injury to an employee may be proven by circumstantial evidence, but mere hearsay evidence is incompetent to prove such fact, and the Industrial Commission may not consider incompetent testimony of declarations of a deceased employee in passing upon the question. *Brown v. Ice Co.*, 97.

e Risks Covered by Policies of Compensation Insurance. (Cancellation of compensation insurance see Insurance H c.)

1. Where the policy contract of an insurance carrier issued in accordance with the provisions of the Workmen's Compensation Act is ambiguous the debt will be resolved in favor of those insured thereunder, having regard to the ascertainment of the intent of the parties as gathered from the instrument as a whole. *Kenan v. Motor Co.*, 108.

2. Under the provisions of a policy of an insurance carrier insuring salesmen, drivers, and helpers and all other employees of a motor sales company wherever engaged, whether working at certain places defined or elsewhere in connection with or in relation to such work or places: *Held*, evidence that an employee was engaged at the time of the accident in the incidental business of his employer in unloading logs from a truck, and was working under the orders of his employer as a part of his duties is sufficient to sustain a finding of the Industrial Commission that the policy contract covered the injury. *Ibid.*

g Persons Entitled to Payment

1. Where compensation under the Workmen's Compensation Act is awarded the widow of the deceased employee as his sole dependent, and the widow dies within a few months after the award is made: *Held*, under a liberal interpretation of the relevant provisions of the Compensation Act the administrator of the widow is entitled to the balance of the award. *Queen v. Fibre Co.*, 94.

h Amount of Compensation

1. Where an injured employee had been employed for less than fifty-two weeks the Workmen's Compensation Act provides that his average weekly wage shall be computed by finding the average weekly wage during the term of employment provided the result would be fair and just to both parties, or in case such method is impractical because of the shortness of the term of employment or its casual nature that the average weekly wage shall be computed with regard to the average weekly wage of a person of the same grade and character employed in the same class of employment in the same locality, and the entire subsection should be construed

MASTER AND SERVANT F h—*Continued.*

as a whole, and where the Industrial Commission has awarded compensation in accordance with the latter method the award will be upheld, the shortness of the term and the casual nature of the employment and the finding that fair results could not be obtained by computing the average weekly wage of the employee, being questions of fact for the Commission. *Munford v. Construction Co.*, 247.

2. Where the Industrial Commission in a hearing before it awards compensation to an injured employee for total loss of his right eye, and directs that the award in respect to injury to the employee's left eye be held *in fieri* until an examination could be made by a specialist to determine the extent of injury to that eye, and thereafter a final award is made for such injury upon report of the specialist: *Held*, an application by the employee for a review of the award in respect to the injury to his left eye made within twelve months from the final award for injury to his left eye is within the limitation prescribed by section 46, chapter 120, Public Laws of 1929, although such application is made more than twelve months after the final award for injury to the right eye, and even though it be conceded that the amendment by section 6, chapter 274, Public Laws of 1931, does not apply. *Williams v. Thompson*, 717.

i Appeal and Review of Award

1. Where the Industrial Commission finds as a fact that the death of an employee was not caused by an accident arising out of and in the course of his employment, and there is competent evidence to support such finding it is conclusive on the courts upon appeal, and the conclusiveness of such finding is not affected by the fact that the award stated that the claimant had failed to sustain the burden of making out his case. *Brown v. Ice Co.*, 97.

2. The findings of fact by the Industrial Commission in a hearing before it are conclusive on the courts when supported by any competent evidence. *Kenan v. Motor Co.*, 108; *Garris v. Hines Bros.*, 148.

3. Where the Industrial Commission computes the average weekly wage of an injured employee in accordance with the average weekly wage of a person of the same grade and character employed in the same class of employment in the same locality, upon findings of the shortness of the term of employment, and that fair and just results would be thereby obtained, such findings based upon the evidence are conclusive and binding upon the courts upon appeal. N. C. Workmen's Compensation Act, sec. 60. *Munford v. Construction Co.*, 247.

4. Where there is competent legal evidence to support a finding of fact by the Industrial Commission in a compensation hearing before it, such finding is binding on the courts on appeal, but its findings are not conclusive when based on incompetent evidence. *Johnson v. Bagging Co.*, 579.

5. The North Carolina Compensation Act provides that no compensation shall be allowed for hernia unless the evidence offered at the hearing before the Industrial Commission is sufficient in the opinion of the Commission to prove definitely to the satisfaction of the Commission the five requisite facts set out in the statute, and where

MASTER AND SERVANT F i—*Continued.*

the Industrial Commission has denied compensation upon the evidence because the requisite facts were not proven to its satisfaction it is error for the Superior Court on appeal to remand the case for compensation on the ground that the requisite facts were proven to the satisfaction of the trial judge. *Richey v. Cotton Mills*, 595; *Slate v. Laundry*, 597.

k Costs and Attorneys' Fees

1. Where the insurer appeals from an award of the Industrial Commission made upon application of the employee for a review of the award for changed condition, and at the time of such application by the employee and appeal by the insurer the provision of section 62, chapter 120, Public Laws of 1931, had become effective, an order by the judge of the Superior Court, included in the judgment affirming the award, that the insurer pay the cost of the proceedings in the Superior Court, including reasonable attorneys' fees to be determined by the Industrial Commission, is without error. N. C. Code of 1931, sec. 8081(rrr). *Williams v. Thompson*, 717.

G State Regulation of Liability of Railroad Employers.

a Applicability of State Statutes

1. State statutes relating to railroad's liability to employers applies to logging roads. *Sampson v. Jackson Bros.*, 413.

b Liability Under State Statutes

1. The provisions of C. S., 3467, that in personal injury cases against a railroad company contributory negligence of plaintiff will not bar recovery but merely minimize the damages, and the provisions of C. S., 3465, abrogating the fellow-servant rule and imposing liability for injuries caused by defective appliances are applicable to tram or logging roads under the provisions of C. S., 3470. *Sampson v. Jackson Bros.*, 413.

2. Where the evidence in an action against a logging road is to the effect that the plaintiff's intestate was killed in the course of his employment by being struck by the defendant's train in the day-time at a place where the track was straight and unobstructed for several hundred yards, that the noise made by the moving train and signals given by it of its approach could have been heard for a considerable distance and that the defendant was apparently in possession of his faculties, and there is no evidence that he was in a helpless condition upon the tracks: *Held*, the evidence is insufficient to be submitted to the jury on the issue of defendant's negligence, and the fact that the defendant failed to have a watchman or lookout upon the back of the train does not alter this result. *Ibid.*

3. Where there is no evidence that the plaintiff was on the defendant's track in a helpless condition or that he was oblivious of the danger of the defendant's approaching train, or that the defendant was guilty of negligence occurring after the plaintiff's contributory negligence, the doctrine of last clear chance does not apply. *Ibid.*

MATERIALMEN'S LIENS see Laborers' and Materialmen's Liens.

MINING—Gasoline tax on gasoline used for digging gravel see Taxation B c 1.

MINORS see Infants, Adoption, Parent and Child.

MONEY RECEIVED.

B Proceedings and Relief.

a Parties and Pleadings

1. Where in an action to recover twice the amount of usury charged and paid the parties agree that only two issues be submitted to the jury, one as to the amount of the plaintiff's indebtedness to the defendant and the other as to the value of the land foreclosed under a mortgage given as security: *Held*, the action by this agreement is transformed into and treated as an action for an accounting for money had and received for the use of the plaintiff, and the defendant's demurrer *ore tenus* on the ground that a cause of action was not stated is properly overruled. *McNeill v. Thomas*, 219.

MORTGAGES AND DEEDS OF TRUST.

C Construction and Operation.

b Parties and Debts Secured

1. Later note held secured by prior mortgage deposited with payee as collateral security. *Rabil v. Fagan*, 224.

c Lien and Priority; Registration (Limitation of action for relief for mistake as to priority see Limitation of Actions B b 2.)

1. While the index and cross-index of a conveyance by a husband and wife of the latter's property should set out the name of the wife, where the records would have shown from an examination by the abstractor for a second mortgagee that the mortgagor had acquired the property from E. T., a married woman, and S. T. her husband, and the cross-index would have shown a deed of trust from "S. T. *et ux.*": *Held*, although the cross-index was not in strict compliance with the statute it was sufficient to have revealed the first deed of trust, and the contention of the trustor in the second deed of trust that his deed constituted a first lien cannot be maintained. *Ins. Co. v. Forbes*, 252.

2. Where after receiving a deed conveying title to lands the grantee mortgages the same but fails to have his deed registered until after the registration of the mortgage, and thereafter the grantee executes another mortgage which is registered subsequent to the registration of the two prior instruments: *Held*, it will be presumed that the deed was delivered at the time of its execution, and the registration thereof showing the time of its execution, the abstractor for the latter mortgage should have examined the title to the date of the execution of the deed, and the second mortgagee cannot successfully contend that his mortgage constituted a prior lien on the lands, the first mortgage being valid and its existence being discoverable upon a proper examination of the registry. *Door Co. v. Joyner*, 182 N. C., 518, relating to estoppel and after-acquired title, cited and distinguished. *Bank v. Mitchell*, 339.

F Transfer of Mortgaged Property.

a Liability of Mortgagor or Transferor

1. Where the mortgagor conveys his equity of redemption by deed in which the purchaser assumes the mortgage debt, and the purchaser in turn sells to another who also assumes the debt: *Held*, in an

MORTGAGES AND DEEDS OF TRUST F a—*Continued.*

action by the mortgagee to foreclose the mortgage and to recover from each of the parties, the contentions of the first purchaser of the equity of redemption that the mortgagee had collected interest directly from the second purchaser and had elected to pursue his remedy against him, that the mortgagee had failed to collect the installments on the debt as they became due and had failed to notify the first purchaser of the second purchaser's default thereon, and had failed to collect taxes advanced or prevent waste by the second purchaser, and that the first purchaser of the equity of redemption was entitled to an off-set or counterclaim therefor as against his liability on the mortgage debt is without merit, and a demurrer to his answer setting up such defenses is properly sustained, mere forbearance by the mortgagee not being sufficient to release the first purchaser from liability on the mortgage debt assumed by him. *Bank v. Whitehurst*, 302.

2. As between the mortgagor and the mortgagee the mortgagor is primarily liable for the mortgage debt, but as between the mortgagor and his grantee assuming the debt the mortgagor is a surety, and the note and the mortgage are not merged, and the mortgagee may sue either *in rem* by foreclosure or *in personam* on the note against the mortgagor and against the purchaser of the equity of redemption on the contract made for the mortgagee's benefit. *Ibid.*

b Liability of Purchaser

1. Where the grantee in a deed to lands merely assumes the indebtedness of a prior mortgage lien thereon the transaction is not a novation of the mortgage note, there being no element of a further consideration passing between the parties or a substitution of a new for an old or subsisting debt. *Bank v. Whitehurst*, 302.

G Satisfaction and Cancellation. (Mortgagee's right to proceeds of insurance under loss payable clause see Insurance N c.)

a Payment in General

1. Where a borrower from a bank executes a deed of trust on his lands to secure his note, and thereafter, while the note and mortgage are unpaid and uncanceled, he executes another note directly to the bank and deposits the first note and deed of trust with the bank as collateral security for the second note, and the second note recites this agreement on its face: *Held*, the mortgage is security for the unpaid balance on both the first and second notes, and an assignee of a second mortgage would have to tender the unpaid balance on both notes in order to be entitled to the cancellation of the first mortgage. *Rabil v. Fagan*, 224.

2. Where the purchaser of an equity of redemption assumes the mortgage debt in his deed and is sued by the mortgagee to recover thereon, and as a set-off or counterclaim the purchaser alleges ownership of certain stock redeemable upon payment of the mortgage debt without alleging by whom the stock was issued or by whom redeemable or that the mortgage debt had been paid: *Held*, upon the pleadings the purchaser is not entitled to set up the stock as a counterclaim in the mortgagee's action to recover on the debt assumed by the purchaser of the equity of redemption. *Bank v. Whitehurst*, 302.

MORTGAGES AND DEEDS OF TRUST G a—*Continued.*

3. Mortgagor held entitled to findings as to whether note was paid or was to be paid out of rents. *Wilson v. Allsbrook*, 498.

4. Where a mortgagor takes out a policy of fire insurance on his property in accordance with an agreement in the mortgage that insurance should be taken out on the property and assigned to the mortgagee, and that the proceeds thereof, in case of loss, should be used to pay the mortgage bond, and thereafter the property is destroyed by fire and the amount of loss paid by the insurance company by drafts payable to the mortgagee and mortgagor, and by agreement of the parties the proceeds of the policies are not used to pay off the bond secured by the mortgage, but are used in the erection of another building upon the land: *Held*, a judgment creditor of the mortgagor under a judgment docketed subsequent to the registration of the mortgage has no right, title or interest in the proceeds of the policies, and the prior mortgage remains outstanding under the agreement of the mortgagee and mortgagor, and is superior to the lien of the judgment, and a purchaser of the property at an execution sale under the judgment may not maintain that he is entitled to the cancellation of the mortgage as a cloud on his title. *Armstrong v. Price*, 833.

b Payment and Assignment or Subrogation

1. Where, in a suit to restrain foreclosure under a first mortgage, the plaintiff alleges that he is the assignee of a second mortgage and had tendered the amount due on the first mortgage to the mortgagee, and contends that he is entitled to have the first mortgage canceled upon the payment of the amount, and the defendant in its answer denies that the plaintiff is the assignee of the second mortgage: *Held*, the denial that the plaintiff is an assignee of the second mortgage raises an issue for the determination of the jury, the plaintiff not being entitled to the relief sought unless he is the assignee of the second mortgage, and the plaintiff's demurrer to the answer on the ground that it failed to set up a defense to the action should have been overruled. *Rabil v. Fagan*, 224.

2. Where money is borrowed and used for the purpose of paying off a prior mortgage on lands, and the money so borrowed is secured by a mortgage on the same lands which is executed and registered on the same day that the first mortgage is paid, and the lender holds the first mortgage as additional security, and the second mortgage is invalid because of defective acknowledgment: *Held*, the second mortgage is considered as merely an assignment of the first, valid mortgage, or the first mortgage itself in a different form, and the lender of the money so used is entitled upon default to foreclose under an equitable lien based on the valid first mortgage, and is entitled to have the cancellation of the first mortgage stricken from the records. *Investment Co. v. Gash*, 126.

H Foreclosure.

b Right of Action and Defenses

1. Where the plaintiff brings suit to restrain the foreclosure of a mortgage on his property and alleges that the note secured by the mortgage was paid or was to be paid out of rents collected by the mortgagor, and the matter is referred to a referee by consent: *Held*, the

MORTGAGES AND DEEDS OF TRUST H b—*Continued.*

mortgagor is entitled to a finding of fact as to whether the note had been paid or was to be paid out of rents, and where the report of the referee does not contain any finding on this aspect of the case the cause will be remanded on the mortgagor's exception to the report. *Wilson v. Allsbrook*, 498.

l Disposition of Proceeds and Surplus

1. In an action to enforce the statutory lien of a materialman on property which had been sold under a deed of trust executed prior to the date on which the materialman had begun furnishing material, the complaint states no cause of action against the trustee in the deed of trust when there is no allegation that notice of the claim of lien had been given the trustee prior to the disbursement of the proceeds of the sale. *Horne-Wilson Co. v. Wiggins Bros.*, 85.

2. Where the trustee in a deed of trust has foreclosed the instrument under the power of sale contained therein, and an advance bid has been made and a resale ordered by the clerk in accordance with the provisions of C. S., 2591, the clerk may order an allowance to the trustee for conducting the sale, and where the trustee has filed an accounting showing the distribution of the proceeds of the sale including a commission in a certain per cent retained by the trustee, the presumption is that the clerk has approved the commission so retained, in this case the per cent specified in the deed of trust. *Brokerage Co. v. Trust Co.*, 182.

n Resale, Deposits, Costs and Commissions

1. Where clerk orders resale he may order allowance to trustee, and where he has approved accounting such order is presumed. *Brokerage Co. v. Trust Co.*, 182.

2. Where the clerk of the court has expressly or presumptively approved the commissions to be allowed the trustee for making the resale of the mortgaged premises under the statutory power given him, the procedure to question the reasonableness of the amount is by exception and appeal to the judge from whose decision an appeal will lie to the Supreme Court, and the matter may not be attacked collaterally, the allowance made by the clerk being final in the absence of exception and appeal. *Ibid.*

r Agreements to Purchase at Foreclosure Sale

1. Where the plaintiff alleges that the first mortgage on his lands had been foreclosed and that he contemplated attacking the validity of the foreclosure, but that the defendant, who held a second mortgage on the lands, agreed to acquire the lands by paying the first mortgagee and to sell the lands and pay the plaintiff any surplus after payment of the indebtedness due the defendant, and that the defendant sold part of the lands: *Held*, the plaintiff is not entitled to an accounting, the plaintiff's interest in the lands having been foreclosed prior to the defendant's acquisition of the lands, and the foreclosure not having been attacked, and there being nothing to show that the plaintiff had paid anything for the alleged agreement or on the repurchase of the lands. *Jackson v. Bank*, 357.

2. An agreement to purchase lands at a foreclosure sale for the mortgagor at an agreed price and account to the mortgagor for the

MORTGAGES AND DEEDS OF TRUST H r—*Continued.*

difference between the price agreed and the indebtedness secured constitute the purchaser a trustee of the equity of redemption for the benefit of the mortgagor. *Ollis v. Ricker*, 671.

MORTUARY TABLES see Damages F a 1.

MUNICIPAL CORPORATIONS. (Municipal courts see Courts B.)

A Creation, Alteration and Dissolution.

f Dissolution and Repeal of Charter

1. Where the charter of an incorporated town is repealed by the General Assembly the lands formerly held by the town in fee is not fastened with a trust in favor of the local community. *University v. High Point*, 558.

2. The General Assembly has authority to deal with property held by a municipal corporation for a public purpose and to provide for its disposition upon the repeal of the municipal charter. *Ibid.*

D Officers, Agents, and Employees.

a Election, Appointment and Tenure

1. Where, under a private law authorizing the governing body of a city to curtail expenses and effect economies as they deem necessary and expressly repealing anything to the contrary in the existing charter, the governing body dismisses an officer who had been employed on the police force for several years solely on the grounds of economy, although several officers his junior in service had been retained: *Held*, there being nothing in the act requiring the application of the rule of seniority in effecting the economies, the officer has failed to show a clear legal right entitling him to mandamus for reinstatement, and a charter provision that officers holding the position for twelve months shall be deemed to hold under classified service and should be subject to lay off only as provided for therein does not affect this result. *Powers v. Asheville*, 2.

E Torts of Municipal Corporations.

c Defects or Obstructions in Streets

1. A traffic post or signal about three feet around at its base and about ten feet high, with the base sufficiently lighted at night, placed by a city at the center of the intersection of two of its streets is not such an obstruction as to amount to negligence in its maintenance, and where the evidence tends only to show that the plaintiff drove his automobile down the center of the street and struck the traffic light structure causing an injury resulting in his death, and that the signal post was lighted and could have been seen several blocks, the evidence is insufficient to be submitted to the jury, but where this result has been obtained by the jury's answering the issue of negligence in defendant's favor the judgment will be affirmed. *Valley v. Gastonia*, 664.

f Injuries to Lands by Sewer Systems

1. Where there is evidence that an incorporated town emptied raw sewage into a stream which resulted in polluting a lake upon which another town had been located, rendering the lake unfit for bathing by causing its waters to carry a high bacterial count dangerous to

MUNICIPAL CORPORATIONS E f—*Continued.*

health and to give off objectionable odors, and causing depreciation of values of business and residential property in the lower town by reason of such odors, and that the lower town, besides having a few permanent residents, entertained several thousand summer visitors and was used as a health resort and as headquarters of a religious denomination, and that the sewage disposal of the upper town was defeating the objects for which the lower town was incorporated: *Held*, the evidence tends to show irreparable damage from a civil wrong causing annoyance in the enjoyment of the legal rights of the residents and visitors of the lower town to the use and privileges of the water of the lake without interference with their health and comfort, and where the exigencies of the upper town do not preclude the abatement of the nuisance, an injunction may be issued in the suit of the lower town upon a sustaining verdict of a jury, and the right to abatement may not be defeated by a demand that permanent damages be assessed. *Anderson v. Waynesville*, 37.

2. Where, before the erection of a dam for a lake, a town located farther up along the stream contracts in writing to satisfactorily dispose of its sewage, which it failed to do although a bond issue for this purpose was authorized by popular vote, and fourteen years thereafter the sewage from the upper town began to cause appreciable damage to the town located at the lake, and thereupon the parties sought to establish a sanitary district, and upon failure of their efforts to do so, brought suit for the abatement of the nuisance three years after appreciable damage from the sewage: *Held*, the lower town was not barred by laches from asserting its right to abatement, the evidence tending to disprove acquiescence in the trespass, and the upper town not having acquired title by prescriptive use. *Ibid.*

3. A municipal system which discharges raw and untreated sewage into waters used by a multitude of people, causing irreparable damage, *is held* not of such exigent nature as to deny relief by abatement. *Ibid.*

4. To the extent that the land of a private owner is depreciated in value by reason of noxious gases and odors given off by the sewage disposal plant of a city, the city is liable for such depreciation as a taking of private property for a public use, although the plant was erected in accordance with plans approved by the State Board of Health and the maintenance of such plant is a governmental function of the city. *Gray v. High Point*, 756.

5. In an action by a private owner of lands to recover damages caused his land by noxious gases and odors emanating from the sewage disposal plant of a city located contiguous to such land, the testimony of several witnesses that odors from the plant were strong and extremely objectionable on the plaintiff's land whenever the wind was from the plant is held sufficient to take the case to the jury, and defendant's motion as of nonsuit was properly denied. C. S., 567. *Ibid.*

6. Where the maintenance of a sewage disposal plant by a city causes depreciation in value to the plaintiff's land by reason of emanation

MUNICIPAL CORPORATIONS E f—*Continued.*

of noxious odors therefrom, the measure of damages is the difference between the fair market value of the land immediately before and immediately after the injury to the plaintiff's land by reason of the emanation of such odors, and includes its value for all practical purposes to which a reasonably prudent man could have put it. *Ibid.*

7. The owner of land has a right that the air over his land shall come in its natural purity, and although he may not recover damages for occasional pollution of the air resulting in mere inconvenience or annoyance, he may recover damages sustained by reason of the emanation of noxious odors from a city's sewage disposal plant when such odors are strong and frequent and cause substantial depreciation of the value of the land. *Ibid.*

8. Where odors emanating from a city's sewage disposal plant amount to a taking of contiguous private property for a public use the owner of such contiguous land is entitled to damages from the time of the first substantial taking. *Ibid.*

9. Owner of land damaged by odors from sewage disposal plant may maintain action for private nuisance. *Ibid.*

F Contracts and Franchises.

a Manner and Form, Requisites and Validity

1. A power company operated electric street cars upon certain of the streets of a city under a municipal franchise, its lines extending to certain streets beyond the city limits. The power company and the city, some years after the franchise was granted, entered into a contract whereby the power company was to substitute, on certain streets, gasoline auto-buses upon certain conditions for the electrically driven cars, and the contract was approved by the Corporation Commission. It further appeared that the change in the method of transportation was for the public benefit: *Held*, the proposed change from electric cars to auto-buses along the designated streets does not involve the granting of a new franchise, requiring a vote of the residents of the city under the provisions of its charter, but relates only to the method of transportation under the old franchise, and where the controversy has been made the subject of an action by the power company under the Declaratory Judgment Act in which all interests were represented, and judgment has been signed sustaining the validity of the contract, exceptions based on contentions that the contract amounted to a new franchise and that the Corporation Commission was without authority to approve the contract cannot be sustained on appeal. *Light Co. v. Iseley*, 811.

H Police Powers and Regulations.

d Public Safety and Health

1. An ordinance of a city providing that a certain species of dog, or dogs of vicious tendencies shall be muzzled by the owners or kept upon the premises or not permitted to run at large within the corporate limits falls within the police powers of the city regarding the safety and health of its citizens, and is a valid abrogation of the rights of the owners in property of this character. *S. v. Harrell*, 210.

MUNICIPAL CORPORATIONS H d—*Continued.*

2. An order of a city manager prohibiting parking of automobiles on the opposite side of the street from the city's fire station, entered in order to facilitate the ingress and egress of the city's fire engines, is held to be valid exercise of the police power, and the defendant's contention that the order was arbitrary and discriminatory and that he was entitled to damages resulting to his property by reason of the loss of a "curb-service" business theretofore maintained in front of his store in the prohibited parking area cannot be maintained. *Thompson v. Reidsville*, 502.

c Violation and Enforcement

1. Evidence tending to show that a certain dog was owned by the defendant and that it had attacked and bitten several persons to the knowledge of the owner, including an attack upon the child of the prosecutrix, is sufficient to resist a motion as of nonsuit in an action under an ordinance of a city prohibiting vicious dogs to run at large within the city limits without being muzzled. *S. v. Harrell*, 210.

J Actions Against.

b Charter Provisions Relating Thereto

1. Where in an action against a city the complaint alleges that the city had trespassed upon the plaintiff's land and seeks to recover damages therefor, and the city admits that it had never condemned the property but contends that it was dedicated to public use by the plaintiff's grantor and that it had acquired title by adverse user and that the action was barred by the statute of limitations: *Held*, a provision in the city charter prescribing certain procedure for the taking of land for city streets by condemnation has no application since such charter provisions contemplate only the taking of property for public use by formal action of the city, and the city's motions to dismiss for want of jurisdiction in that the charter procedure had not been followed and for want of the complaint to sufficiently allege a cause of action are properly overruled. *Moye v. Greenville*, 259.

K Fiscal Management and Taxation.

c Municipal Bonds (Right to issue and validity see Taxation A.)

1. Where under valid statutory authority a municipality issues its bonds payable to bearer and the form of the bonds in other respects comply with the provisions of C. S., 2982, they are negotiable instruments and in the hands of a holder in due course are not subject to defenses ordinarily available to the municipality, and as against such holder the only defense available to the municipality is the want of power and authority to have issued them. *Trust Co. v. Statesville*, 399.

2. Where a negotiable municipal bond is in the hands of a holder in due course, C. S., 3033, it is conclusively presumed that a valid delivery of the bonds had been made so far as the rights of the holder are concerned, and in an action by such holder the defense that the bonds were not delivered is not available to the municipality. C. S., 2997. *Ibid.*

MUNICIPAL CORPORATIONS K c—*Continued.*

3. Where a municipal corporation pays the interest coupons on its bonds for several years it is estopped to deny the validity of the bonds for want of consideration or delivery as against a holder in due course. *Ibid.*

4. Failure to strictly follow statutory procedure does not invalidate bonds in hands of holder in due course. *Ibid.*

MURDER see Homicide.

NEGLIGENCE. (Culpable negligence see Homicide C a; negligence of persons in particular circumstances see Highways B, Railroads D, of persons in particular relationships see Carriers B, Master and Servant D, Electricity A e; release from liability see Torts C; limiting liability for negligence see Contracts A e; measure of damages for negligent injury see Damages F a.)

A Acts and Omissions Constituting Negligence.

a In General

1. The essential elements of actionable negligence are the failure to use due care, injury or damage, and proximate cause, and upon the plaintiff's failure to establish any one of them a judgment of nonsuit is correct. *Rountree v. Fountain*, 381.

2. Although law is swift to afford remedy to injured child, negligent action must ordinarily be based on want of due care. *Haney v. Bailey*, 861.

c Res Ipsa Loquitur

1. Doctrine held inapplicable to this case, *McLeod v. Hicks*, 130; held applicable in this case. *Pendergraft v. Royster*, 384.

B Proximate Cause.

b Last Clear Chance

1. Where in an action by an administrator to recover damages against a railroad company for the death of his intestate the evidence discloses that the defendant was negligent and that the plaintiff's intestate was guilty of contributory negligence as a matter of law and that the contributory negligence continued up until the time the intestate was struck and killed by the defendant's train: *Held*, the doctrine of the last clear chance does not apply, and the defendant's motion for judgment as of nonsuit was properly allowed. *Rives v. R. R.*, 227.

2. Doctrine of last clear chance held not applicable to this case. *Sampson v. Jackson Bros.*, 413.

c Intervening Negligence

1. Nonsuit in guest's action is proper when evidence shows that injury was proximately caused by negligence of third person. *Tuttle v. Bell*, 154.

C Contributory Negligence.

a Of Persons Injured in General

1. The defendant power company dug a hole in a public street and threw the red clay therefrom upon the sidewalk of the town. Rain wet the clay and caused it to become slippery. The plaintiff, while

NEGLIGENCE C a—*Continued.*

walking along the sidewalk before day, slipped on the mud and fell into the hole, resulting in serious injury. There was evidence that plaintiff knew all the conditions of the street and sidewalk at the place in question: *Held*, the defendant's motion as of nonsuit on the ground of contributory negligence was properly refused, the plaintiff having no reason to foresee that he would slip and fall into the hole, and the conditions of the sidewalk not being sufficient to require the plaintiff to leave it and walk in the street for his own safety. *Walker v. Light Co.*, 801.

D Actions.

b Evidence and Burden of Proof (Proof that death resulted from injury see Death B d.)

1. In a negligent personal injury action the burden is on the plaintiff to show that the injury was proximately caused by the defendant's negligence, and evidence raising merely a conjecture as to negligence and proximate cause is insufficient to be submitted to the jury. *Grimes v. Coach Co.*, 605.

2. In an action for actionable negligence testimony of an understanding between the injured person and another as to meeting each other at a time subsequent to the happening of the injury *is held* not relevant to the manner in which the injury occurred, and an exception to its exclusion is not sustained. *Allman v. R. R.*, 660.

c Nonsuit

1. Where evidence fails to show causal connection between alleged negligence and injury in suit a nonsuit is proper. *Rountree v. Fountain*, 381; *Grimes v. Coach Co.*, 605.

2. Evidence held not to disclose contributory negligence barring plaintiff's recovery as matter of law. *Walker v. Light Co.*, 801.

3. Where the doctrine of *res ipsa loquitur* applies it is sufficient to carry the case to the jury upon the question of negligence, but the burden of proof on the issue remains upon the plaintiff. *Pendergraft v. Royster*, 384.

4. In an action to recover for a negligent personal injury a motion as of nonsuit based upon contributory negligence of the plaintiff will not be granted unless there is but one reasonable inference that may be drawn from the evidence in regard to the proximate result of plaintiff's contributory negligence, but where more than one inference can be drawn from the evidence the question of proximate cause must ordinarily be submitted to the jury, and in this case the defendant's motion as of nonsuit should have been denied. *Wadsworth v. Trucking Co.*, 730.

c Verdict and Judgment

1. Where in an action to recover for a negligent personal injury the jury finds that both the plaintiff and defendant were negligent and awards damages to the plaintiff: *Held*, the finding that the plaintiff was negligent bars his recovery, and the verdict is not inconsistent, and no appeal will lie from the trial court's refusal to set aside the verdict in his discretion. *Crane v. Carswell*, 555.

NEGOTIABLE INSTRUMENTS see Bills and Notes.

NUISANCES.

A Conditions Constituting Nuisance in General.

c Right to Maintain Action for Private Nuisance

1. The fact that a city's sewage disposal plant causes injury to the lands of several owners in the vicinity by reason of the emanation of noxious gases and odors will not prevent one of such owners from maintaining an action against the city to recover for the injury to his land alone. *Gray v. High Point*, 756.

B Criminal Prosecutions.

a Acts or Conditions Constituting Public Nuisance

1. A public nuisance is one which affects the local community generally and a private nuisance is one which affects the separate rights of individuals, and in this prosecution for the maintenance of a public nuisance upon evidence that the defendant kept a public place where a large number of people were allowed to congregate at night and to drink, fight and use loud and profane language to the great annoyance of those living in the neighborhood and those passing upon a nearby public highway, the instruction of the court defining the difference between a public and private nuisance is held correct. *S. v. Everhardt*, 610.

d Indictment

1. An indictment for the maintenance of a public nuisance charging that the defendant permitted a large number of people to assemble at a dwelling under her control and there to drink, holler, and use all kinds of vulgar, loud and profane language, etc., to such an extent as to be a common nuisance to the general community it is not demurrable on the ground that the objectionable language alleged to have been used by the occupants of the house was not specifically set out. *S. v. Everhardt*, 610.

NEW TRIAL—Petitions for, in Supreme Court see Appeal and Error K c, in Superior Court see Criminal Law J d, J f.

NONSUIT see Trial D a, Criminal Law I j.

OPINION EVIDENCE see Evidence K, Criminal Law G i.

PARENT AND CHILD. (Adoption see Adoption, contract of child see Infants B.)

A Rights and Liabilities of Parent.

a Liability for Child's Negligent Driving of Family Car

1. In an action against a father to recover damages for a personal injury alleged to have been caused by the negligence of his son while driving a family car, testimony tending to show that another car owned by the father other than the one in question was a family car has no probative force and is irrelevant to the issue. *Eaves v. Coxe*, 173.

2. It is negligence on the part of a father to permit his minor son who is under the legal driving age to drive his truck upon the public highway, and the father may be held liable for injuries proximately caused by such negligence, and although the mere fact that the son was under the legal driving age would not of itself establish such

PARENT AND CHILD A a—*Continued.*

negligence as the proximate cause of an accident under the evidence in this case the issue of proximate cause was for the determination of the jury. *Eller v. Dent*, 439.

c Custody and Control of Child

1. The parents of a child have a natural right to its custody and control, but this right is not absolute and is subject to modification where the interests of the child clearly requires it, but the mother of an illegitimate child, if a suitable person, is entitled to the custody of the child even though there be others more suitable, and where, in a *habeas corpus* proceeding brought by the mother of an illegitimate child for its custody, the court finds that such mother is a person of good character and has since married, but that her husband was not the father of the child, and that the mother and her husband are willing and able to take care of the child, and that the order of adoption secured by the respondents was void as to the mother because she was not a party to the proceedings, and there is no finding that the mother had forfeited her rights by abandoning the child or was not a suitable person for its custody: *Held*, an order granting the custody of the child to the respondents is error and will be reversed on appeal, the finding of the court that it was to the best interests of the child that it remain with the respondents not being controlling in view of the other findings. *In re Shelton*, 75.

PARTIES. (See, also, Adoption A a, Counties F a 1.)

A Parties Plaintiff. (Right of assignee to sue see Assignments A a 1; change of parties by amendment see Pleadings E a 1; insurer may sue *tort feasor* in employee's name see Master and Servant F a 1, 2; misjoinder of parties and causes see Pleadings D b.)

c Interveners (In attachment see Attachment.)

1. Where parties are joined in an action by order of court they are not interveners, and are not subject to the principles of law applicable to interveners. *Baucom v. Bank*, 825.

PARTITION.

A Actions for Partition.

a Jurisdiction, Parties and Procedure

1. Where proceedings are instituted before the clerk of the Superior Court for the sale of lands held by the petitioners as tenants in common and for division of the proceeds, and all persons interested are made parties, the minor petitioners being represented by their uncle appointed by the court upon his finding that he was a suitable person: *Held*, the clerk had jurisdiction of both the subject-matter and the parties to the proceedings. *Ex Parte Huffstetler*, 796.

c Sale and Confirmation

1. Where an order confirming a sale of lands for partition does not provide for the disbursement of the funds, C. S., 2180, but the sale is made under order of the clerk of the Superior Court having jurisdiction of both the subject-matter and parties, the minor petitioners being represented by a person appointed by order of court, and the sale is made part for cash and part for purchase money notes, and the sum received in cash is properly paid into court and properly

PARTITION A c—*Continued.*

disbursed to the parties, the share of the minors therein being less than one hundred dollars and being paid to their mother for their benefit, C. S., 962: *Held*, the sale was not void, and a subsequent petition to set aside the sale is properly refused. *Ex Parte Huffstetler*, 796.

PENALTIES.

A Nature and Right of Action.

a In General

1. The provisions of chapter 449, section 5, Public Laws of 1891, "that no other person than said weighers shall weigh cotton or peanuts sold in said town or township under penalty of $10.00" the penalty to be paid by the buyer and applied to the school fund upon conviction before any justice of the peace, construed with C. S., 447, does not create a criminal offense, and a penalty alone can be imposed and enforced in a civil action and the use of the word "conviction" in the act does not alter this result. *S. v. Briggs*, 158.

PHYSICIANS AND SURGEONS.

C Rights, Duties and Liabilities to Patients.

b Malpractice or Negligence (Expert testimony in actions for, see Evidence K b.)

1. Where an incision for the removal of a cataract is made at the proper place and in the proper manner with the required skill and care according to all the expert testimony relating thereto, a patient later losing his eye after such operation may not recover damage resulting from the operation thus properly performed. *McLeod v. Hicks*, 130.

2. Where a patient loses an eye as the result of disease and there is no evidence that an operation thereon for cataract aided, increased or accelerated the course of the disease the patient may not recover of the surgeon performing the operation for the loss of the eye. *Ibid.*

3. Where a patient brings action for the loss of his eye after an operation thereon for cataract, and the evidence discloses that the defendant surgeon possessed the required skill and care, but the patient seeks to recover on the ground that in performing the operation the surgeon negligently inflicted an incision in the eyeball, but offers no evidence that such incision caused the loss of the eye, and there is evidence that the operation had been properly and skillfully done and that the loss of the eye resulted from other causes, the surgeon's motion as of nonsuit is properly allowed. *Ibid.*

4. In an action against a surgeon for malpractice there was evidence tending to show that the plaintiff was put under the influence of an anesthetic and that in performing the operation the surgeon used cat gut which came in glass tubes, that the nurse broke the glass tubes beforehand and handed the cat gut to the surgeon, and also that there was a glass nozzle to a rubber tube used by the physician in irrigating the wound while performing the operation, there was also evidence that the patient improved in health after the operation, but that several months thereafter she removed from her body a broken piece of glass about an inch long which appeared

PHYSICIANS AND SURGEONS C b—*Continued.*

in form to have been broken from either the glass tube inclosing the cat gut or from the nozzle used by the surgeon in irrigating the wound: *Held*, the evidence was sufficient to take the case to the jury under the doctrine of *res ipsa loquitur*. *Pendergraft v. Royster*, 384.

5. A surgeon in undertaking to operate upon a patient does not insure or warrant the results of the operation but impliedly warrants that he has the knowledge and skill ordinarily possessed by the members of his profession similarly situated, and that he will exercise reasonable diligence and will exert his best judgment in the treatment and care of the case. *Pendergraft v. Royster*, 384.

PLEADINGS. (In particular actions see Usury C a, Money Received B a, Cancellation of Instruments B b, Escheats B c.)

D Demurrer.

a Statement of Cause of Action

1. Where a complaint alleges that the plaintiff borrowed a certain sum from the defendant which was secured by a mortgage, and that unknown to the plaintiff the amount of the note when it was executed was raised to a sum much larger than the amount loaned, and that later the defendant forced him to execute a renewal note in a still larger amount for the purpose of evading the usury laws, and seeks to restrain foreclosure for usury, and the sale is enjoined upon condition that the plaintiff pay a certain sum, and upon failure of the plaintiff to make payment the mortgage is foreclosed, and thereupon the plaintiff files an amended complaint alleging the foreclosure and sale of the property for the amount of the renewal note and seeks to recover double the amount brought by the property in excess of the principal sum alleged: *Held*, the action is to recover for usury charged and paid and is not for the cancellation or rescission of the instrument, and a demurrer on the ground that the complaint did not allege fraud or mistake is properly overruled. *McNeill v. Thomas*, 219.

b Misjoinder of Parties and Causes of Action (See, also, Actions C b.)

1. In an action brought by the Commissioner of Banks against directors of a bank for damages on account of negligent mismanagement, the complaint enumerating in detail negligent acts and omissions of the defendant and alleging that such acts and omissions constituted a general course of dealing and systematic policy of neglect, wrongdoing and mismanagement, in which all defendants participated, and that such negligence proximately caused great losses to the bank, *is held* not demurrable for misjoinder of parties and causes of action. *Hood v. Love*, 583.

2. Where one of the defendants in a civil action demurs to the complaint and its demurrer is sustained, and on appeal it appears that there was a misjoinder of parties and causes of action as alleged in the complaint the judgment will be affirmed. *Carswell v. Whisenant*, 674.

d Time of Demurring

1. A demurrer *ore tenus* on the ground that the complaint fails to state a cause of action may be made at any stage of the trial, and an answer does not waive such demurrer. *McNeill v. Thomas*, 219.

PLEADINGS D—*Continued.*

e Effect of Demurrer

1. In passing upon the sufficiency of a complaint upon demurrer the courts will construe it liberally with a view to substantial justice between the parties and will overrule the demurrer if any portion of the complaint presents facts sufficient to constitute a cause of action or such facts may be fairly gathered therefrom, the remedy being given the defendant in proper instances to apply for a bill of particulars, C. S., 534, or for an order that the pleadings be made more definite and certain by amendment. C. S., 537. *Hood v. Love*, 583.

2. The allegations of the complaint are taken as true upon demurrer. *Betts v. Jones*, 590.

E Amendment to Pleadings.

a Right to Amend in General

1. While it is not permissible for the trial judge, over the defendant's objection, to allow another party who is a stranger to the action and who is solely interested as plaintiff therein to be substituted for the one originally bringing the action so as to substantially change the character or nature of the action, where it appears that the action was brought in the name of the president of a company and that he had paid the money for the tax certificate sued on, and that the certificate had been issued to the company as trustee of the president, and that the action was instituted in the name of the president through inadvertence or mistake, the trial judge has the power to allow the substitution of the company as the party plaintiff under the provisions of C. S., 547, the character or nature of the action not being substantially changed thereby. *Street v. McCabe*, 80.

2. Where money is borrowed to pay off a prior mortgage and the lender takes another mortgage to secure the money so borrowed which is later declared invalid for improper acknowledgment, and the lender brings action to foreclose under the first mortgage under the doctrine of equitable subrogation: *Held*, the trustee can be made a party by amendment if it should be necessary. C. S., 547. *Investment Co. v. Gash*, 126.

G Issues, Proof and Variance.

a In General

1. The allegations of the complaint must be supported by sufficient evidence introduced at the trial in order to avail the pleader. *Sampson v. Jackson Bros.*, 413.

PLEDGES—By bank to secure deposit see Banks and Banking C d, H d 1.

POLICE POWERS see Municipal Corporations H.

PRINCIPAL AND AGENT. (Insurance agents see Insurance K.)

A The Relation.

b Distinction Between Agency and Other Relationships

1. Where the purchaser of an automobile sues the manufacturer thereof for breach of warranties made by the manufacturer's local dealer, and alleges that the local dealer was an agent of the manufacturer,

PRINCIPAL AND AGENT A b—*Continued.*

and the allegation of agency is denied in the answer: *Held*, the contract between the manufacturer and the local dealer is competent on the question of agency, and its exclusion from the evidence after proof of its execution constitutes reversible error. *Gibbs v. Motor Corp.*, 351.

2. The contract between a manufacturer of automobiles and its local dealer is not conclusive upon the question of whether the dealer was a sales agent or independent dealer, but where the contract by its express terms upon a proper interpretation creates the relationship of vendor and independent dealer, and there is no evidence of a course of dealing between the parties tending to establish the relationship of agency, a nonsuit should be granted upon the manufacturer's motion therefor in an action by a purchaser from the local dealer to recover upon warranties made by the local dealer upon allegations that such dealer was the agent of the manufacturer. *Ibid.*

c Rights and Liabilities as to Third Persons. (Admission by agent see Evidence F d.)

c Notice to or Knowledge of Agent

1. Where a member of a loan committee of a bank passes favorably upon a loan for the payment of the purchase price of lands, and he has an interest in the transaction and works for his individual pecuniary benefit his knowledge of fraud or of outstanding equities against the land will not be imputed to the bank, but if the committeeman was acting for the benefit of some other person and not for his own benefit, such knowledge would be imputed to the bank. *Richardson v. Satterwhite*, 113.

f Ratification

1. Where a husband has contracted for the sale of timber growing on his wife's land and both of them later execute a deed therefor it will be presumed that he acted as her authorized agent in executing the contract. *Marks v. McLeod*, 257.

2. Where the purchaser of an automobile sues the manufacturer upon warranties alleged to have been made by the manufacturer's local dealer as sales agent, and the evidence is insufficient to establish the fact of agency, the fact that the manufacturer rendered gratuitous service in endeavoring to make the machine entirely satisfactory to the purchaser after complaint by him to the local dealer is not sufficient to establish ratification by the manufacturer of the warranties made by the local dealer, and the manufacturer's motion of nonsuit should be granted. *Gibbs v. Motor Co.*, 351.

3. A principal will not be allowed to accept the benefits of the unauthorized acts of his agent and repudiate the burdens, but the principal must ratify the whole transaction or reject it completely, and where written instruments of ratification are to be construed or where the facts are undisputed, or only one inference can be drawn therefrom, the question of ratification is for the court. *Lawson v. Bank*, 368.

PRINCIPAL AND SURETY.

B Nature and Extent of Liability on Surety Bonds.

c *Bonds of Public Officers or Agents* (Limitation of actions on, see Limitation of Actions B a 1.)

1. Where the statute fixes the salary of a register of deeds of a county and *ex-officio* clerk to the board of county commissioners, and expressly excludes his receiving any further compensation, the action of the board in ordering the payment of a further sum as compensation for alleged extra service is unlawful, and the acceptance of such amount by the register of deeds and his refusal to repay the amount upon the demand of the county commissioners after a change in its personnel by election are unlawful acts constituting a breach of the register's official bond for which both he and the surety on his bond are liable. *Comrs. of Brunswick v. Walker*, 505.

2. Where the county commissioners have accepted the official bond of the treasurer of the county and he has entered upon his official duties under the bond, the commissioners are without power in the absence of statutory authority to order the bond canceled and to accept another bond in a smaller penal sum in substitution of the first bond, and the treasurer and the surety are liable on the first bond notwithstanding the attempt of the commissioners to release them of liability thereon, but they may not be held liable on the second bond also, the second bond being offered only in substitution of the first, and the condition upon which it was offered being impossible of performance. *Comrs. of Brunswick v. Inman*, 542.

3. Where a county attorney acts as the treasurer of a county as agent of the duly elected treasurer under an agreement between them, and an action is instituted against the treasurer, his surety, the county attorney, and others to recover for sums misappropriated by the county attorney acting as treasurer, and judgment is rendered against the defendants for the funds so misappropriated in building a certain highway to a private beach owned by the county attorney and for the development of the beach: *Held*, it was not error for the trial court upon findings of fact supported by the evidence to allow a credit for the money expended upon that part of the highway duly authorized by the county commissioners as a public road and for which the county received the benefit, although the expenditure therefor by the county attorney acting as treasurer was irregular. *Ibid.*

PROCESS.

B Service of Process.

d Foreign Corporations

1. For a valid service of summons on a corporation operating and doing business in this State, foreign or domestic, the provisions of C. S., 483 must be strictly followed, and a separate copy of the summons must be served on and left with the agent for each corporate defendant. *Hershey Corp. v. R. R.*, 184.

f Unincorporated Associations and Fraternal Orders

1. Unincorporated fraternal associations and lodges, etc., confining their membership to one hazardous occupation, are allowed by statute to do business in North Carolina without a license, N. C. Code,

PROCESS B f—*Continued.*

6274, 6479, and where such association or mutual benefit society has virtually carried on an insurance business in this State and has collected through its resident secretary and treasurer of a local lodge large sums of money which such secretary remits to the central lodge in another State, service of process in an action on one of the association's benefit certificates on such resident secretary who had issued and countersigned large numbers of the association's benefit certificates in this State is held a valid service of summons on the association, even though the association is not incorporated. C. S., 6518. *Winchester v. Brotherhood of R. R. Trainmen*, 735.

PROHIBITION see Intoxicating Liquor.

PUBLIC OFFICERS. (See, also, Municipal Corporations D, Counties; bonds of, see Principal and Surety B c.)

C Rights, Powers, Duties and Liabilities.

d Liability for Injuries Inflicted in Performance of Duties

1. A public officer is not ordinarily personally liable for the exercise of his official discretion or his judgment in matters within the scope of his authority, but he may be personally liable if he acts in such matters corruptly or maliciously, and where in an action against the individual members of a school committee the complaint alleges that the defendants in the selection of a driver of a school bus acted wilfully, wrongfully, maliciously and corruptly, and seeks to recover damages caused by the negligence of the driver so selected in an action against the members of the board in their individual capacity, a demurrer to the complaint is properly overruled, the allegations being taken as true upon the demurrer. *Betts v. Jones*, 590.

QUANTUM MERUIT see Executors and Administrators D a.

RAILROADS. (As carriers see Carriers.)

D Operation.

b Accidents at Crossings

1. Where the evidence tends to show that a railroad company backed cars over a crossing at night without a light thereon, or a flagman at the crossing, and that the cars were moving at a speed in excess of that allowed by the town ordinance and struck and injured plaintiff, and that no warning by signal or bell was given, it is sufficient to be submitted to the jury on the issue of the railroad company's negligence, although the plaintiff could have seen the approaching cars in ample time to have avoided the injury had it been light. *Pridgen v. R. R.*, 62.

2. Where the evidence discloses that no regular trains were operated over a railroad track at a grade crossing or regular shifting done at this point, that the highway was straight and there were no obstructions at the crossing: *Held*, the evidence is insufficient as a matter of law to require the railroad company to maintain a watchman or signaling device before the crossing. *Goldstein v. R. R.*, 166.

RAILROADS D b—*Continued.*

3. Evidence in this case held insufficient to establish a custom of a railroad company to keep a watchman at a certain crossing, and there being no evidence that the plaintiff relied on such alleged custom in using the crossing, the exclusion of testimony of such custom was proper. *Ibid.*

4. Where the plaintiff in an action to recover damages sustained in a collision at a railroad crossing relies on the violation by the railroad of a city ordinance prohibiting the blocking of a crossing in the city by a railroad company for more than three minutes at a time, the plaintiff has the burden of proving that the crossing in question was inside the city limits and that the railroad car into which the automobile collided had been blocking the crossing for more than three minutes, and where the plaintiff's evidence is not of sufficient probative force to be submitted to the jury on these questions a nonsuit is proper. *Ibid.*

5. Where a train is operated through a town at an excessive speed without giving warnings by whistle or bell in violation of an ordinance of the town the railroad company is guilty of negligence. *Rives v. R. R.*, 227.

6. Where the evidence discloses that two of the defendant's live tracks crossed the highway at grade and that as the plaintiff approached the crossing his view of the second track was obstructed by a freight train moving on the first track in a careful manner according to law, and that upon the passing of the freight train the plaintiff attempted to cross and was hit by the defendant's fast moving passenger train going in the opposite direction on the second track, and that the passenger train gave no signal or warning upon approaching the crossing, but that the tracks were straight and unobstructed except for the moving freight train: *Held*, the defendant's motion as of nonsuit was properly allowed, a carefully moving train not constituting an obstruction in contemplation of law. *Moore v. R. R.*, 275.

7. Where the evidence discloses that the plaintiff's intestate approached the two parallel live tracks of the defendant at a grade crossing, that a flagman was standing at the crossing with a flag and stop sign in his hands, that the intestate went upon the tracks apparently watching a freight train approaching from his left and was struck by a passenger train approaching from his right at an excessive speed and without signal in violation of the municipal ordinance: *Held*, a judgment as of nonsuit is properly entered. *Pitt v. R. R.*, 279.

c Injuries to Persons on or Near Track

1. Where the evidence discloses that plaintiff's intestate stood upon the tracks of the defendant railroad company in daylight, where the tracks were straight and unobstructed, until he was hit by defendant's fast moving train, the evidence discloses contributory negligence as a matter of law continuing up to the moment of impact, and the doctrine of the last clear chance does not apply. *Rives v. R. R.*, 227.

RAILROADS D c—*Continued.*

2. The bare fact that the defendant's train was backing at night without a light and that the defendant's intestate was found on the track at a public passway approximately twelve hours thereafter and that the intestate had been intoxicated and was killed by being struck by a train, *is held* insufficient to support the theory of trial that the plaintiff's intestate was down on the track in a helpless condition and should have been seen by those in charge of the train, and the defendant's motion as of nonsuit was properly allowed. *Henry v. R. R.*, 277.

3. Evidence disclosing that the body of the plaintiff's intestate was found on a straight track where it was crossed by a path, that the headlight on the train which struck the intestate was burning and could have been seen for some distance, and there is no evidence that the intestate was down on the track in a helpless condition and should have been seen by the engineer and his condition appreciated in time to have avoided the injury, the railroad company's motion as of nonsuit is properly sustained. *Allman v. R. R.*, 660.

RAPE see Husband and Wife F c.

RATIFICATION see Principal and Agent C f.

RECEIVERS. (Bank receivers see Banks and Banking H c.)

A Nature and Grounds for Receivership.

a Power of Courts in General

1. Courts of equity have original power to appoint receivers for insolvent corporations, and to instruct the receivers in the performance of their duties, and the custody of the receiver is the custody of the law. *Blades v. Hood*, 56.

REFERENCE.

A Proceedings for Reference.

a Order of Reference and Power to Refer

1. An order for a compulsory reference of an action involving a course of dealing between the parties for a substantial period and containing a statement of account in excess of two hundred and fifty items is affirmed under the provisions of C. S., 573, the answer filed by the defendant not constituting a plea in bar in that it does not destroy or defeat the entire claim or demand. *Mfg. Co. v. Horn*, 732.

C Report and Findings. (Report held not to contain necessary findings see Mortgages H b 1.)

a Power of Court to Affirm, Modify, Set Aside, etc., Report and Findings

1. Upon the filing of the report of the referee in a consent reference, as well as in a compulsory one, the trial court has the power to affirm, amend, modify, set aside, make additional findings and confirm, in whole or in part, or disaffirm the report of the referee, and where the court has made additional findings and there is evidence to sustain them the action of the court will be given the effect of a verdict of a jury and will not ordinarily be disturbed on appeal. C. S., 578. *Thigpen v. Trust Co.*, 291.

REFORMATION OF INSTRUMENTS.

A Grounds for Reformation.

a In General

1. The doctrine of reformation of a written instrument is usually applied only for mutual mistake of all the parties, or mistake of one induced by the fraud of the other, and extends in its application to the draftsman of the instrument, a mistake usually being one concerning the contents or legal effect of the instrument, and while a mistake of law *simpliciter* is not ground for reformation, if the mistake of law is induced or accompanied by inequitable conduct of the other party, equity will usually grant the relief, and while all varieties of fraud cannot be included in a single formular, the term is broad enough to include any act, omission or concealment in breach of equitable duty. *Hubbard and Co. v. Horne*, 205.

B Defenses.

c Conditions Precedent to Right of Reformation

1. Where the mortgagee buys in the mortgaged property at the foreclosure sale by the commissioner under decree of court, and sues the mortgagor to reform the instrument for mutual mistake of the parties in describing the property in the mortgage deed, the mortgagor's contention that the mortgagee was entitled to the relief sought only upon condition of a new foreclosure cannot be sustained, the mortgagor and mortgagee being the only parties interested and the evidence clearly establishing the fact that the description was defective through mutual mistake. *Harvey and Co. v. Rouse*, 296.

C Actions.

d Evidence and Burden of Proof

1. In an action for reformation of an instrument parol evidence is admissible to establish mutual mistake or mistake on one side induced by fraud, this being an exception to the parol evidence rule. *Hubbard and Co. v. Horne*, 205.

2. The quantum of proof required for the reformation of a written instrument is clear, strong and convincing proof, and where the elements of this equitable relief are embodied in two issues a charge correctly stating the quantum of proof on one issue, but upon the other charging that there must be a preponderance of the evidence, will be held for reversible error, the instructions tending to confuse the jury as to the rule applicable. *Ibid.*

3. In this case certain land was conveyed by deed which omitted description of one of the boundaries, and the grantee later accepted a quitclaim deed reciting and correcting the error. The grantee thereafter mortgaged the land by deed containing the same description as the original deed. The mortgage was foreclosed by suit in which a verified complaint was filed alleging the number of acres conveyed and that there was a prior mortgage thereon. The prior mortgage correctly described the property. The mortgagor filed no answer and did not resist the decree of foreclosure, and the land was bought in at the commissioner's sale by the mortgagee. There-

REFORMATION OF INSTRUMENTS C d—*Continued.*

after the mortgagee, the purchaser at the sale, brought suit to reform his deed for mutual mistake in describing the boundaries: *Held*, the contention of the mortgagor that there was no sufficient evidence of mutual mistake cannot be sustained, the acceptance by him of the quitclaim deed being an admission of error, and his failure to answer the verified complaint in the foreclosure proceedings being an admission of the matters therein alleged in regard to the acreage and the prior mortgage, and a directed verdict on the issue in plaintiff's favor was justified under the evidence. *Harvey and Co. v. Rouse*, 296.

REGISTER OF DEEDS—Liability on bonds see Principal and Surety B c 1.

REHEARING see Appeal and Error K c 3.

RELEASE see Torts C.

RES GESTÆ see Evidence H b.

RES IPSA LOQUITUR see Negligence A c.

RES JUDICATUR see Judgments L.

RULES OF COURT see Criminal Law L a, Appeal and Error C, F.

SALES.

I Conditional Sales.

d Rights and Remedies of Seller

1. A title retaining contract of sale of a truck which gives the seller or his assignee the right to repossess the truck upon default of the purchaser to make the monthly payments in accordance with its terms, is in effect a chattel mortgage, giving the owner and holder of the conditional sales contract the right to take the property if such taking does not involve a trespass as defined by the decisions. *S. v. Stinnett*, 829.

SCHOOLS AND SCHOOL DISTRICTS. (Liability of school committee to person injured by school bus see Public Officers C d 1.)

A School Districts.

c Maintenance of Schools Therein and Allotment of Funds

1. Under the provisions of our Constitution, Art. IX, secs. 2, 3, the counties are made the governmental agencies of the State in the maintenance of the constitutional six-month term of public school, and the county boards of education are given power to create, divide, abolish and consolidate school districts in accordance with a county-wide plan, C. S., 5473, and the Constitution requires by mandatory provision that at least one elementary school be maintained in each district, C. S., 5481, 5483, 5489, but no authority is given the county boards to consolidate taxing and nontaxing districts. *Elliott v. Board of Equalization*, 749.

2. The county boards of education are given discretionary power to locate high schools within the county on the recommendation of

SCHOOLS AND SCHOOL DISTRICTS A c—*Continued.*

the county superintendent in order to make them available to all the children of the county, but it is not required that a high school should be maintained in each school district of the county and the county board of education may, in the exercise of its discretion, transfer a high school from one district to another. *Ibid.*

3. Where a county board of education has refused to consolidate several school districts with one in which a high school is maintained, the one containing the high school being a special tax district and the others nontaxing districts, the State Board of Equalization is within authority under the provisions of chapter 430, section 6, Public Laws of 1931, to refuse to provide general control, instructional service, operation of plant, and auxiliary agencies for such nontaxing districts, the statute failing to include "districts" within the powers of the Board of Equalization, and the Constitution requiring that at least one elementary school shall be maintained in each school district. *Ibid.*

SECRET ASSAULT see Assault B a 1.

SERVICE see Process.

SEWER SYSTEMS see Municipal Corporations E f.

STATE—Escheats see Escheats.

STATES. (Extradition see Extradition.)

A Relation Between States.

b Full Faith and Credit (Foreign judgments operating as bar see Judgments L c.)

1. Where a husband domiciled in another state obtains a decree of absolute divorce from his wife domiciled in this State in which proceeding the wife is served with summons by publication in accordance with the laws of such other state, and in which the wife does not appear in person or by attorney: *Held*, the decree of divorce based upon such service is not valid in this State, and an attempted second marriage of the wife will be declared void in an action brought by the husband of the second attempted marriage. The distinction is noted where both parties are residents of such other state and its courts have jurisdiction of both parties. *Pridgen v. Pridgen*, 533.

STATUTE OF FRAUDS see Frauds, Statute of.

STATUTE OF LIMITATIONS see Limitation of Actions.

STATUTES. (Statutes construed see Consolidated Statutes.)

B Construction and Operation.

c Criminal Statutes

1. Criminal statutes should be strictly construed, and in case of substantial doubt that construction should be adopted which is the least severe. *S. v. Briggs*, 158.

STATUTES—*Continued.*

C Repeal and Revival.

b Repeal by Implication

1. The repeal of a statute by implication is not favored by the law, and a later statute will not be construed as repealing a former statute unless the repugnancy between them is irreconcilable. *S. v. Davis*, 47.

SUBROGATION. (Insurer's right to subrogation see Insurance O, Master and Servant F a 1, 2; beneficiary subrogated to rights of mortgagee upon payment of bonds from insurance see Executors and Administrators D e 1.)

A Right to Subrogation.

b Right of Person Paying Mortgage Debt to Lien of Mortgage

1. Where money is borrowed and used for the purpose of paying off a prior mortgage on lands, and the money so borrowed is secured by a mortgage on the same lands which is executed and registered on the same day that the first mortgage is paid, and the lender holds the first mortgage as additional security, and the second mortgage is invalid because of defective acknowledgment: *Held*, the second mortgage is considered as merely an assignment of the first, valid mortgage, or the first mortgage itself in a different form, and the lender of the money so used is entitled upon default to foreclose under an equitable lien based on the valid first mortgage, and is entitled to have the cancellation of the first mortgage stricken from the records. *Investment Co. v. Gash*, 126.

SUMMONS see Process.

SUPERSEDEAS.

B Liabilities on Bonds.

a Joint and Several Liability

1. Sureties on supersedeas bonds of joint *tort-feasors* held not entitled to stay of execution as against judgment creditor. *Hamilton v. R. R.*, 136.

2. The provisions of a statute in force at the time of making a contract enter into and become a part of the agreement as if fully written therein and where a judgment has been entered against two joint *tort-feasors* and supersedeas bonds with sureties have been executed to stay execution pending appeal, C. S., 630, the provisions of C. S., 618, will be construed as incorporated in the supersedeas bonds, and where the judgment against both *tort-feasors* has been affirmed on appeal and one of them pays the whole judgment and costs and demands that the judgment be transferred to a trustee for his benefit: *Held*, it is proper for the court, upon motion duly made after notice to all parties, to order that the *tort-feasor* paying the judgment be reimbursed in one-half the judgment and costs out of the funds deposited with the clerk by the surety on the supersedeas bond of the other *tort-feasor*, C. S., 650, and the provision in the bond of such other *tort-feasor* that it should be void upon payment of the judgment by either of the parties will not be given effect, and the order discharges the clerk from liability for the funds so deposited. *Hamilton v. R. R.*, 468.

SURETY BONDS see Principal and Surety.

SURGEONS see Physicians and Surgeons.

TAXATION.

A Constitutionality and Validity of Levy or Bond Issue. (Negotiability of bonds and rights of parties upon transfer see Municipal Corporations K c.)

a Necessity of Vote

1. Judgment that proposed bond issue of county for purpose of refunding bonds issued prior to 1 July, 1931, would be valid is sustained in this case. *Maxwell v. Trust Co.*, 143.

f Form, Requisites and Amount of Bond Issue

1. Whether the statutory provisions that an issuance of bonds by a municipality should be authorized at a regular and not a special meeting of its governing body is mandatory or merely directory is immaterial where the bonds are in the hands of an innocent holder in due course, the failure of the governing body to strictly observe the provisions of the statute not being sufficient to invalidate the bonds in the hands of such holder, especially where the city is estopped by its conduct from denying the validity of the bonds. *Trust Co. v. Statesville*, 399.

B Liability of Persons and Property.

c License and Sales Taxes

1. Digging gravel from a pit for commercial purposes is not mining within the meaning of chapter 145, Public Laws of 1931, as amended by chapter 304, and one paying the tax on gasoline used in digging gravel is not entitled to reimbursement of the tax under the provisions of the statute, gravel not being regarded as a mineral under the mining laws. *Stone Co. v. Maxwell, Commissioner*, 151.

C Levy and Assessment.

d County Boards of Equalization and Review

1. Where the value of lands listed by the taxpayer has been increased, and the taxpayer duly files complaint before the board of county commissioners sitting as a board of equalization and review, and the matter of reassessment is referred to the county tax supervisor who makes a reduction of the tax value, and his reassessment is approved by the county commissioners at a regular meeting a little after the date prescribed by statute for action thereon: *Held*, although the statutory procedure should be followed, the approval of the reassessment is not void in this case, the taxpayer having acted in good faith without laches, and the county commissioners having ratified the reduced assessment, the county may not take advantage of its failure to act within the statutory time, and the taxpayer is entitled to the benefit of the reduced assessment. *Buncombe County v. Beverly Hills, Inc.*, 170.

D Lien and Priority.

b Date of Lien on Personalty

1. There is no lien for taxes on personal property except from levy thereon, N. C. Code of 1931, 7986, and where certain personal property comes into the hands of the defendant first as administrator

TAXATION D b—*Continued.*

and then as distributee he is personally liable for the taxes thereon only from the date he obtained possession, and the county cannot collect from him the taxes due on the property for the years prior to his possession of the property as administrator. N. C. Code of 1931, 7971(50), 7985. *Coltrane v. Donnell*, 515.

G Redemption.

c Tender or Payment of Amount Due

1. Under the provisions of 2 C. S., 8038, the owner or one having an interest in the title to lands which have been sold by the sheriff for taxes may redeem the lands thus sold within one year from the date of sale upon paying to the sheriff for the use of the purchaser the sum mentioned in the certificate with interest at the rate of 20 per cent per annum, etc., and where the owner or his agent inquires of the sheriff, or his deputy in charge, the amount to be paid for the redemption, such owner or his agent has a right to regard the amount so stated as correct, and upon the payment thereof within the time stated the tax lien will cease and the deed made to the purchaser will be avoided and an error of a few cents made by the sheriff in fixing the amount will not be held fatal under the doctrine of *de minimis non curat lex*. *Thompson v. Whitehall Co.*, 652.

H Tax Sales and Foreclosures. (Time and place of sale see Judicial Sales A a 1.)

a Tax Sales and Certificates

1. The statutory requirements in selling land for taxes should be observed, but all irregularities are not fatal, and in this case the alleged irregularities as to the advertisement and sale are held not to entitle the appellant to judgment invalidating the sale in view of the statutes enacted to cure immaterial irregularities, N. C. Code, 8020, 8021, and the changed mode of procedure in the sale of land for taxes. *Street v. McCabe*, 80.

c Attack and Setting Aside

1. Where on a motion to set aside a tax foreclosure sale the clerk orders that the mortgagees of the property be made parties to the action and on appeal to the Superior Court the judge finds as a fact that the appeal was heard by consent of all parties in interest: *Held*, all parties having an interest in the land were parties to the action by consent and the contention of the purchaser at the tax foreclosure sale that they were not parties cannot be sustained. *Harnett County v. Reardon*, 268.

2. Where, in a suit to foreclose a tax certificate, the complaint alleges that there were mortgage liens existing against the property and that the county was entitled to have the owner's equity of redemption sold to satisfy the taxes due and prays that the equity of redemption be foreclosed, and the final judgment decrees that the sale be approved and that the commissioner make deed in fee simple to the purchaser upon payment of the purchase price, and it further appears that the land had been sold under one of the mortgages prior to the tax foreclosure sale and that the purchaser at the mortgage foreclosure sale had asked at the county auditor's

TAXATION H c—*Continued.*

office whether there were any taxes due on the property and was informed that there were none, and that the mortgagees were not served with summons and had no actual knowledge of the tax foreclosure sale: *Held,* the complaint in the tax foreclosure proceedings and the decree therein were at variance and the rights of the mortgagees were not affected thereby, and the sale was ineffectual because the owner's equity of redemption had been foreclosed prior to the tax sale foreclosure and the purchaser at the sale had record notice thereof or in the exercise of due care should have discovered the fact, and the tax sale should have been set aside and the parties put *in statu quo* upon motion in the original cause by the mortgagees and purchaser of the equity of redemption, the motion having been made in apt time, and the decree being irregular. *Ibid.*

d Interest, Costs and Attorneys' Fees

1. Where the court has properly allowed an amendment to the complaint in an action on a tax sale certificate, the amended action is a continuation of the original action, and where the original action was commenced before the expiration of eighteen months after the date of the first certificate of sale, the contentions of the defendant that the plaintiff, under the statute then in force, was not entitled to more than six per cent on the certificate after the expiration of the eighteen months because of failure to bring action within that time cannot be sustained, and, furthermore, the clause relating to interest has been superseded by chapter 260, section 3, Public Laws of 1931, and *held further,* the costs and attorney's fee will not be apportioned. *Street v. McCabe,* 80.

TORTS. (Particular torts see Negligence, Highways B, Trespass, of persons in particular relationships see Municipal Corporations E, Physicians and Surgeons, Electricity.)

B Joint Torts.

b Liabilities of Parties and Right to Contribution

1. Solvent *tort-feasor* and sureties on supersedeas bonds held not entitled to stay of execution upon insolvency of one *tort-feasor. Hamilton v. R. R.,* 136.

2. Joint *tort-feasor* paying judgment is entitled to contribution and supersedeas bond of other *tort-feasor* is liable. *Hamilton v. R. R.,* 468.

C Release from Liability.

b Fraud in Procuring Release

1. Evidence that the plaintiff, while in a hospital where he had been taken following the injury in suit, had signed a release prepared by an agent of the defendant and witnessed by two agents of the hospital whose bill was paid by the defendant, that at the time of signing the release the plaintiff was in a weak condition and suffering from head injuries and had been unconscious for a long period of time and was not in his right mind, that he did not remember signing the release, that the consideration therefor was grossly inadequate and was left with the hospital and doled out to the plaintiff, and that the release recited that it covered all in-

TORTS C b—*Continued.*

juries from the accident, past, present and future, even including permanent injury and possible death, together with the fact that the agent procuring the release did not take the stand although present in court and having peculiar knowledge of the plaintiff's condition at the time of signing the release, *is held* sufficient to show a peculiar relationship between the plaintiff and defendant's agents enabling them to take advantage of him, and is sufficient to be submitted to the jury upon the issue of whether the release was obtained by fraud. *Puckett v. Dyer*, 685.

d Acceptance of Benefits and Ratification.

1. In order to constitute a valid ratification the party charged with ratification must act with knowledge of the material facts or have reasonable grounds for such knowledge, and where in a personal injury action the plaintiff contends that the release set up by the defendant was procured by fraud, and the defendant contends that the plaintiff ratified the release by accepting its benefits, evidence on the part of the plaintiff that his signature was procured when he was woefully incapacitated by parties in a peculiar position to take advantage of him, that he had no further dealing with the defendant relative to the release, that he did not remember signing it and that no copy of the release was left with him, and it appears that the release covered all injuries resulting from the accident, past, present and future, even to the extent of death, is held properly submitted to the jury under instructions which were free from error, and the jury's verdict on the issue in plaintiff's favor is upheld on appeal. *Puckett v. Dyer*, 685.

TRESPASS.

C Criminal Trespass.

a Elements and Essentials of the Crime

1. A criminal trespass involves a breach of the peace or circumstances manifestly and directly tending to it, and evidence tending to show that the agent of a finance company, which owned and held a conditional sales contract on a truck, saw the truck parked on the street, and, the owner being in default, drove the truck away in the absence of the owner and without his knowledge or consent, and took the truck to a garage to be held until payment according to the terms of the conditional sales contract, is held insufficient to establish criminal trespass on the part of the agent, and an instruction to the contrary is held for reversible error. *S. v. Stinnett*, 829.

TRIAL. (Of criminal cases see Criminal Law I; of particular actions see Particular Titles of Actions.)

B Reception of Evidence.

e Withdrawal of Evidence

1. Where incompetent evidence relating to the question of damages is admitted during the trial, but thereafter the court withdraws the evidence and instructs the jury not to consider it, and competent evidence based on proper questions is later admitted upon the issue, the admission of the incompetent evidence is rendered harmless, and an exception thereto will not be sustained. *Gray v. High Point*, 756.

TRIAL—*Continued.*

C Conduct and Course of Trial.

a Argument of Counsel (In criminal cases see Criminal Law I e.)

1. The consolidation of an action by an employee to recover for personal injuries sustained in a collision between the truck he was driving and the defendant's railroad train with an action by the employer for damages to the truck *is held* not error, the two cases having arisen from the same injury and practically the same defenses having been interposed. *Pridgen v. R. R.*, 62.

c Consolidation of Actions (Joinder of actions see Actions C b.)

1. In an action against a *tort-feasor* to recover damages sustained by an employee who had been compensated therefor under the provisions of the Compensation Act, an exception to remarks of plaintiff's counsel that the employee would receive all amounts recovered over the amount of the award paid by the insurance carrier will not be sustained when such remarks were made in answer to remarks of the defendant's counsel that the insurance carrier was the party really interested and was the one pushing the suit. *Pridgen v. R. R.*, 62.

d Allowing Jury to View Premises

1. With the consent of the parties it is not error for the trial judge in his discretion to permit the jury to view the plaintiff's land for the purpose of understanding the evidence in the case respecting damages to the land by the maintenance of a city sewage disposal plant when he correctly charges the jury that it must not regard the information so obtained as substantive evidence. *Gray v. High Point*, 756.

D Taking Case or Question from Jury. (See, also, Contracts F,c, Negligence D c, Highways B o.)

a Nonsuit

1. On a motion as of nonsuit all the evidence, whether offered by the plaintiff or elicited from the defendant's witnesses, is to be considered in the light most favorable to the plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567. *Tuttle v. Bell*, 154; *Pendergraft v. Royster*, 384; *Sampson v. Jackson Bros.*, 413; *Allman v. R. R.*, 660; *Puckett v. Dyer*, 684.

2. A mere scintilla of evidence, raising only a suspicion, conjecture, guess, or speculation as to the issue to be proven is insufficient to take the case to the jury. *Tuttle v. Bell*, 154; *Sampson v. Jackson Bros.*, 413.

3. In a suit on a crop lien and chattel mortgage a motion for judgment as of nonsuit on a cross-bill for reformation of the instrument will be denied when the evidence thereon raises inferences favorable to both parties, and in this case the evidence of mutual mistake or of mistake on one side induced by fraud on the other is held sufficient to be submitted to the jury. *Hubbard and Co. v. Horne*, 205.

TRIAL D a—*Continued.*

4. Where a motion as of nonsuit is not renewed at the close of all the evidence it need not be considered on appeal. *Moye v. Greenville*, 259.

5. Upon a motion of nonsuit the sufficiency of the evidence is a question of law, and in passing upon the question the courts must give the plaintiff the benefit of the most favorable interpretation of the evidence and of every reasonable inference. *Rountree v. Fountain*, 381.

b Directed Verdict

1. Where the evidence upon the trial of an action is uncontradicted and is not conflicting, and there is no evidence by either party tending to impeach the witnesses, and but one reasonable inference can be drawn from the evidence, an instruction that if the jury believed the evidence to answer the issues as directed is not error. *Bank v. Noble*, 300.

E Instructions.

d Applicability to Pleadings and Evidence

1. Where testimony of a declaration by an agent of a past occurrence is admitted in evidence solely for the purpose of contradicting and impeaching the testimony of the agent given upon the trial, it is error for the court in his charge to recount such evidence as an admission of negligence by the agent, but whether the error is cured by a later instruction, given after the jury was recalled from deliberation, correctly limiting the evidence but not retracting the prior instruction, need not be considered where a new trial is awarded upon other grounds. *Hubbard v. R. R.*, 675.

f Objections and Exceptions

1. A misstatement of the contentions of a party must be brought to the trial court's attention in apt time in order to afford an opportunity for correction, and when this has not been done an exception based thereon will not be considered on appeal. *Williams v. Forrest*, 273.

g Construction of Instructions and General Rules Upon Review

1. Where the charge of the trial court is erroneous on a material point the error will not be held harmless because in another part of the charge the law is correctly stated or the error minimized, the charge tending to confuse the jury. *Wellons v. Warren*, 178.

2. Conflicting instructions as to quantum of proof will be held for reversible error. *Hubbard and Co. v. Horne*, 205.

3. The instructions of the trial court will be construed as a whole, and the charge will not be held for error when it clearly and correctly states the law within the understanding of the jury when so construed. *In re Will of Brown*, 347.

4. Where the charge of the court contains conflicting instructions on a material point it will be held for reversible error upon exception. *Hubbard v. R. R.*, 675.

F Issues.

a Form and Sufficiency in General

1. Where the ward's funds have been paid into the hands of an assistant clerk as guardian under appointment by the clerk, and the

TRIAL F a—*Continued.*

guardianship bond has been duly executed with a surety company, in an action against the surety company for breach of the bond: *Held*, the liability of the clerk's bond is not relevant, and issues tendered relating to such liability and to whether any of the funds had inured to the benefit of the clerk's office, and whether the funds had been commingled with official deposits by the assistant clerk are properly refused. *Phipps v. Indemnity Co.*, 420.

2. Issues are sufficient if they present for the determination of the jury all essential matters or determinative facts in dispute. *Green v. Casualty Co.*, 767.

G Verdict.

b Form and Sufficiency of Answers to Issues

1. Where a mortgagor alleges that he executed a chattel mortgage as security for a preëxisting debt and to secure payment of fertilizer to be shipped by the mortgagee, and seeks to have the mortgage declared void for fraud and to recover damages for the mortgagee's refusal to ship the fertilizer as agreed, and the mortgagee alleges that the chattel mortgage was not to become effective or the fertilizer shipped until payment of a certain sum in cash by the mortgagor, and the jury finds from the evidence that the mortgagee had not wrongfully refused to ship the fertilizer and had not procured the execution of the mortgage by fraud: *Held*, the verdict of the jury will be construed in the light of the testimony and the charge of the court, and amounts to a finding that the mortgage never became effective for failure of the mortgagor to make the cash payment constituting a condition precedent, and judgment should be rendered declaring the chattel mortgage of no effect and for the defendant on the amount admitted to be due on the preëxisting debt. *Wilson v. Fertilizer Co.*, 359.

2. Verdict awarding damages upon finding that both parties were negligent is not inconsistent and bars recovery. *Crane v. Carswell*, 555.

d Polling Jury and Impeaching Verdict

1. Where the judge writes the answers to the issues with the acquiescence of the jury either party may request that the jury be polled, there being no exception to the action of the court. *Bank v. Noble*, 300.

e Setting Aside Verdict

1. The trial judge has the discretionary power during the term to set aside a verdict as being against the weight and credibility of the evidence, and his action in so doing is not ordinarily reviewable, C. S., 591, but an order setting aside the verdict on such grounds at a succeeding term of court upon a continuance of the defendant's motion therefor will be reversed on appeal where the record shows that the plaintiff did not consent to the continuance and did not waive his right to except thereto. *Acceptance Corp. v. Jones*, 523.

TRUSTS. (Agreement to purchase land at foreclosure sale creates trust see Mortgages H r; parol trust does not come within provisions of statute of frauds see Frauds, Statute of E b 1.)

A Creation and Validity. (Creation by will see Wills E h, 1, 2.)

b Resulting and Constructive Trusts

1. In a suit to impress a resulting trust upon lands and to recover an amount due, a demurrer interposed on the ground that while a loan was alleged the complaint did not set forth the trust is properly overruled upon the facts admitted by the demurrer. *Rogers v. Banzet*, 217.

E Execution of Trusts.

d Effect of Failure to Properly Execute Trust

1. The trustees of a charitable trust who violate the provisions of the trust are subject to the procedure prescribed by statute, and where the trust is created by will the trust estate is not forfeited in favor of a residuary legatee solely upon the ground that the moneys derived have been diverted to other uses than the testator intended. N. C. Code, 4033, 4034. *Humphrey v. Board of Trustees*, 201.

USURY.

A Usurious Contracts and Transactions.

a Construction of Contracts and Transactions as to Usury

1. Fine imposed by building and loan association for delinquency in paying for stock is not charge of interest on loan. *Moore v. Building and Loan Association*, 592.

C Actions.

a Pleadings

1. A complaint alleging a loan in a certain amount and the execution of a note secured by a mortgage in an amount greatly exceeding the sum of the loan with the legal rate of interest, and that the mortgage had been foreclosed and bought in by the lender for the amount of the note, and seeking to recover twice the amount brought by the property in excess of the principal amount of the loan, sufficiently alleges a cause of action to recover twice the amount of usury charged and paid, and a demurrer thereto is bad. *McNeill v. Thomas*, 219.

2. Where the complaint alleges that the defendant had charged and received usury on certain indebtedness but fails to allege the time and amount of the payment of the alleged usury, it is insufficient to state a cause of action to recover for usury charged and received. *Jackson v. Bank*, 358.

VENUE. (In criminal prosecutions see Criminal Law D e.)

A Nature or Subject of Action.

c Transitory Causes of Action in General

1. An action for damages caused by the pollution of a stream resulting in forcing the plaintiff to shut down his clay mining plant lower down along the stream is transitory, and where the plaintiff brings suit in the county in which its principal office is located, the defendant's motion for a change of venue to the county wherein the land is situate, made as a matter of right, is properly refused. C. S., 463. *Clay Co. v. Clay Co.*, 12.

VENUE—*Continued.*

C Change of Venue.

a For Convenience of Parties or Witnesses

1. Where the court grants defendant's motion for removal of the action from the county of the plaintiff's residence to the county in which the personal injury occurred for the convenience of witnesses, C. S., 470, the answer not having been filed and no issues having been joined, the court has no further discretionary power and may not enter a further order that the jury be drawn from another county. *Eaves v. Coxe*, 173.

VERDICT see Trial G.

WEIGHTS AND MEASURES—Action for penalty for violating statutory provisions see Penalties A a.

WILLS.

D Probate and Caveat. (Nonexpert may testify as to sanity see Evidence K b 3.)

a In General

1. Where a will has been duly probated in common form its validity may not be collaterally attacked even for fraud, and where after the probate of the will a legatee therein brings action against the administrator *c. t. a.* to recover the balance due on the legacy, the administrator may not set up the defense that the bequest to the legatee had been altered after the execution of the will by changing the numbers and figures denominating the bequest to twice the original amount, and that such change was not in the handwriting of the testatrix, and judgment granting plaintiff's motion to strike out allegations in the answer setting up such defense and ordering a reference will be affirmed on appeal. C. S., 4145. *Crowell v. Bradsher*, 492.

E Construction and Operation of Wills.

a General Rules of Construction

1. Where a will is susceptible to two reasonable constructions, one disposing of all of the testator's property, and the other leaving part of the property undisposed of, the former construction will be adopted and the latter rejected, there being a presumption against partial intestacy. *Holmes v. York*, 709.

b Estates and Interests Created

1. A devise of lands to an incorporated town, describing same, and thereafter stating that the lands be kept for its comfort and to protect its health and for suitable grounds for public buildings, the meeting house thereon to be held more especially for the use of the Society of Friends and generally for the use of religious denominations, conveys the fee simple title to the town unencumbered by a trust or condition subsequent which would work a reversion of the lands to the grantor, the later clauses not being repugnant to the fee previously granted. *University v. High Point*, 558.

f Designation of Devisees and Legatees and their Respective Shares

1. The testatrix was seized of two tracts of land at the time of her death, one containing about twenty-six acres and the other five, the

WILLS E f—*Continued.*

smaller tract adjoining the larger and the larger tract adjoining the lands of Y., H. and B. Her will contained a devise to "Y. of all my real property adjoining the lands of Y., H. and B., containing twenty-six acres, more or less." The will contained no residuary clause and made no other disposition of the real property, and Y. appeared to be the chief object of the testatrix's bounty. *Held*, Y. took both tracts of land in fee simple under the will, the will being construed to avoid partial intestacy. C. S., 4164. *Holmes v. York*, 709.

h Estates in Trust

1. A trust fund created by will for the purpose of educating through high school a girl inmate of an orphan asylum to be chosen by the board of trustees from time to time does not fall into the residuary clause for failure of the purpose of the trust on the ground that the State educated orphan children through high school without charge under the provisions of N. C. Code, 5604, 5446; since the statutes make the payment for the education of the children in orphan asylums permissive only and only for a six months term, and the fact that the State is performing part of this duty does not relieve the trustees, it being their duty to select a girl and pay for her tuition and books, etc. *Humphrey v. Board of Trustees*, 201.

2. The clearly expressed provisions of a will leaving in trust certain personal property to the trustees of an orphan home and directing that the income shall be used to educate one of its orphan girls through high school as the money so derived may become available, is sufficiently definite to establish a charitable trust. *Ibid.*

i Actions to Construe Wills

1. In an action involving the construction of a will testimony of a witness of a declaration of the testatrix as to her intention of how the property in controversy should be disposed of under her will is incompetent and is properly excluded. *Holmes v. York*, 709.

F Rights and Liabilities of Devisees and Legatees. (Debts due estate by devisees and legatees see Executors and Administrators E b; advancements see Descent and Distribution C b.)

a General and Specific Devises and Bequests

1. Where a will directs that each of the testator's children should receive a certain sum in money upon attaining the age of twenty-one, and that if the personal property should be insufficient to pay each child the stated sum that it should be made up in the division of the real estate: *Held*, the devisees take the land subject to the charge of the specific bequests in case the personalty is insufficient to pay each legatee the sum stated. *Prevette v. Prevette*, 89.

c Right of Devisees to Convey and Title and Rights of Transferee

1. Where a devisee conveys his interest under the will to his wife the wife takes such lands subject to the debts of the testator and subject to payment of certain specific bequests made a charge upon the land by the will in case the personalty was insufficient therefor, but the lands in the wife's hands is not subject, in the absence of registration, to personal notes given by her trans-

WILLS F c—*Continued.*

feror to the testator's executrix nor for a contract between the devisees for the payment of a certain item out of the estate when the devisees incurred no personal liability therefor. *Prevette v. Prevette*, 89.

WITNESSES—Privileged communications see Evidence D e; testimony of transactions with decedent see Evidence D b; testimony of wife see Husband and Wife F c; corroborating or contradicting witness see Evidence D f, Criminal Law G r.

WORKMEN'S COMPENSATION ACT see Master and Servant F.

WORLD WAR INSURANCE ACT see Insurance N a 2, 3, 4.

WRONGFUL DEATH see Death B.