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VOLUME 204

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NORTH CAROLINA REPORTS

VOL. 204

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1932

SPRING TERM, 1933

REPORTED BY

ROBERT C. STRONG

RALEIGH
BYNUM PRINTING COMPANY
STATE PRINTERS
1933

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

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2 " "	"	24	"	1 " Eq.	"	54	"
3 " "	"	25	"	2 " "	"	55	"
4 " "	"	26	"	3 " "	"	56	"
5 " "	"	27	"	4 " "	"	57	"
6 " "	"	28	"	5 " "	"	58	"
7 " "	"	29	"	6 " "	"	59	"
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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 101st volumes, both inclusive, will be found the opinions of the Court, consisting of three members, from 1879 to 1889. The remaining volumes contain the opinions of the Court, consisting of five members, since that time or since 1889.

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1932.
SPRING TERM, 1933.

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.

*Resigned. Succeeded by Wade H. Bruton, July 1, 1933.

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.
R. HUNT PARKER	Third	Roanoke Rapids.
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.
FELIX E. ALLEY, SR.	Twentieth	Waynesville.

SPECIAL JUDGE

FRANK S. HILL	Murphy.

EMERGENCY JUDGE

THOS. J. SHAW	Greensboro.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
HERBERT R. LEARY	First	Edenton.
DONNELL GILLIAM	Second	Tarboro.
W. H. S. BURGWIN	Third	Woodland.
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.
LEO CARR	Tenth	Burlington.

WESTERN DIVISION

CARLYLE HIGGINS	Eleventh	Sparta.
H. L. KOONTZ	Twelfth	Greensboro.
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Z. V. NETTLES	Nineteenth	Asheville.
JOHN M. QUEEN	Twentieth	Waynesville.

LICENSED ATTORNEYS

SPRING TERM, 1933.

List of applicants to whom license to practice law in North Carolina was granted by Supreme Court at Spring Term, 1933:

AUTEN, JOSEPH LITTLE	Huntersville.
BABCOCK, WILLIAM SAUNDERS	Tarboro.
BALDWIN, THOMAS FLEET	Siler City.
BALEY, JAMES MAJOR, JR.	Asheville.
BATTLEY, WILLIAM RICHARD	Statesville.
BETHEA, THEODORE COBB	Reidsville.
BRAMLETT, JOHN HENRY	Asheville.
BRANHAM, JOHN RUFFIN	Raleigh.
BROWN, JACK HENRY	Asheville.
BURLESON, MAX DRY	Albemarle.
BURNS, ROBERT HENRY, JR.	Whiteville.
COX, JOSEPH CLIFF	Rocky Mount.
CROWSON, MANLY CLARENCE, JR.	Elizabeth City.
CRUTCHFIELD, DOUGLAS CHARLES	Thomasville.
DANIEL, ERASMUS ALSTON	Washington.
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DAVIS, THOMAS FITZGERALD	Roxboro.
DUPREE, HUGH GORDON	Raleigh.
DYSARD, THOMAS LEE, JR.	Statesville.
EUDY, JOHN CLINTON	China Grove.
FLETCHER, FRANK UTLEY	Raleigh.
GLENN, WILLIAM H.	Red Springs.
GRAHAM, JOHN WASHINGTON	Edenton.
GRIMES, WILLIAM	Raleigh.
HAIRFIELD, EDWARD MATTHEW, JR.	Morganton.
HAMILTON, WALTER GEORGE	Asheville.
HARRELL, EDWARD TRUETT	Red Oak.
HARRISON, JAMES KEITH	High Point.
HOBBS, WILLIAM JULIUS	Wilmington.
HUFFINE, SAMPLE FLETCHER	Greensboro.
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JACKSON, CECIL CAIRNES	Biltmore.
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JOHNSON, RICHARD HENRY PIERCE	Clinton.
KELLY, DAVID LEE	Yadkinville.
KITCHIN, JULIAN PERCIVALL, JR.	Asheville.
LATHAM, CARL INGHAM	Sharon, S. C.
LUPTON, HARVEY ARTHUR	Hillsboro.
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MURPHY, HUGH EDWIN	Durham.

OLSON, ROY HERBERT.....Greensboro.
OUTLAW, RICHARD HARDING.....Asheville.
OWENS, ALFRED CLEVELAND.....Wilson.
PAGE, ELLIS ELMORE.....Lumberton.
PARKER, ED.....Goldsboro.
PITTMAN, WALTER JAMES.....Whitakers.
RAY, RALPH VANCE.....Asheville.
RECTOR, THOMAS BEATTY.....Asheville.
RENFROW, WILLIAM FRANCIS.....High Point.
ROBERTS, EVELYN WOOTEN.....Asheville.
RUCKER, MRS. LENA HICKS.....Raleigh.
SABISTON, WILLIAM DIVINE.....Jacksonville.
STERNBERGER, SOLOMON BEAR.....Wilmington.
STRICKLAND, JOHN C.....Greensboro.
STYLES, JAMES SCROOP.....Asheville.
SUISMAN, JOSEPH.....Chapel Hill.
TODD, CURTISS.....Durham.
TREMAIN, RAWLEIGH LEWIS.....High Point.
TYNER, DAVID MCLEAN.....Gulf.
WALTON, FRANK EARL.....Asheville.
WEINSTEIN, SOL BERNARD.....Greensboro.
WILLIAMSON, CHARLES WESLEY.....Durham.

COMITY APPLICANTS.

GRIFFIN, WILLIAM HENRY.....New York.
O'DANIEL, JAMES ROMULUS.....Texas.
WIMBERLY, WILLIAM FRANKLIN, JR.....Georgia.

SUPERIOR COURTS, FALL 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

Fall Term, 1933—Judge Small.

Beaufort—July 24‡; Oct. 2† (2); Nov. 6* (A); Dec. 4†.
Camden—Sept. 25.
Chowan—Sept. 11; Dec. 18.
Currituck—Sept. 4.
Dare—Oct. 23.
Gates—July 31; Dec. 11.
Hyde—Oct. 16.
Pasquotank—Sept. 18†; Oct. 9† (A) (2); Nov. 6†; Nov. 13*.
Perquimans—Oct. 30.
Tyrrell—Oct. 2 (A).

SECOND JUDICIAL DISTRICT

Fall Term, 1933—Judge Barnhill.

Edgecombe—Sept. 11; Oct. 16†; Nov. 13† (2).
Martin—Sept. 18 (2); Nov. 20† (A) (2); Dec. 11.
Nash—Aug. 28; Oct. 9; Nov. 27 (2).
Washington—July 10; Oct. 23†.
Wilson—Sept. 4; Oct. 2†; Oct. 30† (2); Dec. 18.

THIRD JUDICIAL DISTRICT

Fall Term, 1933—Judge Parker.

Bertie—Aug. 28; Nov. 13 (2).
Halifax—Aug. 14 (2); Oct. 2† (A) (2); Oct. 23* (A); Nov. 27 (2).
Hertford—July 31*; Oct. 16*; Oct. 23†; Nov. 27† (A).
Northampton—Aug. 7; Sept. 4†; Oct. 30 (2); Dec. 11†.
Vance—Oct. 2*; Oct. 9†.
Warren—Sept. 18 (2).

FOURTH JUDICIAL DISTRICT

Fall Term, 1933—Judge Daniels.

Chatham—July 31† (2); Oct. 23.
Harnett—Sept. 4*; Sept. 18†; Oct. 2† (A) (2); Nov. 13* (2).
Johnston—Aug. 14*; Sept. 25† (2); Oct. 16 (A); Nov. 6† (A) (2); Dec. 11 (2).
Lee—July 17 (2); Oct. 30; Nov. 6†.
Wayne—Aug. 21; Aug. 28†; Oct. 9† (2); Nov. 27 (2).

FIFTH JUDICIAL DISTRICT

Fall Term, 1933—Judge Frizzelle.

Carteret—Oct. 16; Dec. 4†.
Craven—Sept. 4*; Oct. 2† (2); Nov. 20† (2).
Greene—Dec. 11 (2).
Jones—Sept. 18.
Pamlico—Nov. 6 (2).
Pitt—Aug. 21†; Aug. 28; Sept. 11†; Sept. 25†; Oct. 23†; Oct. 30; Nov. 20† (A).

SIXTH JUDICIAL DISTRICT

Fall Term, 1933—Judge Grady.

Duplin—July 24*; Aug. 28† (2); Oct. 2*; Dec. 4; Dec. 11†.
Lenoir—Aug. 21; Sept. 25†; Oct. 16; Nov. 6† (2); Dec. 11 (A).
Onslow—July 17‡; Oct. 9; Nov. 20† (2).
Sampson—Aug. 7; Aug. 14†; Sept. 11† (2); Oct. 23; Oct. 30†.

SEVENTH JUDICIAL DISTRICT

Fall Term, 1933—Judge Harris.

Franklin—Aug. 28† (2); Oct. 16*; Nov. 13† (2).
Wake—July 10*; Sept. 11*; Sept. 18 (2); Oct. 2†; Oct. 9*; Oct. 23† (2); Nov. 6*; Nov. 27† (2); Dec. 11* (2).

EIGHTH JUDICIAL DISTRICT

Fall Term, 1933—Judge Cranmer.

Brunswick—Sept. 4†; Oct. 2.
Columbus—Aug. 21 (2); Nov. 20† (2).
New Hanover—July 24*; Sept. 11*; Sept. 18†; Oct. 16† (2); Nov. 13*; Dec. 4† (2).
Pender—July 17; Oct. 30 (2).

NINTH JUDICIAL DISTRICT

Fall Term, 1933—Judge Sinclair.

Bladen—Aug. 7†; Sept. 18*.
Cumberland—Aug. 28*; Sept. 25† (2); Oct. 23† (2); Nov. 20*.
Hoke—Aug. 21; Nov. 13.
Robeson—July 10†; Aug. 14*; Sept. 4† (2); Oct. 9*; Oct. 16†; Nov. 6*; Dec. 4† (2); Dec. 18*.

TENTH JUDICIAL DISTRICT

Fall Term, 1933—Judge Devin.

Alamance—July 31†; Aug. 14*; Sept. 4† (2); Nov. 13† (A) (2); Nov. 27*.
Durham—July 17*; Sept. 4* (A); Sept. 11† (A); Sept. 18† (2); Oct. 9*; Oct. 23† (A); Oct. 30† (2); Dec. 4*.
Granville—July 24; Oct. 23†; Nov. 13 (2).
Orange—Aug. 21 (2); Oct. 2†; Dec. 11.
Person—Aug. 7; Oct. 16.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Fall Term, 1933—Judge Clement.

Ashe—July 10† (2); Oct. 16*.
Alleghany—Sept. 25.
Caswell—Oct. 16† (A); Dec. 4.
Forsyth—July 10 (A) (2); Aug. 28 (2); Sept. 25† (A) (2); Oct. 9 (A) (2); Oct. 16† (A); Nov. 6 (2); Nov. 20† (A) (2); Dec. 4 (A) (2).
Rockingham—Aug. 7* (2); Sept. 11† (2); Nov. 20† (2).
Surry—July 10 (A) (2); Oct. 2 (2).

TWELFTH JUDICIAL DISTRICT

Fall Term, 1933—Judge Sink.

Davidson—Aug. 21*; Sept. 11†; Sept. 18† (A); Oct. 2† (A) (2); Nov. 20 (2).
Guilford—July 10* (A); July 31*; Aug. 7† (2); Aug. 28† (2); Sept. 18* (2); Oct. 2† (2); Oct. 23* (A); Oct. 30† (2); Nov. 13*; Nov. 20† (A) (2); Dec. 4† (2); Dec. 18*.
Stokes—July 3*; July 10†; Oct. 16*; Oct. 23†.

THIRTEENTH JUDICIAL DISTRICT

Fall Term, 1933—Judge Stack.

Anson—Sept. 11†; Sept. 25*; Nov. 13†.
Moore—Aug. 14*; Sept. 18†; Sept. 25† (A); Dec. 11†.
Richmond—July 17†; July 24*; Sept. 4†; Oct. 2*; Nov. 20† (A).
Scotland—Oct. 30†; Nov. 27 (2).
Stanly—July 10; Sept. 4† (A) (2); Oct. 9†; Nov. 20.
Union—July 31*; Aug. 21† (2); Oct. 16; Oct. 23†.

FOURTEENTH JUDICIAL DISTRICT

Fall Term, 1933—Judge Harding.

Gaston—July 24*; July 31† (2); Sept. 11* (A); Sept. 18† (2); Oct. 23*; Nov. 27* (A); Dec. 4† (2).
Mecklenburg—July 10* (2); Aug. 28*; Sept. 4† (2); Oct. 2*; Oct. 9† (2); Oct. 30† (2); Nov. 13*; Nov. 20† (2).

FIFTEENTH JUDICIAL DISTRICT

Fall Term, 1933—Judge Oglesby.

Cabarrus—Aug. 14 (3); Oct. 16 (2).
Iredell—July 31 (2); Nov. 6 (2).
Montgomery—July 10; Sept. 25†; Oct. 2; Oct. 30†.
Randolph—July 17† (2); Sept. 4*; Dec. 4 (2).
Rowan—Sept. 11 (2); Oct. 9†; Oct. 16† (A); Nov. 20 (2).

SIXTEENTH JUDICIAL DISTRICT

Fall Term, 1933—Judge Warlick.

Burke—Aug. 7 (2); Sept. 25† (3); Dec. 11 (2).
Catawba—July 3 (2); Sept. 4† (2); Nov. 13*; Nov. 20†; Dec. 4† (A).
Caldwell—Aug. 21 (2); Nov. 27 (2).
Cleveland—July 24 (2); Sept. 18† (A); Oct. 30 (2).
Lincoln—July 17; Oct. 16; Oct. 23†.
Watauga—Sept. 18.

SEVENTEENTH JUDICIAL DISTRICT

Fall Term, 1933—Judge Finley.

Alexander—Sept. 4 (2).
Avery—July 3*; July 10† (2); Oct. 16.*; Oct. 23†.
Davie—Aug. 28; Dec. 4†.
Mitchell—July 24† (2); Oct. 30 (2).
Wilkes—Aug. 7 (2); Oct. 2† (2).
Yadkin—Aug. 21*; Dec. 11† (2).

EIGHTEENTH JUDICIAL DISTRICT

Fall Term, 1933—Judge Schenck.

Henderson—Oct. 9 (2); Nov. 20† (2).
McDowell—July 10† (3); Sept. 11 (2).
Polk—Aug. 28 (2).
Rutherford—Sept. 25† (2); Nov. 6 (2).
Transylvania—July 31 (2); Dec. 4 (2).
Yancey—Aug. 14† (2); Oct. 23† (2).

NINETEENTH JUDICIAL DISTRICT

Fall Term, 1933—Judge McElroy.

Buncombe—July 10† (2); July 24; July 31; Aug. 7† (2); Aug. 21; Sept. 4† (2); Sept. 18; Oct. 2† (2); Oct. 16; Oct. 30; Nov. 6† (2); Nov. 20; Dec. 4† (2); Dec. 18.
Madison—Aug. 28; Sept. 25; Oct. 23; Nov. 27.

TWENTIETH JUDICIAL DISTRICT

Fall Term, 1933—Judge Alley.

Cherokee—Aug. 7 (2); Nov. 6 (2).
Clay—Sept. 25 (A) (2).
Graham—Sept. 4 (2).
Haywood—July 10 (2); Sept. 18† (2); Nov. 27 (2).
Jackson—Oct. 9 (2).
Macon—Aug. 21 (2); Nov. 20; Nov. 27 (A).
Swain—July 24 (2); Oct. 23 (2).

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

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

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

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 first Monday in October. J. P. THOMPSON, Deputy Clerk, Elizabeth City.

Washington, first Monday in April and fourth Monday in September. 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.
WHEELER MARTIN, Assistant United States District Attorney, Williamston.
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 BUIT, Deputy; CORA SHAW, Deputy.

Rockingham, first Monday in March and second Monday in 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

J. R. MCCRARY, 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

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

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1932

McD. RAY v. JOHN G. P. LIVINGSTON.

(*Filed 25 January, 1933.*)

1. Bills and Notes C d—Purchaser from payee after negotiation of instrument back to payee may not hold intermediate endorser liable.

C. S., 3047, providing that an endorser of a negotiable note warrants to all subsequent holders in due course that the instrument is genuine, that he has good title, that all prior parties had capacity to contract, and that the instrument at the time of his endorsement is valid and subsisting, must be construed with the other sections of the Negotiable Instrument Act relating to the liability of endorsers, C. S., 3031, 3039, 3049, and, under the provisions of these sections, where the instrument is negotiated back to the payee the payee cannot hold the intermediate endorsers liable, nor can a purchaser from the payee after reissuance of the note by the payee hold such endorsers liable.

2. Same—Endorser subsequent to endorsement by payee held not liable to purchaser from payee after note had been negotiated back to payee.

Where all the names on a negotiable instrument are forged except the endorsement of the payee and the name of an endorser subsequent to the payee's endorsement, and the note is negotiated back to the payee who sells it to a bona fide purchaser for value: *Held*, the bona fide purchaser for value from the payee upon the reissuance of the note may not hold the endorser whose signature was genuine liable, such endorser being an intermediate endorser between the payee's original endorsement and the payee's subsequent possession of the note and transfer to the purchaser.

3. Same—Posession of note by prior party raises presumption of ownership and that note was negotiated back to him.

The possession of a negotiable instrument raises a presumption of ownership, and where a prior party obtains possession of a note for the second time and sells it by reissuance to a purchaser, it will be presumed that the prior party obtained the note by negotiation back to him by endorsement in blank when his name does not appear on the note the second time, and the purchaser from him is charged with notice thereof.

APPEAL by plaintiff from *Schenck, J.*, at May Term, 1932, of HENDERSON. Affirmed.

The plaintiff brought suit to recover of the defendant as an endorser the amount alleged to be due on the following note:

"$450.00. Hendersonville, N. C., 14 December, 1929.

Six months after date, without grace, we promise to pay to T. A. Steel, or order, four hundred fifty and No/100 dollars. For value received. Payable at the office of the First Bank and Trust Company, Hendersonville, N. C., with interest after date. Protest, presentment and notice of dishonor or extension waived by all parties to this note.

Mrs. T. A. Steele. (Seal.)
C. W. Gilbert. (Seal.)
Nora M. Steele. (Seal.)

Endorsements on said note: T. A. Steele, Jno. G. P. Livingston, J. M. Gilbert, Robt. A. Steele, O. H. Steele, and H. R. Steele."

The parties waived a trial by jury and submitted the case on the following agreed statement of facts:

1. That the plaintiff, McD. Ray, became the holder of the note sued on, which is attached hereto and made a part of this agreed statement of facts before maturity, and without notice that it had been previously dishonored; and in fact, it had not been previously dishonored; that said plaintiff took said note in good faith and for value; that at the time it was negotiated to said plaintiff, he had no notice of any infirmity in the instrument, or defect in the title of the person negotiating it.

2. That the names of all the makers were forged and that the names of all endorsers, who endorsed said note after the defendant, John F. P. Livingston, endorsed were forged.

3. That the name of T. A. Steele and John G. P. Livingston, the first two endorsers on said note, were not forgeries, but are the genuine signatures of the said Steele and Livingston.

4. That the endorser, T. A. Steele, sold and negotiated said note to the plaintiff, McD. Ray.

5. That the defendant, when he endorsed said note, did not know that any of the names to the note were forgeries, and that the plaintiff in purchasing said note did not know that any of said names were forged.

His Honor adjudged that the plaintiff is not entitled to recover of the defendant Livingston. The plaintiff excepted and appealed.

Redden & Redden and C. D. Weeks for plaintiff.
Mack P. Spears for defendant.

ADAMS, J. All the signatures on the note were forged except those of the defendant and T. A. Steele, the payee. It is fundamental that a forged signature creates no obligation. Steele is not a party to the action. The only question is whether the defendant is liable to the plaintiff.

In asserting the liability of the defendant the plaintiff relies chiefly on the provisions of section 3047 of the Consolidated Statutes and on the legal principle enunciated in *Bank v. Crafton,* 181 N. C., 404. In that case the Court held that a "contract of endorsement is a substantive contract, separable and independent of the instrument on which it appears, and where it has been made without qualification and for value it guarantees to a holder in due course among other things that the instrument, at the time of the endorsement is a valid and subsisting obligation." The opinion was based on these facts: Carver had given his promissory note to Crafton, the defendant, for money which the defendant, who was the payee, had won in a game of cards, and Crafton had endorsed the note to W. E. Shuford for whom the bank had discounted it without notice that it had been given for a gambling debt. The note was void because executed in consideration of a gaming contract. C. S., 2142. Upon these facts the Court held, according to the principle stated, that the plaintiff could recover of the defendant.

It is essential that we keep in mind the distinction between the facts in the case just cited and those in the case at bar. In the former, the bank derived its title to the note from Shuford, the last endorser, and had the right at its election to bring suit against him or any prior endorser. C. S., 458; *Lilly v. Baker,* 88 N. C., 151; *Bank v. Carr,* 121 N. C., 113; *Bank v. Lumber Co.,* 123 N. C., 24; *Bank v. Carr,* 130 N. C., 479. In the present case Steele, the payee, sold and negotiated the note to the plaintiff, and the plaintiff instead of suing Steele, sued the defendant who was a subsequent endorser. It is our purpose presently to point out the legal effect of this procedure.

Meantime let us advert to section 3047, which is cited by the plaintiff. It provides that every endorser who endorses without qualification warrants to all subsequent holders in due course (1) that the instrument is

genuine and in all respects what it purports to be; (2) that he has a good title to it; (3) that all prior parties had capacity to contract; and (4) that the instrument is at the time of his endorsement valid and subsisting.

This section, which restricts the warranty to *subsequent* holders in due course, must be considered in connection with other sections of the Negotiable Instruments Law. Section 3039 is in these words: "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."

In *Pierce v. Carlton,* 184 N. C., 175, *Hoke, J.,* in his elucidation of this statute approved the following quotation from Daniels on Negotiable Instruments (6 ed. by Calvert), sec. 805: "But this rule is subject to the single exception that if the note were invalid as between the maker and the payee, the payee could not himself, by purchase from a bona fide holder, become successor to his rights, it not being essential to such bona fide holder's protection to extend the principle so far." If, therefore, the defendant Livingston acquired title to the note as a holder in due course and Steele, while not a holder in due course, derived his title through the defendant he would not succeed to the rights of the former holder, because by reason of the forgery the note was invalid as between the alleged makers and the payee.

We now turn to section 3031: "Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this chapter, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable."

The word "endorsement" usually means the "writing of one's name on an instrument with intent to incur the liability of a party who warrants payment of the instrument, provided it is duly presented to the principal at maturity, not paid by him, and such fact is duly notified to the endorser." 1 Daniel, Neg. Ins. (6 ed. by Calvert), sec. 666. As respects one another, endorsers are liable prima facie in the order in which they endorse—in the absence of contract each being liable only to those who subsequently endorse the paper. C. S., 3049; *Hill v. Shields,* 81 N. C., 250; *Lancaster v. Stanfield,* 191 N. C., 340. As a rule no prior endorser has a cause of action against a subsequent endorser. One who obtains possession of a note or bill after endorsing it is restored to his original position and cannot hold intermediate parties; and one who

acquires possession of the instrument from such person, with notice of the fact, cannot hold the intermediate endorser. *Adrian v. McCaskill,* 103 N. C., 182.

The facts in regard to the payee's endorsement and his subsequent possession of the note are not stated; but an endorsement in blank presumes an intent to transfer the endorser's title. *Adrian v. McCaskill, supra.*

Under what circumstances Steel acquired possession of the note after his endorsement does not appear, but his possession raised a presumption of his ownership. We are therefore justified in assuming upon the agreed facts that Steele transferred his title to the defendant who afterwards negotiated the note back to the payee, the latter according to the signatures of the endorsers being a prior party. The plaintiff was affected with notice of the fact. Steele cannot hold the defendant liable; the plaintiff succeeded to Steele's title and therefore has no cause of action against the defendant. The judgment is

Affirmed.

CLYDE WATSON AND ALBERT WATSON v. CLEVE WATSON, IDA STILES, FLORENCE CHRIST AND CLAY WATSON ET AL.

(Filed 25 January, 1933.)

Infants B b—Acceptance after majority of benefits under consent judgment entered during minority held ratification of consent judgment.

Certain minors were sued to have a deed executed to them by their father set aside. The mother of the minors, who was also a grantee in the deed and a party defendant in the suit, was appointed guardian *ad litem* for the minors, and she accepted service and filed answer. A consent judgment was entered that all the parties plaintiff and defendant were tenants in common in the land, and part of the land was sold under order of court for division. The minors' share in the proceeds of the sale was paid to their guardian appointed by the court. The guardian paid certain of the money to the minors during their minority, and upon their coming of age, paid the balance to them, and they accepted payment with full knowledge of all the vital facts. A number of years later they brought suit attacking the consent judgment: *Held,* by accepting the benefits derived from the sale under the consent judgment after their majority the plaintiffs ratified the same and may not now upset the consent judgment in an action instituted more than eight years after accepting such benefits.

CIVIL ACTION, before *Stack, J.,* at January Term, 1932, of CHEROKEE.

J. M. Watson died on or about 14 February, 1919, in Cherokee County, owning land in said county. The plaintiffs are the children of the second wife and the defendants are the children of the first wife. It

was alleged that on 17 January, 1919, a short time before his death J. M. Watson executed two deeds, purporting to convey certain land owned by him to said Eliza Watson, his second wife, for life, and at her death to her children, Albert Watson and Clyde Watson. It was admitted that the plaintiff, Clyde Watson, was born 14 June, 1901, and that the plaintiff, Albert Watson, was born 30 July, 1902. It was also admitted that Eliza Watson, the second wife, died in August, 1928.

On or about 7 October, 1919, the children of the first marriage brought a suit against the widow and the children of the second marriage, to wit, Eliza Watson, Clyde Watson and Albert Watson, for the purpose of setting aside the deed made to them by J. M. Watson, the father of both plaintiffs and defendants. On 20 November, 1919, the clerk of the Superior Court appointed Eliza Watson, mother of Clyde Watson and Albert Watson, as guardian *ad litem* for said minors. Thereafter a consent judgment was entered in the cause by Judge B. F. Long. The judgment recites: "This cause is compromised upon the terms hereinafter set out, and by consent it is adjudged by the court that the parties plaintiff and defendant, except Eliza Watson, are the owners of the land described in the complaint." It was further ordered that certain of said lands involved in the suit "be sold by the commissioner hereinafter appointed, and the costs of this action be deducted therefrom and the remainder be distributed among the following children of J. M. Watson, share and share alike." All the children are named in the decree. It was further decreed that the widow, Eliza Watson, was to have all the personal property of the deceased, J. M. Watson. It was further ordered that S. W. Lovingood "is hereby appointed commissioner to sell the lands of said J. M. Watson . . . who will report sale to the clerk of this court for confirmation or rejection, and for the further orders of the court. This judgment may be signed out of term anywhere in North Carolina." Appended to the judgment is the following: "By consent. Cleve Watson, C. H. Watson, G. A. Watson, for selves and other plaintiffs; Eliza Watson, Albert Watson, Clyde Watson, guardian *ad litem* of Clyde Watson and Albert Watson, defendants." On 1 March, 1921, Judge Long entered another judgment in the cause reciting that the cause had been compromised upon certain conditions set out in the judgment. This judgment was consented to by attorneys representing the plaintiffs and the defendants. Lovingood, the commissioner appointed to sell the land reported the sale to the court, stating that he had received the sum of $1,670. Lovingood was appointed guardian for Clyde Watson and Albert Watson in October, 1921. On 15 January, 1927, said guardian filed a report with the clerk of the Superior Court of Cherokee County, disclosing that he had disbursed and paid to Clyde Watson and Albert Watson the net proceeds arising from the sale of the land.

On or about 11 June, 1929, Clyde Watson and Albert Watson brought a suit against the defendants, who were the children of the first marriage, alleging that they were the owners in fee of the lands conveyed by J. M. Watson to them by deed dated 17 January, 1919, and that the defendants claim an interest or estate in said property, which constituted a cloud upon their title. The defendants answered, setting up the consent judgment signed by B. F. Long, judge presiding, heretofore referred to. It was admitted that the plaintiffs "are now the owners of said land unless they have been divested of said title by reason of a certain judgment in another action." This admission apparently refers to the consent judgment entered by Judge Long, heretofore referred to.

Lovingood testified that he handled the money derived from the sale of the land as guardian for Clyde Watson and Albert Watson. He said: "The residue that belonged to these boys, I took back from the clerk what was left, and I qualified as guardian and paid these boys from time to time, except at different times when they would have to have this thing and another thing, books, clothes and shoes, and after they became 21 years of age they came and I paid them in full. The money came from land I sold as commissioner. . . . They understood it was the money and part of their estate. They got the same amount of money the other heirs got." The guardian further testified that he settled with one of the boys in May, 1922, and with the other one in January, 1927. Albert Watson, one of the plaintiffs, testified that he did not sign the consent judgment, but that he knew "Mr. Lovingood as commissioner had sold part of the land. I knew he was my guardian. I made a settlement with him as guardian. He paid out some expense for me and paid over some amounts to me. I knew this was the money that he got out of the sale as commissioner of some of the lands. I am 29 years old." Clyde Watson, the other plaintiff, testified that he was 30 years old and did not sign the consent judgment. He further testified: "I knew a suit had been brought to set aside both deeds to all the lands to my mother, my brother and myself. . . . I knew Mr. Sam Lovingood was appointed commissioner to sell it, and I got my part of the money, and I knew he paid me for my part of that land. I accepted it. When I became 21 I knew when he settled on the final account and he and I agreed on that." Mr. M. W. Bell testified that he was attorney for the defendants in the present suit, who were the plaintiffs in the former suit, and that Eliza Watson was duly appointed guardian *ad litem* for Clyde Watson and Albert Watson, and that as such she accepted service on 20 November, 1919, and that she filed an individual answer in the cause, and that the plaintiffs in this suit were about 17 and 18 years of age respectively.

The following issues were submitted to the jury:

1. "Are the plaintiffs the sole owners of the land sued for in this action?"

2. "If not, are they tenants in common with the other heirs at law of J. M. Watson, deceased?"

3. "What interest have the plaintiffs in the land sued for?"

The trial judge instructed the jury to answer the first issue "No," the second issue "Yes," and the third issue "two-thirteenths."

From judgment upon the verdict, the plaintiff appealed.

J. D. Mallonee for plaintiffs.

Gray & Christopher for defendants.

BROGDEN, J. It was admitted by counsel in the trial of the case at bar that the plaintiffs are the owners of the lands in dispute unless "they have been divested of said title by reason of a certain judgment in another action." The action referred to was instituted by the defendants in this suit, who are the children of the first marriage, against the children of the second marriage alleging that the deed made by the deceased J. M. Watson to the widow and children of the second marriage was secured by the exercise of dominating influence upon an old man by the second wife. A purported consent judgment was entered by Judge Long in 1919, decreeing that the parties were tenants in common as to certain land, and further ordering other portions of land to be sold by Lovingood, the commissioner appointed for such purpose. The plaintiffs in this action were minors at that time. The plaintiff, Clyde Watson, became of age on 14 June, 1922, and the plaintiff, Albert Watson, became of age on 30 July, 1923. After they became of age they received from Lovingood the net proceeds of the land sold, remaining in his hands as guardian. They testified at the trial that they knew the source from which the money was derived and accepted it. Notwithstanding, this suit to set aside the consent judgment was not instituted until 1929. The evidence disclosed that the mother, Eliza Watson, was appointed guardian *ad litem,* and that she accepted service of summons and filed an answer. While the evidence is not satisfactory, doubtless due to the fact that the courthouse was burned, the fact remains that the plaintiffs, when they became of age, accepted proceeds derived from a sale of land by virtue of the decree which they now attempt to set aside. Moreover, the money was received and accepted with full knowledge of all the vital facts. This fact-status invokes the application of the principle declared in *Williams v. Williams,* 196 N. C., 675, 146 S. E., 716, which was stated by *Stacy, C. J.,* as follows: "The defend-

ant, after reaching his majority and with full knowledge of all the facts, accepted $360 for his one-sixth interest in the lands of Robert Williams, deceased. This was a ratification of the sale previously made, and the Court will not now permit him to upset the proceeding by motion in the present cause filed more than four years after such ratification." See, also, *Smith v. Gray,* 116 N. C., 311, 21 S. E., 200.

No error.

BAXTER FOSTER, BY HIS NEXT FRIEND, MRS. NANNIE FOSTER, v. FRED MOORE AND WIFE, PEARL MOORE.

(Filed 25 January, 1933.)

Fraudulent Conveyance A a—Question of whether conveyance was deed or mortgage held for jury.

Where the complaint alleges that the plaintiff was a creditor of the defendant under a docketed judgment and seeks to set aside on the ground of fraud and conspiracy a subsequent, registered deed executed by the defendant to his wife, and the answer alleges that the deed was made upon adequate consideration, and also alleges that the defendant owed a large sum of money to his wife and had promised to convey the land to her as security: *Held,* a judgment on the pleadings setting aside the deed as against the issuance of execution is erroneous, for, although the answer is ambiguous, the question of whether the conveyance was a deed as imported on its face or in effect a mortgage to secure a debt, is a question for the determination of the jury; and should the jury answer the issue adversely to the plaintiff, the validity of the instrument must be determined by the principles announced in *Aman v. Walker,* 165 N. C. 224.

APPEAL by defendants from *Cowper, Special Judge,* at 3 October, 1932, Special Term, of MECKLENBURG. Error.

Baxter Foster, a minor, was injured in an automobile wreck on 8 July, 1930. On 6 August, 1930, Baxter Foster, through his mother as next friend, the plaintiff in this action, brought an actionable negligence case against the defendant Fred Moore. On 4 November, 1931, the plaintiff recovered judgment against defendant Fred Moore for $2,500, and costs. The judgment is duly recorded in the clerk's office of Mecklenburg County, North Carolina, in accordance with law and is not paid. Pearl Moore is the wife of Fred Moore. On 3 September, 1930, Fred Moore conveyed to his wife Pearl Moore by deed certain real estate which he owned. This action is brought to set aside the deed as null and void, on the ground of fraud.

The plaintiff alleges in part: "That the defendant, Pearl Moore, did not pay to the defendant, Fred Moore, for said deeds, a sufficient con-

sideration, and in fact did not pay therefor any consideration whatever. That in making said conveyances the defendant, Fred Moore, did not retain sufficient property for the payment of his then existing debts. That the conveyance of said property by the defendant, Fred Moore, to his wife, the defendant, Pearl Moore, was arranged and planned for the purpose of fraudulently avoiding liability to his creditors, and for the purpose of having the title to his property vested in his wife in order that the claims of creditors might be delayed, defeated and defrauded. That the said deeds from Fred Moore to his wife, Pearl Moore, are void and of no effect, as against the plaintiff herein, to whom the liability of the defendant, Fred Moore, in the sum of $2,500 and costs arose prior to the execution, delivery and registration of said deeds. Wherefore, the plaintiff prays: That the deed from the defendant, Fred Moore, to his wife, the defendant Pearl Moore, recorded in the Mecklenburg public registry in Book 786, page 179, be set aside and declared null and void and of no effect as against the plaintiff, in his right to enforce said judgment by execution against the property described in said deed; that the deed, from the defendant, Fred Moore, to his wife, the defendant, Pearl Moore, recorded in the Mecklenburg public registry in Book 786, page 180, be set aside and declared null and void and of no effect as against the plaintiff, in his right to enforce said judgment by execution against the property described in said deed."

The defendants deny the material allegations of the complaint above set forth, but say that "Fred Moore admits that for and in consideration of a considerable sum of money, theretofore borrowed from his wife, Pearl Moore, he conveyed to her the lots."

For a further answer and defense, the defendants say: "That in February, 1930, Pearl Moore, demanded of her husband, Fred Moore, some security for the money which she had loaned him and that in compliance with the said demand, on 15 February, 1930, Fred Moore executed and delivered to his codefendant, Pearl Moore, a deed to the lots referred to in the complaint, which deed is duly recorded in the office of the register of deeds for Mecklenburg County, in Book 786, page 179, to which reference is hereby made. That the plaintiff's cause of action, according to the third paragraph of his complaint, did not accrue until 8 July, 1930, nearly 8 months after the deed Fred Moore executed to his wife, Pearl Moore, was made, which deed was made in good faith and for a valuable consideration. These defendants deny that the said conveyance to Pearl Moore was made as the result of a conspiracy between them to defeat the rights of the plaintiff in this action; that same was made in good faith, and not to defraud the plaintiff, for the reason, that at that time the plaintiff had no cause

of action against the defendants; that the said deed of conveyance was made in good faith and for a consideration of about $1,600, and was not made to defraud the plaintiff or any other creditor of the defendant, Fred Moore. . . . And prays that the said action be dismissed and that the deeds referred to be not declared null and void and set aside and that the defendants recover their costs and go without day."

The court below, on motion of plaintiff for judgment on the pleadings, declared the deeds "null and void and of no effect as against the plaintiff in his right to enforce the judgment referred to in the pleadings by execution against the property described in said deeds." Judgment was signed accordingly. The defendants excepted and assigned error to the judgment as signed, and appealed to the Supreme Court.

G. T. Carswell and Joe W. Ervin for plaintiff.
J. D. McCall for defendants.

CLARKSON, J. The plaintiff contends that on the pleadings the question presented is whether or not a conveyance of land, though absolute on its face, but intended as a mere security for a debt, is valid or void? We do not think the pleadings as a whole bear out plaintiff's contention. The principle contended by plaintiff is well stated by *Ruffin, J.*, and worth repeating, in *Gulley v. Macy*, 84 N. C., at p. 439-40, "That a deed absolute on its face but only intended as a security is fraudulent as to the creditors of the maker, has been thought to be the settled law of this State since the case of *Gregory v. Perkins*, 4 Dev., 50, and the case soon following it of *Holcombe v. Ray*, 1 Ired., 340. Such a rule, the Court declares in those two cases, is necessarily deducible from the statutes requiring mortgages and deeds in trust to be registered, and as those statutes were passed because of the experience of the evils resulting from secret trusts and encumbrances, the courts felt constrained to extend their operations to the extreme limit of the mischiefs intended to be remedied, so as to embrace every instrument which (whatever its form) was intended by the parties to be a security only, and this without regard to any intent on their part to defraud creditors. Such a grantee can acquire no title as against creditors or subseqeunt purchasers, not because of any evil intent to perpetrate a fraud, but because he cannot bring himself within the provisions of a statute which allows mortgages and deeds in trust to take effect from their registration only. As an absolute deed, it cannot be registered because such is not the intent of the parties; nor as a mortgage, because it does not purport to be one and would fail to give the notice to others dealing with its maker which it was the object of the statutes to secure." *Bernhardt v. Brown*, 122 N. C., at p. 591.

The plaintiff in the allegations of the complaint treats the conveyances as deeds and prays that the deeds be set aside for fraud and declared "null and void." In the answer Fred Moore alleges that in consideration of a considerable sum of money theretofore borrowed from his wife, Pearl Moore, he conveyed to her the lots. In the further answer and defense, Fred Moore does say that Pearl Moore demanded security for the money loaned him and in compliance he made the deeds, but later the defendants deny that the conveyances were made as a result of a conspiracy to defeat the rights of plaintiff "that the same was made in good faith and not to defraud plaintiff," and for a consideration of about $1,600. The answer seems to be ambiguous as to the contention made by plaintiff that the deeds were a security for a debt and judgment should not have been rendered on the pleadings. It is for the jury to say from the present pleadings whether the deeds absolute on the face were in fact security for a debt. If this question is decided against plaintiff, then the principle governing this action in reference to fraudulent conveyances, is set forth in *Aman v. Walker,* 165 N. C., at p. 227-8, citing numerous authorities, as follows: "(1) If the conveyance is voluntary, and the grantor retains property fully sufficient and available to pay his debts then existing, and there is no actual intent to defraud, the conveyance is valid. (2) If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution, which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally. (3) If the conveyance is voluntary and made with the actual intent upon the part of the grantor to defraud creditors, it is void, although this fraudulent intent is not participated in by the grantee, and although property sufficient and available to pay existing debts is retained. (4) If the conveyance is upon a valuable consideration and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee and of which intent he had no notice, it is valid. (5) If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the grantor, participated in by the grantee or of which he has notice, it is void." *Tire Co. v. Lester,* 190 N. C., 411.

This matter has recently been fully considered in *Bank v. Lewis,* 201 N. C., 148. *Bank v. McCullers,* 201 N. C., 412; *Bank v. Finch,* 202 N. C., 291. For the reasons given in the judgment of the court below there is

Error.

UNITED STATES FIDELITY AND GUARANTY COMPANY AND N. H. McGEACHY, SHERIFF OF CUMBERLAND COUNTY, v. J. VANCE McGOUGAN ET AL.

(Filed 25 January, 1933.)

1. Taxation D d—Under facts of this case held: tax lien against land was discharged and plaintiffs obtained no right of subrogation thereunder.

The sheriff of a county advertised certain lands for sale for delinquent taxes. The owner executed a note for the amount of the taxes to the sheriff individually, the sheriff accepted the note in payment and discontinued the advertisement of the property, marked the taxes paid upon the proper record, detached the original receipt and attached it to the note. The sheriff accounted to the county for all taxes, including the tax in question, and upon discovery of a shortage, the surety on the sheriff's bond paid the amount of the shortage. The land in question was thereafter foreclosed under deed of trust executed prior to the year for which the taxes were due, which deed of trust provided for foreclosure for nonpayment of taxes. The sheriff assigned the note to his surety, who brought action seeking to enforce the county's lien against the land for the taxes: *Held*, the tax lien was discharged and neither the sheriff nor his surety may assert a claim thereunder. C. S., 7977, 7994.

2. Appeal and Error J c—

Exceptions to the findings of fact will not be sustained where it appears that the evidence and reasonable inferences therefrom support the judgment.

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

CIVIL ACTION, before *Barnhill, J.*, at March Term, 1932, of CUMBERLAND.

On 26 September, 1923, J. Vance McGougan and wife executed a deed of trust on certain land owned by him in 71st Township in Cumberland County, which instrument was duly recorded. McGeachy was sheriff of Cumberland County.

The parties agreed that the judge should find the facts and render judgment thereon. The pertinent facts so found may be briefly summarized as follows: McGougan listed his land covered by said deed of trust in 71st Township, for the years 1925 and 1926. He did not pay the taxes for either year, and on 25 August, 1927, McGeachy, as sheriff, advertised the property for sale in accordance with the law. Thereupon McGougan approached the sheriff and delivered to the said sheriff his promissory note in the sum of $1,726.30, due thirty days after date and bearing interest from maturity. Upon delivery of the note the sheriff discontinued the advertisement of the land and marked "paid" the receipts and record, and removed the original tax receipts

from the official books and attached the same to the note. The sheriff was of the opinion that the note was collectible "and it was his purpose to discount the note and pay the proceeds to the county in satisfaction of said taxes. . . . Thereafter the said sheriff reported said taxes as paid and in his regular annual settlement with the county, accounted for the same and paid the amount due to the proper county official, and as to such taxes made full settlement therefor. . . . That subsequently thereto the county had the books of N. H. McGeachy, sheriff, audited, and as a result of said audit claimed that the sheriff had failed to account for all moneys collected during the preceding years of his administration. The bonding company made settlement with said county upon said claim of shortage, and thereupon said sheriff transferred, assigned and delivered to said bonding company the note of McGougan, defendant hereinbefore referred to, together with the tax receipt thereto attached, and other collateral to indemnify said bonding company against any loss on account of payments made by it, and the said bonding Company is now the owner of said note. That said note was payable to N. H. McGeachy individually and not as sheriff, and that the acceptance of same by the sheriff was a voluntary act for the accommodation of the taxpayer, and the acceptance of same discharged any lien for taxes upon said land." The deed of trust held by the Atlantic Joint Stock Land Bank provided that the holder of the indebtedness secured by the deed of trust had a right to foreclose the deed of trust for the nonpayment of taxes, and said land bank had no knowledge of the claim of the sheriff that he was entitled to be subrogated to the rights of the county in the collection of said taxes.

This action was instituted on 10 November, 1930, on behalf of the bonding company and the sheriff against McGougan. The deed of trust to the land bank was foreclosed and the lands purchased by said bank at the sale.

From the foregoing facts the trial judge was of the opinion "that the lien of taxes having been discharged by the payment and settlement therefor with the county of Cumberland by sheriff McGeachy, the plaintiff, United States Fidelity and Guaranty Company, is entitled to no subrogation to the rights of the county of Cumberland as respects the lien for such taxes; that the aforesaid lands are freed and discharged of any lien for taxes for the years 1925 and 1926, assessed by the county of Cumberland."

From the judgment so rendered the plaintiffs appealed.

Varser, Lawrence, McIntyre & Henry for plaintiff.

J. L. Cockerham, Dickson McLean and H. E. Stacy for defendant, Land Bank.

BROGDEN, J. The land of a taxpayer is advertised for sale for taxes. Thereupon the taxpayer tenders to the sheriff making the sale a promissory note, payable to said sheriff individually, covering the amount of said taxes. The sheriff enters upon the proper record of said taxes the word "paid," detaches the original receipt, attaches the same to the note, discontinues the advertisement of the land, and in his settlement with the county accounts for and pays the amount of said taxes. The note is not paid by the taxpayer and is thereafter assigned to the surety of the sheriff, which surety pays to the county all amounts due by the sheriff for taxes collected and unpaid during his administration.

The foregoing facts present this question of law: Was the tax lien discharged?

The principles of law bearing upon the question are contained in the following cases, to wit: *Jones v. Arrington*, 91 N. C., 125; *Jones v. Arrington*, 94 N. C., 541; *Kerner v. Cottage Co.*, 123 N. C., 294, 31 S. E., 718; *Berry v. Davis*, 158 N. C., 170, 73 S. E., 900; *Hunt v. Cooper*, 194 N. C., 265, 139 S. E., 446; *Litchfield v. Reid*, 195 N. C., 161, 141 S. E., 543. These cases contain certain sign-boards marking out the highway of the law upon the subject. These may be designated as follows: (1) A tax collector has no right to receive anything in payment of taxes except legal tender. *Kerner v. Cottage Co.*, 123 N. C., 294. Such payment is now regulated by statute C. S., 7977, which provides that taxes are payable in the existing national currency, etc. (2) The payment of delinquent taxes by the sheriff to the county in his settlement does not ordinarily destroy the lien for such taxes. *Berry v. Davis*, 158 N. C., 170; *Hunt v. Cooper*, 194 N. C., 265. (3) If a taxpayer gives the sheriff a check, which is paid by the bank upon which it is drawn out of funds therein on deposit to the credit of the taxpayer, and the canceled check is returned to the taxpayer by such bank, and at the time of such payment the sheriff delivers to the taxpayer the receipt for taxes, then the acceptance of such check and delivery of such receipt effects a payment of the taxes and a discharge of the lien therefor, although the sheriff received no money on the instrument by reason of the failure of the bank. *Litchfield v. Reid*, 195 N. C., 161.

The statute C. S., 7994, subsection 3, requires the sheriff or tax collector to deliver a receipt to the party paying the tax, showing "the name of the party, the date of payment, and the amount paid."

The trial judge has found that the note for the taxes, given by the taxpayer, was accepted by the sheriff, and entry of payment made upon his tax record and the receipt detached from the record and attached to the note. Manifestly any person undertaking to determine the encumbrances and liens upon the land would conclude that the entry made

upon the office record by the official charged with the duty of making such entry, would discharge the lien. The land bank as mortgagee had an interest in the property and was empowered by the deed of trust to foreclose the instrument "for the nonpayment of taxes." The tax records constitute the chief evidence of an outstanding lien for taxes, and in the absence of mistake, fraud, collusion or other vitiating element, the entry of payment, interpreted in the light of the facts found by the trial judge, warrants the conclusion that the lien for said taxes was discharged.

In other jurisdictions cases supporting the judgment rendered are: *Mercantile Trust Co. v. Hart,* 35 L. R. A., 352, and *Camden v. Fink Coal & Coke Company,* 61 A. L. R., 584, and annotation. For instance, the Court of Civil Appeals for Texas, in *Furche v. Mayer,* 29 S. W., 1098, in discussing the principle involved where a note was given for the payment of taxes, said: "We find no well-considered case holding a person entitled to subrogation where he pays off the lien debt simply upon the request of the debtor, unaccompanied by an agreement of subrogation to the discharged lien, or circumstances from which such an agreement may be implied." Compare *Guano Co. v. Walston,* 187 N. C., 667, 122 S. E., 663. Therefore, if a sheriff accepts a note in payment for taxes for the accommodation of the taxpayer, marking the records in his office paid and detaching the original receipt from the record, and thereafter pays said taxes to the county, neither such sheriff nor the bondsman can assert or establish a lien upon the land.

There are certain exceptions in the record to the findings of fact, but it appears that the evidence and reasonable inferences that may be drawn therefrom support the judgment.

Affirmed.

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

MRS. JOHN H. DILLARD AND OTHERS ON BEHALF OF THEMSELVES AND ALL OTHER CREDITORS OF J. W. WALKER, v. J. W. WALKER ET AL.

(Filed 25 January, 1933.)

Frauds, Statute of A a—Agreement in this case held to constitute an original agreement not coming within Statute of Frauds.

The petitioner owned a certificate of time deposit in a certain bank. Upon demand on the bank for payment thereof a clause in the certificate requiring thirty days notice of withdrawal was invoked. There was evidence that thereafter the president of the bank persuaded the petitioner to

leave the money on deposit and promised to become personally liable therefor, and to execute a mortgage on certain of his real property as security. There was evidence, also, that the president was an endorser on large numbers of notes, etc., held by the bank and that he owned a large number of shares of its capital stock, and that the withdrawal by the petitioner would have caused the bank to close its doors, resulting in the president's immediate liability to the bank. Thereafter the bank became insolvent. The president of the bank was placed in receivership, and the receiver denied the petitioner's claim against his estate, and the petitioner appealed to the Superior Court: *Held*, the evidence tended to establish that the promise by the president of the bank to become personally liable for the deposit was supported by a new and independent consideration, and constituted an original undertaking by him, and the agreement does not come within the provisions of the statute of fraud, C. S., 987, and parol evidence thereof was competent.

APPEAL by defendant, J. W. Walker and D. H. Tillett, receiver of J. W. Walker, from *Stack, J.*, at June Term, 1932, of CHEROKEE. No error.

This is an action in the nature of a creditors' bill instituted by the plaintiffs on behalf of themselves and all other creditors of J. W. Walker, against the defendants, J. W. Walker and certain of his creditors. On motion of plaintiffs, D. H. Tillett was appointed receiver of the defendant, J. W. Walker, and is now engaged in the performance of his duties as such receiver.

After the action was begun, and while it was pending, Mrs. Frankie Maxwell presented to the receiver her claim against the defendant, J. W. Walker. The claim was not allowed by the receiver. She then filed her petition in this action, which is as follows:

"Your petitioner, Mrs. Frankie Maxwell, respectfully requests that she be made a party plaintiff in this action, and alleges:

1. That the Merchants and Manufacturers Bank is a corporation and was at the dates hereinafter alleged doing a general banking business.

2. That J. W. Walker is and was at the dates hereinafter alleged, and has been for many years, president of said corporation and is and was at said dates the holder of a large amount of the capital stock of said corporation and is and was at said dates financially interested in said bank to a large amount, and is and was endorser on a large amount of notes, certificates of deposit and other bills of said bank, as your petitioner is informed and believes.

3. That during the years 1930 and 1931, your petitioner had on deposit in said bank a large amount of money, to wit: approximately the sum of $8,629.42, on time deposit, and that during the latter part of 1930, or early part of 1931, the petitioner presented her certificates

of deposit to said bank for payment, and that said bank and J. W. Walker, its president, invoked the clause in said certificates requiring 30 days notice of intention to withdraw her money from said bank; that petitioner duly gave notice and that before the expiration of said notice, and after said expiration, the petitioner had several conversations with said J. W. Walker regarding the withdrawal of said money, in which said conversation said J. W. Walker informed petitioner that if she withdrew said money, it would cause him and the bank great financial embarrassment and would probably cause him great loss personally, and that said J. W. Walker proposed to her that if she would leave said money in the bank he would become personally responsible therefor, and would execute and deliver to her a mortgage on his property in Cherokee County, North Carolina, and elsewhere, and recounted to and told her of the great value of his property, including a farm in Cherokee, and other large holdings there, also a boundary of timber land in another county, and after a great deal of persuasion, and believing that said J. W. Walker was financially reliable and amply solvent, and relying on his promise to become personally responsible and to secure the said sum by mortgage as aforesaid, your petitioner did leave her money in said bank, and that said bank failed and its affairs were taken over by the State Banking Department, and as affiant is advised and believes a large portion of said money, if not all, is a total loss to her insofar as the liability of said bank is concerned.

Your petitioner is advised and believes, and so avers the facts to be, that at the time of making said promises and representations to her in order to secure said money that J. W. Walker knew that if your petitioner withdrew her money from said bank, that same would have to close its doors, and that he would become liable on all his endorsements and liabilities to said bank and its stockholders and depositors and creditors, and believing that if petitioner left her money in said bank, it could in time work out all its affairs and thereby save said Walker from any personal responsibility, and that for his own individual personal interest as aforesaid, he made the promises aforementioned to your petitioner, and that she relied upon said promises and left her money in said bank to her great damage.

4. That the defendant, J. W. Walker, has failed and refused to comply with the aforesaid promises made to your petitioner and denies personal responsibility to your petitioner for the said money.

5. Your petitioner is advised and believes that an action entitled as above has been commenced in the Superior Court of Cherokee County for the purpose of settling the claims against J. W. Walker, and to have a receiver appointed to take charge of and sell his property, or so

much thereof as may be required to pay said claims, and that D. H. Tillett has been appointed receiver by the court in said action for said purpose.

6. That your petitioner filed her claim with said receiver, and that same has been disallowed.

Wherefore, your petitioner prays that she may be allowed to litigate her claim in this action, and may have a jury to pass on such issues as are raised herein, that said J. W. Walker be required to execute the said mortgage as promised, or that she be allowed to share in the proceeds of said property if the court is of the opinion that she is not entitled to said mortgage or a judgment adjudging that her claim has priority against said property, and excepts to the finding of the receiver against her claim, and appeals to the judge of the Superior Court."

In his answer to the petition, D. H. Tillett, receiver of J. W. Walker, denied the allegations therein that the said J. W. Walker contracted and agreed with the petitioner that he would become personally responsible for the money on deposit with the Merchants and Manufacturers Bank to the credit of the petitioner, if she would not withdraw said money from said bank, and that he would execute a mortgage on his property to secure the payment of the said money; he also pleaded in bar of petitioner's right to recover on the contract and agreement alleged in the petition the statutes of fraud, C. S., 987, and C. S., 988.

At the trial there was evidence tending to sustain the allegations in the petition, and evidence to the contrary. There was no evidence that the agreement alleged in the petition was in writing, or that there was a memorandum or note, in writing, of such agreement.

The issues submitted to the jury were answered as follows:

"1. Did Mrs. Frankie Maxwell have on deposit in the Merchants and Manufacturers Bank the sum of $8,629.49, at the time of the alleged contract between Mrs. Frankie Maxwell and J. W. Walker, mentioned in the complaint? Answer: Yes.

2. Did J. W. Walker enter into an agreement with Mrs. Frankie Maxwell to become personally liable to her for the amount of her deposit in said bank, and to secure the payment thereof by mortgage on his property after the plaintiff had asked for her money in the bank and after she had served written notice of her intention to withdraw her money 30 days from the date thereof, as alleged in the petition? Answer: Yes.

3. If so, did J. W. Walker breach said contract? Answer: Yes.

4. What damage, if any, is Mrs. Frankie Maxwell entitled to recover of the defendant, J. W. Walker, or the receiver of J. W. Walker, by reason of said alleged breach? Answer: $8,629.49."

From judgment on the verdict that the petitioner recover of the defendant, J. W. Walker, the sum of $8,629.49, and her costs in this action, and that said judgment is a valid claim against the receiver of the said J. W. Walker, and as such is entitled to share pro rata with other unsecured claims in the proceeds of the sale of his property, the defendant, J. W. Walker, and D. H. Tillett, receiver, appealed to the Supreme Court.

R. L. Phillips for petitioner.
J. B. Gray and Ralph Moody for defendants.

CONNOR, J. There was no error in the trial of this action.

The defendants contended at the trial that the agreement of the defendant, J. W. Walker, with the plaintiff, as alleged in the petition, and as shown by the evidence offered by the plaintiff, is a special promise by the defendant to answer the debt, default, or miscarriage of the Merchants and Manufacturers Bank, and that as such agreement was not in writing, or evidenced by a memorandum, or note, in writing, signed by the defendant, or by some person thereunto lawfully authorized by him, the action to charge the defendant upon such special promise cannot be maintained. In support of this contention, the defendants relied on C. S., 987.

The contentions of the defendants were presented (1) by their demurrer *ore tenus* to the petition; (2) by their objections to evidence offered by plaintiff; and (3) by their motions for judgment as of nonsuit at the close of all the evidence. The defendants duly excepted to the refusal of the trial court to sustain their contentions, and on their appeal to this Court rely on these exceptions.

The promise of the defendant, J. W. Walker, to the plaintiff, as alleged in the petition, and as shown by evidence offered by the plaintiff at the trial, was supported by a new and independent consideration. The promise was accepted by the plaintiff, who thereafter made no demand on the bank for her money. The agreement was an original undertaking by the defendant, in his own interest and not in the interest of the bank. For these reasons, the agreement is not within the provisions of C. S., 987. See *Mercantile Company v. Bryant,* 186 N. C., 551, 120 S. E., 200. There was no error in the refusal of the trial court to sustain defendant's demurrer *ore tenus* to the petition, or their objections to the evidence offered by the plaintiff, at the trial. The evidence was properly submitted to the jury, under instructions which are free of error. The judgment is affirmed.

No error.

O. ROY KEITH v. HENDERSON COUNTY AND MARGARET A. PACE, TRADING AS PACE HEATING AND PLUMBING COMPANY, AND FINLEY PACE.

(Filed 25 January, 1933.)

1. Schools and School Districts D c—County held not liable on note for school equipment purchased by county purchasing agent.

The board of education of a county is required to provide suitable supplies for the public schools of the county and to pay for them by vouchers drawn by it within its appropriation on funds provided therefor by the board of county commissioners in the manner prescribed by statute, and where the county board of education has refused to purchase certain equipment because of lack of funds, and the county purchasing agent and chairman of the board of county commissioners purchases the same and gives a note for the purchase price signed by him in the name of the school for whose use the equipment was purchased: *Held*, the county is not liable on the note, the county purchasing agent having no connection with the county board of education.

2. Bills and Notes D b—

In order to constitute a holder in due course of a note payable to a specified person it is required that the instrument be endorsed. C. S., 3010, 3033.

3. Counties C c—Persons dealing with county officials are chargeable with limitations of their authority to bind county for debt.

A person dealing with public officials must take notice of the power and authority conferred on them by statute, and where a note given for county school equipment is signed by the county purchasing agent in the name of the school for whose use the equipment was purchased, a person holding the note is chargeable with notice of his lack of authority to bind the county thereon.

APPEAL by plaintiff from *Schenck, J.*, at May Term, 1932, of HENDERSON. Affirmed.

This is an action brought by plaintiff against the above defendants to recover $1,080 and interest, balance due on a note and contract for one No. 3 Long Iron Fireman Automatic Coal Burner, complete with electric equipment for ¾ H.P. motor, A.C. 60 cycles, 110/220 volts, single phase and automatic control for boiler complete.

The note was for $1,415 dated 2 August, 1930, with schedule of payments. The principal sued on is now due under the contract. The note is signed "East Flat Rock School, by T. D. Stepp (seal), Henderson County Purchasing Agent, witnesses, O. Roy Keith, V. P. Pressley."

The contract recites "an order for an Iron Fireman Automatic Coal Burner." "East Flat Rock School." "Title to all equipment and ma-

terials shall remain with the seller until this contract is paid for in full and according to the terms stated above." The note also states "The title to said property shall be and remain in the payee until the principal and interest of this note, etc." The plaintiff alleged, "That thereafter, to wit, on or about the ..... day of....., 1930, the defendant, Margaret A. Pace, trading as Pace Plumbing and Heating Company, through her manager, Finley Pace, sold, transferred, endorsed and delivered for value received, to the plaintiff, O. Roy Keith, the said note of 2 August, 1930, . . . and this plaintiff is now the owner and holder of said note, in due course for value and without notice."

"The plaintiff alleged that the defendant, Margaret A. Pace, trading as Pace Plumbing and Heating Company, was notified by the said T. D. Stepp, purchasing agent of Henderson County, to withhold the installation of the iron fireman until further notice, and this plaintiff is advised, informed and believes that said further notice has never been given for the installation of the said 'iron fireman,' and this plaintiff is advised, informed, and believes that the said 'iron fireman' is ready for installation and will be installed immediately upon the giving of the necessary instructions by the authorities of Henderson County."

"That on 16 October, 1930, the defendant, Henderson County, paid to this plaintiff, or plaintiff's agent, the sum of $335, which amount was duly credited on the note of 2 August, 1930. That said amount was paid in the form of a county warrant on the treasurer of Henderson County and signed by T. D. Stepp, county accountant, and approved by P. S. Ramsey, register of deeds and clerk *ex officio* of the board of commissioners of Henderson County."

"That thereafter, to wit, on 17 November, 1930, the defendant Henderson County issued its warrant on the treasurer of Henderson County in the sum of $60.00, which was to be applied as a second payment on the note of 2 August, 1930, which said warrant was signed by T. D. Stepp, county accountant, and approved by P. S. Ramsey, register of deeds and clerk *ex officio* of the board of commissioners of Henderson County." This was not paid on account of the failure of the bank.

"That the plaintiff is advised, informed and believes, and therefore avers that before the iron fireman was purchased by Henderson County from the defendant Pace that T. D. Stepp, purchasing agent and accountant of Henderson County, and chairman of the board of commissioners of said county, conferred with the board of education of Henderson County in regard to the purchase of same. That he was told by the said board of education or members thereof, or by R. G. Anders, the clerk of said board and superintendent of education for Henderson County, that while said board of education would like to have the iron

fireman installed in the East Flat Rock High School, *the board of education did not have the funds to pay for same,* but if the county wanted to buy and pay for same and install it in the East Flat Rock High School, the board of education had no objection."

The court below rendered the following judgment: "This cause coming on to be heard before the undersigned judge, and a demurrer *ore tenus* having been lodged by the defendant Henderson County, for that the complaint does not state a cause of action, in that it appears from said complaint that this action is based upon contracts executed by the board of county commissioners for the purchase of an iron fireman for the East Flat Rock School, not included in the budget of said school prepared by the board of education, and that the complaint fails to allege any authority on the part of said commissioners to make said purchase; and for that it appears from the complaint that the action of the commissioners in attempting to buy said iron fireman from the general county fund was acting *ultra vires;* and for that it further appears upon the face of the complaint that the plaintiff is not an innocent purchaser of said contracts; and the court being of the opinion that the demurrer is well taken, said demurrer is sustained, and the action of the plaintiff against the defendant Henderson County is dismissed. MICHAEL SCHENCK, *Judge Presiding.*"

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

R. L. Whitmire for plaintiff.
M. M. Redden for defendant Henderson County.

CLARKSON, J. The question involved: T. D. Stepp, as purchasing agent and chairman of the board of county commissioners for Henderson County, purchased from a local dealer an Iron Fireman Automatic Coal Burner for East Flat Rock School in said county, and executed a note "East Flat Rock School, by T. D. Stepp, Henderson County purchasing agent." T. D. Stepp has no connection with the board of education of Henderson County. Is this note binding on Henderson County? We think not.

The defendant Henderson County demurred *ore tenus* to the complaint filed. The court below sustained the demurrer and in this we can see no error.

Board of Education v. Walter, 198 N. C., 325, in substance decides: "The board of education of a county is required in its large discretion to provide suitable supplies for the public schools of the county out of funds provided by taxation by the county commissioners in the manner

prescribed by statute, and when funds have been provided as the statutes direct the purchases by the county board of education within its appropriation are to be paid upon its voucher out of the funds so appropriated, and the board of county commissioners may not usurp the power of the board of education to make such purchases under a resolution consolidating purchases of supplies for all departments of the county government under the provisions of chapter 146, Public Laws of 1927, the county board of education not being a department of the county government within the intent and meaning of the act."

This Court has further held that under C. S., 5429, even the right to select a janitor for school buildings is not up to the local school committee, but exclusively in the hands of the board of education. *Wiggins v. Board of Education,* 198 N. C., 301. *Elliott v. Board of Equalization,* 203 N. C., 749.

C. S., 3033, is as follows: "A holder in due course is a holder 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." To constitute a holder in due course it is required that the instrument be endorsed. C. S., 3010; *Bank v. Yelverton,* 185 N. C., 314.

The plaintiff alleges that he is a "holder of said note in due course" and sets forth the note as part of the complaint. From a careful inspection of the note as set forth we can find no endorsement of same. Then again plaintiff witnessed the note that defendant Henderson County in law had no power to execute and in fact did not execute. The plaintiff is presumed to know the law. It behooves public officials to follow the law as written. This is the only safe course and those dealing with the officials must take notice of the power and authority conferred on them by the statutes. *Fidelity Co. v. Fleming,* 132 N. C., 332, *Commissioners of Brunswick v. Walker,* 203 N. C., 505, *Commissioners of Brunswick v. Inman,* 203 N. C., 542.

The plaintiff in his brief cited no statute or decision to support his contention. The judgment of the court below is

Affirmed.

ETHEL BROWN v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 25 January, 1933.)

1. Removal of Causes C b—Where complaint fails to state cause of action against resident defendant the cause is removable.

Where the complaint in a suit against two defendants fails to allege a cause of action against the resident defendant, the cause is removable to the Federal Courts upon motion of the nonresident defendant, the jurisdictional amount being established.

2. Same—Where complaint states joint cause and also independent cause against nonresident the cause is removable.

The question of whether a cause of action is joint or separable is to be determined by the manner in which the plaintiff has elected to state his cause of action, the allegations of the complaint being controlling in this respect, but where in addition to alleging a joint action against both the resident and nonresident defendants the complaint also alleges facts sufficient to constitute an independent action against the nonresident defendant, a separable controversy arises and the cause is removable to the Federal Court upon motion of the nonresident defendant, the effect being to carry the entire cause to the Federal Court.

3. Same—Complaint in this case held to state an independent cause of action against nonresident, and cause was removable.

Where the complaint in an action against a resident defendant and a nonresident railroad company alleges that the plaintiff was injured by the joint negligence of both defendants and also alleges that the nonresident defendant allowed its train to coast down hill while approaching a crossing, that the tracks were hidden by an embankment in a deep cut on a curve, that the driver of the wagon in which the plaintiff was riding as a guest could not have seen or heard the approach of the train, and that the engineer, upon seeing the heads of the horses pulling the wagon, gave an untimely signal which caused the horses to rear up and stop on the track, resulting in the injury: *Held*, the complaint states an independent cause of action against the nonresident defendant in addition to the joint cause alleged against both defendants, and the cause is removable to the Federal Court upon motion of the nonresident.

APPEAL by defendant, Southern Railway Company, from *Schenck, J.*, at July Term, 1932, of CLEVELAND.

Civil action to recover damages for alleged negligent injury, brought against Southern Railway Company, a corporation chartered under the laws of the State of Virginia, and William Thomas Tessener, citizen and resident of Cleveland County, North Carolina.

Motion by nonresident corporate defendant to remove cause to the District Court of the United States for the Western District of North Carolina for trial. Motion allowed by the clerk, but reversed on appeal by the judge of the Superior Court, from which latter ruling the movant appeals.

J. Allen Austin for plaintiff.
Ryburn & Hoey for defendant, Railway Company.

STACY, C. J. The petition for removal, besides showing the presence of the requisite jurisdictional amount, asserts a right of removal on the ground of diverse citizenship, and alleges (1) fraudulent joinder; (2) separable controversy, if, indeed, any cause of action be alleged against the resident defendant; and (3) no valid, subsisting cause of action set up against resident defendant.

It is alleged that plaintiff was injured while a guest in W. T. Tessener's two-horse wagon which was struck by a passenger train of the Southern Railway Company at a crossing about two miles from Shelby in Cleveland County, 20 October, 1931. The negligence alleged against the Railway Company is that the track at this crossing was so constructed as to leave a high embankment on a sharp curve, which obstructed the view of a traveler approaching the crossing on the public highway, and, on the occasion in question, the defendant's servants permitted the train to coast down grade, through a deep cut, and approach said crossing with very little, if any, noise, and when within about 100 feet of the crossing, upon seeing the heads of the horses over the embankment, the engineer gave an untimely distress signal which frightened said horses and caused them to rear up and stop on the railroad track. Both horses were killed and the plaintiff was severely injured.

With respect to the resident defendant, it is alleged that "Tessener had no knowledge whatever of an approaching train until he first heard the distress signal, and, at that time, his view of the approaching train was totally obstructed by said embankment."

True, it is also alleged that Tessener negligently failed to "stop, look or listen" before driving upon the crossing, but if he could neither see nor hear the approaching train, as previously alleged, and was unable to save his horses from death and the plaintiff from injury, it would seem that the alleged negligence of the corporate defendant and not that of Tessener was the proximate cause of plaintiff's injury. *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761; *Construction Co. v. R. R.,* 184 N. C., 179, 113 S. E., 672. Compare *Harrison v. R. R.,* 194 N. C., 656, 140 S. E., 598.

It is well settled that a suit brought in a State court against two defendants, one a citizen of the same State as the plaintiff, and the other, a nonresident, is removable to the Federal Court by the nonresident defendant, if the complaint fail to state a cause of action against the resident defendant, or if the charge of concurrent negligence be a mere *brutum fulmen. M'Intyre v. So. Ry. Co.,* 131 Fed., 985; *Overton*

v. R. R., 202 N. C., 848, 163 S. E., 808; *Wright v. Utility Co.*, 198 N. C., 204, 151 S. E., 241; *Simmons v. Insurance Co.*, 196 N. C., 667, 146 S. E., 569; *Hancock v. Missouri-Kansas-Texas R. Co.*, 28 Fed. (2d), 45; 4 Hughes Federal Practice, sec. 2332, page 116.

But however this may be, in addition to charges of concurrent negligence on the part of both defendants, which the movant says is only a conclusion of the pleader, there is also in the present complaint allegation of negligence on the part of the nonresident defendant alone, sufficient in and of itself to constitute a distinct and independent cause of action, which gives rise to a separable controversy. 54 C. J., 296; *Kelly v. Robinson*, 262 Fed., 695; *Cayce v. So. Ry. Co.*, 195 Fed., 786; *M'Intyre v. So. Ry. Co., supra.*

Speaking to the subject in *Gulf & S. I. R. Co. v. Gulf Refining Co.*, 260 Fed., 262, *Holmes, District Judge,* delivering the opinion of the Court, said: "While it is true that a defendant has no right to say that an action shall be several which a plaintiff elects to make joint, yet if the complaint fails to allege facts showing a joint cause of action, or alleges facts showing separate causes, or fails to allege facts showing any cause of action against the resident defendant, then there is a separable controversy which entitles the nonresident defendant to remove."

The following is the holding in *So. Ry. Co. v. Edwards,* 115 Ga., 1022, 42 S. E., 375, as stated in the syllabus, which, under the practice in that state, is prepared by the Court: "Although there may, in a suit against two or more defendants, one of whom is a nonresident, be charges of concurrent negligence against all, yet if there be also a distinct charge of negligence against the nonresident alone, sufficient in and of itself to give rise to a cause of action, the case is one involving a separable controversy between citizens of different states, and therefore removable to the proper United States Court."

That one who is riding in a vehicle, the driver of which is not his agent or servant, nor under his control, and who is injured by the joint or combined negligence of a third party and the driver, may recover of either or both, upon proper allegation, is fully established by our own decisions and the great weight of authority elsewhere. *Ballinger v. Thomas, supra,* and cases there cited.

When the motion to remove is made on the ground of an alleged separable controversy, the question is to be determined by the manner in which the plaintiff has elected to state his cause of action, and for this purpose, the allegations of the complaint are controlling. *Crisp v. Fibre Co.*, 193 N. C., 77, 136 S. E., 238. "The complaint is the basis of determining the question of separability"—*Varser, J.*, in *Timber Co. v.*

Insurance Co., 190 N. C., 801, 130 S. E., 864. But where, in addition to the allegation of concurrent negligence on the part of both defendants, there is also a distinct allegation of negligence on the part of the nonresident defendant, sufficient in and of itself to constitute an independent cause of action, a separable controversy arises upon this latter allegation which entitles the nonresident defendant to remove. 4 Hughes Federal Practice, sec. 2377, page 188.

In a case where removal is proper, the effect is to carry the entire cause into the Federal Court for trial. *Timber Co. v. Insurance Co., supra.* There was error in reversing the clerk's order of removal.

Reversed.

STATE v. TOM COPE.

(Filed 25 January, 1933.)

1. Negligence E a—Definition of culpable negligence.

Culpable negligence imports something more than actionable negligence in the law of torts, and is such recklessness or carelessness, proximately resulting in injury or death, as is incompatible with a proper regard for the safety or rights of others; and the violation of a safety statute regulating the use of highways does not constitute culpable negligence unless such violation is intentional, wilful or wanton, or unless the violation, though unintentional, is accompanied by recklessness or is under circumstances from which probable death or injury to others might have been reasonably anticipated.

2. Negligence E b—

Criminal liability for culpable negligence is unaffected by contributory negligence, as such, of the person injured or killed.

3. Homicide C a—Instruction as to culpable negligence in prosecution for felonious slaying held erroneous.

In a prosecution for the felonious slaying of a pedestrian upon the highway, alleged to have been caused by the defendant's culpable negligence in driving his car, an instruction that if the defendant was guilty of violating a statute enacted for the safety of persons upon the highway, and that such violation proximately resulted in death, that the defendant would be guilty of manslaughter at least, *is held* erroneous as giving the test of civil liability rather than that of criminal responsibility.

APPEAL by defendant from *Stack, J.*, at February Term, 1932, of HAYWOOD.

Criminal prosecution tried upon indictment charging the defendant, and another, with the felonious slaying of one Cecil Ruff.

On Saturday night, 2 August, 1930, the deceased, a boy fifteen years of age, in company with his mother and two boys of the neighborhood, was on his way to church, walking on Highway No. 10, near Saunooke in Haywood County. He was struck by a Chevrolet automobile owned by the defendant's father, and under the control of the defendant at the time.

The evidence is conflicting as to just how the accident occurred, whether the lights were burning, dimmed or out. The witnesses for the State estimate the speed of the car from 40 to 60 miles an hour, while those for the defendant say it was not running over 40 or 45 miles per hour. The pedestrians and the automobile were all traveling in the same direction.

The following portions of the charge form the basis of several exceptive assignments of error:

"Gentlemen of the jury, if one violates any of the laws that were passed for the protection of the traveling public on the highways, and that violation of the law on his part causes the death of another, he will be guilty of manslaughter at least whether he intended to do so or not.

"Now in this case, the State says the defendant was violating the laws that were passed by the Legislature for the protection of those who use the public highways. Our Legislature has passed a number of provisions for the protection of all of us who use the highways, and makes it a misdemeanor or a crime to violate them. If all people using the highways would obey the law we would have no killings or personal injuries or destruction of property, because the law in its wisdom has required such regulation for our protection that if we will follow it we will not hurt anybody and if others will follow it we will not get hurt.

"Get the idea: If any of these laws, enacted for the protection of those who use the highways, is violated by travelers on the highways, and that violation of the law results in the death of some one, then the one that does that is guilty of manslaughter at least."

Verdict: Guilty of manslaughter.

Judgment: Imprisonment in the State's prison for not less than 5 nor more than 8 years.

Defendant appeals, assigning errors.

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

Alley & Alley for defendant.

STACY, C. J. Did the trial court correctly observe the difference between actionable and culpable negligence in charging the jury? Pre-

liminary to answering this question, it may be helpful to plot again the line, sometimes shadowy, which separates the two.

1. Actionable negligence in the law of torts is a breach of some duty imposed by law or a want of due care—commensurate care under the circumstances—which proximately results in injury to another. *Small v. Utilities Co.*, 200 N. C., 719, 158 S. E., 385; *Eller v. Dent*, 203 N. C., 439; *Hurt v. Power Co.*, 194 N. C., 696, 140 S. E., 730; *Ramsbottom v. R. R.*, 138 N. C., 39, 50 S. E., 448; *Drum v. Miller*, 135 N. C., 204, 47 S. E., 421.

2. The violation of a statute or ordinance, intended and designed to prevent injury to persons or property, whether done intentionally or otherwise, is negligence *per se*, and renders one civilly liable in damages, if its violation proximately result in injury to another; for, in such case, the statute or ordinance becomes the standard of conduct or the rule of the prudent man. *King v. Pope*, 202 N. C., 554, 163 S. E., 447; *Godfrey v. Coach Co.*, 201 N. C., 264, 159 S. E., 412; *Taylor v. Stewart*, 172 N. C., 203, 90 S. E., 134.

3. Contributory negligence, when properly pleaded and established, defeats a recovery in the law of torts (*Moore v. Iron Works*, 183 N. C., 438, 111 S. E., 776), except in certain cases (*Cobia v. R. R.*, 188 N. C., 487); while contributory negligence as such has no place in the law of crimes. *S. v. Eldridge*, 197 N. C., 626, 150 S. E., 125; *S. v. McIver*, 175 N. C., 761, 94 S. E., 682.

4. Culpable negligence in the law of crimes is something more than actionable negligence in the law of torts. *S. v. Stansell*, 203 N. C., 69, 164 S. E., 580; *S. v. Rountree*, 181 N. C., 535, 106 S. E., 669.

5. Culpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. *S. v. Whaley*, 191 N. C., 387, 132 S. E., 6; *S. v. Rountree, supra.*

In support of the distinction, here gleaned from the authorities, between actionable negligence in the law of torts and culpable negligence in the law of crimes, it may be noted that "reckless driving" is defined in the uniform act relating to the operation of vehicles on the highways (chap. 148, Public Laws, 1927, sec. 3), as follows: "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 sixty of this act."

Under this definition, the simple violation of a traffic regulation, which does not involve actual danger to life, limb or property, while importing civil liability if damage or injury ensue (*Ledbetter v. English*, 166 N. C., 125, 81 S. E., 1066), would not perforce constitute the criminal offense of reckless driving. *S. v. Stansell, supra; S. v. Whaley, supra; S. v. Durham*, 201 N. C., 724, 161 S. E., 398.

6. An intentional, wilful or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence. *S. v. Palmer*, 197 N. C., 135, 147 S. E., 817; *S. v. Leonard*, 195 N. C., 242, 141 S. E., 736; *S. v. Trott*, 190 N. C., 674, 130 S. E., 627; *S. v. Crutchfield*, 187 N. C., 607, 122 S. E., 391; *S. v. Sudderth*, 184 N. C., 753, 114 S. E., 828; *S. v. Jessup*, 183 N. C., 771, 111 S. E., 523; *S. v. Gray*, 180 N. C., 697, 104 S. E., 647; *S. v. Gash*, 177 N. C., 595, 99 S. E., 337; 2 R. C. L., 1212.

7. But an unintentional violation of a prohibitory statute or ordinance, unaccompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, is not such negligence as imports criminal responsibility. *S. v. Stansell, supra; S. v. Agnew*, 202 N. C., 755, 164 S. E., 578; *S. v. Satterfield*, 198 N. C., 682, 153 S. E., 155; *S. v. Tankersley*, 172 N. C., 955, 90 S. E., 781; *S. v. Horton*, 139 N. C., 588, 51 S. E., 945.

8. However, if the inadvertent violation of a prohibitory statute or ordinance be accompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others, then such negligence, if injury or death proximately ensue, would be culpable and the actor guilty of an assault or manslaughter, and under some circumstances of murder. *S. v. Trott, supra; S. v. Sudderth, supra; S. v. Trollinger*, 162 N. C., 618, 77 S. E., 957; *S. v. Limerick*, 146 N. C., 649, 61 S. E., 567; *S. v. Stitt*, 146 N. C., 643, 61 S. E., 566; *S. v. Turnage*, 138 N. C., 566, 49 S. E., 913.

Taking the court's instructions and placing them side by side with the foregoing epitome of the pertinent decisions on the subject, it appears that the test of civil liability, rather than that of criminal responsibility, was applied in determining the defendant's guilt. In this, there was error.

New trial.

STATE v. ALBERT HARVELL, ROOSEVELT GRAY AND EVA LAMBERT.

(Filed 25 January, 1933.)

1. **Homicide C a—Evidence of culpable negligence in driving automobile held sufficient.**

Evidence tending to show that all of the defendants were drunk and riding in the front seat of a car driven by one of them in a manner contrary to statute, and that the appealing defendant, being mad because not permitted to drive, grabbed the steering wheel, causing the car to run into a filling station in a reckless manner, resulting in the death of the deceased, is held sufficient to overrule a demurrer to the evidence in a prosecution for felonious slaying.

2. **Same—Instruction in this case relating to culpable negligence held not to contain reversible error.**

In this prosecution for a felonious slaying resulting from the negligent operation of an automobile, the instruction relating to culpable negligence, though inexact, *is held* not to contain reversible error, there being no evidence that the violation of the traffic regulation was unintentional or inadvertent.

APPEAL by Roosevelt Gray from *Finley, J.*, at August Term, 1932, of CABARRUS.

Criminal prosecution tried upon indictment charging the defendant, and others, with the felonious slaying of one Stamey Holdbrooks.

The State's evidence tends to show that on 11 July, 1932, the three defendants, Eva Lambert, Albert Harvell and Roosevelt Gray, were in the front seat of a Nash roadster, with Willie Shoe and Cora Lambert in the rumble seat, all drinking, and driving around at the rate of "35 or 40 miles an hour, if not more." The car swung back and forth from one side of the road to the other. Eva Lambert, who was driving, testified that the defendant Gray "said he was going to wreck me and he tried to jerk me into a post and then into the filling station. He was mad because they would not let him drive; he grabbed the steering wheel and jerked it, heading for the telephone post. I got it straightened back into the road; he jerked it into the filling station." This was denied by the defendant Gray.

They ran into Holdbrooks' Filling Station "just like a storm"; tore down the gas tank; "knocked the post clean out of the ground; hit the deceased and knocked him over to the side of the filling station."

Besides the motion to nonsuit, the exception to the following instruction constitutes the defendant's principal assignment of error:

"Negligence must be something more than is required in the trial of an issue in a civil action, in that it must be such negligence that a man of ordinary prudence would avoid under similar circumstances, but

it is sufficient to be submitted to a jury in a criminal prosecution if it is likely to produce death or great bodily harm."

From an adverse verdict and judgment of not less than 4 nor more than 6 years in the State's prison, the defendant, Roosevelt Gray, appeals, assigning errors.

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

Hartsell & Hartsell for defendant.

STACY, C. J., after stating the case: The demurrer to the evidence was properly overruled. *S. v. Dills, post,* 33; *S. v. Durham,* 201 N. C., 724, 161 S. E., 398; *S. v. Rountree,* 181 N. C., 535, 106 S. E., 669.

While the instruction which forms the basis of the appealing defendant's principal exception, may be slightly inexact, tested by the rule in *S. v. Cope, ante,* 28, nevertheless it would seem to be harmless on the present record, as there is no evidence of a simple, unintentional or inadvertent violation of the traffic laws. The conduct of the defendants was reckless and their negligence culpable according to the evidence and the verdict. *S. v. Cope, supra.*

No error.

STATE v. WILL DILLS.

(Filed 25 January, 1933.)

1. Homicide C a—Evidence of culpable negligence in driving on highway held sufficient.

Evidence that the defendant, while intoxicated, drove an automobile on a public highway from one side of the road to the other in a reckless manner, resulting in the car overturning and the death of a person riding in the car, *is held* sufficient to be submitted to the jury in a prosecution for manslaughter.

2. Criminal Law I c—

In a criminal prosecution, as well as in a civil action, the court may withdraw incompetent evidence and instruct the jury not to consider it.

3. Criminal Law G i—Testimony that defendant was "drunk" held competent.

Testimony relating to the fact that the defendant was drunk, which testimony is based upon observation of the defendant a short time before the accident in question, *is held* competent in a prosecution for manslaughter based upon the defendant's culpable negligence in driving upon the highway.

4. Criminal Law G e—Testimony in this case held competent as being of statement made contemporaneously with and in explanation of condition.

Testimony of a remark of a bystander, addressed to the defendant and his companions and undenied by them, that they were too drunk to drive their automobile, and made a short time before the accident resulting in deceased's death, *is held* competent in a prosecution for homicide resulting from the defendant's culpable negligence in driving his automobile, the remark being unpremeditated and being contemporaneous with and explanatory of the defendant's condition.

5. Criminal Law G b—Witness held to have sufficiently identified place of accident involved in the prosecution.

In this case it appeared from other evidence introduced, that the witness sufficiently identified the place of the accident in question, and the defendant's exception to his testimony on the ground that he had not done so is not sustained.

6. Homicide C a—Charge relating to proximate cause held not to contain reversible error in this prosecution for manslaughter.

In this prosecution for manslaughter, based on the defendant's culpable negligence, the charge of the court in the statement of the abstract principles of law involved was not strictly correct, but in its application of the law to the facts of the case it correctly charged that the accident and death in question must have been proximately caused by defendant's culpable negligence, and the defendant admitted that the death of the deceased was caused by the accident: *Held* the charge does not contain reversible error.

APPEAL by defendant from *Stack, J.*, at March Term, 1932, of SWAIN. No error.

The defendant was indicted for manslaughter—the wilful and felonious killing of Ray DeHart in the wreck of an automobile. He was convicted and from the judgment pronounced he appealed upon assigned error.

The material parts of the evidence may briefly be stated. On Sunday, 13 September, 1931, the defendant, the deceased, Carl Wall, and Zeb Cunningham were in a "stripped-down" Chevrolet car or truck on Highway 10, Cunningham, Wall, and the defendant occupying the only seat, the deceased riding in a "crate or enclosure" behind the seat. The defendant was driving. They were going in the direction of Nantahala Station. The wreck occurred in the afternoon between three and four o'clock. The highest estimate of speed was 50 miles an hour and the lowest twenty-five. The State offered evidence that the car was going very fast and "wabbled"; that it ran "wavery across the road, first on one side and then on the other," or "zigzagging in the road going back and forth." There was evidence that the car just before the wreck was on the right shoulder of the road, that at a distance of twenty-five steps it came back on the hard surface, turned to the left into the loose dirt,

and soon afterwards turned over, injuring all the occupants. It was admitted that the death of Ray DeHart was caused by the wreck. There was evidence for the State that at Blowing Springs, two miles or more from the place of the accident, the defendant was drunk, lying on the steering wheel, that wine had been spilled in the car, and that the car had the odor of wine soon after the injury occurred. It was in evidence that the car had been driven recklessly.

The defendant testified that he was perfectly sober; that while driving at 25 or 30 miles an hour something went wrong with the car, in consequence of which it cut across the road, got off the hard surface, and began to jump up and down; that he turned the steering wheel all the way around and it did not catch; that the left wheels broke; and that the car then turned over. Sometime after the wreck the steering gear was found to be loose. Several witnesses testified in corroboration of the defendant.

The usual motions for nonsuit were made and overruled.

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

Fry & Jones and Alley & Alley for defendant.

ADAMS, J. We do not perceive any rational theory upon which the case should have been dismissed. There is evidence not only of the defendant's reckless driving but of his intoxication, and death as a result of the wreck is admitted. The law prohibits the reckless driving of any vehicle upon a highway and the operation of any vehicle upon a highway by a person who is under the influence of intoxicating liquor or narcotic drugs. N. C. Code, 1931, secs. 2621(44), 2621(45). Death caused by a violation of either of these statutes may be manslaughter. *S. v. Stansell*, 203 N. C., 69.

The defendant noted several exceptions to the admission of evidence, all of which in our opinion are without substantial merit. The court directed the jury not to consider the answer referred to in the second exception and had it stricken from the record. In *S. v. May*, 15 N. C., 328, this Court said, "If improper evidence be received, it may afterwards be pronounced incompetent, and the jury instructed not to consider it"; and this procedure has been established as a rule in the trial of civil and criminal actions. *McAllister v. McAllister*, 34 N. C., 184; *S. v. Collins*, 93 N. C., 564; *Hyatt v. McCoy*, 194 N. C., 760; *S. v. Newsome*, 195 N. C., 552; *Sentelle v. Board of Education*, 198 N. C., 389.

The defendant excepted to evidence tending to show that at Blowing Springs a short time before the accident the defendant was in the car,

lying on the steering wheel, drunk, and that a bystander who observed the situation told the occupants of the vehicle "that they were not fit to operate that little truck."

The word "drunk" is defined as, "Under the influence of intoxicating liquor or drugs to such an extent as to have lost the normal control of one's bodily and mental faculties," New Standard Dictionary, and as, "Under the influence of an intoxicant, especially an alcoholic liquor, so that the use of the faculties is materially impaired." Webster's New International Dictionary. The definition is accepted and generally understood, and the word as used by the witness imports the statement of a fact based upon observation. In no other way could the witness more definitely have stated his conception. His remark was not the narrative of a past occurrence; it was made at the moment he observed the defendant and as descriptive of his condition; obviously, it was not premeditated. The statement of a bystander or nonparticipant, if made while a thing is being done, that is, if contemporaneous and explanatory, is generally admissible in evidence. *S. v. Spivey,* 151 N. C., 676, 680. The remark, moreover, was addressed to the defendant and his companions and there is no proof of any denial. *S. v. McCourry,* 128 N. C., 594, 598. The evidence was properly admitted.

The context demonstrates the place to which Tom Grant referred when he described the sinuous course of the car just before it turned over. After saying, "I went to the place where the wreck occurred," he described marks on the highway indicating that a car had skidded—marks near the right edge of the hard surface extending more than two lengths of the car, then off on the left about thirty or forty feet, a curve to the right, and a second turn to the left. The defendant was lying there as if unconscious. There is a marked similarity between this testimony and that of the defendant, who described the movement of the car after, as he said, he had lost control of it. We therefore cannot assent to the defendant's suggestion that the testimony does not tend to identify the place where the accident occurred.

We have duly considered all the exceptions taken by the defendant to the admission and rejection of evidence and are of opinion that they should be overruled.

Turning to the charge we find that the paragraph to which the eleventh exception is directed is not strictly in accord with the law as declared in *S. v. Stansell, supra;* but the paragraph is the statement of an abstract principle. In applying the law the court restricted its concrete form to the question whether the death of DeHart had been caused by the criminal negligence of the defendant in driving the car recklessly or while he was under the influence of intoxicating liquor, and in doing so the court complied with the law as heretofore written.

The defendant's negligence, it was said, must have been criminal or culpable, more than enough to sustain a civil action. It is contended that the doctrine of proximate cause was not explained, and that to hold a person criminally responsible for homicide in a case like this his act must have been a proximate cause of the death. *S. v. Satterfield,* 198 N. C., 682. In reference to the defendant's intoxication his Honor stated as a condition precedent to conviction that the violation of the law in this respect must have caused the wreck and the death of DeHart; and in reference to reckless driving that the violation of the law must have been the direct cause of the wreck and the death. In addition to this, the record, as previously said, contains the admission that "the death of Ray DeHart was caused by the wreck of the defendant's car." The remaining assignments relate to statements of the contentions or to matters which are formal. We find

No error.

C. B. MOORE v. CITY OF CHARLOTTE.

(Filed 25 January, 1933.)

Limitation of Actions A c—Action against city for value of sewer system appropriated by city is barred within two years.

Under the provisions of Michie's N. C. Code of 1931, 442, an action against a city to recover the value of a sewer system installed by the plaintiff and taken over by the city upon extension of its limits is barred after the lapse of two years from the accrual of the cause of action, and the bar is not affected by the payment by the city for certain pipe taken up and salvaged by the city when no claim therefor had been filed by plaintiff as the statute requires.

APPEAL by plaintiff from *Grady, J.,* at January Special Term, 1932, of MECKLENBURG. Affirmed.

This is an action brought by plaintiff against defendant to recover $3,700. The allegations in the complaint are: (1) That the defendant promised to pay the plaintiff for the property put in the development when the territory was taken into the city limits. (2) That the defendant wrongfully appropriates and uses the plaintiff's water mains and sewers. (3) That the city of Charlotte has appropriated private property for a necessary public use, without paying for the same and without condemnation.

In the case on appeal to this Court the facts were agreed upon. It is stated in the agreed facts: "The only question arising in this case, and presented to the Supreme Court, upon appeal, is whether or not

the plaintiff's cause of action is barred by the statutes of limitation." We think the only agreed facts necessary to be considered for a decision of this cause is as follows: "The corporate limits of the city of Charlotte were extended on 1 January, 1928, pursuant to an act of the General Assembly, so as to embrace and include all of said development, including the water and sewer systems above referred to. All of said water and sewer lines laid in the streets as indicated on the plat hereinbefore referred to. The plaintiff, C. B. Moore, testified that when said water and sewer systems were installed within said development, that there was a verbal agreement between himself and W. Edward Vest, superintendent of water system of city of Charlotte, that whenever the corporate limits of the city of Charlotte were extended so as to embrace and include said systems, that said city would pay to the plaintiff the value of said two systems. He further testified that when the corporate limits were extended on 1 January, 1928, he went to Mr. Vest and demanded that they pay him for said water and sewer systems, in accordance with said oral contract, which demand was refused by the said Vest. He testified that said demand was not in writing; and that he also appeared before the board of aldermen of the city and it refused payment, and he told them that he expected them to pay for the sewer and water lines; that sometime during the year 1928 Mr. Vest told him they were not going to pay anybody until the Abbott suit and other suits were decided; that if the Abbott suit went against the city then they would pay the plaintiff and others who were in similar positions. That after the Abbott suit was decided sometime during 1930, he again went to Vest and the commissioners, and was told by them that they had decided not to pay anybody. It was admitted that this action was started on 22 August, 1930. The plaintiff did not give any written notice of his claim to any of the authorities of the city of Charlotte. The plaintiff further testified that about a year and a half after 1 January, 1928, sometime in the spring of 1930, the defendant paid him $128.00, for pipe which had been laid within said development, and which was taken up and salvaged by the city of Charlotte; he testified that this was water pipe which the defendant took up and replaced with other pipe."

The agreed statement further shows: "The court being of the opinion that the plaintiff's cause of action was barred by the statute of limitations, and pleaded in the answer, a judgment of nonsuit was entered, to which the plaintiff objected and excepted, and appealed to the Supreme Court. This is the sole exception relied upon by the plaintiff, and is embraced within the following assignment of error: 'That his Honor erred upon the closing of the defendant's evidence in dismissing the case and signing the judgment of nonsuit, as appears in the record.' "

J. F. Newell and Geo. W. Wilson for plaintiff.
Bridges & Orr for defendant.

CLARKSON, J. Where the defendant properly pleads a statute of limitations the burden is on the plaintiff to show that the action was brought within the time limit fixed by the statute pleaded, or in other words it is not barred by the statute that is pleaded. *Tillery v. Lumber Co.*, 172 N. C., 296; *Marks v. McLeod*, 203 N. C., at p. 258-9.

Plaintiff contends: "The only question arising in this case, and presented to the Supreme Court upon appeal, is whether or not the plaintiff's cause of action is barred by the statute of limitations." We think it is.

The extension of the city limits was 1 January, 1928. The commencement of plaintiff's action was 20 August, 1930, a period of 2 years, 7 months and 19 days.

N. C. Code, 1931 (Michie), 442, is as follows: "Within two years—All claims against counties, cities and towns of this State shall be presented to the chairman of the board of county commissioners, or to the chief officers of the cities and towns, within two years after the maturity of such claims, or the holders shall be forever barred from a recovery thereon."

"The obvious purpose of the law is to enable those municipal bodies mentioned in it to ascertain and make a record of its valid outstanding obligations, and to separate them from such as are spurious or tainted with illegality and denounced in the Constitution." *Wharton v. Commissioners*, 82 N. C., 12, 16. "This is a statute of limitation, and such claims against the county should be presented within two years after maturity." *Lanning v. Commissioners*, 106 N. C., 505, 511. *Board of Education v. Greenville*, 132 N. C., 4; *Dockery v. Hamlet*, 162 N. C., 118. The pipe payment is of no avail to plaintiff as plaintiff presented no claim under the statute. *Abbott Realty Co. v. Charlotte*, 198 N. C., 564, and *Stephens Co. v. Charlotte*, 201 N. C., 258, are distinguishable from this action.

As to *tort actions* "no action for damages against said city of any character whatever to either person or property," etc. Chap. 251, sec. 15, Private Laws of 1911. The time limit in the above act is six months in which to give notice "date and place of happening or infliction of such injury," etc. The above cited law, *supra*, relates to the city of Charlotte, N. C. *Woods v. Durham*, 200 N. C., 608.

Again defendant contends: "All rights and privileges exercised by defendant over plaintiff's property are granted in a written contract between plaintiff and defendant." It is not necessary to consider this defense of the city as to this aspect.

From the record it appears that plaintiff "has slept" on what rights, if any, he had. The defendant was not bound to do so, but pleads the statute, *supra,* which we think available in this action. The judgment of the court below is

Affirmed.

STATE v. FORREST FLEMING.

(Filed 25 January, 1933.)

1. Appeal and Error F a—In this case held: appellee preserved his right to review on theory of trial in lower court.

While a case will be heard on appeal on the theory of trial in the lower court, yet where on appeal from a judgment of a justice of the peace the appellee correctly selects the ground upon which the judgment should be affirmed, and the Superior Court affirms the judgment on a different and insufficient ground, the judgment of the Superior Court, being correct in result, will be affirmed on further appeal.

2. Bastards D a—

Bastardy proceeding is civil proceeding, and appeals from justice's court are controlled by rules applicable to civil cases.

3. Justices of the Peace E a—Appeal from justice of the peace must be taken to next succeeding term of Superior Court.

It is required by statute that appeals from a judgment of the justice of the peace be taken to the next succeeding term of the Superior Court, with the right of appellant to ask for a *recordari* in proper cases, and where an appeal is not taken as prescribed, the appellee may ask that the appeal be docketed and dismissed and the judgment affirmed. C. S., 660.

THIS is a proceeding in bastardy, in which the complainant, Leila Avery, appealed from a judgment of *McElroy, J.,* at March Term, 1932, of BURKE. Affirmed.

On 28 September, 1931, upon oath of the complainant accusing the defendant of being the father of her illegitimate children (twins) a warrant was issued and the defendant was brought before a justice of the peace to answer the charge. He thereupon entered a formal denial.

After hearing the evidence the justice "renderd judgment finding and adjudging that the defendant is the father of said children and fixed an allowance for the complainant, Leila Avery, in the sum of sixty dollars to be paid by the defendant in twelve monthly installments of five dollars, commencing on 15 February, 1932, and continuing to be paid on the 15th day of each month until said allowance of sixty dollars was fully paid."

From this judgment the complainant appealed to the Superior Court upon the ground that the allowance to the plaintiff was inadequate and no bond was required to save the county harmless.

The Superior Court rendered the following judgment: "It appearing to the court that said appeal was docketed in the Superior Court of Burke County on 17 March, 1932, upon motion of the plaintiff, and at said time the defendant also moved to docket said appeal and to affirm the judgment of the magistrate therein, and the court being of the opinion that no appeal lies from the order of the justice fixing the quantum of said allowance and no appeal lies from the failure of the justice to require bond to be filed as provided by statute: It is therefore ordered by the court that said judgment of the justice of the peace be affirmed."

The complainant excepted and appealed.

Avery & Riddle for appellant.

S. J. Ervin and S. J. Ervin, Jr., for appellee.

ADAMS, J. The magistrate rendered his judgment in the cause on 15 January, 1932, and the complainant gave notice of appeal in open court. The return to the notice of appeal was made on 15 March, two months after the judgment had been given, and the case was docketed in the Superior Court on 17 March. Meantime a one-week term of the Superior Court, beginning on 22 February, had been held for the trial of civil and criminal cases, and another term had convened on 14 March. C. S., 1443, Sixteenth District.

During the latter term the case was called and the appellant moved that she be permitted to docket her appeal, the defendant having moved that the appeal be docketed and the judgment of the magistrate be affirmed, as provided by section 660 of the Consolidated Statutes. The court affirmed the justice's judgment on the ground that no appeal lies from an order determining the amount of the allowance or from the failure of the justice to require a bond of the defendant.

The appellant contends that this ruling is the only point to be considered because the appeal presents no other theory. It is true that after a party has elected to try his case on one theory he may not be permitted to change his attitude with respect to it when his appeal is heard. *Starr v. O'Quinn,* 180 N. C., 94; *Walker v. Burt,* 182 N. C., 325. This argument overlooks the defendant's motion to have the case docketed and the judgment affirmed on the principle that the complainant had lost her right of appeal. If the court reached a correct conclusion, but for an insufficient reason, the judgment should nevertheless be affirmed.

For a period of about ten years this Court held, reversing its former ruling, that a proceeding in bastardy was in the nature of a criminal prosecution, but afterwards returned to its original construction holding that the prosecution is a civil proceeding to enforce a police regulation. *S. v. Edwards,* 110 N. C., 511; *S. v. Liles,* 134 N. C., 735; *S. v. Addington,* 143 N. C., 683; *S. v. McDonald,* 152 N. C., 802.

Either the woman or the defendant may appeal to the Superior Court, but the appeal must be taken to the next term. The Superior Court has no right to dispense with this requirement. *Helsabeck v. Grubbs,* 171 N. C., 337. The "next term" means any term, civil or criminal, which begins after the expiration of the ten days allowed for serving the notice of appeal. *Barnes v. Saleeby,* 177 N. C., 256; *MacKenzie v. Development Co.,* 151 N. C., 276; *Johnson v. Andrews,* 132 N. C., 376; *Pants Co. v. Smith,* 125 N. C., 588. An attempted docketing at a subsequent term is a nullity. *MacKenzie v. Development Co., supra.* If the magistrate fails to perform his duty in sending up the appeal, or if the judge is unable to attend the court, the appellant, if in no default, may apply for a *recordari* at the term first convening after the appeal is taken and thereby preserve his rights. *Peltz v. Bailey,* 157 N. C., 166; *Barnes v. Saleeby, supra.*

In the present case more than thirty days passed between the rendition of the judgment and the convening of the Superior Court, and according to all the decisions of this Court on the subject the defendant was entitled to have the judgment affirmed. This is the effect of the judgment. We need not decide whether the reason given is invalid, as the appellant contends. Judgment

Affirmed.

JOHN A. WEAVER ET AL. v. J. W. HAMPTON ET AL.

(Filed 25 January, 1933.)

1. Judgments B b—Clerk has jurisdiction to sign consent judgment in cause pending before referee.

The clerk of the Superior Court has jurisdiction to sign a consent judgment in an action even while the action is pending before a referee. C. S., 593.

2. Reference A c—Order of reference does not destroy jurisdiction of court.

An order of reference does not take the case from the jurisdiction of the court, the referee being merely an instrumentality of the court, and

the court has jurisdiction to hear and determine all proper motions in the cause pending the reference which are not in conflict with the order of reference, including the signing of a consent judgment by the parties.

3. Judgments B a: Counties C a—County commissioners have authority to assent to consent judgment in proper instances.

Under the statutory authority of the county commissioners to make such contracts as may be necessary to the exercise of its proper powers, C. S., 1291, the commissioners have the authority to assent to the entry of a consent judgment in an action pending against the county, when such judgment is entered in good faith and is free from fraud, etc., a consent judgment being a contract of the parties spread upon the records with the approval and sanction of a court of competent jurisdiction.

CIVIL ACTION, before *Harris, J.*, at Special July Term, 1932, of ASHE.

This case was considered on a former appeal reported in 201 N. C., at page 798, where the facts are set forth in detail. An examination of the facts discloses that this action was instituted to set aside the consent judgment rendered in the cause. Upon the former appeal it was adjudicated that plaintiff had stated a cause of action, and thereafter the cause was tried upon the following issue: "Was the consent judgment rendered by the clerk of the Superior Court, dated 3 December, 1930, procured by fraud and collusion of the defendant, J. W. Hampton, and the board of commissioners of Ashe County, as alleged?" The jury answered the issue "No," and from judgment upon the verdict the plaintiffs appealed.

R. H. McNeill, Washington, D. C., Bauguess & Prevette, Jefferson, N. C., and Lovill & Zimmerman, Boone, N. C., for plaintiffs.

R. A. Doughton, T. C. Bowie and Ira T. Johnston for defendants.

BROGDEN, J. The two primary questions of law presented by the record are:

1. Has the clerk of the Superior Court the power to sign a consent judgment in a cause duly instituted in the Superior Court, and at the time of such signing, pending before a referee appointed in an order of compulsory reference?

2. Does the board of county commissioners have the power to compromise a pending suit against the county, or to assent to the entry of a consent judgment terminating litigation against the county?

The evidence in the case is conflicting. Nevertheless, it discloses that a serious controversy existed between the parties. There was evidence that the referee had stated that it seemed desirable that the parties should compose their differences if possible. The jury has found that the

consent judgment entered by the clerk was not tainted by fraud or collusion, and consequently the power of the clerk to sign the judgment immediately assumes paramount importance.

C. S., 593, expressly authorizes the clerks of Superior Courts to enter consent judgments at any time, and such judgments so entered become the judgments of the Superior Court. *Caldwell v. Caldwell,* 189 N. C., 805, 128 S. E., 329. This power is neither paralyzed nor destroyed by the fact that the cause is pending before a referee. A referee does not remove the cause of action from the Superior Court. It merely removes the procedure or method of determining the facts and the law of the case. This idea was first expressed in *McNeill v. Lawton,* 97 N. C., 16, 1 S. E., 493. The Court said: "The view suggested by counsel, that the consent reference in an action, as allowed by the statute, places the action pending the reference, or at all, beyond the control of the court, is unfounded. The action is not referred—it continues pending in court, and all proper motions may be made in it, not inconsistent with the reference and course of procedure therein, as prescribed by the same statute. . . . The reference is for the trial of issues of fact or law, or both, accordingly as its terms may provide. The jurisdiction is that of the court, not that of the referee; he, by the written consent of the parties, becomes a mere adjunct of, and acts in the place of the court, or of the court and jury, in respect to the trial. What he does is ancillary to the authority of the court in the action." Of like tenor, is the declaration in *Jones v. Beaman,* 117 N. C., 259, 23 S. E., 248, as follows: "The court does not refer the action but retains it, pending the reference, with its power to make any necessary and proper order desired by the parties." Therefore, it is concluded that the entry of the consent judgment was fully authorized by law.

The delegated powers of a county are usually exercised by the board of county commissioners. C. S., 1291, expressly authorizes a county "to make such contracts . . . as may be necessary to the exercise of its powers." A consent judgment "is the contract of the parties spread upon the records with the approval and sanction of a court of competent jurisdiction," etc. *Weaver v. Hampton,* 201 N. C., 798. While it has been held that county commissioners have no authority to release the sureties on the bond of a sheriff, it does not follow therefrom that a board of county commissioners has no power to settle a law suit pending against the county where such settlement is made in good faith and free of fraud, collusion or other vitiating element. Indeed, to withdraw such power from the governing board might frequently leave a county tied to a stake and exposed to the bruising lash of indefensible litigation. The Circuit Court of Appeals for the Fourth Circuit in *Board of Commis-*

sioners v. Tollman, 145 Fed., 753, recognized and sanctioned the right of county commissioners to compromise law suits. The Court said: "Again, the power to sue and to defend suits carries with it, by necessary implication, the power to make bona fide compromise adjustments of such suits." It has been generally recognized as a sound principle of law that counties are empowered to arbitrate controversies arising in the exercise of corporate powers. The authorities are assembled in *West v. Coos County,* 237 Pac., 961, 40 A. L. R., 1362, and annotation.

No error.

M. B. REEVES ON BEHALF OF HIMSELF AND ALL OTHER TAXPAYERS OF THE COUNTY OF BUNCOMBE v. BUNCOMBE COUNTY, CLAUDE L. FELMET, A. L. McLEAN AND H. SOLON HYDER, COMPRISING THE BOARD OF COUNTY COMMISSIONERS OF BUNCOMBE COUNTY ET AL.

(Filed 25 January, 1933.)

Counties E b—County held authorized to assume township bonds issued for roads taken over by county as part of county system.

A township voted two successive bond issues for the building of highways and bridges in the township. The county levied a tax within the township for the payment of the first bonds, and the income therefrom was more than sufficient to pay same upon maturity, but no sinking fund was created therefor and the bonds were not paid. The county immediately assumed the second bond issue and levied a county-wide tax for its payment, but same were not paid at maturity. The county took over the roads and bridges of the township as a part of the system of county roads, and later the same was taken over by the State Highway Commission: *Held,* under the provisions of chapter 186, Public-Local Laws of 1931, the county had the authority to assume both bond issues, and to make provision for their payment by the levy of a county-wide tax, for although one political subdivision may not be taxed for the exclusive benefit of another, the bonds in this case were issued for a county-wide obligation.

CIVIL ACTION, before *Clement, J.,* at November Term, 1932, of BUNCOMBE.

The cause was presented to the trial judge upon an agreed statement of facts, which is substantially as follows: Prior to 1 September, 1908, pursuant to the authority of chapter 770 of Public Laws of North Carolina for 1907, an election was held in Black Mountain Township, and the result of the election authorized the issuance of $40,000 in road and bridge bonds for said township. Thereafter, on 1 September, 1908, $25,000 of six per cent bonds were issued. The county of Buncombe

regularly made a levy upon the taxable property of Black Mountain Township from the year 1908 to the year 1930, inclusive, for the purpose of paying off the original bond issue of $25,000, but neglected and failed to create any sinking fund to retire said bonds and used the proceeds arising from the tax levy for general county purposes, failing to apply the same upon the payment of bonds, and the amount so levied, collected and applied by Buncombe County from Black Mountain Township is in excess of $25,000 in bonds and the interest thereon and said bonds are all now outstanding and unpaid.

Upon the bond issue of $15,000 on 1 May, 1911, the said indebtedness was immediately assumed by Buncombe County as a county-wide obligation, and from year to year sufficient levy was made upon the county-wide property to pay the interest upon the same until they became due in the year 1931, when the county of Buncombe levied a sufficient tax to pay the remainder of interest and all of the principal of said bonds when they became due on 1 May, 1931, but defaulted in all payments on 1 April preceding, and said bonds have not yet been paid. All the money received by Black Mountain Township from the proceeds of both bond issues aforesaid "was spent upon roads and bridges in Black Mountain Township, which said roads and bridges were later taken over by the county of Buncombe as a part of the highway system of said county and later taken over by the State Highway Commission, and are now under the control of same."

Chapter 186 of Public-Local Laws of 1931 authorizes the county of Buncombe to assume the bond issues referred to as county-wide obligations and directed "the county commissioners to levy a tax on the general property of the county for the payment of same, together with the interest."

The plaintiff is not a resident of Black Mountain Township and brought a suit in behalf of himself and other taxpayers of Buncombe County not residents of Black Mountain Township to permanently restrain the county and the board of commissioners "from levying or attempting to levy a county-wide tax upon the property of this plaintiff or upon the property of any other resident and citizen of Buncombe County for the purpose of paying or assisting in paying the principal of bonds of Black Mountain Township," etc.

After considering the contentions of the parties the trial judge decreed: "That the two bond issues of Black Mountain Township, to wit, $25,000 issued 1 September, 1908, and $15,000 issued 1 May, 1911, are and ought to be county-wide obligations of the county of Buncombe and the county commissioners of Buncombe County should, and are hereby directed to levy a sufficient county-wide tax, at the appropriate

times, to pay the interest and principal of the same . . . and that the application for a permanent injunction sought to be obtained in this action be, and the same is hereby denied.

From judgment so rendered the plaintiffs appealed."

Johnston & Horner for plaintiff.
Geo. H. Wright and Clinton K. Hughes for defendant.

BROGDEN, J. Do the two bond issues aggregating $40,000 constitute a county-wide obligation of Buncombe County?

The bonds were issued by virtue of power created by special election in Black Mountain Township. The law forbids the levying of a tax upon the property of one political subdivision for the particular and exclusive benefit of another such subdivision. This proposition was discussed in *Commissioners v. Lacy,* 174 N. C., 141, 93 S. E., 482, and the court promulgated the principle and the limitations thereof as follows: "It is true, also, that a state or county may, as a rule, lend its aid or expend its money in the building and maintenance of public roads anywhere within its borders when it is being done for the public benefit or as a part of a State or county system, but in this instance the improvement is entirely localized. The roads of the differing townships or districts are set apart and a scheme is entered upon by which they can be planned, constructed, and improved entirely under township governance and without reference either to State or county benefit; and when this occurs, the principle is presented that it is not within the legislative power to tax one community or local taxing district for the exclusive benefit of another—a principle which has been directly approved in several recent decisions of this Court and is one very generally accepted." *Ellis v. Greene,* 191 N. C., 761, 133 S. E., 395.

The record discloses that the proceeds of both bond issues were spent upon roads and bridges in Black Mountain Township, "which said roads and bridges were later taken over by the county of Buncombe as a part of the highway system of said county, and later taken over by the State Highway Commission, and are now under the control of same." Manifestly the facts so established, disclose that the project was not one of local or township benefit, supervision and control, but such expenditure was made "for the public benefit or a part of the state or county system." Hence the law impresses upon the bond issues the character and quality of a county-wide obligation.

Affirmed.

IN RE P. T. STIERS.

(Filed 25 January, 1933.)

1. Appeal and Error A f—

The State cannot appeal in either civil or criminal cases except upon statutory authority.

2. Attorney and Client E b—

C. S., 205, is complete in itself and, as amended, does not give the State authority to appeal in disbarment proceedings.

3. Attorney and Client E c—Plea of nolo contendere held not confession of crime sufficient to sustain disbarment.

A plea of *nolo contendere* does not amount to a "conviction or confession in open court" sufficient to disbar an attorney under the provisions of C. S., 205, a disbarment proceeding being civil in its nature; and especially is this true where the attorney appears in the disbarment proceeding and denies his guilt and contends that his fault, if any, rested upon a technical violation of a statute.

DISBARMENT proceeding, heard by *Stack, J.*, at September Term, 1932, of ROCKINGHAM.

P. T. Stiers was appointed guardian of one Charles Ring in February, 1922, and received, as such guardian, in monthly installments of $28.25 each, the sum of $5,000 proceeds of government insurance. The guardian contended that he loaned a portion of this money upon real estate security, resulting in a total loss, and that the balance of the fund was invested in a building upon land owned by the guardian and his wife. The guardian further contended that a suit was brought in Guilford County and referred to a referee and a final judgment rendered against him, which said judgment was satisfied in full. Thereafter he was indicted in the District Court of the United States for the Middle District of North Carolina. The bill of indictment contained ten counts alleging that the guardian had received various items of proceeds of War Risk Insurance paid by the government to him, and that he had embezzled the same.

The record discloses that on 13 June, 1932, the case was called for trial in the District Court for the United States, and that the defendant entered a plea of *nolo contendere*. Whereupon, it was adjudged that he pay a fine of $500, and in addition, he was placed on probation for three years in the custody of the probation officer for said district, and he was also "suspended from the practice of law in this Court during the probation period."

After due notice C. W. Higgins, the solicitor, presented to the trial judge "in open court a certified copy of the bill of indictment, judgment

and docket entries, under seal of the United States District Court for the Middle District of North Carolina." After hearing the argument of counsel and considering the records and proceedings in the Federal Court, the following judgment was entered: "Upon the foregoing record the court is of the opinion that the plea of *nolo contendere* does not amount to a confession of a felony and therefore dismisses this proceeding."

From the foregoing judgment the State appealed.

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

P. W. Glidewell for respondent, Stiers.

BROGDEN, J. The record presents two questions of law:

1. Did the State have a right to appeal from the judgment rendered?

2. Does a plea of *nolo contendere* constitute a "conviction or a confession in open court, State or Federal?"

The law recognizes and prescribes two methods for disbarring an attorney. *Committee on Grievances of Bar Association v. Strickland*, 200 N. C., 630, 158 S. E., 110. Such proceedings are in the nature of civil actions. *In re Ebbs*, 150 N. C., 44, 63 S. E., 190. The statutory method of disbarment is prescribed by C. S., 208 to 215 inclusive. However, the proceeding in the present case, was fashioned and presented in accordance with C. S., 205. C. S., 205 was finally enacted as chapter 64, Public Laws of 1929. Section 205, existing prior to 1929, was expressly repealed by said chapter 64, and a new section 205 enacted as a complete unit of legislation. The second section of said chapter 64 expressly repealed all laws and clauses of law in conflict therewith and provided that the act should be in force from and after its ratification.

It is an elementary proposition of law that the State cannot appeal either in civil or criminal actions unless such right is given by the law-making power of the State. It is apprehended that the reason for such a policy is built upon the idea that when the State in its sovereign capacity brings a citizen into its own tribunals, before its own officers, and in obedience to its own processes, and loses, that its avenging hand should be stayed except in unusual cases where the power to appeal is expressly conferred. The right of appeal is given the State in C. S., 215, but C. S., 215 is a part of chapter 941 of the Public Laws of 1907, which committed disbarment proceedings, for causes therein specified, to the initiative of the grievance committee of the North Carolina State Bar Association. Chapter 64 of the Public Laws of 1929, in accordance with which the present proceeding was conducted, is a complete act in

itself and confers no right or power of appeal upon the State. Consequently, the trial judge was warranted in dismissing the proceeding.

Furthermore, the trial judge was warranted in dismissing the proceeding upon the ground stated in the judgment, that is to say, that a plea of *nolo contendere* does not amount to a "conviction or confession in open court" of a felony. This Court, considering the nature and quality of such a plea in *S. v. Burnett,* 174 N. C., 796, 93 S. E., 473, said: "A plea of *nolo contendere,* which is still allowed in some courts, is regarded by some writers as a *quasi*-confession of guilt. Whether that be true or not, it is equivalent to a plea of guilty in so far as it gives the court the power to punish. It seems to be universally held that when the plea is accepted by the court, sentence is imposed upon a plea of guilty. The only advantage in a plea of *nolo contendere* gained by the defendant is that it gives him the advantage of not being estopped to deny his guilt in civil action based upon the same facts. Upon a plea of guilty entered of record, the defendant would be estopped to deny his guilt if sued in a civil proceeding."

Consequently, as a disbarment proceeding is of a civil nature, the mere introduction of a certified copy of an indictment, and judgment thereon, based upon a plea of *nolo contendere,* is not sufficient to deprive an attorney of his license; certainly, when he is present in court, denying his guilt and strenuously contending that his fault, if any, rested upon a technical violation of a statute.

Affirmed.

CITIZENS SAVING AND LOAN COMPANY v. GEORGIA C. WARREN.

(Filed 25 January, 1933.)

1. Estoppel B a—Record agreement not to plead statute of limitations held not to apply to second suit instituted after nonsuit.

A verdict in plaintiff's favor was set aside by consent of the parties upon condition that the defendant would withdraw his plea of the statute of limitations. Upon the second trial a nonsuit was entered. Within a year the present suit was instituted under the provisions of C. S., 415, and the defendant set up the plea of the statute of limitations: *Held,* the agreement not to plead the statute of limitations does not apply to the present suit, the bringing of a suit after nonsuit constituting a different action though the causes of action are the same, and an order striking out the plea of the statute of limitations is error.

2. Appeal and Error A d—

An order striking out defendant's plea of the statute of limitations affects a substantial right and is appealable.

LOAN CO. *v.* WARREN.

APPEAL by defendant from *Finley, J.*, at July Term, 1932, of MECKLENBURG.

Civil action to recover premiums alleged to be due on a number of fire insurance policies.

The appeal arises on plaintiff's motion to strike out defendant's plea of the statute of limitations.

The facts are these:

Suits were instituted against defendant and her husband which were consolidated for trial at May Term, 1931, resulted in verdict for plaintiff, and the following judgment entered:

"By consent of all parties—counsel for the plaintiff and defendants—the verdict is set aside and a new trial ordered, conditioned upon defendants agreeing to withdraw their plea of three-year statute of limitations set up in their answers."

Thereafter, the cases were again tried—the pleas of the statute of limitations having been withdrawn—and a judgment of nonsuit entered at the close of plaintiff's evidence as to the *feme* defendant.

Within a year after such nonsuit, the present action was instituted as permitted by C. S., 415. The defendant again pleaded, in bar of the plaintiff's right to recover, the three-year statute of limitations.

Motion by plaintiff to strike out defendant's plea of the statute of limitations, because in breach of the condition upon which the verdict rendered at the May Term, 1931, was set aside; motion allowed, and defendant appeals.

A. B. Justice for plaintiff.

H. C. Jones and Brock Barkley for defendant.

STACY, C. J., after stating the case: The correctness of the ruling, from which defendant appeals, depends on whether the present proceeding is a new action or a continuation of the old one; for, if it be the same suit, the condition upon which the verdict was set aside at the May Term, 1931, still binds; otherwise not.

In those cases where the plaintiff seeks to use the original action to repel the bar of the statute, expressions may be found tending to support the theory of a *quasi*-continuous action. *Anonymous,* 3 N. C., 63. "In legal contemplation both make but one"—*Ruffin, J.,* in *Morrison v. Connelly,* 13 N. C., 233. "A nonsuit 'is but like the blowing out of a candle, which a man at his own pleasure may light again' "—*Walker, J.,* in *Grimes v. Andrews,* 170 N. C., 515, 87 S. E., 341.

But the statute denominates the first proceeding the "original action," and the second a "new action." C. S., 415; *Cooper v. Crisco,* 201 N. C.,

739, 161 S. E., 310. Indeed, in certain instances, the costs in the "original action" must be paid, thus removing it from the docket, before commencing the "new suit." *Rankin v. Oates,* 183 N. C., 517, 112 S. E., 32.

Undoubtedly, the actions are different, while the causes of action are the same. *Cooper v. Crisco, supra.* "The same candle blown out and lighted again." *Motsinger v. Hauser,* 195 N. C., 483, 142 S. E., 589. It is upon the theory of two actions to enforce the same cause of action that the principle of *res judicata* is founded. *Hampton v. Spinning Co.,* 198 N. C., 235, 151 S. E., 266. The statute authorizes the commencement of a "new action" to enforce the same cause of action which was set up in the "original action." *Woodcock v. Bostic,* 128 N. C., 243, 38 S. E., 881. A fresh action, after nonsuit, for the same cause. *Bradshaw v. Bank,* 172 N. C., 632, 90 S. E., 789. Identity of causes in both actions is essential to the applicability of the statute. *Quelch v. Futch,* 174 N. C., 395, 93 S. E., 899.

The order striking out the defendant's plea of the statute of limitations affects a substantial right, and is therefore appealable. *Ellis v. Ellis,* 198 N. C., 767, 153 S. E., 449; *Hosiery Mill v. Hosiery Mills,* 198 N. C., 596, 152 S. E., 794.

Error.

STATE v. COSTA J. MANON.

(Filed 25 January, 1933.)

1. Husband and Wife A c—Resumption of marital relation does not bar State's right to prosecute husband for abandonment.

Abandonment of the wife by the husband is a statutory offense, and it is not condoned, so far as the State's right to prosecute is concerned, by a subsequent resumption of the marital relation. C. S., 4447.

2. Husband and Wife A d: Criminal Law D a—Abandonment of wife held to have taken place in this State and our court had jurisdiction.

Where the husband abandons his wife in this State and thereafter goes to Reno for the purpose of securing a divorce, and the wife follows him there for the purpose of contesting the suit, and the parties there resume the marital relation, and thereafter the husband returns to this State and later the wife also returns here, and the marital relation is not resumed here and he refuses to contribute to her support: *Held,* the resumption of the marital relation in Reno does not affect the State's right to prosecute for the prior abandonment in this State, and our State courts have jurisdiction of the prosecution for such abandonment.

3. Judgments K b—Judgment held not conditional, but order for capias to issue on motion of solicitor was void.

Judgment in this prosecution for abandonment of wife held not conditional, C. S., 4449, but order that *capias* issue at any time on motion of solicitor is void and not a part of judgment, and *capias* may issue only upon order of the court.

APPEAL by defendant from *Sink, J.*, at May Term, 1932, of BUNCOMBE. No error.

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

W. A. Sullivan and R. R. Williams for defendant.

ADAMS, J. The defendant was convicted of the abandonment and nonsupport of his wife, in breach of C. S., 4447, and from the judgment pronounced he appealed to the Supreme Court. He assigned as error the court's refusal to dismiss the action, to direct a verdict against the State, and to instruct the jury that if they should find from the evidence that the abandonment took place in Reno, Nevada, and not in North Carolina, their verdict should be not guilty.

These assignments are based upon the assumption either that the evidence necessarily shows or that there is evidence tending to show that the act of abandonment was committed in another State. True, the courts of this State have no jurisdiction of extra-territorial crimes, *S. v. Buchanan,* 130 N. C., 660, but in view of the facts disclosed we cannot agree with the defendant as to either assumption. The evidence is that the crime of abandonment and nonsupport was consummated in Buncombe County. The defendant went to Reno; his wife followed him there intending to contest his suit for divorce; while there they lived together a part of the time, and he gave her five dollars. After instituting his action for divorce he came back to Asheville. Soon afterwards his wife returned, but she has not lived with him since that time, and he has refused to contribute anything for her support.

The conduct of the parties in Reno does not bar the State's prosecution of the crime. Abandonment of the wife by the husband was not a criminal offense at common law; it is a statutory misdemeanor. No common-law implications attach to the offense, and it is not condoned by the renewal of the marital relation.

Condonation in law is the conditional forgiveness by a husband or wife of a breach of marital duty by the other, whereby the forgiving party is precluded, so long as the condition is observed, from claiming redress for the breach so condoned. Its basis is the agreement of the parties to a civil action, not the consent of the State, and the condition

is, that the original offense is forgiven if the delinquent will abstain from the commission of a like offense afterwards and treat the forgiving party with conjugal kindness. Bishop on Marriage and Divorce, sec. 53; *Gordon v. Gordon,* 88 N. C., 45; *Lassiter v. Lassiter,* 92 N. C., 129; *Page v. Page,* 167 N. C., 346; *Jones v. Jones,* 173 N. C., 279. If the condition is violated the original offense is revived, *Blakely v. Blakely,* 186 N. C., 351; but as any asserted condonation between the parties does not affect the right of the State to prosecute the defendant, we need not decide whether his failure to support his wife after their return to Asheville revived the original offense. The statute of limitations is not involved.

The judgment is not conditional, as contended by the defendant, C. S., 4449, *S. v. Vickers,* 196 N. C., 239; but the order that a capias issue at any time on motion of the solicitor is ineffective. *S. v. McAfee,* 189 N. C., 320. If the judge had no authority to direct the solicitor to have the capias issued, the order is not part of the judgment; it is void. *S. v. Vickers,* 184 N. C., 676, 680. The process may issue upon an order of the court. We find

No error.

STATE OF NORTH CAROLINA EX REL. THE NORTH CAROLINA BANK AND TRUST COMPANY, GUARDIAN FOR KINNIS BLAKENEY AND JAMES BLAKENEY, v. L. L. PARKER, GUARDIAN, ET AL.

(Filed 25 January, 1933.)

Guardian and Ward B a—Court originally appointing guardian has jurisdiction to appoint his successor.

The court originally appointing a guardian ordinarily has jurisdiction to appoint his successor though the residence of the ward may have been changed in the meantime, and this is especially true where suit against the original guardian is necessary to obtain a settlement.

APPEAL by defendants from *Oglesby, J.,* at October Term, 1932, of UNION.

Civil action for settlement and to recover on guardian bond.

The essential facts are these:

1. On 8 May, 1924, L. L. Parker was duly appointed guardian of the estates of James Blakeney and Kinnis Blakeney, minors six and eight years of age respectively who were at that time residing with their mother in Union County.

2. The Fidelity and Deposit Company of Maryland became surety on the bonds of said guardian.

3. In November, 1930, the said minors, with their mother, moved across the line into Chesterfield County, S. C., where they have since lived.

4. In the fall of 1931, the said L. L. Parker resigned his guardianship of the estates of said minors, after being ordered to file his accounts, and the clerk of the Superior Court of Union County appointed the North Carolina Bank and Trust Company guardian in his stead.

This suit is to recover on the bonds of the first guardian, the amount being agreed upon, if the second appointment be valid.

From a judgment for plaintiff, the defendants appeal, assigning error.

John C. Sikes for plaintiff.

Vann & Milliken for defendant, L. L. Parker.

Tillett, Tillett & Kennedy for defendant, Fidelity and Deposit Co.

STACY, C. J. The rule, generally accordant with the decisions, is that, jurisdiction to appoint a successor to a guardian ordinarily resides with the court making the original appointment, though the residence of the ward may have been changed in the meantime. 28 C. J., 1109. Especially is this so, where, as here, suit against the original guardian and his surety is necessary to obtain a settlement. 15 A. & E. Enc. of Law, 35 and 120.

Nor are our own decisions contrariwise. *Credle v. Baugham*, 152 N. C., 18, 67 S. E., 46.

Affirmed.

WAKE COUNTY v. SION FAISON.

(Filed 25 January, 1933.)

Taxation H c—Deed tendered at foreclosure sale of tax certificate held defective.

The owner of certain land failed to list same for taxes. The land was listed on the tax books in the name of a person other than the owner and was sold for delinquent taxes and bought in by the county and the tax certificate foreclosed: *Held*, the county could not convey a good title to the purchaser at the foreclosure sale it being necessary that the method for the listing and collection of taxes provided by statute should be followed.

APPEAL by defendant from *Harris, J.*, at Chambers in Raleigh, 14 May, 1932. From WAKE. Error.

This is a controversy without action. The facts are agreed upon. The action is to determine the validity of a foreclosure certificate of sale for tax of certain land. The material part of the facts agreed upon for the decision of this cause are as follows: "That for a number of years prior to and for the year 1926, and since that year there was and is now listed on the tax books of Wake County in the name of Mrs. O. J. Shell estate 40 acres Oaks' Land in St. Matthews Township; that the taxes for the year 1926, have not been paid; that the land was sold by sheriff of Wake County on 3 October, 1927; that Wake County became the last and highest bidder and received from said sheriff a tax sales certificate describing the land as '40 acres Oaks, St. Matthews Township.' That the records in the office of the register of deeds of Wake County disclose that the tract of land sold under this proceeding *shows that the title to the land sold was in one H. H. Powell;* that the said Powell has not listed the property for tax during the past ten years as required by law. That on 14 November, 1931, the commissioner prepared and tendered to the defendant a deed for said premises but said defendant refused to accept same because of the points of difference between the plaintiff and defendant as herein set out being as follows: The plaintiff contends: That the deed tendered by the plaintiff to the defendant covering said premises, dated 14 November, 1931, was a good and sufficient deed to convey the premises in fee, free from the claim of any person whomsoever."

This contention was disputed by defendant. The court below rendered judgment for plaintiff. The defendant excepted and assigned error to the judgment as signed and appealed to the Supreme Court.

John W. Hinsdale for plaintiff.
E. D. Flowers for defendant.

CLARKSON, J. The parties to the controversy have agreed upon the facts. The question for decision: Was the deed good and sufficient to convey the real estate in fee simple, free from the claim of any person whomsoever? We think not. The record discloses "that the title to the land sold was in one H. H. Powell." The fact that he has not listed the property for tax does not give the right to list the land as "Mrs. O. J. Shell estate" and sell same and foreclose the tax certificate and make a fee-simple title to the land, as was attempted to be done in this action.

N. C. Code, 1931 (Michie), 7971(36), in part, is as follows: "(1) *Every person owning property, real or personal,* is required to list," etc. If Powell did not list his property, there is a method provided by law.

N. C. Code, 1931 (Michie), 7971(50). See, also, Public-Local Laws, 1911, chap. 452, sec. 14, applicable to Wake County, North Carolina.

The law is plenary as to the listing and collection of taxes, but the method provided by the General Assembly must be followed. We construe, but cannot make, the law. In the judgment of the court below, there is

Error.

T. A. BAUM v. THE NORTH RIVER INSURANCE COMPANY OF THE CITY OF NEW YORK, INCORPORATED.

(Filed 25 January, 1933.)

1. Insurance P g—Verdict in this case held to support judgment in insured's favor.

In this action to recover on a policy of fire insurance on a boat, contested by the insurer on the ground that gasoline was kept on the boat in violation of the terms of the policy, the verdict of the jury that an auxiliary gasoline engine was necessary to the proper use of the boat is held sufficient to support a judgment in insured's favor, the Supreme Court having decided on a former appeal that a small quantity of gasoline kept on the boat would not avoid the policy if such gasoline was necessary to the proper operation of the boat, and the insurer knew of such necessity.

2. Appeal and Error E b—

Where the charge of the trial court is not in the record it will be presumed on appeal that the court charged the law applicable to the facts.

CONNOR, J., dissents.

APPEAL by defendant from *Moore, Special Judge,* and a jury, at May Term, 1932, of DARE. No error.

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

1. Did the defendant company issue the policy of insurance sued on, as alleged in the complaint? Answer: Yes.

2. Was the ferryboat "Rebecca" destroyed by fire on or about 13 May, 1927, as alleged in the complaint? Answer: Yes.

3. At the time of said fire was gasoline being kept, used or allowed on said ferryboat in violation of the terms and provisions of said policy? Answer: No.

4. Was it necessary to use an auxiliary gasoline engine incidental to the proper use and operation of said boat? Answer: Yes.

5. What amount, if any, is plaintiff entitled to recover of the defendant? Answer: $3,000 with interest from 13 July, 1927.

The defendant made several exceptions and assignments of error, one to the judgment as signed by the court below, and appealed to the Supreme Court.

Ehringhaus & Hall for plaintiff.

McMullan & McMullan and Brooks, Parker, Smith & Wharton for defendant.

CLARKSON, J. This case was before this Court on a former appeal, 201 N. C., 445. In that case at p. 448 it was said, citing authorities: "In Cyc. of Insurance Law, Vol. 4 (Couch), section 966b, p. 3347, the following principle is laid down: 'A condition against the use or keeping of gasoline on the insured premises is not broken by its use to an extent necessary to carry on the business for which the insurer knew that the property insured was used, and where both parties must have known either that the business insured must be discontinued or gasoline used therein.' (Note) 'The keeping upon insured premises of a very small quantity of gasoline for use in an engine used to operate the machinery necessary for the business does not nullify insurance upon the property, although the keeping of gasoline is prohibited by the policy, if premiums were paid and accepted.'"

The able and learned judge who tried this case submitted an issue covering this aspect as follows: "Was it necessary to use an auxiliary gasoline engine incidental to the proper use and operation of said boat?" This issue was answered "Yes." The charge of the court below is not in the record and the presumption of law is that the court below charged the law applicable to the facts. We think the answer "Yes" to this issue sufficient to support the judgment.

No error.

CONNOR, J., dissents.

MADISON COUNTY v. FRANK E. COXE AND WIFE, MRS. FRANK E. COXE, ET AL.

(Filed 25 January, 1933.)

1. Trial H a: Appeal and Error J c—Where parties do not demand jury trial facts found by court are conclusive when supported by evidence.

Where the trial court has found the facts upon a motion to set aside a foreclosure of a tax certificate, and there has been no demand by the parties for a trial by jury, and the appellant has excepted only to the facts so found, he is deemed to have waived his constitutional right to trial by jury, and the facts found by the trial judge are conclusive on appeal when supported by competent evidence.

2. Courts A c—Superior Court held to have jurisdiction on appeal from clerk's order denying motion to set aside tax foreclosure.

Where a tax certificate has been foreclosed in an action instituted by the county in the Superior Court, and thereafter the owner and mortgagee file a petition in the cause to set aside the decree and judgment of confirmation, which motion is denied by the clerk upon a hearing before him and an appeal taken to the Superior Court: *Held*, the case is properly in the Superior Court, C. S., 636, and it has jurisdiction to hear and determine the motion.

3. Taxation C a—Law in force at time determines the validity of the listing of property for taxes.

The question as to whether certain lands were validly listed for taxes for a certain year must be determined by the law in force at the time relating to the listing of property for taxes.

4. Same—It is the nondelegable duty of the chairman of the county commissioners to list property not given in by the owner.

Chapter 71, Public Laws of 1927, must be construed as a whole, and section 73 thereof requires that the chairman of the board of county commissioners shall examine the tax list and insert therein all property not given in, and shall charge the owner with the statutory penalty, and where the county list taker has inserted on the tax list certain property not given in by the owner for that year instead of calling the matter to the attention of the chairman, the listing of the property by the list taker is void, the duty of the chairman of the board of county commissioners in this respect being nondelegable.

5. Taxation H c—Tax foreclosure held properly set aside under the facts of this case.

Where upon petition and motion in the cause by the owners of land and the trustee and *cestui que trust* in a trust deed thereon to set aside a foreclosure of a tax certificate on the land it appears that the owners of the land and the trustee and *cestui que trust* lived in the adjoining county and were not personally served with summons or given notice of the proceedings and that the owners' residence was disclosed by his listing of the property for taxes for the previous year, and that the land was not lawfully listed for taxes for the year for which it was sold, and that the petitioners upon notice of the foreclosure filed their petition and tendered the amount of the taxes: *Held*, the foreclosure proceeding of the tax certificate is in a court of equity, and the trial court's decree setting aside the tax foreclosure will be sustained on appeal, the taxes remaining a lien on the land until they are paid, and the county being under duty to make restitution to the purchasers at the foreclosure sale.

APPEAL by plaintiff from *Sink, J.*, at May Term, 1932, of MADISON. Affirmed.

The record discloses that "It is agreed by all parties, and the court finds as a fact that Frank Coxe and Frank E. Coxe is one and the same person." "Middle names and middle initials are immaterial." *S. v. Hester*, 122 N. C., at p. 1050.

This is a suit brought in the Superior Court of Madison County 8 September, 1930, by Madison County *v.* Frank Coxe and wife, Mrs. Frank Coxe, C. R. Bishop and wife, Pauline Bishop, to foreclose a tax sale certificate for the delinquent taxes of the defendant Frank Coxe, for the year 1928, held by the county of Madison. The records of Madison County showed that Frank Coxe and wife, Julia Lord Coxe, had conveyed the land in controversy on 1 October, 1929, to C. R. and Pauline Bishop. On 18 March, 1930, they reconveyed the land to Frank Coxe. There was no legal necessity to have made the Bishops party defendants.

The court below found the following facts and rendered judgment as follows: "This cause coming on to be heard before his Honor, H. Hoyle Sink, judge holding the regular May Term, 1932, of the Superior Court of Madison County, on an appeal in the above cause from an order of the clerk of the Superior Court, and being heard, and after hearing the evidence and argument of counsel, the court finds the following facts:

"1. That on or about 8 September, 1930, the plaintiff Madison County instituted an action in the Superior Court of Madison County to foreclose a tax certificate in which complaint it is alleged that taxes on the property belonging to the defendant Frank Coxe on 1 May, 1928, amounting to the sum of ninety-eight and 20/100 ($98.20) dollars had not been paid.

"That a copy of the said tax certificate is attached to the plaintiff's complaint in the above cause, and is made a part of this finding of fact.

"3. That summons was issued in the above cause against Frank E. Coxe and wife, Mrs. Frank E. Coxe, C. R. Bishop and wife, Pauline Bishop, on 8 September, 1930, directed to the sheriff of Buncombe County, and received by said sheriff on 8 September, 1930, upon which is the following return: 'Due search made and Frank E. Coxe and Mrs. Frank E. Coxe not found in Buncombe County, and C. R. Bishop and Pauline Bishop not found in Buncombe County. J. J. Bailey, sheriff Buncombe County, by D. M. Snelson, deputy sheriff.'

"4. Upon the return of the summons aforesaid to the clerk of the Superior Court of Madison County, an affidavit for an order of publication was made on 15 September, 1930, by C. J. Wild, chairman of the board of county commissioners, which affidavit is made a part of this finding of fact, and upon which affidavit the said order of publication was made.

"5. That the defendants and petitioners, George M. Pritchard, trustee, and Sallie Potter Coxe, were residents of the city of Asheville, county of Buncombe, and State of North Carolina, at the time said action was

commenced in the Superior Court of Madison County, and were not made parties to said proceeding.

"6. That on ..... March, 1932, Frank Coxe and wife, Julia Lord Coxe, George M. Pritchard, trustee, and Sallie Potter Coxe, filed a petition in the cause, before the clerk of the Superior Court of Madison County, and moved to set aside the interlocutory decree and judgment of confirmation in the above cause and dismiss the action, which matter was duly heard before the clerk of the Superior Court, and petitioners' motion denied, and an appeal was duly taken to this court; that the petitioners herein had no notice of the institution of said action or the entering of said judgments and decrees and orders until some time during the latter part of November or the first of December, 1931.

"7. That on 1 May, 1928, Frank Coxe was the owner of the property described in the complaint in this cause, and said property was not listed for taxes for the year 1928 by the said Frank Coxe, or by his agent duly authorized or with his knowledge, consent or procurement, or by the board of county commissioners, as prescribed by statute, the only listing of said property being as shown by a copy of said list sheet hereto attached and made a part of this finding of fact.

"8. That there was no order or minutes of the board of commissioners authorizing or directing the listing of this property for taxes for the year 1928, the only order appearing of record with respect to the listing of taxes for the year 1928 being as follows: 'List of tax listers and assessors appointed by county commissioners for the various townships and wards of the county, Monday, 2 April, 1928: J. Will Roberts, supervisor. No. 1 Township, Ward 1, Wayne Fisher, Marshall, N. C., Route 3,' and then follows the names of tax listers appointed for the various townships in Madison County.

"9. That the property was duly listed by Frank Coxe through his duly appointed agent, W. B. Ramsey, for the year 1927, at which time the real property of Madison County was reassessed for taxation by the commissioners appointed for that purpose.

"10. That the sale of said property under the interlocutory decree entered in the above cause was made by John A. Hendricks, commissioner, pursuant to the notices appearing in the record, on 5 June, 1931, at twelve o'clock noon, at the courthouse door, and report of said sale duly filed by said commissioner on 5 June, 1931, that S. B. Roberts and Roy L. Gudger became the last and highest bidders therefor in the sum of three hundred sixty-seven and 99/100 ($367.99) dollars. It further appears from the evidence in said cause asking for confirmation of said sale, and that the commissioners be directed to make and deliver a deed for same in which motion it appears that the bid was two hundred sixty

and 44/100 ($260.44) dollars. The court finds as a fact that no further sale of said property was ordered by the court or further advertisement other than appears in the record. The court further finds as a fact that taxes for the years 1929 and 1930 were paid out of the funds received at said commissioners' sale in this proceeding, and after the payment of said taxes and the costs no surplus was left.

"11. That on and prior to 1 May, 1928, Frank Coxe was the owner of two tracts of land in Madison County, described in a deed from Tony Ball and wife, Harriet S. Ball, to Frank Coxe, dated 5 May, 1926, and recorded in the office of the register of deeds for Madison County, North Carolina, in Book 46, p. 546, and that at the time of the purchase of said property from Tony Ball aforesaid, Frank Coxe executed and delivered his certain promissory notes aggregating the sum of twelve thousand seventy-two dollars ($12,072), and to secure the payment of the same, executed and delivered to George M. Pritchard, trustee, a deed of trust, which deed of trust is duly recorded in the office of the register of deeds for Madison County, North Carolina, in Book 27, p. 17, and that Sallie Potter Coxe is now the owner, in due course and for a valuable consideration, of five of said notes in the sum of five hundred three dollars ($503) each, totalling the sum of twenty-five hundred fifteen dollars ($2,515); that said notes are unpaid and are a valid and subsisting lien on the real property described therein.

"12. It is agreed by all parties and the court finds as a fact that Frank Coxe and Frank E. Coxe is one and the same person.

"13. The court further finds as a fact that the orders, judgments and decrees entered in the above cause are void and of no effect and that the sale of said property made by the commissioner and the deed made in pursuance of said sale, is invalid, void and of no effect, and that the title and rights of the defendants in and to said property is not foreclosed by said proceeding.

"14. The court finds as a fact that the property referred to in the pleadings is shown on the face of the tax records, other than the list sheet of Madison County in the same form as other property and except the listing, was regularly set up in and upon said record.

"15. The court finds as a fact that the attorney of record for Sallie Potter Coxe, at the hearing and in open court, offered to pay taxes to Madison County for the years 1928, 1929 and 1930, and which offer was not accepted by said county.

"16. The court finds, and it is agreed, that the lands described in the pleadings was the only land owned by Frank Coxe in Madison County in 1928, and that the same consisted of two adjoining tracts.

"Upon the foregoing finding of facts it is ordered and adjudged by the court that the judgments and decrees entered in the above cause are invalid and void, and of no effect, and that the sale of said property by said commissioners is invalid and void, and the deed of said commissioners to the said S. B. Roberts and Roy L. Gudger is invalid and void and passes no title, to be canceled of record.

"It is further ordered by the court that the motion of petitioners filed in this cause be and the same is hereby granted, and the cause, and the same is hereby dismissed, and that the defendants petitioners, recover their cost."

To the judgment as signed and also to the finding of certain facts, the plaintiff excepted, assigned error, and appealed to the Supreme Court.

John A. Hendricks and John H. McElroy for plaintiff.
Ford, Coxe & Carter for defendants.

CLARKSON, J. The record discloses that on 1 May, 1928, Frank Coxe owned two tracts of land totalling 170 acres in Madison County, North Carolina, which was deeded to him on 5 May, 1926, by Tony Ball and wife, Harriet S. Ball. The deed was duly recorded in the register of deeds office for Madison County, N. C. At the time of the purchase of said property Coxe executed and delivered to George M. Pritchard, trustee, a deed of trust on said land to secure certain promissory notes for balance purchase money, aggregating $12,072. The deed of trust was duly recorded in the register of deeds office for Madison County, North Carolina. Sallie Potter Coxe is the owner in due course of five of said notes of $503 each, totalling $2,515 which are unpaid and owing. The land was duly listed for tax for the year 1927 by the agent of Frank Coxe and the tax paid. Thereafter the agent died. The record discloses: "Copied from 1927 tax list: Questions not applicable to taxpayer need not be answered. Blank for listing real estate and personal property. 1 May, 1928. (1) Name, Coxe, Frank E. (N. R.). (2) Postoffice address, Asheville. (3) Township No. 1, Ward 1. (4) Age, if male, for poll tax. (5) Race: White (X); Indian .....; Negro ..... (1) Real estate outside cities. (4) Real estate inside cities. No. acres 170 description, value, $4,260, No. lots, name of street, value." The original tax list sheet is not signed by anyone.

The land was sold for the tax for the year 1928 amounting to $98.20 and bought by Madison County and the alleged tax sale certificate was foreclosed. A motion to set aside the judgment, accompanied by a petition setting forth certain facts was filed in the cause before the clerk of the Superior Court of Madison County, North Carolina, on

24 March, 1932, by George M. Pritchard, trustee, Sallie Potter Coxe, Frank Coxe and Julia Lord Coxe.

The court below found the facts and there was sufficient competent evidence on the record to sustain same. The plaintiff did not demand a jury trial if there were disputed facts to be passed on by a jury, nor did the plaintiff consent to the findings of fact. The plaintiff did make many exceptions and assignments of error to the facts as found. We think they cannot be sustained from the view we take of this case. The findings of fact support the judgment and there being sufficient competent evidence to sustain them this is conclusive in this Court. *Holmes Electric Co. v. Power Co.*, 197 N. C., 766. *Colvard v. Dicus*, 198 N. C., 270; *Morris v. Y. & B. Corporation*, 198 N. C., at p. 708; *Chandler v. Conabeer*, 198 N. C., at p. 758; *Roebuck v. Surety Co.*, 200 N. C., at p. 199.

We think that on the entire record in this case on the undisputed facts plaintiff is not entitled to recover. The case was properly in the Superior Court.

In *Sneed v. Highway Company*, 194 N. C., at pp. 47, 48, is the following: "The judge of the Superior Court, in the exercise of his supervisory power, may require the clerk to send up the appeal, or transfer the case to the civil-issue docket for trial, which seems to have been done in the instant proceeding. *Hicks v. Wooten*, 175 N. C., 597; *R. R. v. King*, 125 N. C., 454." C. S., 636; *Howard v. Hinson*, 191 N. C., 366; *Light Company v. Reeves*, 198 N. C., 404.

The court below found the following facts: "That on .... March, 1932, Frank Coxe and wife, Julia Lord Coxe, George M. Pritchard, trustee, and Sallie Potter Coxe, filed a petition in the cause, before the clerk of the Superior Court of Madison County, and moved to set aside the interlocutory decree and judgment of confirmation in the above cause and dismiss the action, which matter was duly heard before the clerk of the Superior Court, and petitioners' motion denied, and an appeal was duly taken to this Court; that the petitioners herein had no notice of the institution of said action or the entering of said judgments and decrees and orders until some time during the latter part of November or the first of December, 1931.

"That on 1 May, 1928, Frank Coxe was the owner of the property described in the complaint in this cause, and said property was not listed for taxes for the year 1928 by the said Frank Coxe, or by his agent duly authorized or with his knowledge, consent or procurement, or by the board of county commissioners, as prescribed by statute, the only listing of said property being as shown by a copy of said list sheet hereto attached and made a part of this finding of fact."

We think the case of *Phillips v. Kerr,* 198 N. C., at pp. 254 and 255, decisive of this case: "The question is to be determined by the law which was in force in 1923 and 1924. Public Laws, 1923, chap. 12. This act contains the sections upon which rests the decision in *Rexford v. Phillips, supra* (159 N. C., 213). Sections 5217, 5222, 5227 of the Revisal, cited in the opinion, are brought forward in the act of 1923 as sections 23, 30, 27. They provided that the owner in person shall make a return of his property under oath, or in certain cases by an agent. Revisal, 5218, act 1923, sec. 24. If the owner fails to make such return the chairman of the board of commissioners shall list the description and valuation of the property not given in for taxation. Revisal, 5233, act 1923, sec. 75. And if such property is omitted from the list the board of commissioners by the chairman shall add to the simple taxes of the current year all taxes due for preceding years with 25 per centum in addition to the tax with which the owner would otherwise be chargeable. Revisal, 5232, act 1923, sec. 75. The defendants say, however, that the list taker has authority to list the property of a delinquent owner by virtue of the act of 1917. Public Laws, 1917, chap. 234, sec. 25, act 1923, sec. 25, C. S., 7925. This statute makes it the duty of the county commissioners and the several list takers 'to be constantly looking out for property which has not been listed for taxation.' Such property when discovered shall be duly placed upon the assessment list and properly assessed for taxation. By whom? By the chairman of the board of commissioners. He alone is charged with the duty of entering upon the tax list property not given in by the owner or his agent. Act 1923, sec. 75; *Rexford v. Phillips, supra.* He must not only list the property; he must impose the prescribed penalty. To this end the list taker should upon discovery return to the commissioners any property not listed for taxation. Whether his discovery is before or after the tax list has been turned over to the sheriff he must return the unlisted property to the clerk of the board of commissioners. Section 75. The unavoidable conclusion, we think, is this: that the lots in controversy had not been legally listed when the purported sale was made, and that the sheriff's deed conveyed no title."

The question in this case is to be determined by the law in force at the time for listing the property for taxes. Public Laws, 1927, chap. 71. On examination we find that the law is practically the same as the Revisal, secs. 5217, 5218, 5222, 5227, 5232, 5233. Revisal of 1905, Vol. 2. Section 5232 is as follows: "In all cases where the board of commissioners shall have omitted, or in any future year shall omit to enter upon the duplicate of their county any land or town lots situated within their county subject to taxation, it shall be their duty when they enter

the same to duplicate the next succeeding year to add to the taxes of the current year the simple taxes of each and every preceding year in which such land or town lots shall so have escaped taxation, with twenty-five per centum in addition thereto, so far back as the said lands have escaped taxation," etc. Public Laws, 1927, chap. 71, sec. 72.

Revisal, *supra*, sec. 5233: "The chairman of the board of commissioners shall examine the tax list from each township for the previous year and insert in said list the description and valuation of all property not given in, and shall charge all such persons with double the tax with which they would otherwise be chargeable unless satisfactory excuse therefor be rendered to the board of commissioners," etc.

Public Laws, 1927, chap. 71, sec. 73: "The chairman of the board of commissioners shall examine the tax list from each township for the previous year, *and insert in said list the description and valuation of all property not given in*, and shall charge all such persons *with twenty-five per centum* in addition to the tax with which they would otherwise be chargeable, unless satisfactory excuse therefor be rendered to the board of commissioners on or before the first Monday in October. . . . It shall be the duty of the commissioners of each county to employ a competent man whose duty it shall be to spend such time as the commissioners may deem necessary to make diligent search for property not listed for taxes, and to put such property on the tax books," etc.

Section 73, chap. 71 of Public Laws of 1927, must be construed as a whole, not piecemeal. "*To put such property on the tax books.*" The record discloses a competent man was employed, but he was to find the delinquent, and it was the duty of the chairman of the board of commissioners to administer on the party for his omission in accordance with the statute. This was not done. This duty cannot be delegated to another. The alleged listing never had life.

In the present case the plaintiff contends that the *Phillips case, supra*, is not applicable as it "did not originate from a foreclosure procedure, but on a tax deed made by the tax collector to the purchaser of the land, at a sale of land by the tax collector for delinquent taxes." The *Phillips case, supra* (198 N. C.), is bottomed on the sound principle, which is set forth at p. 256: "The provision in reference to the authoritative listing of property is a basic requirement of the law. This conclusion is reached and upheld in *Rexford v. Phillips, supra*, and in *Price v. Slagle*, 189 N. C., 757."

Plaintiff cites *Orange Co. v. Wilson*, 202 N. C., 424, at p. 427, it is clearly stated: "Besides, the trustees of the petitioners were parties defendant and were served with process." *Gammon v. Johnson*, 126 N. C., 64; *Jones v. Williams*, 155 N. C., 179.

Frank Coxe, the owner of the land in controversy, made certain purchase money notes aggregating $12,072, secured by deed in trust to Geo. M. Pritchard, trustee. The deed in trust was duly recorded in Madison County, North Carolina. Sallie Potter Coxe was the owner of five of the notes totalling $2,515. The land was regularly listed on 1 May, 1927, for the 1927 tax for $4,260, by Frank Coxe's agent, who thereafter died. For that listing Frank Coxe's postoffice address was shown as Asheville. The plaintiff, Madison County, sold the land without complying with the law as to listing the property for tax for the year 1928. The tax amounted to $98.20, and was bought in by Madison County and it foreclosed the tax sale certificate without giving Frank Coxe, the owner, or George M. Pritchard, trustee, notice, though they lived in the adjoining county, or the *cestui que* trust, Sallie Potter Coxe.

At the hearing Sallie Potter Coxe offered to pay the taxes and plaintiff would not accept same. These facts, other than the fact that the land was not legally listed for tax for the year 1928, does not appeal to a court of conscience. This is a foreclosure proceeding in a court of equity. The taxes are a lien on the land and will have to be paid to the plaintiff, Madison County, and it must make restitution to the purchasers. *Harnett County v. Reardon*, 203 N. C., at p. 272. *Shale Products Co. v. Cement Co.*, 200 N. C., 226, at p. 229. For the reasons given the judgment of the court below is

Affirmed.

MRS. JOHN DILLARD, T. J. THOMASSON, B. A. RICKETT, W. T. HOLLAND, AND DOC PUETT, ON BEHALF OF THEMSELVES AND ALL OTHER CREDITORS OF J. W. WALKER, v. J. W. WALKER, WILLIAM WALKER, BANK OF MURPHY, A. J. BURNS, GURNEY P. HOOD, STATE BANKING COMMISSIONER, AND G. N. HENSON, AGENT FOR SAID COMMISSIONER, AND LIQUIDATING AGENT FOR CENTRAL BANK AND TRUST COMPANY OF ASHEVILLE, NORTH CAROLINA.

(Filed 25 January, 1933.)

1. Receivers A a—Under the facts of this case the appointment of a receiver for solvent debtor is upheld.

While ordinarily a receiver will not be appointed for a debtor where insolvency is not shown, the appointment of a receiver in a general creditors' bill will not be held for error when the debtor joins in the request for the receivership and none of the creditors object to the appointment of the receiver, and the receiver is appointed for the benefit of all creditors and their rights are protected in accordance with their claims for priority, and the cause is retained by the court.

2. Same—Reduction of claims to judgment is not prerequisite to creditors' right to file a general creditors' bill.

A suit in the nature of a general creditors' bill may be instituted under our statutes by creditors before they have reduced their claims to judgment, it being permissible for the creditors to join in one action a proceeding to recover judgment for the amount of their debts and to subject the debtor's property to the payment thereof, the Superior Court having jurisdiction of both legal and equitable matters, and the court may proceed to determine the validity of the debtor's deed to his son, attacked by the creditors as being voluntary, and to determine the rights of the parties and fix the priorities of payment.

3. Receivers E b — Allowing creditors bringing independent actions priority in accordance with date of docketing held not error.

Where independent actions by creditors have been brought against a debtor who is also a defendant in a suit in the nature of a general creditors' bill, it is not error for the court, upon a proper showing, to permit the plaintiffs in the independent actions to proceed to judgment, restrain the issuance of execution by them, and preserve their rights of priority in the suit in the nature of a general creditors' bill in which they have been made parties, the docketing of their judgments being a lien upon the debtor's lands in accordance with the date of their docketing, C. S., 614, entitling them to priority of payment after the payment of taxes.

APPEAL by certain creditors of defendant, J. W. Walker, from *Sink, J.*, at August Term, 1932, of CHEROKEE. Affirmed.

R. L. Phillips for Mrs. Frankie Maxwell.

F. O. Christopher for town of Andrews and Will Luther, executor, appellant.

Marshall W. Bell and D. Witherspoon for Bank of Murphy and A. J. Burns.

Johnson, Smathers & Rollins for Gurney P. Hood, Commissioner of Banks, ex rel. Central Bank and Trust Company, Asheville, N. C., appellees.

CLARKSON, J. We have read the record and examined the briefs of the litigants carefully. The whole proceeding is peculiar in many respects and we will have to "fish out" the matters to give it proper consideration. It appears from the complaint that the assets of the defendant J. W. Walker in real and personal property amount to some $131,621 and his liabilities are approximately $85,000. The action is in the nature of a creditor's bill. There is no insolvency from the pleadings, therefore there could be no receiver appointed on that account. *Woodall v. Bank*, 201 N. C., 428.

The plaintiff in the prayer for relief sets out the grounds:

1. That they do have and recover of the defendant, J. W. Walker, the amounts due them respectively on their said claims.

2. That the alleged conveyance from J. W. Walker to his son, and codefendant, William Walker, be declared void as having been voluntary, and as having been executed by said defendant without consideration, and without retaining assets with which to discharge his obligations.

3. That the court do take charge of the aforesaid assets of defendant, J. W. Walker, and administer same through a receiver as a common fund for the benefit of all his said creditors, and

4. That the three creditors hereinbefore referred to who have begun separate and independent actions be restrained and enjoined from prosecuting further said actions, and that they do be required to come in this action and participate herein as creditors of said J. W. Walker, and upon their refusal so to do that they be forever barred from participating in said assets; that any other creditors threatening separate and independent actions be enjoined from doing so and that the receiver advertise for creditors of said J. W. Walker, to come into this action and file proof of their respective claims, and that, where possible, personal notice be given by said receiver to all said creditors to file proof of claim and make themselves parties to this action, and

5. That plaintiffs do recover, before general distribution by said receiver, such costs as they may have expended herein, and that the remaining costs be taxed by the court against said general assets, and

6. That plaintiffs do have and recover such other and further relief as in the premises they may be entitled to.

In the assets set forth in the complaint is 2,000 acres of land, three farms, listed as worth $67,500. It is alleged in the complaint that one-half interest in J. W. Walker's three farms of 2,000 acres was conveyed to his son, William Walker. An application by J. W. Walker was made to the Federal Land Bank of Columbia for a loan of $50,000, but the rules of the bank were to the effect that an individual borrower could not exceed $25,000, is the reason the deed to one-half interest was conveyed to William Walker. For certain other reasons the loan was not made. In 8 R. C. L. Creditors Bill, p. 5, part sec. 5, is the following: "It is now well settled that lands or personal property in which a debtor has an equitable estate or interest, the legal title being in another, may be reached by a creditor's bill."

In *Hancock v. Wooten,* 107 N. C., at p. 21 it is said: "Under the former practice, in either of the last mentioned cases, it was necessary, before a resort could be had to a court of equity, that the creditor should first obtain judgment and show that the legal remedy by execution was ineffectual; but this, under the decision of this Court in *Bank v. Harris,* 84 N. C., 206, is now unnecessary, and both causes of action may be included in one suit. This decision by no means ignores the distinct

character of a judgment creditor's bill. On the contrary, it expressly recognizes it as it formerly existed, dispensing only with the necessity of obtaining a judgment in an independent action."

In *Grocery Co. v. Banks,* 185 N. C., at p. 152 the principle is also set forth as follows: "It is settled, therefore, that the creditors may resort to either remedy, under the doctrine of election, and in this instance, having selected the equitable one, he may proceed therein to allege a fraudulent sale, have the same set aside, and the property subjected to sale under decree of the court for the satisfaction of his claim, and especially is this true under our present judicial system. *Harrison v. Battle,* 16 N. C., 537. And it is not now required that the debt should be first reduced to judgment, as a creditor may join in one action a proceeding to recover a judgment for the amount of his debt and another to subject property to the payment thereof, or to enforce his judgment by a mandamus in proper cases, *McLendon v. Commissioners,* 71 N. C., 38, as, under The Code and the present procedure the Superior Court has cognizance of both legal and equitable actions. *Bank v. Harris,* 84 N. C., 206."

It may be that the plaintiff's complaint discloses that J. W. Walker had sufficient property available to pay his debts when the deed to one-half interest in 2,000 acres of land was made to his son.

"If the conveyance is voluntary, and the grantor retains property fully sufficient and available to pay his debts then existing, and there is no actual intent to defraud, the conveyance is valid." *Aman v. Walker,* 165 N. C., at p. 227. *Foster v. Moore, ante,* 9. The complaint was filed 28 October, 1931. An injunction and restraining order was issued by Judge W. F. Harding on the same day, and notice was issued to defendants to show cause why a receiver should not be appointed for the assets and property of the said J. W. Walker, and to the interest therein claimed by the defendant William Walker, to be managed, controlled and administered under the supervision and direction of the court. J. W. Walker filed affidavit which in part says: "That after he had executed and delivered said deed and had filed said applications, he ascertained for the first time that said bank could not legally grant said loans where the proceeds thereof were to be used for the purpose of discharging indebtedness incurred otherwise than for the purchase of said lands, or in making improvements thereon; that affiant's said son, William Walker, paid nothing for the said conveyance, but same was made for the sole purpose of applying for the said loan and that said William Walker holds said title merely as trustee for this affiant, and that affiant is informed and believes that the said William Walker will not reject a judgment declaring him a trustee of

the legal title to the said lands for the use and benefit of this affiant. That affiant's chief interest and concern is to see that all his creditors are paid in full, and that he stands ready and willing to turn over all of his property and assets, subject to his exemptions allowed by law, to any receiver appointed by this court to be administered by said receiver under the orders and directions of the court for the benefit of affiant's creditors."

Bank of Murphy and A. J. Burns filed answer among other things set forth: "The Bank of Murphy, respectfully shows to the court that on 16 October, 1931, it filed complaint and caused a summons to regularly issue against J. W. Walker and W. P. Walker, his son (the same person referred to in the complaint as William Walker) to recover the sum of seven hundred dollars ($700) balance due on a promissory note for one thousand dollars ($1,000), dated 2 August, 1930, due four months after date, with interest on same from 2 October, 1931, till paid; summons and copy of complaint were served on defendants on 16 October, 1931, and plaintiff in that suit becomes entitled to judgment by default final on 16 November, 1931, unless bona fide answer is filed by defendants therein within the thirty days after service allowed by law;

"That defendant A. J. Burns, on 24 October, 1931, filed his complaint and summons regularly issued on said date against J. W. Walker, and one C. M. Wofford, to recover upon a note signed by J. W. Walker, payable to C. M. Wofford and endorsed by said Wofford to said Burns, for the sum of six thousand two hundred fifty dollars ($6,250), with interest thereon from 1 August, 1931, which note is dated 22 December, 1925, due six months after date, on which the interest has been paid to 1 August, 1931, and said summons was duly served on defendants in that suit on 24 October, 1931, with copy of the complaint, and the plaintiff in said suit becomes entitled to judgment by default final on 24 November, 1931, unless bona fide answer is filed within the thirty days allowed by law. . . . That the rights of these defendants to their respective judgments accrued at the times the summons issued in each and their right of priority is determined thereby, together with the diligence each may display; that plaintiffs had the same right to begin suit on their respective claims, which they have not done, and these defendants respectfully protest against their being enjoined in their actions in the effort made by plaintiffs to deprive these defendants of whatever advantage the law gives them by reason of their diligence. . . . That, as these defendants are advised and believe, the Superior Courts of North Carolina have no jurisdiction to take charge of and administer the property of a debtor for the benefit of creditors as attempted in this action."

On 4 November, 1931, Judge Harding rendered the following judgment in part: "This cause coming on to be heard upon the motion to vacate the restraining order issued on 28 October, 1931, restraining the Bank of Murphy, A. J. Burns, and Central Bank and Trust Company from prosecuting their actions against J. W. Walker, and for appointing a receiver of the property of said J. W. Walker, it is ordered by the court that said injunction and restraining order be, and the same is hereby vacated and set aside, *and said parties are hereby permitted to proceed to judgment as allowed by law and that said parties are hereby enjoined from issuing execution upon the judgments obtained by them. And said judgments of said parties are hereby declared to be the first liens upon the property of said J. W. Walker,* and the defendant, J. W. Walker, joining in with the petitioning creditors for the appointment of a receiver."

A receiver was appointed naming him and requiring him to give certain bond and empowering him to take charge of the property of J. W. Walker. Also requiring him to advertise for creditors to come in and make themselves parties and present their claims and make report. "And said receiver is hereby directed to pay the taxes due by the said J. W. Walker out of the first moneys coming into his hand and the costs and charges of administration *and apply next said moneys to the payment of claims in the order of their priority, to wit, the Bank of Murphy, A. J. Burns, and G. N. Henson, liquidating agent of the Central Bank and Trust Company.*"

The receiver made report on 2 December, 1931, and Judge Harding ordered the receiver to publish notice for six weeks for all creditors of the defendant, J. W. Walker, to "file with said receiver proofs of their respective claims within twelve months from the date of said notice is first published, and in default of their filing their claims within said time that they be barred from participating in the assets of said J. W. Walker; and further, that said notice direct all persons, firms, or corporations indebted to said J. W. Walker to make immediate settlement with said receiver. . . . This cause is retained for further orders."

That pursuant to said advertisement Mrs. Frankie Maxwell, who had a claim for $8,629.49 and interest against J. W. Walker on 15 July, 1932, gave notice to the Bank of Murphy, A. J. Burns, and G. N. Henson liquidating agent of the Central Bank that she would move before Judge J. Hoyle Sink to amend the order of Harding, judge, "in so far as said order attempts to create a preference in favor of the above mentioned defendants or either of them." The town of Andrews that had a claim of $20,619.51 and interest against J. W. Walker and Will Luther, executor of the estate of George Luther, that had a claim of $7,693.87 and interest against J. W. Walker, joined in the contention

of Mrs. Maxwell. It is contended by these creditors that the property in the hands of the receiver is not sufficient to pay the preference and leave a surplus with which to pay the general creditors.

When the cause came on for hearing before Sink, judge, he found certain facts and denied the motion. In this we see no error as on the entire record the conclusion reached was correct. The record discloses that the judgments docketed against J. W. Walker in the order of their docketing in the Superior Court of Cherokee County, are as follows: (a) Bank of Murphy, docketed 17 November, 1931; (b) A. J. Burns, docketed 30 November, 1931; (c) Gurney P. Hood, Commissioner of Banks, *ex rel.* Central Bank and Trust Company, docketed 19 December, 1931.

C. S., 614, in part is as follows: "Upon filing a judgment roll upon a judgment affecting the title of real property, or directing in whole or in part the payment of money, it shall be docketed on the judgment docket of the Superior Court of the county where the judgment roll was filed, and may be docketed on the judgment docket of the Superior Court of any other county upon the filing with the clerk thereof a transcript of the original docket, and is a lien on the real property in the county where the same is docketed of every person against whom any such judgment is rendered, and which he has at the time of the docketing thereof in the county in which such real property is situated, or which he acquires at any time thereafter, for ten years from the date of the rendition of the judgment." etc.

Under the above law the parties, the Bank of Murphy, A. J. Burns, and Gurney P. Hood, Commissioner, had liens on the land of J. W. Walker as above set forth for the respective amounts due them.

C. S., 7986, in part, "Taxes shall not be a lien upon personal property except where otherwise provided by law, but from a levy thereon," etc. *Carstarphen v. Plymouth,* 186 N. C., 90. C. S., 711, provides for supplemental proceedings where execution unsatisfied: "In *Carson v. Oates,* 64 N. C., 115, it was said 'Supplemental proceedings were intended to supply the place of proceedings in equity, where relief was given after a creditor had ascertained his debt by a judgment at law, and was unable to obtain satisfaction by process of law.' Such proceedings are held to be a substitute for the former creditors' bill, and are governed by the principles established under the former practice in administering this species of relief in behalf of judgment creditors. *Rand v. Rand,* 78 N. C., 12, 14. Such proceedings differ from the old creditor's bill, however, in that the latter operated for the benefit of all creditors who chose to come in, while the former are only beneficial to the particular creditors who institute them. *Righton v. Pruden,* 73 N. C., 61." See *Grocery Co. v. Banks, supra.*

Judge Harding in the judgment gave the parties what they were entitled to under the law, to be permitted to proceed to judgment which gave them a lien and after payment of taxes to "apply next said moneys to the payment of claims in the order of their priority." J. W. Walker, the owner of the real and personal property joined in the petition for the appointment of the receiver and made no objection to the judgment rendered by Judge Harding. The objecting creditors, Mrs. Maxwell and others, do not question the appointment of the receiver but the preferences. Under the facts and circumstances of this case Mrs. Maxwell and the other creditors joining with her cannot be allowed to upset the judgment as to the preference. The action of the court in restraining said judgment creditors from selling the property of the judgment debtor under execution, and at the same time giving them such rights as they might otherwise have acquired by an execution, levy and supplemental proceeding does not prejudice the intervening creditors, Mrs. Maxwell and others, who had at the time taken no action toward obtaining a judgment against the defendant, Walker. In fact an orderly way was provided by the appointment of a receiver with the consent of J. W. Walker and the Bank, Burns, and Hood, Commissioner, agreeing to same by not objecting. On the entire record the judgment of the court below is

Affirmed.

M. B. REEVES ET AL. v. BOARD OF EDUCATION OF BUNCOMBE COUNTY ET AL.

(Filed 25 January, 1933.)

1. Counties E b—Assumption by county of bonds issued by school districts for necessary school term held valid.

In pursuance to mandate of our Constitution, Art. IX, sec. 3, it is the duty of the commissioners of the various counties in this State to maintain at least a six months term of public school in their respective counties, subject to indictment for their failure to do so, and in accordance with the provisions of our statute, sec. 5467, Michie's Code of 1931, it is their duty, upon information being furnished by the county boards of education, to provide the funds necessary for suitable buildings and proper equipment, and such expenses are a county-wide charge, and where bonds therefor have been voted by special school districts and by a city constituting a special charter district which has since become a part of the general county schools, the county may assume the payment of such bonds as a county-wide obligation under the provisions of N. C. Code (Michie), sec. 5599, and it is not necessary that payment therefor be made from taxes levied only in such special districts.

2. Statutes A a—Amendatory Act passed in accordance with constitutional requirements renders former act, not so passed, valid.

Where a statute required by the Constitution to be passed by the Legislature upon separate readings upon separate days with the aye and no vote recorded, Art. II, sec. 14, is not so passed and is therefore invalid, and a later act, amending to and referring to the former act, is passed in accordance with the constitutional provisions, the two acts will be construed together as one act, and the later act ratifies the former and renders it valid.

3. Appeal and Error J b—Courts will not interfere with discretionary act of county commissioners in absence of abuse.

The discretionary act of the board of county commissioners and the board of education in assuming as a county-wide obligation bonds issued by special charter school districts, N. C. Code (Michie), sec. 5599, will not be interfered with by the courts in the absence of an abuse of such discretion.

APPEAL by plaintiff from *Clement, J.*, at November Term, 1932, of BUNCOMBE. Affirmed.

The findings of fact and judgment of the court below are as follows:

"This cause coming on to be heard and being heard before his Honor, J. H. Clement, judge presiding, at the regular November Term, 1932, of the Superior Court of Buncombe County, North Carolina, the plaintiffs and defendants having in open court waived a jury trial and agreed that the judge might hear the evidence, find the facts and render judgment thereon, and after hearing the evidence, the court finds the following facts:

"1. That all of the school buildings in the various school districts in Buncombe County and fully described and set out in the pleadings, and constructed from the proceeds of bond issues heretofore voted in each of the said districts, are necessary for the six months' public school term of Buncombe County.

"2. That chapter 180 of the Public Laws of 1925, was not regularly passed by the General Assembly by a roll-call vote as prescribed by the Constitution, but that chapter 239 of the Public Laws of 1927, being an act amending said chapter 180 of the Public Laws of 1925, was regularly passed by the General Assembly in accordance with the requirements of the Constitution.

"Upon the foregoing findings of fact the court adjudges, that chapter 180, Public Laws of 1925, as amended by chapter 239, Public Laws of 1927, is constitutional, and that the assumption of the bonded debt of the various school districts in Buncombe County by the said county is a legal and valid assumption of debt, and that the proposed levy by the board of commissioners of Buncombe County of a county-wide tax for

the payment of the principal and interest of said bonds is in all respects legal and proper and duly authorized by law.

"It is further adjudged that the prayer for a permanent injunction contained in the plaintiff's complaint to restrain the board of county commissioners from assuming the bonded debt of said school district and the levying of a tax to pay the principal and interest of said bonds is denied.

"It is further adjudged that the defendants recover their costs herein incurred to be taxed by the clerk. J. H. CLEMENT, *Judge Presiding.*"

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

Johnston & Horner for plaintiffs.
Chas. N. Malone for Board of Education.
Clinton K. Hughes for Board of Commissioners.
George H. Wright for Board of Financial Control.

CLARKSON, J. The questions involved:

1. Can the county of Buncombe assume the payment of bonds issued in special school districts as a county-wide obligation, instead of levying a tax upon the district where the bonds were voted?

2. Can the county of Buncombe assume the payment of bonds issued by the city of Asheville when the same was a special charter school district but has since become a part of the general county schools of Buncombe County under the control of the board of education of said county?

3. Chapter 180 of the Public Laws of 1925 being an act to raise revenue and not having been passed as a roll-call bill, was the same cured by the amendment thereto in chapter 239 of the Public Laws of 1927?

We think all the questions must be answered in the affirmative.

Article IX, sec. 3 of the Constitution provides: "Each county in 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 requirement of this section, they shall be liable to indictment."

Pursuant to this provision of the Constitution, the General Assembly has enacted: "School buildings, properly lighted and equipped with suitable desks for children and tables and chairs for teachers, are necessary in the maintenance of a six months school term. It shall be the duty of the county board of education to present these needs each year

to the county commissioners, together with the cost, and the county commissioners shall be given a reasonable time to provide the funds which they, upon investigation, shall find to be necessary for the proper equipment of the county with buildings suitably equipped, and it shall be the duty of the county commissioners to provide the funds for the same." C. S., 5467, Michie's Code, 1931.

The maintenance and construction of school buildings for the six months public school term being prescribed by the Constitution, the county commissioners could have been compelled to have provided the school buildings in Buncombe County as a county-wide charge, and could have been compelled to have provided the money therefor by the issuance of county-wide bonds, therefore, it would follow that if the various buildings in the various school districts are a county charge, it is proper for the county to assume this obligation which has heretofore been attempted by the districts. There is no sound reason why a school district should have to pay out of its own taxable property a debt which the Constitution and laws of the State impose upon the county. The authority for the assumption by the county of the bonded debt of the various school districts is contained in sec. 6, chap. 180, Public Laws, 1925, as amended by chapter 239, secs. 4 and 5, Public Laws, 1927 (Michie's Code, 1931, sec. 5599), the last paragraph of which reads as follows: "The county board of education with the approval of the board of commissioners may include in the debt service fund in the budget the indebtedness of all districts, including special charter districts, lawfully incurred in erecting and equipping school buildings necessary for the six months school term, and when such indebtedness is taken over for payment by the county as a whole and the local districts are relieved of their annual payments, then the county funds provided for such purpose shall be deducted from the debt service fund prior to the division of this fund among the schools of the county as provided in this section."

In *Julian v. Ward,* 198 N. C., at p. 482, this Court said: "Under these and other pertinent sections of the Constitution, it has been held in this jurisdiction that these provisions are mandatory. It is the duty of the State to provide a general and uniform State system of public schools of at least six months in every year wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one. It is a necessary expense and a vote of the people is not required to make effective these and other constitutional provisions in relation to the public school system of the State. Under the mandatory provision in relation to the public school system of the State, the financing of the public school system of the State is in the discretion

of the General Assembly by appropriate legislation either by State appropriation or through the county acting as an administrative agency of the State. *Lacy v. Bank*, 183 N. C., 373; *Lovelace v. Pratt*, 187 N. C., 686; *Frazier v. Commissioners*, 194 N. C., 49; *Hall v. Commissioners*, 194 N. C., 768."

Wilkinson v. Board of Education, 199 N. C., 669, *Elliott v. Board of Equalization*, 203 N. C., 749.

We think that *Maxwell v. Trust Co.*, 203 N. C., 143, is analogous and practically on "all fours" with the present case.

It may not be amiss to call attention to the county-wide plan in *Howard v. Board of Education*, 196 N. C., 229, which in substance held: Where in the discretion of the county board of education in the exercise of good faith it is required for the best interest of a consolidated school district to sell certain property therein, and it appears that the district has been formed under the county-wide plan, equity will not grant injunctive relief.

"After mature consideration, a comprehensive county-wide plan for rural and urban schools in Lenoir County was determined upon, which involved the consolidation of the small districts into larger districts so that better classification and graduation of pupils and more efficient instruction on the part of the teachers could be had, and that proper high school facilities could be more economically provided. The State Department of Education was requested to make a complete comprehensive survey. The survey was made under the State Supervisor of Rural Schools, with competent assistants." . . . When this survey was being made, it covered a period from 1 December, 1921, to sometime in the spring of 1923. The survey was published in 1924, contains 233 pages, and it is claimed to be the most complete, instructive and far-reaching rural and urban survey ever made in the nation, and a model to be followed. It gives photographs of the groups of the old schoolhouses and the photographs of the proposed new consolidated schoolhouses in lieu of the group of old ones. It gives two maps of the 'School Consolidation Survey,' one showing the location of the old schools, and the other the new consolidated schools."

This consolidation and county-wide plan was made under the Supervisor of Rural Schools, Mr. L. C. Brogden.

The next question presented by this appeal is whether section 6 of chapter 180, Public Laws of 1925, as amended by section 6 of chapter 239, Public Laws of 1927, was passed in accordance with the formalities prescribed by section 14, Article II, of the Constitution? The statutory authority for the county commissioners to assume the debt of school districts incurred in erecting and equipping the school buildings is con-

tained in chapter 180, section 6, Public Laws of 1925. It has been stipulated that this act was not passed by the General Assembly in full compliance with the Constitution. In one branch of the General Assembly the act was passed by a recorded roll call on two separate readings, but when the bill reached the other branch of the General Assembly, it was not placed upon the roll call calendar and was passed by a *viva voce* vote and without the call of the roll. Nothing else appearing, this act might be said to be unconstitutional. However, this section of the act was duly amended by chapter 239, section 6, Public Laws of 1927, which was duly and regularly passed with all the formalities prescribed by the Constitution.

The effect of this amendment is to ratify and make valid any defect in the prior act. The two acts are construed together as one and the latter by its reference to the prior act ratifies the same. This proposition has been sustained by this Court. *Range Company v. Carver,* 118 N. C., 329; *Hinton v. State Treasurer,* 193 N. C., 496.

The Constitution is mandatory in regard to schools. As to roads see *Ellis v. Greene,* 191 N. C., 761, and another case this day filed of *Reeves v. Buncombe County.*

The courts never interfere with the exercise of discretion of boards like defendants unless there has been an abuse of discretion. We can see none in the present case. For the reasons given the judgment of the court below is

Affirmed.

LAURA WINBERRY, SOLE DEPENDENT, AND WIDOW OF GEORGE M. WINBERRY, DECEASED, EMPLOYEE, v. FARLEY STORES, INCORPORATED, EMPLOYER, AND INDEPENDENCE INDEMNITY COMPANY, CARRIER.

(Filed 25 January, 1933.)

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

Where there is sufficient competent evidence to support the finding of the Industrial Commission that the accident resulting in the death of an employee arose out of and in the course of the employment and was not a result of the employee's own wilful intent to injure or kill himself or another, the finding is conclusive on the courts upon appeal.

2. Master and Servant F b—Evidence held to sustain finding that injury was not result of employee's wilful intent to injure another.

Where in a hearing under the Workmen's Compensation Act there is evidence that it was the employee's duty to collect accounts of his employer for goods sold upon the installment plan and that the employee

endeavored to collect an account from a debtor and was struck by another also owing an account to the employer, the injury resulting in death, *is held* sufficient to sustain a finding by the Industrial Commission that the injury was the result of an accident arising out of and in the course of the employment, and was not the result of the employee's own wilful intent to injure or kill himself or another.

APPEAL by plaintiff from *Clement, J.*, at April Term, 1932, of GUILFORD. Reversed.

The hearing Commissioner, J. Dewey Dorsett, found the facts and rendered his opinion and award as follows:

"This case was heard on 2 September, 1930, at Greensboro, North Carolina. When the case was called for trial the defendants admitted that George M. Winberry was dead. They further admitted that at the time of his death he was a regular employee of James H. Farley Company at an average weekly wage of $19.26. They admitted that the death of the deceased, George M. Winberry, was caused by an accident suffered on 15 May, 1930. The defendants denied liability on the sole ground that the accident suffered did not arise out of and in the course of the employment of the deceased with the Farley Stores, Incorporated.

"This case was heard before Dorsett, Commissioner, and an opinion was filed by the Commissioner on 26 September, 1930. From the award rendered in the case the defendants appealed to the Superior Court of Guilford County. The presiding judge, on 11 April, 1931, signed an order setting forth certain reasons and concluding:

"It is now, therefore, ordered that this cause be remanded to the North Carolina Industrial Commission to the end that its decision and award may be corrected, altered or amended accordingly."

"From this order the defendants appealed to the Supreme Court and an appeal bond was fixed at seventy-five dollars. The defendants, before perfecting their appeal, abandoned it and the case is now before the Commission, having been formally certified back to the Industrial Commission by an assistant clerk of the Superior Court, one C. S. Lambeth. The employer in this case is engaged in the clothing business. He sells clothing on the installment plan to customers and employs collectors whose duty it is to go out and locate and collect from their delinquent customers. The deceased was employed as one of the collectors for the defendant, Farley Stores, Incorporated. His widow, Mrs. George M. Winberry, is claiming compensation under the Workmen's Compensation Act of 1929. She contends that her husband, while in the regular course of his employment, and while on a mission for the employer to collect delinquent accounts, was struck on the head by one of these delinquent customers, from which blow her husband died.

The defendants admitted that George M. Winberry, deceased, at the time of his death, was a regular employee of Farley Stores, Incorporated, at an average weekly wage of $19.26, and further admitted that George M. Winberry met his death by accident on 10 May, 1930. They were denying liability in the case on the sole ground that the accident suffered did not arise out of and in the course of the employment of the deceased.

The evidence in the case is that the deceased had made several trips to the place where he suffered his accident to see two colored girls who had delinquent accounts with the Farley Stores, Incorporated. It is also in the record that the Negro man who struck the deceased with a shovel owed an account to the Federal Clothing Company which company had been purchased by the Farley Stores, Incorporated, and that the deceased was also looking for the Negro man who delivered the blow causing the death of the deceased. The Negro man who struck the deceased the death blow was tried in the Superior Court of Guilford County and sentenced to serve a term of twenty years in the State penitentiary. Some time after his confinement in the penitentiary, he suffered a heat stroke from which he died. The Commissioner does not, therefore have the benefit of the testimony of this Negro man in the record as he died before this hearing was conducted.

Under all of the evidence in the case the Commissioner makes the following findings of fact:

1. The parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Act of 1929; the Independence Indemnity Company is the insurance carrier. The employer elected to be bound by the provisions of the Compensation Act; the deceased employee elected to be bound by the provisions of the Compensation Act. The insurance carrier is a company doing business in North Carolina and writing workmen's compensation insurance.

2. On 10 May, 1930, the deceased, George M. Winberry, was regularly employed by Farley Stores, Incorporated, of Greensboro, North Carolina, at an average weekly wage of $19.26.

3. On 10 May, 1930, during his regular hours of employment, and while performing a duty for which he was hired, the deceased suffered an injury by accident, the said injury resulting in his death. In other words, the accident arose out of and in the course of the employment.

4. The deceased, at the time of his death, had dependent upon him for support his wife, Mrs. George M. Winberry. Mrs. Winberry was the only one dependent upon the deceased at the time of the accident and was wholly dependent upon the earnings of the deceased for her support. At the time of the accident she was living with her husband.

5. The injury by accident was caused by an assault upon the deceased by one Archie Robinson. The said Archie Robinson was tried in the

Superior Court of Guilford County and for this assault was sentenced to serve twenty years in the State penitentiary. After being confined for a short while in the penitentiary Robinson suffered from heat prostration and died.

6. From the evidence in this case we find as a fact that the deceased was on a mission for the employer at the time of the assault; that he had delinquent accounts from two girls who lived in the same house occupied by Archie Robinson, as well as a delinquent account to collect from Archie Robinson, and in attempting to collect these accounts the deceased did not wilfully intend to injure himself or to kill another. In other words, the injury sustained by the deceased resulting in his death was not the result of wilful intent on the part of the deceased to injure or kill himself or another.

Upon the foregoing findings of fact are based the following conclusions of law:

As stated in the statement of the case, an opinion was written and filed on 26 September, 1930. The case was appealed to the Superior Court of Guilford County and Judge Shaw remanded the same to the Commission on the ground that the Commission had erroneously mixed its findings of fact and conclusions of law. We are of the opinion that the term "arising out of and in the course of" is a mixed question of fact and law and that it is impossible to separate it. We are further of the opinion that it was necessary to find as a fact that the injury sustained by the deceased, resulting in his death, was not the result of wilful intent of the deceased to injure or kill himself or another because in the case of *Conrad v. Foundry Company* the Court, speaking through *Justice Adams,* remanded the case because such a finding had not been made.

In this connection it is interesting to note that the Appellate Court of Indiana has laid down for the Industrial Commission of that state the findings of fact which should be made in every case. The Court says: "In cases of this character there are five facts which must be found as a legal basis for an award of compensation: (1) That the claimant was an employee; (2) that he received an injury by accident; (3) that the injury arose out of and in the course of the employment; (4) the character and extent of such injury; (5) claimant's average weekly wage. *Munsey Foundry Machine Co. v. Thompson,* 123 N. E., 196."

In every case which has been tried by this Commission we have found that it was necessary to find in each case that the accident did arise out of and in the course of the employment before compensation could be allowed. Several courts have held that the phrase is a mixed question

of fact and law and that it is impossible to divide it. We are of the same opinion. In every case which has been before our Supreme Court that finding has been made and the Court, in every instance, has evidently thought it was a proper finding as no case has been remanded on account of such finding.

The sole defense interposed by the defendants in this case is that the accident causing the death of the deceased did not arise out of and in the course of the employment. The defense, however, does hint at wilful misconduct on the part of the deceased but that defense was not pressed.

The Legislature has spoken in unmistakable terms with reference to when an injured employee or the dependent of such employee is entitled to receive compensation for injuries sustained, or when the claimants are entitled to receive compensation for the death of an injured employee. Section 2(f) of the act says in simple language that "Injury and personal injury shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where the disease results naturally and unavoidably from the accident." The defendants admit that the deceased died as the result of a blow received at the hands of one Archie Robinson, but they deny liability on the ground that the deceased was not in the course of his employment when he received this blow, and that the deceased did not receive this blow because of the employment. The defense interposed by the defendants necessitates that the Commission again define what we believe the phrases "out of" and "in the course of" mean. These phrases have been defined in language which cannot be improved upon by this Commission in that famous and leading case, *In re Employers Liability Assurance Corp.*, 215 Mass., 497, 102 N. E., 697, L. R. A., 1916A, 306.

"The Legislature intended to extend the provisions of the law to all employees while in and about any premises where they may be engaged in the performance of their duties and while at any place where their services or any act, task or mission which forms a necessary part of their services may reasonably require them to be."

From all the facts it may reasonably be found that the deceased was engaged in the performance of his duties of calling on and collecting from his employer's customers who were delinquent in their accounts on the date of the accident. That being true, the Commission should find that the accident which resulted in his death arose out of and in the course of his employment.

A case almost in point with the instant one, Conrad *v.* Cooke-Lewis Foundry Company and the American Mutual Liability Insurance Company, was heard by this Commission and appealed to the Superior and Supreme Courts of this State; the Supreme Court upholding the find-

ings of fact and conclusions of law of the Commission said: "There must be some causal relation between the employment and the injury but if the injury is one which after the event may be seen to have had its origin in the employment it need not be shown that it is one which ought to have been foreseen or expected." The Court further says: "An accident arising in the course of the employment is one which occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time and to do the thing or one which occurs in the course of the employment and as the result of a risk involved in the employment or incident to it or to conditions under which it is required to be performed."

In this case the defendants in their brief say that the assault or fight, was brought on by the wilful intention of the deceased to injure Archie Robinson. On this point the burden of proof is upon him who claims exemption under this section (section 13) and under the evidence this burden has not been sustained by the defendants and we have so found.

The principle applied to the facts in the present case lead to the conclusion that the injury arose out of and in the course of the employment and that it was not caused by the wilful intention of the deceased to injure himself or another. The following award will therefore issue:

The defendants are directed to pay to Mrs. George M. Winberry, widow of the deceased, compensation at the rate of sixty per cent of $19.26, or $11.56, per week for a period of 350 weeks and pay all hospital and medical bills incurred because of the accident and death and pay funeral expenses not to exceed two hundred dollars. All the compensation which is past due will be paid in a lump sum.

Concerning the costs in this matter, it is directed that the same be paid by the defendants. An attorney's fee in the amount of $250.00 is approved for the attorneys representing the claimant.

Upon appeal to the full Commission, the findings of fact, conclusions of law, and award of the hearing Commissioner were sustained. "The motion to dismiss is denied upon authority of the case of Moore *v.* Pine Hall Brick and Pipe Co., heard before the full Commission 6 January, 1932. Upon consideration of all the evidence and arguments and briefs of counsel, the full Commission affirms and adopts as its own the findings of fact, conclusions of law, and award of Commissioner Dorsett."

The Superior Court found "that upon the record there is no evidence to support a finding that the accident resulting in the death of the deceased arose out of his employment or was not the result of his wilful

intent to injure or kill himself or another. It is now, therefore, ordered and adjudged that the decision and award of said North Carolina Industrial Commission be and it is hereby reversed and set aside; that plaintiff take nothing by her action and that defendants go without day and recover of plaintiff their costs of action."

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

Fred F. Myrick for plaintiff.

James MacClamroch, Jr. (Hobgood, Vinson & MacClamroch) for defendants.

CLARKSON, J. The question involved: Did the accident resulting in the death of the deceased arise out of and in the course of his employment, rather than the result of his own wilful intent to injure or kill himself or another? We have read the evidence with care and think there was sufficient evidence to sustain the findings of fact of the North Carolina Industrial Commission, that the accident resulting in the death of the deceased arose out of and in the course of his employment and not as a result of his own wilful intent to injure or kill himself or another.

In *Moore v. State,* 200 N. C., at p. 301, the following observations are made: "The award of the Industrial Commission is conclusive and binding as to all questions of fact. Workmen's Compensation Law (P. L., 1929, chap. 120), sec. 60. Whether an injury by accident has arisen out of and in the course of a person's employment is a mixed question of law and fact, and while the parties to an action or proceeding may admit or agree upon facts they cannot make admissions of law which will be binding upon the courts." *Harden v. Furniture Co.,* 199 N. C., 733; *Hunt v. State,* 201 N. C., 707; *Brown v. Ice Co.,* 203 N. C., 97; *Kenan v. Motor Co.,* 203 N. C., 108; *Garris v. Hines Bros.,* 203 N. C., 148; *Munford v. Construction Co.,* 203 N. C., 247; *Richey v. Cotton Mills,* 203 N. C., 595; *Johnson v. Bagging Co.,* 203 N. C., 579.

In *Greer v. Laundry Co.,* 202 N. C., at p. 731, we find: "It is further provided in said act that an award made by the North Carolina Industrial Commission in a proceeding begun and prosecuted before said Commission for compensation shall be conclusive and binding as to all questions of fact. It has accordingly been held by this Court that only questions of law involved in an award made by the Commission in a proceeding of which the Commission has jurisdiction may be considered and passed upon by the judge of the Superior Court on an appeal to

said court from an award made by the North Carolina Industrial Commission. *Aycock v. Cooper, ante,* 500, 163 S. E., 569, and cases cited in the opinion in that case."

In *Conrad v. Foundry Co.,* 198 N. C., 723, the facts are similar and this Court speaking to the subject at p. 725-6, said: "The condition antecedent to compensation is the occurrence of an (1) injury by accident, (2) arising out of and in the course of the employment. Was the injury suffered by the claimant an injury by accident? In construing the word 'accident' as used in the compensation act we must remember that we are not administering the law of negligence. Under the law an employee can recover damages only when the injury is attributable to the employer's want of due care; but the act under consideration contains elements of mutual concession between the employer and the employee by which the question of negligence is eliminated. 'Both had suffered under the old system, the employer by heavy judgments, . . . the employee through old defenses of exhaustion in wasteful litigation. Both wanted peace. The master in exchange for limited liability was willing to pay on some claims in the future where in the past there had been no liability at all. The servant was willing not only to give up trial by jury, but to accept far less than he had often won in court, provided he was sure to get the small sum without having to fight for it.' *Stertz v. Industrial Commission,* 91 Wash., 588, 158 Pac., 256." For the reasons given, the judgment of the court below is

Reversed.

W. L. PARSONS, JR., ET AL. v. MRS. MARY L. LEAK, WIDOW OF T. C. LEAK, DECEASED, ET AL.

(Filed 25 January, 1933.)

1. Dower A b—Widow is entitled to actual allotment of dower in unencumbered land and to dower's value in encumbered land.

The deceased left an estate consisting of lands and interest in a number of various businesses and named trustees in his will to carry on the businesses for a period after his death, clothing them with full power to do so. The wife dissented from the will and claimed dower. Some of the lands were unencumbered but some had been mortgaged by the deceased in his lifetime and some by the trustees in carrying out the provisions of the will, the widow having joined in all the instruments: *Held,* the widow was entitled to actual allotment of dower in the unencumbered lands and to the money value of her dower in the encumbered lands, payable out of the proceeds of the sale of the remaining assets of the estate under the order of court, after deducting commissions due the trustees, reasonable attorney's fees and charges of administration.

2. Executors and Administrators G b—Executors and administrators are entitled to lawful commissions and expenses out of estate's assets.

The commissions allowed executors and administrators are in reasonable payment for services rendered by them in the performance of their duties, and in proper instances include reasonable costs, charges and attorneys' fees necessary to the performance of their duties, and under the provisions of the statute, C. S., 157, such sums may be retained by them out of the assets of the estate against the rights of creditors and all persons claiming an interest in the estate.

3. Executors and Administrators D d—Charges of administration and executor's commissions have priority over claim for value of dower.

The widow's dower right in the lands of her deceased husband is an interest in his estate, and his executors are entitled to payment of commissions due them, together with reasonable attorney's fees, cost and charges of administration before the payment to the widow of the money value of her dower right in lands sold under mortgages executed by her husband and his executors in which she joined.

ADAMS, J., took no part in the decision of this case.

CIVIL ACTION, before *Finley, J.*, at December Term, 1931, of RICHMOND. The cause was committed to a referee, and only such facts found by him as may be necessary to develop the questions of law involved will be summarized.

T. C. Leak died on 4 December, 1923, domiciled in Richmond County, leaving a last will and testament which was duly probated. Item 2 of the will is as follows: "I am interested in various enterprises and businesses in Richmond County, N. C., my largest interests being farming, sawmilling and cotton-milling. I do not think it would be wise for my interests in these businesses (and possibly my other businesses) to be wound up immediately after my death, and, as I now view my business affairs, I am confident that my interests should be placed in the hands of trustees with power to carry on my present business affairs four or five years after my death, possibly longer. I have been especially impressed with the business acumen of my two nephews, Wm. C. Leak and Walter L. Parsons, Jr., and their devotion to their duties. Likewise, I have absolute confidence in the business ability and integrity and devotion to my interests of my lifelong friend, J. LeGrand Everett, and it is my will and desire and accordingly I do hereby give, devise and bequeath my entire estate, real, personal, and mixed to Wm. C. Leak, Walter L. Parsons, Jr., and J. LeGrand Everett as trustees and I hereby empower them to handle my estate in as full a manner and with all power that I now have in my lifetime." Other provisions of the will required the trustees to pay to the widow "one-third of all profits accruing to my estate from all sources so long as she may live," etc. Certain provisions were made for the two children of the testator, to wit, T. C.

Leak, Jr., and Hal L. Leak. Item 6 of the will is as follows: "Having full confidence in the trustees named herein I desire that no bond be required of them in the fulfillment of their duties as trustees of my estate and I enjoin on them to consult freely and employ any of my present employees in the continuation of my present businesses. However, I want my trustees to make annual reports of their dealings with my estate to the clerk of the court as now required of guardians and to receive jointly an annual compensation of five per cent of the amount handled by them." In Item 4 of the will Leak, Parsons and Everett were appointed guardians of the children of the deceased, and in Item 7 they were appointed executors of the will. Leak, Parsons and Everett qualified as trustees and executors in December, 1923, and took charge of the estate of the testator. Thereafter the widow, Mary L. Leak, duly dissented from the last will and testament of her husband.

At the time of his death the deceased owned more than seven thousand acres of land and various lots, improved and unimproved, together with his residence. He also owned a half interest in an opera house, warehouse, and in certain lands known as the Leak-Porter land. The testator also owned stocks in banks, realty companies, building and loan associations, cotton mills, mule companies, ice company, etc., together with a certain amount of cash, notes and mortgages, life insurance and various accounts receivable. There were also on hand 1,139 bales of cotton, farming implements, gin outfit, etc.

At the time of his death the deceased was indebted in the amount of $534,755.59. Portions of this indebtedness were secured and other portions unsecured. After taking possession and custody of the assets of the estate the trustees, executors and guardians entered upon the administration of the same and undertook to carry on the various enterprises and business activities of the testator. During the course of such administration the executors and trustees received from all sources approximately $1,700,000, and disbursed approximately the same amount. So that at the time of commencement of this action they found it impossible to continue the operation of said business enterprises.

In order to carry on the business enterprises aforesaid it became necessary to borrow money in large amounts, and hence the executors and trustees borrowed money and executed and delivered mortgages and deeds of trust upon certain lands owned by the deceased in which mortgages and deeds of trust the widow joined. Certain other lands were sold by the executors and trustees, and the widow joined in such conveyances. When it became apparent that the business enterprises could no longer be carried on, and that large losses had been sustained, this suit was instituted by the executors, trustees and guardians against the widow and creditors of the estate.

Throughout the course of administration the executors and trustees have filed with the clerk of the Superior Court of Richmond County annually their annual accounts and statements of their expenses and of their receipts and disbursements, "which said reports have been and remain on file in the office of said clerk, and that no person interested in the estate of said T. C. Leak, deceased, has ever filed or made any exceptions to the same, which is admitted." It was found by the referee that the widow had been paid $12,432.23, and the further sum of $24,723.63 for the support and maintenance of the minor children, and that the executors and trustees had retained the sum of $27,400 as part payment of commissions earned in the administration of the estate. The executors and trustees claimed a balance due of $26,600 on commission account and $5,500 as reasonable attorney's fees for legal services necessary and incident to the due administration of the estate.

Upon exceptions filed to the referee's report a hearing was had before the judge upon the report of the referee. The trial judge decreed in part that the widow was entitled to dower "in the lands owned by T. C. Leak at the time of his death and remaining unsold and unencumbered actually allotted and laid off to her by jurors to be named by appropriate decree of the court in this action." The identification of such parcels of property is set out in the judgment, but the same is not deemed pertinent to the question of law involved. The judge found that the widow is entitled to have her dower "allotted in the manner stated above in each tract of land owned by T. C. Leak at the time of his death, and which has heretofore been conveyed by way of mortgage or deed of trust to secure indebtedness, either by the said T. C. Leak and wife prior to his death or by the said executors and trustees and said widow since his death, which has not heretofore been sold by foreclosure sale. In the case of any tract subject to a mortgage or deed of trust which has already been sold, if there remained a surplus from said sale after the payment of costs and expenses of sale and the payment of debts secured by such mortgage or deed of trust, such surplus, when paid into court, shall be held subject to the payment to said widow of her claim against said estate representing the value of her dower rights in said tract of land," etc. The dower right of the widow was further preserved in all lands which had been sold and conveyed by deed executed by the widow and the executors and trustees. The trial judge further decreed "that a sale of all the property and assets of the estate of T. C. Leak, deceased, not heretofore sold, subject to the limitations hereinafter set out, be made under the direction of this court and by a commissioner appointed to make sale thereof, and the net proceeds arising therefrom shall be applied as hereinafter set out. . . . It is further ordered

and decreed that all the proceeds arising from the sale of all unpledged personal assets belonging to said estate and the surplus remaining after payment of the debts secured by pledged personal assets and the proceeds of the sale of all real estate of said deceased, including any surplus remaining after the payment of the debt secured by each mortgage or deed of trust on real estate of said estate from the funds arising from the sale of such mortgaged tract of land shall be paid to the executors and trustees, plaintiffs, who shall retain out of the first of such funds coming into their hands sufficient funds to pay and discharge therefrom the following items, which are hereby found to be necessary costs, expenses, charges, and disbursements in the administration and settlement of said estate, under the terms of the said will of T. C. Leak, deceased, to wit: Mrs. L. G. Fox, balance on salary, $100; J. N. Hasty, balance on salary, $657.01; balance inheritance taxes, $714.89; balance of commissions due executors and trustees, $26,000 (this item to include $5,500 attorney's fees which shall be paid by said executors and trustees), costs of the action including actual and necessary costs, expenses, charges and disbursements in the final administration of the estate. It was further ordered that when the lands had been sold as provided in the judgment that the executors and trustees should first retain "from funds in hand a sufficient sum to pay and have paid the costs, expenses, charges and disbursements as herein decreed and herein found necessary in the administration and settlement of said estate, and the said executors and trustees shall then pay to the said widow from funds then remaining in their hands, if any, so far as the same will extend, such claims for dower and which said claims is hereby decreed to have priority in payment over any and all unsecured claims and debts owing by said estate."

From the foregoing judgment Mary L. Leak, widow, appealed.

F. W. Bynum and Varser, Lawrence & McIntyre for plaintiffs.
J. C. Sedberry for Mary L. Leak.

BROGDEN, J. In settling an insolvent estate, is the widow's claim for the money value of her dower entitled to priority of payment over commissions due the executors and trustees, together with reasonable attorney's fees, costs and charges incident to the proper administration of the estate?

The testator at the time of his death was interested in many business enterprises and owned various types of property. Some of his real estate was encumbered, and large holdings, including his residence, were not encumbered. In his will he declared his desire that his business undertakings be carried on for a substantial period of time. This undertaking required the borrowing of money from time to time and the

giving of security for such sums so borrowed. For such purpose, the widow joined the executors and trustees in the execution of deeds, mortgages and deeds of trust upon certain land. Obviously, under our decisions, she was entitled to dower in this property. The foreclosure of such mortgages and deeds of trust precluded the actual allotment of dower in the physical property, and consequently in accordance with the principles announced in *Chemical Co. v. Walston*, 187 N. C., 817, 123 S. E., 196, and *Blower Co. v. MacKenzie*, 197 N. C., 152, 147 S. E., 829, the money value of her dower must be paid out of funds realized from the sale of the remaining assets specified in the report of the referee and the final judgment of the court. Our statutes and decisions relating to dower have justly made liberal provision for widows and stand as an unfailing guarantee, that even in an insolvent estate, the widow and her dower right shall not be submerged and swept away in the swift-running tide of losses, misfortunes or bad judgment of the deceased husband. The decree provided that dower should be actually allotted and set apart in accordance with law in all the unencumbered land of deceased, and further provided for a sale of the remaining assets as set forth in the judgment. The chief controversy arises upon that portion of the judgment which authorizes the executors and trustees to pay out of the fund created by the sale, the balance of commissions due them, attorney's fees and charges of administration before applying any part of the proceeds to the widow's claim for dower.

Administrators and executors are not allowed commissions merely by virtue of the office or appointment as such. Such commissions are allowed for services rendered in administering, liquidating and settling the estate. *Grant v. Pride*, 16 N. C., 269. It has been the policy of the law to permit and allow reasonable commissions to executors and administrators together with reasonable attorney's fees and such other assistance as might be reasonably necessary to proper and efficient administration. Thus, in *Overman v. Lanier*, 157 N. C., 544, 73 S. E., 192, this Court said: "While, ordinarily, administrators should not be allowed for clerk hire and the expenses of a bookkeeper, this being usually a part of the ordinary services for which he receives a commission, in this case the evidence discloses that it was necessary to employ such clerical assistance, and the allowance thereof was doubtless considered by the court below in fixing the commissions below the limit allowed by law." Again, in *Shepard v. Bryan*, 195 N. C., 822, 143 S. E., 835, it was held that commissions and attorney's fees, if reasonable and duly allowed by the court, constituted proper charges against the estate. See *Thigpen v. Trust Co.*, 203 N. C., 291. C. S., 157, provides that executors and administrators "shall be entitled to a commission not exceeding five per

cent upon the amount of receipts and disbursements 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 any interest in the estate. . . . Nothing in this section shall prevent any executor, administrator or collector from obtaining a reasonable sum for necessary charges and disbursements in the management of the estate." Thus the statute empowers such personal representatives to retain commissions "out of the assets against creditors and all other persons claiming an interest in the estate." Manifestly, a claim of dower is an "interest" in the estate. Hence the wording of the statute lends direct support to the judgment. Moreover, the claim of the widow must be paid out of a fund produced by the sale of assets. This sale of assets and the creation of the fund thereby is accomplished through the processes and powers of administration. Certainly it would appear to be just that a person claiming an interest in a fund should be required to take such benefits subject to the reasonable costs and expenses of creating the very fund which liquidates the claim. It does not impair or diminish the dower right of the widow to require her to pay the freight on her own cargo. This idea was expressed in *Trust Co. v. Stone,* 176 N. C., 270, 97 S. E., 8, in which the Court declared: "We are, therefore, of the opinion the widow is entitled to dower in the proceeds of sale and, by the same reasoning, in the land unsold. She must, however, be content with the ascertainment of its value as to the land sold out of net proceeds, because, having consented to the sale and conversion, she is justly chargeable with the ratable part of the expense."

Affirmed.

ADAMS, J., took no part in the decision of this case.

W. L. PARSONS, JR., ET AL. v. MRS. MARY L. LEAK, WIDOW, ET AL.

(Filed 25 January, 1933.)

1. Estoppel B a—Parties held estopped from setting up priorities contrary to provisions of order allowing them to intervene.

Where parties are permitted by a referee to intervene in a pending cause involving the question of priorities of claim of dower and other claims against the estate of a decedent, and the order of the referee allowing them to intervene specifies that the claims of the interveners shall be heard without affecting the right of priority of the original parties whose claims had already been heard by him: *Held,* the interveners are bound by the limitations in the order and may not claim priority over the original parties to the action.

2. Mortgages G a—Wife joining in mortgage is released of liability where foreclosure under subsequent mortgage realizes amount of first debt.

The wife joined with her husband in executing a note and duly registered mortgage on his lands for money borrowed by him. After his death, while this mortgage was outstanding and unpaid, the husband's executors and trustees conveyed the land to her for the purpose of having her mortgage the same in order to realize funds necessary for their use in carrying out the provisions of a trust imposed upon them by the husband's will. In accordance with this agreement she executed a deed of trust on the land with warranty of an unencumbered title, the *cestui que trust* having knowledge of the fact and purpose of the transfer of the land to her. The deed of trust was foreclosed and the property bought in by the *cestui que trust* for an amount more than sufficient to discharge the original mortgage: *Held*, the wife was but a surety on the original mortgage note and was discharged of personal liability thereon, the amount realized from the foreclosure of the subsequent deed of trust being more than sufficient to discharge the debt under the original mortgage.

3. Subrogation A a—Party can acquire no better right by subrogation than that of principal.

Where a title guaranty company insures the title of certain lands for the benefit of the mortgagee, and is forced to pay the amount of a prior mortgage on the lands, the title company is subrogated to the rights of the mortgagee against the mortgagors, but can have no better right in this respect than the mortgagee.

ADAMS, J., took no part in the decision of this case.

CIVIL ACTION, before *Warlick, J.*, at June Term, 1932, of RICHMOND.

The plaintiffs instituted an action against the widow and creditors of T. C. Leak, deceased, for the purpose of securing an order to sell property to create assets and to settle the estate. After the cause had been committed to a referee, the Title Guaranty and Insurance Company and the Louisville Title Company filed a petition before the referee. The referee made an order that the "Title Guaranty and Insurance Company and the Louisville Title Company be, and they are hereby allowed to become parties to this action and to file their said petitions as their complaint herein. It is further ordered that said parties are allowed to come into this action because the referee finds that it is necessary that the contentions of the said parties be heard and determined in this action in order to adjudge completely and to settle the matters set out in the complaint herein filed, but the said parties shall come into this action and their allegations, together with all answers or replies thereto, shall be heard and determined without affecting or delaying the matters heretofore heard, including the accounts provided for in the order of reference, which has already been heard, and the referee will file his report as to all matters heretofore heard and a

judgment shall be entered thereon either with or without exceptions, as the case may be, separate and apart from and unaffected by the hearing and determination of the issues and questions presented by the said complaint of said movants and the answers and replies thereto."

The North Carolina Joint Stock Land Bank also asked to be made a party, and said petitioner was allowed to intervene by an order of the referee, which said order declares that such intervention "shall not have the effect of interfering with the matters heretofore heard, and the referee will proceed to file the report as to all such matters . . . in all respects as if this order had not been entered," etc. The referee, after finding certain facts with reference to the death of T. C. Leak, leaving a last will and testament and the appointment of Parsons, Leak and Everett, as trustees and executors, proceeded to find other facts pertinent to the controversy. These facts may be substantially stated as follows: On 14 September, 1920, T. C. Leak purchased from S. S. Steele a one-half undivided interest in certain lands. He gave three notes for $8,500 each, payable on 1 January, 1921, 1922, and 1923. Mary L. Leak, his wife, signed the notes with her husband and in order to secure the payment of all said notes, T. C. Leak and his wife, Mary L. Leak, executed a mortgage to S. S. Steele, which mortgage was duly recorded. During his lifetime T. C. Leak paid off the first two notes and paid the interest on the third note of $8,500 to 1 January, 1923. Leak died on 4 December, 1923, and thereafter his executors and trustees paid the interest on said note to 1 January, 1926, and on said date paid $2,000 on principal, leaving a balance of $6,500 due. Interest was also paid on the balance to 1 January, 1929. In the fall of 1925, the executors and trustees needed $50,000 to pay off certain debts and to carry on the business enterprises of the estate. They applied to the North Carolina Joint Stock Land Bank for a loan of $50,000, and were informed by said Land Bank that a loan could not be made to executors and trustees, and suggested that said executors and trustees convey the land to some individual, and that such person could thereupon apply for the loan and secure the same and reconvey the land to the executors and trustees subject to the encumbrance. Thereafter in December, 1925, a special proceeding was instituted in Rockingham County authorizing the executors and trustees to convey the land or mortgage the same, and thereupon the land was conveyed by the executors and trustees to Mary L. Leak, widow of the deceased. She signed an application to the Land Bank for a loan of $50,000 upon the property, representing in substance that there were no liens upon the property and that she was the sole owner thereof. The Land Bank approved the application and employed an attorney at Rockingham, N. C., to examine the title to the property and make an

abstract thereof. Such abstract was made, certifying that Mary L. Leak was the owner of the land in fee simple, free and clear of all encumbrances. This abstract omitted any reference to the Steele mortgage which was then unpaid and uncanceled. The Land Bank made the loan and issued a check to Mary L. Leak, borrower, and to the attorney in the sum of $39,790. The Land Bank retained $10,000 of the loan until certain improvements were made upon the property, and when such improvements had been made the balance of the money was paid in the same manner as the former amount. On 19 March, 1926, Mary L. Leak reconveyed the land to the executors and trustees, subject to the said mortgage of $50,000. The Title Guaranty and Insurance Company had a contract with the Land Bank insuring the title to all property upon which the Land Bank made loans. This contract contained a subrogation clause. On 3 February, 1930, Parsons, Leak and Everett, executors and trustees, instituted a suit setting forth the status of the estate of T. C. Leak and requesting an order to close the estate. The North Carolina Joint Stock Land Bank was made a party defendant to the suit, and entered an appearance and requested permission to foreclose the Mary L. Leak deed of trust securing the said sum of $50,000, as the same was then in default. Shortly thereafter the Land Bank learned for the first time of the existence of the Steele mortgage, and that the same constituted a first lien on the property. Pursuant to an order of the court the Land Bank foreclosed its mortgage "and at said sale said bank became the last and highest bidder for the said land at a bid in the sum of $30,000, which was less than the face value of the amount due on its said $50,000 loan." In January, 1931, the Land Bank paid the balance due on the Steele mortgage, to wit, the sum of $7,285.42, and took an assignment from Steele of said note. Subsequently the Title Guaranty and Insurance Company, pursuant to its contract of insurance with said Land Bank, refunded to the said Land Bank the said sum of $7,285.42, and said Steele note and mortgage was surrendered to said Title Company, and the said Title Company is now the equitable owner of said note as the equitable assignee thereof. The referee further found that the Land Bank knew that the money which it was loaning ostensibly to Mary L. Leak, widow, was in fact for the benefit of the estate, and that at the time of the execution and delivery of the deed of trust securing the loan for $50,000 on said "Beaver Dam farm . . . the said lands had a mortgage value for cash sufficient to have paid said $50,000 deed of trust and the said Steele mortgage."

Upon the foregoing facts the referee was of the opinion that the petitioner, Insurance Company, was entitled to recover $7,285.42 against the executors and trustees of the estate of T. C. Leak. Exceptions were

filed to the report of the referee by the widow and by the Insurance Company. The trial judge approved the findings of fact made by the referee and adjudged that the Title Guaranty Company was entitled to recover the sum of $7,285.42 with interest from the executors of the estate of T. C. Leak and of Mary L. Leak as surety on said note.

From the judgment so rendered the Title Guaranty and Insurance Company assigned as error that portion of the judgment decreeing that the judgment against the executors in favor of the insurance company is subordinate "to the claims approved in the prior judgment in favor of the executors for commissions and expenses, and in favor of the widow, Mary L. Leak, for compensation in lieu of dower." Mary L. Leak, the widow, assigns as error that portion of the judgment which decrees that she is personally liable to the Insurance Company on the Steele note.

W. G. Mordecai, Charles Ross and O. L. Henry for Title Guaranty and Insurance Company.

Varser, Lawrence & McIntyre for executors and trustees of T. C. Leak.

J. C. Sedberry for Mary L. Leak.

BROGDEN, J. If a husband and wife execute a note or notes, securing the same by a mortgage on the land of the husband, who receives the proceeds, and thereafter the property is sold by foreclosure under a subsequent deed of trust for a sum in excess of the amount due upon the first lien, is the wife thereby released from personal liability upon the first note or notes?

The Title Guaranty and Insurance Company appeals from the judgment upon the ground that a priority was given therein to certain other claims involved in another branch of this litigation. The insurance company requested permission of the referee to be made a party to the suit. The referee made an order permitting it to become a party, but therein expressly provided that such intervention "shall be heard and determined without affecting or delaying the matters heretofore heard . . . and unaffected by the hearing and determination of issues and questions presented by the said complaint of said movants and the answers and replies thereto." Consequently, when the Insurance Company pursued its rights before the referee it cannot now be permitted to repudiate the limitations imposed in the order. Therefore, the issuable question of law arises upon the liability of Mary L. Leak, the widow, upon the balance of the Steele note, aggregating $7,285.42.

When a married woman joins with her husband in the execution of a note, securing the same with a mortgage or deed of trust upon the hus-

band's land, and he receives the entire proceeds, she thereby becomes a surety for his debt. *Weil v. Thomas*, 114 N. C., 197, 19 S. E., 103; *Kennedy v. Trust Co.*, 180 N. C., 225, 104 S. E., 464; *Barnes v. Crawford*, 201 N. C., 434. The execution of the mortgage was in itself an application of all the property embraced in the mortgage to the payment of the debt secured therein. *Harvey v. Knitting Co.*, 197 N. C., 177, 148 S. E., 45. The balance due on the Steele note upon which Mary L. Leak was surety was $7,285.42. The referee finds that the property securing the note was worth in excess of $57,000. At the foreclosure under the second mortgage or deed of trust the property actually brought $30,000 and the Land Bank became the purchaser at that sum. Thus, it is obvious that the security of the principal debtor, T. C. Leak, was worth much more than enough to discharge the debt, and when the Land Bank purchased the property at the sale the surety, Mary L. Leak, was thereby released. Manifestly, the Insurance Company, upon the principle of subrogation, could have no claim against the surety, Mary L. Leak, superior to that of the Land Bank. Hence, that portion of the judgment imposing a personal liability upon Mary L. Leak as surety is erroneous. *In all other respects the judgment is approved.*

Affirmed.

ADAMS, J., took no part in the decision of this case.

A. HARDY COLVARD v. NANTAHALA POWER AND LIGHT COMPANY.

(Filed 25 January, 1933.)

1. Appeal and Error J c—Refusal to strike out certain testimony in this case held not prejudicial.

A witness testified as to the amount of damage resulting to the plaintiff's farm from the running of defendant's highly charged transmission line across the land. On cross-examination he testified that his estimate of the damages was based on the fact of danger from the transmission line and that people would not wish to work near it, and on further cross-examination he testified that his testimony as to damages was based on his personal dislike to be near such transmission line. The defendant made a motion to strike out his testimony relative to damages: *Held*, the refusal of the motion to strike out was not prejudicial error, the witness' unobjected testimony as to general fear of power lines being no more prejudicial than the testimony objected to, and there being testimony of several other witnesses to the effect that the value of the land was decreased by general fear of power lines.

2. Same—Admission of certain evidence in this case held not prejudicial in view of testimony elicited by appellant on cross-examination.

Where on the question of the measure of damages to plaintiff's farm caused by the running of defendant's transmission line across the land the defendant has elicited evidence from a witness on cross-examination, over plaintiff's objection, that the transmission line also ran near the witness's house and that the line curved, causing the witness to fear that the insulators might break and result in injury to his house, and that the same curve was on plaintiff's land: *Held*, the defendant opened the door for the evidence of the witness in this respect, and its admission was not prejudicial to him.

3. Eminent Domain C c—Evidence of decrease in value of land caused by general fear of transmission lines held competent.

On the question of the measure of damages to plaintiff's farm caused by the running of defendant's transmission line across it, evidence of the danger from the line and the fear of people of injury therefrom as affecting the decrease in value of the land is properly submitted to the jury, and it is not objectionable as being contingent, remote, or a matter of speculation, and an instruction based thereon is not erroneous.

APPEAL by defendant from *Stack, J.*, and a jury at June Term, 1932, of GRAHAM. No error.

This was an action brought by plaintiff to recover of defendant certain land belonging to him and damages. The defendant after denying the material allegations of the complaint for a further defense alleges that the defendant is advised and believes that it had the right as a public-service corporation under the laws of the State of North Carolina to construct its transmission lines across and upon the lands of the plaintiff, and that it also had the right by and with the consent of the Graham County Railroad Company to construct and operate said transmission line upon the railroad's right of way. *And that its only obligation to the plaintiff as compensation for said right of way is the reasonable value of the increased burden on the easement of the railroad company caused by the construction of said transmission line.* That the defendant is further advised that upon the assessment and payment of such permanent damages as the plaintiff may have sustained by reason of the construction, maintenance and operation of said transmission line, that the defendant is entitled to the unrestricted use of a right of way on and across the plaintiff's land for the maintenance and operation of its transmission line. Wherefore, having fully answered, defendant prays judgment that such actual damages as defendant may have sustained by reason of the construction and operation of defendant's transmission line be ascertained and determined, and that the defendant, on payment of any amount assessed as damages, be granted a permanent right of way over and through the plaintiff's lands described in the

complaint; and for such other and further relief as the court may deem meet and proper.

The following issues were submitted to the jury and their answer thereto:

1. Did the defendant, without agreement, enter upon the lands of the plaintiffs, dig holes and place poles and string wires thereupon and construct and use a transmission line thereon, as alleged in complaint? Answer: Yes. (By consent.)

2. If so, was the transmission line constructed on the right of way of the Graham County Railroad Company, as alleged in the answer? Answer: Yes (by consent), except one wire for 22 feet 5.6 inches over the right of way.

3. Have plaintiff's said lands been diminished in value as a result of the location, maintenance and use of the defendant's transmission line on and across said lands? Answer: Yes.

4. If so, what permanent damage or compensation is the plaintiff entitled to recover of defendant by reason thereof? Answer: $1,125.

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

T. M. Jenkins for plaintiff.

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

CLARKSON, J. The transmission line of defendant was constructed a distance of 2,792 feet angling across plaintiff's 84¾-acre tract and 197 feet across his 2.09-acre tract. There are 12 poles and one brace pole on the land. The power cables sag down and are about 15 to 21 feet from the ground and carries 66,000 voltage. The plaintiff testified in part unobjected to:

"The transmission is constructed on poles set about 300 feet apart on which are placed two cross or angle bars or frames on which three power cables are strung. The wires are about 8 feet wide, about four feet from the poles. . . . There are eight guy cables, six of which attach to power pole with one end and angle off and intersect with metal base to go into the ground about forty feet from the power pole. Then there is another guy pole that sets on the opposite side of the railroad with a guy wire running off from it. There is one "H" frame constructed of two upright poles with cross-arm and cables from one pole to the other. . . . I am familiar with it and know the natural adaptability or uses of that land at the time the transmission was built on it and have an opinion as to what was its fair market value of the first tract described in the complaint immediately before the trans-

mission line was built across it. It was eight thousand dollars. The uses or capabilities of this property was affected by the construction of the transmission line. Immediately after and considering the transmission line on it, the fair market value was about five thousand dollars. That land was by its location and natural adaptabilities suitable for farming, water-power, for building or residential purposes. The transmission line runs near to the most desirable part for dwelling purposes. The lower tract, the second, described in the complaint contains 2.09 acres. The distance of the transmission line across it is 197 feet. No poles are set on it. The market value of it at the time built and without the transmission line was $250. Immediately after and with the line on it, it was $150." *Crisp v. Light Co.*, 201 N. C., 46.

Many witnesses corroborated the plaintiff. The defendant's witnesses estimated the damage from $245 to $300.

A witness for plaintiff, Claude Cape, testified in part: "In my opinion the reasonable market value of both tracts just before the transmission line was built was between seven and eight thousand dollars, and just after the erection of the transmission line across them the market value was three thousand dollars."

On cross-examination by defendant, the witness stated: "Some poles are 15 to 20 feet from railroad. I attribute and base my estimation of the decrease in value of that land of $3,000 to the erection of the transmission line through it. A man don't feel like working around it and don't feel like living around it." Defendant's counsel asked the witness the following question: "You are basing your testimony on your personal liking or dislike of it?" Answer: "That is exactly right." Defendant's counsel then requested: "We ask the court to instruct the jury not to consider his valuation." The court stated: "It is for the jury to say what weight they will give his valuation." The defendant excepted and assigned error. We do not think defendant's contention can be sustained. The witness was on cross-examination and he was being questioned as to the decrease in value of the land. Unobjected to he stated "a man don't feel like working around it and don't feel like living around it." The answer "That is exactly right" is no more prejudicial than the query unobjected to.

Then again W. P. Matheson, a witness for plaintiff, on cross-examination stated: "The value of the land dropped $3,000. I attribute the decreased value of this land on profits *and on danger.* From my understanding of this character of power, *it is dangerous and no one likes to be near it* and I would attribute two-thirds to that fact."

Also Ralph Ramsey, a witness for plaintiff, on cross-examination stated: "The location of the railroad without the transmission line

would not reduce the value so much. It would not hurt it as bad as the transmission line that is there now. *People would not have been afraid to have gone there* and bought the land, just the operation of trains. I attribute practically all my decrease in value *on the fear people would have of going there.* In making my opinion of this valuation, I took into consideration that the land already had a burden of railroad right of way on it, 100 feet wide, with a constructed railroad on it."

All these reasons as to value are practically the same. It is well settled that the testimony is harmless where similar testimony is admitted without objection. *Shelton v. R. R.,* 193 N. C., at p. 674, *Thompson v. Buchanan,* 198 N. C., at p. 281, *Gray v. High Point,* 203 N. C., at p. 764.

On cross-examination of R. V. Howell, counsel for defendant *over plaintiff's objection* asked the witness the following question: "How close is that line to your house?" Answer (over plaintiff's objection): "About 66 feet, this same line." Plaintiff's counsel asked the witness the following question: "What is the effect of that line to your property running in 66 feet of your house, if any?" Answer: "I don't take the interest in it I did, owing to that." Q. "Why?" Answer: "I feel uneasy about it. It is in a curve there and if the insulators should break, it would sag in close to my house and I can't say it is mine. The same curve is at the place on plaintiff's land." The defendant excepted and assigned error and moved to strike out the witness's answer. We think defendant opened the door over plaintiff's objection and the answers on redirect examination cannot be held for prejudicial or reversible error. The witness stated a matter of common knowledge to all.

The defendant excepted assigning error to the following portions of the charge of the court below: "The court instructs you that it is your duty to take into consideration that all elements of damage to the land by reason of the addition and permanent burden of the transmission line, such as additional inconveniences to the plaintiffs in the use of their lands and any and all inconveniences growing directly or being directly caused by the erection and use of said transmission line. And in this connection the court charges you that if you should find from the greater weight of the evidence that the heavily charged wires of the defendant would prevent persons from buying the tract of land at a reasonable market value, you should take this fact into consideration in connection with all other facts tending to reducing in value the tract of land in question."

"The plaintiff contends that the land is very valuable for several purposes and particularly for agricultural purposes and that it has been greatly damaged by the erection of these poles and the overhanging wires.

He contends it carries a voltage of 66,000 and that its presence is dangerous and that it is calculated to deter people from wanting the land and therefore damages him seriously. He contends on account of that people fear the lines and would not want to live near them or cultivate the lands under them. He, therefore, says you should award him substantial damages for the erection of the lines over his land."

We think the exceptions and assignments of error cannot be sustained.

In *R. R. v. Armfield,* 167 N. C., at p. 467, speaking to the subject, we find, citing numerous authorities, the following: "In these and all other cases where this question of condemning a right of way is substantially presented, the principle, as stated, is only intended to exclude considerations of sentiment or personal annoyance detached from any effect on the pecuniary value of the property or the allowance of damages purely of a speculative character, and accordingly it is held here and in well considered cases elsewhere that in awarding damages for a railroad right of way plaintiff shall be allowed to recover the market value of the property actually included, and for the impairment of value done to the remainder, and that in ascertaining the amount it is proper, among other things, to consider the inconvenience and annoyances likely to arise in the orderly exercise of the easement which interfere with the use and proper enjoyment of the property by the owner and which sensibly impair its value, and in this may be included the injury and annoyance from the jarring, noise, smoke, cinders, etc., from the operating of trains and also damage from fires to the extent that it exists from close proximity of the property and not attributable to defendant's negligence." *R. R. v. Manufacturing Co.,* 169 N. C., at p. 161-2.

In *Crisp v. Light Co.,* 201 N. C., at p. 50, citing the above principle set forth in *R. R. v. Mfg. Co., supra,* it is said: "The evidence covered a wide range, but we do not think it was so remote, conjectural or speculative that we could hold it, if error, reversible or prejudicial. We think the evidence that the power line over the property carried 66,000 volts, a circumstance to be considered by the jury. *R. R. v. Mfg. Co.,* 169 N. C., 156."

On defendant's motion and without objection on the part of plaintiff the court below under proper instructions and in charge of the sheriff permitted the jury "to visit and view the premises in controversy."

From a careful examination of the record and able briefs of counsel we can find no prejudicial or reversible error.

No error.

ODOM ALEXANDER v. B. M. BOYD AND COLEMAN A. HUNTER, TRUSTEE, AND STATE COMMERCIAL CORPORATION.

(Filed 25 January, 1933.)

1. Mortgages H h—Requirement of cash deposit of twenty-five per cent of bid at foreclosure sale held unreasonable.

Under the provisions of our statute, C. S., 2591, the last and highest bidder at a foreclosure sale obtains no interest in the land until the elapse of the ten-day period for the filing of an increased bid, and although the mortgagee or trustee may, in fixing the terms of the sale, require a reasonable cash deposit to cover the cost of the sale and insure completion of the sale by the purchaser if no upset bid is made, the reasonableness of such deposit may be determined by analogy to the deposit required for an upset bid, and where a deed of trust provides that the sale should be for cash, and the trustee, after notice, demands a cash deposit at the sale amounting to twenty-five per cent of the bid: *Held*, the amount demanded as a cash deposit is unreasonable, and where the last and highest bid of a proposed purchaser at the sale is refused because of his failure to make the required deposit, and the land is again exposed to sale and bid in by another who makes the deposit, an order restraining the execution of a deed to the second purchaser is properly continued to the final hearing.

2. Mortgages C a—

The statutory provisions relating to foreclosure of mortgages and deeds of trust in force at the time of the execution of such instruments become a part thereof as much as though written therein.

3. Mortgages H h—

The courts look with jealousy on the power of sale contained in mortgages and deeds of trust and the provisions are strictly construed.

APPEAL by defendants from *Finley, J.*, 31 May, 1932, of MECKLENBURG. Affirmed.

This is a civil action wherein the plaintiff sought relief by restraining order to forbid B. M. Boyd and Coleman A. Hunter, trustees, from making a deed to State Commercial Corporation of certain property of the plaintiff, and that temporary restraining order was signed as shown in transcript of record and was made permanent until the hearing as shown by judgment signed by his Honor, T. B. Finley, as shown in transcript of record.

The plaintiff and his wife, Bennetta H. Alexander, executed and delivered a deed of trust to B. M. Boyd and Coleman A. Hunter, trustees, dated 30 November, 1927, and which is recorded in the office of the register of deeds for Mecklenburg County, North Carolina, in Book 686, at p. 55, said deed of trust securing an indebtedness of $7,500 for money

borrowed on real estate, described in said deed of trust and also set forth in the plaintiff's complaint as shown in transcript of record, and that said deed of trust provided in case of default in the payment of the indebtedness secured therein the following provision:

"In case of sale the same shall be by public auction for cash at such time and place that may be determined by the trustees after first advertising the time and place and terms of sale." That the plaintiff and his wife defaulted in the payment of the indebtedness as secured in said deed of trust and according to its terms and conditions, and that demand was made upon said trustees to foreclose the property by the owner and holder of the indebtedness, and that pursuant to such demand, the said trustees did advertise the said property to be sold on 18 April, 1932, said advertisement being in accordance with the terms of the deed of trust, and that the property was duly and legally advertised for sale, and said notice of sale contained the following stipulation:

"Notice is hereby given that the trustees will require a cash deposit of at least 25 per cent of the bid from the successful and high bidder at this sale to be deposited with the said trustees at the time and place to guarantee performance of the bid in the event the bid is not later raised. The trustees reserve the right to reject any bid unless this cash deposit is made at the time of sale as herein advertised."

That on 18 April, 1932, the said B. M. Boyd, trustee, at the usual place of sale at the courthouse of Mecklenburg County exposed said property for sale, when and where one Ralph Rollins became the last and highest bidder therefor in the sum of $7,500 and taxes. The said property was offered subject to the stipulation contained in the advertisement requiring the cash deposit of 25 per cent, and that said requirement was announced by the said B. M. Boyd, trustee, at the time the property was exposed for sale, stating that said deposit could be made to the trustee or James M. Yandle, clerk of the Superior Court, and that the said Ralph Rollins failed to make such a deposit, and that the said B. M. Boyd, trustee, in about ten or fifteen minutes after the failure of the said Ralph Rollins to make said deposit, reëxposed said property for sale, when and where State Commercial Corporation bid in the said property in the sum of $7,000 subject to taxes.

That the sale was duly reported to the clerk of the Superior Court for increased bid, but no increased bid has been placed thereon, and that on 27 April, 1932, the plaintiff secured a temporary restraining order enjoining and restraining the trustees to make deed to the State Commercial Corporation for said property in accordance with said sale and its bid as set forth in transcript of record; that said trustees did refrain from making deed to said State Commercial Corporation, and that a

hearing of said restraining order was had before his Honor, T. B. Finley, on 31 May, 1932, and that his Honor, T. B. Finley, judge presiding, signed judgment or order making the temporary restraining order which had been issued heretofore by his Honor, Cameron MacRae, permanent.

The judgment or order signed by the court below is as follows:

"This cause coming on to be heard before his Honor, T. B. Finley, judge presiding over the courts of the Fourteenth Judicial District, and being heard upon affidavits presented by the plaintiff and the defendant and upon argument by counsel for the plaintiff and for the defendants, and it appearing to the court that the restraining order heretofore issued in this action ought to be continued until the trial and adjudication of the questions of law and fact raised by the pleadings herein.

"Now, therefore, upon motion of W. S. Blakeney, attorney for the plaintiff, it is hereby ordered, adjudged and decreed that the restraining order heretofore entered in this action be and it is hereby continued to the final hearing and adjudication of the issues herein. This order is made, however, upon the condition and express reservation that the plaintiff on or before 6 June, 1932, enter into a bond with good and sufficient surety, to be approved by the clerk of the Superior Court of Mecklenburg County, in the penal sum of $350.00 guaranteeing to the defendants the payment, in the event it is finally determined that this order should not have been granted the plaintiff, of the sum of $40 per month from 6 June, 1932, until such time as the plaintiff may relinquish to the defendants the possession of the premises described in the complaint, no part of said sum to be payable, however, until and unless it is finally determined that this order should not have been granted to the plaintiff. And in case the plaintiff fails by 6 June, 1932, to give such bond upon the terms and conditions aforesaid, then this order is to be null and void and the temporary restraining order heretofore issued in this action is to be dissolved."

The judgment or order was complied with and bond given. The defendants excepted and assigned error to the judgment as signed and appealed to the Supreme Court.

W. S. Blakeney for plaintiff.

Scarborough & Boyd and Fred H. Hasty for defendants.

CLARKSON, J. The only question presented by this appeal is whether or not the trustees in a deed of trust with power to sell, where the instrument itself provides that "In case of sale same shall be by public auction for cash" can, in their discretion, require the successful and high bidder to deposit 25 per cent of his bid in cash at the time and place of sale

to show good faith and to guarantee the performance of his bid in the event his bid is not raised within the ten-day period allowed by law? We think not, on account of the statute in this State.

"It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces those which affect its validity, construction, discharge, and enforcement." *Von Hoffman v. City of Quincy*, 4 Wall., 535, *Bateman v. Sterrett*, 201 N. C., at page 62.

C. S., 2591, N. C. Code, 1931 (Michie), is as follows: "In the foreclosure of mortgages or deeds of trust on real estate, or by order of court in foreclosure proceedings either in the Superior Court or in actions at law, or in the case of the public sale of real estate by an executor, administrator, or administrator with the will annexed, or by any person by virtue of the power contained in a will, the sale shall not be deemed to be closed under ten days. If in ten days from the date of the sale, the sale price is increased ten per cent where the price does not exceed five hundred dollars, and five per cent where the price exceeds five hundred dollars, and the same is paid to the clerk of the Superior Court, the mortgagee, trustee, executor, or person offering the real estate for sale shall reopen the sale of said property and advertise the same in the same manner as in the first instance. The clerk may, in his discretion, require the person making such advance bid to execute a good and sufficient bond in a sufficient amount to guarantee compliance with the terms of sale should the person offering the advance bid be declared the purchaser at the resale. Where the bid or offer is raised as prescribed herein, and the amount paid to the clerk, he shall issue an order to the mortgagee or other person and require him to advertise and resell said real estate. It shall only be required to give fifteen days notice of a resale. Resales may be had as often as the bid may be raised in compliance with this section. Upon the final sale of real estate, the clerk shall issue his order to the mortgagee or other person, and require him to make title to the purchaser. The clerk shall make all such orders as may be just and necessary to safeguard the interest of all parties, and he shall keep a record which will show in detail the amount of each bid, the purchase price, and the final settlement between parties. This section shall not apply to the foreclosure of mortgages or deeds of trust executed prior to April first, nineteen hundred and fifteen."

In re Sermon's Land, 182 N. C., at p. 126-7, speaking to the subject: "The section enters and must be allowed controlling effect upon every deed of trust or mortgage with power of sale executed since the date specified, see *White v. Kincaid*, 149 N. C., 415, and provides and intends

to provide that during the ten days, as stated in the first clause, the bidder acquires no interest in the property itself, but he acquires a position similar to a bidder at a judicial sale and before confirmation. This in our opinion follows not only as the natural meaning of the words used, that the sale shall not be deemed closed under ten days, but the position is fully confirmed by the further provisions of the law that during said ten days the matter is kept open for receipt of increased bids, and in case the stipulated increase is made, the property shall be readvertised and a second sale had. This being clearly the meaning of the law and the position of the purchaser. It is the accepted law in this State that a bidder at a judicial sale before confirmation acquires no interest in the property itself, but his bid is considered only a proposal to buy, which the court may accept or reject in its discretion. In *Upchurch v. Upchurch*, 173 N. C., 88-90, the Court said: 'His offer is considered only a proposition to buy at the price named, the court reserving the right to accept or reject the bid.'" *Cherry v. Gilliam*, 195 N. C., 233; *Davis v. Ins. Co.*, 197 N. C., 617.

In *Hanna v. Mortgage Co.*, 197 N. C., at p. 186, we find: "The principle upon which specific performance of a binding contract to convey land is enforceable, has no application to the successful bidder at a sale under the power contained in a mortgage or deed of trust of lands, during the 10-day limitation prescribed in C. S., 2591, there is no binding contract of purchase, and the bargain is incomplete. Under the provisions of this section, the bidder at the sale during the period of ten days acquires no interest in the property itself, but only a position similar to a bidder at a judicial sale, before confirmation. He is only considered as a preferred bidder, his right depending upon whether there is an increased bid and a resale of the land ordered under the provisions of the statute."

In 3 Jones on Mortgages (8th ed.), part sec. 2407 at p. 930, we find: "In fixing the terms of payment for a sale under a mortgage or trust deed, the mortgagee or trustee is bound to act fairly and with proper discretion. It is usual and proper to require a deposit at the time of sale of a reasonable sum to cover the expense of sale, and insure the completion of it by the purchaser. Such a reasonable deposit is forfeited to the use of the mortgagee if the purchaser fails to comply with the terms of sale, and he cannot recover it back from the mortgagee. If the payment of the whole amount of the purchase money be arbitrarily required at the time of sale, or within an hour's time after it, against the remonstrances of persons in attendance at the sale, the sale will be set aside. It must be shown, however, that this requirement had the effect of keeping persons present from bidding. A requirement, not of the

immediate payment of the entire purchase money, but of a deposit of a sum usually large, and not proportioned to the value of the property, would have the same effect in invalidating the sale. It is not unreasonable to require the payment of five hundred dollars down upon a sale under a mortgage for eight thousand dollars, although the advertisement of the sale did not state that such a payment would be required, but did state that the terms of sale would be stated at the time of sale." *Redfern v. McGrady,* 199 N. C., 128.

An upset bid under C. S., 2591, "If in ten days from the date of the sale, the sale price is increased ten per cent where the price does not exceed five hundred dollars, and five per cent where the price exceeds five hundred dollars."

By analogy a deposit at the sale as is allowed in an upset bid under the statute, we think reasonable. In regard to receivers and giving of bond in cases of insolvency, see C. S., 860, 861; *Ellington v. Currie,* 193 N. C., 610; *Woodall v. Bank,* 201 N. C., 428.

The courts look with jealousy on the power of sale contained in mortgages and deeds of trust and the provisions are strictly construed. It is a matter of common knowledge that money originally loaned is usually some 25 to 50 per cent of the value of the property. In these deflated times of stress and unemployment, where it takes twice as much labor and the product of the soil to equal a dollar in value as compared with the value at the time the debt was contracted, it behooves security holders to deal gently with the now impoverished real estate and home owners.

At this time we do not think it amiss to quote from what the Supreme Court of South Carolina has recently said, speaking through its able, learned and humanitarian *Chief Justice Eugene S. Blease.* The decision was filed on 2 December, 1932. *Theo. Seminary v. Arnette et al.,* and is as follows: "As to a sale of the mortgaged premises during the present great financial depression existing throughout the whole country we deem it not out of place for this Court to say that we think it is not only within the power of the Circuit Judge sitting as a Chancellor in Equity to take present conditions into consideration, but that it is right for him so to do in fixing the time for the sale. The Court of Equity was established for the purpose of giving relief that is equitable, not only to plaintiffs, but to defendants in that court. The defendants in mortgage foreclosure cases, especially those whose homes are involved, who are without fault of their own, but on account of the country's condition are unable to meet their obligations, and the infant defendants in this cause certainly come within that class, are entitled to much consideration and such relief as it is proper for equity to give them, just as

the plaintiff is entitled to consideration and relief. (See *Sou. Trust Co. v. Cudd,* 166 S. C., 108, 164 S. E., 428, as to similar expressions of this Court.) The fixing of the time of sale of mortgaged premises is almost entirely within the discretion of the Circuit Judge, and he may, in his decree, fix reasonable conditions. We are confident that the judge who finally fixes the time of sale in this case will take into proper consideration the rights and circumstances of the defendants, and that his decree, with proper conditions stated therein, will protect those rights." For the reasons given the judgment of the court below is

Affirmed.

DIXIE GROCERY COMPANY, INCORPORATED, THE FEDERAL LAND BANK OF COLUMBIA, INCORPORATED, LIZZIE HARTSOE, D. P. HARTSOE AND O. M. HARTSOE, v. J. W. HOYLE, TRUSTEE AND MRS. D. E. SORRELLS, CESTUI QUE TRUST.

(Filed 25 January, 1933.)

1. **Mortgages G a—Statute relating to conclusive presumption of payment of mortgages after fifteen years is prospective in effect.**

   Our statute prescribing that mortgages and deeds of trust on lands securing the payment of money shall be conclusively presumed to have been paid as against creditors or purchasers for value after fifteen years from the date on which the last installment of the debt was due unless an affidavit is filed with the register of deeds showing the unpaid balance, etc., is prospective in effect, and the act, being passed in 1923, does not affect a mortgage securing a note dated 6 September, 1911, and maturing 8 September, 1911. Michie's N. C. Code of 1931, 2594(5).

2. **Limitation of Actions C a—Provisions that new promise must be signed by party to be charged does not apply to payment on debt.**

   The provisions of C. S., 416, that no acknowledgment or promise for the payment of a note will prevent the running of the statute of limitations unless the agreement be in writing and signed by the party to be charged, expressly exempts from its operation the effect of the payment of principal or interest on the note, and where the record shows that the interest on a mortgage note has been paid to within ten years of the institution of an action to restrain the foreclosure of the mortgage, the plea of the ten-year statute of limitations is bad, and the mortgagee is entitled to foreclosure, nothing else appearing. C. S., 437(3).

APPEAL by plaintiffs from *Schenck, J.,* at October Term, 1932, of LINCOLN. Affirmed.

This is a civil action instituted by plaintiffs to perpetually enjoin defendants from exercising the right to foreclose two certain deeds of

trust, set out in the record. A jury trial was waived, and it was heard by the court upon an agreed statement of facts.

The facts stated by defendants in their brief are substantially correct, and are as follows: "The two deeds of trust are in the usual form and almost identical except as to dates and amounts secured. Each conveys the same 109 acres of land, as security for the several notes under seal. The first deed of trust was executed by O. M. Hartsoe and D. P. Hartsoe and their wives, 6 September, 1911, to secure a note under seal for $500 due 8 September, 1911. The second deed of trust was executed by the same parties, 16 October, 1911, to secure a note under seal for $400, due 20 October, 1911. The two deeds of trust were executed to J. W. Hoyle, trustee for L. W. Hoyle, and the notes were, each, payable to L. W. Hoyle. It is admitted that L. W. Hoyle is dead and that his duly qualified administrator transferred and assigned the two notes to defendant, Mrs. D. E. Sorrells, who has since been the legal owner and holder of the notes. It is admitted that the annual interest has been paid on each of the two notes, by the makers, up to 20 October, 1929, and 7 October, 1929, respectively. The answer admits that on 8 December, 1922, D. P. and O. M. Hartsoe, who had previously held the 109 acres, conveyed as security for the payment of the Hoyle notes, made division of the land between themselves and that each executed division deeds to the other for the one-half of said land. On 11 April, 1923, thereafter, D. P. Hartsoe executed a deed of trust on his half to the First Carolina Joint Stock Land Bank of Columbia, which was foreclosed on 8 February, 1932, and the defendant, Dixie Grocery Company, was the purchaser and took deed therefor. On 31 August, 1929, O. M. Hartsoe executed a mortgage on his half to the Federal Land Bank of Columbia, to secure a loan of $1,000, which is still outstanding. It is admitted that neither the affidavit was registered, nor the marginal entries made on the record of the two deeds of trust, prior to the expiration of fifteen years from the maturity of the Hoyle notes, as provided for in C. S., 2594(5). All of the conveyances referred to above were duly registered."

After the defendant, Mrs. D. E. Sorrells, was made party defendant, the Federal Land Bank of Columbia filed an amended complaint. The Dixie Grocery Company and D. P. and O. M. Hartsoe adopted the amended complaint. The following is in the amended complaint: "The Federal Land Bank of Columbia, Incorporated, hereby pleads the statute of limitations in such cases made and provided for, to wit, section 437, subsection 3, and section 2589 of the Consolidated Statutes of North Carolina, respectively, in bar of any right to make such application,

order or direction to the said John W. Hoyle, trustee as aforesaid, or his successors in trust as the said defendant, Mrs. Dora E. Sorrells, her heirs, assigns, administrators, executors, agents, servants, representatives or attorneys, may claim."

On the record the following facts are admitted: "That the foregoing entries of payments (set out in the record) were, on 25 January, 1932, entered upon the record of said deed of trust in Book 108, page 5, in the office of the register of deeds of Lincoln County, together with the following additional entry: 'The principal of $500, together with interest thereon from 20 October, 1929, to date, is now due and payable on the note secured by this deed of trust.' Signed: Mrs. D. E. Sorrells, assignee of M. H. Hoyle, administrator of L. W. Hoyle, deceased, witness: W. H. Boring, register of deeds. That the foregoing entries of payments (set out in the record) were on 20 January, 1932, entered upon the record of said deed of trust in Book 108, page 8, in the office of register of deeds of Lincoln County, together with the following additional entry: 'The principal of $400, together with interest thereon from 7 October, 1929, to date, is now due and payable on the note secured by this deed of trust.' Signed: Mrs. D. E. Sorrells, assignee of M. H. Hoyle, administrator of L. W. Hoyle, deceased; witness W. H. Boring, register of deeds."

Upon these facts, the court was of the opinion that the plaintiffs were not entitled to the relief sought, and further that the defendants were entitled to the relief demanded in their cross-action, and entered the judgment, as it appears in the record, from which plaintiffs made numerous exceptions and assignments of error and appealed to the Supreme Court.

W. H. Childs and W. A. Denny for Federal Land Bank of Columbia, Incorporated.

Kemp P. Nixon for Dixie Grocery Company, Incorporated, D. P. Hartsoe and O. M. Hartsoe, plaintiffs.

S. M. Roper and A. L. Quickel for defendants.

CLARKSON, J. The questions involved: Does the act of the General Assembly, Public Laws of 1923, chap. 192, sec. 1; N. C. Code, 1931 (Michie), sec. 2594(5), conclusively presume the payment of the two notes in question of date 6 September, 1911, maturity date 8 September, 1911; and the note dated 16 October, 1911, maturity date 20 October, 1911, when the holder of the said notes did not comply with the provisions of the aforesaid act prior to 25 January, 1932, being the date

agreed upon as the time when the marginal records in the office of the register of deeds, Lincoln County, North Carolina, showing the interest payment, etc., as set out in the agreed statement of facts in this case? We think not from the facts and circumstances of this case.

The pertinent part of the statute to be considered is sec. 2594(5) *supra,* which in part is as follows: "The conditions of every mortgage, deed of trust, or other instrument securing the payment of money shall be conclusively presumed to have been complied with or the debts secured thereby paid as against creditors or purchasers for a valuable consideration from the trustor, mortgagor, or grantor, from and after the expiration of fifteen years from the date when the conditions of such instrument by the terms thereof are due to have been complied with, or the maturity of the last installment of debt or interest secured thereby, unless the holder of the indebtedness secured by such instrument or party secured by any provision thereof shall file an affidavit with the register of deeds of the county where such instrument is registered, in which shall be specifically stated the amount of debt unpaid, which is secured by said instrument, or in what respect any other condition thereof shall not have been complied with," etc.

"The conclusive presumption of the payment of a debt secured by mortgage, etc., after fifteen years, as against creditors, or purchasers (Public Laws, 1923, chap. 192), is prospective in its effect. Constitution of U. S., Art. I, sec. 10." *Hicks v. Kearney,* 189 N. C., 316. *Corporation Commission v. R. R.,* 185 N. C., 435; *Andrews v. Masons,* 189 N. C., at p. 702; *Commissioners v. Blue,* 190 N. C., at p. 643; *Humphrey v. Stephens,* 191 N. C., at p. 105; *Overman v. Casualty Co.,* 193 N. C., at pp. 92-93.

The plaintiffs contend that the ten-year statute of limitations is applicable. We cannot so hold.

C. S., 437, within 10 years an action "(3) For the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, *or within ten years after the last payment on the same.*" (Italics ours.)

In *Humphrey v. Stephens, supra,* citing numerous authorities, at pp. 104-5, we find: "If a mortgage is a mere incident to the debt which it is given to secure, it necessarily follows that it lives as long as the debt, and that it may be foreclosed so long as an action upon the debt is not barred by the statute of limitations. *Menzel v. Hinton,* 132 N. C., 660. . . . In *Hicks v. Kearney,* 189 N. C., 316, it is held: The conclusive presumption of the payment of a debt secured by mortgage, etc., after

fifteen years, as against creditors or purchasers (Public Laws, 1923, chap. 192) is prospective in its effect. Const. of U. S., Art. I, sec. 10; Const. of N. C., Art. I, sec. 17. It would seem that the Legislature, in passing the above statute, construed the decisions of this State as we do in this case, and have provided a method to quiet mortgages and liens of long standing. The mortgage follows the debt. The debt here is not barred nor is the mortgage."

C. S., 2589, is discussed in the *Humphrey case, supra.*

In *Roberson v. Matthews,* 200 N. C., at p. 245, speaking to the subject, we find: "Indeed, the trial judge instructed the jury that C. S., 2594, did not apply. This ruling was correct. *Hicks v. Kearney,* 189 N. C., 316, 127 S. E., 205. That decision declares the law to be that C. S., 2594, subsection 5, has no application to a mortgage given prior to the passage of that statute nor does it wipe out a valid debt existing at the time the statute took effect."

C. S., 416, is as follows: "No acknowledgment or promise is evidence of a new or continuing contract, from which the statute of limitations run, unless it is contained in some writing signed by the party to be charged thereby; *but this section does not alter the effect of any payment of principal or interest.*" (Italics ours.)

"It is true that it is well settled in this State that a payment by the principal on a note before the bar of the statute operates as a renewal of the debt as to himself and also as to the surety on the note." *Houser v. Fayssoux,* 168 N. C., at p. 3-4; *Dillard v. Mercantile Co.,* 190 N. C., 228.

In *Green v. Greensboro College,* 83 N. C., at p. 454, we find: "Upon a full and careful review, we are of opinion and so declare that the payments of interest on the note, before it was barred by lapse of time, arrested the operation of the statute as to all the makers, sureties as well as principal, and it commenced again to run only from the day when the last payment was made." *McDonald v. Dickson,* 87 N. C., at p. 406; *Wood v. Barber,* 90 N. C., at p. 80; *Moore v. Goodwin,* 109 N. C., 218; *LeDuc v. Butler,* 112 N. C., 461.

The record discloses that the annual interest has been paid on each of the two notes up to 20 October, 1929, and 7 October, 1929. N. C. Code, 1931 (Michie), sec. 2594(5), is not applicable to the facts and circumstances of this case. For the reasons given the judgment is

Affirmed.

D. M. CARPENTER ET AL. v. TOWN OF MAIDEN AND P. L. KEENER, TAX COLLECTOR.

(Filed 25 January, 1933.)

1. Municipal Corporations G c—Abutting owners held liable for entire cost of improvements under the terms of their petition.

Where the owners of land abutting upon a certain street in an incorporated town petition the town to improve the street under the provisions of C. S., 2710(1), and set forth in the petition that the owners on each side of the street be assessed one-half of the cost of the improvements, and the assessment roll is accordingly made up and the full amount of the cost of the improvements assessed against the abutting owners, one-half upon the lots on each side of the street in accordance with the front footage, and no objection is made thereto by the abutting owners after notice until the town threatens sale of the lots for the assessment liens: *Held*, under the terms of the petition, recognized and acquiesced in by the parties, the abutting owners were liable for the full amount of the cost of the improvements and they cannot successfully claim that the town was liable for a proportionate part of the cost.

2. Contracts B a—Construction given contract by the parties will ordinarily be followed by the courts.

The terms of a petition of owners of abutting lands for the improvement by the town of its street, C. S., 2710(1), is, when favorably acted upon, in the nature of a contract, and the interpretation placed on the petition by the parties before disagreement thereunder, as evidenced by their acts and conduct, will ordinarily be followed by the courts.

APPEAL by plaintiffs from *McElroy, J.*, at April Term, 1932, of CATAWBA. Affirmed.

The material facts for the decision of this controversy are the following:

It was admitted upon the hearing, both by counsel for the plaintiffs and counsel for the defendants, that the town of Maiden is a municipality with such powers as are set forth in the pleadings, that the petition for certain improvements in the town prepared and signed, as shown by the record of this petition, was filed with the board of aldermen, or town commissioners; that, during the years 1922 and 1923, the permanent improvements along said Main Street in Maiden were made, as alleged and set out in the pleadings; that subsequently, the municipal authorities sent out statements to the property owners along Main Street, including among others, the plaintiffs in this action, calling upon them for the payment of the entire cost of the street improvements made by the municipal authorities, exclusive of those at street intersections, which payments have not been made by the plaintiffs, and that the

only question presented to the court in order to pass upon the motion of the plaintiffs for a continuance of the restraining order was whether or not the liability of the property of the respective plaintiffs was for the payment of one-half of the total cost (less the street intersections), of the improvements made by the town—the other half thereof to be paid by the municipality at large, or the liability of the plaintiffs' property was for the entire cost of such improvements prorated upon a front foot basis against the property of the plaintiffs and others abutting upon said street.

After hearing the argument and considering the questions involved, the court reached and announced the conclusion as follows: "That, upon the face of the petition and the proper legal consideration thereof, in the opinion of the court, the municipal authorities of the town of Maiden had the right to assess the entire cost of the street improvements referred to hereinbefore against the abutting property on either side of that part of Main Street, which was improved."

Plaintiffs excepted and assigned error to the conclusion of law made by the court below.

The court below signed order or judgment dissolving the restraining order theretofore granted. The plaintiffs assigned error to the order or judgment as signed and appealed to the Supreme Court.

E. B. Cline for plaintiffs.
L. F. Klutz for defendants.

CLARKSON, J. There are other questions presented on this appeal but to determine the controversy one question only is sufficient to be considered: Was the court below correct in holding that the defendant, town of Maiden, had, under the petition filed with the town commissioners in this case, the right to assess against the abutting properties the *entire* cost of the work (exclusive of cost of intersections, etc., set forth in C. S., 2710(1) done by the municipality instead of one-half thereof? We think so.

C. S., 2710(1), is as follows: "One-half of the total cost of a street or sidewalk improvement made by a municipality, exclusive of so much of the cost as is incurred at street intersections and the share of railroads or street railways, shall be specially assessed upon the lots and parcels of land abutting directly on the improvements, according to the extent of their respective frontage thereon by an equal rate per foot of such frontage, unless the petition for such street or sidewalk improvement shall request that a larger proportion of such cost, specified in the petition, be so assessed, in which case such larger proportion shall be so assessed, and the remainder of such cost shall be borne by the munici-

pality at large; but no assessment for street and sidewalks shall be made against abutting property on any such street or sidewalk until said street or sidewalk has been definitely laid out and the boundaries of the same definitely fixed." Laws, 1915, chap. 56, sec. 8; 1919, chap. 86.

The part of the petition signed by plaintiffs germane is as follows: "The undersigned petitioners respectfully request that one-half of the total cost of the street improvements, exclusive of that at street intersections and exclusive of that borne by the State Highway Commission be especially assessed against the abutting property on each side of the streets to be improved."

The language of the statute and petition is clear that one-half of the total cost of the street improvements (exclusive of that at street intersections and exclusive of that borne by the State Highway Commission) be especially assessed against the abutting property on each side of the streets to be improved.

In *Mount Olive v. R. R.*, 188 N. C., at p. 334, the statute has been construed: "The above section is taken from Laws, 1915, chap. 56, sec. 8, with the exception that the Consolidated Statutes has added 'one-half on abutting property,' and the latter part of the section commencing with 'but no,' etc. (Laws, 1919, chap. 86.) The clear interpretation of the act, we think, means what its language says—that one-half of the total cost of the street improvements shall be assessed upon the parcel of land abutting directly on the improvement, according to the extent of the respective frontage thereon. Section 2703 defines what 'frontage' means: 'Frontage, when used in reference to a lot or parcel of land abutting directly on a local improvement, means that side or limit of the lot or parcel of land which abuts directly on the improvement.'"

The petition goes even further than the statute "on each side of the streets to be improved." *Hilliard v. Asheville*, 118 N. C., 845; *Morris v. Hendersonville*, 168 N. C., 401; *Felmet v. Canton*, 177 N. C., 52; *McChester v. China Grove*, 196 N. C., 301.

The record discloses that the plaintiffs recognized the above construction of the statute and petition. Affidavits from two parties undenied by plaintiff D. M. Carpenter, is as follows: "About four years ago we heard D. M. Carpenter, one of the above plaintiffs, say that we will have to raise the money some way to pay same. He did not make any protest regarding the amount of street assessment, or raise any objection to the assessment in any way; he did not question the amount of any statement that had been mailed to him or to any one else concerning the street improvements. We never heard of his raising any objections to the amount of street assessments charged to the different owners until about the time the town officials had advertised that if the assessments were

not paid they were going to advertise the property along said street. This was the first time we heard any objection from him or any of the other plaintiffs, or for that matter, from anybody."

Affidavit of one party: "D. M. Carpenter made payments on street assessment in front of the Reformed Church without any protest."

Another affidavit by the mayor of the town of Maiden undenied: "The remaining five plaintiffs made payments on their improvements involved in the above entitled proceedings as follows (setting same forth). That said payments were made without protest and with no objections whatever to the amount assessed and this long after they had each received notices telling them the amount of their street assessments and too, long after they had been notified to appear and make any objections or exceptions that they might want to make to the assessment roll. No protest or objection of any kind was made by either of these plaintiffs or by anyone else for about eight years after the assessment roll was duly adopted by the board of aldermen according to law and after due advertisement and due notice given in accordance with law."

In *Cole v. Fibre Co.*, 200 N. C., at p. 487, citing numerous authorities the following sound principle is laid down: "The general rule is, that where, from the language employed in a contract, a question of doubtful meaning arises, and it appears that the parties themselves have interpreted their contract, practically or otherwise, the courts will ordinarily follow such interpretation, for it is to be presumed that the parties to a contract know best what was meant by its terms, and are least liable to be mistaken as to its purpose and intent. . . . 'Parties are far less liable to have been mistaken as to the meaning of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and one of them then seeks a construction at variance with the practical construction they have placed upon it of what was intended by its provisions.'" 6 R. C. L., 853. This principle is also set forth *In re Assessment against R. R.*, 196 N. C., 756.

We cannot follow the contention of the plaintiffs' attorney in this case, long a Superior Court judge and an ornament to the bench, but his philosophy of government set forth in his brief is worth preserving: "All our lawbooks teach us that municipal corporations are created for the purpose of exercising a variety of political rights, according to the design of its institution or the powers conferred upon it; created at the request or with the consent of their members, and for the promotion of their convenience and welfare. One says that 'a city governed by an aristocracy, whether of birth or wealth, though it may be splendidly adorned with all that wealth and taste can afford, will still lack the

virility and independence that can only be secured by the active interest of the governed in the government. It will contain the seeds of decay, that will ultimately cause the decadence of civic spirit and the consequent degradation of its citizens.'" May we add that a city governed by men who have aristocracy of character is the goal. For the reasons given the judgment of the court below is

Affirmed.

MRS. GEORGE M. CORE v. W. T. McCOY AND COMPANY, F. A. CULP AND S. L. CULP, TRADING AS CULP BROTHERS, AND ED MELLON COMPANY.

(Filed 25 January, 1933.)

Attachment J b—Attaching creditor held not liable to third person for wrongful attachment under facts of this case.

Where a writ of attachment is issued against the property of a nonresident stored in a warehouse, and certain furniture of the nonresident's mother, also stored in the warehouse in his name, is seized and sold by the officers, the mother may not recover the value of the furniture in an action against the attaching creditor where there is no evidence that the creditor was present or participated in the sale, or that he had knowledge of the mother's claim or received the proceeds of the sale with knowledge of the wrongful act of the officers.

APPEAL by defendants W. T. McCoy and Company and Culp Brothers from *Schenck, J.*, at February Term, 1932, of MECKLENBURG. Reversed.

The plaintiff alleged that she was the owner of certain personal property; that prior to July, 1930, she had lived in Charlotte with her married son V. R. Core; that her property had been in his home; that she and her son had left the city; that in storing his personal property in a warehouse her son had stored hers also in his name; that the defendants had levied an attachment against his property and had sold hers; that the defendants had converted her property and that she was entitled to recover its market value.

The defendants filed answers and as to the two appealing defendants the jury returned the following verdict:

1. Was the plaintiff, Mrs. George M. Core, on 29 July, 1930, the owner of the furniture described in the complaint? Answer: Yes.

2. Did the defendant, W. T. McCoy and Company, convert, or cause to be converted to its own use any part of said furniture? Answer: Yes.

3. If so, what was the value of the property so converted by the said defendant, W. T. McCoy and Company at the time of such conversion? Answer: $449.69.

4. Was the negligence of Mrs. George M. Core the proximate cause of the conversion of her said furniture by the said defendant, W. T. McCoy and Company, as alleged in the answer? Answer: No.

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1. Was the plaintiff, Mrs. George M. Core, on 29 July, 1930, the owner of the furniture described in the complaint? Answer: Yes.

2. Did the defendants, F. A. and T. L. Culp, trading as Culp Brothers, convert or cause to be converted to their own use any part of said furniture? Answer: Yes.

3. If so, what was the value of the property as converted by said defendants, F. A. and S. L. Culp, trading as Culp Brothers, at the time of such conversion? Answer: $113.84.

4. Was the negligence of Mrs. George M. Core the proximate cause of the conversion of her said furniture by the said defendants, F. A. and T. L. Culp, trading as Culp Brothers, as alleged in the answer: Answer: No.

Judgment against all the defendants, from which McCoy and Company and Culp Brothers appealed upon assigned error.

Bridges & Orr for appellants.

J. Louis Carter and Thaddeus A. Adams for appellee.

PER CURIAM. The plaintiff, living temporarily with her son, V. R. Core, went on a visit to her brother in West Virginia on 1 February, 1930. She left her furniture in her son's house in Charlotte. On 3 May, 1930, he left Charlotte and went to Chicago. He had become indebted to McCoy and Company in the sum of $129.15, to Culp Brothers in the sum of $32.70, and to Ed Mellon Company in the sum of $87.50. Before going to Chicago he stored his furniture and the plaintiff's in a warehouse and signed a storage contract in his own name. The defendants caused warrants of attachment to be issued against the property of V. R. Core, but not against the property of the plaintiff.

The appellants moved for judgment of nonsuit. They say that the plaintiff's allegations are not sustained by the evidence; that the appellants did not cause the officers to levy the attachment on the plaintiff's property; and that an attaching creditor who does not direct or assist the officer or otherwise aid him in committing a trespass is not liable in damages to a stranger or third party whose property is wrongfully sold.

In our opinion the motion for nonsuit should have been granted. The officer who sold the property is not a party to the action and the question of his liability is not before us. *Tatham v. DeHart,* 183 N. C., 657; *Gay v. Mitchell,* 146 N. C., 509. In declining the defendants' mo-

tion his Honor probably had in mind the case of *Flowers v. Spears*, 190 N. C., 747; but it will be seen by reference to the record in that case that the sheriff had been notified a short time after the warrant of attachment had been issued that the attached property was owned by the plaintiff, and that the court instructed the jury in reference to a sale by all the defendants, not by the sheriff alone. In the present case we find no evidence that the officer or the defendants had any notice, actual or constructive, of the plaintiff's claim, or that the defendants received any part of the proceeds of the sale with knowledge that any person other than the defendant had or claimed an interest in the property attached or that defendants with knowledge of the wrong ratified the officer's act.

The controlling principle has been stated as follows: "While an attaching creditor may be held liable, jointly with the levying officer and independently of any bond, for a wrongful seizure, under the attachment, of property of a person other than defendant in attachment, such liability is confined to cases in which he counseled, directed, or consented to the illegal act of the levying officer, or, knowing that the acts of the officer were wrongful or irregular, adopted, ratified, or confirmed them; and for a wrongful seizure with which the attaching creditor was not so connected he cannot be held liable, but the injured person must seek his redress solely against the levying officer and the sureties on his bond." 6 C. J., 416, sec. 966.

It is not contended that the evidence makes a case of malicious prosecution or abuse of process. *Wright v. Harris*, 160 N. C., 543; *Mahoney v. Tyler*, 136 N. C., 40. Judgment

Reversed.

H. C. TUCKER AND J. C. GAMBILL, TRADING AND DOING BUSINESS UNDER THE STYLE AND FIRM NAME OF TUCKER AND GAMBILL, v. THE BANK OF ASHE, LIQUIDATING AGENT FOR THE PEOPLES BANK AND TRUST COMPANY, ET AL.

(Filed 25 January, 1933.)

Judgments F b—Judgment in this case held ambiguous and not supported by the record and a new trial is awarded.

Where a judgment is ambiguous resort may be had to the pleadings and record to ascertain its meaning, but when it remains ambiguous and not supported by the record when thus considered a new trial will be awarded.

APPEAL by defendants from *Stack, J.*, and a jury, at July Term, 1932, of ASHE. New trial.

The following judgment was rendered in the court below:

"This cause coming on to be heard before his Honor, A. M. Stack, judge presiding, and a jury, upon the pleadings, evidence, and the following issues:

"1. Did the plaintiffs, Tucker and Gambill on said 27 May, 1925, pay to said Peoples Bank and Trust Company $2,972 to be credited on a $1,970 note and a $1,300 note due said bank by the plaintiffs, then held as collateral by the Bank of Bristol or some other bank, as alleged? 2. Were the two notes in question of $1,970 and of $1,300 given in renewal or exchange for the two notes named in the issue above? 3. In what amount are plaintiffs now indebted to the Peoples Bank and Trust Company on said two last named notes?

"And the jury having answered the first issue yes and the second issue yes and the third issue '$478.00 with interest from 27 May, 1925, until paid'; and it appearing to the court that there is another suit in this court brought by the Bank of Ashe, liquidating agent for the Peoples Bank and Trust Company, against Tucker and Gambill, for the recovery of the amount due on the renewals of the two notes; one for $1,970 and one for $1,300 described in the second issue.

"It is therefore, upon motion of C. W. Higgins, attorney for the plaintiffs in this cause, considered and adjudged that the amount due by the plaintiffs to the Peoples Bank and Trust Company on the two notes set out in the second issue was $478.00 on 27 May, 1925. It is therefore considered and adjudged by the court that the Bank of Ashe, liquidating agent of the Peoples Bank and Trust Company, recover of Tucker and Gambill the sum of $478.00 with interest on the same from 27 May, 1925, less any payments made by them on the two notes referred to or the renewal thereof. Credits by interest or otherwise to be allowed. It is further adjudged that the defendant pay the cost of this action, to be taxed by the clerk."

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

C. W. Higgins and R. F. Crouse for plaintiffs.

T. C. Bowie, Ira T. Johnston and W. B. Austin for defendants.

PER CURIAM. There are many exceptions and assignments of error made by defendants that we think unnecessary to consider.

We have read the record and the briefs of the litigants with care. From the record in this Court the judgment is ambiguous and not supported by the record. Defendants agreed to nothing and stood on their legal rights which they had a right to do.

In Vol. 1, 2d ed., Black on Judgments, part section 123 pp. 179-180, speaking to the subject we find: "The rule for the construction of ambiguous judgments is clearly stated by the Supreme Court of Kansas in the following language: 'Wherever the entry of a judgment is so obscure as not to clearly express the exact determination of the court, reference may be had to the pleadings and the other proceedings; and if, with the light thus thrown upon such entry, its obscurity is dispelled and its intended signification made apparent, the judgment will be upheld and carried into effect in the same manner as though its meaning and intent were made clear and manifest by its own terms.' This rule also applies to decrees in equity. The meaning and effect of a decree may, in case of doubt, be ascertained by reference to the bill and other proceedings, particularly when these are referred to in the decree itself. And for this purpose, recourse may be had to duly attested stipulations between the parties. But where a judgment refers to the findings for certain data, and the findings do not contain the data, but refer again to the pleadings, which are also uncertain, the judgment will be reversed for uncertainty."

In *Southerland v. Crump,* 199 N. C., at p. 113, "With respect to a disputed question of fact we can know judicially only what the record discloses." For the reasons stated above there must be a

New trial.

FRED L. EVERSOLE v. R. E. SPRINKLE.

(Filed 25 January, 1933.)

Negligence D c—

Where the evidence on the question of contributory negligence is conflicting a motion as of nonsuit is improvidently granted.

APPEAL by plaintiff from *Moore, J.,* at August Term, 1932, of YANCEY. New trial.

Charles Hutchins for plaintiff.
Johnson, Smathers & Rollins for defendant.

PER CURIAM. The plaintiff brought suit against the defendant to recover damages for personal injury caused by the alleged negligence of the defendant. The material allegations are substantially these: The plaintiff while driving a Ford truck on Little Rock Creek Highway near Bakersville met several larger trucks operated by the defendant, which were loaded with wood. These trucks occupied a part of the

highway to which the plaintiff was entitled under the law, leaving a narrow space for the passage of the Ford truck.

The plaintiff contended that if he had stopped his truck a collision would have occurred and that when he turned to the right, the embankment gave away and his car rolled down the side of the mountain. His injury was not denied.

At the close of the plaintiff's evidence the court dismissed the action as in case of nonsuit. The judgment was based apparently on the contributory negligence of the plaintiff; it was conceded that there was evidence tending to establish the negligence of the defendant.

We deem it unnecessary to analyze the forty-three pages of testimony. A part of it unquestionably tends to show the plaintiff's contributory negligence, and a part to prove the exercise of due care. Under these circumstances the issue of contributory negligence was a matter for the jury to determine. *For this reason the plaintiff is entitled to a*

New trial.

STATE OF NORTH CAROLINA ON RELATION OF THE COMMISSIONER OF REVENUE v. BROWN REALTY COMPANY.

(Filed 25 January, 1933.)

Appeal and Error J c—It will be assumed that judgment is supported by necessary facts in absence of findings of fact or request therefor.

Where no facts are found by the trial court, and no request is made therefor by the appellant, it will be assumed, in an action involving the appellant's right to a refund on income taxes paid to the Commissioner of Revenue, that the judgment is supported by the essential facts, and it will be affirmed on appeal.

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

John H. Cathey and Isabel Cathey for appellant.

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

PER CURIAM. The defendant filed a petition before the State Department of Revenue for a revision of its income tax assessment for the income year of 1925, and for a refund of taxes claimed to have been paid in excess of the amount actually due.

For the income tax year of 1925 the defendant made its income tax return to R. A. Doughton, Commissioner of Revenue, and upon this

return the income tax was assessed and a part of it was paid. Sometime afterwards the defendant was allowed a refund of taxes from the Federal Government based upon certain collections and changes, as will appear by reference to pages 21-25 of the case on appeal.

The defendant reported this refund to the State Department of Revenue as required by law and the Revenue Commissioner made a reëxamination of the tax returns and refunded to the defendant the sum of $1,000. The defendant contends that this payment is not a bar to a further hearing of its claim for a refund, while the Commissioner insists that the payment was intended to be final. The controversy seems to depend on the question whether section 502 of the Revenue Act makes it mandatory upon the Commissioner to adopt the correction made in the Federal income tax report and assessment. The material part of section 502 is as follows: "The Commissioner shall thereupon proceed to determine, from such evidence as he may have brought to his attention or shall otherwise acquire, the correct net income of such taxpayer for the fiscal or calendar year, and if there shall be any additional tax due from such taxpayer the same shall be assessed and collected, and if there shall have been an overpayment of the tax, the said Commissioner shall, within 30 days after the final determination of the net income of such taxpayer, refund the amount of such excess."

The trial court adjudged that the plaintiff is not entitled to recover any sum whatever in refund of any taxes heretofore paid to the State Revenue Department.

The court found no facts, but in the absence of the request to this effect by the appellant, we must assume that the judgment is based upon such facts as are essential to support it. We think the judgment is free from error and that it should be

Affirmed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1933

FARMERS BANK AND TRUST COMPANY v. H. W. REDWINE, JOE REDWINE, VIRGINIA REDWINE AND SAM REDWINE.

(Filed 8 February, 1933.)

1. **Limitation of Actions A a—Where action to recover penalty for usury is barred such penalty may not be set up in counterclaim.**

   C. S., 442, subsection 2 bars an action to recover the penalty for usury after the expiration of two years, and where more than two years has elapsed from the payment of alleged usury until the institution of an action on the debt alleged to have been tainted with usury, the defendant's counterclaim for twice the amount of usury charged is barred.

2. **Same—Amendment limiting time for forfeiture of interest for usury is prospective in effect.**

   The amendment to C. S., 442 by chapter 231, Public Laws of 1931, barring the forfeiture of all interest for usury after the lapse of two years, is prospective in effect, and does not apply to a forfeiture of interest for usury when such forfeiture occurred prior to the enactment of the amendment. If the statute did affect forfeitures incurred prior to its enactment the defendant would have a reasonable time in which to maintain such forfeitures.

3. **Usury A b—Plaintiff held entitled to principal amount of note sued on without interest.**

   Defendant executed a note to the plaintiff, which note was renewed from time to time, usurious interest being charged and voluntarily paid upon the renewals. The plaintiff brought suit on the last renewal note more than two years after the charge of usurious interest: *Held*, although

the defendant's counterclaim for the penalty for usury was barred by C. S., 442, subsection 2, the defendant was entitled to a forfeiture of the interest under C. S., 2306, but was not entitled to have the amount of interest paid applied on the principal of the note, and the plaintiff was entitled to recover the amount of the note sued on without interest.

APPEAL by plaintiff from *Harding, J.*, at May Term, 1932, of UNION. Modified and affirmed.

This is an action on a note which is in words and figures as follows:

"$487.58. Monroe, N. C., 1 November, 1929.

1 November, 1930, after date, for value received we, or either of us, promise to pay to the order of Farmers Bank and Trust Company, Monroe, N. C., four hundred eighty-seven and 58/100 dollars, negotiable and payable without offset, at Farmers Bank and Trust Company, Monroe, N. C., with interest after maturity at the rate of six per cent per annum until paid. The drawers and endorsers and all sureties hereto severally waive presentment for payment, protest, or notice of protest, and nonpayment of this note, and all defenses on the ground of any extension of the time of its payment that may be given by the holder or holders to them or either of them.

Witness our hands and seals. H. W. Redwine. (Seal.)

P. O. Waxhaw, N. C. No. 8369. Due 11/1/30."

On the back of the note appear the following names, in writing: "Joe Redwine, Virginia Redwine, Sam Redwine."

In their answer, the defendants admit the execution and endorsement by them of the note sued on, as alleged in the complaint; they do not deny that the plaintiff is the holder of the note, nor do they allege that said note has been paid.

The defendants allege in their answer that on or about 1 April, 1926, the plaintiff loaned to the defendants a sum of money, and that in consideration of said loan, the defendants executed and endorsed a note payable to the plaintiff for the amount of said loan. They allege that from time to time the defendants executed and endorsed other notes in successive renewal of said original note, and that the note sued on in this action is the last of such renewal notes.

The defendants further allege in their answer that from time to time, as the successive renewal notes became due according to their tenor, the plaintiff before renewing the same, knowingly took, received, reserved and charged interest on said loan at a greater rate than six per cent per annum, to wit: at the rate of eight per cent. They allege that by virtue of the provisions of C. S., 2306, all interest on said loan was

forfeited, and that defendants are now entitled to recover of the plaintiff, as the statutory penalty for taking, receiving and reserving such usurious interest, twice the amount of the interest paid to plaintiff by the defendants. They further allege that the amount of such usurious interest paid by them to the plaintiff, to wit: $215.58, should be applied as a payment on the principal of the note sued on in this action.

The defendants plead as counterclaim in this action, (1) the amount of usurious interest paid by defendants to the plaintiff on the loan made to the defendants by the plaintiff on 1 April, 1926; and (2) twice the amount of such usurious interest.

The plaintiff in its reply to the further answer of the defendants, denies that plaintiff has taken, received, reserved or charged, or that the defendants have paid interest on the loan made to the defendants by the plaintiff at a greater rate than six per cent per annum. The plaintiff pleads in bar of defendants' recovery on their counterclaim as alleged in their answer, the two-year statute of limitations. C. S., 442, as amended by chapter 231, Public Laws of North Carolina, 1931.

At the trial, after evidence had been introduced by the plaintiff, it was agreed by the parties to the action:

1. That this action was begun by summons dated 16 November, 1931.

2. That the aggregate of the amounts charged by the plaintiff and paid by the defendants as interest on the loan made by the plaintiff to the defendants on 1 April, 1926, is $151.58, and that this sum is in excess of the interest on the said loan at six per cent per annum from 1 April, 1926, to 1 November, 1929.

3. That the consideration for the note sued on in this action is the amount of the loan made by the plaintiff to the defendants on 1 April, 1926, the said note being the last of the renewal notes executed and endorsed by the defendants on account of said loan.

4. That there was no agreement between the parties to this action at the date of said loan, or at the dates of the successive notes executed and endorsed by the defendants in consideration of said loan, that the original note or the renewal notes loaned should be renewed at their respective maturities.

5. That at the date of each renewal note, the amount of interest to be paid by the defendants to the plaintiff on their debt on account of said loan was agreed upon, and such amount when agreed upon was paid by the defendants to the plaintiff as interest; that no amount has been paid by the defendants to the plaintiff as interest on said loan since 1 November, 1929.

6. That there was no issue of fact between the parties to the action to be submitted to the jury, and that judgment should be rendered by the court on the facts agreed upon by the parties.

Judgment was thereupon rendered by the court that the plaintiffs recover of the defendants the sum of $336.00, with interest from the date of the judgment, and that plaintiff pay the costs of the action.

From this judgment, the plaintiff appealed to the Supreme Court.

Gilliam Craig, John C. Sikes and Vann & Milliken for plaintiff.
R. B. Redwine and John M. Redwine for defendants.

CONNOR, J. At the trial of this action in the Superior Court, the plaintiff moved for judgment on the facts agreed that plaintiff recover of the defendants the sum of $487.58, with interest on said sum from 1 November, 1930, and the costs of the action. This motion was denied, and plaintiff duly excepted. The plaintiff further excepted to the judgment signed by the court. On its appeal to this Court, the plaintiff contends that there was error (1) in the denial of its motion for judgment on the facts agreed, for that the forfeiture of all interest on the debt of the defendants to the plaintiff, as evidenced by the note executed and endorsed by the defendants, and sued on in this action, is barred by C. S., 442, as amended by chapter 231, Public Laws of North Carolina, 1931, and (2) in the judgment signed by the court, for that the sum of $151.58 was paid voluntarily by the defendants as interest on their debt to the plaintiff, and for that reason is not applicable as a payment on the principal of said debt.

The defendants did not except to the judgment of the Superior Court, and have not appealed therefrom to this Court. They concede that on the facts agreed, their counterclaim for twice the amount of usurious interest paid by them to the plaintiff, is barred by C. S., 442, subsection 2. The defendants' cause of action on which they base their counterclaim for the penalty for usury paid accrued more than two years before the commencement of this action. The counterclaim was barred by the statute of limitations in force at the date the cause of action accrued. C. S., 442, subsection 2.

The law applicable to the usurious transactions involved in this action, at the dates of such transactions, is found in section 2306, Consolidated Statutes of North Carolina, 1919. This statute has not been amended or altered by the General Assembly of this State, and reads as follows:

"2306. Penalty for usury: Corporate bonds may be sold below par. The taking, receiving, reserving or charging a greater rate of interest than six per centum per annum, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon, and in case a greater rate of interest has been paid, the person or his legal representatives, or corporation

by whom it has been paid, may recover back twice the amount of interest paid, in an action in the nature of action for debt. In any action brought in any court of competent jurisdiction to recover upon any such note or other evidence of debt, it is lawful for the party against whom the action is brought to plead as a counterclaim the penalty above provided for, to wit: Twice the amount of interest paid as aforesaid, and also the forfeiture of the entire interest. Nothing contained in the foregoing section, however, shall be held or construed to prohibit private corporations from paying a commission on or for the sale of their coupon bonds, nor from selling such bonds for less than the par value thereof. This section shall not apply to contracts executed prior to February twenty-first, nineteen hundred and five."

The entire interest on the debt which is the consideration of the note sued on in this action was forfeited under the provisions of the statute, when the plaintiff first charged the defendants interest on said debt at a greater rate than six per cent per annum. This forfeiture occurred prior to the date of the note, to wit: 1 November, 1929, and notwithstanding the agreement therein that the note was payable on 1 November, 1930, with interest from maturity at the rate of six per cent per annum, the debt was stripped of its interest-bearing quality. The agreement with respect to the payment of interest was void. No rights or liabilities, which are enforceable in this action, arose out of said agreement, unless as contended by the plaintiff. Chapter 231, Public Laws of North Carolina, 1931, is applicable to the forfeiture of interest on said debt under the provisions of C. S., 2306.

Chapter 231, Public Laws of North Carolina, 1931, is as follows:

"*The General Assembly of North Carolina do enact:*

Section 1. That section four hundred and forty-two of the Consolidated Statutes of North Carolina be amended by adding a new subsection number three, as follows:

'3. The forfeiture of all interest for usury.' That nothing herein shall apply to pending litigation.

Section 2. That this act shall be in force and effect from and after its ratification."

The act was ratified on 1 April, 1931. C. S., 442, as amended by the addition of subsection 3, provides that there shall be no forfeiture of interest for usury after the expiration of two years from the date of a forfeiture under the provisions of C. S., 2306.

This action was begun on 16 November, 1931. The forfeiture of all interest on the note sued on in the action occurred more than two years before the commencement of the action. If chapter 231, Public Laws of 1931, is applicable to the forfeiture of interest in the instant case,

the defendants would not be allowed a reasonable time within which to assert their rights under C. S., 2306, and upon well settled principles the statute would be void as to the defendants. *Barnhardt v. Morrison*, 178 N. C., 563, 101 S. E., 218. We do not think, however, that the language of the statute manifests a purpose on the part of the General Assembly that the statute shall operate retrospectively. The statute is prospective only, and is applicable only to a forfeiture under C. S., 2306, which has occurred, or shall occur, since its ratification on 1 April, 1931.

There was no error in the judgment denying the plaintiff interest on the principal of the note sued on. Such interest was forfeited under the provisions of C. S., 2306, and such forfeiture is not affected by the provisions of C. S., 442, subsection 3.

It was agreed by and between the parties to this action that the sum of $151.58 was paid by the defendants to the plaintiff as interest on the debt from 1 April, 1926, to 1 November, 1929, and that such interest was usurious. This sum was paid by the defendants voluntarily, and could not be recovered in an action instituted by the defendants against the plaintiff for that purpose. For this reason, it was error to allow said sum as a counterclaim in this action. The plaintiff is entitled to judgment for the principal of the note sued on, without interest. The judgment as modified in accordance with this opinion is affirmed.

Modified and affirmed.

J. SIDNEY HOOD v. JOHN MITCHELL, CHIEF STATE BANK EXAMINER, GURNEY P. HOOD, COMMISSIONER OF BANKS, ET AL.

(Filed 8 February, 1933.)

1. Banks and Banking H h—Action for injury received in insolvent bank's elevator held properly dismissed as to bank examiner individually.

In an action against the Chief State Bank Examiner and the Commissioner of Banks, as his successor, to recover for an injury alleged to have been caused by the negligent condition of an elevator in a building in the hands of the receiver as a part of an insolvent bank's assets, the demurrer of the Chief State Bank Examiner in his individual capacity *is held* properly sustained.

2. States E a—Action against statutory receivers of insolvent bank for injuries received in bank's elevator held not action against the State.

An action against the Chief State Bank Examiner and the Commissioner of Banks, as his successor, to recover for an injury alleged to have been caused by the negligent condition of an elevator in a building under

defendants' control as a part of the assets of an insolvent bank *is held* not an action against the State of North Carolina nor against the successive statutory receivers as agencies of the State, and the State has no interest in the action, the recovery being payable solely out of the assets of the insolvent bank.

3. Negligence D a—Complaint held not to show contributory negligence as matter of law and demurrer was properly overruled.

A complaint alleging that the plaintiff had been informed by the manager of a building in which he rented offices as to a safety device on the elevator therein which would prevent the opening of the elevator door if the elevator was not in place at that floor, that the plaintiff was given a key to unlock the elevator doors so that he could use same in the operator's absence, that the plaintiff, at night, unlocked the door of the elevator shaft on the ground floor, and, relying on the safety device and being unable to see into the shaft because of defective lighting, stepped into the empty shaft to his injury *is held* not to show contributory negligence of the plaintiff as a matter of law, and the defendant's demurrer thereto was properly overruled.

APPEAL by defendants from *Finley, J.*, at March Term, 1932, of GASTON. Affirmed.

This is an action to recover damages resulting from personal injuries suffered by the plaintiff, and caused, as alleged in the complaint, by the negligence of the defendants.

The plaintiff is a physician engaged in the practice of his profession in the city of Gastonia, N. C. Since 1924, he has occupied offices in a building located in the city of Gastonia, known as the Third Trust Company Building. He entered into possession of said offices in 1924, as a tenant of the Third Trust Company, which was at that time the owner of said building.

On or about 29 April, 1929, the Commercial Bank and Trust Company, a corporation organized and doing business as a banking corporation under the laws of the State of North Carolina, suspended its business. The Corporation Commission of North Carolina took possession of all the assets of said company for purposes of liquidation. Since said date, the said Corporation Commission, acting through the defendant, John Mitchell, chief State Bank Examiner, and its successor, the defendant, Gurney P. Hood, Commissioner of Banks, have been, successively, engaged in the liquidation of said Commercial Bank and Trust Company, as provided by statute.

Among the assets of said Commercial Bank and Trust Company, which came into the possession of the said Corporation Commission, were certain equities in the office building owned by the Third Trust Company. The said office building was encumbered by a deed of trust

executed by the Third Trust Building to secure certain bonds which had been issued by said Third Trust Company, and which were then outstanding. The deed of trust was foreclosed, and the Corporation Commission, as authorized by a decree of the Superior Court of Gaston County, purchased said building at a sale made on 14 February, 1930. In accordance with said decree, the said office building was conveyed by the trustee in said deed of trust, to the defendant, John Mitchell, chief State Bank Examiner, by deed dated 25 February, 1930. Since the date of said deed, the defendant, John Mitchell, chief State Bank Examiner, has held said office building as an asset of the Commercial Bank and Trust Company of Gastonia. The said office building is now under the control and in the possession of the defendant, Gurney P. Hood, Commissioner of Banks, who as successor of the Corporation Commission is now engaged in the liquidation of the Commercial Bank and Trust Company.

The allegations of the complaint in which the plaintiff states the cause of action on which he seeks to recover of the defendants in this action, are as follows:

"14. That the plaintiff has continuously been a tenant in the building aforesaid since early in 1924, and became a tenant of the defendants by renting rooms in the said Third Trust Company Building as offices for the use and conduct of his profession, and that the plaintiff has occupied, and still occupies offices in said building for the purpose aforesaid, and has continuously been and is now a tenant of said defendants since the purchase by defendants as aforesaid and the execution of the aforesaid deed of conveyance on or about 25 February, 1930.

15. That among other things, the defendants by their contract of rental agreement were to render competent elevator service to the plaintiff and plaintiff's clientele in reaching plaintiff's offices from the ground or main floor of the building to the floor on which said offices are located.

16. That the defendants in lieu of keeping an employee at all times for the operation of elevators in said building, furnished the plaintiff an instrument or key to unlock the doors of the elevator shaft, so that in case of requiring the use of said elevator, when the defendants' operator was off duty, he might unlock the door and use the elevator; and that the defendants instructed the plaintiff as to the operation of said elevator.

17. That the defendants, their agents and servants, represented to the plaintiff that said elevator was equipped with the latest and most approved type of safety devices, one of which said safety devices was to prevent said door or doors of the shaft from being unlocked by the

instrument or key furnished plaintiff by defendants unless the car or elevator was at the floor of said building where it was desired to use the said elevator, and further represented that it was impossible to unlock said door or doors unless the elevator was in place at said particular door or doors.

18. That relying upon the representations aforesaid, and believing that said safety device or devices were in proper and safe working order, the plaintiff on Sunday night, 6 April, 1930, desiring to enter his offices on the fifth floor of said building, entered the lobby or hallway of defendants' said building, inserted the key in the lock of said elevator door, and opened the same, and stepped into what he reasonably expected to be the car or elevator, but the said car or elevator was not there, when plaintiff stepped into the elevator shaft, and the plaintiff was thrown or hurled fourteen feet or more into the basement floor below; that defendants had carelessly and negligently allowed and permitted the said safety device on the door of said elevator shaft to get out of proper working order, and, as before alleged, the plaintiff was thrown or hurled a distance of fourteen feet or more; that plaintiff suffered the following injuries, to wit: a fractured knee-cap on the right knee, causing a part of the knee cap to be broken loose and float below the joint; badly bruised and lacerated left elbow joint; three bruises on the lower jaw, leaving a permanent scar on plaintiff's chin, four teeth knocked out or crushed; the back of the head and neck of plaintiff severely bruised, causing paralysis of the anterior group of muscles in the right thigh, and from the aforesaid injuries and the shock sustained by reason of the fall, this plaintiff was unconscious for about three days and incurred considerable hospital and medical expense.

19. That at the time aforesaid, when the plaintiff went into said building for the purpose of opening said elevator and going into his offices, as aforesaid, it was necessary for him to go into the lobby or hallway of said building, which led to the elevator or elevator shaft; that the defendants did not maintain or have any light or method of illuminating said lobby or hallway and particularly at the time when this plaintiff entered the same as aforesaid; that it was dark in said hallway or lobby; that the only way or method provided by the defendants for lighting or illuminating said elevator at said time or times, was the lighting apparatus or fixture within the elevator; that this could not be reached or turned on so as to give light, until after the door of the said elevator shaft had been opened, and the switch or light in said elevator turned on after entrance into said elevator; that at the time aforesaid, when the plaintiff entered said lobby or hallway, the same was dark, and the only way the plaintiff had of reaching the light

was to open said door of the elevator shaft and go into the elevator and turn or switch on the light, as aforesaid, all of which the plaintiff intended to do as was his usual custom when entering the elevator at night when the same was dark.

20. That the aforesaid injuries of plaintiff were wholly due to the carelessness and negligence of defendants in that, as before alleged, said elevator was furnished and was then under the supervision and control of the said defendants or their agents or employees; that said safety device on the door had been allowed or permitted by carelessness and negligence of the defendants to become defective and out of order; the failure of defendants to give to the plaintiff any notice or knowledge that the same was defective or out of order; that the carelessness and negligence of the defendants in failing to provide any or sufficient light in said hallway or lobby prevented the plaintiff from seeing said elevator door shaft and elevator; that the carelessness and negligence of the defendants, as aforesaid, was the sole and proximate cause of plaintiff's injuries as hereinbefore alleged.

21. That by reason of the injuries, as hereinbefore alleged, due to the carelessness and negligence of the defendants, the plaintiff suffered greatly in body and mind, and has been put to great hospital and medical expense, and as he is informed and believes, he will continue to suffer in body and mind, and plaintiff has been informed and believes that the injury to his knee and leg will be permanent, and his earnings will be materially lessened and decreased by his inability to practice his profession with his customary skill and energy; that by reason of the carelessness and negligence of the defendants, as hereinbefore alleged, and the injuries sustained by plaintiff, as hereinbefore set out, the plaintiff has been damaged in the sum of $50,000."

The defendants demurred to the complaint on the ground:

1. That no cause of action is alleged in the complaint against the defendant, John Mitchell, individually.

2. That defendants other than John Mitchell, individually, are agencies of the State of North Carolina, and for that reason no action can be maintained by the plaintiff against said defendants to recover damages for the injuries sustained by the plaintiff, as alleged in the complaint.

3. That the allegations of the complaint show that plaintiff, by his own negligence, contributed to his injuries, and for that reason no cause of action is alleged in the complaint against the defendants.

The demurrer was sustained as to the defendant, John Mitchell, individually, and was overruled as to the other defendants.

The defendants other than John Mitchell, individually, appealed to the Supreme Court.

E. B. Denny, E. R. Warren and A. C. Jones for plaintiff.
O. F. Mason, Jr., and P. W. Garland for defendants.

CONNOR, J. There was no error in the judgment overruling the demurrer as to all the defendants other than John Mitchell, individually. No cause of action is stated in the complaint as to this defendant. The action was properly dismissed as to him.

This is not an action against the State of North Carolina, or against the appealing defendants as agencies of the State. The State of North Carolina, in its capacity as a sovereign, has no interest, direct or remote, in the cause of action alleged in the complaint. For that reason, *Carpenter v. R. R.*, 184 N. C., 400, 114 S. E., 693, has no application in the instant case.

The Corporation Commission of North Carolina, at the date of the injuries suffered by plaintiff, was, and the defendant, Gurney P. Hood, Commissioner of Banks, as the successor of said Commission, is now in possession of the assets of the Commercial Bank and Trust Company, of Gastonia, N. C., for purposes of liquidation as provided by statute. The said Commission was, and the said defendant is now, a statutory receiver of the said Commercial Bank and Trust Company, with all the rights and liabilities of a receiver appointed by a court of competent jurisdiction. *Blades v. Hood, Commissioner of Banks*, 203 N. C., 56, 164 S. E., 823; *In re Trust Co.*, 198 N. C., 783, 153 S. E., 452. A recovery in this action by the plaintiff will be paid by the defendant, Gurney P. Hood, Commissioner of Banks out of the assets in his hands as statutory receiver of the Commercial Bank and Trust Company, and not otherwise.

It cannot be held as a matter of law that on the facts alleged in the complaint, the plaintiff by his own negligence contributed to his injuries as alleged in the complaint. Ordinarily, where there is evidence tending to support this defense, the evidence must be submitted to the jury. It is rarely the case that the Court can hold as a matter of law, upon the allegations of the complaint, or upon evidence offered by the plaintiff, that plaintiff, who has been injured by the negligence of the defendant, cannot recover damages resulting from such injuries, because by his own negligence he contributed to his injuries. It is sufficient to say that this is not such a case. The decision in *Scott v. Telegraph Company*, 198 N. C., 795, 153 S. E., 413, was made on a fact situation altogether different from that in the instant case. The judgment is

Affirmed.

EVELYN JOLLEY, BY HER NEXT FRIEND, IRWIN JOLLEY, v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 8 February, 1933.)

1. Infants C c—Doctrine of implied emancipation applies to the facts of this case and minor plaintiff could maintain the action.

The plaintiff, a minor living with and supported by her father, without objection by her father, prepared herself for the teaching profession, and, after consulting her father, accepted by wire a wired offer of a teaching position. Her wired acceptance was not delivered by the telegraph company and she brought action, by her father as next friend, to recover damages sustained: *Held*, the plaintiff could maintain the action in her own right to recover the loss of salary sustained as a result of the defendant's negligence, the doctrine of implied emancipation applying to the facts of the case.

2. Telegraph Companies A d—Verdict held to establish loss of valid contract entitling plaintiff to recover actual damages.

Plaintiff brought action against the defendant telegraph company to recover damages for its negligent failure to deliver plaintiff's telegram accepting an offer of a teaching position. The defendant contended that the plaintiff was entitled to nominal damages at most on the ground that there was no valid contract in that the acceptance was not in the exact terms of the offer, and that the county school superintendent had not approved the offerer's appointment. The jury answered the issue as to damage in the plaintiff's favor: *Held*, the issue, unobjected to, embraced the question of whether there was a valid contract, and the evidence cannot be held insufficient as a matter of law to support an inference that the discrepancy between the offer and acceptance was of an immaterial matter; and it appearing that the offerer had authority to employ teachers subject to the approval of the county superintendent, and had conferred with the superintendent regarding the offer in question, the jury could infer that the offerer had at least implied authority to make the contract.

CIVIL ACTION, before *Hill, Special Judge,* at September Term, 1932, of CLEVELAND.

The plaintiff is a young woman, living at Mooresboro, North Carolina, and graduated at Meredith College in 1929. During her college course she did special work in order to prepare for teaching English and French. She had also taken a correspondence course in the University of North Carolina in order to qualify for a Grade A certificate. W. A. Redfern, on 27 August, 1930, delivered a telegram to the defendant, Western Union, at Chapel Hill, which is substantially as follows: "Miss Evelyn Jolley, Mooresboro, North Carolina. Have been elected to teach English, French, dramatics, Manteo High School. Wire answer. W. A. Redfern." This telegram was received by Miss Jolley

by mail between 10:00 and 10:30 o'clock on 28 August, 1930. After consulting with her father, and at about 12.00 o'clock on said date, she went to the agent of the defendant and delivered for transmission the following message: "W. A. Redfern, Chapel Hill, N. C. Accept English, French, Manteo High School. Evelyn Jolley." Redfern testified that he left a forwarding address with the agent of the defendant at Chapel Hill, and that he inquired at the office in Chapel Hill if there was any reply to his telegram, and that he left Chapel Hill on 28 August, about eight o'clock. The forwarding address given was Elizabeth City. Upon arriving at Elizabeth City he made inquiry with regard to a reply from the plaintiff to his message.

As the plaintiff did not hear from Mr. Redfern, she wrote a letter on 6 September, inquiring when the school at Manteo would open. On 8 September, Redfern wrote a letter to the plaintiff, stating: "In reply to your letter of 6 September, I must state that I have employed another for the position since I did not receive an answer to my wire. I waited from 27 August until 4 September for a reply and did not receive one, so employed another. In fact, your letter tonight was the first I had heard from you."

The evidence tended to show that the salary for the holders of a Grade A. certificate under the State schedule was $100.00 per month. Plaintiff offered evidence tending to show that she purchased clothing and made preparation to assume her duties at Manteo, and that after she was informed by Redfern that her telegram of acceptance had never been delivered, and that another teacher had been employed that she made diligent effort to procure other employment but was unable to do so. The school term at Manteo was eight months and the plaintiff sued for $900.00, covering the expected salary and $100.00 for purchases which she had made, or money spent in preparing to teach in Manteo. Redfern testified that he had authority to employ teachers for the Manteo High School and that he had conferred with the county superintendent at Chapel Hill before offering the position to Miss Jolley. He further testified that there were three trustees of Manteo High School and that the county superintendent was his superior officer. "He had the right to approve or reject my employments. They were submitted to him before they were made. . . . Even after I made an appointment the superintendent had a right to reject it."

The cause was submitted to the jury upon the following issues:

1. "Did the defendant negligently fail to transmit and deliver the telegram as alleged in the complaint?"

2. "If so, was plaintiff injured thereby?"

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

The foregoing issues were answered in favor of the plaintiff, and there was an award of $600.00 damages. From judgment upon the verdict the defendant appealed.

B. T. Falls for plaintiff.
Francis R. Stark and Alfred S. Barnard for defendant.

BROGDEN, J. Two questions of law arise upon the record.

1. Can an unemancipated minor, living with and being supported by her father, recover for earnings lost by the failure to promptly deliver a telegram?

2. Was the plaintiff entitled to recover more than nominal damages?

The plaintiff was a graduate of Meredith College and had prepared herself to teach English and French in the schools of North Carolina. There was no evidence of express emancipation, but evidence of implied emancipation sufficient to support the verdict, was introduced at the trial. The doctrine of implied emancipation is fully recognized in this State. Thus, in *Ingram v. R. R.*, 152 N. C., 762, 67 S. E., 926, the Court said: "It is well settled that if a contract of employment is made by a minor and approved and confirmed by his father, and under such contract the son is to receive the wages earned by him, the father, by approving and confirming the agreement, in effect emancipates his son, as to wages earned by him under the contract, which becomes the property of the son, and not the property of the father. . . . If a minor son contracts on his own account for his services with the knowledge of his father, who makes no objection thereto, there is an implied emancipation and an assent that the son shall be entitled to the earnings in his own right." *Lowrie v. Oxendine*, 153 N. C., 267, 69 S. E., 131. See, also, *Daniel v. R. R.*, 171 N. C., 23, 86 S. E., 174; *Holland v. Hartley*, 171 N. C., 376, 88 S. E., 507.

The record discloses that the daughter conferred with her father before sending the telegram of acceptance. The Redfern telegram offered the position to the daughter. The father had permitted her to prepare for teaching in her own way and made no objection to her telegram of acceptance. He was appointed next friend to bring the suit in behalf of his daughter, and there is no allegation challenging her right to receive the proceeds of recovery. Consequently, this aspect of the case must be resolved in favor of plaintiff.

The defendant insists that the plaintiff, if permitted to recover at all, is not entitled to recover more than nominal damages for two

reasons. First, she was offered a position to teach English, French and dramatics. In her telegram of acceptance she agreed to teach English and French, omitting any reference to dramatics.

Second, that there was no formal approval of the employment of the plaintiff by the school board or county superintendent.

The testimony does not disclose whether dramatics is an essential part of the course of study in Manteo High School or that this subject was a material term of the agreement. However, the jury in answering the second issue found that the plaintiff was "injured" by the failure to deliver the telegram. There was no objection to this issue. Obviously she could not have been injured by the delay except upon the theory that a valid contract existed between the parties. It cannot be said as a matter of law that the evidence did not warrant such an inference.

Upon the facts disclosed at the trial, the applicable principle of law stated by *Hoke, J.*, in *Gardner v. Telegraph Co.*, 171 N. C., 405 is: "A telegraph company sued for breach of contract for failure to properly transmit and deliver a commercial message may be held liable as in other cases on breach established, for such damages as were in reasonable contemplation of the parties and which are capable of ascertainment with a reasonable degree of certainty." The defendant relied upon *Walser v. Tel. Co.*, 114 N. C., 440, 19 S. E., 366; *Newsome v. Telegraph Co.*, 137 N. C., 513, 50 S. E., 279; 144 N. C., 178, 56 S. E., 863; 153 N. C., 153, 69 S. E., 10, and *Tanning Co. v. Tel. Co.*, 143 N. C., 376, 55 S. E., 777. All of these cases are distinguished in the *Gardner case, supra.* Referring to these cases, the Court said: "The cases to which we are referred by counsel for appellee, *Newsome v. Telegraph Co.*, 144 N. C., 178; *Tanning Co. v. Tel. Co.*, 143 N. C., 376; *Williams v. Tel. Co.*, 136 N. C., 82, and *Walser v. Tel. Co.*, 114 N. C., 440, were cases where there was nothing in the message itself or in the facts known or communicated which gave any fair or reasonable intimation that the damages claimed were to be expected or where the evidence did not tend to establish the loss of a definite contract, but only disclosed the preliminary negotiations or trade inquiries from which a contract might or might not arise."

It appears from the evidence that Redfern had authority to employ teachers, and that he had consulted with the county superintendent before offering a position to the plaintiff. These facts readily and reasonably support the inference that Redfern at least was acting within the apparent scope of his authority.

No error.

W. T. WILLIAMS ET AL. v. GURNEY P. HOOD, COMMISSIONER OF BANKS, ET AL.

(Filed 8 February, 1933.)

Banks and Banking H d—Depositor held not entitled to preference in insolvent bank's assets under the facts of this case.

A depositor had funds credited to him in several accounts as guardian, one account as "special account" and one account as "checking account." Thereafter he signed blank checks on these accounts and delivered them to the bank with written instructions that they be filled out in a specified aggregate sum and charged to his accounts, and the proceeds used to purchase Federal and State bonds. The bank, through negotiations by its president, attempted to dissuade the purchase of the bonds, but thereafter agreed to follow the depositor's instructions. The bank became insolvent about two months later without having carried out the instructions: *Held*, the relation of debtor and creditor existed between the bank and the depositor in respect to the deposits, which relation was not altered by the bank's agreement to purchase the bonds, and the depositor was not entitled to a preference in the bank's assets in the absence of a showing that the deposits were special deposits for a special purpose or constituted a trust fund in the bank's hands.

APPEAL by defendant, Gurney P. Hood, Commissioner of Banks, from *Oglesby, J.*, at September Term, 1932, of RICHMOND. Reversed.

This is an action to have plaintiff's claim against the Bank of Pee Dee, now in the hands of the defendant, Gurney P. Hood, Commissioner of Banks, for liquidation because of its insolvency, adjudged a preference in the administration of the assets of said bank, on the ground that the funds deposited by the plaintiff with said bank, and in its possession at the date of its insolvency, were trust funds, and for that reason did not pass into the possession of the defendant as general assets of the insolvent bank.

The action was heard on a demurrer to the complaint on the ground that the facts stated therein are not sufficient to constitute a cause of action for a preferential claim against the assets of the Bank of Pee Dee, now in the possession of the defendant, Gurney P. Hood, Commissioner of Banks, for liquidation under the provisions of chapter 113, Public Laws of North Carolina, 1927, as amended.

The facts alleged in the complaint, and admitted by the demurrer are as follows:

1. Some time prior to the month of January, 1930, the plaintiff deposited with the Bank of Pee Dee certain funds, which at his request were credited on the books of said bank, as follows:

W. T. Williams, guardian for John Skelton Williams, Jr.	$1,401.39
W. T. Williams, guardian for W. T. Williams, Jr.	1,458.29
W. T. Williams, special account	2,041.03
W. T. Williams, checking account	1,015.63

2. During the month of January, 1930, because of his apprehension as to the financial condition of the Bank of Pee Dee, the plaintiff decided to withdraw from said bank the sum of $5,000, and to invest said sum in bonds of the United States or of the State of North Carolina. In consequence of this decision, the plaintiff signed blank checks, drawn on the Bank of Pee Dee, and sent said checks, with his pass books, to said bank, with instructions, in writing, to its officers to fill in the blanks in said checks, so that the aggregate amount of said checks would be $5,000, to charge said checks, when filled out in accordance with plaintiff's instructions, to his accounts, and to purchase with the proceeds of said checks bonds of the United States or of the State of North Carolina. The plaintiff further instructed said officers of the Bank of Pee Dee to hold said bonds, when purchased in accordance with his instructions, for him.

Within a few days after the Bank of Pee Dee had received said checks, pass books and written instructions from the plaintiff, its president called to see him, and urged him to withdraw said instruction with respect to the purchase of said bonds. In consequence of his conversation with said president, plaintiff withdrew said instructions, and the checks, pass books and written instructions were returned to plaintiff by the president of the Bank of Pee Dee.

3. On or about 1 October, 1930, the plaintiff again delivered to the Bank of Pee Dee the checks, pass books, and written instructions which had been returned to him by the president of the said bank, and insisted that said bank comply at once with his instructions with respect to the purchase of said bonds. Within a few days thereafter, the president of the Bank of Pee Dee again called to see the plaintiff. At this time the said president agreed to comply with plaintiff's instructions, and to purchase the said bonds for him. Thereafter the plaintiff was confined to his home by reason of illness, and was unable to call at the bank until after 8 December, 1930. During this time, he relied upon the promise of the president of the Bank of Pee Dee that said bank would purchase for him the bonds in accordance with his instructions.

4. On 8 December, 1930, the Bank of Pee Dee closed its doors and ceased to do business, because of its insolvency. At said date, the bank

had in its vaults the sum of $8,405.51, in currency, and in its possession cash items due from other banks, amounting to the sum of $24,877.54. This currency and these cash items passed into the possession of the defendant as assets of the Bank of Pee Dee.

5. Within a few days after the Bank of Pee Dee ceased to do business, the plaintiff was advised by its cashier that said bank had not purchased the bonds for the plaintiff as it agreed to do, and had not charged plaintiff's accounts with said bank with any sums on account of the blank checks which plaintiff had sent to said bank on or about 1 October, 1930.

6. Before the commencement of this action, the plaintiff filed his claim against the Bank of Pee Dee with the defendant, and prayed that said claim be allowed as a preference in the administration by the defendant of the assets of said bank. This prayer was denied.

The demurrer was overruled, and the defendant, Gurney P. Hood, Commissioner of Banks, appealed to the Supreme Court.

F. Donald Phillips for plaintiff.

W. R. Jones for defendant.

CONNOR, J. The relationship between the plaintiff and the Bank of Pee Dee, with respect to the funds deposited by the plaintiff with said bank, prior to 1 January, 1930, was that of creditor and debtor. These funds were not trust funds at the dates they were deposited with the bank by the plaintiff. No facts are alleged in the complaint which show or from which it can be reasonably inferred that said funds constituted a special deposit for a special purpose. *Parker v. Trust Co.*, 202 N. C., 230, 162 S. E., 564. Nor are any facts alleged in the complaint which show or from which it can reasonably be inferred that said funds after they were deposited became trust funds. The relationship between the plaintiff and the bank, as creditor and debtor, with respect to said funds, was not changed or altered by the agreement of the bank to purchase bonds for the plaintiff, and to pay for said bonds out of said funds. *Blakey v. Brinson*, 286 U. S., 254, 76 L. Ed., 1089.

There was error in the judgment overruling the demurrer. The demurrer should have been sustained. The judgment is

Reversed.

IN THE MATTER OF THE LIQUIDATION OF THE BANK OF PENDER.

(Filed 8 February, 1933.)

Banks and Banking H d—Depositor held not entitled to preference in insolvent bank's assets under facts of this case.

A depositor took a cashier's check for his deposit, and thereafter surrendered the cashier's check to the bank and purchased or exchanged it for the bank's draft for the purchase price of Liberty Bonds, which draft was sent by the bank to a broker with instructions to purchase the bonds for the depositor. The bank became insolvent before the draft was paid: *Held*, the transaction did not entitle the depositor to a preference in the bank's assets, the transaction not constituting a statutory preference under C. S., 218(c) or a preference under the trust fund theory.

CIVIL ACTION, before *Grady, J.*, at July Term, 1932, of PENDER.

The parties waived a jury trial and the judge found the facts. These facts are substantially as follows: The Bank of Pender closed its doors on 6 January, 1932, and its assets were thereby vested in the Commissioner of Banks. Prior to 29 December, 1931, Fitzhugh Lee had on deposit in the savings department the sum of $3,714.26, and on said date he drew a check for said sum payable to his wife, Mrs. Fitzhugh Lee. Mrs. Lee thereupon requested the bank to issue to her a cashier's check for said sum of money and told the president of the bank "that she was withdrawing the money for the purpose of buying Liberty Bonds." Branch informed her that he would buy bonds for her, and on 30 December, 1931, he wrote a letter to Fitzhugh Lee requesting that he mail cashier's check to the bank. On 4 January, 1932, Mrs. Lee endorsed the cashier's check and Fitzhugh Lee took the same in person to Branch, president of the bank, and delivered said cashier's check to said president, properly endorsed by him, and at the same time Fitzhugh Lee delivered to the said C. C. Branch, president, the sum of $2,460 in currency. "He requested Branch to place $74.26 of said amount to his credit and to purchase for him $6,100 in Liberty Bonds with the balance. Said cashier's check was marked paid on 5 January, 1932, by said Bank of Pender, and thereupon C. C. Branch, president, directed Miss Maude Paddison, assistant cashier of said bank, to make a draft on the North Carolina Bank and Trust Company of Wilmington for $3,600, and another draft on the American Bank and Trust Company of Richmond for $2,500, both in favor of Frederick E. Nolting, of Richmond, Virginia, which said two drafts were accordingly drawn and forwarded to said Nolting by C. C. Branch, president of said Bank of Pender." Accompanying the draft was a letter directed to Nolting, requesting the purchase of $6,100 of Liberty Bonds. Fitzhugh Lee received $2,500 in

Liberty Bonds from Nolting and Company, purchased with the draft on the Richmond bank, "which cleared in due course, but the Bank of Pender closed its doors on 6 January, 1932, and the draft on the North Carolina Bank and Trust Company of Wilmington did not clear in the meantime, and was never paid." Said draft for $3,600 was held by Nolting and Company at the time the Bank of Pender closed its doors. "It is admitted that the Bank of Pender invoked the thirty-day clause on savings accounts prior to 29 December, 1931, but Fitzhugh Lee was not notified of said act on the part of said bank."

Branch, president of the bank, said that the currency and the cashier's check were delivered to him for the express purpose of paying for $6,100 worth of 4¼ Liberty Bonds.

Fitzhugh Lee contends upon the foregoing facts that he is entitled to a preference in the sum of $3,600. The trial judge declared in the final judgment: "Claimant held a cashier's check issued to him by the Bank of Pender. This was a mere acknowledgment on the part of the bank that it was indebted to him in the sum of $3,714.26. He directed the bank to cancel the check and purchase for him certain bonds. A draft was issued by the bank on the North Carolina Bank and Trust Company for $3,600, payable to Nolting and Company, which draft was never paid because of failure of the Bank of Pender. There was no deposit of money. The money was already in the bank, and by a process of bookkeeping the debt of the bank was shifted to Nolting and Company. There was no augmentation or swelling of the assets of the bank by this transaction. . . . Wherefore, it is adjudged that the claimant is not entitled to any preference, but that his claim must run the ordinary gamut of an unsecured debt, sharing in such dividends as may be declared from time to time."

From the foregoing judgment the claimant appealed.

Woodus Kellum for claimant.
R. G. Johnson for Commissioner of Banks.

BROGDEN, J. If a depositor in a bank takes a cashier's check for his deposit, and thereafter surrenders the cashier's check, purchasing with the proceeds, a draft for the purchase price of Liberty Bonds, and the bank is closed before the draft is paid, does such transaction constitute a preference?

The claimant received Liberty Bonds for the cash which he deposited in the bank. Consequently, the only question to be determined is whether the transaction with the cashier's check and draft constitutes a preference. The question of law must be answered in the negative. The trans-

action did not constitute a statutory preference as defined by C. S., 218(c), as construed and interpreted in *Morecock v. Hood,* 202 N. C., 321, nor did it constitute a preference upon the trust fund theory declared in *Parker v. Trust Co.,* 202 N. C., 230. The trial judge correctly interpreted the law and the judgment is

Affirmed.

BILLIE BURNS, BY HIS NEXT FRIEND, MRS. PETER BURNS, v. NORTH STATE LAUNDRY, INCORPORATED.

(Filed 8 February, 1933.)

1. Trial E h—Under facts of this case plaintiff is entitled to new trial for jury's uncertainty as to evidence and law.

In this case the jury was excused from Thursday until the following Tuesday while having the case under consideration. Upon resuming deliberations, the foreman inquired of the attending officer whether the judge would not again read his charge. The court was not informed of the request and did not reread his charge, but gave additional instruction upon request of defendant's counsel in the absence of plaintiff's counsel: *Held,* the plaintiff is entitled to a new trial upon his appeal from an adverse verdict, it being apparent that the minds of the jury needed refreshing in regard to the evidence and law under the facts disclosed by the record.

2. Same—Court may give further instructions in absence of counsel.

All parties properly in court are charged with notice of proceedings while the action is pending and the court in session, and the court while in regular session may, except in certain cases, give additional instructions in the absence of counsel.

APPEAL by plaintiff from *MacRae, Special Judge,* at May Special Term, 1932, of MECKLENBURG. New trial.

Civil action brought by an infant twenty-two months of age, by his next friend, against the defendant to recover damages alleged to have been caused by the negligence of the defendant's agent in the operation of a truck.

The place of the accident is the home of the plaintiff situated on Turner Avenue in the city of Charlotte, known as the Burns Property. The Burns residence is twenty-two feet from the sidewalk on the west side of Turner Avenue, which runs north and south. The lot is about fifty feet wide; on the north side is a ten-foot alley. Between the alley and the house is a private driveway about 10 feet in width. The front yard is open. The defendant's agent drove the truck into the driveway to deliver laundry and in backing the truck into the street ran upon

the plaintiff and inflicted injury for which the present action was instituted. The two issues of negligence and damages were submitted to the jury, and the first issue was answered No; the second was not answered. Judgment for defendant; appeal by plaintiff.

Counsel for the parties agreed that the clerk should take the verdict in their absence and in the absence of the court and that the usual motions, if any, should be made at a later time during the term. The charge was concluded on Thursday afternoon at three o'clock, and at four o'clock the jury applied to the court for additional or explanatory instructions. The instructions were given, Afterwards on the same day the court excused the jury until Monday at 9:30 a.m. and later until Tuesday morning.

When the jury returned, the foreman informed the deputy sheriff in charge of the court that the jury wanted further instructions, but the officer did not convey this information to the court. On Tuesday morning the defendant's counsel requested the judge, not while the court was in session, to give certain prayers for instructions based upon the defendant's contentions in respect to the evidence. These instructions were given in the absence and without the knowledge of the plaintiff's counsel. The jury had previously requested that the entire charge be read to them. This was not done. The plaintiff assigned as error exceptions 8-13 inclusive.

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

ADAMS, J. The court charged the jury on the afternoon of Thursday and excused them until the following Monday, and subsequently until Tuesday. For four days they were separated. When they returned to the courthouse on Tuesday morning to resume their deliberations the foreman inquired of the attending officer whether the judge would not again read his charge to the jury, but the officer "did not convey to the court the message of the foreman." On the same morning at the instance of the defendant's counsel the court gave the jury additional instructions. The request for these instructions was not made in open court or in the presence of the jury or of the attorney for the plaintiff. There is an intimation in the defendant's brief that the request was made at Chambers. This, however, is not necessarily the decisive question.

It is true as a general rule that all parties to an action when properly in court are charged with notice of proceedings which subsequently take place while the action is pending and the court is in session. *University v. Lassiter,* 83 N. C., 38; *Williams v. Whiting,* 94 N. C., 481; *Spencer*

v. Credle, 102 N. C., 68; *Coor v. Smith*, 107 N. C., 430. It is true, also, that the court while in regular session may, except in certain cases, give further instructions, although counsel are not present. *Biggs v. Gurganus*, 152 N. C., 173; *Bank v. Florida-Carolina Estates, Inc.*, 200 N. C., 480. See, also, *In re Will of Yelverton*, 198 N. C., 746.

This rule, however, must be considered in connection with the facts appearing in the record. While the occasion inducing a dispersing of the jury from Thursday until Tuesday is not given, we may assume that the experienced and capable judge who presided at the trial had sufficient reason for his order; but the request of the jury, made when they returned to the court, to say nothing of the difficulty of keeping in mind the distinguishing features of the charge during their separation, indicated the necessity of having their memory refreshed in regard to the evidence as well as the law and, without such assistance, the uncertainty of rendering a just verdict. This conclusion is altogether reasonable in view of the fact that in the absence of the plaintiff's counsel the defendant requested and obtained instructions which presumably were favorable to the defense. For these reasons the plaintiff is entitled to a new trial.

New trial.

ANDREW J. DAVIS v. R. E. ROYALL.

(Filed 8 February, 1933.)

1. Bills and Notes H a—

In an action against an endorser on a note the burden of showing that notice of dishonor was given the endorser is on the plaintiff.

2. Bills and Notes D c—Held: evidence did not show as matter of law that endorser waived his right to notice of dishonor.

Interest on a note was paid after maturity, the entries thereof on the back of the note being made by an endorser. Thereafter, the endorser severed his business connections with the principal on the note, and the interest was again paid without the knowledge of the endorser. There was no waiver of notice of dishonor on the face of the note, and it did not appear whether the interest was paid in advance. In an action on the note against the endorser: *Held*, it cannot be determined as a matter of law that the endorser was not entitled to notice of dishonor by reason of his consent to an extension of time of payment granted the principal. C. S., 3071, 3085, 3055.

CIVIL ACTION, before *Devin, J.*, at June Term, 1932, of WAKE.

On 26 January, 1926, the Royall Cotton Mills executed and delivered to the plaintiff a promissory negotiable note in the sum of $2,000, pay-

able twelve months after date. The defendant, R. E. Royall, was an accommodation endorser on said note. At the time of the endorsement Royall was president of the mill, but severed his connection as such officer in September, 1929, although serving as chairman of the board for sometime thereafter. Interest was paid on the note through 26 January, 1931. The defendant, Royall, made entries of interest payments on the note, including 26 January, 1930. When the note matured on 26 January, 1931, the interest was paid by Mr. Johnson, president of the mill, succeeding Mr. Royall. In December, 1930, the plaintiff wrote the Royall Cotton Mills, maker of the note, that he wanted the note paid in full. The cotton mill went into the hands of the receiver in June, 1931, and this action was instituted on 12 January, 1932.

There was evidence tending to show that the plaintiff had said to the defendant: "I told him that the money had not been paid and that he was responsible for it. I forgot that he was on the note for a short time and his name was at the bottom of the signature for four or five years. I said, 'Mr. Royall, you know that you are responsible for this money.' I told Mr. Royall in front of his bank on 26 January, when the note was due, that he was endorser on the note and it had not been paid. I said to him, 'You are responsible,'" etc.

An issue of indebtedness was submitted to the jury and answered in favor of the plaintiff.

J. G. Mills for plaintiff.

N. Y. Gulley and Biggs & Broughton for defendant.

BROGDEN, J. The trial judge instructed the jury as follows: "The plaintiff having offered the note, and its execution and endorsement being admitted, nothing else appearing, nothing having been paid on the note, the plaintiff would be entitled to have you answer the issue $2,000 and interest, and it would then be incumbent upon the defendant to show that the plaintiff would not be entitled to recover for the reason that the plaintiff failed to give him notice of dishonor in accordance with the statute. If he has so satisfied you by the greater weight of evidence, you will say, 'Nothing.'"

The defendant asserts that the foregoing instruction is erroneous for that the burden of showing notice of dishonor was placed upon the defendant. The contention of the defendant is upheld by the decision in *Exchange Co. v. Bonner,* 180 N. C., 20, 103 S. E., 907. See, also, *Busbee v. Creech,* 192 N. C., 499, 135 S. E., 326, and *Pittman v. Bell,* 196 N. C., 805.

Nevertheless, plaintiff insists that the defendant was not entitled to notice as a matter of law for the reason that he consented to the exten-

sion of time of payment granted principal. There is no waiver of notice in the face of the instrument and it does not appear whether the interest was paid in advance. It does appear that interest was paid on 26 January, 1931, at a time when the defendant, Royall, had nothing to do with the mill and knew nothing of such payment. The principle announced in *Bank v. Johnston,* 169 N. C., 526, 86 S. E., 360, is applicable in proper cases, but the evidence in the record is not of such definite character as to enable this Court to declare as a matter of law that the defendant was not entitled to notice of dishonor as provided in C. S., 3071, 3085, and 3055. *Wrenn v. Cotton Mills,* 198 N. C., 89, 150 S. E., 676; *Corporation Commission v. Wilkinson,* 201 N. C., 344.

New trial.

CITY OF HIGH POINT v. J. W. CLINARD ET AL.

(Filed 8 February, 1933.)

Limitation of Actions A d—Action to enforce lien for street assessments is governed by ten-year statute.

The assessment against abutting lands for street improvements is made a lien on the land superior to all other liens and encumbrances, chapter 56, Public Laws, 1915, and the ten-year statute of limitation is applicable thereto and not the three-year statute.

APPEAL by defendants from *Harding, J.,* at October Term, 1932, of GUILFORD.

Civil action to recover delinquent street assessment, levied for local improvement, under authority of chapter 56, Public Laws, 1915, as amended, heard upon facts agreed.

1. The original levy and validity of assessment against defendants' property, located in the city of High Point, for street improvement, is not controverted. The assessment roll was duly confirmed 25 November, 1921, and thereby became a lien on defendants' property, by virtue of the statute, "superior to all other liens and encumbrances." Section 9, chapter 56, Public Laws, 1915.

2. The assessment levied against the defendants' property was $287.05, payable in ten equal annual installments. The first four installments were paid. Default was made in the installment due 25 November, 1925, and no further payments have been made.

3. It is provided in section 10, chapter 56, Public Laws, 1915, that in case of the failure or neglect of any property owner to pay "said installment when the same shall become due and payable, then and in that event all of said installments remaining unpaid shall at once be-

come due and payable," and collection may be enforced by sale of the property as in case of unpaid taxes.

4. By act of Assembly, chapter 331, Public Laws, 1929, it is provided that no statute of limitations shall bar the right of a municipality to enforce any remedy provided by law for the collection of unpaid assessments, whether for paving or other benefits, save from and after ten years from default in the payment thereof.

5. Under chapter 131, Public-Local and Private Laws, 1931, "all special assessments or installments of special assessments heretofore levied by the city of High Point for local improvements" were authorized to be extended by resolution of the city council duly adopted, which was done.

6. That the amount levied against defendants' property under this reassessment or extension was $240.95, payable in eight equal annual installments of $30.12 each, the first installment maturing on 1 October, 1931.

7. The defendants having failed and neglected to pay the installment due 1 October, 1931, this action was instituted 1 June, 1932, in the Municipal Court of the city of High Point to recover the full amount of said assessment, $240.95 with interest from 1 July, 1931.

8. The only defense interposed is the plea of the three years statute of limitations.

There was a judgment for the plaintiff in the municipal court, which was affirmed on appeal to the Superior Court, and from this latter ruling, the defendants appeal.

Grover H. Jones and Thos. W. Sprinkle for plaintiff.

Wm. Henry Hoyt, Self, Bagby, Aiken & Patrick and Clem B. Holding of counsel.

E. A. Wright, R. L. Foust and Walter E. Crissman for defendants.

STACY, C. J. The case falls within a very narrow compass. It is simply this: Defendants say that when they failed to pay the installment due on 25 November, 1925, plaintiff's right of action accrued, was barred at the expiration of three years thereafter, and that the statutes of 1929 and 1931, passed after the bar of the statute was complete, could not revive the right of action. For this position, they rely upon the following decisions: *Morganton v. Avery,* 179 N. C., 551, 103 S. E., 138; *Greensboro v. McAdoo,* 112 N. C., 359, 17 S. E., 178; *In re Beauchamp,* 146 N. C., 254, 59 S. E., 687; *Whitehurst v. Dey,* 90 N. C., 542; Note 36 A. L. R., 1316, *et seq.*

The position of the defendants, however, overlooks the fact that by virtue of the statute, chapter 56, Public Laws, 1915, under which the

assessment was originally levied, the confirmation of "the assessments embraced in the assessment roll" is made a "lien on the real property against which the same are assessed, superior to all other liens and encumbrances." *Schank v. Asheville,* 154 N. C., 40, 69 S. E., 681. This brings the case under the ten years statute, as decided in *Drainage District v. Huffstetler,* 173 N. C., 523, 92 S. E., 368, rather than under the three years statute, as contended for by the defendants. Compare *Statesville v. Jenkins,* 199 N. C., 159, 154 S. E., 15.

In this view of the matter, it becomes unnecessary to consider the question, debated on brief, whether a right of action already barred may be revived by a change in the statute of limitations. *Dunn v. Beaman,* 126 N. C., 766, 36 S. E., 172; *Varner v. Johnston,* 112 N. C., 570, 17 S. E., 483; *Campbell v. Holt,* 115 U. S., 620; Note, 36 A. L. R., 1316, *et seq.* See, also, *Wilkes County v. Forester, post,* 163.

Affirmed.

C. L. LEGGETT v. FEDERAL LAND BANK OF COLUMBIA, SOUTH CAROLINA.

(Filed 8 February, 1933.)

Process B d—Federal Land Bank may not be served with summons by service on Secretary of State under provisions of C. S., 1137.

A Federal Land Bank created by act of Congress and deriving its right to own property and to do business in this State solely through a Federal statute is not a foreign corporation exercising such functions under express or implied authority of this State, and C. S., 1137, relating to service of process on foreign corporations by service upon the Secretary of State is not applicable to such corporation, and our courts acquire no jurisdiction over it by such service.

APPEAL by the defendant from *Frizzelle, J.,* at June Term, 1932, of MARTIN. Reversed.

This is an action to recover damages for the breach of a contract in writing by which the defendant agreed to sell and convey to the plaintiff the land described in the complaint.

The action was begun by a summons issued by the clerk of the Superior Court of Martin County, dated 12 December, 1931, and directed to the sheriff of Wake County, North Carolina. The summons was served as directed by leaving a copy of said summons with J. A. Hartness, Secretary of State, and thereafter duly returned by the sheriff of Wake County to the Superior Court of Martin County.

In the complaint thereafter filed by the plaintiff, it is alleged that the plaintiff is a resident of Martin County, North Carolina, and that the

defendant is a corporation organized and doing business under and by virtue of an act of the Congress of the United States of America, with its principal office in the city of Columbia, in the State of South Carolina. It is further alleged in the complaint that the defendant has property in Martin County, North Carolina, and is doing business in this State.

The defendant, in apt time, entered a special appearance, and moved that the action be dismissed on the ground that the court had acquired no jurisdiction of the defendant by the service of the summons in the action by the sheriff of Wake County by leaving a copy of said summons with the Secretary of State, under the provisions of C. S., 1137. The motion was denied, and the defendant appealed to the Supreme Court.

Joseph W. Bailey for plaintiff.

B. A. Critcher, Frank P. McGowan and Harry D. Reed for defendant.

CONNOR, J. The summons in this action was served in accordance with the provisions of C. S., 1137. The defendant contends that such service was not effective as to it, for the reason that the statute is not applicable to the defendant. The statute is in words as follows:

"C. S., 1137. Every corporation having property or doing business in this State, whether incorporated under its laws or not, shall have an officer or agent in this State upon whom process in all actions or proceedings against it can be served. A corporation failing to comply with the provisions of this section is liable to forfeiture of its charter, or to the revocation of its license to do business in this State. In the latter event, process in an action or proceeding against the corporation may be served upon the Secretary of State by leaving a true copy thereof with him, and he shall mail the copy to the president, secretary, or other officer of the corporation, upon whom, if residing in this State, service could be had. For this service to be performed by the secretary, he shall receive a fee of fifty cents to be paid by the party at whose instance the service was made."

The validity of this statute has been sustained, where the defendant is a corporation organized under the laws of another State, and has property or is doing business in this State, and summons issued in an action begun or pending in a court of this State against such corporation, has been served in accordance with the provisions of the statute. See *White v. Lumber Co.*, 199 N. C., 410, 154 S. E., 620; *Timber Co. v. Insurance Co.*, 192 N. C., 115, 133 S. E., 424; *R. R. v. Cobb*, 190 N. C., 375, 129 S. E., 828; *Lunceford v. Association*, 190 N. C., 314, 129 S. E., 805; *Anderson v. Fidelity Co.*, 174 N. C., 417, 93 S. E., 948; *Currie v. Mining Co.*, 157 N. C., 209, 72 S. E., 980; *Fisher v. Insurance*

Co., 136 N. C., 217, 48 S. E., 667. The principles on which the statute is held valid, when applied to a corporation organized under the laws of another State, are stated by *Walker, J.*, in his opinion in the last cited case. In that opinion it is said:

"It is thoroughly well settled that the right of a foreign corporation to engage in business within a State other than that of its creation, depends solely upon the will of such other State, and this right may be granted or withheld by the State at its discretion, or it may be granted on any condition the State may see fit to impose, unless there is an interference with interstate commerce, or some other federal principle is violated."

"A foreign corporation, as will be seen from the authorities, can exercise the right to do business in a State only by comity or as an act of grace on the part of the State, and the condition upon which the favor is extended goes with it, and cannot be separated from it, so that if the privilege is enjoyed the condition must be performed."

The defendant in the instant case is a corporation created and organized under an act of the Congress of the United States, known as "The Federal Farm Loan Act." The validity of this act was upheld in *Smith v. Kansas City Title and Trust Company*, 255 U. S., 180, 65 L. Ed., 577. The defendant was not only created and organized under and by virtue of said act of Congress; it derives its right to own property and to do business in this State, solely from said act. It is not a foreign corporation, having property or doing business in this State, under a license, express or implied, from North Carolina. 14(a) C. J., 1214. For this reason the provisions of C. S., 1137, are not applicable to the defendant. There was error in the order denying the motion of defendant that the action be dismissed. The order must be

Reversed.

J. S. ARMSTRONG v. CHARLES A. JONAS, TRUSTEE, ET AL.

(Filed 8 February, 1933.)

Mortgages A c—

A notary public who owns a life estate in lands has no interest therein which would render his taking the acknowledgment of a deed of trust on the remainder in fee void.

CIVIL ACTION, before *Harris, J.*, at July Special Term, 1932, of LINCOLN.

On 1 July, 1927, Kenneth Grigg and wife executed a deed of trust to Charles A. Jonas, trustee, and the Commercial Bank and Trust Company, *cestui que trust,* to secure a note for $10,000, payable to said bank. The property described in the deed of trust was situated on Main Street in the town of Lincolnton. The deed of trust contains the following stipulation: "It is agreed that W. E. Grigg is the owner of a life estate in the property herein conveyed, said property having been willed to him by B. F. Grigg during the lifetime of said W. E. Grigg." The Seth Lumber Company purchased the note and deed of trust above described for valuable consideration on or about 18 June, 1931, and is now the owner and holder of said deed of trust. On 16 September, 1929, J. S. Armstrong, plaintiff, secured a judgment against Kenneth Grigg and W. E. Grigg, amounting to $2,735 with interest and cost. Thereafter an execution was issued and the land duly sold thereunder by the sheriff on 20 July, 1931. At said execution sale the plaintiff Armstrong became the purchaser of said land, and on 22 August, 1931, instituted the present action to cancel the deed of trust, dated 1 July, 1927, and recorded in Book of Mortgages 154, at page 438, as a cloud upon his title, upon the proof that the acknowledgment of said deed of trust was taken by W. E. Grigg, notary public, who at the time owned a life estate in the land. At the conclusion of the evidence there was judgment of nonsuit, and the plaintiff appealed.

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

Ryburn & Hoey for Lumber Company.

Kemp B. Nixon for Charles A. Jonas and the liquidating agent of the Commercial Bank.

BROGDEN, J. If a notary public owns a life estate in a parcel of land, is he qualified to take the acknowledgment of the grantor and his wife to the execution of a deed of trust upon the remainder in fee?

It has been generally held that if a notary public is a party, trustee, or *cestui que trust,* in a conveyance of land that he is disqualified to probate the instrument or to take the acknowledgment of its execution. *Blanton v. Bostic,* 126 N. C., 418, 35 S. E., 1035; *Cowan v. Dale,* 189 N. C., 684, 128 S. E., 155; *Bank v. Tolbert,* 192 N. C., 126, 133 S. E., 558; *Investment Company v. Wooten,* 198 N. C., 452, 152 S. E., 167. The Court observed in the *Investment Company case, supra,* that "from the authorities in this jurisdiction, the principle laid down ordinarily is to the effect that the notary public must not have a pecuniary or financial interest in the property conveyed."

The pecuniary interest which vitiates an official act of this sort, implies that the officer taking the acknowledgment will either actually or probably receive as his own, money or equivalent value as a result of the transaction. What value, benefit or advantage could the life tenant possibly realize from the execution of the deed of trust on the remainder in fee? His life estate is neither diminished nor enlarged thereby; nor is the enjoyment thereof in anyway impaired or affected. Consequently, it is the opinion of this Court that the trial judge made a correct ruling.

Affirmed.

W. C. HANKS, ADMINISTRATOR OF CURTIS HANKS, DECEASED, v. SOUTHERN PUBLIC UTILITIES COMPANY.

(Filed 8 February, 1933.)

1. Master and Servant F a—

The North Carolina Workmen's Compensation Law is constitutional.

2. Same—

Under the provisions of section 8081(k) every employer and employee within the purview of the Compensation Act is presumed to have accepted its provisions.

3. Same: Pleadings D c—Vitiating defect must appear upon face of complaint in order to be available upon demurrer.

Where a demurrer is interposed in an action by the administrator of a deceased employee on the ground that the action is cognizable only by the Industrial Commission, and it does not appear from the face of the complaint that the defendant employed more than five men in this State, section 8081 (u), the demurrer is properly overruled, it being necessary that the vitiating defect appear on the face of the complaint in order to be available on demurrer.

CIVIL ACTION, before *Moore, J.*, at June Term, 1932, of WILKES.

The plaintiff filed a complaint to recover damages for personal injury. A demurrer thereto was sustained, and thereupon the plaintiff filed an amended complaint alleging that his intestate was killed on 6 December, 1929. The cause of death was contact with a guy wire improperly insulated; and it was also alleged that the defendant negligently failed to furnish the deceased with safe and suitable tools and appliances with which to perform his duties. Paragraph 10 of the complaint is as follows: "That at the time of the grievance herein set forth and at no time prior thereto had the plaintiff's intestate accepted the provisions of the Workmen's Compensation Act, or by any acts or conduct acquiesced

in or agreed to become bound by the provisions thereof." The defendant demurred to the amended complaint for that on 6 December, 1929, the date of the injury and death, plaintiff's intestate was employed by the defendant "in its business in the State of North Carolina, and that his alleged injury occurred in the State of North Carolina, and that such employee was subject to the provisions of the North Carolina Workmen's Compensation Act." The demurrer was overruled and the defendant appealed.

T. C. Bowie and Wm. M. Allen for plaintiff.
Manly, Hendren and Womble for defendant.

BROGDEN, J. The defendant contended that the injury occurred subsequent to the enactment of the Workmen's Compensation law, and that as a result the cause was cognizable by the Industrial Commission. The plaintiff contended that the Workmen's Compensation Act was unconstitutional for that it impaired the right of trial by jury, guaranteed by the Constitution of North Carolina.

The constitutionality of the Workmen's Compensation Act was upheld in *Hearner v. Lincolnton*, 202 N. C., 400, 162 S. E., 909. See, also, *Hagler v. Highway Commission*, 200 N. C., 733, 158 S. E., 383.

The plaintiff alleges in paragraph 10 of the complaint that his intestate had not accepted the provisions of the Workmen's Compensation Act. However, this is immaterial for the reason that C. S., 8081(k) provides in substance that every employer and employee coming within the purview of the act is presumed to have accepted the provisions thereof.

However, the demurrer was properly overruled. It does not appear upon the face of the complaint that the Workmen's Compensation Act applies to the defendant. C. S., 8081(u) provides in subsection (b) that the Workmen's Compensation Act does not apply to casual employees, "nor to any person, firm or private corporation that has regularly in service less than five employees in the said business within this State," etc. *Aycock v. Cooper*, 202 N. C., 500, 163 S. E., 569. The face of the complaint does not disclose that the defendant employs more than five men. A demurrer cannot be sustained unless the vitiating defect appears upon the face of the pleadings assailed. *Justice v. Sherard*, 197 N. C., 237, 148 S. E., 241.

Affirmed.

STATE v. ADE FRANKLIN.

(Filed 8 February, 1933.)

Indictment E d: Bills and notes I f—In this case held: there was fatal variance between indictment and proof.

Where the indictment charges the defendant with issuing a worthless check to a certain person and the evidence at the trial relates only to the issuance of a check to another person, there is a fatal variance between the indictment and proof, and a demurrer to the evidence should be sustained or the action dismissed as in case of nonsuit. C. S., 4643. As to whether a check given under representations that the drawer would have money in the bank to meet payment within ten days comes within the provisions of the "bad-check" law is not presented for decision on the record.

APPEAL by defendant from *Moore, J.*, at April Term, 1932, of AVERY.

Criminal prosecution tried upon indictment in which it is charged that the defendant, on 19 October, 1931, did, unlawfully and wilfully, execute, utter, and give a worthless check on the Avery County Bank, in the sum of $21.50, payable to Watauga Chevrolet Company, and dated 24 July, 1930, which said check was presented to the bank for payment, and payment refused because the defendant had not provided sufficient funds in said bank to pay off said check, in violation of chapter 62, Public Laws, 1927, generally known as the "Bad Check Law."

The State offered only one witness, Max Daniels, whose entire testimony is as follows:

"I sold the defendant, Ade Franklin, a car in July and he gave me his check and said: 'I have got no money in the bank but I will have it in there in ten days,' and asked me to hold the check ten days and I did; and I presented it after ten days, and there was not any money in the bank. I presented the check to the bank and it was not paid. I do not know why. Yes, I endorsed the check. I put it through the window and they wouldn't accept it. They said there was no money. I wrote the check myself and Mr. Franklin held the pen and made his mark."

The defendant demurred to the State's evidence and rested.

Verdict: Guilty in the manner and form as charged in the bill of indictment.

Judgment: Eighteen months on the roads.

Defendant appeals, assigning errors.

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

J. W. Ragland for defendant.

STACY, C. J. It is not charged in the bill of indictment that the check described therein was "delivered to another . . . for the payment of money or its equivalent, knowing at the time . . . that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation." Chapter 62, Public Laws, 1927; *S. v. Yarboro,* 194 N. C., 498, 140 S. E., 216; *S. v. Baker,* 199 N. C., 578, 155 S. E., 249.

Nor does it appear that the check mentioned in the indictment is the same as the one given to the witness, Max Daniels. Apparently the charge relates to one transaction, while the proof concerns another. *S. v. Corpening,* 191 N. C., 751, 133 S. E., 14.

Where there is a fatal variance between the indictment and the proof, it is proper to sustain the demurrer to the evidence, or to dismiss the action as in case of nonsuit. C. S., 4643; *S. v. Harris,* 195 N. C., 306, 141 S. E., 883; *S. v. Harbert,* 185 N. C., 760, 118 S. E., 6; *S. v. Gibson,* 170 N. C., 697, 86 S. E., 774.

The point debated on brief as to whether the evidence brings the case within the principle announced in *S. v. Crawford,* 198 N. C., 522, 152 S. E., 504, is not presented by the record. *S. v. Corpening, supra.*

Reversed.

GURNEY P. HOOD, COMMISSIONER, EX REL. FIRST BANK AND TRUST COMPANY, V. J. MACK RHODES AND THE FIDELITY AND CASUALTY COMPANY OF NEW YORK.

(Filed 8 February, 1933.)

Principal and Surety B d—Contractual limitation on time for bringing action on bond of bank official is unaffected by C. S., 441.

Where the bond covering defalcation of a bank official provides that no action thereon should be maintained after six months from the termination of the bond, the contractual limitation is valid and bars an action on the bond after the expiration of the prescribed period although the defalcation was not sooner discovered because of the concealment of the official, nor is this result affected by the provisions of C. S., 441 that action against the official is not deemed to have accrued until the discovery of the facts constituting the fraud.

APPEAL by plaintiff from *Schenck, J.,* at May Term, 1932, of HENDERSON.

Civil action to recover for alleged faithlessness of bank official and to hold surety for his derelictions, heard upon demurrer.

The complaint alleges:

1. That J. Mack Rhodes, officer of the First Bank and Trust Company of Hendersonville, misappropriated not less than $5,000 annually from 1 June, 1926, to 1 June, 1929.

2. That on 1 June, 1926, a $5,000 fidelity bond was executed by the Fidelity and Casualty Company of New York, indemnifying the First Bank and Trust Company against loss through fraud, dishonesty, forgery, theft, embezzlement, or wrongful abstraction by any of its officers or employees. This bond was renewed each year for three years and expired by mutual consent 1 June, 1929. It contains the following clause:

"In the event of the cancellation or termination of this bond as to any employee, whether by notice or otherwise, the right to make a claim hereunder as to such employee shall cease at the end of six months after such termination."

3. The First Bank and Trust Company closed its doors 19 November, 1930. Soon thereafter, defalcations of at least $5,000 annually while said bond was in force, was discovered and immediately reported to the defendant, Casualty Company.

4. That demand for payment of $15,000 has been made upon the defendants, and refused.

Demurrer interposed by the Fidelity and Casualty Company of New York on the ground that the complaint fails to state facts sufficient to constitute a cause of action against said defendant. Demurrer sustained. Plaintiff appeals.

Redden & Redden for plaintiff.

Johnson, Smathers & Rollins for defendant, Casualty Company.

STACY, C. J. By the terms of the bond in suit, the right to make claim thereunder expired at the end of six months after its termination. It terminated by mutual consent 1 June, 1929. Claim was not made until more than seventeen months thereafter. The demurrer was properly sustained. Annotations, 43 A. L. R., 977, and 62 A. L. R., 411; *Chicora Bank v. U. S. F. & G. Co.*, 159 S. E. (S. C.), 454; *Ballard Co. v. U. S. F. & G. Co.*, 150 Ky., 236, 150 S. W., 1, Ann. Cas., 1914C, 1208; *Baird v. Northwestern Trust Co.*, 56 N. D., 398, 217 N. W., 538, 56 A. L. R., 1257.

The decisions are to the effect, that where the liability of the insurer is expressly limited in an indemnity or fidelity bond to losses occasioned and discovered during a specified time, there is no liability unless the loss not only occurs but is also discovered within the prescribed period, and the mere fact that the discovery is prevented by the concealment of the defaulter will not extend the period of indemnity. 14 R. C. L., 1268.

Nor is the case altered by the fact that under C. S., 441, cause of action for fraud as against the defaulting officer, is not deemed to have accrued "until the discovery by the aggrieved party of the facts constituting the fraud." This is a statute of limitations and can have no effect upon the valid contractual relations existing between the indemnitor and indemnitee. *Williams v. U. S. Cas. Co.*, 150 N. C., 597, 64 S. E., 510.

Affirmed.

D. T. HYDE v. JOHN A. TATHAM AND WILLIAMS AND FULGHAM LUMBER COMPANY.

(Filed 8 February, 1933.)

1. Pleadings G b—

The liability of a defendant will be determined in accordance with the theory of liability alleged in the complaint.

2. Bills and Notes C a—Person signing note as endorser is bound in that capacity in absence of words indicating contrary intention.

One who signs a note as an endorser without indicating by proper words his intention to be bound in any other capacity is an endorser, C. S., 3044, and by his unqualified endorsement engages to pay the note to a holder, or any subsequent endorser required to pay it, upon proper notice of dishonor and proceedings thereon. C. S., 3047.

3. Same—An endorser of commercial paper is entitled to notice of dishonor.

An endorser on commercial paper is entitled to notice of dishonor, and where in an action against an endorser on a note there is testimony that the endorsement was not an accommodation endorsement, C. S., 3061, an instruction that if the jury found that the note had been executed and transferred to plaintiff and had not been paid, that they should allow recovery for the amount of the note with interest is error.

APPEAL by defendant Tatham from *Stack, J.*, at June Term, 1932, of GRAHAM. New trial.

The Williams and Fulgham Lumber Company executed and delivered to its codefendant John A. Tatham its promissory note as follows:

"$262.98. Biltmore, N. C., 13 January, 1931.

Three months after date we promise to pay to the order of John A. Tatham, two hundred and sixty-two dollars ninety-eight cents. At National Bank of Commerce, Asheville, N. C. Value received.

Williams and Fulgham Lumber Co.

No. 5522. Per J. E. Fulgham, Sec. and Treas.

"Endorsed on back: John A. Tatham, D. T. Hyde."

The plaintiff brought suit on this note and on another note dated 10 February, 1931, in the sum of $250, executed by the Williams and Fulgham Lumber Company, and on an open account for $417.91 alleged to be due by the Lumber Company. Tatham's motion for nonsuit was denied as to the action on the note herein set out and was allowed as to the last two causes of action. The jury returned a verdict fixing Tatham's indebtedness to the plaintiff at $262.98 with interest from 13 April, 1931. Judgment for plaintiff; appeal by Tatham.

Moody & Moody for appellant.
No counsel contra.

ADAMS, J. The plaintiff was the only witness. He testified that he had received the note from Tatham before its maturity and had endorsed and delivered it to Hyatt; that Hyatt had returned it, and that the plaintiff was the owner and holder of the note at the time he brought suit.

Instead of being clear the testimony is rather confusing. A part of it seems to indicate that Tatham sold the lumber "for the money," and thereby became indebted to the plaintiff; but other parts are inconsistent with this inference. The plaintiff alleges, however, that Tatham is indebted to him on the note, not in assumpsit for money had and received; and in passing on the question of the appellant's liability we are restricted to the allegations in the complaint.

Tatham was an endorser of the note: he did not indicate by appropriate words his intention to be bound in any other capacity. C. S., 3044; *Houser v. Fayssoux,* 168 N. C., 1. By his unqualified endorsement he engaged that on due presentment the note should be paid according to its tenor, and that if dishonored and the necessary proceedings on dishonor were taken he would pay the amount thereof to the holder or to any subsequent endorser who might be compelled to pay it. C. S., 3047.

An endorser of commercial paper is entitled to notice of dishonor. *Perry v. Taylor,* 148 N. C., 362; *Houser v. Fayssoux, supra; Bank v. Johnston,* 169 N. C., 526; *Horton v. Wilson,* 175 N. C., 533. We find nothing in the record which is sufficiently definite to be within any of the exceptions to this rule. Presentment for payment is not required to charge an endorser if the instrument is made for accommodation and he has no reason to believe that it will be paid if presented; C. S., 3061; but the plaintiff testified that the appellant was not an endorser for accommodation.

We think the following instruction to the jury was inaccurate: "If you believe the note was executed and transferred to the plaintiff, there being nothing to show discharge or payment, your answer would be the amount of the note with interest as stated. The evidence is undisputed and if you believe it, your answer would be $262.98 with interest from 13 April, 1931."

The exception to the instruction entitles the appellant to a new trial, in which the facts may be more clearly developed.

New trial.

STATE v. D. M. BYRD.

(Filed 8 February, 1933.)

Bills and Notes I f—

A post-dated check for a past account does not come within provisions of the "bad-check law." C. S., 4283(a).

APPEAL by defendant from *Moore, J.*, at April Term, 1932, of MITCHELL. New trial.

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

Berry & Greene for defendant.

ADAMS, J. The defendant drew two checks on the Bank of Spruce Pine payable to the order of the Climax Manufacturing Company. Both checks were post-dated—that is, the date on each check was later than the real date of its issue. The question is whether the defendant is guilty of giving a worthless check in violation of section 4283(a) of the Consolidated Statutes.

The trial court instructed the jury to convict the defendant if they believed the evidence and found beyond a reasonable doubt that he had given the checks, and that it made no difference whether the checks were or were not post-dated.

They were given for a past account and if post-dated did not import criminal liability. *S. v. Crawford,* 198 N. C., 522. For error in the instruction the defendant is entitled to a new trial.

New trial.

WILKES COUNTY v. C. A. FORESTER AND WIFE, LUNA FORESTER.

(Filed 8 February, 1933.)

1. **Limitation of Actions E c—**

Where the applicable statute of limitation is properly pleaded the burden is on plaintiff to show that the action is not barred thereby.

2. **Taxation H b—County's right to foreclose tax certificate held barred for failure to bring action within eighteen months.**

Where a county has purchased certain land at a tax sale and elects to proceed to foreclose its tax certificate under the provisions of N. C. Code (Michie), 8028, the county is bound by the limitation prescribed by section 8037, and its action to foreclose such certificate is barred after the elapse of eighteen months from the date of the purchase of the certificate when the limitation prescribed by the statute is properly pleaded.

3. **Limitation of Actions A a—Where statute providing remedy prescribes limitation such limitation applies to sovereign.**

The general rule that the sovereign is not barred by the statute of limitations does not apply where the statute providing the remedy also prescribes a limitation.

4. **Limitation of Actions A a—After action is barred right of action cannot be revived by statute.**

Where the bar of the statute of limitations has been completed the Legislature may not repeal the bar by statute, since such action would affect a vested right.

5. **Taxation H b: Statutes A c—After right to foreclose tax certificate is barred statute may not revive right by changing limitation.**

The provisions of chapter 260, section 3, Public Laws of 1931, in so far as they attempt to revive the right to foreclose a tax certificate after such right had been barred under the provisions of N. C. Code (Michie), sec. 8037, is unconstitutional and void, but under the proviso in the act it would seem that it was not intended to so apply.

APPEAL by plaintiff from *Moore, J.*, at June Term, 1932, of WILKES. Affirmed.

This was a civil action instituted by plaintiff against defendants in the Superior Court of Wilkes County, under C. S., 8037, and amendments, in which action the plaintiff is seeking to foreclose certain certificates of tax sales on the property described in the complaint for taxes for the years 1924 and 1925. The summons was issued 16 May, 1930. One of the certificates of tax sale was for the tax for 1924 and dated 20 November, 1928, but sold on 5 November, 1928; and the other was for tax of 1925 and dated 27 November, 1928, but sold 8 November, 1928. The above is accurate, the further answer of defendants is incomplete, but the plea is sufficient.

The complaint, among other things, alleges that "3. The premises have not been redeemed from the sales mentioned and there is now due and owing plaintiff the sums mentioned in the preceding paragraph, which are a first lien on the premises, which sums or certificates of sale shall bear interest at the rate provided by law on the entire amount of taxes and sheriff's costs as prescribed by chapter 221, Public Laws of North Carolina, session 1927, as amended by chapter 204, Public Laws of North Carolina, session 1929, and as amended by acts of General Assembly, session 1931, under the provisions of which this action is required to be brought against the defendants who have or claim to have an interest or estate in the premises.' Wherefore, plaintiff asks the court to render judgment as follows: (a) Declaring a first lien on the premises for the amounts mentioned in the second paragraph above and interest claimed in the third paragraph hereof. (b) Foreclosure of said liens on the premises and the appointment of a commissioner to make sale according to the usage and practice of the courts and agreeable to the statute. (c) An order of publication as provided in chapter 221, Public Laws of North Carolina, session 1927, as amended by chapter 204, Public Laws of North Carolina, session 1929, and as amended by acts of General Assembly, session 1931. (d) For costs of action and for such other and further relief as plaintiff may be entitled to under the provisions of the above mentioned statute and amendments thereto and other applicable provisions of law.

The defendants, in their answer, say: "Answering allegations contained in paragraph 2, the defendants admit that the property was listed and assessed for taxes, but they deny the remainder of said paragraph and aver the truth to be, that the taxes described in said paragraph have been fully paid, and if said property was sold that the same was an illegal sale, as these defendants are informed, believe and allege, and that the taxes have been paid at the time of the sale and all other allegations in said paragraph are denied. That allegations contained in paragraph 3 of the complaint are not true and the same are denied. These defendants, further answering the complaint, and for further defense, say: That they are advised, informed and believe under the statute, 8037, Consolidated Statutes, that the plaintiff was required to bring its action within 18 months from the date of the certificate of sale and that the certificate of sale as alleged in the complaint should have been issued on the day of the sale as the bidder was entitled to the certificate on the date of said sale and that the sale in this action was on 5 November, 1928, and that the action was not instituted until 16 May, 1930, and more than 18 months elapsed from the date of the sale before said action was instituted and that the plaintiff's action is barred by said statute,

and that said statute of limitation is hereby pleaded as a bar to the plaintiff's right to recover in this action. Wherefore, these defendants, having fully answered the complaint of the plaintiff, pray that this action against them be dismissed; that any tax receipts or certificates which are now held by the county be canceled of record and surrendered to these defendants; that these defendants recover their cost expended and for any other and further relief that they may be entitled to recover."

A. H. Casey for plaintiff.
Trivette & Holshouser for defendants.

CLARKSON, J. At the close of plaintiff's evidence, the defendants made a motion in the court below for judgment as in case of nonsuit. C. S., 567. We see no error in the court below granting the nonsuit. This is an action brought to foreclose certificates of tax sales for the years 1924 and 1925 under C. S., 8037, and amendments.

The statute of limitations having been pleaded by defendants, the burden was on plaintiff to show that its suit was brought within eighteen months from the time of the accrual of the cause of action, or otherwise it was not barred. This has been the prevailing rule with us as to the burden of proof, where the statute of limitation is properly pleaded. *Marks v. McLeod,* 203 N. C., at pp. 258-9.

Public Laws, 1927, chapter 321, at p. 582, sec. 4. C. S., 8028, as substituted, is as follows: "*Remedy of holder of certificate of sale. Every county,* person, firm or corporation, private or municipal, who has purchased any lands or interest in the same at any tax sale, as evidenced by sheriff's certificate of sale, or becomes a holder of any sheriff's certificate of sale referred to in section 8024, Consolidated Statutes, *shall have the right of foreclosure of said certificate of sale by civil action and this shall constitute his sole right and only remedy to foreclose the same.*"

C. S., 8037, as substituted (Public Laws, 1927, chap. 321, at p. 584), is as follows: "*Every county,* or political subdivision of the State which is now, or may hereafter become, the holder by purchase at sheriff's sale of land for taxes of any certificate of sale, *shall bring action to foreclose the same within eighteen months from the date of the certificate.*"

Public Laws, 1929, chap. 204, sec. 4, at p. 261, is as follows: "*Any certificate of sale in the hands of any person, corporation, firm, county or municipality on which an action to foreclose has not been brought, which according to the terms of chapter two hundred and twenty-one of the Public Laws of one thousand nine hundred and twenty-seven should have been brought,* shall have until December first, one thousand nine hundred and twenty-nine to institute such action. This action and

extension shall and does include all such certificates whether the same were issued for the sale of one thousand nine hundred and twenty-seven taxes *and any and all certificates sold or issued prior thereto.* This section does not in any way or manner repeal so much of said section eight thousand and thirty-seven in said chapter which provides *that such action to foreclose shall be brought within eighteen months from the date of the certificate* beginning with certificates purchased and issued during the year one thousand nine hundred and twenty-eight." See Public Laws, 1929, chap. 334.

Public Laws, 1931, chap. 260, sec. 3, is as follows: "That chapter two hundred and four of the Public Laws of one thousand nine hundred and twenty-nine be and the same is hereby amended by striking out all of section four and inserting in lieu thereof the following: 'Section 4. Any person, corporation or firm, *or the board of commissioners of any county* or the governing body of any municipality holding a certificate of sale on which an action to foreclose has not been brought but according to the terms of chapter two hundred twenty-one of the Public Laws of one thousand nine hundred and twenty-seven as amended should have been brought, shall have until the first day of December, one thousand nine hundred and thirty-one, to institute such action. *This section and extension shall include all* certificates executed for the sales prior to and including sale for the tax levy of the year one thousand nine hundred twenty-eight. The board of commissioners or the governing body of any county or municipality holding any certificate upon which action has been brought, but upon which final judgment of confirmation has not been rendered, may, by recorded resolution, cause such action to be held in abeyance until the first day of December, one thousand nine hundred and thirty-one, and the court shall abide by such resolution: *Provided, however, that where any action to foreclose has heretofore been instituted or brought for the collection of any tax certificate, prior to the ratification of this act, under the then existing laws, nothing herein shall prevent or prohibit the continuance and suing to completion any of said suit or suits under the laws existing at the time of institution of said action.*" (Italics ours in all the foregoing statutes.)

The record, undisputed, discloses: (1) The certificates of tax sales now owned by plaintiff county were purchased by it on 5 November, 1928, and on 8 November, 1928. (2) The summons in this action was issued 16 May, 1930—over eighteen months after the purchase of the certificates of tax sales.

(1) The first question involved: Is plaintiff barred by the eighteen months statute of limitations, which is properly pleaded, where it attempted to foreclose certain certificates of tax sales? We think so. It so elected.

There are two methods of tax foreclosures provided by the statutes. C. S., 7987, is as follows: "The lien of the State, county, and municipal taxes levied for any and all purposes in each year shall attach to all real estate of the taxpayer situated within the county or other municipality by which the tax list is placed in the sheriff's hands, which lien shall attach on the first day of June, annually, and shall continue until such taxes, with any penalty and costs which shall accrue thereon, shall be paid." C. S., 7990, is as follows: "A lien upon real estate for taxes or assessments due thereon may be enforced by an action in the nature of an action to foreclose a mortgage, in which action the court shall order a sale of such real estate, or so much thereof as shall be necessary for that purpose, for the satisfaction of the amount adjudged to be due on such lien, together with interest, penalties, and costs allowed by law, and the costs of such action. When such lien is in favor of the State or county, or both, such action shall be prosecuted by and in the name of the county; when the lien is in favor of any other municipal corporation the action shall be prosecuted by and in the name of such corporation. When such lien is in favor of any private individual or private corporation holding a certificate of tax sale or deed under a tax sale, whether as original purchaser at a tax sale or as assignee of the county or other municipal corporation or of any other holder thereof, such action shall be prosecuted in the name of the real party in interest."

In proceeding under these statutes, the sovereign is not barred. *Wilmington v. Cronly,* 122 N. C., 383.

In *Wilmington v. Moore,* 170 N. C., at p. 53, the following observations are made: "The power of the General Assembly to enact legislation authorizing collection of back taxes and the right of the State and municipalities representing it to enforce collection by appropriate action in the courts, is fully established in this State." *Threadgill v. Wadesboro,* 170 N. C., at p. 643; *New Hanover County v. Whiteman,* 190 N. C., 332; *Whitley v. Washington,* 193 N. C., 240; *Hunt v. Cooper,* 194 N. C., at p. 267; *Shale Products Co. v. Cement Co.,* 200 N. C., at p. 230. Under the above there is no statute of limitations applicable. In the present action, however, it is different.

We have the statutes first above cited which relate to foreclosures by a county which has advertised the taxpayer's land, and it is not purchased by a stranger but purchased by a county and a certificate of tax sale is issued to the county. The foreclosure of this certificate of tax sale is "sole right and only remedy" and C. S., 8037, *supra,* provides that such action to foreclose be brought "within eighteen months from the date of the certificate." *New Hanover County v. Whiteman, supra; Shale Products Co. v. Cement Co., supra.*

The plaintiff brought this action under the statutes first above cited, to foreclose its certificates of tax sales. The defendants set up the plea of the statute of limitations, which we must sustain. The general rule *"nullum tempus occurrit reipublicæ"* does not obtain, in a case where the statute applicable provides a time limit in which the action must be brought. *Manning v. R. R.,* 188 N. C., at p. 665; *Gault v. Lake Waccamaw,* 200 N. C., at p. 599.

Under the well-settled authorities in this jurisdiction, plaintiff's action is barred by the statute in force applicable to this controversy.

(2) The second question involved: Public Laws, 1931, chap. 260, sec. 3; at p. 320: "This section and extension shall include all certificates executed for the sale prior to and including sale for the tax levy of the year one thousand nine hundred and twenty-eight." Is this provision, when the cause of actions is barred, constitutional? We think not.

This enabling act was passed after the bar of the statute was complete. See *Trust Co. v. Redwine, ante,* 126; *High Point v. Clinard, ante,* 149.

"In *Campbell v. Holt,* 115 U. S., 263, it is said: 'It may, therefore, very well be held that, in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect such act deprives the party of his property without due process of law. The reason is, that, by the law in existence before the repealing act, the property has become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this to plaintiff, would be to deprive him of the property, without due process of law.' See *Dunn v. Beaman,* 126 N. C., at p. 770." *Booth v. Hairston,* 193 N. C., at p. 286. Although the *Campbell case, supra,* is not applicable to the facts in this action, it has been frequently cited to sustain them.

In *Dunn v. Beaman, supra,* this interesting *obiter dictum* is found: "The referee holds, however, and was sustained by the judge below, that though 'this claim was already barred when chapter 269, Laws of 1889, was passed, it was revived thereby.' That chapter struck out the words, 'in cases heretofore solely cognizable in courts of equity,' from section 155(9), of The Code. The ruling, that though a debt is barred by the statute of limitation the Legislature may remove the bar by repealing the limitation after it has accrued, is within the reasoning of *Pearson, C. J.,* in *Hinton v. Hinton,* 61 N. C., 410, and is sustained by *Justice Miller,* in *Campbell v. Holt,* 115 U. S., 620, decided in 1885, the Court in the latter case holding that this is true as to a debt, though not as to the title to property which has ripened, because *time does not pay the debt, but time may vest the right of property.* On the other hand,

it has been held by the Supreme Court of this State (1884), in *Whitehurst v. Dey,* 90 N. C., 542, that the Legislature cannot revive a right of action as to a debt when it has become barred by the lapse of time, though it is true the decision was not necessary to the disposition of that case. The point is an interesting and important one, but it is not necessary that we pass upon it, for there is no state of facts to which it is applicable."

McIntosh, Practice & Procedure in Civil Cases, latter part of section 104, at p. 105, speaking to the subject, citing numerous authorities, says: "Where the effect of the statute is to bar the remedy and that bar is complete, it is generally held that a change in the statute cannot revive the remedy. Where the bar of the statute is not complete, a change in the statute may extend or shorten the time, but in the latter case a reasonable time must be given for the claimant to enforce his right." See *Carawan v. Barnett,* 197 N. C., 511.

In 17 R. C. L., "Limitations of actions" is the following; sections 15 and 16, at pp. 674-5: "Section 15. *Vested right of defense when bar is complete.* One who has become released from a demand by the operation of the statute of limitations is protected against its revival by a change in the limitation law, the defense in such case being considered a vested right or property, which cannot be taken away by legislation, or even by the action of a constitutional convention, attempting to revive the cause of action either by repeal of the statute or by affirmative act. Section 16. *Bar of statute as affecting rights in property.* There appears to be no divergence of opinion as to the full applicability of the principle that the Legislature cannot divest a vested right to a defense under the statute of limitations, whether the case involves the title to real estate or personal property. Where a right of action to recover property is barred in favor of one having possession thereof the possessor becomes the owner of the property, with all the incidents of ownership, and his title cannot be impaired by subsequent legislation."

6 R. C. L., "Constitutional Law" latter part of section 308, at p. 320: "In most jurisdictions it is held that after a cause of action has become barred by the statute of limitation, the defendant has a vested right to rely on that statute as a defense, and neither a constitutional convention nor the Legislature has power to divest that right and revive the cause of action. Where title to property has vested under a statute of limitations it is not possible by any enactment to extend the statute or revive the remedy since this would impair a vested right in the property."

In *Ballentine & Sons v. Thos. Macken* (N. J.), 10 A. L. R., at p. 837, citing *Campbell v. Holt, supra,* and numerous other authorities,

it is said: "The rule is institutional and fundamental that a party who has become released from a demand by the operation of the statute is protected against its revival by a change in the limitation law; the defense of the statute being considered a vested right, which cannot be taken away by legislation without violating the inhibition of the 14th Amendment to the Federal Constitution."

In *Varner v. Johnston,* 112 N. C., p. 576 (*Burwell, J.*), annotated in 36 A. L. R., at p. 1318: "It was held that an action to declare the contents of a destroyed will, which was barred by the statute of limitations, was not revived by a subsequent statute apparently passed during the appeal, the Court saying that said subsequent statute 'can have no application to the matter before us. As the law was when the case was heard in the Superior Court, the proceeding was barred.' "

In 36 A. L. R., *supra,* at p. 1318, we find: "There are many cases holding that where the right to collect a debt is barred by the statute of limitations, the legislature has no power to revive the right of action," citing *Whitehurst v. Dey, supra.*

Whatever may be the holdings in other jurisdictions, we think this jurisdiction is committed to the rule that an enabling statute to revive a cause of action barred by the statute of limitations is inoperative and of no avail. *Booth v. Hairston, supra.* It cannot be resuscitated. The sovereign, permitted an old principle to be invaded in this matter, that no time runs against the commonwealth or State, and the General Assembly having passed the statute of limitations which defendants properly pleaded, the statute of 1931, which attempted to destroy defendants' defense of the statute of limitations, is inoperative and void as to them. It takes away vested rights of defendants and therefore is unconstitutional. Again we think under the proviso, the present action is exempted from the statute. Public Laws, 1931, chapter 260, *supra:* "Nothing herein shall prevent or prohibit the continuance and suing to completion any of said suit or suits *under the laws existing at the time of institution of said action.*"

This case has been decided since the death of Judge Walter E. Moore, who heard this cause in the court below. It is one of the last appeals to this Court from the courts he presided over. It may not be out of place to say that he died at an advanced age—full of honors. An able judge, one who did much in educational lines in the mountain section of this commonwealth, and his love for his State was shown in many uplift movements. For the reasons given, the judgment of the court below is

Affirmed.

TOWN OF LUMBERTON v. GURNEY P. HOOD, COMMISSIONER OF BANKS, PLANTERS BANK AND TRUST COMPANY, AND R. C. COPPEDGE, LIQUIDATING AGENT.

(Filed 8 February, 1933.)

1. Banks and Banking H d—Right of bank to offset depositor's claim against depositor's debt to bank.

Upon the insolvency of a bank it has the right to offset an amount due a depositor against the depositor's debt to the bank if the depositor's debt has matured, or, even though the debt has not matured, if the depositor is insolvent.

2. Same—Bank held not entitled to offset municipal bonds owned by it against the municipality's deposit in the bank.

A bank executed bonds to secure deposits by an incorporated town. The bank refused to renew the bonds at their expiration, but entered into a written agreement with the town whereby the town was "assigned" certain of its municipal bonds owned by the bank to "protect it against loss on account of deposits." The bank became insolvent. The municipal bonds bore maturity dates of 1935, 1941 and 1942, and at the time of the bank's insolvency were selling below par, although the town was solvent: *Held*, the bank was not entitled to offset the town's deposit against the municipal bonds owned by it, the town being solvent and the bonds not having matured.

3. Indemnity B a—

An action on an "indemnity" contract in its technical sense could not be instituted at law until damages had been suffered, but a suit in equity could be maintained to enforce rights arising therefrom.

4. Actions B a—

Both legal and equitable rights and remedies may be maintained in one civil action. Constitution, Art. IV, sec. 1, C. S., 399.

5. Contracts B a—Intention of parties to contract will be given effect.

In interpreting a contract the intention of the parties as gathered from the entire instrument will be given effect, but such intention may be sought from circumstances surrounding its execution, including the subject-matter, the relation of the parties, and the object of the agreement.

6. Banks and Banking H d—Town held entitled to immediate sale of its bonds pledged by bank to secure deposit.

A bank executed bonds to secure deposits by an incorporated town. The bank refused to renew the bonds at their expiration, but entered into a written agreement with the town whereby the town was "assigned" certain of its municipal bonds owned by the bank to "protect it against loss on account of deposits." The bank became insolvent, and the town demanded of the liquidating agent the amount of its deposit, and sought to sell the bonds so assigned: *Held*, the purpose of the agreement was to prevent damage to the town by reason of the loss of the deposit or the tying up of its funds, and the town is entitled to have the bonds sold

and applied to the payment of its deposit without having to wait until the amount of loss should be determined in the process of liquidation of the bank.

APPEAL by defendants from *Small, J.,* at Chambers, 19 September, 1932. From ROBESON.

The case was heard on an agreed statement of facts, the substance of which is as follows:

The plaintiff is a municipal corporation; the Planters Bank and Trust Company was engaged in the business of banking at Lumberton; the defendant Hood is the Commissioner of Banks; and R. C. Coppedge is the liquidating agent of said bank. The plaintiff required the defendant bank as a depository of its funds to execute a surety bond to indemnify it against loss. The bank gave the bond, and it remained in force from 1925 until 1 July, 1931, when the bank refused to renew the bond. Thereupon the plaintiff and the defendant bank entered into the following contract:

"Lumberton, N. C., 1 July, 1931.

Planters Bank and Trust Company.—City.

Gentlemen:

This is to certify that the town of Lumberton holds $8,000 of town of Lumberton municipal bonds assigned by you to it in lieu of a surety bond in a like amount to protect the town of Lumberton from any loss on account of deposits made by the said town with you. The town of Lumberton agrees to be responsible for the safe-keeping of said bonds until the conditions under which the assignment has been made are fully discharged and at that time the same will be redelivered to the Planters Bank and Trust Company. As an evidence of this mutual agreement between the town of Lumberton and the Planters Bank and Trust Company, this letter is approved by the signature of the Planters Bank and Trust Company.

This 1 July, 1931. Town of Lumberton.
By E. M. Johnson, Mayor.

Attest: R. W. Wishart, city clerk. Approved: Planters Bank and Trust Company, by K. M. Barnes, president."

The execution of this contract was approved by the proper authorities representing the plaintiff and the bank. The bank then turned over to the plaintiff $8,000 in the bonds of the town of Lumberton which were the property of the bank. These bonds were as follows: Funding Bonds, Nos. 24, 25, and 26 in the sum of $1,000 each, due 1 April, 1935, bearing interest at 6%; Street Improvement Bond, No. 76, for $1,000 due 1 April, 1941, at 6% interest; Street Improvement Bonds, Nos. 77, 78, 79 and 80, each in the sum of $1,000 due 1 April, 1942, bearing interest at

6%. These bonds are now held by the plaintiff. On 19 December, 1931, the bank closed its doors and the Commissioner of Banks took charge of the affairs and placed it under the management of the liquidating agent. On the day the bank was closed the plaintiff had on deposit the sum of $6,831.66, and since that time has demanded of the bank the payment of the said amount, and has notified the Commissioner and liquidating agent that it would advertise and sell the bonds referred to unless the amount of deposit was paid. The defendants thereupon offered to allow the plaintiff to retain as its own property free from any claim or demand of the defendant bank enough of the municipal bonds to aggregate, including interest, the sum of $6,831.66, the remainder of the said $8,000 in bonds to be returned to the defendants. The defendants made an alternative proposition to pay to the plaintiff from time to time in the orderly liquidation of the bank sums of money aggregating the amount of deposit. The bank is yet in process of liquidation and it cannot be determined what dividend it will be able to pay, or whether it will be able to satisfy in full the demands of its creditors. The bank has no funds with which to purchase the bonds. The bonds are not listed upon any stock exchange and while the town of Lumberton is financially solvent, still on account of the long existing financial depression and the time of almost world-wide economic distress, said bonds would not bring, if sold at this time, more than seventy per cent of their par or face value. Conditions are worse now than they were when said bank closed its doors, as said bonds could have been sold then for 85 per cent of their face value, whereas now they cannot be sold for more than 70 per cent thereof.

Upon the foregoing facts, the court rendered the following judgment:

First: That the plaintiff have and recover of the defendant, Planters Bank and Trust Company, the sum of $6,831.66, with interest thereon from 21 December, 1931. It is further considered and adjudged that in default in the payment of said sum with interest and costs into the office of the clerk of this court within 90 days from 1 October, 1932, said bonds be sold to satisfy the amount for which judgment is now rendered in favor of the plaintiff. And R. W. Wishart is hereby appointed as commissioner to make sale of said bonds and he will sell same at public auction to the highest bidder for cash at the courthouse door at Lumberton, N. C., after first advertising the time and place of sale for 30 days at the courthouse door and four other public places once a week for four weeks, and also by publication once a week for four consecutive weeks in some newspaper published in said county and he will file his report of sale in the office of the clerk within ten days thereafter.

It is further considered and adjudged that the plaintiff recover of the defendant the costs of this action as taxed by the clerk.

The defendants excepted and appealed upon assigned error.

T. A. McNeill and Varser, Lawrence, McIntyre & Henry for appellants.

John G. Proctor and Johnson & Floyd for appellee.

ADAMS, J. The Planters Bank and Trust Company, a corporation engaged in the business of banking, held funding and street improvement bonds issued by the plaintiff in the sum of $8,000, payable on 1 April, 1935, 1941, and 1942. On 19 December, 1931, it closed its doors and the Commissioner of Banks took charge of its assets. At that time the plaintiff had on deposit in the bank the sum of $6,831.66, which was subject to check. For a number of years prior thereto the plaintiff had deposited funds in the bank, and in 1925 had passed a resolution requiring the bank to execute a bond payable to the town to protect it against the loss of its deposits. Upon the refusal of the bank to renew the bond, the parties entered into the written contract set out in the statement of facts. The plaintiff demanded payment of its deposit and, upon the refusal of the Commissioner of Banks to make payment, brought suit to recover the amount of deposit and to get an order for a sale of the bonds it held as security. The defendants resisted judgment on the ground that the bank owned the bonds and had a right to offset against the plaintiff's demand the amount due the plaintiff on its deposit. The plaintiff denied the asserted right of set-off or counterclaim.

There is diversity of opinion and conflict of authority concerning the effect on the right of set-off of the immaturity of a claim at the time insolvency proceedings are begun. A discussion of the question with annotations appears in the following cases: *Gerseta Corp. v. Equitable Trust Company*, 43 A. L. R., 320; *Prudential Realty Co. v. Allen*, 25 *ibid.*, 935; *Steelman v. Atchley*, 32 L. R. A. (N. S.), 1060; *Richardson v. Anderson*, 25 L. R. A. (N. S.), 393; *Nashville Trust Co. v. Fourth National Bank*, 15 L. R. A., 710; *Fidelity Trust and Safety Vault Co. v. Merchants National Bank*, 9 L. R. A., 108.

The decisions of this Court are in accord with those which hold that a bank may offset the amount it is due for deposits against the indebtedness of a depositor if the depositor's indebtedness to the bank has matured or if the depositor is insolvent. The principle is stated as follows in *Hodgin v. Bank*, 124 N. C., 540: "A bank has the right to apply the debt due by it for deposits to any indebtedness by the depositor, in the same right, to the bank, provided such indebtedness to the bank has matured. *Bank v. Hill*, 76 Ind., 223; *Knapp v. Cowell*, 77 Iowa, 528; *Coats v. Preston*, 105 Ill., 470; *Bank v. Bowen*, 21 Kansas, 354; *Clark v. Bank*, 160 Mass., 26; *Bank v. Armstrong*, 15 N. C., 519; *Muench v. Bank*, 11 Mo. App., 144; Morse on Banks, sec. 324; *Bank v. Hughes*, 17 Wend., 94; *Eyrich v. Bank*, 67 Miss., 60. Even if the in-

debtedness to the bank has not matured, if the depositor becomes insolvent, the bank by virtue of the right of equitable set-off may apply the deposits with it of such debtor to his indebtedness. *Dammon v. Bank,* 50 Mass., 194; *Flour Co. v. Bank,* 90 Ky., 225; *Trust Co. v. Bank,* 91 Tenn., 336; *Seed Co. v. Talmage,* 96 Ga., 254; Waterman on Set-off, 432."

The reversal of another proposition laid down in that case does not affect this statement of the law. *Hodgin v. Bank,* 125 N. C., 503. Indeed, the principle is approved in *Moore v. Bank,* 173 N. C., 182; *Trust Co. v. Trust Co.,* 188 N. C., 766; *Graham v. Warehouse,* 189 N. C., 533; *Trust Co. v. Spencer,* 193 N. C., 745; *Coburn v. Carstarphen,* 194 N. C., 368. It is needless to review the several decisions in which the question is discussed. We do not regard *Davis v. Mfg. Co.,* 114 N. C., 331, which deals with the cross-demands of insolvent corporations, as necessarily in conflict with these cases.

In their briefs the defendants seem to concede the general principle as declared in *Hodgin v. Bank, supra;* but they say that since the bonds at this time will not sell for more than 70 per cent of their par value, the plaintiff is for practical purposes insolvent. We cannot agree with the defendants. It is admitted that "the town of Lumberton is financially solvent." The market value of the best of securities fluctuates. Today it may be low and tomorrow it may be high; it is not always determined by the question of the debtor's financial standing. Our conclusion, therefore, is this: Since the town of Lumberton is solvent and the bonds are not due, the right of set-off is precluded.

The defendants raise another question. The bank assigned the bonds to the plaintiff "to protect the town of Lumberton from any loss on account of deposits made by the town with the bank." The defendants say that even if the doctrine of offset or counterclaim is not applicable here the plaintiff cannot sell the bonds until the liquidation of the bank is completed and the percentage of its delinquency is determined. This position can be sustained, if at all, only upon the theory that the contract between the parties is strictly a contract of indemnity.

Technically the word "indemnify" is used in the sense of giving security or in the sense of relieving a party from liability for accrued damage. In a broad sense indemnity signifies that which is given to a person to save him from suffering damage. 31 C. J., 419. Under the former practice if a collateral obligation was in strickness an indemnity an action at law could not ordinarily be maintained until some actual loss or damage had been suffered, but a suit could be prosecuted in a court of equity if it was necessary for the prevention of wrongs or the enforcement of rights growing out of the obligation. *Hilliard v. New-*

berry, 153 N. C., 104; *Burroughs v. McNeill,* 22 N. C., 297. The distinction between actions at law and suits in equity has been abolished and under the prevailing system a civil action is a proceeding for the enforcement or protection of a right or the redress or prevention of a wrong. Constitution, Art. IV, sec. 1; C. S., 399.

In the interpretation of contracts the intention of the parties as embodied in the entire instrument is the end to be attained, but the intention may be sought from the circumstances surrounding its execution, including the subject-matter, the relation of the parties, and the object of the agreement. *Kirkman v. Hodgin,* 151 N. C., 588; *Hornthal v. Howcott,* 154 N. C., 228; *Wiley v. Lumber Co.,* 156 N. C., 210; *Faust v. Rohr,* 166 N. C., 187; *Bank v. Redwine,* 171 N. C., 559; *King v. Davis,* 190 N. C., 737.

The manifest purpose of the contract in question was to prevent damage to the plaintiff by the bank's holding the funds subject to use on demand of the depositor. The plaintiff is not an individual but a municipal corporation charged with the performance of duties necessary to its government; for its functions are governmental as well as municipal. For purposes of local administration it may be deemed an agency of the State. In the conduct of its business depositing and withdrawing money may usually be regarded as a daily incident. Security for prompt payment may be demanded. In this case the bonds were accepted by the plaintiff in lieu of a "security bond." The obvious purpose would be defeated if the funds were dissipated or "tied up" for the indefinite period required for the liquidation of the bank. We are, therefore, of opinion that the plaintiff is not required to await final settlement by the Commissioner of Banks but may proceed at once to sell the bonds held as collateral security. Judgment

Affirmed.

H. W. BATEMAN v. JESS BROOKS AND W. M. RITTER LUMBER COMPANY.

(Filed 8 February, 1933.)

1. Master and Servant G b—Evidence of negligence in this action against logging road held sufficient to be submitted to jury.

In an action to recover damages of a steam logging or tram road and its foreman, evidence tending to show that the defendant company failed to repair or use air brakes on its cars and that the plaintiff was injured by slipping and falling between the moving cars while attempting to apply the hand brakes thereon by walking or running between them and using a brake wrench, and that the defendant's foreman and *alter ego* had

directed the plaintiff to apply the brakes in this dangerous manner, *is held* sufficient to be submitted to the jury on the issue of the defendant's actionable negligence, the rules as to contributory negligence and assumption of risk prescribed by C. S., 3467, 3468 applying to the action. C. S., 3470.

2. Master and Servant G c—Provisions of C. S., 3467, 3468, apply to action against logging road by injured employee.

The provisions of C. S., 3467, that in actions against a railroad company by an employee thereof contributory negligence shall not bar recovery but shall be considered only in diminution of damages and that no employee shall be held to have been guilty of contributory negligence where the violation of a statute enacted for the safety of employees contributed to the injury or the injury was caused by negligence, and the provisions of C. S., 3468 that no employee shall be held to have assumed risks resulting from the violation of such safety statutes by the employer or from its negligence, apply to an action by an employee of a logging or tram road to recover damages for an injury suffered by him in the performance of his duties. C. S., 3470.

3. Same—Where rule for safety of employees is constantly violated to employer's knowledge it becomes a dead rule.

Where a rule promulgated by an employer for the safety of employees is constantly and habitually violated by the employees for a long period of time to the knowledge of the employer or his *alter ego* the rule becomes a dead rule and its violation by an employee may not be set up as contributory negligence in an action by the employee to recover damages for a negligent personal injury.

4. Evidence K b—Testimony of witness in this case as to effect of hand and air brakes held competent.

In an action by an employee against a logging or tram road to recover for injuries received by the employee while attempting to apply a hand brake on the cars, the air brakes thereon having become in such state of disrepair as to render them useless, the admission of testimony of witnesses of years of experience and with personal knowledge of the facts as to the operation of hand and air brakes and as to whether the injury could have been avoided had the air brakes been repaired and used, *is held* not to constitute reversible error.

5. Appeal and Error J c—

An exception to the admission of incompetent evidence will not ordinarily be considered where evidence of the same import is later admitted without objection.

APPEAL by defendants from *Stack, J.*, and a jury, at April Term, 1932, of MACON. No error.

This is an action for actionable negligence brought by plaintiff against defendants, alleging damage.

The plaintiff was an employee of defendant W. M. Ritter Lumber Company, which was engaged in the general lumber business in Macon County, N. C. In connection with its business it had a large band mill

located at Rainbow Springs, in said county. It owned a standard gauge railroad of some seven miles, which went back into its lands in the woods, to haul lumber to its band mill. It operated over the tracks for the purpose, locomotive engines, trains, and cars. The defendant, Jess Brooks, was defendant Lumber Company's general woods superintendent and train foreman, with the power and authority to hire and discharge hands. He employed the plaintiff to work for the Lumber Company. Before his injury, on 14 July, 1931, he had been working as brakeman some four years. The plaintiff alleged that at the time of his injury "it was the duty of the defendant Jess Brooks and the defendant W. M. Ritter Lumber Company to furnish and provide for the plaintiff in the exercise of reasonable and ordinary care a reasonably safe and suitable place in which to perform the work required of him, and to furnish and provide for the use of the plaintiff while engaged in the performance of his said duties in the course of his said employment, reasonably safe and suitable appliances, ways, means, methods and equipment with which to perform his said duties, and it was likewise the duty of the said defendants, and each of them, to provide the plaintiff with sufficient number of competent colaborers and assistants and with reasonably safe and suitable cars, machinery and equipment with which to do and perform the duties required of him, and also to warn and instruct the plaintiff of any risk or danger incident to the performance of his said work, to the end that the plaintiff might perform his said duties without any unnecessary risk, hazard or danger to his life or limb; but that the said defendants, Jess Brooks and W. M. Ritter Lumber Company, in violation of the aforesaid duties incumbent upon them were negligent upon said occasion, in that defendants did negligently, carelessly and recklessly order and direct this plaintiff on this occasion and at divers other times to go between said railroad cars where same were coupled together and walk and run along the ends of the cross ties projecting from the steel rails of said railroad track in order to apply the brakes to and upon the car then being pulled by a locomotive engine, without providing the plaintiff in the exercise of reasonable and ordinary care suitable equipment, ways or means to apply said brakes with reasonable safety to himself. . . . Defendants ordered and directed the plaintiff to go in between said cars and apply the brakes thereto with a brake wrench, whereupon this plaintiff protested and requested the said defendant to provide other ways and means of applying the brakes to said cars and requested of the said train foreman that he and the defendant company furnish a wheel brake or air brakes for the operation of said cars, and plaintiff alleges that the said defendant negligently refused to provide said wheel brake, air brakes or other ways and means to apply the brakes

to and upon the wheels of said cars. . . . While the plaintiff in obedience to the orders of the defendant, Jess Brooks, was walking or running along said cross ties between said cars for the purpose of applying the brakes thereto, was caught by the wheel of one of said freight cars and was thrown with great force and violence to and upon the track and cross ties and thereby run over, crushed, bruised and mangled by said train, and said train was negligently and carelessly operated and run over the left leg of plaintiff on said occasion, cutting, bruising and breaking the bones of plaintiff's said leg in such a way and manner as to make it necessary for plaintiff's said leg to be amputated about 5 inches above the knee joint.

"That when plaintiff was caught by the wheels of said log car on said occasion he was knocked down and dragged along said track for a distance of 18 feet or more before said train was stopped, and plaintiff here avers that if said train had been properly equipped with air brakes that same could have been stopped before plaintiff's leg was crushed, broken and bruised as aforesaid.

"That sometime prior to plaintiff's aforesaid injuries, the defendant company had its cars and engines equipped with air brakes, but negligently allowed and permitted the air hose on said train to get out of order and use and failed to keep same in proper repair so that the air could be applied to and upon the wheels of said log cars in order that said train might be operated with safety to plaintiff and his coemployees.

"That on the date of the aforesaid injury, plaintiff was a young man 23 years of age, strong, able-bodied, industrious and of good habits, and had been for several years prior thereto regularly employed at good wages and on the date of said injury was receiving the sum of $3.25 per day.

"That the aforesaid careless, negligent, wilful and reckless acts and conduct and omissions of the defendants, and each of them contributed to and were the direct and proximate, concurrent and joint cause of the plaintiff's said injury and suffering, all to his great damage in the sum of $50,000."

The defendants denied the material allegations of the complaint of plaintiff as to negligence, and set up the plea of contributory negligence.

"That if the plaintiff was injured by reason of any negligence on the part of these defendants or either of them, which is expressly denied, he contributed to his injury by his own negligence in negligently and carelessly violating orders and stepping across the railroad iron when the train was moving only two or three miles an hour, and but for his negligence no injury would have occurred and such contributory negligence on his part is expressly pleaded in bar of any recovery in this cause."

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

"This cause coming on to be heard and same being heard at this the April Term, 1932, of Macon Superior Court, before the Honorable A. M. Stack, judge presiding, and a jury, upon the following issues:

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

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

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

"And the jury having answered the first of said issues Yes and the second of said issues No, and the third of said issues $9,000;

"It is now, upon motion of Edwards & Leatherwood, attorneys for the plaintiff, considered, ordered, adjudged and decreed that the plaintiff H. W. Bateman have and recover judgment against the defendants, Jess Brooks and W. M. Ritter Lumber Company, in the sum of $9,000, together with the costs of this action to be taxed by the clerk of this court."

The defendants excepted and assigned error to the judgment as signed and made numerous other exceptions and assignments of error and appealed to the Supreme Court. The material evidence necessary for a decision of the case will be set forth in the opinion.

Edwards & Leatherwood for plaintiffs.
Alley & Alley and Johnston & Horner for defendants.

CLARKSON, J. The defendant at the close of plaintiff's evidence and at the close of all the evidence made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions and in this we can see no error.

We think the evidence of plaintiff was sufficient to be submitted to a jury and fully warranted the verdict and judgment. The action is for actionable negligence. We think the evidence supports fully the allegations in the complaint. The defendant denied negligence and set up the plea of contributory negligence. The plaintiff was an employee, a brakeman for the defendant Ritter Lumber Company's railroad, and had been in the employ of defendant Lumber Company for four years when injured, on 14 July, 1931. At the time of the injury he was 23 years old, weighed 190 pounds, earning $3.25 a day, "was healthy and stout as a mule." The train ran over his left leg and it had to be amputated about three hours after the injury, about five inches above the knee joint and he is a cripple for life. The train he was working on was

standard gauge. The Lumber Company had a large band mill at Rainbow Springs, and the railroad ran about 7 miles into the woods to get timber from the lands of defendant Lumber Company to haul it to the band mill.

C. S., 3467, is as follows: "In all actions hereafter brought against any common carrier by railroad to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided, however,* that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

C. S., 3468: "In any action brought against any common carrier under or by virtue of any of the provisions of this article to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee or the death or injury was caused by negligence."

C. S., 3470: "The provisions in this article relating to liability for damages shall also apply to logging roads and tramroads."

In *Stewart v. Lumber Co.,* 193 N. C., at p. 141, the following observation is made: "But since the act of 1919, chap. 275, C. S., 3470, same applies with equal force to logging roads and tramroads." *Lilley v. Cooperage Co.,* 194 N. C., at p. 255; *Moore v. Rawls,* 196 N. C., at p. 129; *Sampson v. Jackson Bros.,* 203 N. C., at p. 417.

All the evidence was to the effect that the defendant, Jess Brooks, was the foreman or superintendent, an *alter ego* of defendant Lumber Company. *Robinson v. Ivey,* 193 N. C., at p. 811. At the time plaintiff was injured, eight cars were attached to the engine, heavily loaded with 20 logs to a car, going down hill on a 7 per cent grade. The track was 56 inches wide and the brake wrench was 18 to 20 inches long, which was given plaintiff to use.

Plaintiff, unobjected to, testified:

"Q. What orders did Jess Brooks give you about the matter, if any? A. A few days before I got hurt they suggested not to slide no wheels and I made the statement I could not do it the way we had to apply the brakes and he said to run along slow and do it.

"Q. Who? A. Jess Brooks.

"Jess Brooks was superintendent and train foreman over all the trains and woods. Before this time, he told us what to do with the train. He told us to go in there and apply the brakes on this car and run along slow and do it. Well, as I stated a while ago, a few days before I got hurt there Jess Brooks told me to quit sliding the wheels. That means if you slide them on the rail you wear them out.

"Q. How would you slide them? A. By tying up the brakes too tight, and I told him I could not keep from sliding them the way we had to brake.

"He said keep going over them and they would not slide. Had to tie the brakes up and if you tied them up with the train standing still and then move it the wheels would be sliding. He said to keep going over the brakes and release them so as not to slide the wheels; *if a man goes over the brakes to release them, have to go in between them on the ground to do it.* . . . Had to put the wrench in the socket, it was over 15 inches inside the rail and had to put them in and pull around and after went so far couldn't pull any further and had to take it out and set it back again. To do that I had to go in between the cars. . . . When you went between the cars to apply this brake and brake wrench you had to step over the rail to the brake if you had any power to put the brake on.

"At the time of the accident, the track where I got hurt was built right in the branch, branch on each side of the track, and it had rained that day and all wet and it was put up on rocks right in the creek. I was pulling the wrench to tighten the brake tighter, and when I did that and put more power on it to pull it tight, my hand slipped off of it. I was walking while I was putting it on, the train was moving. I was doing it that day just like I had always done it. . . . Mr. Brooks, foreman of the defendant company, was present at the time when he saw me step in between these moving cars to apply this Jim-Crow wrench. I couldn't say how many times; he was with us several days. On the occasion of my injury on 14 July, 1931, I stepped in across the steel rail to apply these brakes between the cars.

"Q. State why you put your foot across this steel rail at the time? A. When you reached over here to tie up your brakes you have to have both hands in there and you can't tell where your feet are going, just like a blind duck, and when you put your hands over here you have to put your foot inside to maintain your balance.

"My right foot was over. My left leg was cut off. I was on the right side of the car going down the hill. It was the wheel of the rear that caught me instead of the front one; the car was right behind me, had to walk right in front of it to tie up the brake."

In *Bradford v. English,* 190 N. C., at p. 745, citing numerous authorities, *Varser, J.,* speaking to the subject, said: "The instant case comes within *Tate v. Mirror Co.,* 165 N. C., 279; *Pigford v. R. R.,* 160 N. C., 101. An employer of labor may be held responsible for directions given, or methods used by reason of which an employee is injured. It is as much the duty of the master to exercise due care to provide the servant with reasonably safe means and method of work, such as proper assistance in the performance of his task, and it is to exercise due care to furnish him a safe place and proper tools and appliances." *Robinson v. Ivey,* 193 N. C., 812. Again in *Herring v. R. R.,* 189 N. C., at p. 290, citing numerous authorities, we find: "It is well settled law that railroad companies, in the conduct of their business, have a perfect right to make and promulgate reasonable rules and regulations. To be binding, they must be properly promulgated and in full force and effect—a living rule—and not revoked or abrogated by other inconsistent rules and regulations or orders. With knowledge or acquiescence of the master, either express or implied that they have been habitually violated, they are ordinarily regarded as a dead rule, waived, abrogated or revoked." *Hamilton v. R. R.,* 200 N. C., at p. 563.

If the defendant company or its *alter ego,* Jess Brooks, ever promulgated a rule that defendant in using the wrench should not go in between the cars, it was a dead rule. The *alter ego* Brooks "saw me step in between these moving cars to apply this Jim-Crow wrench. I could not say how many times." Then from plaintiff's testimony, "To do that, had to go in between the cars."

As said in *Robinson case, supra,* "without obedience, we would have chaos and anarchy, the industrial life would be stagnant."

Another aspect: Plaintiff testified:

"I first tied one brake up and went to the other one and had to pull my wrench out and set it back in to tighten it better and I tried to put it back in and my hand slipped and I fell. I hollered when I fell. After I hollered some of the other crew hollered at the engineer and he stopped then I imagine as quick as he could and it dragged me about 18 feet and it was against my leg skidding the wheel was. The engine dragged me 15 to 18 feet after I fell, and when he stopped the slack in the cars behind run down and ran over my leg. My leg is gone. It ran over it. Hurt me. It ran over my leg right there; one of the loaded cars, three or four thousand feet of logs on it. Some air brakes on these cars but in shape so could not use them. Train line was broke and air hose gone. The brakes had been in this condition 4 or 5 months. Air brakes are used on car to apply the brakes and stop the train. . . .

"Q. Do you know yourself what could have been done if there had been air brakes on the car?

"Defendants object, overruled, exception and assignment of error.

"A. They could have applied that air and held them cars off of me, the slack. I had been working there 4 years. Had air brakes before: had until 3 or 4 months.

"Q. I believe you stated this air brake business was what you had complained to Mr. Brooks about?

"Defendants object, overruled, exception and assignment of error.

"A. It had been suggested to Mr. Brooks that air brakes were necessary.

"I don't remember his answer. That had been called to his attention. About 4 or 5 months before this they let them go down; I mean didn't keep them coupled and the air lines down; 'let them go down,' means didn't keep their equipment up, train lines and things and get the brake off and not put them back. They did not have any air in them." . . .

H. N. Younce, a witness for plaintiff, testified, in part:

"They were using hand brake or Jim-Crow brake and air brake. I know what the condition of the air brakes was at the time. I left the shop 5 months before the accident.

"Q. What was the condition of them at that time?

"Defendants object, overruled, exception and assigned error.

"A. They were bad.

"After I quit working in the shop 4 or 5 months before this, the brakes were out of repair. I didn't have the proper equipment to keep them in repair. I suppose Mr. Brooks, the superintendent, knew about this. I talked to him about it. . . . Air brake is brake that works in harmony with the hand brakes and if the rear end car on the train is in excellent condition and the next car to the engine is out of condition the whole train is out of condition because the air brakes operate from the engine. . . . I know that they used the hand brakes right along with the air brakes."

Frank Ledford, a witness for plaintiff, testified, in part:

"They were using hand brakes on the train. The air brakes were not any good. They couldn't be used because the air holes were gone. . . . If we had had air brakes against the engine, each car would have stopped just where it was; stopped if the engine stopped. . . . This is not the only job I have seen the Jim Crow used on that is not standard. The brakes are used from wheel. Wheel stands up on a staff waist high. Brake on that car is on platform and to apply it stand on the car. To apply the Jim Crow have to walk on the ground and walk in between them."

Jess Brooks, defendant, testified in part, on cross-examination:

"You can use air brakes on any per cent grade you want to, but can't use in safety without hand brakes on steep grade.

"Anywhere where you can't hold with your engine, can't use air brakes; they would help to some extent. Air brakes are and are not used in emergency cases. If you didn't keep your air applied all the time to help hold the cars back, but if something should happen you would apply your air brakes, *you could stop quicker in case of emergency.* I don't know whether he would have used the air brakes or not. He was going so slow one way could stop as quick as the other. *If the air brakes had been applied it would have helped stop the cars if he had used it, but he might not have used it.* I didn't have them repair those because I didn't want them repaired. They might have stopped the train quicker; don't know they would have used them."

W. T. Latham testified in part, for defendants, on cross-examination:

"If your air brakes are in proper condition and your air line in proper condition, if you apply the air brakes it will stop the cars in a reasonable time.

"Q. I ask if the air brake system is in proper condition and properly applied is it the best known system to stop a car quick?

"Defendants object, overruled, exception and assignment of error.

"A. Yes, I think the air would stop the car quicker than the hand brake, if properly applied."

None of these exceptions and assignments of error can be sustained. All of these witnesses were trained men in the particular avocation. They had knowledge and experience.

"It is the witness' impression, from conditions actually observed and noted by him. Even if it should be regarded as more strictly 'opinion evidence,' when it comes from a source of this kind, from one who has had personal observation of the facts, and from practical training and experience is qualified to give an opinion which is likely to aid the jury to a correct conclusion, such evidence is coming to be more and more received in trials before the jury. McKelvey speaks of it with approval as 'expert testimony on the facts.' McKelvey, p. 230." *Davenport v. R. R.,* 148 N. C., at pp. 294-5.

In *Street v. Coal Co.,* 196 N. C., page 183, it is there held:

"Where an inference is so usual, natural or instinctive as to accord with general experience its statement is received as substantially one of fact—part of the common stock of knowledge." 22 C. J., p. 530; *Britt v. R. R.,* 148 N. C., 37.

Again, it is well settled in this jurisdiction that it is not necessary to cite authorities if incompetent evidence is admitted over objection, but if the same or substantially the same evidence is given without objection, the benefit of the exception is ordinarily lost. In *Moore v. Rawls,* 196 N. C., 125, the matter of logging roads is thoroughly dis-

cussed. In that case, there is nothing said in regard to air brakes. In fact, it is undisputed on the record that they were used by defendant Lumber Company and needed repair.

Ray Williams, a witness for defendant, on cross-examination, said: "This air brake is always used in connection with the Jim Crow. It all worked together on that job, air and Jim Crow all operated same brake. I don't know how long before Bateman got injured they had not had any shop man to repair that brake; not any there at that time."

Moral Culberson, the engineer, a witness for defendant, on cross-examination, testified:

"The reason we didn't have air brakes the loading crew of the Ritter Lumber Company had knocked them out of order. Brooks knew about that and had not had them repaired."

We can see no error as to the charge on the measure of damages. The court below charged correctly as to diminished damages under the statute if the plaintiff was guilty of contributory negligence, to which there was no exception. None of the exceptions and assignments of error can be sustained.

After a careful review of the record, able briefs of litigants and the painstaking charge by the court below, covering every aspect of the law applicable to the facts, we do not think there is any prejudicial or reversible error on the record. The questions were mainly of fact for the jury to determine. The judgment of the court below is

Affirmed.

MARY BREWER, BY HER NEXT FRIEND, MRS. W. E. OLDHAM, v. DR. A. DET. VALK, BOARD OF COUNTY COMMISSIONERS OF FORSYTH COUNTY, W. T. WILSON, GUARDIAN OF MARY BREWER.

(Filed 8 February, 1933.)

Constitutional Law I c—Statute providing for sterilization of mental defectives is void, there being no provision for notice and hearing.

A statute which makes it the duty of the board of county commissioners to have any mental defective sterilized by a qualified, registered surgeon upon a written order signed by the next of kin or legal guardian of such person or by the responsible executive of any State institution of which such person is an inmate, with the special provision that such order shall be approved by four reviewers specified, *i. e.* the Commissioner of Charities and Public Welfare, the Secretary of the Board of Health, and the chief officer of two institutions of the feeble-minded or insane, is unconstitutional, it being in violation of the provisions of the Fourteenth Amendment, sec. 1, of the Constitution of the United States declaring that

no State shall deprive any person of his life, liberty or property without due process of law or deny them the equal protection of the laws, and of the State Constitution, Art. I, sec. 17, providing that no person shall be deprived of life, liberty or property but by the law of the land, there being no provision in the statute giving a person ordered to be sterilized notice and a hearing or affording him the right to appeal to the courts.

APPEAL by defendants from *Stack, J.*, at October Term, 1932, of FORSYTH. Affirmed.

This is a civil action had before his Honor, A. M. Stack, judge presiding at the October Term, 1932, of the Superior Court of Forsyth County on complaint of the plaintiff for a permanent restraining order enjoining and restraining Dr. A. DeT. Valk from proceeding with an operation to asexualize or sterilize Mary Brewer under authority of chapter 43, section 6, entitled "Sterilization of Persons Mentally Defective." (See Michie's N. C. Code of 1931, section 2304h-l.)

The complaint is as follows: "The plaintiff, by her next friend, Mrs. W. E. Oldham, complaining of the defendants says: (1) That on 29 April, 1932, at a hearing before his Honor, W. E. Church, clerk of the Superior Court of Forsyth County, and a jury, the plaintiff was adjudged incompetent to manage her affairs and the defendant, W. T. Wilson was appointed as her legal guardian. (2) That on 29 April, 1932, the defendant, W. T. Wilson, requested the board of commissioners of Forsyth County to authorize and to have performed an operation upon the plaintiff for the purpose of rendering her sterile; that in compliance with this request, the board of commissioners of Forsyth County authorized and ordered the defendant, Dr. A. DeT. Valk, to perform an operation upon the plaintiff for the purpose of rendering her sterile. (3) That the defendant, Dr. A. DeT. Valk, is now preparing to so operate upon the plaintiff to her irreparable hurt and injury. (4) That the plaintiff does not consent to such operation and that if it is performed it will be without her consent and against her will. (5) That the proceedings mentioned above in paragraphs 2, 3 and 4 of this complaint were had under the authority of chapter 34 of the North Carolina Laws of 1929, which laws the plaintiff is informed and believes and, therefore, alleges, are unconstitutional as being in violation of the provisions of Article I, sections 17 and 35 of the Constitution of North Carolina, and section 1 of the Fourteenth Amendment to the Constitution of the United States. (6) That if the above mentioned operation is performed upon the plaintiff, she will suffer irreparable physical and mental hurt and loss for redress of which she neither has nor will have adequate remedy at law. Wherefore, the plaintiff prays: (1) That the defendants, their attorneys, agents or successors be enjoined and re-

strained from performing any operation upon the plaintiff for the purpose of rendering her sterile and that they be enjoined from proceeding in any manner to have such operation performed. (2) That notice issue to the defendants and each of them to appear before His Honor, the judge of the Superior Court of Forsyth County, at a time to be set to show cause, if any they have, why this injunction should not be made permanent."

The judgment of the court below is as follows: "This cause coming on to be heard and being heard before his Honor, A. M. Stack, judge presiding at the 3 October Term of the Superior Court of Forsyth County, and it appearing that a temporary injunction was signed on 6 October, 1932, upon a bill for injunction having been filed restraining the defendants from sterilizing the person of Mary Brewer, under authority of section 2304(i) of the Consolidated Statutes and of the sections following; and it appearing that ten days notice was given to the defendants in which to answer or show cause why this restraining order should not be made permanent; and it further appearing that defendants waived the ten days notice and voluntarily appeared in court on Saturday, 8 October, 1932, at 9:30 a.m., for the purpose of a hearing on the above restraining order; and it further appearing to the court that said statute is invalid and unconstitutional for that it fails to give plaintiff notice of the said operation, an opportunity to present witnesses and be heard, and it thereby violates the Fourteenth Amendment of the Constitution of the United States and section 1, Article XVII of the Constitution of North Carolina: It is, therefore, ordered, considered, adjudged and decreed, that the restraining order heretofore signed on 6 October, 1932, be, and the same is hereby continued and made permanent and the defendants are forever enjoined from sterilizing the said Mary Brewer, or perform upon her person any operation under the authority of section 2304(i) of the Consolidated Statutes and the sections following, which might impair her procreative organs."

To the signing of the foregoing judgment, the defendants excepted, assigned error and appealed to the Supreme Court.

Hanselle L. Hester, Gordon E. Dean and William C. Lassiter for plaintiff.

Fred S. Hutchins, E. C. Bryson and T. Spruill Thornton for defendants.

CLARKSON, J. The question involved: Is chapter 43, article 6, entitled "Sterilization of persons mentally defective" (Michie's N. C. Code of 1931, section 2304(i) and (j), Public Laws of 1929, chap. 34, secs. 2 and

3, unconstitutional, in that it failed to give this plaintiff notice and a hearing of the proposed operation, an opportunity to present witnesses and be heard, and thereby violates the Fourteenth Amendment, section one, of the Constitution of the United States and Article I, section 17, Constitution of North Carolina? We think so.

The sections are as follows: "(i) It shall be the duty of the board of commissioners of any county of North Carolina, at the public cost and expense, to have the operation performed upon any mentally defective or feeble-minded resident of the county, not an inmate of any public institution, upon the petition and request of the next of kin or legal guardian of such mentally defective person." "(j) No operation under this chapter shall be performed by other than a duly qualified and registered North Carolina surgeon, and by him, only upon a written order signed by the responsible executive head of the institution, or board, or next of kin, or legal guardian having custody or charge of the feeble-minded, or mentally defective inmate or patient, with the special provision that the order so issued shall in each specific case have the signed approval of four reviewers, which shall be (1) The Commissioner of Charities and Public Welfare of North Carolina; (2) the Secretary of the State Board of Health of North Carolina; (3 and 4) the chief medical officer of each of any two of the institutions for the feeble-minded or insane of the State of North Carolina."

The Constitution of the United States, Amendment 14, sec. 1, is as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of North Carolina, Art. I, sec. 17, is as follows: "No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property but by the law of the land." We shall also quote Article I, sec. 29: "A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty."

The defendants contend that the statute now under consideration comes within the police power of the State—promotion of general welfare and is constitutional, the courts have been unable or unwilling definitely to circumscribe police powers.

The principle is well stated in 6 R. C. L. (Police Power), sec. 182, pp. 183-4: "The police power is an attribute of sovereignty, possessed

by every sovereign state, and is a necessary attribute of every civilized government. It is inherent in the states of the American Union and is not a grant derived from or under any written constitution. It has been said that the very existence of government depends on it, as well as the security of social order, the life and health of the citizen, and the enjoyment of private and social life and the beneficial use of property. It has been described as the most essential, at times the most insistent, and always one of the least limitable of the powers of government." Part sec. 190, p. 191: "the police power under the American constitutional system has been left to the states. It has always belonged to them and was not surrendered by them to the general government, nor directly restrained by the Constitution of the United States. Each state has the power therefore to regulate the relative rights and duties of all persons, individuals and corporations, within its jurisdiction, for the public convenience and the public good. The only limit to its exercise in the enactment of law is that they shall not prove repugnant to the provisions of the state or national constitution," etc. *Reed v. Engineering Co.*, 188 N. C., at p. 42.

Mary Brewer is the mother of five children. It is the purpose under this act to sterilize her so she shall be incapable of further procreation. The record of her and her husband and children are heart-rending and we need not set them forth at length here. Those welfare organizations and humane officials who appear in the picture are to be commended for their care and interest in this mother and children. "For ye have the poor always with you." We always have had and always will have people of low mentality without normal intelligence. It has been since the beginning of time. The causes of this are often the sins of the fathers, heredity, disease, poverty and undernourishment—the struggle for daily bread, dissipation, and many other things, causing bodily and mental weakness. To the great credit of this commonwealth, under our Christian civilization, it has established institutions for the feeble-minded, cripple children, deaf, dumb and blind, and hospitals for those "whom the finger of God has touched," and other humane undertakings. We have many in the class like the present. The record discloses harrowing things in regard to this woman. "Mary Brewer was born in Greensboro, in 1905. She was the oldest of a family of 12 children, one of whom died of meningitis. She went to work at the age of ten years in a hosiery mill, from there to a cigarette factory and then to a knitting mill. . . . Mrs. Brewer states that before Margaret was born she went hungry often, and that the family are often hungry now." She married early in life. As to the husband and father: "We have tried to reinstate the family and tried to get Mr. Brewer to work. When

he worked he didn't put his money into the proper sources; he would drink and gamble."

There is nothing in the record reflecting on the virtue of Mary Brewer. It is the purpose under this statute to sterilize her so that she cannot give birth to children. As to the danger and seriousness of an operation of this kind, this is in the realm of the physician. The husband is left out of the picture, the lone woman is the burden-bearer. The sole question for us: Under the due process clause, can this sterilization be done *without notice or a hearing?* It has long been settled to the contrary in this jurisdiction—we have many cases affecting property rights.

In *Hart v. Commissioners,* 192 N. C., at p. 165, speaking to the subject, we find: "It is a sound and just principle of law and one worthy of acceptation that 'absence of notice or opportunity to be heard, violates the due process of law provision.' *Lumber Co. v. Smith,* 146 N. C., 199; *Markham v. Carver,* 188 N. C., 615." *Hamilton v. Adams,* 6 N. C., at p. 162; *Gamble v. McCrady,* 75 N. C., at p. 511; *Yarborough v. Park Commission,* 196 N. C., at p. 289.

In *Harden v. Raleigh,* 192 N. C., 395, the zoning ordinance was held constitutional, at p. 398, for the reason that "A tribunal was established and charged with duties, not ministerial but at least *quasi*-judicial and subject to review as the statute prescribed." *Little v. Raleigh,* 195 N. C., 793; *MacRae v. Fayetteville,* 198 N. C., at pp. 55-6; *S. v. Roberson,* 198 N. C., 72.

In property rights due process requires a forum with notice and a hearing. It goes without saying that the same must apply to human rights. If the Constitution and laws in relation to due process—notice and hearing which undoubtedly apply to a material thing, they should more so apply to the human element. "And he said unto them, What man shall there be among you, that shall have one sheep, and if it fall into a pit on the Sabbath day, will he not lay hold on it and lift it out? *How much* then is a man better than a sheep?" St. Matthew, 12:11, 12. *Miller v. Cornell,* 187 N. C., at p. 555.

The matter of sterilization and contraception is discussed in Herzog Medical Jurisprudence, chap. XLVII, at p. 713, where it is said: "The Virginia Statute (Laws of Virginia, 1924, chap. 394), provides that the superintendent of any state institution for incompetents may advise vasectomy or salpingectomy; that the operation should not be performed unless a board of experts prescribes the same, *at which time the patient may defend himself or herself and that appeal may be had from the decision of the board to the higher courts of the state.*" (Italics ours.)

In *Buck v. Bell*, 274 U. S., 200 (71 L. Ed., 1001), the Virginia Act was declared constitutional; at pp. 206, 207, the Court said: "On complying with the very careful provisions by which the act protects the patients from possible abuse. The superintendent first presents a petition to the special board of directors of his hospital or colony, stating the facts, and the grounds for his opinion, verified by affidavit. Notice of the petition and of the time and place of the hearing in the institution is to be served upon the inmate, and also upon his guardian, and if there is no guardian the superintendent is to apply to the circuit court of the county to appoint one. If the inmate is a minor notice also is to be given to his parents if any with a copy of the petition. The board is to see to it that the inmate may attend the hearings if desired by him or his guardian. The evidence is all to be reduced to writing, and after the board has made its order for or against the operation, the superintendent, or the inmate, or his guardian, may appeal to the circuit court of the county. The circuit court may consider the record of the board and the evidence before it and such other admissible evidence as may be offered, and may affirm, revise, or reverse the order of the board and enter such order as it deems just. Finally any party may apply to the Supreme Court of appeals, which, if it grants the appeal, is to hear the case upon the record of the trial in the circuit court and may enter such order as it thinks the circuit court should have entered. There can be no doubt that so far as procedure is concerned the rights of the patient are most carefully considered, and as every step in this case was taken in scrupulous compliance with the statute and after months of observation, there is no doubt that in that respect the plaintiff in error has had due process of law." 51 A. L. R., 855.

The present act makes no provision for notice and hearing, and therefore impinges the due process clause of the Constitution.

In *Sutton v. Phillips*, 116 N. C., at p. 504, as to the constitutionality of a statute, it is held: "While the courts have the power, and it is their duty, in proper cases to declare an act of the Legislature unconstitutional it is a well recognized principle that the courts will not declare that this coördinate branch of the government has exceeded the powers vested in it unless it is plainly and clearly the case. If there is any reasonable doubt it will be resolved in favor of the lawful exercise of their powers by the representatives of the people." *Long v. Rockingham*, 187 N. C., at p. 203; *Reed v. Engineering Co.*, 188 N. C., at p. 42; *Hinton v. State Treasurer*, 193 N. C., at p. 499.

We have read carefully the well prepared and able briefs of the parties to the controversy. We cannot do otherwise than declare the act unconstitutional for the reasons given. The judgment of the court below is

Affirmed.

WILLIAM MASSEY, EMPLOYEE, *v.* BOARD OF EDUCATION OF MECKLENBURG COUNTY, EMPLOYER.

(Filed 8 February, 1933.)

1. Master and Servant F i—Sufficiency of evidence to support finding is question of law.

Although the findings of fact of the Industrial Commission on conflicting evidence are final and not reviewable by the courts, the question of the sufficiency of the evidence to support its finding is a question of law and is reviewable, and where the evidence before the Industrial Commission in a hearing before it is not conflicting and the only question is whether it is sufficient to support its finding relative to whether the injury arose out of and in the course of the injured employee's employment, the question is one of law and is reviewable by the court upon appeal. N. C. Code of 1931 (Michie), sec. 8081(j) (f).

2. Master and Servant F d—Evidence is to be considered in light most favorable to claimant in hearing before Industrial Commission.

All the evidence which makes for the claim of an injured employee in a hearing before the Industrial Commission will be considered in the light most favorable to the claimant and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom.

3. Master and Servant F b—Held: evidence showed that injury resulted from accident arising out of and in course of employment.

Evidence at a hearing before the Industrial Commission that the applicant for compensation was employed as a janitor at a public school, and that it was part of the services required of him to clean the building and to purchase cleaning material necessary therefor with money furnished him by teachers, and that it was customary for him to buy such material at a certain store while on his way to work, and that on his way to work he was struck and injured by an automobile while attempting to cross the street to the store to buy cleaning material according to his custom *is held* sufficient to show that the injury was from an accident arising out of and in the course of his employment, and the evidence not being conflicting, the question is one of fact, and the Industrial Commission's finding to the contrary is erroneous.

APPEAL by defendant from *Harding, J.*, at April Term, 1932, of MECKLENBURG. Affirmed.

A claim was filed by the plaintiff in the above matter for compensation before the Industrial Commission. A hearing before an individual Commissioner, Matt H. Allen, was held in Charlotte on 25 April, 1931. The hearing Commissioner found that the injury did not arise out of and in the course of the plaintiff's employment, and entered an award denying compensation and dismissing the case. An appeal was taken to the full Commission and after a hearing by the full Commission on 15 July, 1931, the full Commission affirmed the award of the individual

Commissioner. The plaintiff appealed to the Superior Court. His Honor, Judge Harding, found on the facts that the accident did arise out of and in the course of the plaintiff's employment, reversed the decision of the Commission and directed that the cause be remanded to the Industrial Commission. The defendants excepted, assigned error, and appealed to the Supreme Court.

About six miles from Charlotte, N. C., is a county school, known as "Woodlawn." Frank Graham is chairman of the Mecklenburg County School Committee. The plaintiff was employed by him as janitor at $60.00 a month. He says of plaintiff: "I have known William Massey about 25 years, I suppose. I know his character is good. . . . William being a faithful janitor. . . . I have always known him to be very reliable and dependable. If he told me anything, he told the truth."

The defendant introduced no evidence, the evidence of plaintiff was to the effect that William Massey lived in Charlotte and had to travel each working day to his work from Charlotte, and his duties required him to be at work from 6 a.m. to 6 p.m., and sometimes later "depending upon how much cleaning I have to do in the evening." At the time of his injury, on 28 November, 1931, he was 48 years old and had eleven children, and "am trying to buy my own home." In crossing a street on his way to work, to buy certain cleaning material he was instructed and given the money to buy, he was struck by a motor vehicle. He lost five teeth. Dr. W. A. Williams, a dentist, testified, in part: "I removed the teeth and jaw bone. I heard what he said as to the amount of jaw bone gone and that was about right, about two inches wide and three-quarters of an inch deep."

Plaintiff was injured in the morning about 10:30 o'clock and was unconscious several hours. There was also a cut lip and wound on his scalp and the result of the injury affected his walking, so that "I give out." One of his hands was affected so that he did not have much "grip in my hand."

Dr. E. E. Blackmon testified, in part: "I should say that is quite an injury. In my opinion his earning power is somewhat impaired by his present condition. He is not able to earn what he could earn if he didn't have this impairment of his arm. I don't know what per cent his earning power is impaired. . . . His upper left jaw was fractured."

Mrs. W. C. Boylston, principal of the school where plaintiff worked, testified, in part: "His job is janitor and he drives the bus. He makes one trip on the bus. I customarily send him to the store to get things for the school. As to whether at the time he was hurt on 28 November, I had previous to that time instructed him to go to the A. & P. store and buy some material, I didn't say A. & P., but *I asked him to get some cleaning material and instructed my sixth-grade teacher to give him some*

money out of this project, which she did. That was on Wednesday before he was hurt on Friday. *I instructed the teachers to have him to get some materials.* . . . I think, as I remember, he told me he got the supplies near his home because we hadn't any store at the school and he would have to go out of the way. *I would say it was his custom to go to the store first and then go to the school. He would save some time by doing that.* I have been principal at Woodlawn School for two years and known him that long. *I know his character; it is good, absolutely. If he told me anything I would believe him. He is very dependable. Everything I told him to do I knew it would be done. I found him to be a good man.*"

Mrs. G. E. Smith, a teacher in the school, testified, in part: "On Wednesday before the Friday on which William was hurt, I gave him some money to buy some materials. . . . *He always bought it when he was out of any material and needed to clean up the school building.* . . . He would go to the store first because there were not any stores right close and a store was on his way between his home and the school. *It would save time by buying it on his way in. That was his custom. It was after store hours when he would leave the school.*"

William Massey, plaintiff, testified, in part: "On Friday morning I left my home on the way out to the schoolhouse to do some cleaning, and stopped at the store, an A. & P. store, to buy the material. Just as I started to walk across the street on my way to the store this car struck me. That was about 10:30, and from that time to about three o'clock I didn't know anything. I didn't get to the store at all. I never did get to the store. *My teachers had told me to go to a store and get this material. I started there from my house carrying out their orders. I saved time by going to the store before I went to the school. I had done the same thing before.* . . . I had started across the street to the store to buy this material the teachers had told me to buy. *I had the money in my pocket to buy it, and if I had got it I would have gone to school and cleaned up my work.* . . . I always buy my merchandise at the same place, get it at the same place. As to whether I ever bought any anywhere else except this A. & P., this Brillo, they didn't have it many places and I could always get it at an A. & P. *I didn't buy any of my other materials elsewhere.*"

Robert B. Street for plaintiff.
C. H. Gover and Wm. T. Covington, Jr., for defendants.

CLARKSON, J. The Workmen's Compensation Law, chap. 120, Public Laws of N. C., 1929, section 2(f) (N. C. Code, 1931 (Michie), sec. 8081(i), subsec. (f), is as follows: "'Injury' and 'personal injury' shall

mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident."

It is a well-settled rule in this jurisdiction that it is a question of law as to whether there is sufficient competent evidence, more than a scintilla, to support an action. It is also the well-settled rule of practice in this jurisdiction, in cases of nonsuit, and cases of this kind, that 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." *Bellamy v. Mfg. Co.*, 200 N. C., at p. 678; *Jackson v. Creamery*, 202 N. C., 196. The facts and principles of law in both the *Bellamy and Jackson cases, supra,* are in some respects similar to the case at bar.

It is well settled that if there is any sufficient 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. *Kenan v. Motor Co.*, 203 N. C., at p. 110; *Johnson v. Bagging Co.*, 203 N. C., 579; *Richey v. Cotton Mills*, 203 N. C., 595.

On all the evidence, and there was none except that introduced by plaintiff, the hearing Commissioner and full Commission, on an appeal, decided as a matter of law that there was no sufficient competent evidence that the injury to plaintiff was "only injury by accident arising out of and in the course of employment." The court below, on this aspect, overruled the Industrial Commission and directed that the cause be remanded to the Industrial Commission. The defendant appealed to this Court. We can see no error in the decision of the court below. The decisions of the Industrial Commission are persuasive, but not binding on this Court on questions of law. We think there was sufficient competent evidence introduced by plaintiff to sustain his contention that he was entitled to compensation under the Workman's Compensation Law, as before set forth. If there was sufficient competent evidence and it was conflicting, it is well settled that this is for the Industrial Commission to decide and not us.

The "come and go" rule, as laid down in *Hunt v. State*, 201 N. C., 707, is not applicable under the facts in this case. *Edwards v. Loving Co.*, 203 N. C., 189; *Bray v. Weatherly and Co.*, 203 N. C., 160. See *Winberry v. Farley Stores, Inc., ante*, 79.

The evidence is to the effect that plaintiff was on his way to the schoolhouse, on the day of the injury, to perform his task of cleaning.

He had the money given by the proper authority to buy the "Brillo," the cleaning material, which he usually bought at the A. &. P. store, the place he traded and most likely to have it, and was crossing the street to purchase the material, on his way to the schoolhouse, when he was struck by a motor vehicle. The evidence was that he had a "special mission" or "special service"—"out of hours"—to perform, and it was the custom "in carrying out their orders" for him to purchase material when he was on his way to the schoolhouse. The evidence was that he was out of material which he needed, and the money was given him to buy it, to clean up the school building. In fact, without purchasing the cleaning material on his way to the schoolhouse, he could not do the cleaning, and, if he had not purchased it and performed the duty of cleaning, the employer no doubt had the right of discharge. We think the purchase was a major factor in the plaintiff's movement and not incidental. Without the cleaning material, how could he clean?

A case similar is *Kyle v. Greene High School* (Iowa) 226 N. W. Rep. 71 at p. 72 and 73, citing a wealth of authorities, the following is said: "An exception to the aforesaid general rule is found in cases where it is shown that the employee, although not at his regular place of employment, even before or after customary working hours, is doing, is on his way home after performing, or on the way from his home to perform, some special service or errand or the discharge of some duty incidental to the nature of his employment in the interest of, or under direction of, his employer. In such cases, an injury arising en route from the home to the place where the work is performed, or from the place of performance of the work to the home, is considered as arising out of and in the course of the employment." *Scrivner v. Franklin School District* (Idaho) 293 Pac. Rep, 666.

We think a case similar to the present is *Voehl v. Indemnity Insurance Co. of North America,* decided by the United States Supreme Count, see Advance Sheets filed February 6, 1933. Plaintiff "filed a claim for compensation for an injury sustained through an automobile accident while he was on his way to his employer's place of business on Sunday, April 6, 1930, for the purpose, according to his contention, of performing the duties assigned to him." The concluding part of the opinion, citing numerous authorities in the notes, is as follows: "The general rule is that injuries sustained by employees when going to or returning from their regular place of work are not deemed to arise out of and in the course of their employment. Ordinarily the hazards they encounter in such journeys are not incident to the employer's business. But this general rule is subject to exceptions which depend upon the nature and circumstances of the particular employment. 'No exact

formula can be laid down which will automatically solve every case.' *Cudahy Co. v. Parramore,* 263 U. S., 418, 424. See, also, *Bountiful Brick Co. v. Giles,* 276 U. S., 154, 158. While service on regular hours at a stated place generally begins at that place, there is always room for agreement by which the service may be taken to begin earlier or elsewhere. Service in extra hours or on special errands has an element of distinction which the employer may recognize by agreeing that such service shall commence when the employee leaves his home on the duty assigned to him and shall continue until his return. An agreement to that effect may be either express or be shown by the course of business. In such case the hazards of the journey may properly be regarded as hazards of the service and hence within the purview of the Compensation Act."

The plaintiff, from the record, when he was injured was performing this special mission or service, by the custom and by the direct and specific instructions and orders of the employer. He was on his way to the school building to do the cleaning. There was no unreasonable departure in crossing the street to get the cleaning material, where he usually purchased it, and perhaps could not purchase it elsewhere. He had the money for the purpose furnished by those in authority. It was necessary for him to have this cleaning material to do the work which he was on his way to perform.

We have read with care the record and the most excellent, well prepared briefs of the litigants. We think from the undisputed facts that there was sufficient competent evidence introduced by plaintiff for the Industrial Commission to have allowed compensation.

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

Affirmed.

H. W. KINDLER v. WACHOVIA BANK AND TRUST COMPANY.

(Filed 22 February, 1933.)

1. Bills and Notes C a—Liability of unqualified endorser on note.

By an unqualified endorsement a party warrants to subsequent holders in due course that the note is genuine and what it purports to be, that he has good title, that all prior parties had capacity to contract, that the instrument is valid and subsisting, and he engages to pay it to the holder or any subsequent endorser compelled to pay it if the note is dishonored and the necessary proceedings thereon are taken. C. S., 3044, 3045, 3047.

2. Evidence J a—Admissibility of parol evidence to explain writing.

Although parol evidence is not admissible to contradict, vary, or add to a written instrument, where the contract is not required to be in writing

and part is written and part unwritten, the unwritten part may be established by parol if it does not contradict the writing, and in proper cases it may be shown by parol that an obligation was to be assumed only upon a certain contingency or that payment was to be made out of a particular fund or that specified credits should be allowed.

3. Bills and Notes H c—Parol evidence that endorser should not be held liable on note in any event held incompetent.

Where an unqualified endorsement is supported by a valuable consideration and the maker seeks to enforce the endorser's liability the endorser may introduce parol evidence of an agreement entered into by the parties contemporaneously with the execution of the note that payment was to be made out of a particular fund, but he may not introduce parol evidence in contradiction of the written terms of the note that he was not to be held liable in any event, and under the facts of this case a new trial is awarded for the erroneous admission of such evidence.

4. Estoppel C b—Held: party could have protected himself by qualified endorsement and was not entitled to relief from unqualified endorsement.

In an action involving plaintiff's liability to a bank on his unqualified endorsement of a note, plaintiff sought to set up a parol agreement that the note should be paid out of collateral given by the maker to the bank and that in no event was the plaintiff to be held liable thereon. The plaintiff accepted the proceeds of the note in payment of material furnished the maker. The plaintiff contended that he had lost his right to a materialman's lien by reason of the transaction: *Held*, the contention respecting the loss of the lien is unavailing, the plaintiff having had ample opportunity of protecting himself by a qualified endorsement.

APPEAL by defendant from *Sink, J.*, at March Term, 1932, of BUNCOMBE. New trial.

On 23 March, 1929, L. B. Jackson executed his promissory note to the defendant, Wachovia Bank and Trust Company, or order, in the sum of $5,000 with interest at 6 per cent payable 90 days after date. It bore the following endorsement: "H. W. Kindler." The defendant made the loan in June, 1928. The original note had twice been renewed, and the note in suit was the last renewal.

On 16 March, 1930, the plaintiff instituted the present action. In his complaint he alleged in substance that prior to 26 June, 1928, he had furnished material and done work for L. B. Jackson, for which Jackson had become indebted to him in a sum exceeding $5,000; that the defendant held collateral securities of Jackson for the purpose of protecting Jackson's indebtedness to the bank; that the plaintiff and certain officers of the defendant entered into the following agreement: If Jackson would give a note and the plaintiff would endorse the note, the defendant would pay to the plaintiff the sum of $5,000 and would use the collateral it had in its possession belonging to Jackson and his affiliated interests and

corporations for the purpose of paying off said note; that the collateral was sufficient to discharge the note; that the note would be paid out of the collateral; that the plaintiff would not be called upon to pay the note or to make it good; that the defendant would rely only upon the collateral for payment; and that in pursuance of this agreement the plaintiff signed the note as endorser and did not insist upon the liens which he could have enforced against the property of Jackson.

The defendant denied the alleged agreement as to the collateral securities and the release of the plaintiff, and alleged that it had made no contract with the plaintiff except such as appears upon the note in controversy.

The plaintiff was permitted to testify as follows subject to the defendant's objection and exceptions:

Q. What did they (the officers of the Wachovia Bank and Trust Company) say when you told them the Central Bank and Trust Company wouldn't take the note that he owed you for this plumbing and heating? Answer: They said that Jackson had a large amount of collateral down there and that this note would be taken care of without it coming back on me.

Q. State what occurred there? Answer: There was very little said beyond that. I was sure that the note wouldn't come back on me.

Q. What did they say the note would be paid out of, if anything? Answer: Taken out of a large amount of collateral that Jackson had in their possession.

Q. Who said that? Answer: Mr. Raysor. He stated that in the presence of Strong and Ebbs, sitting in the enclosure.

Q. Then what did you do? Answer: I accepted the check for $5,000 endorsed the note and left the bank. Interest was deducted from that check. Jackson paid me the interest personally.

. . . . . .

Q. Did they make that agreement with you before you endorsed the note? Answer: Yes.

Q. How soon after they made that agreement with you did you endorse the note? Answer: We conversed there for two or three minutes and finally I went to the window to the left and endorsed the note.

The verdict was as follows:

"What amount, if any, is the defendant entitled to recover of the plaintiff on the note referred to in the complaint? Answer: Nothing."

Raysor, Strong and Ebbs were officers of the defendant.

Judgment for plaintiff; appeal by defendant.

Alfred S. Barnard for appellant.

R. R. Williams and William J. Cocke, Jr., for appellee.

ADAMS, J. The decisive question is whether the evidence excepted to should have been excluded. The plaintiff admitted his endorsement of the note. He did not indicate by appropriate words his intention to be bound in any other capacity; he entered into a substantive agreement and incurred the liability of a general endorser. By his endorsement without qualification he warranted to all subsequent holders in due course that the instrument was genuine and in all respects what it purported to be, that he had a good title to it, that all prior parties had capacity to contract, and that the instrument was valid and subsisting. He also engaged that on due presentment the note should be paid according to its tenor, and if dishonored and the necessary proceedings were taken he would pay the amount of the note to the holder or to any subsequent endorser who might be compelled to pay it. C. S., 3044, 3045, 3047; *Perry v. Taylor,* 148 N. C., 362; *Bank v. Crafton,* 181 N. C., 404; *Trust Co. v. York,* 199 N. C., 624; *Ray v. Livingston, ante,* 1.

The endorsement of the plaintiff was neither special nor restrictive nor qualified, nor conditional. Can he release himself from the legal consequences of his endorsement by proof of a parol agreement with the defendant that by his endorsement he incurred no liability? No fraud or mistake is alleged. The endorsement itself imports liability. When a contract is reduced to writing parol evidence will not be heard to contradict, vary, or add to the written instrument.

The principle is clearly set forth in *Moffitt v. Maness,* 102 N. C., 457, and has often been restated. Another principle is equally familiar. If a contract not required to be in writing is partly written and partly verbal the unwritten part may be proved if it does not contradict or vary the terms of the writing. *Twidy v. Saunderson,* 31 N. C., 5; *Manning v. Jones,* 44 N. C., 368; *Daughtry v. Boothe,* 49 N. C., 87; *Ray v. Blackwell,* 94 N. C., 10; *Sumner v. Lumber Co.,* 175 N. C., 654; *Henderson v. Forrest,* 184 N. C., 230; *Stack v. Stack,* 202 N. C., 461. The plaintiff says that the latter principle is available to him because the written agreement is incomplete and evidence of all the terms is admissible.

In proper cases it may be shown by parol evidence that an obligation was to be assumed only upon a certain contingency, or that payment should be made out of a particular fund or otherwise discharged in a certain way, or that specified credits should be allowed. *Kerchner v. McRae,* 80 N. C., 219; *Braswell v. Pope,* 82 N. C., 57; *Kelly v. Oliver,* 113 N. C., 442; *Evans v. Freeman,* 142 N. C., 61; *Typewriter Co. v. Hardware Co.,* 143 N. C., 97; *Garrison v. Machine Co.,* 159 N. C., 285; *Thomas v. Carteret,* 182 N. C., 374; *Bank v. Winslow,* 193 N. C., 470.

In *Evans v. Freeman, supra,* the plaintiff brought suit on a promissory note in the sum of $50.00 executed by the defendant and assigned by Askew, the payee, to the plaintiff. The defendant offered parol evidence that payment of the note was to be made out of proceeds arising from the sales of the patent right of an automatic stock-feeder and that if there were no sales there was to be no payment. The evidence was held to be competent; if there were no sales there was a total failure of consideration. Of like import are *Quin v. Sexton,* 125 N. C., 447 and *Carrington v. Waff,* 112 N. C., 115, which are typical of a long line of cases dealing with this principle. They differ from the case before us in the fact that the plaintiff's endorsement of the note was supported by a valuable consideration, the loan of five thousand dollars.

The logical interpretation of the plaintiff's evidence is this: that the note was to be paid out of the proceeds of Jackson's collateral securities and that the plaintiff was to be relieved of any liability growing out of his endorsement—that although the law imposed liability by the terms of the written contract he could establish his exemption from liability by parol evidence contradicting the writing by which the liability was imposed. This evidence was tantamount to proof that in no event could the defendant be held liable on his endorsement. A similar defense against liability on a note was made in *Bank v. Moore,* 138 N. C., 529, and the Court said: "The only defense attempted amounts in substance to this: That though the defendant executed his note and received a valuable consideration there was an understanding and agreement at the time that payment should never be enforced or demanded. All the authorities are agreed that such a defense is not open to the defendant."

In accord with the ruling that parol evidence is competent in proof of an agreement that a debt is to be paid from a particular fund, we think the plaintiff may testify as to the agreed mode of payment; but his testimony that in no event should he be liable is in direct contradiction of the terms of his endorsement and should have been excluded. There is intimation in the record that the collaterals referred to are not available for the payment of the note. Whether this is true we have no means of knowing, but according to the evidence as it now appears the plaintiff cannot maintain his absolute exemption from all liability.

Reference is made to the plaintiff's loss of right to file a lien against the property of Jackson, but he had ample opportunity to protect himself by a qualified endorsement of the note. For error in the admission of evidence the defendant is entitled to a

New trial.

JOHN P. STEDMAN, TREASURER STATE OF NORTH CAROLINA, v. CITY OF WINSTON-SALEM.

(Filed 22 February, 1933.)

1. Taxation B b—

Our State gasoline tax is an excise and not a property tax. C. S., 2613(i5).

2. Taxation B d—Gasoline tax on municipalities held constitutional.

Under the provisions of our Constitution, Art. V, sec. 5, the General Assembly is prohibited from levying a property tax on property owned by municipal corporations, but the prohibition does not extend to excise taxes, and under the provisions of C. S., 2613(i5), a municipality is liable for the gasoline tax on gasoline bought by it in bulk and distributed by it to its various departments for use in its governmental functions.

3. Same—

Exemptions from taxation must be strictly construed in favor of the taxing power.

4. Statutes A e—

An act will not be held unconstitutional unless its invalidity appears beyond a reasonable doubt, and where two reasonable interpretations are possible that one will be adopted which sustains the statute.

5. Constitutional Law A a—

The expansion of commercial life and the complexity of social contacts and obligations demand a liberalization of constitutional interpretation.

CIVIL ACTION, before *Devin, J.*, at March Term, 1932, of WAKE.

The defendant is a municipal corporation existing by virtue of chapter 232, Private Laws of 1927. On 3 December, 1931, the city of Winston-Salem purchased from the American Oil Company in Norfolk, Virginia, a tank car load of gasoline, containing 10,203 gallons, and caused the same to be shipped to the city of Winston-Salem, North Carolina, and unloaded the same into a storage tank. This gasoline was to be used in motors operated by the public works department of the defendant and in operating automobiles used by the police department in the prosecution of crime, and in constructing and maintaining streets and highways, collection of garbage, automobiles used by the agents of the health department and other activities of a governmental nature. C. S., 2613(i5), levies a tax of six cents per gallon "on all motor fuel, sold, distributed, or used within this State. The tax hereby levied shall be collected and paid by the distributor producing . . . or holding in possession within the State, and shall be paid by such distributor to the Commissioner of Revenue," etc. C. S., (i1), defines a distributor as "any person,

firm, association of persons, corporation, municipality, county, or other political subdivision that has on hand motor fuels . . . for sale, distribution, or use herein."

The plaintiff, treasurer, instituted this action to collect from the defendant the sum of $612.18 upon said motor fuel. The trial judge was of the opinion that the plaintiff was not entitled to recover, and from such judgment the plaintiff appealed.

Attorney-General Brummitt and Assistant Attorneys-General Siler and Ross for plaintiff.

Parrish & Deal for defendant.

BROGDEN, J. (1) Is the gasoline tax a property tax or an excise tax? (2) If an excise tax, is the same invalid by virtue of the constitutional exemption in Article V, section 5 thereof?

A phase of this case was heretofore considered in *O'Berry v. Mecklenburg County,* 198 N. C., 357, 151 S. E., 880. The statute then in force did not expressly include a municipality or political subdivision of the State within the definition of distributor. Consequently, the Court held that a county was not a distributor and liable for the tax on motor fuel used by such county in the discharge of its governmental functions. Perhaps, as a result of that decision, the General Assembly in 1931, as heretofore indicated, expressly included a municipality within the definition of a distributor.

The defendant asserts that the statute is unconstitutional because it invades or violates Article V, section 5, of the Constitution. The pertinent portion of this provision is that: "property belonging to the State or to municipal corporations shall be exempt from taxation." The word "property" has been defined by this Court as "rightful dominion over external objects; ownership; the unrestricted and exclusive right to a thing; the right to dispose of the substance of a thing in every legal way, to possess it, to use it and to exclude every one else from interfering with it. Property is the highest right a man can have to anything, being used for that right which one has to lands or tenements, goods or chattels, which no way depends on another man's courtesy. A right imparting to the owner a power of indefinite user, capable of being transmitted to universal successors by way of descent and imparting to the owner the right of disposition." *Vann v. Edwards,* 135 N. C., 661, 47 S. E., 784. Thus, it would appear that property is a right of exclusive dominion and unrestricted user, within the law. Hence, in order to support the tax, it must be conceived that tangible property is one thing and the use and enjoyment thereof another thing so as to achieve

a result whereby the one may be exempt and the other taxed. This result has been achieved by assuming that a tax on the use of property is an excise tax, while the tax upon the property itself is an *ad valorem* tax. Courts and text-writers generally have reached the conclusion that a gasoline tax of the type involved in this suit, is an excise tax. Furthermore, the decisions are in accord upon the proposition that constitutional exemptions are ordinarily applicable only to *ad valorem* taxes. This view is held by the courts of Florida, Tennessee, Kentucky, Colorado, Idaho, Utah, New Mexico and South Carolina. See *Orange State Oil Co. v. Amos,* 130 Southern, 707; *Foster & Creighton Co. v. Graham,* 285 S. W., 570; *People v. City and County of Denver,* 272 Pac., 629; *Independent School District v. Pfost,* 4 Pac. (2d), 377; *City of Greenville v. Query,* 164 S. E., 844. *Bowman v. Continental Oil Co.,* 256 U. S., 642; *Hart Refineries v. Harmon,* 278 U. S., 499; *Breece Lumber Co. v. Mirabal, Comptroller,* 287 Pac., 699, affirmed 283 U. S., 788.

One of the latest decisions is the *Query case, supra.* Article X, section 4, of the Constitution of South Carolina provides: "There shall be exempted from taxation all county, township and municipal property used exclusively for public purposes." The Court said: "There is no inhibition in our Constitution on the power of the General Assembly to impose excise taxes. As the provisions of Article X deal only with *ad valorem* taxes on property (and, in addition, with license taxes on occupations and businesses, income taxes, and others expressly therein named), it would seem logically to follow that the exemptions provided for in that article would apply only to the kinds of taxes therein dealt with and regulated. As neither this provision of the Constitution, nor any other, in any way refer to excise taxes, we hold that the exemptions therein allowed cannot be claimed against such taxes. In this conclusion we are not without support from eminent authority."

Moreover, it has been consistently held in this State that the court will not declare an act of the Legislature unconstitutional unless the invalidity appears beyond a reasonable doubt. Thus, if the validity of a statute is assailed, and there are two possible interpretations, that interpretation will be upheld which sustains the statute. Also, it has been generally held that exemption from taxation must be strictly construed in favor of the taxing power.

The judicial denomination of a tax as an excise tax or a property tax is a mere use of terms and the selection of certain letters from the alphabet. The ultimate test is the operation of the tax and its practical application to the commercial transactions of life. Nevertheless, it must be conceded and recognized that the expansion of commercial life and the complexity of social contacts and obligations have constantly demanded a broadening of taxing power; perhaps, not fully conceived and

appraised by our ancestors in framing constitutional exemptions. Consequently, economic necessity has demanded and continues to demand a liberalization of constitutional interpretation. This liberalizing necessity was applied by *Brown, J.,* in the absentee voter case. In *Jenkins v. Board of Elections,* 180 N. C., 169, 85 S. E., 289, he wrote: "The fact that this law originated from extraordinary emergency, and was not contemplated by the framers of the Constitution, can make no difference. If the power resides in the legislators, they may exercise it and apply it to all voters, whether soldiers or not. A power not limited or withheld abides in the people, and in such case the Legislature, like Parliament, is omnipotent. . . . A constitution should not receive a technical construction as if it were an ordinary instrument or statute. It should be interpreted so as to carry out the general principles of the government, and not defeat them." The opinion quotes the following: "When we construe a constitution by implication of such rigor and inflexibility as to defeat the legislative regulations, we not only violate accepted principles of interpretation, but we destroy the rights which the Constitution intended to guard."

The money derived from the gasoline tax is to be used in the general maintenance of the highway system of the State, and, as our Constitution does not forbid the levy of excise taxes for such purposes, and as the General Assembly has expressly included municipalities within the definition of distributors using motor fuel, this Court is not inclined to strike down the statute.

Reversed.

C. W. GILLIAM, TRUSTEE, JENNINGS MANUFACTURING COMPANY, BANKRUPT, v. T. B. SAUNDERS, W. G. SMITHERMAN AND B. S. HURLEY.

(Filed 22 February, 1933.)

Judgments K c — Issue of conspiracy in procuring judgment held determined adversely to plaintiff by jury's verdict on conflicting evidence.

While the courts will not permit the same attorney to represent both parties to an action, even colorably, in this action to set aside a judgment on the ground of conspiracy of the parties in procuring the judgment in order to defeat the plaintiff's recovery in an action pending against the defendant at the time of the rendition of the judgment sought to be set aside, the jury found upon conflicting evidence that the attorney in the action attacked did not act for both parties and did not enter into a conspiracy to procure a fraudulent judgment, and the verdict of the jury determines the rights of the parties.

GILLIAM *v.* SAUNDERS.

CIVIL ACTION, before *Schenck, J.*, at April Term, 1932, of MONTGOMERY.

On or about 21 March, 1928, certain property of the bankrupt was sold by decree in bankruptcy, and the defendant, T. B. Saunders, purchased the property for the sum of $26,250, Saunders did not comply with the bid and thereafter the property was resold on 23 June, 1928, and brought approximately $20,000. Thereafter the trustee in bankruptcy instituted a suit against the defendant, Saunders, to recover the deficiency occasioned by his failure to comply with his bid, amounting to $4,500. On 17 September, 1928, while said suit was pending, W. G. Smitherman instituted a suit against Saunders in Montgomery County to recover a sum of $14,100. The summons in the cause was issued on 17 September, 1928, and the following entry appears thereon: "I accept service of the within summons and copy of the complaint. This 17 September, 1928. T. B. Saunders." No answer was filed by Saunders and judgment by default for said sum was duly taken on 10 June, 1929. Thereafter the plaintiff, trustee in bankruptcy, secured judgment against Saunders for said sum of $4,500 on 9 October, 1930. Thus, it appears that while the bankruptcy action was pending against Saunders and before final judgment, Smitherman secured a judgment against Saunders in Montgomery County in 1929.

On 14 October, 1931, Gilliam, trustee in bankruptcy, brought this suit in Montgomery County to set aside the Smitherman judgment, alleging that said judgment was procured as a result of conspiracy between Saunders, Smitherman and Hurley. The cause of action is substantially stated in the following excerpt from the complaint: "The said T. B. Saunders, B. S. Hurley and W. B. Smitherman did, unlawfully and illegally, conspire together, scheme, plan and design a plan or method to unlawfully and illegally prevent the collection and enforcement of any judgment recovered against the said T. B. Saunders; that in furtherance of such scheme, plan, design and conspiracy, the said B. S. Hurley, with the knowledge and consent and approval of the said T. B. Saunders and W. G. Smitherman, procured and caused to be issued out of the office of the clerk of the Superior Court a summons in an action entitled W. G. Smitherman *v.* T. B. Saunders; that at the time the said summons was procured, the said B. S. Hurley represented himself as being counsel for the plaintiff in said action, W. G. Smitherman, and did, on said date, file a complaint signed by the said B. S. Hurley, as attorney for the plaintiff. . . . T. B. Saunders was not indebted to plaintiff in any amount and the alleged cause of action was instituted solely for the purpose of preventing the collection of judgment procured by the plaintiff

herein. . . . In furtherance of said conspiracy . . . B. S. Hurley, without any authority in fact, law, or equity, and as attorney for the defendant, T. B. Saunders, did, on 17 September, 1928, accept service of said summons for the said T. B. Saunders in said action while he was at the time also attorney for the plaintiff, W. G. Smitherman."

Mr. Hurley testified that Smitherman employed him to collect a claim against Saunders; that Saunders came to his office in response to notice, and that the complaint and summons had been filled out and executed at the time. Saunders was ill and his arm in a swing, and, admitting the correctness of the account, requested said attorney to accept service of summons in order to save the costs, and to write his name for him on the summons. The attorney further expressly and unequivocally denied that he was representing Saunders in the transaction, or that there was any lack of good faith. He testified that he had represented Saunders in other matters connected with the bankruptcy proceeding, but was not attempting or undertaking to represent both parties in the suit of Smitherman *v.* Saunders. Saunders testified that Hurley was not representing him in the Smitherman suit, but that he had employed Hurley to represent him in other matters. He further testified that Smitherman's claim was a bona fide one, and that he requested Hurley to sign the acceptance of summons.

Evidence offered by the plaintiff tended to show that Saunders in an examination before the referee in bankruptcy, had stated that Hurley was his attorney at the time he accepted service of summons in the Smitherman suit, and that it was a friendly summons.

The following issues were submitted to the jury:

1. "Did the defendants, T. B. Saunders, W. G. Smitherman and B. S. Hurley, connive and conspire, scheme and plan together to take a fraudulent judgment in the case of W. G. Smitherman *v.* T. B. Saunders, as alleged in the complaint?"

2. "Did the defendant, B. S. Hurley, attorney at law, act as attorney for both plaintiff, W. G. Smitherman, and the defendant, T. B. Saunders, in the suit entitled W. G. Smitherman *v.* T. B. Saunders, as set out in the complaint?"

The jury answered both issues "No."

From judgment upon the verdict the plaintiff appealed.

Armstrong & Armstrong, P. V. Critcher, Martin & Brinkley and H. R. Kyser for plaintiff.

Brown & Brown and Garland S. Garriss for defendant.

BROGDEN, J. In 1799 the General Assembly of North Carolina created an appellate court, consisting of the Superior Court judges, who, of

course, heard and adjudicated appeals from their own judgments. This statute was continued in force by chapter 12 of the Laws of 1801, which expressly provided, among other things, that "no attorney should be allowed to speak or admitted as counsel in the aforesaid court." Doubtless it was supposed that, if attorneys were permitted to appear in the Appellate Court, by alertness of mind or smoothness of tongue, they would either lure the judgment of that high tribunal or perhaps corrupt the morals of the distinguished jurists. At any rate, attorneys were not allowed to appear in the Appellate Court of that day or to champion the cause of their clients therein. While that absurd barbarism has been abated, this Court, as constituted in 1819, has continuously held that an attorney, however friendly the relationship of the parties, cannot appear even colorably for opposing litigants. Apparently the question was first considered in *Moore v. Gidney,* 75 N. C., 34. The Court said: "But it is denied that the counsel of the plaintiff acted as the defendant's counsel, farther than in drawing up her answer; and we are satisfied that no improper influence was intended. Yet the law does not tolerate that the same counsel may appear on both sides of an adversary proceeding, even colorably; and in general will not permit a judgment or decree so affected to stand if made the subject of exception in due time by the parties injured thereby. The presumption, in such cases, is that the party was unduly influenced by that relation, and the opposite party cannot take the benefit of it. It does not appear affirmatively in this case that Mrs. Moore, the defendant, was not influenced to her prejudice and thrown off her guard thereby. The purity and fairness of all judicial proceedings should so appear when drawn in question." *Molyneux v. Huey,* 81 N. C., 106; *Patrick v. Bryan,* 202 N. C., 62, 162 S. E., 207. Moreover, the unamenable mandate of both law and morals forbids an attorney, in the homely phrase of the fields, "to run with the rabbits and bark with the hounds."

In the present case the issue of fact was sharply drawn. The evidence was conflicting. A jury heard the witnesses, observed their demeanor, weighed the testimony, and found the verdict. This verdict expressly declares that the attorney did not act for both parties and did not enter into a conspiracy to procure a fraudulent judgment. The cause of action alleged in the complaint, rests exclusively upon allegations of conspiracy in procuring the judgment, for that the attorney accepted service of summons at the request of defendant in the suit of Smitherman *v.* Saunders. This cause of action and the pertinent issues arising therefrom have been settled by the verdict of the jury. Hence, other aspects debated in the briefs have no application.

Affirmed.

JOHN W. WALKER v. RUTH P. WALKER.

(Filed 22 February, 1933.)

1. Trial H b—

The decision of the court upon an issue of fact should be in writing and should contain a separate statement of the facts and the conclusions of law. C. S., 569.

2. Homestead A b—Homestead exemption may not be claimed against sums ordered to be paid for support of minor child.

In a decree of absolute divorce the wife was given the custody of a minor daughter and the husband was ordered to pay a certain sum monthly for the child's support, and to execute a bond securing such payments, the case being retained with leave to the parties to apply for a modification of the order. Upon a motion in the original cause for a renewal of the bond after the husband had been placed in a receiver's hands and had defaulted in the payments, an order was issued that the husband should pay the amount delinquent, that it should be a charge on his homestead and personal property exemption when allotted, and that the receiver pay the sums out of assets in his hands: *Held*, the order that the sums assessed should be a charge on the husband's homestead and personal property exemptions was authorized by the original order and by statute, C. S., 1664, and the receiver having filed an answer to the motion, he admitted that the assets were in excess of the husband's liabilities, rendering it unnecessary to decide whether the husband's exemptions should be first exhausted before resort to the assets in the receiver's hands.

3. Judgments I b—Motion in original cause held proper remedy against sureties on bond given by order of court, the cause having been retained.

Where a decree for absolute divorce is entered which provides that the husband should pay to his wife certain sums monthly for the support of his minor child left in the mother's custody, and that he should give bond securing the payments, and the cause is retained with leave to the parties to apply for a modification of the order: *Held*, the mother was an interested party, and the liability of the sureties of the bond is properly determined by a motion in the original cause, the action not being finally disposed of by the original decree for absolute divorce.

4. Execution K c—Husband held entitled to hearing before execution against his person for failure to pay sums ordered for support of minor child.

Where in a divorce decree the court orders that the husband pay certain sums for the support of his minor child, and the cause is retained, and upon motion in the cause it is determined that the husband was in default in the payments and he is ordered to pay the amount delinquent within a certain time: *Held*, execution against his person may not be entered without a hearing, and upon a judgment of the Supreme Court sustaining the order, the husband should be granted a reasonable extension of time for making the past-due payments.

5. Judgments F b—

Order in this case held not to require duplicate payment by principal and sureties on bond securing payment of monthly sums for support of minor child.

APPEAL from *Stack, J.*, at Chambers, 14 April, 1932, by D. H. Tillitt, receiver of John W. Walker, J. B. Carringer, and the executors of H. N. Wells, deceased. From CHEROKEE.

After signing a decree dissolving the bonds of matrimony between John W. Walker and Ruth P. Walker, Judge Bryson made an order on 21 December, 1923, awarding to the plaintiff the custody of a son and to the defendant the custody of Margaret Walker, an infant daughter, and adjudged that John W. Walker pay for the maintenance and support of his infant daughter certain stated sums in monthly installments until she arrived at the age of 21 years; also that he execute a sufficient bond in the sum of $7,500 with a bonding company licensed to do business in North Carolina conditioned for the faithful performance of his duties and the payment of said amounts. The cause was retained with leave to the parties to apply for a modification of the order.

At a special term held in December, 1923, Judge McElroy on motion of the plaintiff modified the order so as to permit the plaintiff to give a personal bond instead of one in a bonding company. The bond was executed by the plaintiff as principal and by H. N. Wells and J. B. Carringer as sureties. H. N. Wells is dead and Frank E. Haynes, H. V. Wells, and Mrs. Margaret Wells are his executors. J. B. Carringer is insolvent.

The plaintiff made the payments for the benefit of his infant daughter until October, 1931, since which time he has not complied with said order or made payment of any installment. Upon failure of the plaintiff to comply with the former order of the court the defendant made a motion in the cause for a renewal of the plaintiff's bond, and upon affidavits filed by the plaintiff, the defendant, the receiver and one of the executors, Judge Stack made an order that the plaintiff and his receiver, and J. B. Carringer and the executors of H. N. Wells, deceased, pay the defendant for the maintenance and support of Margaret Walker the sum of $175, the installments due and unpaid, that the receiver pay the same out of any money, property, or effects of the plaintiff, and that if payment should not be made within 20 days from 14 April, 1932, by the plaintiff or his receiver, execution should issue against Carringer, surety, and proper steps should be taken against the executors of H. N. Wells, who also was a surety. It was further adjudged that the homestead and personal property exemptions of the plaintiff, when allotted, should be specifically charged with the payment of said amounts; that the plaintiff

should make payment within 20 days from 14 April, 1932; and that the amount of the payments to be made from 2 April, 1932, to 2 April, 1935, be reduced to $10 per month, but that this reduction should not be allowed unless the sum of $175 was paid within 20 days from 14 April, 1932.

D. H. Tillitt, receiver of John W. Walker, and J. B. Carringer, and the executors of H. N. Wells excepted to the foregoing judgment and appealed to the Supreme Court.

Ralph Moody and J. B. Gray for D. H. Tillitt, receiver.
J. D. Mallonee for J. B. Carringer and the executors of H. N. Wells.
M. W. Bell for Ruth P. Walker.

ADAMS, J. Upon the trial of an issue of fact by the court its decision shall be given in writing and shall contain a separate statement of the facts found and the conclusions of law. C. S., 569; *Eley v. R. R.*, 165 N. C., 78. Conceding for the present purpose that the principle applies when mixed questions of fact and law are involved (*Foushee v. Pattershall*, 67 N. C., 453) we think there is no substantial difference between the parties as to the facts upon which the controversy is to be determined.

The plaintiff did not appeal. The sums assessed against him are a debt of record and may be enforced by attachment in proper cases or by the milder form of a *fieri facias*. *Wood v. Wood*, 61 N. C., 538; *Sanders v. Sanders*, 167 N. C., 317. By its first order the court retained the cause subject to the right of either party at any time to apply for a modification of the order, and pursuant to this provision Judge Stack made the sums assessed a charge on the plaintiff's homestead and personal property exemptions when allotted. The modification was authorized by statute as well as by the order of the court. C. S., 1664. As remarked in *Sanders v. Sanders, supra*, if the maintenance of the child had not been declared a charge on the plaintiff's land "the decree might be made a nullity."

While the amount allowed for the support and maintenance of the infant is an obligation of record growing out of an appropriation or allotment under the police power (*Davis v. Bass*, 188 N. C., 200, 208), it is not an ordinary debt in the sense of a financial obligation against which the plaintiff may claim his homestead and personal property exemptions. This principle which has been applied to cases involving alimony or subsistence for the wife is also applicable to those which involve the support and maintenance of minor children. *Pain v. Pain*, 80 N. C., 322; *Anderson v. Anderson*, 183 N. C., 139; *Holton v. Holton*, 186 N. C., 355; *Sanders v. Sanders, supra;* C. S., 1664.

The duty of a father to support his minor child is correlative with the father's right to the custody, control, and earnings of the child. 20 R. C. L., 622; *Walker v. Crowder,* 37 N. C., 478; *Hagler v. McCombs,* 66 N. C., 346, 351; *Burke v. Turner,* 85 N. C., 500, 504; *Sanders v. Sanders,* 167 N. C., 319. The plaintiff's receiver filed an answer to the rule to show cause why he should not be required to pay the overdue payments out of the trust estate and therein admitted that the assets estimated at their reasonable market value are in excess of the plaintiff's liabilities. In view of this admission it is not necessary to consider the question whether the plaintiff's exemptions must be exhausted before resort is had to the assets in the hands of the receiver. We need only say that we find no error in the order affecting the plaintiff and the receiver of his estate. The plaintiff's estate has not been committed to a trustee in bankruptcy but to a receiver appointed by the Superior Court of Cherokee County.

It is contended that the liability of the sureties on the bond can be adjudged, if at all, only by an independent action and not by a motion in the cause. It is true that a new action is the mode of testing a final decree which has been carried into effect. *Rawles v. Carter,* 119 N. C., 596; *Sledge v. Elliott,* 116 N. C., 712; *England v. Garner,* 84 N. C., 212. In this case, however, not only was the action retained subject to further orders and decrees; it was provided that the plaintiff should make monthly payments to the mother of the child, and the condition of the bond was the plaintiff's compliance with the order. The mother was therefore an interested party. The action was not finally disposed of by the first decree, and a motion in the cause is the proper remedy.

The order in regard to the surviving surety and the executors of the deceased surety is free from error.

We do not understand that the order contemplates an immediate attachment against the plaintiff in case of his inability or failure to make the outstanding payments, for on this question he would be entitled to a specific hearing, or that the order contemplates duplicate payments by all the appellants. When the case goes back the court may grant a reasonable extension of time within which the past-due payments may be made, and as modified in this respect the judgment is affirmed.

Modified and affirmed.

MRS. PRUE A. DEESE v. THE TRAVELLERS INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

(Filed 22 February, 1933.)

1. Insurance H c—Evidence held insufficient to show as matter of law that insured under group policy was not employee at time of his death.

Where there is evidence that one of the employees insured under a policy of group insurance was an employee of the company taking out the insurance at the time of the execution of the policy, that thereafter the employer was placed in the hands of a receiver, but that the employee continued to do the same work at the same place until his death, and that his pro rata share of the premium on the policy owed by the company which had taken out the insurance was taken out of his wages after the receivership, and there is no evidence that the employee consented to or had knowledge of the fact that after the receivership he was carried on the payroll of another company or that he had been discharged or had left the employment of the first company, *is held* insufficient to show as a matter of law that he had ceased to be an employee of the first company, and the evidence was properly submitted to the jury in an action on the policy by his beneficiary.

2. Same—Group policy held not to have lapsed as to employee paying pro rata share of premium within grace period under facts of this case.

A policy of group insurance issued by the defendant provided that upon expiration of its term it might be renewed from year to year, and gave a grace period of thirty days during which it should remain in force and might be renewed. Under the terms of an agreement with the employer, of which the insurer had knowledge, the premium was deducted pro rata from the wages of the employees. The employer failed to exercise its option to renew the policy. Suit was entered on the policy by the named beneficiary of one of the employees who died within the thirty days grace period, and evidence was introduced showing that the employee had not been given notice that the policy had been canceled, and that his pro rata part of the premium had been deducted from his wages after the expiration date of the policy but during the thirty days grace period: *Held*, the insurer's contention that the policy was not in force at the date of the employee's death cannot be maintained, at least as to the employee paying his pro rata part of the premium during the thirty days grace period and relying on the terms of the policy.

APPEAL by defendants from *Moore, Special Judge*, at March Special Term, 1932, of MECKLENBURG. No error.

This is an action to recover of the defendant the sum of two thousand dollars ($2,000), due to the plaintiff as the beneficiary named in a certificate issued by the defendant to her husband, Oscar J. Deese, an

employee of the Carolina Nash Company, pursuant to the provisions of a group life policy of insurance issued by the defendant to the said Carolina Nash Company, by which the defendant agreed to pay to the beneficiary named in said certificate the sum of two thousand dollars ($2,000), upon the death of Oscar J. Deese, provided such death should occur while the said policy was in force, and while the said Oscar J. Deese was an employee of the said Carolina Nash Company.

It is alleged in the complaint that at the date of his death, to wit: 6 October, 1930, Oscar J. Deese was an employee of the Carolina Nash Company, and that the group life policy of insurance under which the said Oscar J. Deese was insured, was in full force and effect. Both these allegations are denied in the answer filed by the defendant.

At the trial, evidence was introduced by both plaintiff and defendant. The issue submitted to the jury was answered as follows:

"Is the defendant indebted to the plaintiff upon group life policy G-6271, certificate No. 14, as alleged in the complaint? Answer: Yes, $2,000, with interest from 6 October, 1930."

From judgment that plaintiff recover of the defendant the sum of $2,000, with interest from 6 October, 1930, and the costs of the action, the defendant appealed to the Supreme Court.

H. L. Taylor, T. L. Kirkpatrick and J. H. Sembower for plaintiff.
Tillett, Tillett & Kennedy for defendant.

CONNOR, J. Two questions are involved in the issue submitted to the jury at the trial of this action. Both these questions were answered in the affirmative. They are:

1. Was the insured, Oscar J. Deese, an employee of the Carolina Nash Company at the date of his death, to wit: 6 October, 1930?

2. If so, was group life policy G-6271, issued by the defendant to the Carolina Nash Company, and covering the employees of said company, who had accepted the insurance provided by said policy, in force and effect as to Oscar J. Deese, at the date of his death, to wit: 6 October, 1930?

By its motion for judgment as of nonsuit, at the close of all the evidence, the defendant presented to the trial court its contention that there was no evidence from which the jury could answer either of the questions involved in the issue in the affirmative, and on its appeal to this Court the defendant by its assignment of error based on its exception to the refusal of the trial court to allow its motion for judgment as of nonsuit, presents its contention that the judgment should be reversed

and the action dismissed, for that there was no evidence at the trial to support the affirmative answer to the issue, on which the judgment was rendered.

It is conceded that Oscar J. Deese was an employee of the Carolina Nash Company at the date of the issuance of group life policy G-6271, to wit: 24 September, 1929, and that he continued as such employee until some time in September, 1930. There was evidence tending to show that from about 15 September, 1930, when a receiver was appointed for the Carolina Nash Company, until 6 October, 1930, when he died, Oscar J. Deese continued to do the same work, at the same place, as he had done prior to the appointment of the receiver. There was no evidence that he was discharged from or that he left the employment of the Carolina Nash Company at any time prior to his death. The bookkeeping arrangement by which he was carried on the payroll of the Burwell-Harris Company, in the absence of any evidence tending to show that he knew or consented to such arrangement, was not sufficient to show as a matter of law that he had ceased to be an employee of Carolina Nash Company, and had become an employee of Burwell-Harris Company. He received his wages for work done after the appointment of the receiver, on 4 October, 1930, from a bookkeeper who deducted from his wages the amount due Carolina Nash Company on account of insurance. There was ample evidence to support an affirmative answer to the first question involved in the issue.

Group Life Policy G-6271 was issued by the defendant on 24 September, 1929. The policy became effective at said date, and continued in force for a term of one year. This term expired on 24 September, 1930. It was provided, however, in the policy that it might be renewed from year to year, and a grace period of thirty-one days, during which the policy should remain in full force, would be allowed for the payment of any renewal premium.

There was no evidence tending to show that the Carolina Nash Company exercised its option, either before or after 24 September, 1930, to renew the policy for another year. There was evidence, however, tending to show that on 4 October, 1930, the Carolina Nash Company deducted from the wages of Oscar J. Deese, earned after 24 September, 1930, the sum which he had agreed to pay for his insurance under the group life policy. No notice had been given to Oscar J. Deese by the Carolina Nash Company, his employer, or by the defendant, his insurer, that the group life policy had not been renewed. In the absence of such notice, upon his payment to his employer, in accordance with the provisions of the policy, of the sum which he had agreed with both his employer and the defendant to pay for his insurance, the policy was in force, at least as

to him, at the date of his death. The defendant knew when it issued the certificate to Oscar J. Deese, that the said Oscar J. Deese had agreed to pay to the Carolina Nash Company the sums required to keep the policy in force as to him. Its contention that the policy was not in force at the date of his death, because the Carolina Nash Company had failed to renew the policy, cannot and ought not to be sustained, where there was evidence tending to show that in reliance upon the provisions of the policy, the insured employee continued to pay the sum which he had agreed to pay after the policy had expired, but within the grace period of thirty-one days allowed by the policy for the payment of the renewal premium. The judgment is affirmed.

No error.

NATH BIRCHFIELD v. DEPARTMENT OF CONSERVATION AND DEVELOPMENT OF NORTH CAROLINA.

(Filed 22 February, 1933.)

1. Master and Servant F i—

Whether a person was an employee at the time of his injury is a question of law and reviewable where the facts are not in dispute.

2. Master and Servant F a—Claimant held not employed as deputy game warden at time of injury and was not entitled to compensation.

Where a person duly appointed a deputy game warden is injured while engaged in assisting the county game warden, but at the time of his injury the appointment had neither been communicated to him nor accepted by him, the injury is not sustained while performing service by virtue or color of the appointment, and the injury is not compensable under the Workmen's Compensation Act.

CIVIL ACTION, before *Stack, J.*, at June Term, 1932, of GRAHAM.

On 4 November, 1930, C. F. Denton, game warden for Graham County, wrote the State Game Commission in Raleigh, requesting the appointment of the plaintiff, Nath Birchfield, as deputy game warden. Denton requested the plaintiff to go with him and assist in breaking up bear traps, and the plaintiff and the defendant began a three-day trip in the mountains for such purpose. On 7 November the State game warden forwarded from Raleigh to Denton papers of appointment, oath of office, and deputy game warden badge for the plaintiff. On 8 November, before the papers were received, the plaintiff at the request of Denton, was in the mountains assisting in destroying bear traps. Arriving at a large trap Denton directed the plaintiff to shoot the spring thereof, and in

response to such request the plaintiff shot the spring and the bullet bounced and struck the plaintiff in the eye, causing severe injury. Denton as game warden for Graham County, had no authority to employ deputy game wardens.

After the injury on 20 November, the plaintiff duly executed the oath of office and returned the same to Raleigh. The cause was submitted to the Industrial Commission and the hearing Commissioner found "that the plaintiff had never been legally employed" by the State, and dismissed the claim. Upon appeal to the full Commission the findings of fact, conclusions of law and award of the trial commissioner were affirmed. Thereupon the plaintiff appealed to the Superior Court and the trial judge found "that there was error in the conclusion of law by the Industrial Commission and that the award disallowing compensation was contrary to law and against the weight of evidence," and remanded the cause to the Industrial Commission to determine the amount of compensation to which the claimant was entitled.

From such judgment the defendant appealed.

T. M. Jenkins for plaintiff.

Attorney-General Brummitt and Assistant Attorney-General Siler for the Department of Conservation and Development of North Carolina.

BROGDEN, J. Was the plaintiff an employee of the State at the time of the injury?

The Industrial Commission found as a fact that he was not an employee, and ordinarily this would end the controversy if there was any competent evidence to support the finding. It is contended, however, that the facts are not in dispute, and, therefore, the question as to whether the plaintiff was an employee is wholly a conclusion of law.

The exercise of the duties and functions of a public office or public employment of an appointive nature, rests upon the concurrence of two essential facts: (1) due appointment, and (2) proper qualification.

The appointment must be duly made by proper authority, communicated to and accepted by the appointee. The qualification consists in the giving of a bond or taking of an oath where such is required or in otherwise complying with the provisions of law. The courts have held generally that if a person assumes the duties or enters upon the discharge of the functions of an office, even under a colorable appointment or election, that he is at least a *de facto* officer to the extent of incurring liability in the performance of such duties. *Lee v. Martin,* 186 N. C., 127, 118 S. E., 914. C. S., 2141(w), empowers the State game warden to appoint or employ deputy wardens with the approval of the Com-

mission. Apparently the plaintiff was duly appointed by the State game warden, but such appointment had neither been communicated to him nor accepted by him at the time of his injury. Although he was engaged in assisting the game warden of Graham County, he was not performing such service by virtue or color of an appointment made by the State game warden. Consequently he was not then discharging duties under circumstances implying an acceptance of the appointment, neither had the plaintiff taken the oath required by law. The general effect of failure to take a proper oath is discussed in the following cases: *Clark v. Stanley*, 66 N. C., 59; *Lee v. Dunn*, 73 N. C., 595; *Lee v. Martin, supra*, and *S. v. Long*, 186 N. C., 516, 120 S. E., 87. The effect of failure to take the oath of office before the injury is debated in the briefs, but this phase of the case becomes immaterial by reason of the conclusion that there was no communication of the appointment or acceptance thereof prior to the date of the injury.

Reversed.

SMITH-DOUGLASS COMPANY, INCORPORATED, v. SAM T. HONEYCUTT, H. G. GRAY AND K. L. ROSE.

(Filed 22 February, 1933.)

Venue A c—Corporation domesticated under C. S., 1181, acquires right to sue and be sued as domestic corporation.

Where a foreign corporation has submitted to domestication in this State by filing its certificate of incorporation with the Secretary of State and by otherwise complying with the provisions of C. S., 1181, and has designated a certain county in this State as the location of its principal office and has filed a certified copy of its certificate of incorporation in the office of the clerk of the Superior Court of such county: *Held*, it thereby acquires the right to sue and be sued in the courts of this State as a domestic corporation, C. S., 466, and where it brings action on a note in the county of its designated residence the defendants are not entitled to removal to the county of their residence as a matter of right. C. S., 469, 463, 464.

APPEAL by plaintiff from *Hill, Special Judge*, at October Term, 1932, of PASQUOTANK. Reversed.

The plaintiff brought suit in Pasquotank County to recover the amount due on a promissory note executed by the defendants. The defendants, who are residents of Johnston County, made a motion to have the cause removed to the county of their residence as a matter of right. The motion was allowed and the plaintiff excepted and appealed.

The order of removal contains the following statement of facts: "The defendants are residents of Johnston County, North Carolina. The Smith-Douglass Company was originally chartered under the laws of the State of Virginia. It became domesticated in the State of North Carolina and entitled to do business therein, by compliance with the statutes relative thereto, and filed in the office of the Secretary of State of North Carolina its certificate of incorporation, being the original certificate of incorporation employed in obtaining its charter in the State of Virginia, which complies with the laws of North Carolina relative to domestic corporations originally chartered therein. The plaintiff has designated Pasquotank County as the location of its principal office in North Carolina, and has filed a certified copy of said certificate of incorporation, designating Pasquotank County as the location of its principal office, in the office of the clerk of the Superior Court of Pasquotank County. In filing such certificate of incorporation in the office of Secretary of State and in the office of the clerk of the Superior Court of Pasquotank County, and paying taxes, fees, etc., the plaintiff has complied with all of the laws of North Carolina relative to the creation of domestic corporations."

J. H. LeRoy, Jr., for plaintiffs.

ADAMS, J. In all cases other than those which are recognized as local (C. S., 463, 464) the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement. C. S., 469. *Whitford v. Ins. Co.,* 156 N. C., 42. This action was instituted in Pasquotank; the defendants reside in Johnston. The plaintiff is a corporation organized under the laws of the State of Virginia and has designated Pasquotank County as the place of its principal office in North Carolina. It is provided that for the purpose of suing and being sued the principal place of business of a domestic corporation is its residence. C. S., 466. Before the enactment of this statute a domestic corporation had no residence. *Alliance v. Murrell,* 119 N. C., 124. The purpose of the statute was to put such corporations on an equality with individuals with respect to venue. *Rackley v. Lumber Co.,* 153 N. C., 171. The venue in actions against foreign corporations is prescribed in section 467 of the Consolidated Statutes; and for breach of contract the proper venue in an action by a nonresident corporation is the county in which the defendant resides. *Cotton Oil Co. v. Grimes,* 183 N. C., 97.

The immediate question is whether upon the facts found by the trial court the plaintiff may be regarded for the purpose of venue as a domestic corporation.

The fact that a foreign corporation is permitted to do business in another State does not make it a domestic corporation for all purposes. *Harrison v. St. Louis & S. F. R. Co.*, 232 U. S., 318, 58 L. Ed., 621; *Southern R. Co. v. Allison*, 190 U. S., 326, 47 L. Ed., 1078. In the latter case, which reversed the decision in *Allison v. R. R.*, 129 N. C., 336, the Supreme Court of the United States observed, quoting from a previous opinion, "The presumption that a corporation is composed of citizens of the State which created it accompanies such corporation where it does business in another State," and further remarked: "So it seems that a corporation may be made what is termed a domestic corporation, or in form a domestic corporation, of a State in compliance with the legislation thereof, by filing a copy of its charter and by-laws with the Secretary of State; yet such fact does not affect the character of the original corporation. It does not thereby become a citizen of the State in which a copy of its charter is filed, so far as to affect the jurisdiction of the Federal Courts upon a question of diverse citizenship."

That question is not presented in this appeal. Here the plaintiff submitted to domestication by complying with the requisites of permission to conduct its business in this State. C. S., 1181. It thereby acquired the right to sue and be sued in the courts of this State as a domestic corporation; and as the place of its residence as defined by statute is the county of Pasquotank, the plaintiff had the right to bring its suit in that county. The judgment is

Reversed.

SMITH-DOUGLASS COMPANY, INCORPORATED, v. BAILEY AND COMPANY, INCORPORATED, AND W. L. BAILEY.

(Filed 22 February, 1933.)

For digest see *Smith-Douglass Co. v. Honeycutt, ante*, 219.

APPEAL by plaintiff from *Hill, Special Judge*, at October Term, 1932, of PASQUOTANK. Reversed.

J. H. LeRoy, Jr., for plaintiff.
C. H. Leggett for defendant.

ADAMS, J. The disposition of this appeal is controlled by the decision in *Smith-Douglass Co. v. Honeycutt, ante*, 219.

Reversed.

S. F. DRY v. CHARLOTTE COCA-COLA BOTTLING COMPANY.

(Filed 22 February, 1933.)

1. Appeal and Error J d—

Where the charge of the court is not in the record it is presumed that it correctly instructed the jury upon all phases of the evidence.

2. Food A a—Rule of liability for deleterious substances in bottled drink.

In this action to recover damages alleged to have been caused by foreign and deleterious substances in a bottled drink it *is held* that the facts bring the case within the rule of liability declared in *Perry v. Bottling Co.*, 196 N. C., 175, and *Broom v. Bottling Co.*, 200 N. C., 55.

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

On 9 October, 1930, the plaintiff purchased a bottle of coca-cola from A. Alexander. The narrative of the facts is substantially as follows: "I took a couple of swallows of it and noticed it had a peculiar taste, and I looked at it and saw there was something in it. I spoke to Mr. Alexander and said: 'Something is wrong with this coca-cola, something is in it.' . . . We walked to the front and held it to the light and there was a fly in it. The fly seemed to be in a mashed condition and there was something white oozing from its body. . . This top was on it when I bought it. Immediately after I drank the coca-cola I turned deathly sick and vomited. Mr. Alexander opened the bottle I bought from him. I think he got it out of the ice box. I did not notice what he did with the cap when he pulled it off. He pulled it off on the side of the counter and just let it fall down, and then I took a couple of swallows."

The merchant, Alexander, testified that he bought the coca-cola from the defendant. Another witness testified that on or about 17 February, 1931, he purchased coca-cola bottled by the defendant for his wife and that it contained some substance which burned her throat. Another witness testified that "last spring" he purchased coca-cola bottled by the defendant and found a spotted fly in the beverage. Another witness testified that in 1929 he sold the plaintiff a coca-cola bottled by the defendant which had a fly in it. Another witness testified that in February, 1929, he purchased a coca-cola bottled by the defendant that had paint in it.

The jury answered the issues in favor of the plaintiff and awarded damages in the sum of $125.00. From judgment upon the verdict the defendant appealed.

G. T. Carswell and Joe W. Ervin for plaintiff.
John M. Robinson and Hunter M. Jones for defendant.

PER CURIAM. The charge of the court is not in the record, and it is therefore presumed that the trial judge correctly instructed the jury upon all phases of the evidence. The facts bring the case within the rules of liability heretofore declared in *Perry v. Bottling Co.*, 196 N. C., 175, 145 S. E., 14, and *Broom v. Bottling Co.*, 200 N. C., 55, 156 S. E., 152.

Affirmed.

IN RE WILL OF H. A. NICHOLSON.

(Filed 22 February, 1933.)

Appeal and Error J e—

In this caveat proceeding the answer of witness on question of mental capacity *is held* not to constitute reversible error in the light of the whole record.

APPEAL by propounders from *Hill, Special Judge,* at October Term, 1932, of PASQUOTANK.

Issue of *devisavit vel non,* raised by a caveat to the will of H. A. Nicholson, late of Pasquotank County, based upon alleged mental incapacity.

The principal exception is to the following testimony of Mrs. Annie Nicholson, distant relative of the deceased:

"Q. Now, Mrs. Nicholson, from your observation of him have you an opinion satisfactory to yourself as to his mental capacity, to know what property he had, who his relatives were, what claims they had upon him, and the scope and effect of making a will in December, 1930? Answer: No, I do not think so."

"Q. You have or have not that opinion? Answer: I have an opinion."

"Q. What is that opinion? Answer: My opinion is that he was not capable of making a will. I do not think he had the mind to make a will. That is my opinion."

Motion to strike out the answer; overruled; exception.

From a verdict and judgment in favor of the caveators, the propounders appeal, assigning errors.

LeRoy & Meekins and M. B. Simpson for caveators.
George J. Spence and McMullan & McMullan for propounders.

STACY, C. J. Propounders contend that under *S. v. Hauser*, 202 N. C., 738, 164 S. E., 457, *S. v. Journegan*, 185 N. C., 700, 117 S. E., 27, *In re Peterson*, 136 N. C., 13, 48 S. E., 561, *Crowell v. Kirk*, 14 N. C., 355, and other decisions to like effect, the evidence of Mrs. Nicholson invaded the province of the jury, and, for this reason, should have been excluded.

In reply, the caveators say the answer of the witness, even if somewhat objectionable, cannot be held for reversible error when taken in connection with the question propounded and the whole record. *In re Will of Creecy*, 190 N. C., 301, 129 S. E., 822; *In re Brooch's Will*, 172 N. C., 520, 90 S. E., 681. This was the view of the trial court, and we are disposed to uphold the ruling. *Whitaker v. Hamilton*, 126 N. C., 465, 35 S. E., 815.

No error.

A. W. DRINKWATER v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 22 February, 1933.)

1. Limitation of Actions E c—

Where the statute of limitations is properly pleaded the burden is on plaintiff to show that the action is not barred.

2. Limitation of Actions B g—Identity of "new action" and original action may not be shown by parol.

Parol evidence is not competent to show the identity of a "new action" commenced after nonsuit and the original action, and where no complaint is filed in the original action, and the statute of limitations is properly pleaded in the "new action" the "new action" will be held barred when it is not commenced within the time allowed.

APPEAL by defendant from *Moore, Special Judge*, at August Special Term, 1932, of DARE.

Civil action to recover damages for error in transmission of an interstate telegram filed by plaintiff with defendant on 20 March, 1928.

This action was instituted 8 April, 1931. The defendant pleaded the three years statute of limitations. C. S., 441. To repel this plea of the statute, the plaintiff offered evidence tending to show that on 9 February, 1931, he instituted suit against the defendant in the Recorder's Court of Dare County; that on 17 March, 1931, judgment of nonsuit was entered therein; and that the costs of said action were paid prior to the institution of the present suit. It does not appear that complaint was filed in the action instituted in the Recorder's Court of Dare County.

Upon issues joined, there was a verdict and judgment for plaintiff, from which the defendant appeals, assigning errors.

Worth & Horner for plaintiff.
Ehringhaus & Hall for defendant.

STACY, C. J., after stating the case: It is provided by C. S., 441, that an action to recover on a contract, obligation or liability arising out of contract, express or implied, except those mentioned in preceding sections, shall be commenced within three years from the date of the accrual of the cause of action. *Welfare v. Thompson,* 83 N. C., 276. If not brought within this time, upon the plea of the statute by the defendant, such right of action is deemed to be barred. *Trust Co. v. Clifton,* 203 N. C., 483. *High Point v. Clinard, ante,* 149.

The defendant having pleaded the statute of limitations, the burden was on the plaintiff to show that his suit was commenced within three years from the time of the accrual of the cause of action or that otherwise it was not barred. *Rankin v. Oates,* 183 N. C., 517, 112 S. E., 32. This has been the prevailing rule with us relative to the burden of proof where the statute of limitations is properly pleaded. *Marks v. McLeod,* 203 N. C., 257, 165 S. E., 693; *Tillery v. Lumber Co.,* 172 N. C., 296, 90 S. E., 196.

Admittedly, the plaintiff's right of action accrued 20 March, 1928. The present suit was instituted 8 April, 1931. This was too late, unless the plaintiff has otherwise saved himself from the running of the statute. To meet this situation, plaintiff seeks to avail himself of the provisions of C. S., 415, which authorizes a fresh action, after nonsuit, for the same cause, at any time within one year, by showing that within the statutory period suit was commenced in the Recorder's Court of Dare County, judgment of nonsuit entered therein, and the costs of the original action paid before the commencement of the present suit.

But it does not appear that the "new action" is to enforce the same cause of action intended to be set up in the "original action," as no complaint was filed therein. *Loan Co. v. Warren, ante,* 50. The identity of the causes may not be shown by parol. *Motsinger v. Hauser,* 195 N. C., 483, 142 S. E., 589. Hence, judgment of nonsuit should have been entered.

Reversed.

J. E. GUY, TRADING UNDER THE NAME OF CAROLINA LOAN COMPANY, v. VIRGIE HARMON AND HUSBAND, TOM HARMON.

(Filed 22 February, 1933.)

Taxation H b—Where minors are not made parties to foreclosure of tax certificate their interest in the land is unaffected.

Where land owned by minors subject to their mother's dower right therein is sold for taxes and bought in by an individual, and foreclosure proceedings are instituted in which only the mother and her second husband are made parties: *Held*, the interest in the land of the mother and her second husband are divested by the proceedings, but the rights of the minors therein are not affected, they not having been made parties to the suit.

CIVIL ACTION, before *Moore, J.* From AVERY.

On 1 July, 1929, the sheriff of Avery County sold a certain lot situated in the town of Elk Park, on Depot Street, for taxes, amounting to $12.38. The land was listed in the name of Virgie Harmon. Plaintiff, Guy, purchased the property, and thereafter on 26 November, 1930, instituted an action of foreclosure. The pertinent facts appear in the judgment of the court and are as follows:

1. "That this was, and is, an action to foreclose a tax sale certificate on land listed in the name of Virgie Harmon.

2. "That, as the title of the action shows, the husband of said Virgie Harmon was made, and is, a party to the action; that summons was duly served on Virgie Harmon and husband, Tom Harmon; and that notice of said action was duly posted and published as required by law.

3. That E. C. Guy became the purchaser of the land in controversy at the foreclosure sale, as set forth in the petition for writ of possession herein; and that a deed was duly executed and delivered by the Commissioner to the said E. C. Guy therefor.

4. That the defendants, Virgie Harmon and husband, Tom Harmon, are not the sole owners of said land, but that Dorothy Caldwell, minor, age 18; Jack Caldwell, minor, age 15; and Christine Caldwell, minor, age 13, are the owners of said land as heirs at law of Charles Caldwell, deceased, the former husband of Virgie Harmon, and that Virgie Harmon owns, or is entitled to, a dower interest in said land.

5. That the said minors above named were not made parties defendant in the action.

And the court being of the opinion that the sale of said land is void as to said minor owners under the facts above set forth, it is now, therefore, considered, ordered and adjudged by the court that the order of the clerk granting a writ of possession be, and the same is hereby overruled, and the writ of possession is hereby denied."

J. W. Ragland for plaintiff.
No counsel for defendants.

BROGDEN, J. Manifestly the interest of Virgie Harmon and her husband, Tom Harmon, in the land has been properly divested, because the judgment is conclusive upon the said defendants to the extent of any interest they may have in the land.

The minor owners of the land were not made parties to the suit unless newspaper publication be sufficient for such purpose. Foreclosure is an equitable proceeding and the law as interpreted and applied in this State, has uniformly commanded a day in court for parties in interest. *Gammon v. Johnson,* 126 N. C., 64, 35 S. E., 185; *Jones v. Williams,* 155 N. C., 179, 71 S. E., 222; *Madison County v. Coxe, ante,* 58. Indeed, this Court in *Hines v. Williams,* 198 N. C., 420, 152 S. E., 39, in approving a judgment divesting the interest of minors in a tax foreclosure, declared: "It appears that the infant defendants and all persons having a vested or contingent interest in the land have had their day in court."

The plaintiff is not saved by the application of the principles enunciated in *Orange County v. Wilson,* 202 N. C., 425, 163 S. E., 13, for the reason the trustees of petitioners "were parties defendant and were served with process."

Modified and Affirmed.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY v. JOHN B. SKURKAY.

(Filed 22 February, 1933.)

1. States A a—

In an action on a policy of life insurance executed in Pennsylvania the laws of that State in respect to the insurer's right to cancellation, involved in the action, determine the controversy.

2. Insurance I b—In this case held: under Pennsylvania law the misrepresentation related to material risk as a matter of law.

In this action by the insurer to cancel a policy of health and accident insurance with disability benefits, there was uncontroverted evidence that the insured had other policies of insurance carrying a large aggregate amount of disability benefits, and that the insured, an intelligent man, in his application for the policy in suit, stated that he had no disability benefits under other policies. The insurance contract was executed in Pennsylvania. Applying the law of that State it *is held,* the misrepresen-

tation related to a material risk as a matter of law, and the insured having written the answers to the questions in the application himself, the doctrine of estoppel does not apply although the insurer's agent was present, knew the facts and saw the insured write the answers, and the insurer was entitled to a directed verdict.

CIVIL ACTION, before *Sink, J.* From BUNCOMBE.

On or about 10 April, 1930, the defendant, a resident of Masontown, Pennsylvania, made written application to the plaintiff for a policy of health and accident insurance and a policy was duly issued. The policy recites: "In consideration of the application for this policy, a copy of which is attached hereto and made a part hereof, and of the annual premium of $186.60, to be paid on or before 17 April in each year during the continuance of this policy until thirty full annual premiums have been paid, does hereby insure John B. Skurkay, of Masontown, State of Pennsylvania," etc. The disability indemnity provided was $300.00 a month. The application contained the following questions: "Do you hereby agree that all the foregoing statements and answers, as written, are true, and that your acceptance of any policy issued on this application shall constitute the ratification by you of any corrections, additions or changes made by the company and noted in memorandum attached to policy when issued?" This question was answered in the handwriting of the defendant, "Yes." The application also contained the following: "I hereby declare that all the statements and answers to the above questions are complete and true, and I agree that they shall form a part of the contract of insurance applied for," etc. This portion of the application was signed by the defendant in his own handwriting. Question 26 of the application was as follows: "Do your average earnings, excluding income from investments, exceed the aggregate indemnity payable for disability under this and all other policies now carried by you?" This question was answered, "Yes." Question 27 involved two specific inquiries: (a) amount of life insurance; (b) disability benefit per month or week, accruing from other policies then in force. The defendant wrote the word "none" under the heading requiring information as to the amount of disability benefit payable per month or per week by the terms of such other policies. The policy of insurance contains certain standard provisions, among others, as follows: 2. "No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the company and such approval be endorsed thereon." G. "The copy of the application attached hereto is hereby made a part of this contract. The falsity of any statement in the application for this policy shall not bar the right to recovery hereunder unless such false

statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the company, anything in the application herefor to the contrary notwithstanding."

The plaintiff, insurance company, brought an action against the defendant to cancel the policy, alleging that at the time the defendant made the application, that he had outstanding policies providing monthly disability benefits in the sum of $330.00, and that when the defendant in the application for the policy sued on, had stated in writing that he had no insurance with disability benefit that such statement was false and material. The defendant filed an answer denying that he had made any false statement and alleging that if there were any errors or mistakes contained in the written application "that all the facts were truly stated by this defendant to the agent who solicited and wrote said insurance, at and before said application was signed. . . . That the said agent presented to this defendant a blank form purporting to be an application for insurance, and at said time this defendant stated that he had insurance policies all of which were in the possession of a brother-in-law of defendant or in a safety deposit box of a bank with which said brother-in-law was associated, in a town some distance from Masontown, and that this defendant did not know whether the said insurance policies contained any disability benefits, and stated to the said agent that this defendant would have to get said insurance policies and look at them before he could tell whether they contained sick benefits; whereupon, the said agent of said insurance company, with full knowledge of all the facts, stated to this defendant that it made no difference, and instructed and directed this defendant to answer the said question as to disability benefits in said insurance policy as contained in said writing purporting to be an application for insurance, and that the answer inserted therein was also written at the request and direction of the plaintiff through its authorized agent," etc.

The cause was tried in the county court of Buncombe County. The defendant, Skurkay, testified that he was a physician living in Pennsylvania at the time of application for the insurance. He came to Asheville about November, 1930, and there was evidence tending to show that he was suffering with tuberculosis. He testified that the agent for the insurance company was named Koontz, and that Koontz came to his office and persuaded him to take out the policy of insurance in controversy. The defendant further testified that when he was filling out the application Koontz was standing "right back of me, reading the questions in the application. He came down them and I answered accordingly. He really told me what to put in, and I wrote it until we came to the ques-

tions under discussion. As to question 26: 'Do your average earnings, including income from investments, exceed the aggregate indemnity payable for disability under this and all other policies now carried by you?' I answered 'Yes.' Then he came to question 27: 'What is the total amount of insurance in force on your life?' . . . When we came to question 27, he said: 'How much life insurance do you carry?' I hesitated, had to think. I put down $10,000, $10,000, $13,000, and $6,000. When he came to question: 'Do you carry any disability benefits?' I started to put 'unknown,' as you can see. I said: 'I can't tell you whether I carry disability benefits or not. My policies are with my brother-in-law in the Peoples National Bank in a town thirty-eight miles away, where I keep my valuables.' He said: 'Since you answered question No. 26, 'Yes,' . . . that doesn't matter, put down none! So I put down 'none.'"

The evidence tended to show that the defendant was an intelligent man and had acted as medical examiner for insurance companies. He also testified that his income at the time was from $725.00 to $750.00 per month. On cross-examination he said: "When I came to fill out the application in this Connecticut policy I did not know for sure whether those other policies contained disability benefits. I thought they might have them in it."

There was evidence offered by the plaintiff tending to show that the amount of other disability benefits in force was considered by the companies in issuing policies, and that policies would ordinarily be issued "up to within sixty per cent of that income, provided the other requirements had been met," etc. The officer of plaintiff, who passed upon applications for accident and health insurance with disability benefits, stated that if he had known that the defendant had benefits aggregating $330.00 per month under other policies then in force, he would have declined the application.

The question was submitted to a jury and the verdict declared: (1) that the defendant had stated in the written application that other policies of life insurance covering his life "contained no disability benefits"; (2) that the plaintiff knew that the policies were not available to the defendant at the time of signing the application, and that defendant did not know whether they contained disability benefit provisions; (3) that the answer to question No. 27 in the application, relating to disability benefits, was not material to the risk; (4) that the plaintiff waived the incorrectness of the answer in the application; (5) that the policy was not fraudulently obtained; (6) that the defendant was entitled to recover $900.00 with interest upon his counterclaim for three months' benefit under the policy.

There was an appeal to the Superior Court from the judgment of the county court, and the trial judge overruled the exceptions and affirmed the judgment of the county court. From such judgment plaintiff appealed.

John Izard and Harkins, Van Winkle & Walton for plaintiff.
C. H. Voorhees and B. M. Anderson, Hartford, Conn., of counsel.
R. R. Williams for defendant.

BROGDEN, J. The contract of insurance was made in Pennsylvania, and must be interpreted in accordance with the law of that State. *Cannaday v. R. R.*, 143 N. C., 439, 55 S. E., 836; *Hall v. Tel. Co.*, 139 N. C., 369, 52 S. E., 50; *Tieffenbrun v. Flannery*, 198 N. C., 397, 151 S. E., 857. Consequently, in undertaking to interpret and apply the law of Pennsylvania, this Court is somewhat in the position of an innocent by-stander.

In arriving at the meaning and applicability of the Pennsylvania laws and decisions, the plaintiff offered as a witness an eminent attorney of that State and a graduate of the University of Pittsburgh Law School, who testified in substance that the answer to question No. 27 considered in the light of pertinent Pennsylvania decisions, was material as a matter of law. The defendant offered an eminent member of the Pennsylvania bar, also a graduate of the University of Pittsburgh Law School, who testified that the materiality of the question should be submitted to the jury, and further, that the knowledge of the agent, Koontz, was imputable to the plaintiff and constituted an estoppel. These eminent experts cite and rely upon the same Pennsylvania cases to support their conclusions. In other words, two legal experts, graduates of the same law school, and practicing in the same state, cite the same opinions, but draw conclusions therefrom as far apart as zenith and nadir.

However, both parties cite the case of *Koppleman v. Commercial Casualty Insurance Company*, 302 Pa., 106, 153 Atl., 121. This decision was rendered in 1930, and is one of the latest decisions upon the pertinent principles of law. Quoting from the *March case*, 186 Pa., 629, 40 Atl., 1100, the Pennsylvania Court said: "Misrepresentation or untrue statement in an application, if made in good faith, shall not avoid the policy unless it relate to some matter material to the risk. If it does relate to such matter, the act is inapplicable. If the matter is not material to the risk, and the statement is made in good faith, although it is untrue, it shall not avoid the policy. . . . Ordinarily questions of good faith and materiality are for the jury, and where the materiality of a statement to the risk involved is itself of a doubtful character, its

determination should be submitted to the jury. But it was never intended by the act of 1885, nor did that act assume to change the law in cases where the matter stated was palpably and manifestly material to the risk, or where it was absolutely and visibly false in fact." The *Koppleman case* is an illuminating utterance and assembles, discusses and distinguishes various decisions in Pennsylvania upon a variety of false statements or representations in application for insurance. Summarizing the governing principle the Court said: "In the instant case, the proof is not only undisputed, but it comes from the plaintiff himself. Under such conditions, whether it be a representation or warranty, if the statement made is material and admittedly untrue, there can be no recovery on the policy." The same general view of the Pennsylvania law is declared by the District Court of Pennsylvania in *Zeidel v. Connecticut General Life Insurance Company*, 44 Fed. (2d), 843. The *March case, supra,* holds specifically that existing insurance in another company at the time of an application is material as a matter of law. The Court said: "In respect to the first class of questions above enumerated, in which the materiality of them was submitted to the jury, we are clearly of the opinion that they were all material, and that the jury should have been so instructed." See, also, *Leadman v. Aetna Life Ins. Co.*, 163 S. E., 716, and *Southern Surety Company of New York v. Fortson*, 161 S. E., 679. The *Fortson case, supra,* involved a false statement as to the amount of disability insurance carried by the applicant.

In the case at bar the defendant, a skilled and intelligent man, wrote the answers to the questions in the application himself. The answer to question 27, so written by him, was false. He solemnly agrees "that all the foregoing statements and answers as written are true." Manifestly the amount of disability benefit carried by an applicant would enter into a determination of the advisability of the risk. If the agent had written the answers in the application, the doctrine of estoppel announced in *Evans v. Metropolitan Life Ins. Co.*, 294 Pa., 406, would doubtless apply; but the defendant, the sole and exclusive author of the statements in the application, furnished material information to the plaintiff, which, in the language of the Pennsylvania Court, "was absolutely and visibly false in fact." Therefore, as we interpret the Pennsylvania decisions, the plaintiff was entitled to have the trial judge give the following instructions duly requested:

(a) "The court has charged you that the policy in controversy contained additional provision 'G,' and the court charges you that under the law of Pennsylvania the answer to question 27 in the application is a warranty, and that a warranty cannot be waived by an agent such as solicited the policy in this case. The evidence is not disputed that the

answer to question 27 is false, and being a warranty as explained, it is your duty to answer the issues in favor of the plaintiff."

(b) "That under the facts in this case and all the evidence, the court instructs you that under the law of Pennsylvania question No. 27 was material to the risk, and you will answer the third issue 'Yes.'"

The exceptions of the plaintiff to the failure of the trial court to give the foregoing instructions is sustained.

Reversed.

STATE v. W. A. BANKS.

(Filed 22 February, 1933.)

1. Criminal Law H c: L e—

A motion for a continuance is addressed to the discretion of the trial court, and in the absence of abuse, his ruling thereon is not reviewable.

2. Same—Held: Refusal of motion for continuance was free from abuse of discretion.

In this case the defendant requested a continuance for the purpose of taking depositions as to the character of the State's witnesses who were nonresidents, without giving names, etc., as required by C. S., 560, Rule of Practice in Superior Courts No. 5. The defendant was allowed to cross-examine the witnesses before trial, and the witnesses admitted upon the trial that they had been prosecuted for various criminal offenses. The witnesses obviously could not give bond for their appearance at a subsequent term: *Held*, the trial court's refusal of the motion for a continuance was in the exercise of a discretion free from abuse.

3. Criminal Law L e—

The admission of testimony of a witness that the deceased was "captain" of a group of bonus marchers, and testimony of another witness in explanation of his previous testimony on private examination *is held* not to constitute reversible error in this prosecution for homicide.

4. Criminal Law G q—Refusal to allow cross-examination of witness relative to letter he had written his wife held not error.

In this prosecution for a homicide the defendant offered in evidence a letter written by one of the State's witnesses to his wife, which had been given defendant's counsel by the witness's wife. The defendant proposed to cross-examine the witness in respect to the letter for the purpose of showing bias: *Held*, the trial court's refusal to allow the cross-examination was not error, it appearing that the wife had given the letter to a third person and that it had not been acquired by a third person without the consent or privity of the wife, C. S., 1801, and it further appearing that the letter contained no expression of bias of the witness which was not elicited on his cross-examination.

5. Homicide H c—Instruction in this case held not to contain reversible error.

In this prosecution for murder the trial court's charge as to justifiable and excusable homicide *is held* not to contain reversible error, the charge correctly stating that an accidental killing committed unintentionally and without negligence was excusable, and there being no evidence of self-defense.

6. Same—

Remark of the court in its charge that there was no evidence that killing was "done in any other way" *is held* to relate solely to fact that killing was done with pistol, construing charge as a whole, and the instruction was in accordance with the evidence and was not erroneous.

7. Homicide G b—Presumptions and burden of proof where killing with deadly weapon is established by State.

Where the State establishes a killing with a deadly weapon the burden is on the State to prove beyond a reasonable doubt that the defendant perpetrated the crime, and the burden is on the defendant to rebut the presumption of malice, or prove matters rendering the killing justifiable or excusable.

APPEAL by defendant from *Harding, J.*, at June Term, 1932, of MCDOWELL.

The defendant was indicted for the murder of Louis Chiapetta on 17 June, 1932; was prosecuted for murder in the second degree or manslaughter; and was convicted of manslaughter. From the judgment pronounced he appealed upon error assigned.

The deceased and J. W. Phillips, Walter Carroll, Tennie Sliter, and John Moore, Jr., of Houston, Texas, and Arthur Horton, and J. W. Barnard of Little Rock, Ark., were a part of the bonus expedition that went on trains from the southwest to Washington as ex-soldiers. They spent a few days in Washington and traveled together on their return. They arrived at Marion, North Carolina, in a box car at about 10 p.m. on 17 June, 1932. There someone shot Chiapetta and inflicted a wound which caused his death, the bullet having gone through his body. The surviving six were witnesses for the State on the trial. They testified in effect that the defendant shot Chiapetta while the latter was lying down in the box car. There was evidence for the State tending to show that the men in the box car had not had liquor, had not been drinking, and had not assaulted or resisted the defendant, and that they were on the train with the consent or acquiescence of the railroad authorities.

The conductor testified that he had not given these men his consent or permission to ride on the train. After the deceased was shot the defendant took the train and went to Asheville.

The defendant offered evidence tending to show the following circumstances: "The defendant was special railroad police officer of the

Southern Railroad, commissioned by the State of North Carolina, whose duty it was to inspect and police trains against trespassing and robbing.

On his round of duty when the train arrived in Marion, he came to the empty box car in which the deceased and his companions were riding. He flashed his light and noticed a number of men in there, and asked them to come out, but no attention was paid to him. He then crawled up into the car when someone in there hollered to him "Get out of here or we will kick your ..... head off." Just then he started to flash his light and the crowd made a move as if to go to the door, but instead of doing so, pushed him out of the door to the ground, and at the same time some one in the crowd kicked his flashlight out of his hand. When he struck the ground three or four of the men got on him and grappled with him, one on the rear and one on each side and the others around. They tried to disarm him and in the struggle the pistol was discharged one time under the train and there was a tinkling sound as if the bullet had struck metal. There was no outcry from anyone that anybody had been shot. About that time a second shot was fired from a point west and up the track. Then the deceased and those attacking the defendant began to scatter, and one of them picked up the defendant's flashlight and ran through the train and was followed a short distance by the defendant. At this time the train was pulling out and the defendant boarded it, but did not learn that any one was shot until he reached Asheville. The deceased was shot by a bullet entering in front about one and one-half inches below and just left of the navel and ranged upward slightly and passed out on the right side just back of the middle of the body and below the ribs. The defendant contended that if the deceased was hit by the bullet from the pistol of the defendant it was as a result of the ricochet of the bullet, and that the deceased could have been hit by the second shot which was fired by another."

All this was denied by witnesses for the State, who testified that the defendant shot the deceased, was accused of the offense at the time, did not deny the act, ran away from the scene, and went on the train to Asheville.

The material exceptions are set out in the opinion.

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

Chas. Hutchins and Winborne & Proctor for defendant.

ADAMS, J. On 13 June, 1932, the Superior Court of McDowell County convened for the trial of civil and criminal causes. In the preceding January grand jurors had been drawn whose term of service continued

until the first day of July. They were in session during the sitting of the court and, having concluded their work, were released on Thursday, 16 June, and were afterwards recalled by the court during the term to investigate the homicide which meantime had occurred.

The deceased was shot with a pistol on Friday night, 17 June, 1932, and died on the following Sunday. On Tuesday, 21 June, the grand jury returned a bill charging the defendant with murder. The court set the case for hearing on Wednesday, 29 June, the latest date permissible under the statute for entering upon the trial while the court was in session. The defendant, reserving his rights in apt time, moved for a continuance of the case on the ground that he had not had sufficient time to prepare his defense; that six witnesses for the prosecution were nonresidents of the State, four residing in Texas and two in Arkansas; that they were with the deceased at the time the wound was inflicted; that the defendant had information which led him to believe that the character of each of these witnesses was bad; and that he had had no time to take the deposition of nonresident witnesses. The motion for continuance was overruled and the defendant excepted.

It has been held in numerous decisions of this Court that the question of granting or refusing a motion for the continuance of an action is peculiarly within the discretion of the trial court. The exception to the rule is the court's abuse of discretion. The defendant contends that the circumstances bring his case within the exception, for the reason that he had no opportunity to produce evidence as to the bad character of the nonresident witnesses who testified on behalf of the State.

With respect to this position several facts are to be considered. It is provided by statute that if a continuance is asked because a witness is absent the affidavit must contain the name and residence of the witness, the facts to be proved by him, and a statement that the applicant expects to procure his attendance at a subsequent term. C. S., 560; Rule Superior Court, No. 5. The defendant did not comply with this requirement. The fact that he had information which led his mind to a particular conclusion did not remove his motion from the field of speculation. The object was to get evidence of bad character, if it could be obtained; but the defendant was permitted to cross-examine these witnesses before the trial, and at the trial all admitted having had experience in the criminal courts or having been charged with violation of the criminal law. According to their several admissions, Phillips had been charged with theft and burglary; Carroll had been the recipient of five bullets during a fight "up in Michigan"; Sliter had been arrested for the theft of an emery wheel; Barnard had done work in a penitentiary; Moore had been arrested for an aggravated assault; and Horton "had

not stayed anywhere long enough to be caught." This testimony furnished ample illumination on the question of character; more light would hardly have been supplied by a bare statement of the "good" or "bad" character of any of these witnesses; and under the circumstances it is not easy to perceive that the defendant could have been materially prejudiced by the absence of a deposition

Without regard to this, the trial judge, who continued the case for eight days was confronted with a problem. All the State's witnesses who had been in the car lived outside North Carolina; manifestly they could not give security for their attendance at a subsequent term of the court. Should they be held in custody as witnesses or discharged and permitted to leave the State? In the latter event would the defendant ever be tried? Amid these conflicting influences the court denied the defendant's motion for a continuance and in doing so exercised discretion which was free from abuse. *S. v. Garner,* 203 N. C., 361; *S. v. Rhodes,* 202 N. C., 101; *Wolf v. Goldstein,* 192 N. C., 818; *S. v. Sauls,* 190 N. C., 810; *S. v. Riley,* 188 N. C., 72; *Likas v. Lackey,* 186 N. C., 398; *Billings v. Observer,* 150 N. C., 540; *Jarrett v. Trunk Co.,* 142 N. C., 466; *S. v. Sultan, ibid.,* 569.

Neither the admission in evidence of Carroll's statement that the deceased has been "captain of the boys going up" nor the testimony of Barnard on the redirect examination in explanation of something he had previously said on his private examination constitutes reversible error. Exceptions 1, 3, 4, and 5 are overruled.

While in Marion, J. W. Barnard wrote his wife a letter dated 21 June, 1932, and in some way it afterwards went into the hands of the defendant. His wife was in another State. The defendant's counsel proposed to cross-examine Barnard in regard to the letter. What the defendant proposed to elicit from the witness does not appear. The solicitor objected and inquired where and how the defendant had procured the letter. One of the counsel for the defendant answered, "His (the defendant's) wife gave it to us." The objection was sustained and the defendant excepted.

The exception rests upon the asserted right of the defendant to produce any evidence tending to show the bias or prejudice of the witness. This position is in accord with the general rule. *S. v. Davidson,* 67 N. C., 119; *S. v. Lawhorn,* 88 N. C., 634; *S. v. Robertson,* 166 N. C., 356. There may be conditions under which the rule will not be excluded by the statutory inhibition against the disclosure of confidential communications between husband and wife during their marriage. C. S., 1801. In *S. v. Wallace,* 162 N. C., 623, it was held that the inhibition applies to the husband or the wife and not to third parties, and that if

the communication by the husband is in writing and is procured by a third party without the consent or privity of the wife the reason given by the common law for the exclusion of the communication no longer exists. The principle has been sustained in later cases. *S. v. Randall,* 170 N. C., 757; *S. v. McKinney,* 175 N. C., 784; *S. v. Branch,* 193 N. C., 621; *S. v. Freeman,* 197 N. C., 376. But it does not apply to a case in which a confidential letter written by a husband to his wife was procured by a party to the litigation by the consent or privity of the wife alone; and this is the fact with which we are here confronted. The question was discussed and the controlling authorities were cited in *McCoy v. Justice,* 199 N. C., 602, 612. It will be noted that the letters admitted in evidence in *S. v. Branch, supra,* had been delivered by the wife to a third party at the request of the defendant. In the present case the only information relating to the letter was the defendant's admission that the wife of the witness had given it to him. At the request of the defendant the letter was written into the record and in our opinion it contains no statement expressive of any bias or prejudice which the defendant did not elicit on the cross-examination of the witness.

The defendant complains that the court's definition of excusable and justifiable homicide was inaccurate and misleading, but in this we find no reversible error. The first part of the instruction dealt with accidental death and stated that homicide committed unintentionally and without negligence was excusable; and the other part was not prejudicial to the defendant because the record discloses no element of self-defense.

We do not assent to the defendant's construction of the clause which is the subject of the twenty-seventh exception. After saying the burden was on the State to satisfy the jury beyond a reasonable doubt that the defendant killed the deceased, and "that he did it with a pistol," the judge remarked, "There is no evidence to show that it was brought about in any other way"—that is, except by a pistol. All the evidence was to this effect and it is obvious that there was no error in the instruction. Any other interpretation would be inconsistent with other portions of the charge.

Exception was taken to the following instruction: "In this case the defendant doesn't admit the killing, that is, he doesn't admit that he did it. So the burden is on the State to satify you beyond a reasonable doubt that the defendant did the killing, that he did it with a pistol, and if you are satisfied of that beyond a reasonable doubt, it will be your duty to convict the defendant of murder in the second degree, nothing else appearing, and then the burden shifts to the defendant to rebut the presumption of malice raised by the use of the deadly weapon to reduce it to

manslaughter or show it was done under such surrounding situations as to make it either justifiable or excusable homicide."

Elsewhere it was said the burden was on the defendant to satisfy the jury that the presumption of malice had been rebutted. This instruction conforms to the law as uniformly declared in our decisions. The practice of "proceeding with the evidence" in a civil action is entirely distinct. *S. v. Worley,* 141 N. C., 764; *S. v. Quick,* 150 N. C., 820; *S. v. Lane,* 166 N. C., 339; *S. v. Brinkley,* 183 N. C., 720; *S. v. Miller,* 185 N. C., 679.

There are other exceptions. We have given them careful consideration. We find them to be without substantial merit or such importance as demands a more prolonged opinion. We find

No error.

RICHARD W. SPEAS BY HIS NEXT FRIEND, E. G. SHUGART, v. CITY OF GREENSBORO AND LINDSAY S. WALL.

(Filed 22 February, 1933.)

1. Municipal Corporations E c—It is duty of city to keep streets in reasonably safe condition.

It is a positive duty of a city to keep its streets in a reasonably safe and suitable condition, and it may not escape liability for its negligent failure to do so on the ground that such duty is a governmental function.

2. Same—Evidence that city had failed to use due care in respect to lighting traffic signal held sufficient to be submitted to jury.

In this action to recover for personal injuries sustained in a collision of an automobile with a traffic signal maintained by a city at a street intersection there was evidence that the lights of the signal were not burning at the time of the accident, and that the lights had not been properly lighted for a long period of time: *Held,* notice of such defects may be implied, and the evidence was sufficient to be submitted to the jury on the question of whether the city had used due care to provide adequate lights.

3. Same—Negligence of driver of car held not to constitute intervening negligence.

There was evidence that the driver of the car in which the plaintiff was riding as a guest was negligent in driving into a traffic signal at a street intersection, and that the city was negligent in failing to use due care in respect to the lighting of the traffic signal: *Held,* the negligence of the driver was not intervening negligence as a matter of law, since the probability of such injury should have been within the reasonable contemplation of the city.

4. Highways B k—Guest held not guilty of contributory negligence as matter of law in failing to keep look-out for own safety.

The plaintiff was riding as a guest in an automobile owned and driven by another. There was evidence that the plaintiff could not have seen through the wind-shield in front of him on account of rain thereon. The car crashed into a municipal traffic signal and the plaintiff brought suit against the city and the driver: *Held*, the plaintiff was not guilty of contributory negligence as a matter of law in failing to keep a look-out for his own safety.

5. Appeal and Error J c—

Instruction in this case held not to contain reversible error considered in the light of the evidence upon the trial.

6. Pleadings E a—Trial court has discretionary power to allow amendment.

It is within the discretionary power of the trial court to allow the filing of amended or supplemental complaints, and an amendment of a pleading may be allowed after verdict to conform the allegations to the proof. C. S., 547, 551.

7. Highways B g—Defendant's testimony held to establish negligence as matter of law.

Where the driver of a car in which the plaintiff was riding as a guest testifies that he could have seen an object twenty feet away under the circumstances, and that he could have stopped the car in five or six feet, and all the evidence tends to show that he drove the car into a traffic signal at a street intersection, his testimony establishes negligence on his part as a matter of law.

APPEAL by defendants from *Oglesby, J.*, at March Term, 1932, of GUILFORD. No error.

This is an action for personal injury alleged to have been caused by the negligence of the defendants.

At the center of the intersection of Greene and Gaston streets the city of Greensboro maintains a traffic device known as a "silent policeman." It consists of a concrete block approximately three feet wide and two feet high anchored to the street pavement and a metal base projecting upward from the block and supporting an electric signal with alternating red and green lights. On the morning of 6 December, 1930, the plaintiff was riding in a Ford roadster driven by the defendant Wall. It had one seat and the curtains were up. The car when driven into the intersection of Greene and Gaston streets struck the traffic device, and the plaintiff was seriously injured.

The jury found that the plaintiff's injury had been proximately caused by the negligence of each of the defendants and that the plaintiff had not been negligent, and assessed the damages.

Judgment for the plaintiff; appeal by the defendants upon assigned error.

Manly, Hendren & Womble for plaintiff.
Andrew Joyner, Jr., for city of Greensboro.
Sapp & Sapp for Lindsay W. Wall.

ADAMS, J. The record is voluminous but the controversy involves only a few familiar principles of law. A brief consideration of the exceptions is all that is necessary.

Neither defendant is entitled to a judgment of nonsuit. The motion of the corporate defendant rests upon three propositions: (1) The evidence of negligence against the city is not sufficient to justify the submission of an issue to the jury; (2) the plaintiff's injury was due to the independent and intervening acts of the defendant Wall; (3) according to his own evidence the negligence of the plaintiff proximately contributed to his injury. The motion of the defendant Wall is founded on the two propositions that the plaintiff was negligent and that he was not.

The exercise of due care to keep its streets in a reasonably safe and suitable condition is one of the positive obligations imposed upon a municipal corporation. The discharge of this obligation cannot be evaded on the theory that in the construction and maintenance of its streets the municipality acts in a governmental capacity, *Graham v. Charlotte,* 186 N. C., 649; *Willis v. New Bern,* 191 N. C., 507; *Michaux v. Rocky Mount,* 193 N. C., 550; *Hamilton v. Rocky Mount,* 199 N. C., 504.

The court instructed the jury that the erection of the "silent policeman" at the intersection of the streets was not enough to constitute negligence (*Valley v. Gastonia,* 203 N. C., 664) and left to the determination of the jury the question whether the city had used due care in providing adequate lights. If the city failed to exercise such care it was negligent. *Bunch v. Edenton,* 90 N. C., 431; *Bailey v. Winston-Salem,* 157 N. C., 253; *Pickett v. R. R.,* 200 N. C., 750. Several witnesses testified that the lights on the traffic device were not burning when the wreck occurred. Indeed, the plaintiff offered evidence that there were no lights on the streets. It is not essential that the city should have had actual notice that the lights were not burning. Notice may be implied. One of the witnesses said that the lights had been turned on and off in the morning irregularly for a long period, and this was at least some evidence of implied notice. *Dillon v. Raleigh,* 124 N. C., 184; *Bailey v. Winston-Salem, supra; Willis v. New Bern, supra; Pickett v. R. R., supra.*

We do not regard the driving of the car on the street as an intervening act which superseded the causal relation between the city's negligence and the plaintiff's injury. On the contrary the danger of traversing the intersecting streets by those having occasion to travel in vehicles and the probability of injury resultant from inadequate lights are matters which should have been in the reasonable contemplation of the city.

In our opinion there is not sufficient evidence to support the contention that the plaintiff's action should be dismissed on the ground of his contributory negligence. The morning was dark and cold. The plaintiff assumed a comfortable position in the car, "placing his knees against the dashboard," and pulled up the collar of his overcoat. The windshield wiper was in front of the driver but on that morning it did not afford much help. There was no wiper in front of the plaintiff, and there the windshield was soiled and covered with water. We find nothing in the record which would bar his recovery as a matter of law by reason of his alleged contributory negligence, and the issue of fact was submitted to the jury under correct instructions and answered in his favor.

The city excepted to the following instruction: "The court further instructs you that if you find the light was not burning on the silent policeman, and that ordinary prudence would require that such a light be burning, taking into consideration the hour of the morning, the visibility, etc., that you find existed, and that the city in the exercise of ordinary care could have known it was not burning, and that this failure of the light not burning was the proximate cause of the injury sustained by the plaintiff, that would constitute actionable negligence and you would answer the issue, Yes."

It is argued that the instruction is erroneous because it contains no reference to the lights located at the corners of the intersection. Some of the witnesses said that these lights were not burning and this testimony the judge no doubt had in mind when he used the phrase, "And that ordinary prudence would require that such a light be burning." The defendants' evidence tended to show that the corner lights when burning illuminated the streets but not that they were burning at the time of the injury.

We have examined all the exceptions taken by the city to the charge of the court and find no error. The action of the judge in reference to the "amended" and "supplemental" complaints was entirely a matter of discretion. The amended complaint was in fact an additional complaint filed against a defendant who was not a party when the first complaint was filed; and the purpose of the plaintiff was to prosecute the action against the defendants as joint *tort-feasors*. The amendment of a pleading may be made after verdict to conform the allegation to the proof. C. S., 547, 551.

The court charged the jury to find that the defendant Wall was negligent if they should find the facts to be as he had testified. He admitted that he could have seen an object twenty feet in front of his car, that he was driving at the rate of fifteen miles an hour, that he could have stopped the car within five or six feet, and that he did not see the traffic post before striking it. His testimony is equivalent to his saying that he did not see what he should have seen in the exercise of due care and did not stop as he should have stopped in time to avert the collision. The instruction is in accord with the principle stated in *Hughes v. Luther,* 189 N. C., 841, which has been cited with approval in *Weston v. R. R.,* 194 N. C., 210, *Davis v. Jeffreys,* 197 N. C., 712, and *Williams v. Express Lines,* 198 N. C., 193.

The briefs filed by the parties present various phases of the law in its relation to the exceptions, but we think it unnecessary to classify and distinguish the principles enunciated in the opinions cited. The case was carefully tried and we find no error for which the defendants should be awarded a new trial.

No error.

MEADOWS FERTILIZER COMPANY v. MARTHA B. GODLEY, ADMINISTRATRIX OF MARSHALL W. GODLEY, DECEASED, AND MARTHA B. GODLEY IN HER OWN RIGHT.

(Filed 22 February, 1933.)

1. Insurance N a—Change of beneficiary will be given effect where insured does all in his power to effect change under terms of policy.

Where a policy of life insurance reserves the right in the insured to change the beneficiary therein named, the named beneficiary has only a contingent interest therein, and the insured may change the beneficiary in accordance with the terms of the policy at any time, and where the insured has done all that is possible under the circumstances to change the beneficiary in accordance with the terms of the policy, such change of beneficiary will be given effect under the principle that equity regards as done that which ought to have been done, and where the insured's wife is thus made the beneficiary the proceeds inure to her sole benefit free from the claims of his creditors. N. C. Code, 6464(a).

2. Appeal and Error J c—Findings of fact are conclusive when supported by evidence.

Where the court finds the facts under agreement of the parties, his findings of fact are conclusive when supported by any sufficient evidence, and where the judgment is supported by the findings of fact it also is conclusive.

3. Insurance N a—Under facts of this case change of beneficiary by insured was not effected.

Where under an agreement that the court should find the facts the court finds that the deceased had expressed an intention to change the beneficiary in a policy of insurance on his life, but had done no affirmative act to effect such change, the court's judgment that no change of beneficiary had been effected will be affirmed on appeal.

APPEAL by defendant, Martha B. Godley, from *Parker, J.*, at December Term, 1932, of BEAUFORT. Affirmed.

The record discloses an agreement that the court below should find the facts and render judgment thereon. Under the agreement the court below made an exhaustive and lengthy findings of fact, and rendered the following judgment:

"This cause coming on to be heard at this term of court before his Honor, R. Hunt Parker, judge presiding, upon the agreed statement of facts and being heard: Now, therefore, after consideration of the case agreed and argument of counsel, it is ordered and adjudged and decreed as follows: (1) That Martha B. Godley, in her own right having been made a party defendant comes into court and adopts the answer of Martha B. Godley, administratrix, and adopts in her own right the agreed statement of facts in this action. (2) That as to policy No. 302762 issued on 14 December, 1928, by Durham Life Insurance Company of Raleigh, N. C., on the life of Marshall W. Godley, it is ordered, adjudged and decreed, that the insured has substantially complied with the provisions of said policy relating to the change in beneficiary and on the principle that equity regards as done that which ought to be done, this court hereby gives effect to the intention of the insured and holds that the change of beneficiary has been accomplished, and it is therefore adjudged that Martha B. Godley, in her own right, is beneficiary to the proceeds thereof, subject to the rights of Phillips Fertilizer Company as assignee therein: (3) That as to policy No. 302773, issued on 12 December, 1928, by Durham Life Insurance Company on the life of Marshall W. Godley, *the court holds that no affirmative act on the part of the insured to change the beneficiary was done and that the letters written by Jesse B. Ross express only unexecuted intention, and the court therefore adjudges that no change of beneficiary was effected as to said policy* and that the proceeds of said policy are probably payable to Martha B. Godley, as administratrix of the estate of Marshall W. Godley and is an asset of said estate for the benefit of the creditors and other parties in interest as their respective interests may appear. It is by consent adjudged that the debt owing to Meadows Fertilizer Company (who is endorsee and owner of the notes originally given to N. W

Latham) by the estate of Marshall W. Godley, is $931.14, with interest from 1 March, 1931. It is ordered that the costs of this action be paid by the estate of Marshall W. Godley."

To that part of the foregoing judgment relating to policy No. 302773 and adjudging that the proceeds of said policy is an asset of the estate of Marshall B. Godley, the defendant, Martha B. Godley in her own right, excepted, assigned error and appealed to the Supreme Court. To that part of the foregoing judgment relating to policy No. 302762, the plaintiff excepted, assigned error and appealed to the Supreme Court.

The defendant Martha B. Godley, appellant, groups her exceptions and assigns error as follows: "To the erroneous conclusion reached by the judge in so far as he adjudges that the beneficiary was not changed on policy No. 302773, as appears by the judgment."

H. C. Carter for plaintiff, appellee.
Ward & Grimes for defendant, Martha B. Godley, appellant.

CLARKSON, J. There can be, from the facts found by the court below, no controversy as to insurance policy No. 302762, on the life of Marshall W. Godley, it being properly changed as to the beneficiary under the terms of the policy. In fact, in the appellee's brief we find: "Having in mind these principles we are forced to the conclusion by the facts in the case that as to policy No. 302762 he had a definite purpose to change the beneficiary and did what he could, and all he could, to effect such change."

The appeal presents the question only whether the policy No. 302773 was properly changed in accordance with the terms of the policy. We think not.

In *Pearsall v. Bloodworth,* 194 N. C., 628, it was held: "While formerly an insolvent insured could not change, according to a provision in his policy, the beneficiary of his policy of life insurance from his estate to his wife, without consideration against the rights of his creditors, this is now changed by our statute. C. S., 6464, providing that a policy of life insurance made payable to the wife, or after its issuance assigned and transferred, or in any way made payable to her, shall inure to her separate benefit." See N. C., Code of 1931 (Michie) 6464(a); Laws of 1931, chap. 179, sec. 1.

The only question involved in this appeal is whether the change of the beneficiary was consummated.

In *Teague v. Ins. Co.,* 200 N. C., at p. 456, speaking to the subject: "The law in other jurisdictions, applicable to the decision of the question presented by this appeal, is stated in 37 C. J., at p. 584, in section 350(b). The text in this section is supported by abundant citations of

authoritative judicial decisions. It is there said: 'On the principle that equity regards as done that which ought to be done, the courts will give effect to the intention of insured by holding that the change of beneficiary has been accomplished where he has done all that he could to comply with the provisions of the policy, as where he sent a proper written notice or request to the home office of the company, but was unable to send the policy by reason of circumstances beyond his control, as where it had been lost, or was in the possession of another person who refused to surrender it or was otherwise inaccessible, or where he sent both the policy and a proper written notice or request and all that remained to be done were certain formal and ministerial acts on the part of the company, such as the endorsement of the change on the policy, and these acts were either not done at all or were done after the death of the insured.' "

In *Parker v. Potter,* 200 N. C., at p. 355, it is written: "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. Ins. Co.,* 142 N. C., 14; *Wooten v. Order of Odd Fellows,* 176 N. C., 52; *Lockhart v. Ins. Co.,* 193 N. C., 8. This principle, however, does not prevail where the right or interest of a 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, etc., 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 *Taylor v. Coburn,* 202 N. C., at p. 326, it is held, citing numerous authorities: "Accordingly it is generally held that a gift of an insurance policy may be made by delivery without a written assignment. Because delivery of an article may be actual, constructive, or symbolic, no absolute rule, applicable to all cases, can be laid down. It is a settled principle, however, that the donor's surrender of the property must be complete and his dominion and control of it must be relinquished."

The court below by agreement found the facts. It is well settled in this jurisdiction, where a jury trial is waived, as in this case, and the trial judge finds the facts and judgment is entered thereon, if there was any sufficient competent evidence to support the findings of fact and the facts found support the judgment, in such cases the findings of fact and the judgment thereon are conclusive.

The court below, after setting forth the facts, stated in the judgment: "The court holds that no affirmative act on the part of the insured to change the beneficiary was done and that the letters written by Jesse B. Ross *express only unexecuted intention,* and the court therefore adjudges that no change of beneficiary was effected as to said policy." For the reasons given, the judgment is

Affirmed.

JOHN F. SPENCE ET AL. v. E. B. GRANGER ET AL.

(Filed 22 February, 1933.)

Drainage Districts B d—Under the facts of this case original assessment was not bar to appellants' motion to vacate assessment.

In a proceeding to establish a "jury ditch," C. S., 5275, *et seq.*, an assessment was made against certain landowners which was confirmed by the clerk. Thereafter an order was made for a supplemental assessment to meet a deficit in the former assessment. The supplemental assessment was set aside as to the appellants upon their motion entered on the ground that they had not been given notice thereof, and no appeal was taken from the judge's order confirming the clerk's order vacating the supplemental assessment, and there was an affidavit filed in the record that it was agreed by the parties that the appellants' land did not drain into the "jury ditch," and the appellants voluntarily agreed to an assessment for the construction of an "intercept ditch." The appellants paid certain assessments levied under the original assessment thinking that such amounts were for the "intercept ditch." Thereafter they made a motion to vacate the original assessment, which motion was allowed by the clerk upon findings that their lands did not drain into the "jury ditch," and that they did not have notice of the supplemental assessment. Upon appeal the trial court reversed the clerk's order, holding that the original assessment was *res judicata*, and the parties appealed to the Supreme Court: *Held*, the statutory procedure is analogous to the general drainage law, and its provisions are applicable, and the proceedings are regarded as kept alive for further orders without being retained on the docket, and the original assessment did not constitute a bar to the motion to vacate, and the assessment was properly set aside on the facts found.

APPEAL by certain defendants, movants from *Hill, J.*, at October Term, 1932, of PASQUOTANK. Reversed.

McMullan & McMullan for movants, appellants.
Thompson & Wilson for appellees.

CLARKSON, J. The summons in this proceeding was issued 29 August, 1927, and served on the appellants 7 September, 1927.

This is a proceeding brought by plaintiffs against defendants to establish a "jury ditch" about four and a half (4½) miles long, draining into Pasquotank River, known as "Shepard Ditch," under C. S., 5275. C. S., 5276, sets out the procedure. C. S., 5277, costs of repairs enforced by judgments. C. S., 5279, provides that the dominant owner can repair by giving servient owner three days notice. C. S., 5280, canal for seven years necessity presumed and procedure provided for maintaining same. Public Laws, 1931, chap. 227, among other things makes a new section 5280(a) and is an enabling act "to make other and further assessments for the costs of establishment, construction and expense" when former provisions are insufficient.

Some of the defendants, appellants, in answer to plaintiffs' petition, among other things, say: "That all of the lands of the above named defendants drain into a ditch called the "Eight Foot Ditch" or into ditches running parallel therewith; from the opposite side of the road running between these lands and the Shepherd Ditch." . . . The above answering defendants further answering the petition say for themselves, that their lands, nor any part of them drain into said Shepherd Ditch, but on the other hand are shut off from the same by a 20-foot road, and all ditches that could lead into said Shepherd Ditch, from their said lands or any of them are now, and have been dammed off from said Shepherd Ditch for over twenty-five years. . . . That they have kept the above referred to and mentioned Eight Foot Ditch open as a common drain for their lands, as well as other ditches running parallel to said Eight Foot Ditch, and that all of said ditches are independent of said Shepherd Ditch, and have been, for a longer time, than any one now living can remember; and that all of said ditches drain into a swamp opening into Pasquotank River. . . . That they have been keeping and are now keeping said Eight Foot Ditch open as a common drainway for their lands; and to make them come into the Shepherd Ditch would not only work a great hardship upon them, but would cause them a great expense, for which they could not get any benefit at all."

On 9 February, 1928, jurors were regularly appointed. They rendered their report 22 May, 1929, making assessments. On 25 June, 1929, judgment and confirmation was entered by the clerk. On 17 July, 1929, the clerk made an order appointing certain commissioners to carry out the former judgment. Thereafter two of the jurors made a report to the clerk that "it is necessary that an amount be further assessed against the

land embraced in said Jury Ditch proceeding that will aggregate an amount approximately eighteen hundred dollars ($1,800)."

The clerk made an order as follows: "It appearing to the court upon investigation that the former report of the jurors in the above entitled proceeding has produced an amount insufficient to pay off and discharge the cost and expense of the work done in the establishment of the Tadmore Jury-Ditches, established under this proceeding: Therefore, by authority of the laws of North Carolina as contained in chapter 94 of the Consolidated Statutes and as amended by chapter 227 of the Public Laws of North Carolina, 1931, it being found by the court as a fact that the deficiency exists to the extent of approximately eighteen hundred dollars ($1,800). It is therefore ordered, that the jurors in the proceeding meet and forthwith make a supplementary report upon an equitable and just basis and proportion as made in the former report, sufficient in amount, to cover said deficiency, being approximately eighteen hundred dollars ($1,800), as aforesaid. This 31 October, 1931. That thereafter, to wit, on 14 November, 1931, the jurors, pursuant to the order entered by the Superior Court clerk, submitted a report of their supplemental assessment, with a schedule assessing against each landowner an increase of 40 per cent over his former assessment. Thereafter, to wit, on 15 January, 1932, said supplemental report was confirmed by the clerk. Thereafter, in apt time, these movants or appellants, filed a motion in the cause before the clerk to vacate and set aside said supplemental assessment."

Among the grounds: "That said report, said order and said judgment were each and all entered without notice to movants."

The clerk who had rendered the judgment without notice, on 19 February, 1932, vacated and set aside the judgment. An appeal was taken to the Superior Court and Judge F. A. Daniels, on 19 February, 1932, made the following order: "The court being of the opinion that said judgment in the above entitled cause ought to be vacated and set aside and that the order of the clerk of Superior Court this day entered should be affirmed, doth—upon motion of attorneys for movants, order, adjudge and decree that the order this day entered by the clerk of Superior Court setting aside the judgment confirming the supplemental report heretofore filed herein be, and the same hereby is, in all respects affirmed."

The record discloses no exception or appeal from the judgment. The record has an affidavit set forth, dated 16 February, 1932, signed by J. B. Leigh, attorney for the appellants, in which it is alleged that at a meeting of "all parties concerned being represented" that it was agreed that the lands of appellants did not drain from the jury ditch in ques-

tion and that they were to dig an "intercept ditch" and pay for same *pro tanto*, which they did. "It was expressly agreed that these said parties aforementioned should be forever excluded from the provisions of the jury ditch and that said agreement was not put on record due to the inadvertence of the parties and of this affiant in believing the matter to be forever closed as regards assessments."

The appellants filed an affidavit signed by all of them confirming the affidavit of Leigh. Further "They, and each of them, prior to the rendition of said judgment had compromised and agreed with the said Montgomery (W. S. Montgomery, jury ditch contractor) as per the affidavit of J. B. Leigh, Esq., duly filed in this case, and that they, and each of them, have paid to the said Montgomery the various amounts agreed upon in said compromise; that none of them were served with any notice of the hearing of the matter in the Superior Court, or any other court, nor did they, or any one of them see any publication of any notice in the press or otherwise until it was reported afterwards that judgment had been rendered against their lands."

On 5 September, 1932, the clerk who had theretofore passed on all these matters, on exceptions to the supplemental report of the jurors, found certain facts. The clerk found all the facts for appellants as they contended for on this appeal. No notice given as to order appointing the jurors who "filed a supplemental assessment of 40 per cent against all of the said parties appearing on the original assessment roll," etc. Also the contention made by Leigh and appellants as to "intercept ditch," that the assessment in the original judgment was "tentative assessment," and "after hearing the evidence of all interested parties the court doth make this further finding of fact: First, that the lands of the said parties hereinbefore enumerated were amply drained by private ditches and were not benefited by the construction of the Shepherd Jury Ditch, and second, that the said parties, when called upon to pay the original assessment levied against them could not have reasonably known that the amounts so contributed by them respectively, after their voluntary agreement to contribute, were included in the assessment roll of the Shepherd Jury Ditch, but reasonably believed that the amounts so paid were not included in the assessment rolls relative to the said Shepherd Jury Ditch, but that they were placed there to cover their voluntary contributions for the construction of the said intercept ditch and in discharge of this obligation only were they paid. . . . Said judgment be, and same is hereby, vacated and set aside and that the names of said parties be stricken from the assessment rolls relative to the Shepherd Jury Ditch. . . . To the foregoing judgment, the receiver, N. S. Leary, and other interested parties, excepts and appeals to the judge of Superior Court."

The court below rendered the following judgment: "The court, upon the entire record in the cause, and after argument of counsel, being of the opinion that the matters so set up and relied upon and all issues and question therein involved have heretofore been finally adjudicated by orders and decrees entered herein, the said excepting parties then being parties to the cause, and no appeal having been taken, and that such exception cannot now be considered by the court: it is, therefore, ordered, decreed and adjudged by the court that the aforesaid judgment of the clerk, dated 5 September, 1932, be and the same is hereby reversed and stricken out, that the aforesaid exception to said supplemental report of 14 November, 1931, be and the same is hereby overruled, and that said supplemental report be and the same is hereby in all respects confirmed, and that as to those parties or lands against which additional or supplemental assessments of forty per cent have been made by the jurors, judgment is hereby entered against them accordingly."

The only exception and assignment of error made by movants or appellants, is as follows: "That they except to the apparent reassessment levied against them by said jurors, for the reason that their lands do not drain from the Shepherd Jury Ditch; that it was so understood at the time of the original assessment as is stated in the affidavit of J. B. Leigh, heretofore filed, which is incorporated herein and by reference made a part of this paragraph; and that the costs placed against them on the original assessment were for the cost of an intercept ditch for which they voluntarily agreed to pay." We think this exception and assignment of error well taken. Although this proceeding is under the statute establishing a "jury ditch," yet the principle under the general drainage act is analogous and applicable.

. In *Staton v. Staton,* 148 N. C., at p. 490, we find: "The plaintiff herein instituted a proceeding in 1885, under the drainage act (now Revisal, chap. 88)—(Vol. 2, C. S., 1919, chap. 94, Drainage)—for the right to drain into Barnes Canal. Commissioners were appointed, the rights and duties of the several parties determined and the amount each should pay assessed. The report was confirmed 30 January, 1886. This is a subsidiary proceeding begun in the clerk's court, which sets out that repairs to the canal are needed, that some of the tracts have changed hands and that one tract in particular has been partitioned, and asking that the amount assessed against that tract be divided and assessed in proper proportions against each of the partitioners. This is in effect a motion in the cause. From the nature of the proceeding, the judgment in 1886 is not a final judgment, conclusive of the rights of the parties for all time, as in a litigated matter. But it is a proceeding *in rem,* which can be brought forward from time to time, upon notice to all

the parties to be affected, for orders in the cause, dividing (as here sought) the amount to be paid by each of the new tracts into which a former tract has been divided by partition or by sale; to amend the assessments, when for any cause the amount previously assessed should be increased or diminished, for repairs; for enlarging and deepening the canal or for other purposes, or to extend the canal and bring in other parties. It is a flexible proceeding, and to be modified and moulded by decrees from time to time to promote the objects of the proceeding. The whole matter remains in the control of the court. It is not necessary, however, to keep such cases on the docket, but they can be brought forward from time to time, upon notice to the parties, upon supplementary petition filed therein, and further decrees made to conform to the exigencies and changes which may arise. . . . These proceedings are not highly technical, but are intended to be inexpensive and to be moulded from time to time, by the orders of the court, as may best promote the beneficial results contemplated by the statute." *Drainage District v. Cahoon,* 193 N. C., 326.

In the present case there *was no notice of the supplemental order* assessing against each landowner an increase of 40 per cent over the former assessment. As in the *Staton case supra, notice was vital.* Then again, there was no exception or appeal from Judge Daniels' order confirming the clerk who vacated and set aside his former order. The judgment below is

Reversed.

PATTIE P. LYNCH BY HER NEXT FRIEND, BEULAH B. LYNCH, v. CAROLINA TELEPHONE AND TELEGRAPH COMPANY.

(Filed 1 March, 1933.)

1. Negligence D b—

The burden is on the plaintiff to establish a causal relation between the alleged negligence and the injury in suit.

2. Trial D a—On motion of nonsuit all the 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.

3. Negligence D b—

All the elements of actionable negligence, including the element of causal relationship, may be proven by circumstantial evidence.

4. Telephone Companies B c—Evidence of causal relation between negligence of company and injury to plaintiff held sufficient.

Evidence that plaintiff was injured by being struck by a bolt of lightning as she passed within two feet of the telephone installed in her home, that her father had seen the bolt of lightning on the telephone wires coming into the house, that the wires of the phone were "swealed" and the telephone instrument damaged, that bits of wood were knocked off the telephone poles for some distance from the house is held sufficient to be submitted to the jury on the issue of causal relation between the telephone company's negligence in failing to properly maintain a ground wire used to prevent lightning from entering the house over the wires, and the injury in suit.

5. Appeal and Error J d—

Where the charge of the court is not in the record it is presumed that the court charged the law correctly applicable to the facts.

APPEAL by defendants from *Frizzelle, J.,* and a jury, at September Term, 1932, of WARREN. No error.

This is an action for actionable negligence instituted by plaintiff against defendant alleging damage.

The following seven allegations of the complaint are admitted by defendant:

"2. That plaintiff is a resident of Warren County, North Carolina, and is an infant 20 years of age, who appears herein by her duly appointed, qualifying and acting next friend, Beulah B. Lynch.

3. That on 24 June, 1930, defendant furnished for its customary charges telephone service in the dwelling of F. B. Lynch, in Warren County, where plaintiff made her home as a regular member of the family.

4. That as a part of the equipment necessary to furnishing such service in said Lynch home the defendant maintained a wire known as a ground wire, which consisted of a wire running from a certain point in the house to a metal rod driven into the ground outside of the house.

5. That a properly connected ground wire is a part of the usual and customary equipment at each dwelling where telephone service is maintained.

6. That for reasons for protection from lightning a properly connected ground wire is necessary at each dwelling where telephone service is maintained.

7. That at said Lynch dwelling on 24 June, 1930, and for several months prior thereto there was no lightning arrester other than a ground wire at said Lynch dwelling.

8. That unless the telephone apparatus at a dwelling is properly maintained, lightning may be conducted into such dwelling by striking other parts of defendant's general system of wires."

The plaintiff further alleges:

"9. That on 24 June, 1930, and for several months prior thereto defendant negligently and carelessly maintained at said Lynch dwelling an insufficient and improper ground wire, with full knowledge thereof from August, 1929, until 24 June, 1930.

10. That after a severe ball or bolt of lightning had entered said dwelling during the month of August, 1929, upon which occasion the telephone in said dwelling was wrecked, defendant's agent and employee inspected the ground wire connection, pronounced same wholly inadequate and unsafe and pretended to repair same, stating that such repair was temporary and would be made permanent and thoroughly safe at an early date.

11. That plaintiff and the other members of said Lynch home were wholly unfamiliar with matters of electricity and relied implicitly upon defendant's said agent and employee to protect them from the dangers of improperly grounded telephone apparatus; that plaintiff and said family exercised no control over said apparatus, both on account of their ignorance and defendant's control.

12. That said telephone, telephone apparatus and ground wire were carelessly and negligently allowed by defendant to remain in said unsafe, improper and insufficient condition in utter disregard for the safety of the occupants of said dwelling and with negligent, heedless, careless, reckless, and wanton disregard and indifference for their lives and property; that during the said period from August, 1929, until 24 June, 1930, plaintiff's life and well-being, as a result of defendant's said negligence were wholly at the peril of powerful balls and bolts of lightning and chance.

13. That on 24 June, 1930, at or about seven o'clock in the afternoon, while a thunderstorm was in progress, plaintiff passed within two feet of the telephone maintained as aforesaid; that upon reaching a point two feet therefrom plaintiff was struck on the right side of her head by a ball or bolt of lightning and rendered unconscious thereby, said ball or bolt of lightning having entered said dwelling over said improperly maintained apparatus; that plaintiff remained unconscious for several hours, was so painfully shocked and injured that her life was despaired of throughout a large part of the night, her body became weak, cold, stiff, and numb, and her hearing lost in her right ear for several days.

14. That as a direct and proximate result of her said injuries, plaintiff at times becomes exceedingly nervous, weak, cold, numb and frightened, such spells lasting for an hour or more and periods of extreme

weakness lasting for a day or more; that plaintiff has become generally nervous and suffers during every thunderstorm paroxysms of fear, resulting in extreme nervousness, fright, discomfort and suffering, all of which conditions will follow plaintiff throughout her life and continuously cause her great pain, suffering, annoyance, embarrassment and humiliation.

15. That all of plaintiff's said injuries and conditions were and are proximately and directly caused by the negligence of defendant, hereinbefore set forth, she having been before her injuries a perfectly normal, healthy and happy girl.

16. That as a direct and proximate result of defendant's said negligence and its reckless and wanton disregard for plaintiff's safety, plaintiff has been damaged in the sum of ten thousand dollars."

Defendant in its answer says:

"10. That it is admitted that during the month of August, 1929, lightning entered the dwelling and damaged the telephone there located; the remainder of section 10 is untrue and is denied.

11. That this defendant has no knowledge or information as to the matters set forth in this section and therefore denies the same.

12. That section 12 is untrue and is denied.

13. That it is admitted that on or about 24 June, 1930, that plaintiff was struck by lightning and suffered some ill effects therefrom; the remainder of said section is untrue and is denied. And further answering this section the defendant avers that on this day an electrical storm of unusual intensity developed in and around the community; that in addition to the wires and equipment used in connection with the telephone there was located upon said house a system of lightning rods and nearby a lighting system and that wires from all of these ran upon and into said house and as this defendant is advised, believes and avers the lightning entered said house either from the lightning rods or the lighting system. And this defendant further avers that at times of unusual electrical disturbance lightning often enters a dwelling by means of wires therein located and damages the equipment notwithstanding the existence of a properly installed and maintained ground connection.

14. That section 14 is untrue and is denied.

15. That section 16 is untrue and is denied.

Wherefore, defendant prays that plaintiff take nothing by her action and that it recover its costs."

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

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

2. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $5,000."

Judgment was rendered by the court below on the verdict. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The necessary facts and assignments of error will be set forth in the opinion.

Julius Banzet and Frank B. Banzet for plaintiff.
Kerr & Kerr and Gilliam & Bond for defendant.

CLARKSON, J. The defendant abandons all of its exceptions and assignments of error except one and says that "the single question presented by this appeal is the correctness of the action of the trial court in overruling defendant's motion for judgment as in case of nonsuit, C. S., 567, at the close of plaintiff's evidence and at the close of all the evidence.

The plaintiff was injured during an electrical storm when within two feet of defendant's telephone installed in her home by receiving a shock caused by a discharge of lightning, which damaged the telephone and connecting equipment. The negligence of defendant consisted in its failure to have a type of ground connection such as was approved and in general use. The defendant's position is that there was no evidence that its negligence, if conceded, was the proximate cause of the injuries." We think the court below made no error in overruling defendant's motions.

The defendant in its brief states so well its position that we quote it: "The defendant concedes that it was fixed with knowledge that lightning might be conducted over its telephone wires to and into plaintiff's home and there do injury, and that it was its duty to provide all known and approved devices in general use for preventing such consequences and guarding against accidents from lightning. Defendant further concedes that plaintiff's case was sufficient to be submitted to the jury from the standpoint of whether or not the method of grounding used by defendant at plaintiff's home at the time of the accident was such as was approved and in general use, but defendant insists that plaintiff's case was fatally defective in that it failed to show any causal connection between the negligence and the injuries; that as to this essential element of actionable negligence the jury necessarily was left to guess and speculate, and that for this reason the motion for judgment of nonsuit should have been allowed. The defendant's position is based upon the principle, which we assume is not seriously questioned, that the evidence in an action for personal injuries resulting from negligence must show not only the negligence and the injuries but the causal connection between the two. We admit that generally the question of whether or not

the negligence was the proximate cause of the injury is a question of fact for the jury to determine, but take the position that there is a preliminary question for the Court to determine, that is, whether or not there is any substantial evidence upon which to base the finding by the jury, just as, while the question of whether or not the defendant was negligent is for the jury to find, it is for the court to determine whether or not there is any evidence of it."

The principle of law is well settled that the negligence must be the proximate cause of the injury—there must be a causal relation between the negligence and the injury. *Byrd v. Express Co.,* 139 N. C., at p. 273; *Pangle v. Appalachian Hall,* 190 N. C., 833; *Smith v. Wharton,* 199 N. C., 246; *Denny v. Snow,* 199 N. C., 773; *Tuttle v. Bell,* 203 N. C., at p. 154; *Grimes v. Coach Co.,* 203 N. C., 605.

In *Rountree v. Fountain,* 203 N. C., at p. 383, where a nonsuit was granted, this Court said: "The plaintiff has 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."

The settled rule is that upon a motion as of nonsuit 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 to be drawn therefrom.

Pattie P. Lynch, the injured girl, testified in part: "The telephone in question was connected to the wall about four feet from the floor, I expect. In passing from the bed room going towards the kitchen through the dining room on the day in question, I had to pass within approximately two feet of the telephone in question. I recall going right near the telephone on that night and as I approached the telephone in that passageway, something like a sound hit me on the right side of the head and that is all I know."

F. B. Lynch, the father testified, in part: "The telephone was placed in my house on the customary basis of service. I had paid for the service twelve months in advance. I knew nothing about the telephone apparatus and relied upon the telephone company. I saw the bolt of lightning about 50 yards from the telephone line. I saw it on the wire that came in the house probably about 50 yards from the house. It was so quick I could not tell. I later observed the poles upon which these wires were strung and as much as a half a mile up the road from my house the poles were affected by the lightning, little pieces knocked off on the ground where the lightning came on down. At the time that Pattie was hurt, there was a tremendous explosion. It was worse than a

shot gun, something like a blasting at a stone quarry. The house was full of smoke and odor and every one in it was scared to death, not only excited about her, but scared naturally. The little piece of wire that came from the ceiling that was attached to the phone, was swealed (scorched or singed) and the ceiling in the house was smoked. The house was not damaged in any other way. By swealed, I mean swealed or smoked. It was not burnt or stained. It was swealed next to the telephone."

All the elements of actionable negligence can be proved by circumstantial as well as direct evidence. In the present case the evidence is to the effect that the injured girl was within two feet of the telephone "right near—something like a sound hit me on the right side of the head." The father testified that he saw the bolt on the telephone line about 50 yards on the wire that came into the house. "The little piece of wire that came from the ceiling that was attached to the phone was swealed." "It was swealed next to the telephone." One sees a smoking gun, hears the explosion and the gun is pointed in the direction of a man or a bird, the man or bird falls. One hears a hen cackle coming from a brush heap or hen house and on going to the brush heap or hen house one finds a warm egg. (There is an old saying "It looks like wisdom a hen never cackles until she lays an egg.") The evidence, though circumstantial, would be sufficient to be submitted to a jury to pass on.

The evidence on the part of plaintiff sustained the material allegations of the complaint. These were denied by defendant and its evidence sustained its contentions. The matter on all the ingredients of actionable negligence, including proximate cause, we think in this case there was sufficient evidence to be submitted to a jury to determine. The probative force is for them. The charge of the court below is not in the record and the presumption of law is to the effect that the court charged the law correctly applicable to the facts.

The liability of telephone companies is well stated in Jones, 2d ed. Telegraph and Telephone Companies, part sec. 198, p. 225, *et seq.*: "Telephone companies should equip their telephones which they have installed in buildings with known and approved devices so as to prevent their wires from conducting lightning or excessive currents of electricity to or into said buildings; and, in the discharge of such duty, they must exercise the care of a prudent person under like circumstances, otherwise they will be liable to any one injured thereby. Consequently they will be liable for personal injuries to one using their instruments in the ordinary manner during an ordinary electrical disturbance, or from a discharge of electricity from wires to persons not actually coming in contact therewith. Furthermore, where so dangerous an agency as

electricity is undertaken to be delivered into houses by electrical companies for daily use, very great care and caution should be observed, and such a degree thereof as is commensurate with the danger involved, and which is enhanced by the lack of the consumer's knowledge of the safety of the means and appliances employed to effect the delivery. It is generally held that in case of injuries sustained from electric appliances on private property the doctrine of *res ipsa loquitur* applies where it is shown that all the appliances for generating and delivering the electric current are under the control of the person or company furnishing the same. So, also, the company will be liable if the injury results, not from a shock received from an excessive current of electricity, but because of the negligence of the electric company in not properly attaching its fixtures."

In 26 R. C. L., part sec. 40, "Telegraphs and Telephones," at p. 531-2, the following principle is laid down: "A duty is imposed upon telephone companies to adopt precautions for preventing charges of atmospheric electricity from entering buildings over their telephone wires; and if there are known and approved appliances or devices which may prevent injury to persons or property from the above cause, due care should be used in selecting, placing and maintaining the same to such extent as may be reasonably necessary and effective, and for failure to perform the duty imposed upon it in this respect the company may become liable for injury or death occasioned thereby, even though the person injured in such case was not using the telephone. Such wires should also be properly insulated where the company is bound to know that they could become the conductor of a deadly current heavily and dangerously charged; and if a person is injured by an electric current from a telephone on his premises, such fact of itself is evidence of negligence on the part of the company."

In *Pearce v. Mountain States Tel. & Tel. Co.* (Colo.), 76 L. R. A., 1918-F, at p. 1105, the Court said, in part: "There was evidence that an excess current of electricity, induced by lightning, was conveyed over the telephone wires into plaintiff's building, setting it on fire. Defendant was bound to know that its wires might become charged with a dangerous current induced by lightning, which made it the duty of the company to use reasonable precaution to guard against fire. Because such excess current was produced by lightning makes no difference in defendant's liability, if it could have avoided the injury by exercising ordinary care and diligence. From the business in which defendant is engaged, it is presumed to possess special knowledge and skill in such matters, not possessed by laymen, which it was its duty to use for the protection of its patrons, no matter whether the current was generated

by it or produced by lightning. It was as much its duty to be diligent in affording protection against a current likely to come over the wires not generated by it, as a current it generated, and it could not escape this responsibility by pleading that the excess current was induced by lightning. No one was responsible for the lightning; but if defendant's faulty installation or management of the phone and its appliances was responsible for the excess current coming over the wires, entering the building and doing the damage, or if by the use of ordinary and reasonable care, precaution, and diligence it could have avoided the injury, it is responsible." *Turner v. Power Co.*, 154 N. C., 131; *Starr v. Telephone Co.*, 156 N. C., 435; *Shaw v. Public-Service Co.*, 168 N. C., 611; *McAllister v. Pryor*, 187 N. C., 832; *Elliott v. Comrs. of Lexington*, 201 N. C., 838.

We think the principle on which this action was tried is well settled in this State. The evidence was sufficient to have been submitted to the jury on the question of actionable negligence. The question of proximate cause was for the jury to determine. There is no evidence of an intervening cause that produced the injury. In law we find

No error.

STATE OF NORTH CAROLINA ON THE RELATION OF A. G. MYERS, J. ALLAN TAYLOR, E. K. BISHOP, JAMES A. GRAY, JOHN W. HOUSE, I. M. BAILEY, GEORGE MARSH, T. J. PURDIE, M. O. BLOUNT, T. AUSTIN FINCH, CHAS. G. YATES AND SAM P. BURTON, CONSTITUTING THE TRANSPORTATION ADVISORY COMMISSION, v. WILMINGTON-WRIGHTSVILLE BEACH CAUSEWAY COMPANY, TIDEWATER POWER COMPANY AND OTHERS.

(Filed 1 March, 1933.)

1. Judgments M a—Judgment stands until reversed or modified according to law.

Where in a proceeding for the condemnation of land by the State for the purpose of transferring same to the Federal Government for an inland waterway, chapter 266, Public Laws of 1925, chapter 44, Public Laws of 1927, chapters 4 and 7, Public Laws of 1929, the State denies the title of the defendants to the lands in question, and judgment is entered by the court upon its findings of fact that defendants were the owners in fee of the lands and were entitled to just compensation and damages resulting from such taking, and it is ordered that the cause be retained for trial upon the issue of the amount of compensation and damages, and no appeal is taken from the judgment and the judgment is not reversed or modified according to law, it is conclusive in all respects upon the parties. C. S., 601.

2. Eminent Domain C c—Defendants held entitled to have amount reasonably expended for construction of draw-bridge included as element of damages.

Lands of the defendant public-service corporations were condemned by the State for the purpose of transferring same to the Federal Government for an inland waterway. Defendants maintained a bridge and trestle over the waters where the canal was to be constructed, and it was necessary to destroy them, necessitating the construction of a temporary bridge for the maintenance of defendants' franchises. A permanent draw-bridge was thereafter constructed by defendants in accordance with specifications and requirements of the United States Government in its jurisdiction over navigable waters. The trial court allowed compensation and damages for the lands actually taken, for the easement acquired over the other lands of defendants, the amount reasonably expended for the construction of the temporary bridge and the rebuilding of mains and electric lines: *Held*, the amount reasonably expended by defendants for the construction of the draw-bridge in accordance with the specifications of the United States Government should have been included as an element of damages, the construction of such draw-bridge being necessary for the preservation of defendants' franchises as public-service corporations, and for the preservation of the value of their property not included in the right of way condemned.

APPEAL by defendants from *Barnhill, J.*, at January Special Term, 1932, of NEW HANOVER. Error and Remanded.

Since the appeal by the defendants from the order of Grady, J., at September Term, 1929, of the Superior Court of New Hanover County, in the above entitled action, was heard and decided by the Supreme Court, at Spring Term, 1930 (199 N. C., 169, 154 S. E., 74), the issues raised by the pleadings involving the title to the lands described in the complaint have been tried and determined in accordance with the contentions of the defendants. On the facts found by the court, and in accordance with its conclusions of law, as set out in the judgment, it was ordered, adjudged and decreed that each of the defendants is entitled to just compensation for the land owned by the said defendant and taken by the plaintiff for the purpose of conveying the same to the United States for use as a right of way for an inland waterway, to be constructed under the provisions of an act of Congress. It was further ordered that the action be and the same was retained for the assessment of damages as provided by law or by agreement of the parties. This judgment was rendered by Midyette, J., on 25 May, 1931. Neither of the parties has prosecuted an appeal from said judgment to the Supreme Court.

Pursuant to the order in the foregoing judgment, the action came on for trial, and was tried before Barnhill, J., at January Special Term, 1932, of the Superior Court of New Hanover County, when and where judgment was rendered as follows:

"This cause was originally tried before Midyette, J., upon a waiver of trial by jury, at which trial all issues raised by the pleadings, except the issue of damages or compensation, were determined. The cause now comes on to be heard by the undersigned judge at this the January Special Term, 1932, of the Superior Court of New Hanover County. When the cause was called for trial, all parties specifically waived trial by jury and agreed that the court should hear the evidence, find the facts therefrom, and render judgment thereon as upon a verdict of a jury. Failure to have a hearing before commissioners, and all other omissions or irregularities in the preliminary proceedings were likewise waived.

The court proceeded to hear the evidence which appears of record, upon the following issue: 'What amount are the defendants entitled to recover of the plaintiffs as compensation for the lands taken and condemned for a right of way for the Inland Waterway Canal over and across the lands of the defendants?'

After hearing the evidence and the argument of counsel, and after consideration of the briefs submitted by counsel, the court finds the following facts:

1. The lands of the defendant Tidewater Power Company, hereinafter referred to as the Power Company, so condemned, is a strip 192.5 feet by 1,000 feet; and the lands of the defendant, Wilmington-Wrightsville Beach Causeway Company, hereinafter referred to as the Causeway Company, so condemned, is a strip 207.5 feet by 1,000 feet. The two parcels are contiguous and constitute a strip of land 400 feet by 1,000 feet, and forms a part of the rights of way of the two defendants, which are public-service corporations, from the mainland at Wrightsville Station to Harbor Island, and as to the defendant Tidewater Power Company, it constitutes a part of the right of way of its interurban system extending from Wilmington to and through the town of Wrightsville Beach.

2. Of the land condemned a strip 400 feet by about 206 feet was actually taken and has been converted into a part of the Inland Waterway Canal.

3. In constructing said canal it was necessary to cut the rights of way of the defendant companies, and in so doing a trestle of the defendant, Tidewater Power Company (about 201 feet in length), and about 5 or 6 feet of its fill was destroyed; and a part of the bridge of the defendant Causeway Company (about 180 feet in length), and about five or six feet of its fill, was removed.

4. There is an artificially constructed fill extending from Harbor Island westward to within a short distance of the mainland at Wrightsville Station used jointly by the defendants as a right of way. This

fill is constructed over and across sound marshland, most of which (except the fill itself) overflows at high tide. The land between the western end of the fill and the mainland is composed of marshland and a small stream or water course known as Bradley's Creek. The canal does not follow the said stream across the premises in controversy and the question of navigability of said stream raised by plaintiffs has been adjudged at the former hearing.

5. The space between the fill and the mainland referred to in the foregoing paragraph was, on the part of the Power Company, bridged by a trestle, and on the part of the Causeway Company, by a bridge.

6. In constructing said Inland Waterway Canal about 201 feet of said trestle and about 180 feet of said bridge, were completely cut away and destroyed; and in addition thereto, five or six feet were cut off the end of the fill. The right of way condemned but not actually within the bounds of the canal—approximately 800 feet by 400 feet—lies mostly to the east of the canal itself and embraces a portion of said feet.

7. The plaintiff, acting under the authority conferred by statute—chapter 44, Public Laws of North Carolina, 1927, and chapters 4 and 7, Public Laws of North Carolina, 1929—brought this action, condemned said right of way over and across the property of the defendants, 1,000 feet by 400 feet, and immediately conveyed said easement to the United States of America to be used in the construction of the Inland Waterway, as contemplated by said acts of the General Assembly of North Carolina. The actual cutting of said property of the defendants was done by the authority of the government of the United States, but there is a stipulation of record in this action, by the terms of which plaintiffs bind themselves not to undertake to avail itself of that fact; and the question before the court is to be determined as if said cutting had been done by the plaintiffs. The terms of said stipulation are not sufficiently broad to bind the State to pay for a draw-bridge installed under regulations and requirements of the government of the United States relating to crossings over navigable streams.

8. The defendant Power Company had and maintained gas mains and electric lines along said right of way extending to the town of Wrightsville Beach for the service to its customers on Harbor Island and in the town of Wrightsville Beach. In cutting said canal, it was necessary for and the government of the United States did sever these mains and lines.

9. The actual taking of said property by the government of the United States was begun on 4 November, 1930, and in order for the defendants to prevent any interruption in their service to the public and to maintain their respective franchises, it was necessary for them to, and they did, construct a temporary bridge or structure for use jointly by the defendants during the time the use of their rights of way at the point

of said canal was prevented by the cutting of the canal and the construction of a draw-bridge over the same.

10. In reconstructing their rights of way, after the construction of the said canal, the defendants were required by the government of the United States to build and maintain a draw-bridge in accordance with the rules and regulations prescribed by said government, in the exercise of its jurisdiction over navigable streams, which requirements were imposed by virtue of the authority of said government over navigable waters and in order to permit free passage of ships along said canal, the canal as constructed being navigable.

11. The value of the lands taken, and of that subjected to the dominant easement of the government of the United States, as well as of the lands of the defendants lying to the eastward, rest almost entirely, if not exclusively, on its availability and adaptability for the uses to which it is now being subjected, to wit: as a right of way for public-service corporations. The said property, disconnected from and not considered in connection with the respective franchises of the defendant companies, is of little value.

12. In the condemnation of said property, the respective franchises of the defendant companies, were not taken or materially interfered with, except that in order to maintain the same it was necessary for the defendants to construct the temporary bridge or structure referred to in paragraph 9.

13. The reasonable value of the trestle of the defendant Power Company, which was destroyed, and the value of the lands actually taken, including bulkhead and part of fill, was thirty-nine hundred dollars ($3,900).

14. The reasonable value of that part of the bridge of the defendant Causeway Company, including the land actually taken, was eleven thousand dollars ($11,000).

15. The easement imposed on the lands of both defendants which was not actually taken in the construction of the canal was reasonably worth five hundred dollars ($500), and the said sum will fully compensate defendants for the imposition of said easement upon their lands.

16. It reasonably cost the defendant Power Company fifteen hundred ninety-five and 53/100 dollars ($1,595.53) to rebuild and replace its gas mains, which were cut and removed in the construction of said canal; and nineteen hundred ninety-two and 14/100 dollars ($1,992.14) to rebuild and replace its electric lines which were likewise cut and removed in the construction of said canal.

17. It reasonably cost the defendant the sum of twenty-eight hundred fifty-two and 67/100 dollars ($2,852.67) to construct a temporary bridge for use pending the construction of the canal and to operate the same

during said period. This includes cost of engineering, supervision of construction, and expense of removal of structure after the use of the same had been abandoned. Of the amount claimed by the defendants for this item, the salaries of two of the operators for the period of the operation of said temporary structure was not incurred by reason of said condemnation, for the reason that their services were required in the operation of the original bridge. Only one additional operator, in order to provide twenty-four hours service, was required.

18. There were no benefits, either general or special, accruing to the defendants or either of them by reason of the construction of said canal.

19. Any and all items of expense or alleged damage claimed by the defendants or either of them not mentioned in the foregoing findings of fact are disallowed by the court as elements of compensation.

The court is of the opinion that defendants are not entitled to recover for the costs of the construction of the draw-bridge and expenses incident thereto, or to have the same considered as an element of damage in arriving at a sum which will justly compensate them for the land taken and subjected to the dominant easement involved in this controversy for the reason that the same was required by the government of the United States in the exercise of its regulatory authority over and concerning navigable waters. It is, however, of the opinion that the just compensation the plaintiff is required to pay to the defendants for the taking of said lands and the imposition of said easement embraces the reasonable value of the property taken; the decreased value of the residue of the property owned by the defendants by reason of the imposition of said easement upon their lands; and the reasonable costs incurred in maintaining a temporary service for the preservation of their respective franchises, pending the construction of the canal. These items as found by the court are included in findings of fact Nos. 13, 14, 15, 16 and 17, and total the sum of twenty-one thousand eight hundred forty and 34/100 dollars ($21,840.34). And the court finds as a fact that the value of the lands taken, and the decreased value of the remaining property owned by the defendants and not taken by the plaintiffs, will not exceed said sum, and that the payment of said sum will constitute full and just compensation for the lands taken and the easement imposed upon the lands of the defendants.

The defendants announced in open court that they had an agreement for the distribution of any recovery in this action, and requested the court to award the sums allowed in this action to the defendants jointly.

It is therefore ordered, considered and adjudged that the defendants have and recover of the plaintiffs as just compensation for the lands taken and the easement imposed, the sum of twenty-one thousand eight

hundred forty and 34/100 dollars ($21,840.34) with interest thereon from 4 November, 1930, together with their costs incurred in this action, to be taxed by the clerk. M. V. BARNHILL, *Judge Presiding.*"

Each of the defendants excepted to the foregoing judgment and appealed therefrom to the Supreme Court.

I. M. Bailey and Bryan & Campbell for plaintiffs.
Thos. W. Davis and L. J. Poisson for defendant Power Company.
George Rountree and J. O. Carr for defendant Causeway Company.

CONNOR, J. This action was begun in the Superior Court of New Hanover County on 15 July, 1929. It was begun and prosecuted in the name of the State of North Carolina by the Transportation Advisory Commission, as an agency of the State organized under the provisions of chapter 266, Public Laws of North Carolina, 1925. This statute is entitled, "An act to create an Advisory Commission to investigate and report upon the question of freight rate discrimination and upon the question of the development of waterways." The Commission was expressly directed to investigate and report to the Governor "what action, if any, the State can safely and properly take in coöperation with the Federal Government or otherwise, to aid in the development of water transportation to and from North Carolina ports." The statute became effective on 10 March, 1925, and since said date has been in full force and effect.

The Congress of the United States in the River and Harbor Act, which was approved on 21 January, 1927, authorized the construction by the Federal Government of an inland waterway or inter-coastal canal, in accordance with surveys and reports made by United States engineers, in aid of interstate commerce by water transportation, provided the right of way for such inland waterway or canal was furnished by local interests, without cost to the United States. This inland waterway or inter-coastal canal, as located by the engineers, and as authorized by Congress, extended in part from Beaufort to Cape Fear River, in North Carolina. By the provisions of chapter 44, Public Laws of North Carolina, 1927, as amended by chapters 4 and 7, Public Laws of North Carolina, 1929, the General Assembly of this State undertook to furnish to the United States, without cost to the Federal Government, the right of way for said waterway or canal from Beaufort to Cape Fear River, and to that end authorized and directed the Transportation Advisory Commission to secure such right of way, either by agreement with the owners of lands over which the right of way was located, or by condemnation under the power of eminent domain, conferred upon the said Commission for that purpose.

This action was begun to secure the right of way for said inland waterway or inter-coastal canal over the lands described in the complaint. The defendants were in possession of said lands, claiming the title thereto in fee. The plaintiffs denied that the defendants were the owners of said lands, and alleged that the State had the right to take possession of the same without paying compensation or damages to the defendants. In an appeal by the defendants to this Court from an order made in the action by Grady, J., at September Term, 1929, of the Superior Court of New Hanover County, it was held that the facts stated in the complaint are sufficient to constitute a cause of action on which the plaintiffs are entitled to relief. The validity of the statutes under which the action was begun and prosecuted, was upheld. The order denying the motion of the defendants that the action be dismissed was affirmed. See *Myers v. Causeway Co.*, 199 N. C., 169, 154 S. E., 74.

Since the appeal by the defendants from the order of Grady, J., was heard and decided by this Court, the action has been tried on the issues raised by the pleadings and involving the title to the lands described in the complaint. At this trial before Midyette, J., on the facts found by the court, it was adjudged that the defendants are the owners in fee of the lands described in the complaint, and taken by the plaintiff under the power of eminent domain. It was further adjudged that the defendants are entitled to just compensation for said lands, and to damages resulting from the taking of said lands by the plaintiff. It was ordered that the action be and the same was retained for trial of the issue involving the amount which the defendants are entitled to recover of the plaintiff as compensation and damages. The judgment rendered by Judge Midyette is dated 25 May, 1931. This judgment has not been reversed or modified according to law, and is conclusive in all respects upon the parties to this action. C. S., 601.

On their appeal to this Court from the judgment of Judge Barnhill, the defendants contend that there is error in said judgment for that the court held as a matter of law that the defendants are not entitled to recover of the plaintiffs, as an element of their damages, the cost of the construction of the draw-bridge which the defendants were required to construct over the lands taken by the plaintiffs, under the power of eminent domain, in order to maintain their respective franchises as public-service corporations, and to preserve the value of their property not included within the right of way for the inland waterway or inter-coastal canal, which has been constructed by the United States Government. The court did not include in the amount awarded to the defendants the cost of such bridge, nor did it find the reasonable cost of the construction of a bridge for that purpose, although there was evidence tending to show such cost. In this there was error. On all the facts

appearing in the record, the amount reasonably expended by the defendants in the construction of the bridge over the right of way of the inland waterway or canal, in order to maintain their respective franchises as public-service corporations, and to preserve the value of their property not included in the right of way, is a proper element of the damages which the defendants are entitled to recover in this action. In order that such amount may be found by the court, and included in the judgment, this action is remanded to the Superior Court of New Hanover County.

Error and remanded.

D. B. ANDREWS v. NATIONAL OIL COMPANY.

(Filed 1 March, 1933.)

1. Pleadings D a—

Upon demurrer the allegations of the complaint are to be taken as true, and a demurrer to the sufficiency of the complaint will not be sustained if the complaint in any of its parts sufficiently alleges a cause of action.

2. Money Received B a—Complaint held to sufficiently state cause of action for money had and received.

The complaint in this action alleged in substance that plaintiff ran a gasoline filling station leased by the defendant under an agreement that plaintiff would buy gasoline from defendant at one cent per gallon over the wholesale price and retail it for the retail market price, that the pumps were owned and controlled by defendant, that plaintiff discovered that he was losing money and repeatedly complained to defendant and suggested that the pumps were leaking, that defendant, with a reckless disregard for the truth of its statements, falsely represented that the pumps were in good condition and suggested that the loss was due to plaintiff's bookkeeping, that sometime thereafter plaintiff tested the pumps and found a shortage and that defendant then also tested them with the same result, that defendant tore up the concrete and discovered a leak in the pipes as big as a man's finger. Plaintiff prayed judgment for the amount he had paid defendant for gasoline which had leaked from the pumps as money had and received by defendant to the use of plaintiff: *Held*, the exact relationship between the parties is immaterial, and the complaint sufficiently states a cause of action for money had and received, and a demurrer thereto was properly overruled.

APPEAL by defendant from *Daniels, J.*, at October Term, 1932, of EDGECOMBE. Affirmed.

The complaint is as follows:

"1. The plaintiff, D. B. Andrews, is a resident of Edgecombe County, North Carolina, and the defendant National Oil Company is a corporation organized and doing business under the laws of the State of Virginia, having its principal office in the city of Richmond, but doing

business in North Carolina and having an office in Nash County in said State, on Earl Street, in the city of Rocky Mount.

2. On 6 October, 1930, the defendant was in possession of a gasoline filling station in the city of Rocky Mount, at the corner of Church and Nash streets, known as 'Church Street Service Station,' under a lease expiring 30 September, 1932. The said service station was equipped with three gasoline tanks buried underground and covered with concrete, two of which had one gasoline pump each, the other having two gasoline pumps connected with the tank by underground pipes through a T-joint.

3. That on 6 October, 1930, the defendant made a verbal contract with the plaintiff whereby plaintiff agreed until the expiration of said lease to occupy and operate the said service station, buying all gasoline and oil for sale for automobiles from the defendant daily therefor at current tank-wagon prices, plus one cent additional per gallon, and selling same at current retail prices in Rocky Mount, N. C., the additional one cent per gallon on the gasoline being paid as rent for the premises and the tanks and gasoline pumps, the plaintiff himself owning the air pump, greasing equipment, tools, etc., plaintiff's compensation for his services as sales agent or commission man for defendant being the difference between the cost and the retail price of the products handled.

4. Within sixty days after 6 October, 1930, the plaintiff discovered that he was losing money, apparently through shortage in gasoline, and complained to the defendant about it, suggesting that the underground tanks belonging to the defendant were leaking. The defendant assured plaintiff that this could not be so, that it had operated these tanks for a long time and that it knew that they were in good condition, that the defendant suggested that the loss was due to plaintiff's faulty records, and not to any leak. Plaintiff accepted the assurances made by the defendant and continued to buy gasoline from it. Plaintiff had no right to tear up concrete and inspect the tanks which were the property of the defendant, and no duty to do so, and relied upon the assurances made to him by the defendant in continuing to let the defendant put gasoline into the said tanks.

Said assurances were in fact untrue, and were made by defendant in reckless disregard of their truth or falsity, with intent that plaintiff should rely thereupon and continue to buy gasoline from the defendant. Throughout the year 1931, plaintiff repeatedly made complaints to the defendant that he was losing gasoline in some unexplained way, and requested that the defendant tear up the concrete and examine the tanks, but as often as plaintiff made complaint the defendant assured him that it must be faulty records, and that there could be no leak in the tanks, which assurances were accepted by the plaintiff as a possible

explanation, until 19 March, 1932, when plaintiff made a careful test of the pumps on the largest tank, allowing no one to operate these pumps except himself from the 19th of March until the 21st of March, locking both pumps and fill pipe when plaintiff was absent during this period, the result of which test was a loss of some unexplained cause of forty-three gallons out of two hundred and seventy gallons, in the space of 48 hours. Thereafter the plaintiff refused to permit the defendant to put any more gasoline into the tank with the two pumps which had been tested. The defendant for the first time made a test on its own account on Tuesday, 22 March, 1932, locking both pumps and fill pipe, and found a loss of eight gallons out of one hundred gallons in the space of 5 hours. A few days thereafter the defendant's district manager again insisted that the loss was plaintiff's fault and not a leak in the tanks, but plaintiff persisted in refusing to permit any gasoline to be put into that tank, and finally the defendant broke up the concrete and examined the tank and found a leak in the pipe at the T-joint, through which a stream of gasoline as big as a man's finger was running out. The plaintiff immediately demanded reimbursement from the defendant for gasoline lost through the leak, which demand the defendant referred to its district manager, who ignored it.

5. The defendant repaired the leak and shortly thereafter, to wit, on 7 April, 1932, at the request and insistence of the defendant, the plaintiff agreed to a rescission of his contract with the defendant, and sold his equipment, thus terminating his connection with the defendant.

6. That the plaintiff has suffered a minimum loss through the said leak of 8,370 gallons of gasoline from 6 October, 1930, to 7 April, 1932, for which the plaintiff paid the average price of 16½ cents per gallon, making a total of $1,381.05 which the plaintiff has paid the defendant for gasoline which was lost through the leak in the equipment belonging to the defendant into which plaintiff was required to place said gasoline, which was under the sole control of the defendant, for which the plaintiff has received no benefit, which amount was not paid voluntarily, but upon the insistence of the defendant that plaintiff's loss was due to plaintiff's fault in that he was ignorant of proper methods of accounting which assurances were accepted by the plaintiff until 19 March, 1932, when plaintiff acquired definite and reliable knowledge that there was a leak in the defendant's equipment. The said money was paid by plaintiff to the defendant in good faith under a mutual mistake of fact, induced by the assurances of the defendant, but for which plaintiff would not have paid for said gasoline, and plaintiff is entitled to recover the same from the defendant in equity and good conscience as money had and received to his use.

Wherefore, plaintiff prays that he recover of the defendant the sum of $1,381.05 with interest from the average interest date, 1 July, 1931,

at the rate of six per cent per annum and the costs of this action, and such other and further relief as he may be entitled to."

The demurrer of defendant is as follows: "The defendant demurs to the complaint filed in this action by the plaintiff upon the following grounds; that the complaint does not state facts sufficient to constitute cause of action, for that: (1) The complaint does not allege facts which show that the defendant was under any legal or contractual duty to discover the leaks in the tank, if any existed, or to repair such leaks, if any existed. (2) The complaint does not allege facts which show that the defendant knew of the existence of such leaks in the tank, if any existed, and knowing such facts falsely represented to the plaintiff that none existed. Wherefore, the defendant prays that this demurrer to the complaint be sustained and that this action be dismissed at plaintiff's cost. This 13 September, 1932."

The court below rendered the following judgment: "This cause coming on to be heard upon demurrer filed by defendant to the complaint and being heard and the plaintiff moving for leave to file an amendment to the complaint during the course of the argument, the defendant not objecting, the court allowed the amendment and the cause was determined upon the demurrer to the complaint as amended. After argument, it is ordered, considered and adjudged: (1) That the plaintiff is given leave to amend the complaint by inserting in paragraph four thereof the following: 'Said assurances were in fact untrue, and were made by defendant in reckless disregard of their truth or falsity, with the intent that plaintiff should rely thereupon and continue to buy gasoline from the defendant.' (2) That the demurrer filed by the defendant, considered as directed to complaint as amended, is overruled and the defendant is allowed thirty days from date of this judgment to file answer."

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

Battle & Winslow for plaintiff.
Gilliam & Bond for defendant.

CLARKSON, J. "The office of a demurrer is to determine the legal sufficiency of a pleading, admitting for the purpose the truth of all the matters and things alleged therein." *Davies v. Blomberg,* 185 N. C., at p. 496. *Mountain Park Institute v. Lovill,* 198 N. C., at p. 645-6.

In *Smith v. Suitt,* 199 N. C., at p. 9, speaking to the subject: "The complaint is not demurrable unless it is wholly insufficient. If a demurrer is interposed to a whole complaint and any one of the causes of action is good the demurrer will be overruled."

The facts: The defendant was in possession of a filling station in the city of Rocky Mount, under a lease expiring 30 September, 1932. The service station was equipped with three gasoline tanks buried underground and covered with concrete, two of which had one gasoline pump each, the other having two gasoline pumps connected with the tank by underground pipes through a T-joint. On 6 October, 1930, defendant made a verbal contract "whereby plaintiff agreed until the expiration of said lease to occupy and operate the said service station, buying all gasoline and oil for sale for automobiles from the defendant and paying the defendant daily therefor at current tank-wagon prices, plus one cent additional per gallon, and selling same at current retail prices in Rocky Mount, N. C., the additional one cent per gallon on the gasoline being paid as rent for the premises and the tank and gasoline pumps, the plaintiff himself owning the air pump, greasing equipment, tools, etc."

Within sixty days plaintiff discovered that he was losing money and complained to defendant, suggesting that the underground tanks belonging to it were leaking. "The defendant assured plaintiff that this could not be so, that it had operated these tanks for a long time and that it knew that they were in good condition." Relying on the assurances which were untrue and made by defendant in reckless disregard of their truth or falsity, with intent that plaintiff should rely on same, and from the pleadings and by inference he did rely on same, and plaintiff continued to buy from defendant gasoline. The complaints were repeatedly made by plaintiff to defendant, and defendant assured him "that there could be no leak in the tanks."

On 19 March, 1923, plaintiff made test and found "a loss of eight gallons out of one hundred gallons in the space of five hours. A few days thereafter the defendant's district manager again insisted that the loss was plaintiff's fault and not a leak in the tanks, but plaintiff persisted in refusing to permit any gasoline to be put into that tank, and finally the defendant broke up the concrete and examined the tank and found a leak in the pipe at the T-joint, through which a stream of gasoline as big as a man's finger was running out. The plaintiff immediately demanded reimbursement from the defendant for gasoline lost through the leak, which demand the defendant referred to its district manager, who ignored it."

The plaintiff now sues for gasoline "which was lost through the leak in the equipment belonging to the defendant into which plaintiff was required to place said gasoline, which was under the sole control of the defendant"; and alleges that "plaintiff is entitled to recover the same from the defendant in equity and good conscience as money had and received to his use."

It is said that fraud is hard to define as the ramifications are so subtle that they are hard to discover—like unto the serpent in the Garden of Eden "more subtle than any beast of the field."

The relationship between plaintiff and defendant, under the contract between them, is not easy to define. We do not think it necessary to go into the different aspects of employer and employee, landlord and tenant, licensor and licensee, sales agent or commission man, bailor and bailee, independent contractor, etc. These are elaborately argued pro and con on the hearing and in the briefs of litigants.

In *Acceptance Corporation v. Mayberry,* 195 N. C., at p. 513, it is said: "The Court has repeatedly said that in order to determine the nature of a contract, and the relation of the parties thereto, with respect to each other, and with respect to the subject-matter of the contract, it looks to the real intention of the parties and construes their contract accordingly, without much, if any, regard to the name by which it is designated or to the particular language employed."

"The law is, that 'an agreement ought to receive that construction which will best effectuate the intention of the parties to be collected from the whole of the agreement,' and that 'greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent.' Anson on Contract, p. 425; Wigmore on Evidence, sec. 2460." *Cole v. Fibre Co.,* 200 N. C., at p. 489; *Rushing v. Texas Co.,* 199 N. C., 173.

The defendant was in possession of a gasoline filling station. It had buried underground, concealed in the earth and covered with concrete, three gasoline tanks for the purpose of housing gasoline. Two of these had one gasoline pump each and the other had two gasoline pumps, connected with the tank by underground pipes through a T-joint. In the pipe at the T-joint to the gasoline tanks was a leak, which was unknown to plaintiff. Defendant had the sole control over the tanks, pipe and T-joint. They were installed by and the property of defendant. Defendant knew, or in the exercise of due care ought to have known, of the leak. Plaintiff each day put the gasoline which he sold and made a cent a gallon on, into the tanks. Every assurance was made plaintiff during the loss of gasoline that the tanks were in good condition and there was no leak. Plaintiff relied and acted on these assurances, which were untrue, the truth or falsity of which, in the exercise of due care, defendant ought to have known were untrue. Plaintiff kept buying gasoline from defendant, paying for same and at last discovered by test the leakage in the pipe at the T-joint—which was owned and controlled by defendant. Finally defendant broke up the concrete, which it had the sole control over, and found a leak in the pipe at the T-joint, through which a stream as big as a man's finger was running out.

Call the contract what you may, we think plaintiff has alleged a good cause of action against defendant. The strength of the common law is its elasticity to meet the varying situations as they arise in the course of human events. The filling station, which has come into play with the motor vehicles, and their relation to the gasoline and oil distributors are interwoven. In the present case *one party* owned the land, *the operator* the air-pump, greasing equipment, tools, etc. The *distributor* the underground pipes, tanks, T-joint, etc., concealed and covered with cement, and the tanks connected by underground pipes with a T-joint. The operator got one cent a gallon for his services and the distributor each day supplied the gasoline as needed. The demurrer was properly overruled.

In *Bahnsen v. Clemmons*, 79 N. C., at p. 557, we find: "'When the defendant,' says Mr. Greenleaf 'is proved to have in his hands the money of the plaintiff which *ex equo et bono, he ought to refund, the law conclusively presumes that he has promised so to do,* and the jury are bound to find accordingly; and after verdict the promise is presumed to have been actually proved.' 2 Greenleaf Ev., sec. 104. 'The count for money had and received which in its spirit and objects has been likened to a bill in equity, may in general be proved by any legal evidence showing that the defendant has received or obtained possession of the money of the plaintiff which in equity and good conscience he ought to pay over to the plaintiff.' *Ibid.*, sec. 117."

In *Jenkins v. Wood*, 201 N. C., at p. 463, is the following: "The defendant insists that fraud is not sufficiently pleaded, but the facts warrant a recovery for money had and received, and the complaint, by liberal construction, is broad enough to support such theory. *Stroud v. Ins. Co.*, 148 N. C., 54, 61 S. E., 626; *Mitchem v. Pasour*, 173 N. C., 487, 92 S. E., 322."

We see no error in the court below overruling the demurrer. The judgment is

Affirmed.

T. W. DANIEL AND J. M. DANIEL v. TALLASSEE POWER COMPANY.

(Filed 1 March, 1933.)

1. Tenants in Common B c—Refusal to confine action between tenants for waste to issue of title held not error although partition proceedings had been instituted.

One tenant in common may sue another for waste, and while a tenant in common is usually entitled to an allotment of that part of the common property on which in good faith he has made improvements and to have its value assessed as if no improvements had been made, where suit has been entered against one tenant in common by his cotenants

to recover damages for the ponding of water upon the land and for waste in cutting trees thereon, and pending the action the defendant institutes proceedings in partition, and the action for waste is first upon the calendar: *Held*, the trial court's refusal to limit the action for waste to the issue of title and upon determination of the issue to have the land partitioned is not error, and the fact that the proceedings for partition is pleaded as a further defense does not affect the allegation in the complaint. C. S., 891.

2. Deeds and Conveyances D c—Admission of parol evidence of boundary in contradiction of unambiguous description in deed held error.

In an action involving the boundaries to lands the plaintiff introduced evidence of a parol agreement between plaintiff and contiguous owners fixing the boundaries. The description in the deed introduced by plaintiff was unambiguous and was at variance with the boundaries agreed upon by parol: *Held*, the evidence of the parol agreement respecting the boundaries was incompetent, the parol agreement not being contemporaneous with the execution of the deed, and being in contradiction of the unambiguous description therein.

APPEAL by defendant from *Harding, J.*, at July Term, 1932, of DAVIDSON. New trial.

The plaintiffs and the defendant are tenants in common of a tract of land situated in Healing Springs Township, Davidson County, T. W. Daniel owning a 3/24 undivided interest, J. M. Daniel a 7/24 undivided interest, and the defendant at 14/24 undivided interest.

The plaintiffs brought suit to recover damages of the defendant for ponding water upon the land by the construction of a dam on Yadkin River and for waste committed by cutting and removing timber from the land.

The defendant denied that the boundaries of the land are as alleged by the plaintiffs, set out others which it claimed to be the correct boundaries, and alleged that there was pending in the Superior Court of Davidson County an action entitled "Tallassee Power Company *v.* J. M. Daniel and T. W. Daniel," in which the petitioners requested partition of the land in controversy and an allotment to the defendant of the part which the defendant has cleared and flooded.

The jury returned the following verdict:

1. Are the plaintiffs and defendants owners and tenants in common in the land in controversy as contended for by the plaintiffs and represented on the map made by the surveyor appointed by this court, bounded by the letters and figures on said map and the lines running between red A, red B, yellow one, yellow two and yellow three, or red E, red F, and down Flat Swamp Creek as represented on the map to red A? Answer: Yes.

2. Are the plaintiffs and defendants owners of and tenants in common in the lands in controversy as contended for by the defendant and

represented on the map made by the surveyor appointed by this court, bounded by the letters on said map and the lines running between red A, red B, red C, red M, red N, red O, red D, red E, or yellow three, red F, and down Flat Swamp Creek, as represented on the map, back to red A? Answer: .....

3. Did the defendant wrongfully damage the said land, as alleged in the complaint? Answer: Yes.

4. What permanent damages, if any, are the plaintiffs entitled to recover of the defendant? Answer: $3,000.

It was adjudged that the parties are tenants in common, as alleged, of the tract described in the complaint, that the plaintiffs recover $3,000 as permanent damages, and that upon payment of this sum the defendant, the Carolina Aluminum Company (successor of Tallassee Power Company), shall have a permanent easement to maintain the impounded water at the present maximum height of the High Rock Dam free from any claims on the part of the plaintiffs, their heirs and assigns, and to clear and keep clear a strip of land two feet above the maximum elevation of the dam.

The defendant excepted and appealed.

Spruill & Olive, J. M. Daniel, Jr., and Phillips & Bower for plaintiffs.

W. M. Hendren, Raper & Raper and R. L. Smith & Sons for defendant.

ADAMS, J. After this action had been instituted the defendant brought a proceeding before the clerk of the Superior Court for partition of the land owned by the parties and asked that the area appropriated by the defendant be allotted to the Power Company at a value to be estimated without regard to the use for which the property had been taken. The present plaintiffs, who were defendants in that action, filed an answer and upon the joinder of issue on the question of location the proceeding was transferred to the civil issue docket. At the July Term both actions were on the calendar for trial on the same day, the case at bar having precedence in point of time. When the case was called the defendant moved that the trial be restricted to an issue of title and upon determination of the issue to have the land partitioned. The court denied the motion and the defendant excepted.

This Court has frequently applied the equitable principle that a tenant in common upon the partition of land is usually entitled to an allotment of that part of the common property on which in good faith he has made improvements and that its value is to be assessed as if no improvements had been made. *Pope v. Whitehead,* 68 N. C., 191; *Collett v. Henderson,* 80 N. C., 337; *Simmons v. Foscue,* 81 N. C., 86;

Cox v. Ward, 107 N. C., 507; *Pipkin v. Pipkin,* 120 N. C., 161; *Fisher v. Toxaway Co.,* 171 N. C., 547; *Layton v. Byrd,* 198 N. C., 466.

These were proceedings for the partition of property, and if the Power Company were the actor the question proposed would demand consideration; but here the cause of action is set forth in the complaint filed by the plaintiffs upon which the defendant joins issue in its answer. The fact that the proceeding for partition is pleaded as a further defense does not affect the allegations in the complaint.

That the defendant cut wood from the land is not seriously contested; the disagreement has reference to the quantity and value of the wood or timber that was cut and removed. The cutting of trees may be waste and for waste one tenant in common may sue another. C. S., 891; *Hinson v. Hinson,* 120 N. C., 400; *Morrison v. Morrison,* 122 N. C., 598.

We are of opinion, however, that the court inadvertently admitted incompetent evidence to the prejudice of the defendant. The boundaries of the land set out in the complaint are as follows: "Beginning at a maple on the bank of Flat Swamp Creek, running thence south 77 deg. 8′ east 1,959 feet to a rock and iron pipe, Oath Carrick's corner, on the line of tract No. 2; thence north 6 deg. 30′ east 264 feet to a stake; thence N. 60 deg. 30′ E. 1,470 feet to a stone heap; thence N. 12 deg. 45′ W. 1,164 feet to an 18″ ash stump on the east bank of Bear Branch; thence down the meanders of the same 17 chs. to Flat Swamp Creek; thence down the meanders of Flat Swamp Creek to the beginning, containing 125 acres, more or less." These boundaries are not taken from any of the deeds and are at variance with those embraced in the deeds introduced by the plaintiffs and by the defendant. The land on which the water is said to have been ponded was known as the Woodson Daniel land and the adjoining tract as the Harris or Healing Springs tract. The former tract is described in a deed from J. C. Hedgecock to Woodson Daniel and James Lane: "Beginning at a maple on the bank of Flat Swamp; thence on a conditional line partly on east course 31 chains and 50 links to a pine; thence north 4 chains to a stake; thence east 19 chains to a post oak; thence north 26 chains to a black oak; thence west 7 chains to an ash on the bank of Bear Branch; thence down the meanders of the same 17 chains to Flat Swamp; thence down the meanders of the swamp to the beginning, containing 125 acres, more or less."

There is no controversy as to the location of the first two lines; nor is it denied that they correspond with the first two lines of the description given in the complaint. The dispute relates to the succeeding calls, those in deed being "thence east 19 chains to a black oak," etc., and those in the complaint "thence north 60° 30′ E. 1,470 feet to a stone heap, thence north 12 deg. 45′ W. 1,164 feet to an 18″ ash stump on the east bank of Bear Branch," etc.

T. W. Daniel, testifying in behalf of the plaintiffs said that he was present at a survey of the two tracts made between 1870 and 1875 when William Harris and Woodson Daniel, the owners of the adjoining tracts were present, and that a line was run from an ash on Bear Branch to a stone heap on the north side of the Turner lot and thence to a stake four chains north of the Oath Carrick corner, which is the end of the first line in the Hedgecock deed, and that the lines thus run, represented on the plat by the yellow figures 1, 2, 3, were agreed on by the parties.

The defendant objected to this evidence on the ground that as the lines indicated by the yellow figures are not called for in any of the deeds the plaintiffs have undertaken by parol evidence to establish new agreed lines and to contradict the unambiguous description in the deeds. We think the evidence should have been excluded.

The decisions of this Court are in support of the defendant's position. If the calls in a deed are sufficiently definite to be located by extrinsic evidence, the location cannot be changed by parol agreement unless the agreement was contemporaneous with the making of the deed. The instrument speaks for itself and where there is no ambiguity in the calls, as suggested in *Caraway v. Chancy,* 51 N. C., 361, "It seems most dangerous to carry the exception to the general rule of law." The principle is clearly stated and maintained in later cases. *Shaffer v. Hahn,* 111 N. C., 1; *Buckner v. Anderson, ibid.,* 572, 577; *Shaffer v. Gaynor,* 117 N. C., 15; *Haddock v. Leary,* 148 N. C., 378; *Boddie v. Bond,* 158 N. C., 204; *Woodard v. Harrell,* 191 N. C., 194. Where the location of a particular call in a deed is in doubt and the object is to find out where the line is a different principle prevails. *Taylor v. Meadows,* 175 N. C., 373; *Wiggins v. Rogers, ibid.,* 67; *Kirkpatrick v. McCracken,* 161 N. C., 198. Parol evidence is not admissible "to fit the description to the thing," when the calls in a deed are unambiguous and the lines sought to be established differ entirely from those in the deeds.

For error in the admission of evidence the defendant is entitled to a New trial.

FEDERAL LAND BANK OF COLUMBIA, SOUTH CAROLINA, v. MRS. WILL GAINES.

(Filed 1 March, 1933.)

Bills and Notes I b—Under facts of this case check not disbursed for benefit of payee because of insolvency of bank did not operate as payment.

Construing the Federal Farm Loan Act, it is *held:* the National Farm Loan Associations provided for in the act as intermediaries between the Federal Land Banks and borrowers therefrom is not the agent of the bor-

rowers in transactions necessary to the closing of loans approved by the Land Banks, and where a loan has been approved and in closing the loan the Land Bank's check for the amount thereof has been endorsed by the borrower and by the association's agent and deposited to the association's credit, and only a small part of the proceeds are distributed for the benefit of the borrower because of the later insolvency of the bank of deposit, the borrower is liable on her note and mortgage only for the amount distributed for her benefit, and upon payment of such sum is entitled to have the note and mortgage canceled.

APPEAL by plaintiff from *Schenck, J.*, at April Term, 1932, of POLK. Affirmed.

This is a controversy without action (C. S., 626), submitted to the court, upon a statement of facts agreed, which are as follows:

1. The Federal Land Bank of Columbia is a Federal Land Bank chartered, organized and doing business under the provisions of an act of the Congress of the United States known as the Federal Farm Loan Act.

2. The Columbus National Farm Loan Association is a National Farm Loan Association chartered, organized and doing business under the terms and provisions of the Federal Farm Loan Act.

3. On 16 August, 1930, Mrs. Will Gaines made application through the Columbus National Farm Loan Association to the Federal Land Bank of Columbia for a loan of one thousand dollars ($1,000), offering as security for the loan a mortgage on twenty-seven (27) acres of land in Polk County, North Carolina. The application was approved by the Columbus National Farm Loan Association on 20 August, 1930, and on that date Mrs. Gaines was admitted to membership in said Association. The application was approved by the Federal Land Bank of Columbia on 1 October, 1930. A copy of the application for the loan is attached to this statement of facts, made a part hereof, marked Exhibit A.

4. On 2 October, 1930, Mrs. Gaines was advised by the Federal Land Bank of Columbia of the approval of her application for a loan, and was requested to select from a list of approved attorneys furnished her by the bank, attorneys to prepare an abstract of title for consideration of the bank. Mrs. Gaines employed Messrs. Jones and Massenburg to prepare the abstract of title, and they furnished it to the bank on 25 October, 1930.

5. On 5 November, 1930, Mrs. Gaines executed and delivered to the Federal Land Bank of Columbia a note and mortgage for the loan in the amount of $1,000, copies of which are attached to this statement of facts, marked, respectively, Exhibits B and C, and made part hereof.

6. On 14 November, 1930, the Federal Land Bank of Columbia sent to Messrs. Jones and Massenburg its check on the Commercial National

Bank of Charlotte, North Carolina, dated 12 November, 1930, for $945.00, payable jointly to Percy Lewis, secretary-treasurer of the Columbus National Farm Loan Association, and Mrs. Will Gaines, with instructions to the attorneys and to the secretary-treasurer of the Columbus National Farm Loan Association for closing the loan to Mrs. Gaines. A copy of the check, with endorsements thereon, is attached to this statement, made part hereof, marked Exhibit D. With the check was sent a closed loan statement, to be filled in by the secretary-treasurer of the Columbus National Farm Loan Association and signed by him and Mrs. Gaines. A copy of the statement as sent with the check is attached to this statement, made part hereof, and marked Exhibit E. The check represented the proceeds of the loan after deducting fifty dollars ($50) for Mrs. Gaines' stock in the Columbus National Farm Loan Association, three dollars and fifty cents ($3.50) for title determination fee, and one dollar ($1.00) for title insurance premium.

7. The check referred to in the preceding paragraph was delivered by the attorneys to Percy Lewis, secretary-treasurer of Columbus National Farm Loan Association, on 18 November, 1930, and was handled by him as indicated in a letter addressed by Mr. Lewis under date of 19 October, 1931, to Mr. M. R. McCown, a copy of which is attached to this statement, marked Exhibit F, and made part hereof. At the time of this transaction the Polk County Bank and Trust Company was the only bank in Columbus, North Carolina. The Polk County Bank and Trust Company was open for business through Friday, 21 November, 1930, but failed to open for business on Saturday, 22 November, 1930.

8. No payments on the loan have been made by Mrs. Gaines to the Federal Land Bank of Columbia, although the Federal Land Bank of Columbia has demanded from Mrs. Gaines payment of the interest, which under the terms of the note executed by her was due 1 December, 1930, and of the interest and the first installment of principal, which under the terms of the note were due 1 December, 1931.

It appears from the letter referred to in paragraph 7 of the statement of facts agreed, that upon the receipt by him of the check payable to the order of Percy Lewis, secretary-treasurer of the Columbus National Farm Loan Association, and of Mrs. Will Gaines, the said Percy Lewis advised the defendant by telephone that he had received the check and that her endorsement was required before the check could be collected.

The defendant thereupon authorized Percy Lewis to write her name on the back of the check, which he did. The check was then deposited in the Polk County Bank and Trust Company to the credit of the Columbus National Farm Loan Association. The check was paid by the bank on which it was drawn. No part of the proceeds of said check,

except the sum of $54.23 which was paid for taxes on the land conveyed by the mortgage, has been disbursed to or on the account of the defendant.

On the foregoing facts, the plaintiff contended that the note and mortgage executed by the defendant and now in the possession of the plaintiff, are valid, and that plaintiff is entitled to collect from the defendant the full amount of said note, according to its terms, and that upon default by the defendant in the payment of said note, the plaintiff has the right to foreclose the said mortgage; the defendant contended that neither the note nor the mortgage is valid, for the reason that she has received no consideration for the note.

The court was of opinion that the note and mortgage are valid only for the sum of $54.23, the amount disbursed by the Columbus National Farm Loan Association in payment of taxes, and therefore ordered, adjudged and decreed that the note and mortgage be canceled upon the payment by the defendant to the plaintiff of the sum of $54.23.

From the judgment on the facts agreed, the plaintiff appealed to the Supreme Court.

J. S. Massenburg and Harry D. Reed for plaintiff..
M. R. McCown for defendant.

CONNOR, J. The transactions between the plaintiff and the defendant as disclosed by the statement of facts agreed appearing in the record were conducted in strict accord with the provisions of the act of Congress known as the Federal Farm Loan Act. In accordance with these provisions, the defendant, who had applied for and accepted membership in the Columbus National Farm Loan Association, applied through said association to the plaintiff for a loan of one thousand dollars, offering as security for said loan her note for one thousand dollars, secured by a mortgage on twenty-seven acres of land in Polk County, North Carolina. This application was endorsed by the association, and approved by the plaintiff. Upon the delivery to it of the note and mortgage duly executed by the defendant, the plaintiff transmitted to the Columbus National Farm Loan Association funds to be disbursed by said association to the defendant on account of the loan.

The said association has disbursed only the sum of $54.23 of said funds. The balance of said funds are on deposit in the Polk County Bank and Trust Company, and are not available for closing the loan. The defendant has received no consideration for her note and mortgage, except the sum of $54.23, unless it shall be held that the Columbus National Farm Loan Association received the funds from the plaintiff as the agent of the defendant.

As we construe the provisions of the Federal Farm Loan Act, the Columbus National Farm Loan Association was not the agent of the defendant in the transactions disclosed by the statement of facts agreed. The Federal Farm Loan Act provides for the organization of National Farm Loan Associations as intermediaries between borrowers and Federal Land Banks. All applications for loans from a Federal Land Bank must be made through a National Farm Loan Association. No loan can be made by a Federal Land Bank directly to the borrower. When the application for a loan has been received by a Federal Land Bank, through a National Farm Loan Association, and approved, the act requires that funds to close the loan shall be transmitted by the Land Bank to the Association, for disbursement to the borrower.

Under the provisions of the act, the National Farm Loan Association is a public agent, designated by the act as the intermediary between the bank and the borrower. It was so held in *Fed. Land Bank v. Shingler*, 174 Ga., 352, 162 S. E., 815, and in *Bjorkstam v. Fed. Land Bank*, 138 Wash., 456, 244 Pac., 981. There is no error in the judgment in this case. It is

Affirmed.

ROCKY MOUNT SAVINGS AND TRUST COMPANY AND MRS. ANABEL ROSS, ADMINISTRATORS OF T. N. ROSS, DECEASED, V. ÆTNA LIFE INSURANCE COMPANY.

(Filed 1 March, 1933.)

1. Insurance E d—Evidence of waiver of right to reject application for reinstatement by failure to act thereon in reasonable time held sufficient.

Where, after the forfeiture of a policy of life insurance for nonpayment of premiums, the insured makes application with the company for reinstatement according to the terms of the policy contract, and remits his check in the amount necessary therefor, and the insurer accepts the check, but requires a physical examination of the insured before reinstating the policy, but notice of such requirement is not given the insured although twenty-one days elapse between the time the insured's agent received the information from the company and the time the insured was seized with fatal sickness: *Held*, the evidence is sufficient to be submitted to the jury on the issue of whether the insurer waived its right to reject the application by failing to act thereon within a reasonable time.

2. Trial E c—

Although it is not required by law that the trial judge should state the contentions of the parties to the jury, C. S., 564, the practice has grown up in our courts as a helpful and accepted procedure, and a fair statment of the contentions of a party will not be held for error upon exception.

CIVIL ACTION, before *Frizzelle, J.* From NASH.

This cause has heretofore been considered by this Court in two appeals, the first reported in 199 N. C., p. 465, and the second reported in 201 N. C., p. 552, in which the facts are set forth in detail.

One issue was submitted to the jury, as follows: "Did the defendant, Ætna Life Insurance Company, waive the forfeiture of the policy of insurance No. N-515135?" The jury answered the issue, "Yes," and there was judgment upon the verdict.

The trial judge instructed the jury as follows: (a) "If you believe the defendant's evidence, you will answer the issue 'No.'" (b) "If you find the facts to be as testified by the defendant's witness you will answer the issue 'No.'"

From judgment entered the defendant appealed.

Cooley & Bone and Vaughan & Yarborough for plaintiff.
Murray Allen for defendant.

BROGDEN, J. On 1 November, 1927, the policy of life insurance of the deceased, T. N. Ross, issued by the defendant company, lapsed, subject to the contract right of the insured to apply for reinstatement as provided in the policy. On 7 November, 1927, the general agent of the defendant at Raleigh wrote to the insured, calling his attention to the fact that he had a right to submit a request for reinstatement of his policy and stated, "If you are not prepared to pay the full amount of the premium, $26.72, we will be glad to accept a partial payment of $10.00 and extend the balance of the premium, if you will sign the enclosed note, partially filled out." On 8 November, the insured signed the application for reinstatement, declaring in effect that he was in good health so far as he knew, and enclosed therewith a check for $10.00. On 10 November, the general agent acknowledged receipt of the check and the application for reinstatement and forwarded the same to the home office of the defendant at Hartford, Connecticut, where it was received on 18 November. On 21 November, the home office referred the application for reinstatement to the medical department. The medical department required further physical examination. On 22 November, the home office notified the general agent at Raleigh that a complete medical examination of the insured was necessary before passing upon the application for reinstatement. On 26 November, Upshaw, the general agent at Raleigh, advised Bartholomew, the local agent in Nashville, North Carolina, that a complete medical examination of the insured was required, "by one of the company's regular examiners." The letter further stated, "If it is not convenient for you to attend to this matter for us, kindly advise us and we will be glad to write to the insured

direct." The insured was then living in Nashville, and the evidence disclosed that the insured "did not receive any request from Mr. Upshaw or the Ætna Life Insurance Company, or any of its representatives for a physical examination." The wife of the insured testified that he "went to work every day. He was taken sick on Monday before Christmas (20 December, 1927), and was carried to the hospital on Thursday. Mr. Ross did not have any illness of any kind from the time he had an attack of gastritis or other illness in July up until the time he was taken sick in December. He did not take any medicine of any kind that I know of during that time." Throughout this period of time Bartholomew, the local agent, had an office "right across the street from my husband's office . . . within a half block," etc.

Consequently, it is clear that for a period of approximately twenty-three days, while the insured was apparently in good health, no notice was given to him of the requirement for a medical examination and no opportunity afforded for complying with the request of the insurer prior to his death. In the meantime, the defendant, having cashed the check of the insured for $10.00, retained the same until after death, when an offer to return the same was made to the administrator.

Authority is not lacking that under such circumstances a waiver may be inferred by a jury. Couch Cyclopedia Insurance, Vol. 6, section 1375. *Lechler v. Montana Insurance Co.*, 186 N. W., 271, 23 A. L. R., 1193; *Life & Casualty Co. of Tennessee v. Street*, 105 Southern, 672. In the latter case the Court said: "Hence the authorities have soundly held that undue delay in acting upon the application, or failure to communicate to the insured the fact of the rejection of his application, may amount to a waiver of formal requirements, and operate as an effective revival." See *Lovick v. Life Association*, 110 N. C., 93, 14 S. E., 506; *Garland v. Ins. Co.*, 179 N. C., 67, 101 S. E., 616; *Coile v. Commercial Travelers*, 161 N. C., 105, 76 S. E., 622.

In the opinion in a former appeal in this case, 201 N. C., 552, it did not appear when the insured was stricken with sickness or that notice of the requirements for a new medical examination had not been communicated during the time he was apparently in good health. Therefore, it is the opinion of the Court that there was sufficient evidence to be submitted to the jury on the issue of waiver, and hence the verdict is determinative.

Moreover, the special instructions given by the trial judge, viewed in the light of the evidence produced at the hearing, were more favorable than all the testimony warranted.

The defendant excepts to the statement of its contentions by the trial judge. There is no law requiring trial judges to state the contentions of litigants. The statute C. S., 564, enjoins the statement of the evidence

"in a plain and correct manner." However, the statement of the contentions has steadily grown into an accepted and helpful body of practice in trial courts. While counsel have sometimes insisted, in rare instances, that such statements were partial and bore the tang of the "stump"; nevertheless, the practice springs from a worthy and intelligent effort to designate and clarify to the jury, the determinative issues of fact. They tend to clear the battlefield of smoke and noise. Writing upon the subject in *Clark v. R. R.*, 109 N. C., 430, 14 S. E., 43, *Avery, J.*, declared: "It was not error in the court to recapitulate fairly such contentions as illustrated the bearing of the evidence upon the issues. It is often helpful, if not necessary, for the court to do so, in order that they understand how to apply the law to the testimony."

No error.

J. B. BLADES LUMBER COMPANY v. THE FINANCE COMPANY OF AMERICA AT BALTIMORE.

(Filed 8 March, 1933.)

1. Appeal and Error J c—

The findings of fact of the trial court in respect to service of summons are conclusive when supported by evidence.

2. Process B d—Transient auditor of foreign corporation held not local agent of foreign corporation for purpose of service of process.

A traveling auditor for a foreign corporation who is a nonresident and who covers several states in the performance of his duties, and who is in this State intermittently and for short periods, is not a local agent for the purpose of service of process, the term local agent meaning an agent residing in this State permanently or temporarily for the purpose of his agency, and the fact that such agent received money for the corporation on a single instance does not alter this result, and service of process on such agent is not valid service on the corporation when such corporation has no property or place of business in this State. C. S., 483(1).

APPEAL by plaintiff from *Harris, J.*, at November Term, 1932, of CRAVEN. Affirmed.

The defendant entered a special appearance and moved to strike out a purported service of summons and to dismiss the action for want of service. The officer's return is: "Served 10/27/32, by delivering a copy of the within summons to F. J. Miller, agent of the Finance Company of America at Baltimore."

The defendant is a corporation of the State of Delaware, having its principal place of business in the city of Baltimore. In its affidavits

the defendant alleges that F. J. Miller is neither the president or other head of said corporation, nor is secretary, cashier, treasurer, director, managing or local agent, nor an agent for the purpose of service of summons upon the corporation. The plaintiff's affidavits allege that Miller is the defendant's agent for the purpose of collecting money.

Judge Harris found the facts to be as follows: The defendant has no office or place of business in the State of North Carolina at this time, nor has it had at any other time, and that it is not now, and was not on 27 October, 1932, nor at any other time, engaged in business in North Carolina; and that it has no property in this State.

F. J. Miller is a resident of the State of Pennsylvania, 28 years of age, employed by the defendant corporation as a traveling auditor under the supervision of its treasurer. His duties consist of examining the books and accounts of his employer's customers in various states. He arrived in New Bern 27 October, 1932, under direction to examine the books and accounts of J. B. Blades Lumber Company; he did so, made up a report thereon for his employer, and on the afternoon of the same day departed to perform similar duties in various states, as he had been previously directed by his employer. He visited several other towns in this State, examining books and accounts for his employer, but he was only transiently in this State. He was not regularly employed as a collector of accounts, but on his trip to New Bern he was specially authorized and instructed by letter from I. Strouse, treasurer of the defendant corporation, to collect the account due from the J. B. Blades Lumber Company, or to collect such part of it as he could and to try to get post-dated checks for such part as he was unable to collect in cash. He exhibited the letter to J. B. Blades, president of the plaintiff corporation, and while he was in New Bern the plaintiff corporation paid to him the sum of $50 to be credited on its account amounting to several thousand dollars due to the defendant corporation, and he executed a receipt therefor in the name of his employer and forwarded the payment to his employer at Baltimore, who retained it and credited it on account. While in New Bern Miller solicited the plaintiff corporation to send additional business to his employer, that is, to send additional notes and accounts for purchase or discount under an existing contract between them. Other traveling auditors of the defendant corporation had previously accepted payments from the plaintiff which had been credited to its account by defendant. Other traveling auditors had previously likewise solicited additional business. After the payment of $50 to Miller the copy of summons was delivered to him.

Upon these facts the court was of opinion that Miller was not such officer or agent of the defendant as the statute contemplates and that the

delivery of a copy of the summons to him did not constitute service of summons upon the defendant, and thereupon adjudged that the action be dismissed.

The plaintiff excepted and appealed.

H. P. Whitehurst and R. E. Whitehurst for plaintiff.
John A. Guion for defendant.

ADAMS, J. We are concerned not so much with the affidavits as with the court's findings of fact based upon the affidavits; and as the findings are supported by the evidence they are as conclusive as the verdict of a jury and are not subject to review. *Matthews v. Fry,* 143 N. C., 384; *Cox v. Boyden,* 175 N. C., 368; *Tyer v. Lumber Co.,* 188 N. C., 268; *Tinker v. Rice Motors, Inc.,* 198 N. C., 73.

The plaintiff is a domestic and the defendant a foreign corporation. The plaintiff undertook to bring the defendant into court by the service of process upon F. J. Miller. The question is whether the pretended service was effective against the defendant.

When an action is brought against a corporation the summons shall be served by delivering a copy thereof to the president or other head of the corporation, secretary, cashier, treasurer, director, or managing or local agent of the corporation. 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 service; and such service can be made in respect to a foreign corporation only when it has property, or the cause of action arose, or the plaintiff resides, in this State, or when it can be made personally within the State upon the president, treasurer, or secretary. C. S., 483(1).

Was Miller a local agent of the defendant? In *Moore v. Bank,* 92 N. C., 591, the Court said: "The term *local* pertains to place, and a local agent to receive and collect money, *ex vi termini,* means an agent residing either permanently or temporarily for the purpose of his agency, and was not intended to embrace a mere transient agent." In a later case this definition was applied to a statement of facts impressively similar to those in the present case. *Tinker v. Rice Motors, Inc., supra.* Whether a person is the agent of another is to be determined by the nature of the business and the extent of the authority given and exercised; and to be an agent such person must be regularly employed and have some measure of control over the business, or some feature of the business, entrusted to him. *Whitehurst v. Kerr,* 153 N. C., 76. A traveling auditor is not a local agent (*Higgs v. Sperry,* 139 N. C., 299); and a single instance of receiving money can by no reasonable interpretation be considered the "receiving or collecting" of money on behalf of a corporation. *Kelly v. Lefaiver,* 144 N. C., 4.

Upon the authority of these and other cases dealing with the subject the judgment of the Superior Court must be affirmed. Miller was not a local agent of the defendant; he is a nonresident and was "transiently in this State" on a special and restricted mission; he went to New Bern on 27 October and on the same day "departed to perform similar duties," as his employer had directed. The defendant has never had any property or office or place of business in this State. Judgment

Affirmed.

N. W. WARREN v. LITTLETON ORANGE CRUSH BOTTLING COMPANY, INCORPORATED.

(Filed 8 March, 1933.)

1. Corporation G a—Assumption of debt contracted for corporate property held not ultra vires the corporation.

A contract executed by a corporation in the transaction of its business providing for the assumption by the corporation of a debt contracted by others for the purchase of property necessary to the prosecution of the corporation's business is binding on the corporation if authorized and properly executed by it.

2. Corporations G c—Corporate seal is not necessary to contract executed by general manager in the transaction of the corporation's business.

The corporate seal is not necessary to a contract executed by the president and general manager of a corporation under which the corporation assumed a debt contracted for property necessary to the transaction of the corporation's business.

3. Corporations G c—President and general manager of corporation had power to execute contract in this case without authorization of its directors.

The president and general manager of a corporation has the power, without authorization of its board of directors, to bind the corporation by a contract incidental to its business which is executed in good faith and which provides for the assumption by the corporation of a debt contracted by others for property necessary to the transaction of the corporate business.

4. Corporations G c: Contracts A a—Extension of time for payment of notes held sufficient consideration for assumption of other debt due payee.

The extension of time given a corporation for the payment of its notes is a sufficient consideration for the corporation's contract with the payee assuming a debt due the payee which was contracted by its president and others individually for property necessary to the transaction of the corporate business.

APPEAL by plaintiff from *Moore, Special Judge,* at October Term, 1932, of HALIFAX. New trial.

On 14 November, 1929, the defendant purchased property from the plaintiff at $32,000, and made a mortgage reciting the payment of $12,000 in cash or other securities and the execution of notes for $20,000—one for $2,000 and six for $3,000 each. The note for $2,000 was paid at maturity. On 31 October, 1931, the parties entered into negotiations for an extension of time for the payment of the note next due. The purported agreement of 31 October is as follows:

"Littleton, N. C., 31 October, 1931.

This agreement made this 31 October, by the Littleton Orange Crush Bottling Company and Mr. N. W. Warren, as follows: That the note now or will be due on 4 November, for $3,000 and interest amounting to $180 making a total of $3,180 will be extended with the understanding that we pay Mr. Warren $1,000 on above note at maturity, and $1,000 in thirty days from 4 November, and thereafter $500 per month until the balance has been paid, we are also indebted to Mr. Warren, as interest $720 which will be paid as above stated.

Signed: N. W. Warren.

Signed: Littleton Orange Crush Bottling Co., by C. E. Carter.

Witness: R. W. Carter, Jr."

There is evidence that the defendant complied with the contract except as to the payment of $720. The plaintiff testified that the $720 item "represents the interest on the $12,000 notes, their individual notes." The individual notes were made to the plaintiff: $5,000 by C. E. Carter, $5,000 by Mrs. Bena Crockett, and $2,000 by Dr. Carter.

The plaintiff brought suit to recover judgment for $720 and at the close of his evidence the court intimated that he could not recover. The plaintiff took a nonsuit and appealed.

Julian R. Allsbrook and Cromwell Daniel for plaintiff.

George C. Green for defendant.

ADAMS, J. The only question is whether the evidence construed most favorably for the plaintiff should have been submitted to the jury. The notes referred to in the contract were given for the purchase of property necessary for the prosecution of the defendant's business, and the contract under consideration was incidental to the business. Being incidental, if it was authorized and was properly executed the contract is binding on the defendant. *Hospital v. Nicholson,* 189 N. C., 44.

The corporate seal was not necessary. In *Mershon v. Morris,* 148 N. C., 48, the Court, after saying that the ancient rule that a corpora-

tion could act only by its corporate seal has been greatly relaxed in later times, if, indeed, not wholly abrogated, approved the following quotation from 10 Cyc., 1003: "Excluding the operation of express statutes, a very extensive principle of the law of corporations, applicable to every kind of written contract executed ostensibly by a corporation and to every kind of act done by its officers and agents professedly in its behalf, is that, when the officer or agent is the appropriate officer or agent to execute a contract or do an act of a particular kind in behalf of the corporation, the law presumes a precedent authorization, regularly and rightfully made, and it is not necessary to produce evidence of such authority from the records of the corporation, always provided that the corporation itself had the power under its charter or governing statute to execute the contract or to do the act."

We find nothing in the evidence which as a matter of law rebuts the presumption of previous authorization. The plaintiff testified that he had attended a meeting of the directors held with reference to the agreement on 29 October. The defendant had five directors; only four of them attended the meeting; Mrs. Crockett had not been notified and did not attend. The defendant insists that as there is no evidence of by-laws fixing the time and place of the meeting any pretended authorization of the contract by the directors is void, and for this position it cites *Bank v. Lumber Co.*, 116 N. C., 828. In that case it was shown that the meeting was held at an unusual time and place and that the agent who attempted to dispose of the property was the treasurer of the corporation. The contract in controversy in the present case was executed on behalf of the defendant by C. E. Carter, and witnessed by R. W. Carter, Jr., who was a director. C. E. Carter held the position of president, director, and general manager of the corporation. It was in evidence that he had full authority with respect to the execution of contracts, notes, checks, and other instruments relating to the business of the defendant.

The president of a corporation is *ex vi termini* its general agent. *Davis v. Ins. Co.*, 134 N. C., 60; *Bank v. Oil Co.*, 157 N. C., 302; *Trust Co. v. Transit Lines*, 198 N. C., 675. The term "general agent" implies general powers; hence a general agent can ordinarily make contracts for the company. *Grabbs v. Ins. Co.*, 125 N. C., 389, 397. In *Cardwell v. Garrison*, 179 N. C., 476, it was held that the endorsement of notes by the president of a corporation was binding notwithstanding a resolution passed by the directors that no contract should be valid unless it bore the signature of the secretary and treasurer.

If it be granted that the president of a corporation as such has no power to bind the corporation by contracts executed by him in its name without the express authority of its board of directors, a general

manager, if his authority is not limited, has power to bind the corporation by contracts made in good faith and within the corporate power, without any resolution of the board of directors expressly authorizing the contracts. *Lumber Co. v. Elias,* 199 N. C., 103. Upon the undisputed evidence we are of opinion that the authorization of the directors was not essential to the validity of the contract.

It is argued, however, that the plaintiff is trying to subject the defendant to liability for the debt of individuals. Without deciding the question let us concede the proposition that the debt the plaintiff is seeking to recover was contracted by C. E. Carter, Mrs. Crockett, and Dr. Carter; the defendant, nevertheless, had the legal right to contract for value to pay the debt of another. The contract sued on is supported by a valuable consideration—that is, the grant by the plaintiff to the defendant of an extension of time within which the defendant should pay the note. In *Fawcett v. Fawcett,* 191 N. C., 679, it was said: "Any benefit to the promisor or any loss or detriment to the promisee is a sufficient consideration to support a contract. In *Brown v. Ray,* 32 N. C., 72, it is said that to make a consideration it is not necessary that the person giving the promise should receive or expect to receive any benefit; it is sufficient if the other party be subjected to loss or inconvenience. A promise for a promise, a right, interest, or benefit accruing to the one party, or forbearance, detriment, or loss given, suffered or undertaken by the other, is sufficient to constitute a valuable consideration. *Institute v. Mebane,* 165 N. C., 644; *Brown v. Taylor,* 174 N. C., 423; *Mfg. Co. v. McCormick,* 175 N. C., 277; *Exum v. Lynch,* 188 N. C., 392."

The defendant having profited by the extension should not retain the benefit and at the same time repudiate its obligation. Whether the transaction was usurious can be determined by a full disclosure of the facts.

Upon the evidence in the record we think the case should have been submitted to the jury.

New trial.

STATE OF NORTH CAROLINA AND SWAIN COUNTY v. ED FLOYD ET AL., AND STATE OF NORTH CAROLINA AND SWAIN COUNTY v. HEIRS AT LAW OF W. E. QUEEN ET AL.

(Filed 8 March, 1933.)

1. Eminent Domain E b—

Where condemnation proceedings are instituted by the State and are prosecuted to a final determination the State is deemed the owner of the land from the commencement of the proceedings.

2. Taxation D a—Property held withdrawn from taxation through condemnation by State prior to date of listing property for taxes.

Where condemnation proceedings are instituted by the State against certain property for the purpose of incorporating it as a part of the Great Smoky Mountain National Park, chapter 48, Public Laws of 1927, and the report of the appraisers is affirmed by the clerk upon appeal to him upon exceptions duly filed, and the owners do not remain in possession after the decree of confirmation: *Held*, the land is withdrawn from taxation by the sovereign as of the date of the decree of confirmation, and where such decree is entered in January the land is not subject to taxes listed against it the following April although the condemnation proceedings were not determined until a subsequent date, and this result is not altered by the provision of the statute that the fee could not pass to the State until the payment of the award, nor the provision permitting the commission to elect not to acquire the lands even after final judgment when such right is not exercised.

3. Taxation E a—Funds paid into clerk's hands in condemnation proceeding held not subject to payment of taxes under facts of this case.

Where in proceedings for the condemnation of land by the State under chapter 48, Public Laws of 1927 for incorporation into the Great Smoky Mountain National Park the clerk confirms the report of the appraisers and retains the cause for adjudication of claims against the sum paid into the clerk's hands by the State as compensation: *Held*, the county wherein the land lies is not entitled to the payment of taxes out of such fund where the decree of confirmation was entered prior to date of the listing of the taxes and the compensation is paid subsequent to the listing date.

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

On 13 September, 1929, the State of North Carolina instituted a condemnation proceeding before the clerk of the Superior Court of Buncombe County for the purpose of acquiring the lands of Ed Floyd, T. C. Queen, *et al.*, for the purpose of incorporating said land as a part of the Great Smoky Mountain National Park. The proceeding was instituted and conducted under and by virtue of chapter 48, Public Laws of 1927, and acts amendatory thereto. The respondents filed answer admitting the right of the State to condemn the land for park purposes but contested the price to be paid.

Commissioners were duly appointed, who viewed and appraised the land, making a written report to the clerk. Thereafter exceptions were duly filed to the value placed on said lands by the commissioners, and said exceptions "were heard and passed upon by the clerk of the Superior Court of Buncombe County on 27 January, 1930 . . . and on said date the clerk of the Superior Court of Buncombe County confirmed the report of said commissioners and entered judgment in accordance therewith, adjudging the value of the lands as fixed by the commissioners." The said judgment contained the following clause: "That the

foregoing entitled actions are retained for the purpose of adjudication of any and all claims which might be ascertained in, to, or against the money to be paid into the court by the petitioner, the State of North Carolina, pursuant to the provisions of said judgment." The clerk directed that the value of the lands be paid into the clerk's office by the petitioner, and the respondents appealed from the confirming judgment of the clerk to the Superior Court. Pending the appeal the sheriff of Swain County filed a statement with the clerk of the Superior Court, claiming that on 1 April, 1930, the lands described in the petition were placed upon the tax list of Swain County, and that as a result Swain County was entitled to collect taxes and penalties out of the compensation awarded the owner and then in the hands of the clerk.

The trial judge was of the opinion that the taxes and penalties constituted a prior lien upon the compensation and that the funds were subject to such tax lien. From the judgment so rendered the respondents appealed.

Jones & Ward for respondents.
Frye & Jones for Swain County.

BROGDEN, J. (1) Was the land of the respondent subject to tax on 1 April, 1930?

(2) Does the tax constitute a debt of the landowner enforceable against the money in the hands of the clerk?

For compensation purposes the commencement of the proceeding marks the time of the taking. Consequently, the owner of the land cannot recover for any improvement placed thereon or for enhancement thereof due to other causes. The obvious reason for such conclusion is that the first judicial act in the condemnation process is in contemplation of law, a setting apart of the property for public use. Therefore, if the proceeding is prosecuted to final conclusion the sovereign is deemed to be the owner from the commencement of the proceeding. *Power Co. v. Hayes,* 193 N. C., 104, 136 S. E., 353.

The petitioner, Swain County, contends, however, that the foregoing principle is not pertinent by reason of certain provisions in the Park Act. These provisions are: (1) "Upon the payment of the award rendered in any process or proceedings the title to the lands . . . shall vest in fee simple in the State of North Carolina." (2) "After the final judgment . . . if . . . the acquisition of title to said land (is) undesirable . . . . then the said commission shall be authorized to designate . . . its election not to acquire the title and not to pay the award," etc.

The foregoing clauses are not determinative. While the State does not get a fee-simple title until the payment of the award, notwithstanding, the status of the landowner and of the property is established when the clerk of the Superior Court, upon exceptions duly filed, confirmed the report of the appraising commissioners. This interpretation is reinforced and supported by long prevailing declarations of this Court. For example, in *S. v. Lyle,* 100 N. C., 497, 6 S. E., 379, it is written: "Ever since the ruling in *R. R. v. Davis,* 19 N. C., 451, decided in 1837, after full argument and elaborate and exhaustive discussion of the subject, it has been deemed and acted on as the settled law in this State, that private property may be taken under authority of the State for public uses, upon just compensation to be rendered to the owner, to be ascertained in the mode prescribed by law, and that the payment need not precede such taking, nor is a jury indispensable in assessing the damages therefor." *Jeffress v. Greenville,* 154 N. C., 490, 70 S. E., 919; *Highway Commission v. Young,* 200 N. C., 603, 158 S. E., 91. Nor is the fact that the Park Commission, even after final judgment, had the power to decline to take the land, entitled to prevailing significance. Although clothed with such right, the Commission did not exercise it, but pursued the proceeding to final conclusion. It further appears that the judgment rendered by the clerk and by the judge upon appeal contained a clause retaining the action for the purpose of adjudicating "all claims which might be ascertained in, to or against the money to be paid into the court by the petitioner," etc. Upon this phase of the case, Swain County is asserting no claim against money, but is contending that the land was subject to tax on 1 April, 1930.

It is the thought of this Court that such position is untenable. There is no allegation in the petition and no findings by the trial judge tending to show that the landowners remained in possession of the lands after the decree of confirmation by the clerk or that they received any rents or profits therefrom after commencement of the proceeding. Indeed, it is alleged in the answer of the landowners, which is a part of the record, "that the respondents having surrendered possession of the lands in question to the State of North Carolina on the date said petition was filed, and having filed answers, admitting the right of the State . . . to condemn said land, your respondents aver and say that from and after said date they are not liable for any taxes thereon." Furthermore, it is provided in section 19 of the Park Act that "each judgment rendered in such proceeding shall bind the land and bar all persons claiming title to or interest," etc.

Therefore, it is the opinion of the court that said lands were not subject to tax on 1 April, 1930.

The second question of law is not pertinent. If the land on 1 April, 1930, was not subject to tax, it must necessarily follow that no debt was created. That is to say, the land was taken by the State by virtue of the power of eminent domain prior to 1 April, 1930. Hence it was withdrawn from taxation by the act of the sovereign. The money was not paid until subsequent thereto, and, therefore, the same was not taxable as the property of the landowner on 1 April, 1930.

Swain County relies upon *Carstarphen v. Plymouth,* 186 N. C., 90, 118 S. E., 905; and *Guilford v. Georgia Co.,* 112 N. C., 34, 17 S. E., 10. See, also, *Products Co. v. Cement Co.,* 200 N. C., 226, 156 S. E., 777. In the *Carstarphen case* there was a sale of the property or a transfer of the title, but the property was not actually withdrawn from taxation by the sovereign through the process of condemnation, and the *Guilford case* involved a claim for taxes duly levied and assessed against the assets of an insolvent corporation. Consequently, these cases are not applicable to the questions involved.

Reversed.

STATE OF NORTH CAROLINA v. CHAMPION FIBRE COMPANY AND SWAIN COUNTY, NORTH CAROLINA.

(Filed 8 March, 1933.)

Taxation D a—Liability for taxes arises on July first of each year.

Construing chapters 427 and 428, Public Laws of 1931, and C. S., 1334(53), it *is held,* the liability of a landowner for taxes arises on July first of each year, and where land has been conveyed to the State for public park purposes (chapter 48, Public Laws of 1927) by deed executed in April the land is not subject to taxes for the fiscal year beginning the following July, it having been withdrawn from taxation by act of the State.

CIVIL ACTION, before *Clement, J.,* at September Term, 1932, of BUNCOMBE.

The agreed facts are substantially as follows:

On 29 January, 1930, the State of North Carolina filed its petition in the Superior Court of Buncombe County, praying for the condemnation of certain lands owned by the defendant, Champion Fibre Company, for park purposes, by virtue of the provisions of chapter 48 of Public Laws of 1927. No orders or judgments in the cause appear in the record, but on 29 April, 1931, the Champion Fibre Company, conveyed the land to the State. The deed was filed on 13 May, 1931, and

recorded on 5 June, 1931, and thereafter on 20 July, 1931, the State conveyed the land to the United States of America. The Champion Fibre Company did not list the lands for taxation on 1 April, 1931, but the officers of Swain County, where the land is situated, listed the same for taxation as of 1 April, 1931. No tax was paid and the land was sold and purchased by Swain County. The amount claimed by the county, together with penalties and costs amounted to $12,380.01.

The trial judge was of the opinion that the said taxes were not a lien upon the lands nor a debt of the Champion Fibre Company, and ordered that the tax certificates held by the county be canceled.

From such judgment Swain County appealed.

Attorney-General Brummitt, and Assistant Attorneys-General Seawell and Siler for the State.

Jones & Ward for Champion Fibre Company.

Frye & Jones and Edwards & Leatherwood for Swain County.

BROGDEN, J. When does the liability of the taxpayer for State and county taxes arise or begin with reference to taxes levied upon real estate?

Prior to 1931 there were certain conflicts in the revenue and machinery acts with reference to the collection of taxes. By virtue of chapter 427 of Public Laws of 1931 and chapter 428 thereof certain changes have been made in the taxing laws. A definite time is now set for various steps in the taxing process. These may be classified as follows:

(1) In quadrennial assessment years the value of real property shall be determined on 1 January; in other years 1 April.

(2) The listing for taxation with reference to ownership is fixed as of 1 April.

(3) The Board of Equalization and Review shall meet on the third Monday in June and "complete their duties on or before the first Monday in July" of each and every year.

(4) The board of county commissioners "shall not later than the second Monday in August levy such rate of tax for said purposes as may be necessary," etc.

(5) All taxes levied and assessed by any county "shall be due and payable on the first Monday of October of the year in which so assessed and levied."

(6) The lien of taxes shall attach to all real estate "annually on the date that such taxes are due and payable."

It is contended by the State and the Champion Fibre Company that the landowner was not liable for taxes listed by Swain County on 1

April, 1931. Upon the other hand Swain County contends that liability begins at listing time on 1 April in each year.

Section 490 of chapter 427 of the Public Laws of 1931, provides that "State, county and municipal taxes levied for any and all purposes pursuant to this act shall be for the fiscal year in which they become due," etc. The only statutory definition for the term "fiscal year" is C. S., 1334(53), as follows: "The 'fiscal year' is the annual period for the compilation of fiscal operations, and begins on the first day of July and ends on the 30th day of June." Thus it is apparent, that welding the statutes together by established rules of correct interpretation, the fiscal year and the tax year are coterminous and coincident. Therefore, when the Champion Fibre Company paid taxes levied in 1930, such payment covered a definite period from 1 July, 1930, to 30 June, 1931. Hence the liability of the landowner for taxes for the year 1931 arose and began on 1 July, 1931.

The title to the property passed to the State in April, 1931, by deed duly executed and recorded, and as a result the property was withdrawn from taxation by conveyance to the sovereign prior to the date of attaching liability, and the ruling of the trial judge was correct. This view of the case eliminates a discussion of the legal effect of the filing of the petition in the condemnation proceeding.

Affirmed.

THE PLANTERS SAVINGS BANK TO THE USE OF BANK OF GATES v. C. M. EARLEY AND OTHERS, STOCKHOLDERS OF THE PLANTERS SAVINGS BANK.

(Filed 8 March, 1933.)

1. Banks and Banking J a—Approval of stockholders of selling bank is not necessary to transfer of all its assets to another bank for liquidation.

The transfer of all the assets of a bank, including the statutory liability of its stockholders, may be made to another bank for the purposes of liquidation when two-thirds of the directors of the selling bank and the Corporation Commission approve, sec. 4, chap. 47, Public Laws of 1927, and the approval of the stockholders of the selling bank is not necessary.

2. Banks and Banking J c—Action to assess stockholders of bank which had transferred all its assets to another bank for liquidation is equitable.

Where a bank has transferred all its assets, including the statutory liability of its stockholders, to another bank for the purpose of liquidation, an action instituted for the purpose of assessing the statutory liability of the stockholders of the insolvent bank involves an accounting

and is equitable in its nature, over which the Superior Court has exclusive jurisdiction, and all the stockholders of the insolvent bank are proper, if not necessary, parties, but no judgment can be rendered against them until the amount for which each stockholder is liable has been determined.

APPEAL by the demurring defendants from *Parker, J.*, at December Term, 1932, of GATES. Affirmed.

This action was heard on the demurrer to the complaint filed by certain of the defendants.

The facts alleged in the complaint are substantially as follows:

On 11 March, 1930, because of its impending insolvency, and of its inability for that reason to continue its business, the Planters Savings Bank, a corporation organized and doing business at Gatesville, N. C., under the banking laws of this State, sold and transferred all its assets of every kind, including the statutory liability of its stockholders to its depositors and other creditors, to the Bank of Gates. In consideration of such sale and transfer, the Bank of Gates, a corporation organized and doing business at Gatesville, N. C., under the banking laws of this State, assumed the liability of the Planters Savings Bank to its depositors and other creditors, and agreed to pay the claims of such depositors and other creditors in full. Before its consummation, the said sale and transfer was duly approved, as to all its terms, by the board of directors of the Planters Savings Bank, and also by the Corporation Commission of North Carolina.

Since the said sale and transfer, the Bank of Gates has paid the claims of all the depositors and other creditors of the Planters Savings Bank in full. The assets of the Planters Savings Bank have been liquidated by the Bank of Gates. The proceeds of such liquidation have not been sufficient in amount to reimburse the Bank of Gates for the amount which the said bank advanced for the payment of the claims against the Planters Savings Bank. There is now due the Bank of Gates on account of the amount which it has advanced to pay said claims the sum of $24,795.32.

The par value of the capital stock of the Planters Savings Bank is $20,000. This capital stock is divided into 400 shares, each of the par value of $50.00. The defendants are stockholders of the Planters Savings Bank, each defendant owning the number of shares of stock alleged in the complaint. An assessment of 100 per cent, or of $50.00 per share, on each share of the stock of the Planters Savings Bank will be required to pay the amount now due the Bank of Gates.

From judgment overruling their demurrer, and allowing them to file answers to the complaint within the time prescribed by law, the demurring defendants appealed to the Supreme Court.

A. P. Godwin, J. M. Glenn and MacLean & Rodman for plaintiff.
P. W. McMullan and John H. Hall for defendants.

CONNOR, J. The judgment in this action is affirmed on the authority of *Trust Co. v. Roscower,* 199 N. C., 653, 153 S. E., 560. In that case the sale and transfer by the insolvent bank of its assets of every kind, including the statutory liability of its stockholders to its depositors and other creditors, to another bank, for purposes of liquidation, was approved not only by two-thirds of its directors and the Corporation Commission, but also by the holders of two-thirds of its capital stock. The approval of the sale and transfer of its assets by the stockholders of the selling bank was not required by the statute under which the sale and transfer was made, and added nothing to its validity. A valid sale and transfer of its assets may be made by a bank organized and doing business under the laws of this State, to another bank, for purposes of liquidation, when the sale and transfer is approved, as to all its terms, by two-thirds of the directors of the selling bank and the Corporation Commission. The approval of the stockholders of the selling bank is not required by the statute. Sec. 4, chapter 47, Public Laws of North Carolina, 1927. The statute is not invalid for that reason.

This action involves primarily an accounting and for that reason is equitable in its nature. The accounting may be had only in the Superior Court. *Trust Co. v. Leggett,* 191 N. C., 362, 131 S. E., 752. All the stockholders of the insolvent bank are proper, if not necessary, parties. The complaint is not demurrable for misjoinder of parties or causes of action. No judgment can be rendered against any of the stockholders until the amount for which each stockholder is liable has been determined. This amount cannot exceed the par value of the shares of stock owned by him, but may be less. There is no error. The judgment is

Affirmed.

STATE v. SEATON PATRICK.

(Filed 8 March, 1933.)

Seduction B d—Supporting character evidence of prosecutrix must tend to establish her good character at time of alleged seduction.

In a prosecution for seduction under promise of marriage the character evidence of the prosecutrix relied on as supporting evidence must tend to establish her good character at the time of the alleged seduction, and where the only "supporting testimony" relied on is testimony of the prosecutrix's good character two years prior to the alleged seduction,

with no testimony as to her character subsequent to that time, the evidence is insufficient to be submitted to the jury and defendant's motion as of nonsuit should have been granted.

CRIMINAL ACTION, before *Daniels, J.*, at January Term, 1933, of WASHINGTON.

The defendant was indicted for seduction under promise of marriage. There was a verdict of guilty followed by a sentence of two years in the State's prison. The prosecutrix testified that the immoral relations began in September, 1930. The State offered four witnesses who undertook to testify as to the good character of prosecutrix. All of these witnesses testified that the prosecutrix left the community "about four years ago," except one, who stated that she went away in 1928, and that he did not know anything about her after that. Moreover, all of said witnesses stated on the witness stand that they knew nothing about the character of the prosecutrix within a period of four years prior to the trial.

From the judgment pronounced, the defendant appealed.

Attorney-General Brummitt, Assistant Attorney-General Siler and Gertrude M. Upchurch for the State.

W. L. Whitley for defendant.

BROGDEN, J. If character evidence is relied upon exclusively as "supporting testimony" in the trial of a seduction case, must such character evidence tend to establish good character at the time of the trial or at the time of the seduction?

Each of the constituent elements of the crime of seduction requires proof of supporting testimony consisting of independent facts and circumstances. However, evidence of good character of prosecutrix has been deemed adequate "supporting testimony" of innocence and virtue. *S. v. Moody,* 90 S. E., 900; *S. v. Doss,* 188 N. C., 214, 124 S. E., 156; *S. v. Crook,* 189 N. C., 545, 127 S. E., 579; *S. v. Shatley,* 201 N. C., 83.

In the case at bar the State offered the testimony of four witnesses who undertook to testify as to the good character of the prosecutrix. The evidence discloses that the prosecutrix went away from home about four years prior to the trial, and none of the witnesses offered by the State ventured to testify with respect to her character during such four-year period. If the character evidence so given was sufficient to constitute "supporting testimony," then the verdict must stand; otherwise the motion for nonsuit should have been granted. In *S. v. Doss* supporting testimony of innocence consisted of proof "that the character of the prosecutrix has always been good prior to this occurrence." In the *Malonee case,* 154 N. C., 200, 69 S. E., 786, the Court declared that

"the proof of chastity should relate to the time preceding the seduction or the time when it became known, as it is manifest that her reputation in that regard would be injuriously affected by the offense itself when revealed, and the very crime would thus become the means of protecting the criminal, and the more notorious the seduction and the more extensively her shame had been published to the world, the more certain would be the immunity from punishment." The question involved in this appeal was first considered in *S. v. Johnson,* 60 N. C., 151. Discussing character evidence, the Court said: "The question is now presented, for the first time, in this State, to what time shall the prosecutor's evidence refer? to the time of the alleged commission of the offense? or to that of the trial? The authorities referred to by the counsel, seem to leave this question somewhat unsettled in the courts of England and of the States, where it has occurred. We think that, upon principle, it ought to be confined to the time when the charge was first made." The same idea was elaborated in *S. v. Spurling,* 118 N. C., 1250, 24 S. E., 533, which involved a prosecution for slander of an innocent woman. This case holds that if a prosecutrix does not testify as a witness that proof of her good character "would have applied only to her reputation up to the time of the alleged intercourse with the defendant"; and further, that if the prosecutrix is a witness in the case, her general character at the time of the trial may be shown for the purpose of supporting or impairing the credibility of her testimony as a witness.

In the case at bar the purported character evidence related to the last two years prior to the seduction and approximately four years prior to the trial. Consequently the State offered no evidence that the character of the prosecutrix was good at the time of the seduction. Manifestly, the character evidence was too stale to constitute such "supporting testimony" as the statute contemplates and the decisions require. Therefore, the motion for nonsuit should have been allowed.

Reversed.

M. G. BAREFOOT v. THE HOME INSURANCE COMPANY OF NEW YORK.

(Filed 8 March, 1933.)

Insurance J c—Where encumbrance is paid off prior to loss insurer may not avoid liability on ground that encumbrance violated terms of policy.

A clause in a policy of fire and theft insurance requiring that the insured disclose any encumbrance or lien against the automobile insured is not a valid defense to an action on the policy where an encumbrance on the car in violation of the terms of the policy is paid off and discharged prior to the occurrence of loss covered by the policy.

APPEAL by defendant from *Grady, J.*, at September Term, 1932, of HARNETT. No error.

On 26 April, 1930, the plaintiff bought a Ford car from J. W. Thornton (a local dealer at Dunn) on the installment plan and gave him a conditional sales contract. At the same time he applied to the seller for insurance and the premium was included in the purchase price of the car. The sale was financed through the Universal Credit Company of Charlotte. On the same day (26 April) the plaintiff gave H. C. Wooten a second mortgage on the car to secure $130. On or about 29 April, 1930, the defendant delivered to the plaintiff its policy dated 26 April, insuring the car against the hazard of theft and fire. The term of the policy was twelve months, beginning 26 April, 1930, and ending 26 April, 1931. The car was stolen on Saturday night, 15 November, 1930, and was found on the next Wednesday almost totally destroyed by fire. The plaintiff demanded payment of the insurance and the defendant disclaimed liability by reason of a clause in the policy which required the plaintiff at the time of applying for the insurance to make disclosure of any encumbrance or lien on the car. The plaintiff admitted that at no time after issuing the policy did he notify the insurance company of the mortgage to Wooten; but Wooten testifying on behalf of the defendant said that J. W. Thornton was present when the plaintiff executed the lien to Wooten and in fact furnished the paper on which it was written; that Thornton was informed of the entire transaction and assured Wooten that the policy would protect him just as it would protect Wooten. In response to the issues submitted the jury found from the evidence that the defendant had issued its policy on the car and had knowledge of the second lien, that the plaintiff had discharged the lien before the car had been stolen, and that the value of the car was $500 at the time it was burned. The court gave judgment for the plaintiff and the defendant appealed.

James Best for plaintiff.
R. L. Godwin for defendant.

ADAMS, J. The second lien was not in effect when the car was burned. It had previously been paid and discharged. The appeal is therefore to be determined by the principle enunciated in *Cottingham v. Insurance Co.*, 168 N. C., 259. The encumbrance suspended the risk and the policy was revived when the encumbrance was discharged. The question of Thornton's agency and the exceptions to the instructions relating to it need not be considered. It would have been erroneous to grant the defendant's motion for nonsuit.

No error.

ELIJAH DANCY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 8 March, 1933.)

Railroads D b—Evidence held sufficient to overrule nonsuit in action for damages resulting from collision at crossing.

Evidence tending to show that defendant's train approached a crossing within a city's limits at an excessive rate of speed through a heavy fog without giving warning by bell or whistle, and struck plaintiff's truck, that plaintiff stopped his truck before attempting to cross, but failed to see or hear the approach of the train, *is held* sufficient to overrule defendant's motion as of nonsuit, there being no evidence that plaintiff could not have heard warning signals by bell or whistle had such been given.

APPEAL by plaintiff from *Daniels, J.*, at November Term, 1932, of EDGECOMBE. Reversed.

This is an action to recover damages for personal injuries suffered by plaintiff when the motor truck which he was driving was struck by defendant's train at a railroad crossing within the corporate limits of the city of Rocky Mount.

The allegations in the complaint that plaintiff was injured by the negligence of the defendant are denied in the answer. The defendant in its answer alleged that plaintiff by his own negligence contributed to his injuries, and for that reason is not entitled to recover in this action.

From judgment dismissing the action at the close of the evidence offered by the plaintiff, the plaintiff appealed to the Supreme Court.

Geo. M. Fountain and C. H. Leggett for plaintiff.

Thos. W. Davis, Gilliam & Bond and Spruill & Spruill for defendant.

CONNOR, J. The evidence offered by the plaintiff at the trial of this action tended to show that defendant's train approached the crossing at a speed of forty to fifty miles per hour, through a heavy fog, without giving warning of its approach by ringing the bell or blowing the whistle on the engine, or otherwise; it also tended to show that plaintiff stopped the truck which he was driving at a distance of twelve or fifteen feet from the defendant's tracks, and looked and listened for an approaching train. He neither heard nor saw a train, and thereupon drove his truck on the crossing. Defendant's train appeared suddenly out of the fog and struck plaintiff's truck, before he had driven off the crossing. There was evidence tending to show that because of the fog plaintiff could not see for more than one hundred to one hundred and fifty yards in the direction from which the train was approaching the crossing. There was no evidence tending to show that plaintiff could not have heard the

ringing of a bell or the blowing of a whistle. Plaintiff did not drive on the crossing until he had assured himself by the exercise of his senses of sight and hearing that no train was approaching the crossing.

There was error in the judgment dismissing the action as of nonsuit. *Butner v. R. R.*, 199 N. C., 695, 155 S. E., 601. The judgment must be Reversed.

STATE v. ANDREW CARTER.

(Filed 8 March, 1933.)

Homicide G a—Evidence in this prosecution for homicide is held insufficient to resist defendant's motion as of nonsuit.

Evidence tending to show that deceased was in an advanced stage of pregnancy and was found dead lying on her bed where she had evidently been placed, it being impossible that she could have died in such position, that she was purging some at the nose and mouth and a small quantity of bloody fluid was oozing from her vagina, but that she was not in labor when she died, with medical opinion testimony that she died from a blow on the stomach, but that no bruises were found inside her body upon an autopsy, that the defendant, the deceased's husband, had been indicted for assaulting the deceased on previous occasions, but that he did not return home on the night of her death until eleven o'clock, when according to his testimony, he found the door latched and went to his father's house for the night and did not see his wife until the next morning when he found her dead, and that defendant did not view his wife's body after it had been removed to the undertaker's establishment *is held* insufficient to be submitted to the jury, and a nonsuit is entered by the Supreme Court on appeal. C. S., 4643.

APPEAL by defendant from *Frizzelle, J.*, at August Term, 1932, of BERTIE.

Criminal prosecution tried upon indictment charging the defendant with the murder of his wife, Lottie Carter.

The record discloses:

1. That Lottie Carter died at her home sometime during the night of 9 August, 1932. Her body was found the next morning about 7:30 o'clock, four to six hours after death. She was lying on the bed, partially covered with a sheet. Her infant child was playing on the bed beside her. She was in an advanced stage of pregnancy—within about a week of confinement. There was blood under the pillow and on the bed. The deceased was purging some at the mouth and nose, and a small quantity of bloody fluid was oozing from her vagina. She was not in labor, and her body had apparently been placed on the bed. She could not have died, quietly and without moving, in the position she was in. On the

afternoon before, the deceased had run some hogs out of the field, and had been warned by her father-in-law against such violent exercise.

2. The coroner, who is a physician, testified that in his opinion, a blow on the stomach, above the navel, caused the death of the deceased. On cross-examination, he testified that an autopsy was performed and "no bruises found inside the body." This was after the body had been embalmed.

3. The defendant had, on two previous occasions, been indicted for assaulting his wife. He was away from home on the night in question. Returning around 11:00 o'clock and finding the door fastened with the button on the inside, according to his testimony, he went to his father's house, about 400 yards away, and spent the night. The next morning, he pushed the door open, and upon seeing his wife, jumped back and exclaimed: "Lord, she is dead."

4. The defendant did not view his wife's body after it had been removed to the undertaker's establishment.

Verdict: Guilty of murder in the second degree.

Judgment: Imprisonment in the State's Prison at hard labor for a term of not less than eight nor more than ten years.

Defendant appeals, assigning errors.

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

J. A. Pritchett and J. H. Matthews for defendant.

STACY, C. J. The evidence does no more than raise a suspicion, somewhat strong perhaps, of a homicide and the defendant's guilt. This is not enough on a prosecution for murder. *S. v. Everett,* 194 N. C., 442, 140 S. E., 22. The demurrer to the evidence will be sustained, and judgment of nonsuit entered here, C. S., 4643, on authority of the following cases: *S. v. Church,* 202 N. C., 692, 163 S. E., 874; *S. v. Johnson,* 199 N. C., 429, 154 S. E., 730; *S. v. Battle,* 198 N. C., 379, 151 S. E., 927; *S. v. Swinson,* 196 N. C., 100, 144 S. E., 555; *S. v. Montague,* 195 N. C., 20, 141 S. E., 285; *S. v. Prince,* 182 N. C., 788, 108 S. E., 330; *S. v. Rhodes,* 111 N. C., 647, 15 S. E., 1038; *S. v. Goodson,* 107 N. C., 798, 12 S. E., 329; *S. v. Brackville,* 106 N. C., 701, 11 S. E., 284; *S. v. Massey,* 86 N. C., 660; *S. v. Vinson,* 63 N. C., 335.

The failure of the defendant to view his wife's body at the undertaker's establishment was no stronger circumstance than the failure of the defendant in *S. v. Birkman,* 198 N. C., 545, 152 S. E., 630, to provide suitable burial clothes and a casket for his wife's funeral.

Reversed.

O. D. HINNANT v. AMERICAN FIRE AND MARINE INSURANCE COMPANY ET AL.

(Filed 8 March, 1933.)

Appeal and Error F e—Motion for certiorari must be supported by transcript of record and appellee must be given notice of motion.

In order to support a motion for *certiorari* it is required that appellant file transcript of the record proper and give appellee notice of the motion, and appellee's transcript of record filed on motion to docket and dismiss cannot avail the appellant on his motion for *certiorari*. Rules 17 and 34.

MOTION by American Fire and Marine Insurance Company to docket and dismiss plaintiff's appeal.

The case was tried September-October Term, 1932, Johnston Superior Court, and nonsuited at the close of plaintiff's evidence. Appeal duly noted. Upon failure of plaintiff to bring up and file transcript of record as required by the rules, the American Fire and Marine Insurance Company filed certificate from the clerk and moved to docket and dismiss the appeal under Rule 17. In answer to this motion, the respondent asked for *certiorari* to bring up the appeal. The appeal was ordered docketed and *certiorari* allowed. Movant requests that order of *certiorari* be withdrawn; first, because issued without notice and before movant could be heard; second, because appeal had been abandoned; and, third, for the reason that no record proper had been filed upon which said application could be made.

A. J. Fletcher for movant.
W. P. Aycock and E. J. Wellons for respondent.

STACY, C. J. Filing transcript of record proper as basis for *certiorari* is required to acquaint the Court with knowledge of the pendency of the action, that notice of appeal was duly given, and that the same has not been abandoned. *Pittman v. Kimberly*, 92 N. C., 562; *S. v. Freeman*, 114 N. C., 872, 19 S. E., 630; *Baker v. Hare*, 192 N. C., 788, 136 S. E., 113; *Brock v. Ellis*, 193 N. C., 540, 137 S. E., 585. Entries of appeal need not appear in *habeas corpus* proceedings. *In re Croom*, 175 N. C., 455, 95 S. E., 903.

The *certiorari* was improvidently granted. Rule 34. Notice is required as well as filing transcript of record proper. It appears that plaintiff had abandoned his appeal and was apparently relying upon a subsequent order of the judge, until the present motion to docket and dismiss the appeal was filed in this Court.

The transcript of record filed by movant on its appeal will not enure to the benefit of respondent, because the two appeals are not from the same judgment. The respondent gave notice of appeal from the judgment of nonsuit. The movant appealed from the order entered sixty days thereafter.

The motion to docket and dismiss plaintiff's appeal is well founded. Respondent's rights, if any he now have, may arise in subsequent proceedings.

Motion allowed.

O. D. HINNANT v. AMERICAN FIRE AND MARINE INSURANCE COMPANY ET AL.

(Filed 8 March, 1933.)

New Trial C c—

The trial court is without authority to vacate a judgment of nonsuit and grant a new trial after adjournment of the term at which the case was tried except by consent. In this case such order was entered by the trial court when called upon to settle the case on appeal.

APPEAL by defendant, American Fire and Marine Insurance Company, from *Grady, J.*, at Chambers in Smithfield, 10 December, 1932. From JOHNSTON.

Civil action to recover on insurance policy, tried at the September-October Term, 1932, Johnston Superior Court, which resulted in judgment of nonsuit, and from which plaintiff gave notice of appeal. Plaintiff's statement of case on appeal and defendant's counter-case were both filed in apt time, and duly sent to the judge for settlement. The following order was entered 10 December, 1932:

"This cause coming on to be heard at Smithfield, N. C., for the purpose of settling the case on appeal, and this court having carefully considered the counter-case as made out by the defendants, and the court being of the opinion, upon said counter-case, and the case as made up and served by the plaintiff, that a new trial should be ordered, and that it is useless to put the parties to the expense of an appeal; now, upon the facts admitted in the two 'cases' as made up by the parties, and also in the discretion of the court, it is ordered that the verdict and judgment entered in this cause at the September-October Term, 1932, be and the same is set aside, and a new trial ordered upon the same or some other proper issues.

This 10 December, 1932. HENRY A. GRADY, *Judge Presiding.*"

From this order the defendant, American Fire and Marine Insurance Company, appeals, assigning error.

A. J. Fletcher for defendant, American Fire and Marine Insurance Company.

STACY, C. J. Laudable as his purpose may have been, the learned judge was without authority to vacate the judgment of nonsuit and grant a new trial after adjournment of the term at which the case was tried, except by consent. *Acceptance Corp. v. Jones,* 203 N. C., 523; *Bisanar v. Suttlemyre,* 193 N. C., 711, 138 S. E., 1; *Dunn v. Taylor,* 187 N. C., 385, 121 S. E., 659.

The order, therefore, from which the defendant appeals, will be stricken out.

Error.

E. M. ROLLINS v. S. B. ROGERS ET AL., COMMISSIONERS.

(Filed 8 March, 1933.)

Mandamus A b: Schools D f—Mandamus to compel payment of additional salary to county school superintendent held error in this case.

Mandamus will lie only to compel performance of a legal duty by a party having a clear legal right to demand performance, and the writ is erroneously granted on petition of a county superintendent to compel the levy of taxes for the payment of an additional salary to him as superintendent of a special-charter school district where the matter is in dispute between the board of county commissioners and the county board of education, and the boards have not had a joint meeting nor the clerk of the Superior Court called upon to arbitrate the matter. 3 C. S., 5608.

APPEAL by defendants from *Harris, J.,* at October Term, 1932, of VANCE.

Application for writ of mandamus, heard upon demurrer.

Plaintiff is superintendent of public instruction for Vance County. He alleges that he was also elected superintendent of the schools of Henderson Township, special-charter district, for a term beginning 1 July, 1932, and ending 30 June, 1933, at a salary of $600 in addition to his salary as county superintendent. When the school budgets were presented to the defendant board of county commissioners, they declined to approve the item of $600, here in dispute, on the ground that the county was already paying the plaintiff for his full time.

There was no joint meeting of the county board of education and the board of county commissioners in an effort to adjust the difference between them, nor was the clerk of the Superior Court called upon to arbitrate the matter as provided by 3 C. S., 5608.

Plaintiff's application for mandamus to compel the defendants to levy sufficient tax to cover the salary item in dispute was allowed, from which ruling the defendants appeal.

J. H. Bridgers and Jasper B. Hicks for plaintiff.
A. A. Bunn and Kittrell & Kittrell for defendants.

STACY, C. J. Mandamus is available against a board of county commissioners only to compel the board to do something which it is its duty to do without it. The writ confers no new authority. The party seeking it must have a clear legal right to demand it, and the board must be under a legal obligation to perform the act sought to be enforced. Neither of these prerequisites has been shown in the instant case. *Powers v. Asheville,* 203 N. C., 2, 164 S. E., 324; *Person v. Doughton,* 186 N. C., 723, 120 S. E., 481. The writ was improvidently granted.

Reversed.

RAYMOND MAXWELL AND HAROLD MAXWELL, COPARTNERS, TRADING AS MAXWELL COMPANY, v. THE PROCTOR AND GAMBLE DISTRIBUTING COMPANY, A CORPORATION, AND THE EASTERN BANK AND TRUST COMPANY, A BANKING CORPORATION.

(Filed 8 March, 1933.)

1. Principal and Agent A a—Fact of agency held sufficiently proven aliunde acts and declarations of agents.

Evidence that defendant transacted business with plaintiffs for a long period of time in accordance with the terms of a contract alleged by plaintiffs to have been executed for defendant by its duly authorized agents, is sufficient to show ratification by plaintiff and constitute evidence of agency *aliunde* the acts and declarations of the alleged agents sufficient to render evidence of their acts and declarations competent, and the direct and circumstantial evidence of agency in this case together with the fact that the alleged agents were present in court and did not deny plaintiffs' testimony as to their acts and declarations is held sufficient to be submitted to the jury.

2. Same—

The manner and time in which the evidence *aliunde* as to agency may be introduced is largely in the discretion of the trial court.

3. Principal and Agent C f—

The unauthorized acts of an agent must be ratified in whole or rejected in whole.

4. Evidence D f—

The fact that witnesses made inconsistent statements does not render their testimony incompetent, but affects only their credibility, which is for the determination of the jury.

5. Damages F b—Measure of damages for breach of contract will be determined as of time of breach and not as of time of performance.

The measure of damages for the breach of a contract is the loss suffered by plaintiff at the time of the breach which was within the reasonable contemplation of the parties, and not the loss as of the time for performance under its terms.

6. Contracts E d—Instruction relating to waiver of breach by plaintiff held without error.

The charge of the court in this action for breach of contract in respect to waiver of breach by plaintiffs by placing another shipping order with defendant is held correct, considering the charge as a whole, and the jury's verdict that such action did not constitute a waiver is upheld, there being evidence that the order was placed only for the purpose of obtaining service on defendant by attachment.

7. Trial E e—

Where in an action for breach of contract the defendant desires more specific instructions as to the measure of damages he should aptly tender a request therefor.

APPEAL by defendant, the Proctor and Gamble Distributing Company, a corporation, from *Frizzelle, J.*, and a jury, at October Term, 1932, of CRAVEN. No error.

The allegations of the complaint and the evidence on the part of plaintiff were to the effect: That on or about 28 February, 1929, plaintiffs made a contract with defendant, a Delaware corporation, through certain of its agents, whereby the plaintiff became the sole representative and distributor of the defendant's soap products in certain territory comprising five counties (Craven, Onslow, Jones, Pamlico and Carteret) in North Carolina. The said contract contained certain conditions and agreements, among which were: That the defendant contracted and agreed that plaintiffs should be the sole representatives or distributors of its goods in said territory; that defendant would not sell its products to local or retail trade except for the account of plaintiffs, all of such orders or sales to be filled from the warehouse of plaintiffs; that defendant would furnish a local salesman to work and contact the retail trade in said territory, making sales for the account of plaintiffs and shipments to be made from plaintiffs' warehouse in New Bern; that the defendant would protect plaintiffs on all declines in prices of said goods so that the margin of profit provided in the contract might be available to plaintiffs on all retail sales between the wholesale prices and retail prices; that the contract should extend for an indefinite period of time and so long as the contractual relations were satisfactory, and in the event it should be desired to discontinue the contract, that proper notice would be given plaintiffs by the defendant and that the defendant would relieve plaintiffs of all goods on hand or give shipping orders for such

goods at the time of the termination of the contract. The relations in said contract extended for more than one year, that is, February, 1929, to April, 1930, with full compliance of all the terms and conditions on the part of both the plaintiffs and defendant. In April, 1930, the defendant, without notice, breached its contract with plaintiffs and began soliciting local trade and retail merchants and making sales and delivery of its soap products from its own warehouse in direct competition with plaintiffs, and by selling its goods at a retail price for less than the wholesale price which they had required the plaintiffs to pay for said goods then in the warehouse of plaintiffs, and that upon the discovery by the plaintiffs of that fact, they immediately requested that the defendant relieve them of the stock of goods then on hand in the warehouse of plaintiffs of the total value of over $6,256.66, which the defendant failed and refused to do, thus forcing the plaintiffs to dispose of said stock of goods on a competitive basis which the defendant was offering to the other trade in the territory and causing them to suffer great loss and damage in the sum of $3,132.83. The answer of the defendant denied the alleged contract and the alleged breach.

The testimony of plaintiff, Raymond Maxwell, was to the effect that for several months prior to the contract McKenzie "had been selling Proctor and Gamble goods to local merchants about over the territory. . . . And about the 10th or 12th of February, 1929, he came in and said his wholesale distributor in New Bern was going out of business or had gone out of business; he said that they had been handling all of his wholesale orders for him and that he had to get a wholesale distributor in New Bern to take care of this territory, and they couldn't take care of the territory satisfactorily any other way, and that he wanted us to buy their goods in carload lots and take care of the orders for the retail trade on their regular list prices. . . . He said that his company would never go direct to the retail trade any more, that they had decided that the proper way to distribute their goods was through wholesale merchants who bought in carload lots and that if we would buy their goods in carload lots that they would guarantee to move every case of their goods that we purchased at their regular list price and that at any time that we had their goods in our stock and there should come a decline in the prices of their goods that the goods would be reported and that the company would issue credit memorandum for the amount of their decline. . . . McKenzie brought with him Klettner and introduced him as Proctor and Gamble's representative. We discussed the profits that we would have with Mr. McKenzie and Mr. Klettner at that time. . . . It was understood at that time, if the terms of the contract were changed as to terminating the contract with us, they guaranteed to move every case we bought at their regular list

price; after we had this agreement with Mr. Klettner and Mr. McKenzie we bought a carload of their goods, or gave them specifications for a carload of their goods on this occasion that we are talking about. . . . The shipment was billed from Proctor and Gamble Distributing Company. . . . The date of the invoice is 28 February, the invoice and bill showing $2,508.97, is marked paid. . . . After we received the shipment, the first carload shipment, we received a communication from the Proctor and Gamble Company of Atlanta, through the mail, which was an itemized invoice for the order given to Klettner and McKenzie. Also a letter of 20 May, 1929, from the Proctor and Gamble Distributing Company, Atlanta, Ga., addressed "To all Distributors: Crisco Merchandising Allowance." Among other "puffing" statements is the following: "We believe the present time is an opportune one for your men to get extra heavy volume on Crisco and we trust you will do everything possible to take advantage of this offer while it is in effect. We feel sure your trade will do well to buy freely—advertise and push it to the consuming trade, in order to develop a greater business on this outstanding product—Crisco."

Within about fourteen months period of the alleged contract, before the alleged breach, plaintiffs ordered about eight cars of soap and soap products from defendant. The total invoice of the cars purchased from defendant during the period of the alleged contract amounted to $24,230, and when the alleged breach took place plaintiffs' stock on hand amounted to $6,256.66. The relationship continued from February, 1929, to April, 1930.

The witness, Raymond Maxwell, further testified: "Q. Then during that time what did Proctor and Gamble do in connection with handling the goods in your warehouse and having you to sell and the general distributing? A. Why, he was complying with the terms of our agreement by turning his orders over to us to be filled from our stock. Mr. McKenzie was the salesman here filling the orders through our stock, turning the orders over to us to be filled by us. . . . We figured our average profit, and it was running about seven per cent over and above the cost of the goods. . . . About 16 April, 1930, Mr. McKenzie called on us and informed us that he had instructions from his company to pool a car of their products to our retail customers. . . . Q. What does he mean by pooling a car? A. Sell a car of their products direct to the retail dealers of the territory that we covered and on which we had an agreement. . . . Upon receipt of this information we talked about it for some time and told Mr. McKenzie that they were breaking their agreement with us. . . . At the time Mr. McKenzie informed us that he was going to sell our retail trade in our territory direct; then we told him we wanted him to move our stock, and he said

he would have to take that up with the company; he said he would do what he could about it, but he would rather we would take it up direct, so we wired the company direct; we called him down to the office that night of 16 April and prepared a wire to the company which he read and which he agreed was correct."

The telegram to defendant at Atlanta, Ga., charging a violation of contract stated "As the terms of this agreement have been violated please give us disposition this stock immediately." After sending the telegram Mr. Stone, of the Atlanta office, called plaintiffs over long-distance phone. A letter of 21 April, 1930, in consequence of interview with Stone was sent to defendant "Atten: Mr. Stone," and read: "Complying with your request in conversation with the writer on the telephone today, we beg to advise that our present stock of your goods is as follows: (setting same forth). We will thank you to give us disposition of this stock in accordance with our wire of the 16th to your Mr. S. R. Kane."

Again plaintiffs wrote a letter, 2 May, 1930: "In response to your request on telephone on the 21st (April) we immediately sent you an itemized list of your products by letter on that date, and to date we have not received disposition of the car of your products which your representative sold the retailers of this city. You promised the writer that you would fill these orders promptly out of our stock, and we will thank you to let us have disposition at once."

Plaintiff further testified: "The Proctor and Gamble Company protected us on every decline in price of their goods during the time that we continued under their contract arrangement. . . . Q. What information did you have, if any, relative to the decline of the Proctor and Gamble goods from the time that they breached the contract until the present time? A. Proctor and Gamble's price list."

Plaintiffs offered in evidence price list of defendants, dated 1 July, 1930: "This price list supersedes all previous lists." Plaintiffs also offered in evidence, another price list published by Proctor and Gamble Distributing Company: "This price list supersedes all previous lists. . . . Orders should be given to our salesmen or be mailed or telephoned direct to the Proctor and Gamble Distributing Company. . . . Prices subject to change without notice. . . ."

Plaintiff, Raymond Maxwell, further testified: "Q. Mr. Maxwell how did you get the price list from the Proctor and Gamble Distributing Company after the breach by them? A. Proctor and Gamble Distributing Company quit sending us a price list, and so in disposing of those goods we had on hand, which we were bending every effort to get rid of, we would find out that the price of goods had declined, and we would get the Proctor and Gamble price list. The price list introduced here in

evidence were Proctor and Gamble's price lists; we could get these lists from time to time; we had to meet the competitive prices of Proctor and Gamble to dispose of these goods; we met the prices of Proctor and Gamble and sometimes sold them lower than that to get rid of them; we made every effort to dispose of the goods to our customers since the company would not relieve us of them; we still have some goods on hand; we have been working over these goods since 16 April, 1930; this is October, about thirty months or two and a half years; we ascertain the loss from the sale of goods from our warehouse meeting the prices of the Proctor and Gamble price list. . . . I was furnished a price list regularly by Proctor and Gamble between February, 1929, and April, 1930. . . . While he (Mr. McKenzie) was working under this contract and agreement he came in every week practically; our stockman took the stock. Mr. McKenzie didn't take it; I don't know that Mr. McKenzie knew where we kept our stock; in April he came in and told me he was going to pool a car and thereupon I called upon Proctor and Gamble to give me shipping orders for my 1,300 cases; this was on 16 April, 1930; that is what I allege to be a breach of the contract; when they broke the contract and went direct to the retail trade, we asked them to relieve us of our stock; the pooling of the car was a breach of the contract; I don't know when they pooled the car, but he told me on 16 April, 1930, that he was pooling it. At that time I declared the contract breached and declared a cancellation and sent that telegram on 16 April. . . . Q. Were those the two men you made your contract with? A. Yes, sir. Q. Now, Mr. Guion asked you whether the 205 cases ordered by you at that time were in a pooled order. Now state why you ordered the goods at that time from Mr. McKenzie in a pooled car shipment? A. Why, we ordered those goods because we couldn't find anything in this State belonging to Proctor and Gamble which we could attach to protect us against the loss we had sustained, therefore, it was necessary to get some goods to attach and, therefore, we ordered the goods bill of lading, sight draft attached and, therefore, we ordered these goods. Q. That was the only way you could get jurisdiction? A. Absolutely. . . . Proctor and Gamble were a nonresident corporation. . . . We bought and paid for approximately $24,230 worth of their goods between February, 1929, and April, 1930; we had just a small quantity of the shipment of June, 1928, when we made the contract; we couldn't have sold $6,256.66 worth of goods at the time this contract was breached if we could have put it up and sold it in a lump sum; couldn't have sold it for very much."

Harold Maxwell corroborated Raymond Maxwell's testimony, and testified, in part: "Q. What, if anything, did he (Klettner) say that he would do about any goods that was on his hands? A. And that he would

guarantee to move every case of stuff that we bought on a profit to Maxwell and Company. Q. Now, in accordance with that conversation, was an order placed with Mr. McKenzie? A. Yes, sir, we gave Mr. Klettner and Mr. McKenzie an order that night. Court: That was the night of 20 February; 20 February, I believe was the date. Q. February of what year? A. 1929. Court: Is that the time that you gentlemen say the contract was made? A. That's the day the contract was really made, judge. They talked about the car way before that, but that had nothing to do with this contract. . . . And he (McKenzie) met us there at eight o'clock and we sent this telegram that was brought in court here today; after that Mr. Raymond Maxwell talked to Mr. Stone, in Atlanta, and after that we wrote a letter dated 21 April to Proctor and Gamble Company; the damage sustained by Maxwell Company by reason of the breach of this contract and failure to remove these goods off our hands was figured at $1,024.69 besides the other things we can't figure; the trouble we had had before was years ago. . . . Q. Now, Mr. Maxwell, you tell his Honor and the jury what was the fair, reasonable market value of those goods left on the hands of Mr. Maxwell at the time of the breach, in the place and in the condition they were left on his hands? A. If they were put up in bulk and sold they wouldn't have brought three thousand dollars. Q. Is that in your opinion a fair market value of the goods in the condition they were left in your hands? A. $3,000 bulk, yes, sir."

Raymond Maxwell, recalled, testified: "Q. Will you tell his Honor and the jury what the fair market price of those goods, sold in bulk, was, sold on this market if you had to get rid of them at that time? A. It would be $3,132.83. I didn't know of anybody buying it that way then; I think if you put those goods on the market here at that time it would not bring more than half price; this is based on if put up and sold as a whole here. . . . I never knew a general store to buy retail here; the business here since 1929, has been a decrease in the value and volume of the commodities sold."

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

"1. Did the plaintiffs and the defendant contract, as alleged in the complaint? Answer: Yes.

2. Did the defendant breach the contract, as alleged in the complaint, during April, 1930? Answer: Yes.

3. Did plaintiff waive breach of contract as alleged in answer? Answer: No.

4. What damages, if any, has plaintiff sustained by reason of the breach of the contract, as alleged in the complaint? Answer: $2,000."

The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The necessary assignments of error to determine the controversy will be set forth in the opinion.

W. H. Lee and Moore & Dunn for plaintiffs.
Dinsmore, Shohl & Sawyer and W. B. R. Guion for defendant.

CLARKSON, J. The defendant introduced no evidence and at the close of plaintiffs' evidence made a motion for judgment as in case of nonsuit. C. S., 567. The court overruled the motion and in this we can see no error.

The defendant contends that "The termination of this motion must depend upon the competency of plaintiffs' evidence to establish (a) contract; and (b) its breach." Defendant also contends: "That there was no competent evidence offered of the contract. The whole evidence offered by the plaintiffs is to the acts and declarations of the alleged agent, without proof *aliunde* of agency."

We think from the direct and circumstantial evidence introduced by plaintiffs that it was sufficient to show that Mr. Klettner and Mr. McKenzie made the contract with the plaintiffs, as is alleged by them, on behalf of defendant corporation, and that the defendant breached it. That the defendant at its Atlanta branch carried out all the terms and agreements made with plaintiffs by Klettner and McKenzie, and there was evidence of ratification. The ear-marks of agency, ratification, breach, etc., are set forth in the above evidence of plaintiffs.

It was in evidence that McKenzie and Klettner, whom plaintiffs contended they made the contract with, were in the courtroom at the trial of this action. "Q. Were those the two men you made your contract with? Answer: Yes, sir."

This is a civil action. These men did not go on the stand and deny as to what plaintiffs testified was the contract made by them on behalf of the defendant company. There was evidence introduced later to show the agency *aliunde*.

In *Walker v. Walker*, 201 N. C., at p. 184, we find: "Whether the charge was true or not, the falsity of it was peculiarly within the defendant's knowledge. The fact that she did not refute the damaging charge made by plaintiff, it may be that this was a silent admission of the charge made against her. In *Hudson v. Jordan*, 108 N. C., at p. 13, the party's failure to testify was regarded as a 'pregnant circumstance.' *Powell v. Strickland*, 163 N. C., at p. 402; *In re Hinton*, 180 N. C., at p. 213." *In re Will of Beale*, 202 N. C., 623.

The manner and time in which the evidence *aliunde* as to agency may be introduced, is largely in the discretion of the court below.

In N. C. Handbook of Evidence (Lockhart), 2d ed., sec. 154, at pp. 187-8, citing numerous authorities, is the following: "Admissions by agents, made while doing acts within the scope of the agency, and relating to the business in hand, are admissible against the principal, but such admissions are not admissible to prove the agency; the agency must be shown *aliunde* before the agent's admissions will be received. It seems that the judge in his discretion might allow the admissions to be introduced conditionally before the agency was proved, the party introducing the admissions promising to prove the agency afterwards, and it being understood that unless the agency were proved, the admissions would be stricken out. But admissions by an agent, made subsequent to the completion of the transaction to which they relate, are not admissible against the principal, even though the agent continued to act for the same principal in other matters. The declarations and admissions of the agents of corporations are governed by the same principles which apply to the agents of individuals." *Buckner v. C. I. T. Corp.*, 198 N. C., at p. 699; *Credit Co. v. Greenhill*, 201 N. C., at p. 612.

In *Acceptance Corp. v. Fletcher*, 202 N. C., at p. 172, is the following: "In these cases it is held that where there is evidence tending to show that an alleged agent has repeatedly collected money upon debts owed to the alleged principal, and the alleged principal has received the money collected by the alleged agent, and applied the same as payments on his debts, the inference is permissible that an agreement to that effect has been made by and between them, and that the evidence is sufficient to make out a prima facie case of agency." *Bobbitt v. Land Co.*, 191 N. C., at p. 328; *Atkinson v. Harvester Co.*, 191 N. C., 291; *Sears, Roebuck & Co. v. Banking Co.*, 191 N. C., at p. 505; *Bank v. Sklut*, 198 N. C., 589; *Buchanan v. Carolina Stores, Inc.*, 200 N. C., 792.

In *Bobbitt v. Land Co., supra*, at p. 328, is the following: "*Hoke, J.*, in *Powell v. Lumber Co.*, 168 N. C., p. 635, speaking to the question, says: 'A general agent is said to be one who is authorized to act for his principal in all matters concerning a particular business or employment of a particular nature. Tiffany on Agency, p. 191. And it is the recognized rule that such an agent may usually bind his principal as to all acts within the scope of his agency, including not only the authority actually conferred, but such as is usually 'confided to an agent employed to transact the business which is given him to do,' and it is held that, as to third persons, this real and apparent authority is one and the same, and may not be restricted by special or private instructions of the principal unless the limitations sought to be placed upon it are known to such persons or the act or power in question is of such an unusual character as to put a man of reasonable business prudence upon inquiry as to the existence of the particular authority

claimed (citing authorities). The power of an agent, then, to bind his principal may include not only the authority actually conferred, but the authority implied as usual and necessary to the proper performance of the work intrusted to him, and it may be further extended by reason of acts indicating authority which the principal has approved or knowingly, or, at times, even negligently permitted the agent to do in the course of his employment," citing authorities.

In *Parks v. Trust Co.*, 195 N. C., at pp. 455 and 456: "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.'" *Lawson v. Bank*, 203 N. C., 368.

In regard to the question of the discrepancies in the plaintiffs' testimony in regard to damage, this was a matter for the jury to determine.

In *Collett v. R. R.*, 198 N. C., at p. 762, citing numerous authorities, speaking to the subject, it is said: "Indeed, it cannot be denied that there are inconsistencies, if not direct conflicts, in the testimony of one or two witnesses introduced by the plaintiff. But while these apparent inconsistencies may have affected the credibility of the witness they would not have justified the withdrawal of their testimony from the jury. This principle is maintained in a number of our cases."

On the measure of damages, the court below charged the jury: "The court instructs you that the rule for the assessment of damages in a case like this is the difference between the contract price and the fair market value of the goods at the time of the alleged breach. . . . Our court has said in a number of cases, and I am quoting now, gentlemen, from a case in 196 N. C., *McCall v. Lumber Company* (at p. 603): 'That where the contract,' as in this case, 'is broken before the arrival of the time for full performance and the opposite party elects to consider it in that light, the market price on that day of the breach is to govern in the assessment of the damage. The damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not at the time fixed for the full performance.'"

In *Monger v. Lutterloh,* 195 N. C., at p. 279, citing numerous authorities, it is said: "The rule is too firmly embedded in our jurisprudence to need repeating, that ordinarily the amount of loss which a party to a contract would naturally and probably suffer from its nonperformance, and which was reasonably within the minds of the parties at the time of its making, including such special damages as may be said to arise directly from circumstances existent to the knowledge of the parties, and with reference to which the contract was made, is the measure of damages for the breach of said contract. *Causey v. Davis,* 185 N. C., 155, 116 S. E., 401. Such was the rule laid down in the celebrated case of *Hadley v. Baxendale,* 9 Exch., 341, and this case has been consistently followed by us."

The defendant tendered the third issue as set out in the record, and the court submitted this as follows: "Did the plaintiffs waive breach of contract as alleged in answer?" This was premised on the evidence of the "pooling car" shipment. We see no error in the charge of the court below on this aspect. The defendant in its prayers for instructions submitted no prayer in regard to the measure of damage. If it desired more specific instructions, it is well settled that a prayer on this aspect should have been requested.

The defendant strenuously contends in many of its exceptions and assignments of error as to the charge, that the court below failed to declare and explain the law arising on the facts. With no evidence introduced by the defendant and only two witnesses for the plaintiffs, the court's charge comprised 21 pages, as shown by the record. It is complete as to the law on every aspect and carefully prepared, it did not impinge on C. S., 564. It gave the contentions of both sides.

In *Davis v. Long,* 189 N. C., at p. 137, we find: "In *Simmons v. Davenport,* 140 N. C., p. 410, *Walker, J.,* said: 'In the absence of any such request, we cannot say that it was reversible error for the court to have charged in the general terms employed by it, especially in a case like this one, which involves so little complication that a jury could not well have misunderstood the legal aspect of the matter. If a party desires fuller or more specific instructions, he must ask for them and not wait until the verdict has gone against him and then, for the first time, complain of the charge," citing authorities.

The case was a simple one, both as to law and facts, and the contentions could be easily understood by the jury. It was mainly questions of fact for the jury to determine. Because after stating the contentions the court below did not then make a direct charge on that particular aspect, we cannot hold it prejudicial or reversible error.

This action is typical of what is said in *Foster v. Allison Corp.,* 191 N. C., at p. 172: "State courts are enforcing contracts by foreign claim-

ants against its own citizens and corporations as it should do, but when the citizen has a suit against a foreign corporation or person, and it has no property in the State, the claim is frequently lost. If the foreign corporation or person has an agent, the cry or defense is frequently no authority or *ultra vires*. There should be no favorites." In the judgment of the court below, we find

No error.

B. F. COLLINS v. VIRGINIA POWER AND ELECTRIC COMPANY.

(Filed 8 March, 1933.)

1. Contracts A e: Electricity A a—Contract limiting liability for negligence in furnishing electricity held void as against public policy.

A public-service corporation maintained a primary wire charged with a deadly current of electricity along a highway from which secondary wires led across plaintiff's premises to his warehouse, all of which electrical equipment was furnished and installed by and was under the sole control and inspection of the electric company: *Held*, the electric company's written contract with the owner of the warehouse that it would not be liable for damages which might occur on his property from electricity is void, such contract being against public policy as relieving the electric company of negligence in respect to its duties to properly install, maintain and inspect its equipment.

2. Electricity A a: Negligence A c—Doctrine of res ipsa loquitur held to apply to fire originating at electric fixture.

In an action for damages against an electric power company, evidence tending to show that plaintiff's warehouse caught fire at the point where defendant's wire was attached to the warehouse by a bracket, and that the wires, poles, bracket and other electrical equipment were installed and maintained by the power company and were under its exclusive control and inspection is sufficient to be submitted to the jury under the doctrine of *res ipsa loquitur*.

3. Trial E g—

The charge to the jury will be construed as a whole, and where it is free from error upon such construction an exception thereto will not be sustained.

4. Electricity A a—

The charge in this case, when construed as a whole, correctly instructed the jury that they must find that the fire originated at defendant's electrical fixture before they could apply the doctrine of *res ipsa loquitur*.

APPEAL by defendant from *Moore, Special Judge*, and a jury, at October Special Term, 1932, of HALIFAX. No error.

This is an action for actionable negligence brought by plaintiff against defendant alleging damage. The evidence of plaintiff was to the effect

that on 2 May, 1932, he owned a warehouse, frame wooden building, the market value of which was $1,100, with a stock of merchandise in it, the market value of $400. The defendant is a public-service corporation furnishing electric power and lights. Its name indicates what it is—"Power and Electric Company." It had a primary service-current line on poles which carried 6,600 voltage running along State Highway No. 40. A secondary three-wire service line transmitted or conducted the current from one of its primary poles, which had a transformer to a pole within some 30 or 40 feet of plaintiff's warehouse frame wooden building. A metal bracket was attached to the southwest corner of the warehouse, about 15 feet from the ground, the bracket was not over 2 feet from the eaves of the southwest corner of the west side. The wires, bracket, equipment, appliances, installation, insulation of wires, material, maintenance, inspection, etc., were all done and furnished by defendant on plaintiff's premises.

O. S. Dickinson, a witness for plaintiff, who had been working for plaintiff about 20 years, testified in part: That on 2 May, 1932, he was sleeping in a room in the brick building of plaintiff, next to the warehouse, he was awakened—the window he looked out was about 20 feet from the bracket: "When I woke up I jumped up and ran to the window so I could look out and see the fire. When I looked out the window *I saw the corner of the warehouse on fire where the wires came to the warehouse.* That was the southwest corner of the warehouse. The metal bracket which has been described was not over two feet from the eaves of the southwest corner, on the west side, right on the corner, as close as it could get to it, next to the store building. When I looked out of the window and saw the fire there was not a very large area burning at that time. I don't think there was over three feet. It was not over three feet from the corner. I could see the eaves just were catching a little, weather-boarding catching up this way and whether it was catching on the south side I don't know because I could not see on that side. No fire whatever on the top of the building. *The fire was right along the metal bracket. When I looked out and saw the fire burning around the metal bracket.*" Dickinson dressed and went to the warehouse. "I took my keys and opened the warehouse and got up in the warehouse and not a spark of fire in there, just smoke at the corner where the fire was coming through the crack. No fire in the inside of the warehouse, the fire *was right on that corner where the bracket was.* . . . After I came from the inside of the warehouse I went to the place where the fire was burning. Went down to the corner of the warehouse. *I saw the fire burning around the bracket and of course it was getting larger and larger.* . . . As the fire burned the wires soon fell down in the water. I could see it popping and blue fires. Q. When the wires

fell into the water what happened to the wires? A. They were popping and shooting. Q. What happened to the wires as they fell into the water or after they fell into the water? A. They were popping and you could see blue blazes flying from them. . . . *I would say the wires sputtered in the water five minutes before they stopped.* I didn't notice particular. I don't know that they sputtered five minutes. I don't think it was over that. Might have been five minutes or a little longer. I don't know how the current was finally cut off of the wires. . . . About twenty feet from the window. That was the closest window. That is the window I looked out of, the south window. When I jumped up out of bed I rushed straight to that window. They were standing under that window calling me, on the side of the building. *It is not over twenty-five feet from the rear window to that metal bracket.* I should not think it is over twenty-five feet from the window on the rear to the metal bracket on the end of that warehouse. . . . I went upstairs at nine o'clock that night and went right to bed. This fire occurred somewhere between ten-thirty and eleven o'clock. I don't know exactly."

William W. Johnson, a witness for plaintiff testified in part: "I was in Weldon on the night of 2 May, 1932, and saw the fire at Collins' warehouse. . . . When I got there the fire was on the corner of the warehouse about fifteen feet from the ground, burning in a circle that you could put your arm around. *The wires went directly into the circle of this fire,* the wires coming from a pole went in and you could see the wires coming out to go to the brick store building, came out from it. The wires came from a pole, I guess to be around thirty or forty feet from the corner of that warehouse. They were light wires, black wires. . . . The fire was on the corner this was approximately a foot, the flame just touching the tip, place it projects over, I wouldn't say a foot but the flame running up to the edge of the roof. The flames were in about a foot of the roof and the center of the fire was a foot or eighteen inches down, *after I saw the fire up there where the wires went into the center of it.* . . . He unlocked the warehouse door and I went in the warehouse with him. . . . I had observed the fire on the outside. I saw the wires fall. When they burned loose at the top they fell out, kinder pulled away from the building and fell out towards, formed more or less, a straight line from the pole to the store. They fell to the west, away from the side of the building. *They fell on the ground. After they fell on the ground they sputtered for probably a minute to two minutes.* The garden hose had been turned out there and the ground was wet and when they hit the ground they arced up and burned in two, insulation burned right off of them. . . . *I said when I got to the building there was burning up in the neighbor-*

hood of the bracket and there was a circular area of fire that you could reach your arm around like this, I could not say how much below the bracket was burning because I didn't see the bracket. *I could see the wires coming in. It was not over eight inches below the lowest wire that was burning* but I didn't see any bracket at all. *I would say it was burning a foot to fifteen inches above the bracket.*"

H. R. Hargrove, witness for plaintiff, testified in part: "On the night of 2 May, 1932, I was in my store. I saw this fire which it is alleged occurred on that night. I got there somewhere between ten-thirty and ten forty-five. . . . *There was a metal bracket on the warehouse, with three wires connected to that metal bracket.* The wires led from the pole on the street, thirty or thirty-five feet. Those wires were used to run current in the Roanoke Supply Company. *The fire was around the metal bracket on the warehouse. The center of the fire was at the metal bracket on the warehouse, best I could see it.* I imagine this metal bracket was located about a foot, might be more, from the roof. Might be less. When I first got there the flames had not reached the roof. . . . *The wires fell down and sputtered and arced a minute or two.* The current was finally cut off, the wire was cut in two. I don't know who cut the wire."

There was other evidence on the part of plaintiff corroborating the above named witnesses. The plaintiff introduced two witnesses whom the court below found were experts. The first, in answer to a hypothetical question, propounded by plaintiff, testified: "Q. Do you have an opinion as to what was the cause of the fire? A. Yes, sir. Q. What is that opinion? A. It was set afire from the wires in my opinion." The second, in answer to a hypothetical question, testified: "Q. Do you have an opinion as to what was the cause of the fire? A. Yes, sir, I should say it can be caused by arcing on that bracket."

The defendant denied negligence and introduced witnesses to the effect that the fire did not start as contended for by plaintiff's witnesses at the bracket, but elsewhere. That the wires, bracket, etc., were properly installed, insulated and inspected.

J. H. Cranwell, a witness for defendant, testified in part: "I am employed by the Virginia Electric and Power Company, I have been with the company a long time, probably twenty some years, twenty-three or four years. I live in Roanoke Rapids. I am supposed to be service man with the company, meter reader, looking after service. *In looking after service it is my duty to inspect service and see that the appliances are all right. That is part of my job to inspect the service and see that they are kept in good condition. I inspected the service into the premises of Mr. Collins, where the fire occurred, every month;* around the 12th or 13th of each month passed there and read the meters, always inspected

the service when convenient for me to do it. The last time I inspected that service was the 13th or 14th of April, which would be less than thirty days before the fire. That record was not in writing. I inspected the wire that came from the transformer to the corner of the building and from the corner to the back end of the brick store building. The wires were in good condition, bracket and spools and all in good condition."

The defendant introduced several experts who testified contrary to plaintiff's experts.

N. E. Cannada, an expert witness for defendant, testified in part: "I am an electrical engineer. Studied electrical engineering at school. I am State electrical engineer and inspector. I have charge of inspection of all electrical wires in the State for the protection of life and property. I examine the cause of electrical fires. I have heard the testimony in this case. I have heard the hypothetical question read and I understand it. In the light of that question, in the light of the evidence and facts and circumstances in evidence in this case in my opinion *it is possible that the fire there could have been caused by electric current at the rack at the southwest corner of the wooden building that burned on 2nd of May.* I do not think it could have been an electric fire because it would have been impossible for the amount of current that it would have taken to heat up that rack of that size for the heat to have set fire to wood. I don't know and I could not answer if it would have been possible to have had a short circuit or arc which might have caused a spark or sputter that would have set that building on fire, I would say I do not know what material was in and around the rack. The testimony is it was ordinary wood. I do not think a spark or short circuit could have set it on fire. An arc would not set a flat piece of board on fire because not long enough duration to heat the wood at the temperature to cause a blaze. I am familiar with the up-to-date, first-class operating equipment in the way of wires, fuses, transformers, insulation over wires, racks, spools used by electric utility companies in the State of North Carolina. The equipment used by this company that is shown in evidence is first-class operating up-to-date equipment. The method of business of this company, so far as disclosed, is first-class operating practice in the State of North Carolina. (Cross-examination.) If those wires were up against a wooden building that would be different. That would be a different thing. I am predicating my testimony on the fact that those wires didn't come in contact with the wooden building."

Defendant set up the further defense: "That, on 16 September, 1927, plaintiff made and entered into a contract and agreement with defendant company, by the terms of which defendant company was to furnish to plaintiff, for the price fixed in said contract, electric service at its plant

or plants in South Weldon, North Carolina. . . . That, among the terms and conditions of the rules and regulations endorsed on the back of said agreement, there appear the following, to wit:

(a) '1. The Virginia Electric and Power Company (hereafter called the company) will furnish the meter and the service appliances up to the nearest convenient point on the property line or building line of the customer necessary to connect the customer's equipment with the mains of the company. The wiring, equipment and appliances from the customer's property, shall, except as stated above, be furnished by the customer, who shall be responsible for the installation, maintenance, condition and use thereof.'

(b) '9. The electric current supplied under this contract is supplied by the company and purchased by the customer upon the express agreement that—the company shall not, in any event, be liable—for any loss or damage resulting from the presence, character, or condition of the wires or appliances of the customer, or for any loss or damage by reason of the construction, maintenance or use of the intermediate service line from the entrance upon the customer's property to the meter.'

(c) '13. The company assumes no obligation or liability for or on account of any condition on the customer's premises or for any defects in the customer's wiring or appliances, or for the inspection or repairs thereof.'

The defendant expressly pleads the terms and conditions, appearing on the back of said contract and agreement, and especially those set out above, in bar of plaintiff's right to recover."

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

"1. Was the warehouse and property of the plaintiff burned and destroyed by the negligence of the defendant as alleged in the complaint? Answer: Yes.

2. What damage, if any, is plaintiff entitled to recover of the defendant? Answer: $1,200."

The court below rendered judgment on the verdict. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The necessary facts, material exceptions and assignments of error will be set forth in the opinion.

Julian R. Allsbrook and Dunn & Johnson for plaintiff.

J. Justin Moore, Archibald G. Robertson, Geo. C. Green and Spruill & Spruill for defendant.

CLARKSON, J. Most of defendant's exceptions and assignments of error were abandoned. Rules of Practice in the Supreme Court of North Carolina, 200 N. C., p. 831, part of Rule 28.

The defendant in its brief sets forth the following questions involved for our decision:

(1) Is the plaintiff barred of recovery by the provisions of the agreement between him and defendant company, dated 16 September, 1927? We think not.

(2) Did the court err in submitting to the jury the question of whether or not the *res ipsa loquitur* rule applies in this case, and in its instructions to the jury thereon? We think, taking the charge as a whole, there was no prejudicial or reversible error.

(3) Was there error in the court's instruction to the jury on the issue of damages? On the argument it was stated by counsel for defendant that if the court decided the other questions against defendant, the error which the defendant complained of would not be pressed.

The defendant is a public-service corporation. It is given the extraordinary power and authority to take the private property of individuals or corporations, upon payment of a just compensation necessary for its public purposes. Also certain rights over State Highways, etc. C. S., 1705, 1706, 1695, 1696, 7525. For the benefits it assumes the burdens. It cannot contract against its negligence when discharging its primary duty to the public. Any other holding would put the individual or corporation using and paying for its power at the mercy of the public-service corporation.

In *Slocumb v. R. R.*, 165 N. C., at p. 343, the principle is well stated, citing numerous authorities: "It is well settled here and elsewhere that a common carrier while performing its duties to the public cannot contract against its negligence; 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 enforceable."

Singleton v. R. R., 203 N. C., 462, is distinguishable from the present case: (Headnote) "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."

In Cooley on Torts, Vol. 3 (4th ed.), chap. 21, part sec. 494, at p. 449, it is said: "But there may be contracts which, perhaps, public policy would forbid. This has been held to be the case with the contracts of common carriers which assume to exempt them, not only from liability for the inevitable risks attendant upon their business, but for risks from the negligence of themselves and their servants. In numerous cases it has been held that they could not by any stipulation relieve themselves from responsibility for injuries resulting from a want of ordinary care. . . . (part sec. 496, pp. 460-61) The cases of car-

riers and telegraph companies have been specifically mentioned, because it is chiefly in these cases that such contracts are met with. But although the reasons which forbid such contracts have special force in the business of carrying persons and goods, and of sending messages, they apply universally, and should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct." 6 R. C. L., sec. 132, at p. 727-8.

The evidence in the present case is to the effect that defendant had placed a bracket on the warehouse, wooden frame building, run the wires from the primary current and had complete and sole control of the set-up and current. The wires, bracket, equipment, appliances, installation, insulation of wires, material, maintenance and inspection were all done and furnished by defendant on plaintiff's premises. Defendant's witness, J. H. Cranwell, testified, in part: "In looking after service it is my duty to inspect service and see that the appliances are all right. That is part of my job to inspect the service and see that they are kept in good condition. I inspected the service into the premises of Mr. Collins, where the fire occurred, every month." In fact, after the fire, defendant removed the wires.

Under the facts and circumstances of this case, the position contended for by defendant cannot be sustained—the contract is against public policy, null and void, and of no avail as a defense to this action. Any other holding would limit and endanger the use in the homes and elsewhere of electric power; and this beneficent, modern convenience seriously handicapped, as users know practically nothing about this invisible, subtle and dangerous force. *McAllister v. Prior,* 187 N. C., at p. 855-6.

The next contention of defendant is in regard to the charge of the court below on the aspect of *res ipsa liquitur.* This Court has recently written on the subject now debated, in *Lynch v. Tel. & Tel. Co., ante,* 252, quoting from Jones Telegraph and Telephone Companies (2d ed.), part sec. 198, at p. 225: "Furthermore, where so dangerous an agency as electricity is undertaken to be delivered into houses by electrical companies for daily use, very great care and caution should be observed, and such a degree thereof as is commensurate with the danger involved, and which is enhanced by the lack of the consumer's knowledge of the safety of the means and appliances employed to effect the delivery. It is generally held that in case of injuries sustained from electric appliances on private property the doctrine of *res ipsa loquitur* applies where it is shown that all the appliances for generating and delivering the electric current are under the control of the person or company furnishing the same."

Now, in the present case it was shown by plaintiff, and not seriously denied by defendant, that as before stated, the wires, bracket, etc., on

plaintiff's premises were all furnished and installed, inspected, etc., by defendant. It has sole control and responsibility. In terse and correct language defendant says: "The one acute question was, 'What caused the fire producing the injury?' and, upon that question not only was the factual evidence of plaintiff's and defendant's witnesses conflicting, but the expert evidence was equally so."

The charge of the court below must be construed as a whole, not disconnectedly or disjointedly. From a careful reading of the charge of the court below, it gives clearly and fairly the contentions of the litigants on both sides, and the law applicable to the facts. The only exception and assignments of error (the damages one abandoned), is the one we are now considering hereinafter set forth. The court below, before it set forth the *res ipsa loquitur* attitude, gave these contentions and charged as follows: "Plaintiff offered evidence tending to show that there were a number of witnesses who saw the fire when it was first discovered and that it was around the bracket a foot and a half or twelve inches from it; fire in foot or foot and a half of the eaves of the house. . . . On the other hand, defendant contends you ought not to be so satisfied first, that the fire was on this warehouse as the plaintiff contends that it was in the beginning, and second, that even if it was that it was due to some other cause than the electrical energy it was supplying and that you should answer this issue 'No.' I charge you, gentlemen, in this case if the plaintiff recover at all he must recover on negligence as alleged in the complaint. He contends it was due to the negligent manner in which the defendant permitted its apparatus to become in or be in and that it was negligent in that and that due to that negligence this building was burned and his property destroyed, that you should find one of these facts from this evidence and by its greater weight. On the other hand, defendant contends, that you ought not to be so satisfied, either that the fire was occasioned at this particular place where the bracket was located or if you should be so satisfied of that that you ought not to be satisfied by the greater weight of the evidence that the electrical energy coming over No. 6 wire be of sufficient intensity to occasion the burning of this building."

The contentions and charge deal with the disputed fact of the origin of the fire between the plaintiff and defendant. As this fact was disputed on this attitude the jury had to determine same. The court below later charged the jury: "I charge you, therefore, that when the thing which causes an injury is shown to be under the management of the defendant and the happening is such as in the ordinary course of things does not happen, if those who have the management of the instrumentalities use proper care in the absence of explanation by the defendant, it constitutes some evidence that the accident arose from the want of care. The occurrence or injury may, in connection with other circumstances,

sufficiently show negligence as to justify judgment where the thing causing the injury is under the management of the defendant and the accident is such that in the ordinary course of things does not happen if ordinary care is used." If the facts were as contended by plaintiff as to the origin of the fire, it is intimated in the above charge that the rule of *res ipsa loquitur* applied. It is the duty of this Court to reconcile the charge if possible and for this purpose consider it as a whole. This aspect of the charge would, with the above contentions and charge, and taking all the contentions and charge as a whole into consideration, indicate that if the jury, by the greater weight of the evidence, reached the conclusion in their deliberations that the fire started at the bracket, then the principle of *res ipsa loquitur* would apply. It is only where there is a material and irreconcilable conflict that a new trial is ordinarily awarded.

Taking the charge as a whole, we see no prejudicial or reversible error. In the judgment below we find

No error.

STATE v. WYLIE B. NOLAND.

(Filed 8 March, 1933.)

1. Criminal Law D c—Venue of prosecution for offering a bribe to a juror is the county in which the offer is communicated to the juror.

The crime of offering a bribe to a juror, C. S., 4373, is committed in the county where the offer is communicated to the juror, and where the defendant is charged with having offered such bribe through the kinsmen and wife of the juror who were residents of a county other than the one in which the juror was serving after being selected from a special venire, the proper venue is the county in which the juror was serving and in which the defendant's offer was communicated to him by his wife, although defendant communicated with the juror's kinsmen and wife in the county of their residence.

2. Bribery B a—In prosecution under C. S., 4373, it need not be alleged that juror received any fee or compensation.

In a prosecution under C. S., 4373 for offering a bribe to a juror it is not necessary that the indictment should charge that the juror received any fee or other compensation, the statutes making a distinction between bribery and an offer to bribe and both offenses being included in the common-law definition of bribery.

3. Same—Indictment held to sufficiently charge corrupt purpose in offering bribe to juror.

An indictment charging that defendant "unlawfully, wilfully, and feloniously offered a bribe to an acting juror with intent to influence the verdict and procure an acquittal" is held to sufficiently charge the corrupt purpose of such offer.

4. Indictment C a—

If a bill of indictment is sufficient to enable the court to proceed to judgment, the prosecution should not be stayed for any informality or refinement. C. S., 4623.

5. Criminal Law G r—Action of court in allowing solicitor to refresh witness's mind by reference to witness's affidavit held not error.

Where a witness has made an affidavit concerning certain facts, and on the trial his answers in respect to such facts are evasive and hesitant an exception to the court's action in allowing the solicitor to call the witness's attention to the affidavit for the purpose of refreshing his memory will not be sustained.

6. Same—

Testimony of witness in reference to the receipt of a letter written him by juror's wife held competent as corroborative of her testimony in prosecution of defendant for offering bribe to the juror.

7. Trial B b—

The order in which the evidence should be introduced is a matter for the trial court.

8. Bribery B b: Criminal Law G r—Testimony held competent to show indirect communication of offer to bribe and as corroborating evidence.

Where there is evidence that the defendant approached the father of a juror relative to offering the juror a bribe, and asked him to talk over the proposition with the juror's wife, testimony of the juror's wife to this effect is competent as tending to corroborate her father-in-law's testimony and as tending to show defendant's indirect communication of the bribe to the juror, and an affidavit made by the witness is also competent for the purpose of corroborating her testimony although made in another proceeding.

9. Criminal Law I g—Charge will not be held for error for immaterial matters.

Where the charge to the jury presents the vital issue in the case in substantial compliance with C. S., 564, it will not be held for reversible error on exception to immaterial matters.

10. Criminal Law I k—Court may refuse to accept incomplete verdict and order jury to reconsider.

Where the verdict of the jury is incomplete, insensible or repugnant the trial court may, before the verdict has been accepted by him, instruct the jury to reconsider, and where in a prosecution for offering a bribe to a juror the jury returns a verdict of "guilty of attempt," and the trial court gives additional instructions and the jury then brings in a verdict of "guilty of offering a bribe" to a juror, an exception to the trial court's refusal to accept the first verdict will not be sustained, and sentence on the second verdict will be upheld.

11. Bribery A b—An offer to bribe is the same as an attempt to bribe.

An "offer to bribe" is the same as an "attempt to bribe," and in a prosecution for offering a bribe to a juror, C. S., 4373, an instruction directing the jury to reconsider after it had returned an incomplete

verdict will not be held for error for failure to instruct the jury as to an attempt to commit the crime charged, especially where the question is not raised until the first verdict had been returned.

APPEAL by defendant from *Clement, J.*, at August Term, 1932, of BUNCOMBE. No error.

The defendant was indicted and convicted of offering a bribe to Hurst Justice, a qualified juror serving in a criminal action entitled "State *v.* W. B. Davis *et al.*," tried at a Special Term of the Superior Court of Buncombe County, which was convened in July, 1931. From the judgment pronounced he appealed to the Supreme Court upon assigned error.

Attorney-General Brummitt, Assistant Attorneys-General Seawell and Siler and Gertrude M. Upchurch for the State.

Marcus Erwin and Grover C. Davis for defendant.

ADAMS, J. Hurst Justice, the juror, H. L. Justice his father, and W. B. Noland the defendant, are residents of Haywood County. The State's evidence tends to show that while the criminal action against Davis and his codefendants was being tried in Asheville, the defendant Noland went to the home of H. L. Justice and told him that if he could ascertain how Hurst Justice stood with respect to the trial and if he stood for acquittal, H. L. Justice and the defendant could each get $500 for learning how the juror stood and the juror himself could get $1,000 "for standing that way"; also that the defendant said, "I am not expecting to bribe him; if he is against us I don't want to change him; but if he is for us I would love to get the money." There is evidence that he requested H. L. Justice to communicate the proposition to the juror's wife; that the defendant with H. L. Justice and the latter's wife went to the home of the juror who was in Asheville; and that H. L. Justice informed his daughter-in-law of the offer after the defendant had gone on to the dwelling of Brownlow Snider, another member of the jury. It is in evidence, also, that the juror's wife went to Asheville during the trial and told her husband all that the defendant had said. It is obvious, then, that whatever message the juror received from the defendant through these intermediaries was communicated to him in Buncombe County. There, if anywhere, the corrupt offer was made to him and there the proper venue was laid. "In the prosecution of all offenses it shall be deemed and taken as true that the offense was committed in the county in which by the indictment it is alleged to have taken place unless the defendant shall deny the same by plea in abatement." C. S., 4606; *S. v. Outerbridge*, 82 N. C., 618; *S. v. Lytle*, 117 N. C., 799; *S. v. Long*, 143 N. C., 671; *S. v. Oliver*, 186 N. C., 329; *S. v. Mitchell*,

202 N. C., 439. The defendant was, therefore, not entitled to a change of venue and his motion for removal of the case to Haywood County was properly denied.

The defendant demurred to the first count in the indictment for the alleged reason that it does not state facts sufficient to constitute the crime of bribing a juror as defined in C. S., 4375, and does not charge that the juror received any fee or other compensation as a reward for his misconduct or that he acted corruptly.

Bribery, as defined by Blackstone, was committed when a judge or other person concerned in the administration of justice took any undue reward to influence his behavior in his office. 4 Black., 139. Russell, in his work on Crimes, extends the definition to all cases where any undue reward is received by or offered to any person whose ordinary business relates to the administration of public justice in order to influence his behavior in office and incline him to disregard the known rules of honesty and integrity. 2 Russell, Crimes, 122. Wharton says, "Bribery is corruptly tendering or receiving a price for official action." 3 Crim. Law (12 ed.), sec. 2234.

With respect to juries our statute (C. S., 4375) provides in part that if any juror either directly or indirectly shall take anything from any defendant in a State prosecution or from any other person to give his verdict, the juror receiving and the person giving the reward shall be guilty of a felony; and another statute declares that any person who offers a bribe, whether it be accepted or not, shall be guilty of a like crime. C. S., 4373. The several statutes pertaining to the subject recognize the distinction between bribery and an offer to bribe. C. S., 4372, *et seq.*

Under the earlier indictments the offer or tender of a bribe was usually characterized as "corrupt," but the law prescribes no exclusive formula for stating the corrupt intent, no technical words in which the charge of corruption shall be made. Wharton's Criminal Law, (12 ed.), sec. 1903. If the bill is sufficient to enable the court to proceed to judgment, the prosecution should not be stayed for any informality or refinement. C. S., 4623. Assuming, however, that the indictment must set out the evil intent, we observe in the first count an averment that the defendant unlawfully, wilfully, and feloniously offered a bribe to an acting juror with intent to influence the verdict and to procure the acquittal of the defendants. This is a sufficient charge of the corrupt purpose.

The defendant's objection to the examination of H. L. Justice, a witness for the State, is without substantial merit. The witness had made an affidavit as to facts which were material and upon his examination in this case was hesitant and evasive in his answers to questions asked him by the solicitor. The court gave the prosecuting officer leave to

call the attention of the witness directly to the contents of his affidavit. The examination was not intended as an impeachment of the witness but as an effort to refresh his memory by reference to statements he had previously made and to prevent confusion or equivocation in his testimony. The trial court in the exercise of its discretion may under such circumstances permit a party to propound leading questions to his own witness. *S. v. Buck,* 191 N. C., 528; *Howell v. Solomon,* 167 N. C., 588; *S. v. Cobb,* 164 N. C., 419.

The testimony of this witness in reference to the receipt of a letter written him by the juror's wife corroborated her testimony and was competent at least for this purpose. *S. v. Brodie,* 190 N. C., 554. The order in which the evidence should be introduced was a matter for the court. *Steel Co. v. Copeland,* 159 N. C., 556. Mrs. Justice's testimony was admissible likewise, not only in corroboration of H. L. Justice, but as evidence of an indirect communication of the defendant to the juror, who was her husband. The exception rests upon the contention that she had not been instructed by the defendant to inform her husband of the offer. This is a misapprehension. There is evidence that the defendant requested H. L. Justice "to talk over the proposition" with Mrs. Justice; that he did so, and asked her to tell her husband of "the entire proposition." The defendant was "to come back for the affiant"—obviously to learn from H. L. Justice the result of the interview between the juror and his wife. This in any event is a permissible inference. Mrs. Justice communicated the offer to her husband and made an affidavit to this effect. The affidavit was admitted in corroboration of her testimony and was competent for this purpose although made in another proceeding. Her statements in the two cases correspond, each strengthening and confirming the other. It is in evidence or is deducible from the evidence that the defendant intended to see the juror in person when he went to the latter's home and failing in his endeavor sought to communicate the offer through the agency of others and finally succeeded in his undertaking. In these circumstances assignments 15, 16, 17, and 18 must be overruled.

We find no error in the judge's charge. Several of the assignments relate to the contentions of the State, some to the court's use of the word "intended," and others to the "criminal intent" of the defendant; but the vital issue joined upon the indictment was presented to the jury under instructions which are in substantial compliance with the provisions of C. S., 564, and are free from error.

After considering the evidence and the charge, the jury returned into the courtroom and announced as their verdict "guilty of attempt." The court then told the jury that the defendant was not on trial for an attempt to commit a crime, and gave this additional instruction: "The offense charged is that he is guilty of offering a bribe; that does not

mean he carried the bribe himself and offered it to the person he attempted to bribe, but he could do it himself or do it through another." The jury retired and afterwards returned as their verdict, "Guilty of offering a bribe to the juror Hurst Justice." The defendant excepted to the court's refusal to accept the return first announced and to the further instruction given the jury.

The phrase "Guilty of attempt" was not a complete verdict. The words do not necessarily import an attempt to commit a crime. Furthermore, to be complete a verdict must be accepted by the court for record. When an informal, insensible, or repugnant verdict is returned the jury may be directed to retire, reconsider the matter, and bring in a verdict which is proper in form. *S. v. Hudson,* 74 N. C., 246; *S. v. Whitaker,* 89 N. C., 473; *S. v. Godwin,* 138 N. C., 582; *S. v. Snipes,* 185 N. C., 743. This is the course which the court pursued.

The defendant excepted to the last instruction for the reason that the court did not charge the jury in reference to the question of an attempt to commit the crime charged. An attempt to bribe and an offer to bribe are analogous. Wharton says, "Defining bribery to be the corruptly tendering or receiving a price for official action, it is an offense at common law and so is an attempt to bribe even though the offense be not consummated; and the offense is complete when an offer is made." 3 Crim. Law (12 ed.), sec. 2234. Bishop remarks that for the attempt to bribe it is not enough simply to allege that the defendant did attempt to commit bribery, and that the better common-law form suggests the use of such words as "offer," "solicit" and the like. 3 New Crim. Procedure (2 ed.), sec. 126(2). In 2 Cyc. Crim. Law, sec. 1211, it is said: An "attempt to bribe" is the same as an "offer to bribe," and that an attempt to offer a bribe is an attempt to bribe and not an attempt at an attempt. *Johnson v. State,* 92 N. S. W., 257; *People v. Bennett,* 182 N. Y. App. Div., 871. The exception is to the refusal of the court to charge that the defendant could be convicted of an attempt to perpetrate an attempt.

To prevent confusion the trial judge informed the jury that the indictment was drafted in the words of the statute (C. S., 4373) charging an "offer" and not an "attempt" to bribe the juror. The case was tried upon the theory of an offer, and that of "an attempt at an attempt" seems to have been raised after the first purported verdict had been returned.

We find no error in the trial. The offense of which the defendant is convicted, while of remarkable rarity in this State, calls for stern condemnation. There is no room for palliation. It tends to corruption, to the perversion of justice, to the paralysis of the courts. As remarked by Blackstone, "It is calculated for the genius of despotic countries where the true principles of government are never understood."

No error.

NORTH CAROLINA JOINT STOCK LAND BANK OF DURHAM, AND C. H. DIXON, RECEIVER OF THE FIRST NATIONAL BANK OF DURHAM, TRUSTEE, *v.* MISS EULALA COX.

(Filed 8 March, 1933.)

Mortgages C c—Records held sufficient to put reasonable man upon inquiry which would have disclosed existence of prior mortgage.

Although the name of the wife should be shown on the index and cross-index of a deed or mortgage, where the records in the office of the register of deeds are sufficient to put a reasonable man upon inquiry which would have disclosed the name of the wife, a mortgage indexed and cross-indexed in such manner will not lose its priority over a later registered encumbrance on the same property.

APPEAL by plaintiffs from *Frizzelle, J.*, heard at Chambers, 4 January, 1933. From PITT. Affirmed.

The plaintiffs brought suit to have a mortgage on land given the defendant by T. A. Carson and Effie Carson, his wife, declared void as against the plaintiffs on the ground that the mortgage had not been properly indexed. The defendant advertised the property for sale under the power conferred by the mortgage and the plaintiffs obtained a restraining order, and at the hearing the court found the following facts:

On 24 November, 1906, W. J. Teel and wife conveyed the land in controversy to Effie Carson, wife of T. A. Carson, by deed recorded 24 November, 1906, which was registered and indexed and cross-indexed in the general index for real estate conveyances as follows: "1906 Carson, Effie, from W. J. Teel and wife. D. P. 8-198, Bethel Township." "1906 Teel, W. J. and wife to Effie Carson, D. P. 8-198, Bethel Township."

On 1 August, 1913, Effie Carson conveyed to her husband, Thos. A. Carson, the aforementioned property, which deed was recorded in the office of the register of deeds of Pitt County on 23 January, 1915, in Book G-11, at page 1, and indexed and cross-indexed in the general index for real estate conveyances as follows: "1913 Carson, Effie, to T. A. Carson, G-11, page 1, Bethel Township." "1913 Carson, Thomas A., from Effie Carson, G. 11, page 1, Bethel Township." The officer taking the probate of said deed omitted in the certificate to state his conclusions and that the conveyance was not unreasonable or injurious to her; said deed, certificate of officer and the order for registration are made a part of the findings of fact herein.

On 21 January, 1925, T. A. Carson and wife, Effie Carson, executed and delivered to the defendant, Miss Eulala Cox, a mortgage deed recorded in the office of the register of deeds of Pitt County on 23 January, 1925, upon the property described, which was cross-indexed and

indexed on the general index for real estate conveyances, as follows: "1925 Carson, T. A. and Wf. to Miss Eulala Cox, M. U-15-36." "1925 Cox, Miss Eulala, from T. A. Carson and wf. M. U-15-36."

On 16 December, 1926, there was received in the office of the register of deeds of Pitt County a deed in trust from T. A. Carson and wife to W. H. Woolard, trustee, which was recorded in Book O-16, page 275, upon the same described property, which was indexed in the general index for real estate conveyances, as follows: "Carson, T. A. and wf. to W. H. Woolard, tr., M. O-16, 275, 163 acres. Bethel Township."

On 27 August, 1927, T. A. Carson and wife, Effie Carson, executed a deed in trust to W. C. Braswell, trustee, upon the said tract of land, which instrument was received in said office and indexed upon the general index for real estate conveyances as follows: "Carson, T. A. and wife to W. C. Braswell, D. T. T-16-345. 8-28-27, 163 acres."

On 28 February, 1928, T. A. Carson and wife, Effie Carson, executed a deed in trust to W. S. Tyson, trustee, upon said land, which was received in office on 28 February, 1928, and indexed in the general index for real estate conveyances as follows: "Carson, T. A. and wf. to W. S. Tyson, D. T. M-17-43. 2-28-28. Bethel Township."

On 8 March, 1928, there was received in the office of the register of deeds of Pitt County a deed in trust from T. A. Carson and wife, to the First National Bank of Durham, trustee, upon the aforesaid property, which was received in said office and indexed as follows: "Carson, T. A. and wf. to First National Bank of Durham, Tr. D. T. P-16, page 635, 8 March, 28, 160 acres."

The property described in the mortgage to the defendant and the deed of trust in favor of the plaintiff was in 1913 conveyed, or attempted to be conveyed by Effie Carson to her husband, T. A. Carson, by the aforesaid deed recorded in Book G-11, at page 1, which instrument was properly indexed and cross-indexed on the real estate index for Pitt County, and in 1925 the mortgage from T. A. Carson and wife, Effie Carson, to the defendant was properly and legally indexed and cross-indexed on the real estate index for said county and that the deed in trust to the plaintiff was not executed and recorded until 1928.

The indexing and cross-indexing of the mortgage to the defendant was proper, legal and valid, and that the same is a first mortgage upon said property and prior to that of the plaintiff.

The property described in the plaintiff's and defendant's instruments, as well as in the deed of trust to W. H. Woolard, trustee, W. C. Braswell, trustee, and W. S. Tyson, trustee, is the same, and that the deeds in trust to W. H. Woolard, trustee, and to W. C. Braswell, trustee, refer to the land as being the same conveyed by Effie Carson to Thomas A. Carson as appears by reference to Book G-11, page 1, and that the

deed of trust to the plaintiff refers to Effie Carson as being the wife of T. A. Carson, and the property as being the property of T. A. Carson and wife, Effie Carson, and the same property described in the application filed with the plaintiff by T. A. Carson and wife, Effie Carson.

The court adjudged that the mortgage executed by T. A. Carson and his wife to the defendant was properly indexed and cross-indexed; that the lien thereby created is prior to the lien held by the plaintiffs; and that the restraining order be dissolved. The plaintiffs excepted and appealed.

Harding & Lee for plaintiffs.
J. B. James for defendant.

PER CURIAM. The appeal in the present case is controlled by the principle stated in *Ins. Co. v. Forbes,* 203 N. C., 252, and *West v. Jackson,* 198 N. C., 693. In the latter case the Court said: "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 those 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." By inquiry or otherwise the plaintiffs ascertained that Effie Carson was T. A. Carson's wife, for the fact is set out not only in the premises of the deed under which the plaintiffs claim but in a reference to a map attached to the abstract of T. A. Carson and Effie Carson filed with the North Carolina Joint Stock Land Bank of Durham. Moreover, the index of the defendant's mortgage is as nearly a compliance with the law as is that of plaintiffs' deed.

Affirmed.

LAVINA FLACK v. GURNEY P. HOOD, COMMISSIONER OF BANKS.

(Filed 15 March, 1933.)

1. Banks and Banking H d—Deposit for a special purpose is impressed with a trust entitling depositor to a preference.

A deposit in a bank made with a distinct understanding that it is to be held by the bank for the purpose of furthering a transaction between the depositor and a third person, or a deposit made under circumstances necessarily implying that it is made for such purpose, is impressed with a trust entitling the depositor to a preference over general depositors in case the bank becomes insolvent and is placed in a receiver's hands before discharging the trust.

2. Same—Preference of deposit in trust department is not defeated by overdraft in trust department's account with commercial department.

Where a deposit for a special purpose creating a trust fund in the bank's hands is made in the trust department of the bank, and is in turn deposited with other trust funds by the trust department in a general account carried with the commercial department of the same bank, the depositor is not deprived of his right to preference over general depositors upon the insolvency of the bank by the fact that the account of the trust department with the commercial department of the bank is overdrawn, since the assets in the receiver's hands are increased to the extent of such deposit regardless of the fact that the deposit is commingled with other deposits in the trust department and in turn commingled with the bank's general funds, and the bank will not be allowed to defeat its fiduciary responsibilities by a system of self-dealing.

APPEAL by defendant from *Clement, J.*, at August Term, 1932, of BUNCOMBE.

Civil action to establish preference, or priority of plaintiff's claim to funds in the hands of the liquidating agent of insolvent bank.

The case was heard by the court without the intervention of a jury, upon facts agreed or found without objection:

1. The Central Bank and Trust Company of Asheville, N. C., chartered under the banking laws of the State, was placed in the hands of the defendant as liquidating agent, because of insolvency, on 19 November, 1930.

2. Prior thereto and at various times from 18 May, 1930, to 18 November, 1930, the plaintiff had deposited with, or delivered to the Central Bank and Trust Company as trustee, under a trust agreement in writing and duly registered, sums aggregating $2,931.25 for the establishment of a fund to pay the interest and principal installments, as they should become due, upon certain first mortgage notes held by third persons and in the hands of the trustee for collection.

3. These deposits were carried as a trust account in the trust department of the bank, and had not been applied to the specific purposes for which said account was held at the time of the bank's closing.

4. All moneys received under the terms of the trust agreement were deposited by the trust department of the Central Bank and Trust Company in its general account carried with the commercial department of the same bank. This general account of the trust department with the commercial department—made up of many funds received from various parties—was the only account carried by the trust department at the time of the closing of the Central Bank and Trust Company and was at that time overdrawn by approximately $21,000.

Upon the foregoing pertinent facts, it was adjudged "that the claim of the plaintiff be, and the same is hereby, allowed as a preferred claim against the assets of the Central Bank and Trust Company, and when

final settlement is made by said defendant the said claim shall be allowed priority in payment over the claims of the common creditors and shall either be paid in full, as a preferred claim, or in the event of an insufficient amount, to pay all of the preferred claims, then it shall share pro rata with the other preferred claims against the said Central Bank and Trust Company."

Defendant appeals, assigning error.

Harkins, Van Winkle & Walton for plaintiff.
Johnson, Smathers & Rollins and T. A. Uzzell, Jr., for defendant.

STACY, C. J. The case is controlled by the decision in *Parker v. Trust Co.*, 202 N. C., 230, 162 S. E., 564 (*Newsom v. Mut. Life Asso.*, 136 So. (Fla.), 389, likewise practically on all-fours), unless the circumstance, appearing here, but which did not appear there, that the account of the trust department with the commercial department was overdrawn at the time of the closing of the Central Bank and Trust Company, differentiates the two cases and reduces plaintiff's claim from one of preference to one of commonalty.

It is the position of the plaintiff that the method of handling the account in question was a matter of internal bookkeeping, or of self-dealing, and is without material significance in the case (*Glidden v. Gutelius*, 96 Fla., 834, 119 So., 140); that the Central Bank and Trust Company was authorized to do a trust business as well as a commercial business (C. S., 217(a); that it had but one charter, and although its two departments may have been separate and distinct, together they comprized but a single business unit (*In re Prudential Trust Co.*, 244 Mass., 64), rendering it inequitable to allow such an institution to change its status from trustee to debtor simply by shifting funds from its right hand to its left, or from one till to another (*Terre Haute Trust Co. v. Scott*, 181 N. E. (Ind. App.), 369; Note 31 Mich. L. Rev., 532; 44 Harvard L. Rev., 1281); that the general depositors knew, or should have known, that trust funds in the hands of such a banking institution, deposited for special purposes, were perforce received in a fiduciary capacity and would necessarily be held subject to the equitable principles existing between the parties to such fiduciary relationship (*Bank v. Corp. Com.*, 201 N. C., 381, 160 S. E., 360; *Corp. Com. v. Trust Co.*, 193 N. C., 696, 138 S. E., 22; *Glidden v. Gutelius, supra*); and that when an agent, bailee, or trustee, commingles funds with his own, and dissipates a portion of the commingled fund, he will be presumed to have dissipated his own funds first, and that the remainder of such commingled fund will be subject to distribution among his *cestui que trustent* according to their respective rights. *Myers v. Matusek*, 98 Fla., 1126, 125 So., 360; Note, 82 A. L. R., 46 *et seq.*

The defendant, on the other hand, says that the rightfulness of the deposit made by the trust department with the commercial department, whether legal or other, in the absence of statutory authorization, is not challenged; that it does appear by so depositing said funds they were thereby segregated or earmarked as belonging to a separate account; that this account was overdrawn to the extent of $21,000 at the time of the bank's closing; that instead of augmenting the funds in the hands of the liquidating agent, they were apparently diminished to the extent of the overdraft; that to entitle a claimant to preferential payment from the assets of an insolvent bank in the hands of a liquidating agent, it must appear the funds demanded were in the bank's possession as agent, bailee, or trustee; that such funds reached the hands of the liquidating agent in some form; that the assets brought under his control were larger by this amount than they otherwise would have been (*Tinsley v. Amos*, 135 So. (Fla.), 397); and that plaintiff has failed to make out such a case. *McDonald v. Fulton*, 125 Ohio, 507, 182 N. E., 504; *Empire State Surety Co. v. Carroll County*, 194 Fed., 593, at p. 604.

In the liquidation of insolvent banks, the general depositors are entitled to no preference, and must share pro rata with the general creditors. *Corp. Com. v. Trust Co.*, 194 N. C., 125, 138 S. E., 530; *Corp. Com. v. Trust Co., supra*. But where deposits are made with the distinct understanding that they are to be held by the bank for the purpose of furthering a transaction between the depositor and a third person, or where they are made under such circumstances as give rise to a necessary implication that they are made for such a purpose, the deposits become impressed with a trust which entitles the depositor to a preference over the general creditors of the bank in case the bank becomes insolvent while holding the deposits. *Corp. Com. v. Trust Co., supra; Hudspeth v. Union Trust & Savings Bank*, 196 Iowa, 706, 195 N. W., 378, 31 A. L. R., 466, and note; 7 C. J., 631.

There are also certain statutory preferences (C. S., 218(c); *Morecock v. Hood, Comr.*, 202 N. C., 321, 162 S. E., 730), as well as equitable ones (*Parker v. Trust Co., supra*), allowable in the liquidation of insolvent banks, but the present record deals only with the equitable right of priority. *In re Bank, ante*, 143, 167 S. E., 561.

The argument of the defendant proceeds upon the premise that the trust and commercial departments of the Central Bank and Trust Company were two separate and distinct entities, whereas in truth and in fact they were but component parts of a single unit. The fact that the trust department account was overdrawn at the time of the bank's closing proves no more than that the Central Bank and Trust Company misused or misapplied plaintiff's funds for its own purposes. It had various

other moneys all mingled in the same till, with those deposited by plaintiff, and the overdraft in the trust department account was but a bookkeeping arrangement so far as the bank's creditors are concerned. A corporate fiduciary will not be permitted to escape the responsibilities arising from such status by the simple expedient of self-dealing. Note, 31 Mich. L. Rev., 532.

The plaintiff has shown that she deposited with the Central Bank and Trust Company certain funds for a specific purpose, which the bank received in trust, mingled them with other funds, and became insolvent before discharging the trust, with a portion of the commingled fund still on hand when the defendant, as liquidating agent, took charge of its affairs. Plaintiff's funds were not only mingled with others in the general account of the trust department, but this account was likewise commingled with the general funds of the bank. It appears, therefore, that the general coffers of the bank were enriched to the extent of plaintiff's deposits, and the assets coming into the hands of the defendant were accordingly increased or made larger. This entitles the plaintiff to a preference. *Peters v. Bain,* 133 U. S., 670, 33 L. Ed., 696; *Brennan v. Tillinghast,* 201 Fed., 609; *Schumacher v. Harriett,* 52 Fed. (2d), 817; *Lusk v. Günther,* 32 Wyo., 294, 232 Pac., 518; *Andrew v. Hamilton County State Bank,* 207 Iowa, 403, 223 N. W., 176; 30 Mich. L. Rev., 441.

The decisions in *Corp. Com. v. Bank,* 137 N. C., 697, 50 S. E., 308, 2 Ann. Cas., 537, *Bank v. Davis,* 114 N. C., 343, 19 S. E., 280, and *Chemical Co. v. Rogers,* 172 N. C., 154, 90 S. E., 129, are not at variance with the conclusions reached in *Corp. Com. v. Trust Co.,* 193 N. C., 696, 138 S. E., 22, nor in *Parker v. Trust Co.,* 202 N. C., 230, 162 S. E., 564, nor with anything said herein. The whole subject is elaborately discussed in a recent annotation, 82 A. L. R., 46, *et seq.,* from which it appears that many perplexing questions have lately arisen in connection with the liquidation of insolvent banks. The various courts have found it difficult with consistency to plot the line, sometimes shadowy, which separates the rights of preferential creditors from those of the general or common creditors. Much of the confusion apparently has come from a failure to distinguish between the right of preference, or equity of priority, and the right to have certain specific property returned to the creditor, as under claim and delivery, on the principle of fungible goods or because of direct ownership therein. And while it may not be possible to lay down a rule applicable in all cases, due to the manifold situations arising, equity will not forsake the pursuit, simply because of the difficulties presented, unless and until the legislative department shall preëmpt the field by enactment of statutory regulations covering the subject. Nor do we decide in advance

upon the effect or validity of such preëmption should it be undertaken. *State, ex rel. Sorensen v. Farmers State Bank,* 121 Neb., 532.

The precise question here presented is new in this jurisdiction, but the ruling appealed from is supported in tendency, at least, by a number of decisions, and will be upheld.

Affirmed.

C. W. FRANCY POST NO. 70 OF THE AMERICAN LEGION OF THE DEPARTMENT OF NORTH CAROLINA AT OTEEN, N. C.; THE NORTH CAROLINA DEPARTMENT OF THE AMERICAN LEGION; THE AMERICAN LEGION, A CORPORATION; AND WACHOVIA BANK AND TRUST COMPANY, TRUSTEE, *v.* CENTRAL BANK AND TRUST COMPANY ET AL.

(Filed 15 March, 1933.)

(For digest see *Flack v. Hood, Comr., ante,* 337.)

APPEAL by plaintiffs from *Clement, J.,* at October Term, 1932, of BUNCOMBE. Reversed.

The object of the action is to obtain a preference on certain funds deposited in the Central Bank and Trust Company by declaring the defendants trustees for the plaintiffs of $5,384.79 which has been intermingled with the funds of the defendants on deposit in the Wachovia Bank and Trust Company to the credit of the Commissioner of the Central Bank and Trust Company; also to restrain the disbursement of funds until the sum of $5,384.79 is set apart for the benefit of the plaintiffs, or in lieu thereof that a lien be engrafted upon all the assets of the Central Bank and Trust Company to secure the payment of the stated amount.

The parties waived a trial by jury and agreed that the judge should hear the evidence, find the facts, and render judgment. The court found the facts and adjudged that the plaintiffs are not entitled to a preference but to a pro rata share in the assets.

Bourne, Parker, Arledge & DuBose for plaintiffs.
Johnson, Smathers & Rollins for defendants.

ADAMS, J. It is the opinion of the Court that the plaintiffs are entitled to a preference and that the case is governed by the principles stated in *Parker v. Trust Co.,* 202 N. C., 230, and *Flack v. Hood, Comr., ante,* 337. Judgment

Reversed.

YOUNG M. SMITH, RECEIVER OF THE MEADOWS REALTY COMPANY, *v.* GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. CENTRAL BANK AND TRUST COMPANY OF ASHEVILLE, N. C.

(Filed 15 March, 1933.)

(For digest see *Flack v. Hood, Comr., ante,* 337.)

APPEAL by defendant from *Clement, J.,* at Chambers, at August Term, 1932, of BUNCOMBE. Affirmed.

The court below found the following facts, undisputed by the litigants, and rendered judgment thereon:

"1. That Young M. Smith was regularly appointed as permanent receiver of the Meadows Realty Company by order of the Honorable Guy Weaver, judge, General County Court, on ..... March, 1931, in a case entitled 'Calland Realty Corporation *v.* The Meadows Realty Company,' and that he has qualified as such receiver and has entered upon his duties as such.

2. That the Central Bank and Trust Company was a corporation duly created, organized and existing under the laws of the State of North Carolina with its principal place of business at Asheville, N. C., and was engaged in the commercial banking business and operated as a part of the bank, a department known as the trust department, and that said bank suspended business on account of insolvency at the close of business on 19 November, 1930, and thereafter went into liquidation, and that the defendant, Gurney P. Hood, Commissioner of Banks for the State of North Carolina, is now liquidating said Central Bank and Trust Company by virtue of statutory authority.

3. That the Meadows Realty Company did, on or about 1 January, 1928, issue its corporate bonds in accordance with two specific issues in the sum of $125,000 each, and there was executed as surety for such series of bonds two certain deeds of trust both executed by the Meadows Realty Company to the Central Bank and Trust Company as trustee, by the terms of which the Meadows Realty Company pledged as security for the indebtedness, evidenced by its bonds, said two deeds of trust each bearing date of 1 January, 1928, and being of record in Deed of Trust, Book 284, page 415, and Deed of Trust, Book 284, page 442, respectively, in the office of the register of deeds of Buncombe County, N. C.

4. That on or about 16 January, 1928, the Meadows Realty Company entered into an agreement with the Central Bank and Trust Company as trustee, and by the terms of said agreement the sum of $75,000 realized from the purchase price of the above referred to bonds was placed in the hands of the Central Bank and Trust Company as trustee

to be held by it and disbursed by it in accordance with the terms and conditions of said agreement. A copy of said agreement is attached hereto and is hereby incorporated herein and made a part of this finding of fact and judgment as if fully set out herein, and it has been stipulated between counsel in open court that so much of said agreement as either counsel think pertinent may be included in the record of the case on appeal.

5. That the records of the trust department of the Central Bank and Trust Company show that there remained in the hands of the said trust department of the Central Bank and Trust Company of the $75,000 so placed with it, in accordance with the terms of the aforementioned agreement, on 19 November, 1930, the date of the closing of the said Central Bank and Trust Company, the sum of $10,371.89, and that the above referred to agreement was the only agreement entered into by and between the Meadows Realty Company and the Central Bank and Trust Company as trustee, concerning such funds and that the sum of $10,371.89 was the balance of the $75,000 above referred to, as shown on the ledger sheet of the trust department for the Meadows Realty Company, it being Trust No. 403.

6. The court further finds as a fact that the $75,000 above referred to was deposited by the trust department of said Central Bank and Trust Company in its account with the commercial department of said bank, the said account being known as the trust department account, it being the only account which the trust department carried in the commercial department of said bank.

7. That at the time of the closing of the said Central Bank and Trust Company, to wit, 19 November, 1930, the trust department account with the commercial department of the Central Bank and Trust Company, was overdrawn in the approximate amount of $21,000, the trust department having at that time no cash on hand.

8. That from time to time, after the deposit of $75,000 by the trust department with the commercial department of said bank, the trust department did withdraw by check all the funds which it had placed with the commercial department and expended them for numerous, unknown and unascertainable matters and things.

9. That the Meadows Realty Company, its successors, officers, or agents had no knowledge of the disposition of the funds above referred to amounting to $75,000 as made by the Central Bank and Trust Company or of its trust department.

10. That the plaintiff in this action filed notice of his claim with the liquidating agent of the Central Bank and Trust Company in due form on 5 May, 1931, requesting that the above referred to claim be declared a preferred claim, and that the said liquidating agent rejected the said

claim on 5 June, 1931, and notice of said rejection was received by Young M. Smith, receiver, plaintiff, on 6 June, 1931, and that this suit was instituted and complaint filed within the statutory 90 days thereafter.

It was stipulated by both counsel for plaintiff and counsel for defendant in open court that the foregoing findings of fact are correct and that there is no objection thereto by either party.

Upon the foregoing findings of fact it is, thereupon, ordered, adjudged and decreed that the claim of the plaintiff be, and the same is hereby, allowed as a preferred claim against the assets of the Central Bank and Trust Company, and when final settlement is made by said defendant the said claim shall be allowed priority in payment over the claims of the common creditors and shall either be paid in full, as a preferred claim, or in the event of an insufficient amount, to pay all of the preferred claims, then it shall share pro rata with the other preferred claims against the said Central Bank and Trust Company; and that the defendant be taxed with the costs."

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

Harkins, VanWinkle & Walton for plaintiff.

Johnson, Smathers & Rollins and T. A. Uzzell, Jr., for defendant.

CLARKSON, J. The plaintiff contends that the $75,000 was placed with the Central Bank and Trust Company under an agreement that said sum was to meet certain specific obligations of said Meadows Realty Company, and that the bank had knowledge of this fact, and that their deposit was what is known in law as a deposit for a specific purpose, and consequently are entitled to a preference against the assets now in the hands of the Commissioner of Banks.

The defendant contends, on the other hand, that, in order for a trust to attach to the assets now in the hands of the liquidating agent, the funds or a part of the funds belonging to the plaintiff must exist in the hands of the liquidating agent, upon which the trust can attach, in order that equity may return to its rightful owner that which actually belongs to him, and that no such funds remain in the receiver's hands.

The plaintiff contends that defendants' contention is a misconception of what the plaintiff is seeking in this case. "He is not trying to locate a fund upon which he can impress a trust. He is seeking to have his claim awarded a preference over the claims of unsecured creditors as in law and equity he is entitled to have."

This case is governed by *Parker v. Trust Co.*, 202 N. C., 230, and *Flack v. Hood, Comr., ante*, 337. The judgment of the court below is

Affirmed.

ASHEVILLE SAFE DEPOSIT COMPANY, TRUSTEE, v. GURNEY P. HOOD, COMMISSIONER OF BANKS OF THE STATE OF NORTH CAROLINA, AND G. N. HENSON, LIQUIDATING AGENT FOR THE CENTRAL BANK AND TRUST COMPANY.

(Filed 15 March, 1933.)

Appeal and Error F a—Defendant held not entitled to raise question of plaintiff's right to sue, no objection having been made in court below.

Where an action is instituted by a corporation on the theory that it was a duly substituted trustee of an active trust, C. S., 446, 449, and the plaintiff's right to sue is not raised in the lower court, and the lower court finds as a fact under agreement of the parties that plaintiff was duly substituted as trustee, the question of whether the plaintiff is the real party in interest may not be raised by the defendant for the first time in the Supreme Court.

(For digest on the question of preference in the distribution of an insolvent bank's assets see *Flack v. Hood, Comr., ante*, 337.)

APPEAL by defendants from *Sink, J.*, at June Civil Term, 1932, of BUNCOMBE. Affirmed.

The parties to this controversy, in the court below, agreed to waive a jury trial and that the court should find the facts and render judgment thereon. The findings of fact, in part, are as follows:

"The Continental Mortgage Company is a corporation duly created and existing, and was formerly engaged in business in the city of Asheville, North Carolina, and formerly engaged in the business of making loans secured by deeds of trust constituting liens on real estate in the county of Buncombe and other counties in the State of North Carolina.

That in all the loans so made by said Continental Mortgage Company, the Central Bank and Trust Company was designated as trustee in the several deeds of trust securing said loans—that is to say, loans were made to individuals by the Continental Mortgage Company and notes were executed evidencing said loans, usually payable monthly, secured by deeds of trust in which the said Central Bank and Trust Company was named as trustee.

That the Continental Mortgage Company issued several series of bonds, payable to bearer, and sold the same to the public, and pledged, among other things, as collateral security to said bonds, the notes and mortgages referred to in the preceding paragraph, and said notes and mortgages were held in the trust department of the Central Bank and Trust Company.

That, as set forth above, the notes and mortgages referred to contained a provision for monthly payments by the borrowers, and also contained a provision authorizing the trustee to hold these monthly

payments until a semiannual interest installment matured under the terms of said deed of trust, and pursuant to some arrangement between the said bank and Continental Mortgage Company, the makers of said notes made monthly payments direct to the Continental Mortgage Company, which company received said payments from time to time and deposited same to its own credit in the Central Bank and Trust Company, and then made monthly remittances to the trust department of the said Central Bank and Trust Company, giving one check to said bank for the aggregate amount of all collections made from the numerous individuals who had made payment during the preceding month, the said check being accepted by the trust department of the said Central Bank and Trust Company and deposited to the credit of 'trust department'; that with each monthly remittance thus made by the Continental Mortgage Company, an accompanying statement was furnished to the bank, showing the several individuals who had made payments, and the amount of such payments, which record and statement was filed with the trust department of the Central Bank and Trust Company, to the end that a proper record might be made of the collections so made by the Continental Mortgage Company and so remitted to said Central Bank and Trust Company, as trustee.

That upon receipt of payments from the Continental Mortgage Company in the manner set forth in the preceding paragraph, the Central Bank and Trust Company opened an individual account with each mortgagor who had thus made payments on his mortgage through the said Continental Mortgage Company, said payments being shown as a deposit on an individual ledger account under the name of the individual so making the payments, and that it was the practice of the bank, upon the maturity of the semiannual payments due by said mortgagor, to debit his account on the individual ledger and credit his individual note to the amount of the payments thus previously made.

That at the time of the failure of the Central Bank and Trust Company the aggregate amount to the credit on the individual ledger account of the several individuals who had made payments on their mortgages to the Continental Mortgage Company, and which company had in turn remitted to the bank, as hereinbefore set out, was ninety-eight thousand, nine hundred and nineteen dollars and ninety cents ($98,919.90); and that according to the books of said bank the said entire amount remained to the credit of the several individuals and had not been credited upon their notes and mortgages. . . .

Upon the foregoing findings of fact the court is of the opinion and so adjudges that the plaintiff is entitled to recover the sum of $98,919.90, with interest thereon from 19 November, 1930, and that the same is entitled to be adjudged as a preferred claim against the assets of the

Central Bank and Trust Company, in the hands of the defendants, and to be paid only in the event there is sufficient amount to pay all preferred claims, and, if there is not a sufficient amount, that then said claims shall pro rate equally with other preferred claims allowed by the court."

From the judgment rendered by the court below, defendants excepted, assigned error and appealed to the Supreme Court.

Alfred S. Barnard for plaintiff.
Johnson, Smathers & Rollins for defendants.

CLARKSON, J. Defendants contend that it is doubtful if the plaintiff in this cause is the real party in interest. C. S., 446, 449. *Sheppard v. Jackson,* 198 N. C., 627. Under C. S., 449, *supra,* "A trustee of an express trust"—"may sue without joining with him the person for whose benefit the action is prosecuted." The record discloses that "The plaintiffs and defendants having in open court waived a jury trial and agreed that the judge might hear the evidence, find the facts and render judgment thereon." The court below found: "That the said Central Bank and Trust Company having become, by reason of its insolvency, disqualified to act as trustee in the several deeds of trust executed to it for the benefit of the said Continental Mortgage Company and said Federal Mortgage Company, the plaintiff was in accordance with the terms and provisions of said deeds of trust duly substituted as trustee in all of said deeds of trust, and all of the amounts so collected by the Central Bank and Trust Company, as trustee under said deeds of trust on the notes and mortgages so delivered to it for collection, as aforesaid, should be paid to the plaintiff as such substituted trustee, to be applied by it in accordance with the terms and provisions of the agreement under which the said Central Bank and Trust Company collected the same."

This question as to plaintiff's right to sue was not raised in the court below. Conceding, but not deciding that the plaintiff was not the real party in interest or "a trustee of an express trust," we think that it is too late now to make this contention. The theory on which the case was tried was to the effect that plaintiff was the real party in interest and authorized to receive any recovery in this action and make proper application of the fund. If the question had been raised in the court below an amendment could have been allowed. This Court can allow an amendment as to parties. C. S., 1414. *Kent v. Bottoms,* 56 N. C., 69; *Hodge v. R. R.,* 108 N. C., 24.

From the facts found by the court below and the judgment thereon, the plaintiff, on behalf of the Continental Mortgage Company, is entitled to recover of defendants $98,919.90.

The case is governed by *Parker v. Trust Co.*, 202 N. C., 230, and *Flack v. Hood, Comr., ante,* 337.

The claims filed by plaintiff were on behalf of the *Continental Mortgage Company,* and the *Federal Mortgage Company.* The Federal Mortgage Company's claim of $188,428.10 was denied by the court below, as a preference and in this we see no error. The judgment of the court below is

Affirmed.

BEACON MANUFACTURING COMPANY v. GURNEY P. HOOD, COMMISSIONER OF BANKS, AND G. N. HENSON, LIQUIDATING AGENT OF THE CENTRAL BANK AND TRUST COMPANY.

(Filed 15 March, 1933.)

Banks and Banking H d—Deposit made in reliance on false, published bank statement does not entitle depositor to preference.

A complaint alleging that plaintiff relied on the false and fraudulent statement of a bank's condition published in a newspaper, and in consequence deposited a check in the bank which was collected by the bank and credited to the depositor's account several days before the bank was placed in a receiver's hands, without any allegation that such misrepresentations were made to the plaintiff personally, *is held* insufficient to state a cause of action against the receiver for a preferred claim, and his demurrer thereto was properly sustained.

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

This is an action to have the claim of the plaintiff against the Central Bank and Trust Company of Asheville, N. C., an insolvent banking corporation, now in the hands of the defendants for liquidation as provided by statute, adjudged a preference, and ordered paid by the defendants out of the assets in their hands of the Central Bank and Trust Company before the payment by them of the claims of other depositors and creditors of the said Central Bank and Trust Company.

It is alleged in the complaint that on 7 November, 1930, the plaintiff sent to the Central Bank and Trust Company, by mail, for deposit to its credit, its check for $20,000, drawn on a bank at New Bedford, in the State of Massachusetts; and that said check was received and collected by the Central Bank and Trust Company, and its proceeds placed to the credit of plaintiff on or about 14 November, 1930.

It is further alleged in the complaint that prior to 7 November, 1930, the Central Bank and Trust Company, through its officers and directors, for the purpose of inducing plaintiff and others to deposit money in said Bank and Trust Company, from time to time, published statements

showing the financial condition of said Bank and Trust Company; that these statements showed that said Bank and Trust Company was solvent, and amply able to meet and satisfy its pecuniary obligations; that said statements were false and fraudulent, for that said Bank and Trust Company at the time they were published was hopelessly insolvent, as its officers and directors well knew; and that plaintiff was induced by and relied on these false and fraudulent statements, when it sent its check to the said Bank and Trust Company, for deposit on 7 November, 1930.

It is further alleged in the complaint that the Central Bank and Trust Company closed its doors and ceased to do business on or about 19 November, 1930, because of its insolvency; and that all its property and assets, including approximately $65,000, in cash, were taken over and passed into the possession of the defendants as provided by statute.

It is further alleged in the complaint that at the date on which the Central Bank and Trust Company closed its doors and ceased to do business, to wit: 19 November, 1930, the balance due to the plaintiff by the said Central Bank and Trust Company, on its account as a depositor, was $20,200.78, and that plaintiff is entitled to have its claim for said amount, or at least for the sum of $20,000, adjudged a preference and paid out of the assets of the Central Bank and Trust Company, before the claims of other depositors or creditors are paid.

It was admitted in the record that plaintiff's claim against the Central Bank and Trust Company for $20,200.78 has been allowed by the defendants; the contention, however, that said claim should be allowed as a preference, was rejected by the defendants prior to the commencement of this action.

The defendants demurred to the complaint on the ground that the facts stated therein are not sufficient to constitute a cause of action for a preferential claim, for that it is not alleged in the complaint that any representations were made to the plaintiff specifically as to the solvency of the Central Bank and Trust Company, at or prior to the date of its deposit on 7 November, 1930, as an inducement peculiar to the plaintiff to make said deposit.

At the hearing of the action on defendants' demurrer, it was ordered and adjudged that the demurrer be and it was sustained.

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

James F. Armstrong and Alfred S. Barnard for plaintiff.
Johnson, Smathers & Rollins for defendants.

CONNOR, J. The plaintiff contends that on the facts alleged in the complaint and admitted by the demurrer, its title to the proceeds of the

check which it deposited in the Central Bank and Trust Company on 7 November, 1930, did not pass to or vest in said Central Bank and Trust Company. This contention is founded upon the allegation in the complaint that plaintiff was induced to deposit said check by false and fraudulent representations made to it and the public by the Central Bank and Trust Company, through its officers and directors, by means of statements as to its financial condition published by said Bank and Trust Company prior to 7 November, 1930. It is not alleged in the complaint, however, that at or before the date of said deposit, any representation as to its financial condition was made to the plaintiff by the Central Bank and Trust Company or by any of its officers or directors in its behalf, other than statements published by the said Central Bank and Trust Company as inducements to the plaintiff and the public to make deposits in said Bank and Trust Company. In the absence of a false and fraudulent representation made specifically to the plaintiff, with respect to the financial condition of the Central Bank and Trust Company, the plaintiff has no equity superior to the rights of other depositors or creditors of the Central Bank and Trust Company, who made deposits in said company in reliance upon the statements published by said company, and there was no error in the judgment dismissing the action. *Steele v. Allen* (Mass.), 134 N. E., 401, 20 A. L. R., 1203. The judgment is

Affirmed.

FIRST NATIONAL BANK AND TRUST COMPANY OF ASHEVILLE, N. C., RECEIVER AND TRUSTEE OF THE CENTRAL SECURITIES COMPANY, ASHEVILLE, N. C., v. GURNEY P. HOOD, COMMISSIONER OF BANKS OF NORTH CAROLINA, ET AL.

(Filed 15 March, 1933.)

Banks and Banking H d—Purchaser of bonds held entitled to preference under bank's agreement to hold securities for protection of bonds.

Where a bank acting as trustee under a trust indenture to hold securities for the protection of a bond issue receives the proceeds of the bond issue and commingles them with its general funds instead of purchasing securities and holding them for the protection of the bond issue as it was bound to do under the trust agreement, the purchaser of the bonds, relying upon the bank's statement that it was holding such securities, is entitled to a preference in the bank's assets in the hands of a receiver.

CIVIL ACTION, before *Sink, J.* From BUNCOMBE.

The question was determined upon an agreed statement of facts. A summary of such pertinent facts is as follows: The plaintiff is the duly

appointed receiver of Central Securities Company of Asheville. The defendant, as Commissioner of Banks, has in his possession for liquidation all the property and assets of Central Bank and Trust Company. The officers of Central Securities Company and the Central Bank and Trust Company were practically the same; that is to say, W. B. Davis was president and active manager for both companies, and there were other interlocking officers. In December, 1928, the bank was trustee in a certain trust indenture, according to the terms of which the Securities Company assigned, transferred, deposited and pledged unto the bank in trust certain notes, bonds, mortgages, cash and other securities. This pledge of securities was for the purpose of supporting coupon bonds issued and to be issued by the Securities Company. On 28 January, 1930, the Securities Company contemplated the issue of what is described as Series E. Bonds, and on said date entered into a supplemental trust agreement with the bank as trustee. By virtue of this supplemental agreement Series E. Bonds were issued by the Securities Company in the sum of $380,000. $280,000 of these bonds had been purchased by A. E. Kusterer and Company of Grand Rapids, Michigan. On 10 September, 1930, negotiations were begun between the Securities Company and Kusterer for the purchase of $100,000 of said Series E. Bonds. Kusterer agreed to purchase $100,000 worth of said bonds, but before consummating the purchase inquired of the bond department of the bank as to the securities held for the payment of said bonds. Thereupon the bond department of the bank on 23 September, 1930, advised Kusterer that it then held, among other securities, $117,500 in Liberty Bonds. Relying upon said representations so made by the bank, Kusterer paid to the bank as trustee on 24 September, 1930, the purchase price of $100,000 for said Series E. Bonds. At the time of making the representations to Kusterer and Company as an inducement to the purchase, the bank did not have but $27,500 of Liberty Bonds. Thereafter, on various days in September, the Securities Company bought an aggregate of $90,000 of Liberty Bonds. Drafts for the purchase price of these bonds were paid by the bank. All of these bonds were sold, and it was specifically agreed "that the funds derived by the Central Bank and Trust Company from the sale of United States Liberty Bonds, above mentioned, were appropriated and used by Central Bank and Trust Company in the course of its business and went to swell the assets of said bank." The bank failed on 19 November, 1930, and the receiver for the Securities Company filed a claim with the defendant contending that the Securities Company was entitled to a preference. The defendant took a contrary view.

After hearing the argument of counsel the trial judge was of the opinion that the plaintiff was entitled to a preference for $117,500, and so adjudged. From the judgment so rendered the defendant appealed.

Alfred S. Barnard for plaintiff.
Johnson, Smathers & Rollins for defendants.

BROGDEN, J. Eliminating scenery and background, the case is this: The Central Bank and Trust Company was trustee under a trust indenture to hold securities for the protection of a bond issue duly made by the Securities Company. Certain bonds of such issue were sold, and the purchaser paid the money to the trustee. The trustee commingled the money and appropriated the same to its own use. The facts interpreted in the light of recent cases dealing with preferences, disclose that this money had a string tied to it or an invisible legal fence about it, setting it apart from the general funds of the bank. Therefore, the judgment is affirmed upon authority of *Parker v. Trust Co.*, 202 N. C., 230, 162 S. E., 564, and *Flack v. Hood, Comr., ante*, 337.

Affirmed.

BOARD OF EDUCATION OF BUNCOMBE COUNTY, AND T. H. REEVES, TREASURER OF BUNCOMBE COUNTY, v. GURNEY P. HOOD, COMMISSIONER OF BANKS, AND G. N. HENSON, LIQUIDATING AGENT OF CENTRAL BANK AND TRUST COMPANY.

(Filed 15 March, 1933.)

Banks and Banking H d—Cashier's check does not constitute statutory or equitable preference against assets of insolvent bank.

Where a bank debits a depositor's account with the amount of a check drawn by the depositor and issues its cashier's check for the amount, but is placed in a receiver's hands before remitting the proceeds to a third person as instructed to do by the depositor: *Held*, the cashier's check does not constitute a preference either as defined by C. S., 218(c) or under the trust fund theory.

CIVIL ACTION, before *Clement, J.*, at October Term, 1932, of BUNCOMBE.

It was agreed that the trial judge should find the facts and enter judgment thereon. Such of these facts as are pertinent to the point of law involved are as follows:

On 7 November, 1930, the board of education drew a draft, "payable to the Central Bank and Trust Company of Asheville," and drawn upon the treasurer of Buncombe County, in the sum of $204,333.33, with attached memorandum reading as follows: "Notes due Central Hanover Bank and Trust Company, $200,000; interest on same from 12 June, 1930, at 5%, $4,333.33; total $204,333.33." Between the dates of 7 November and 15 November, the secretary of the board of education

presented the draft to the Central Bank and Trust Company "with instructions that said bank collect the proceeds of said warrant or draft from the treasurer of Buncombe County and transmit the same to Central Hanover Bank and Trust Company for the express and sole purpose of paying off and discharging the aforesaid $200,000 of notes with accrued interest. On 15 November, 1930, L. L. Jenkins, treasurer of the public school fund of Buncombe County, executed and delivered to the Central Bank and Trust Company a check "on the Buncombe County school fund in the sum of the aforesaid warrant or draft, and the same is stamped paid by the bank on 14 November, 1930. On 14 November, 1930, the ledger sheet of Buncombe County school fund was debited with the aforesaid check, reducing the balance of the public school fund from $376,313.49 to $171,980.16. On the same day the Central Bank and Trust Company issued its cashier's check, payable to 'ourselves' in the sum of $204,333.33." This cashier's check was marked paid 19 November, 1930, and said sum was credited to the Buncombe County school fund, increasing the balance in said fund to $390,373.39. The Central Bank and Trust Company failed to transmit or cause to be transmitted to the Central Hanover Bank and Trust Company of New York City the proceeds of said check and closed its doors on 20 November, 1930. On the day it closed the bank had these items and due from other banks the sum of $144,474.85. Of this sum only $65,493.13 in cash actually came into the hands of the receiver. The bank had other unencumbered and unpledged assets of the face value of approximately $4,600,000.

Upon the foregoing findings of fact the trial judge was of the opinion that the claim of plaintiff constituted a preference and ordered that plaintiff's claim be paid out of the amount of cash actually on hand at the time of the failure, to wit, the sum of $65,493.13, and that such claim did not constitute a preference to be paid out of the other general assets of the bank.

From such judgment both parties appealed.

C. N. Malone and Jones & Ward for plaintiff.
Johnson, Smathers & Rollins for defendants.

BROGDEN, J. The cashier's check described in the evidence did not constitute a statutory preference as defined by C. S., 218(c). *In re Bank, ante,* 143. See, also, *Morecock v. Hood, Comr.,* 202 N. C., 321, 162 S. E., 730. Nor do the facts constitute a preference upon the trust fund theory as interpreted in *Parker v. Trust Co.,* 202 N. C., 230, 162 S. E., 564; *Williams v. Hood, Comr., ante,* 140. See, also, *Flack v. Hood, Comr., ante,* 337.

Reversed.

MANSON McCLEESE v. EASTERN BANK AND TRUST COMPANY.

(Filed 15 March, 1933.)

Appeal and Error A e—

Where the questions sought to be presented on appeal have become academic the appeal will be dismissed.

APPEAL by defendant from *Harris, J.*, at October Term, 1932, of PAMLICO. Appeal dismissed.

W. B. R. Guion for plaintiff.
Warren & Warren for defendant.

CLARKSON, J. The plaintiff when a minor had on deposit in defendant bank, on ..... September, 1930, about $819.13 and $34.64. He, with his mother as guardian, made an agreement with defendant, on 8 August, 1930, in part, as follows: "I/we will postpone until 20 December, 1932, the payments, without interest of my/our respective claims against said bank, or any individuals thereon, and no part of said claims against said bank shall be legally demandable prior to 20 December, 1932," etc.

After plaintiff came of age he sued defendant, on 23 September, 1932, and alleged in the complaint, in part: "That at said time and place, this plaintiff was without business experience, an orphan, and relied upon the assurances above mentioned; but upon reaching the age of 21 and the plaintiff became 21 on 18 September, 1932, after mature consideration, concluded that it was necessary for plaintiff to have said sum of money, and that his own best interests required that he have the sum. That on 23 September, 1932, plaintiff drew his check on said Eastern Bank and Trust Company, and presented the same at said bank at Bayboro for payment, advising the said bank that although he, when a minor, had entered into a contract not to check upon said account until 20 December, 1932, upon certain representations, that he now disbelieved the representations and, 21 years of age, desired his money. That the defendant then and there refused to give the said money to plaintiff."

The defendant demurred to the complaint: "That the complaint filed herein does not state facts sufficient to constitute a cause of action in that: (1) It appears on the face of the complaint that the plaintiff, in 1930, a minor 20 years of age, executed and agreed with the defendant herein that he would not check against or draw upon his deposits in said defendant bank until 20 December, 1932, and that in violation of his admitted agreement plaintiff on 23 September, 1932, drew his check

on his deposit in said bank and presented same for payment. (2) That there is attached hereto a true copy of plaintiff's agreement with said bank as referred to in the complaint, which is also executed by Mrs. Beatrice McCleese, guardian of said minor plaintiff, and attention is here called to (3 C. S., 1924) section 220(i), which provides as follows: 'Whenever any person who is a minor of the age of fifteen years and upward shall make a deposit in any State or National Bank in this State, the same shall be held for the exclusive benefit and right of said minor, free from the control of all persons whatsoever, and it shall be paid, together with interest, if there be any interest thereon, to the person in whose name the deposit shall be made, and the receipt, check, or quittance of such minor to the said State or National (bank) shall be valid and sufficient release and discharge for such deposit, or any part thereof, to the bank in which said deposit was made.' Wherefore, defendant prays judgment that this action be dismissed at the cost of the plaintiff."

At October Term, 1932, the court below overruled the demurrer "to the foregoing judgment overruling the demurrer the defendant excepts and appeals to the Supreme Court. Notice of appeal given in open court and waived," etc.

On 7 November, 1932, the plaintiff made a motion accompanied by affidavit setting forth certain facts, praying that a receiver be appointed for defendant. The defendant made motion "to strike from files and dismiss motion and affidavits of plaintiff asking for receivership."

The court below set forth certain facts and rendered judgment: "It is now thereupon ordered, adjudged and decreed that the defendant deposit in court the said sums of $819.13 and of $34.64, to be safely held, pending the final determination of this case. 21 November, 1932. W. C. Harris, judge presiding. On motion of the defendant for the stay of the foregoing judgment, it is considered, ordered and adjudged that the foregoing judgment may be, and the same shall be, stayed upon the filing by the defendant of a good and sufficient bond, in the amount of $853.77, with sureties to be approved by the clerk of the Superior Court of Pamlico County, etc. W. C. Harris, judge presiding. 21 November, 1932."

Defendant, in accordance with the judgment, gave bond and appealed to this Court. It appears by the record and defendant admits that plaintiff "agreed with the defendant herein that he would not check against or draw upon his deposits in said defendant bank until 20 December, 1932."

Conceding, but not deciding that under the statute plaintiff could make the agreement contended for by defendant, the agreement expired 20 December, 1932. This is March, 1933. We will not discuss the law as to what is a speaking demurrer, the right of minors, under the above section of the Consolidated Statutes, or the requiring defendant to give

bond on appeal, by the court below in the application by plaintiff for a receiver. Under the now existing facts the questions presented are moot, academic. *Rousseau v. Bullis,* 201 N. C., 12. For the reasons given, the appeal will be dismissed.

Appeal dismissed.

CHRISTINE WINDLEY v. LOIS BROCK, F. BROCK, AND MARVIN WRIGHT.

(Filed 15 March, 1933.)

Highways B b—Where evidence shows that intersection was not obstructed instruction defining obstructed intersection and speed thereat is error.

In an action involving the question of negligence in causing a collision of automobiles 173 feet from an intersection of highways, an instruction defining the legal speed at an obstructed intersection and defining what constitutes an obstructed intersection will be held for reversible error where all the evidence shows that the intersection in question was not an obstructed intersection as defined by law.

CIVIL ACTION, before *Parker, J.,* at October Term, 1932, of HYDE.

The plaintiff was a guest in a car owned and driven by the defendant, Marvin Wright, traveling from Washington to Wilmington on route No. 30. State Highway No. 12 intersects No. 30. The Wright car was traveling southward along No. 30, approaching the intersection of Highway No. 12. At the same time the car driven by the defendant, Lois Brock, was traveling northwardly along No. 30 approaching the said intersection of No. 12. The road at the point of intersection on both sides thereof was straight for a considerable distance, variously estimated at from five hundred yards to a mile. The evidence further tended to show that when the Brock car reached a point approximately 173 feet south of the intersection it turned to the left across the road or highway to enter a filling station on the west side of the highway, and that the two cars collided at a point about 173 feet south of the intersection. The plaintiff contended that the Wright car, in which she was a guest, was operated at an excessive rate of speed, and that the Brock car was negligently operated in that it turned directly across the road in front of the Wright car. This testimony shifted the controversy to the defendants, and each one contended that the other was negligent.

Issues of negligence were submitted with reference to the negligence of both Lois Brock and of Marvin Wright and answered by the jury in favor of plaintiff. Damages were awarded in the sum of $5,000, and from the judgment upon the verdict the defendant, Wright, appealed.

H. C. Carter for plaintiff.

MacLean & Rodman for defendant.

BROGDEN, J. The trial judge charged the jury as follows: "The court further charges that persons driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other conditions then existing, and no person shall drive any vehicle upon a highway at such a speed as to endanger the life, limb or property of any person, and at a rate of speed greater than 15 miles an hour when approaching within 50 feet and in traversing an intersection of highways when the driver's view is obstructed. The court further charges you in this connection that a driver's view is deemed to be obstructed when at any time during the last 100 feet of his approach to such intersection he does not have a clear and uninterrupted view of such intersection, and of the traffic upon all the highways entering such intersection for a distance of 200 feet from such intersection. The court further charges that the juncture of State Highway No. 30 and the State Highway No. 12 as referred to by the witnesses in this case constituted intersecting highways within the meaning of the law."

The defendant, Wright, challenges the above instruction upon two grounds: (1) That a collision 173 feet from an intersection does not invoke the application of the speed law governing the operation of automobiles at intersections; (2) that there was no evidence that the intersection was obstructed and that hence it was probable that the jury received the impression that a speed in excess of 15 miles an hour at the intersection described in the evidence, constituted evidence of negligence.

The court expresses no opinion as to whether a collision 173 feet from an intersection should be properly classified as a junction accident or injury. However, the defendants' contention with respect to the instruction relating to a speed of fifteen miles an hour at an obstructed intersection is sustained. There is no evidence in the record that the intersection was obstructed. Therefore, the principle announced in *Rudd v. Holmes*, 198 N. C., 640, 152 S. E., 894, is conclusive. The Court said: "The defendant excepted on the ground that the instruction assumes as a fact that the defendant's view was obstructed. Whether his view was obstructed was undetermined. The defendant did not admit it, and in his brief the plaintiff says that no witness distinctly testified to it, although the testimony of the plaintiff, Dewey Harris, and J. E. Lucas is sufficient to show, if believed, that the defendant's view was obstructed. The evidence may have been sufficient, but the jury had no opportunity to decide the question. The burden was upon the plaintiff to prove each of the elements necessary to constitute negligence, including the plaintiff's failure to restrict his speed, because when approaching the intersection his view was obstructed."

New trial.

WILLIS ROBERTSON v. VIRGINIA ELECTRIC AND POWER COMPANY ET AL.

(Filed 15 March, 1933.)

1. Master and Servant D b—

The modern tendency is to give the rule defining "course of employment" a liberal and practical application, especially where the business of the master involves a duty to the public or to third persons.

2. Corporations G i—

A corporation is civilly liable for torts committed by its servants or agents within the course of their employment precisely as a natural person.

3. Master and Servant D b—Evidence that defendant's employees were acting within scope of employment in setting out fire held sufficient.

The evidence tended to show that defendant's employees were digging holes for telephone poles along defendant's right of way, that they were molested by yellow jackets, and in order to get rid of them, set fire to a tree above their nest, that the fire was allowed to burn and spread until a large part of plaintiff's woods were destroyed: *Held*, the evidence was sufficient to be submitted to the jury on the issue of whether the damage was caused by defendant's employees while acting within the scope of their employment.

BROGDEN and ADAMS, JJ., dissent.

APPEAL by defendants from *Cowper, Special Judge*, at June Special Term, 1932, of WASHINGTON.

Civil action to recover damages for an alleged negligent burning of plaintiff's timber lands.

There is evidence tending to show that on 2 September, 1930, about 1:30 or 2:00 p.m., while servants of the defendants were engaged in digging holes for telephone poles along a right of way near Plymouth, N. C., they were molested by yellow jackets from a nest under an old pine, a small one, and in an effort to get rid of the yellow jackets and their stings, the tree was set on fire by one of the servants, and allowed to burn until the fire spread from the right of way to plaintiff's woods, causing considerable damage. The defendants' evidence is strongly and directly opposite.

Verdict for the plaintiff on the issues of ownership and negligence, and damages assessed at $1,000. From judgment thereon, the defendants appeal, assigning as error the insufficiency of the evidence to carry the case to the jury or to support the verdict.

E. L. Owens and Ward & Grimes for plaintiff.

T. Justin Moore, Zeb Vance Norman and Spruill & Spruill for defendants.

STACY, C. J. Was the servant about the master's business and acting in the course of his employment when he set fire to the yellow jackets' nest in order to prosecute the work he was engaged to do? *Sawyer v. R. R.*, 142 N. C., 1, 54 S. E., 793.

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

While the formal statement of the rule is simple enough, its application under a variety of conditions is not always so easy. No hard and fast definition of the expression "course of employment," or "scope of authority," readily applicable to all cases, can be given, for rigidity of statement is opposed to liberality of application; and, if the right is to prevail in all cases, the former must bend to the latter. Otherwise substance would yield to form.

The modern tendency is to give the rule a liberal and practicable application, especially where the business of the master, entrusted to his servants, involves a duty owed by him to the public or to third persons. *Dickerson v. Refining Co.*, 201 N. C., 90, 159 S. E., 446; *Martin v. Bus Co.*, 197 N. C., 720, 150 S. E., 501; *Grier v. Grier*, 192 N. C., 760, 135 S. E., 852; *Jackson v. Tel. Co.*, 139 N. C., 347, 51 S. E., 1015.

In *McLaughlin v. Cloquet Tie & P. Co.*, 119 Minn., 454, 138 N. W., 434, 49 L. R. A. (N. S.), 544, the defendant entrusted to its employees the work of rafting lumber products down a stream and through the lands of the plaintiff. The work during its progress was interfered with by a stump in the stream at a point near the plaintiff's house. The foreman and a driver, another employee, waded into the stream and sawed out the obstruction, and in doing so, both got wet. The driver, upon reaching the shore, built a fire near the bank of the stream on plaintiff's land for the purpose of drying his clothes. He negligently failed to put out the fire, whereby the plaintiff sustained damages. The Court held that "the execution of the work entrusted by the defendant to its employees required them to pass over the plaintiff's land along the banks of the stream, and the defendant owed to the plaintiff the duty of exercising due care to prevent injury to the plaintiff's land in the course of the work assigned to its employees. The building of the fire by the driver to dry his clothes was not, as a matter of law, a departure from the course of his employment; for it was incidentally connected there-

with, and was made necessary by his going into the stream to remove the obstruction, which was a part of the work assigned to him."

We perceive no difference in principle between the case at bar and the *McLaughlin case.* See, also, *Baxter v. Great Northern R. Co.,* 75 N. W. (Minn.), 1114; Note, Ann. Cas., 1914A, 1102; 11 R. C. L., 942.

The case of *Marlowe v. Bland,* 154 N. C., 140, 69 S. E., 754, 47 L. R. A. (N. S.), 1116, strongly urged by the defendants in favor of their position, is distinguishable in that the fire there set out, to clear the land of corn stalks, was started by the employee after his assigned task of cutting and piling the corn stalks had been completed, while here the work was going on and the fire was started for the purpose of enabling the defendants' servants to do the work assigned to them. The case of *Excelsior Products Mfg. Co. v. Kansas City So. R. Co.,* 263 Mo., 142, 172 S. W., 359, Ann. Cas., 1917B, 1047, is likewise distinguishable.

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

When the servant is engaged in the work of the master, doing that which he is employed or directed to do, and an actionable wrong is done to another, either negligently or maliciously, the master is liable, not only for what the servant does, but also for the ways and means employed by him in performing the act in question. *Ange v. Woodmen,* 173 N. C., 33; Reinhard on Agency, sec. 335; *Bucken v. R. R.,* 157 N. C., 443, 73 S. E., 137; *May v. Tel. Co.,* 157 N. C., 416, 72 S. E., 1059; *Berry v. R. R.,* 155 N. C., 287, 71 S. E., 322; *Roberts v. R. R.,* 143 N. C., 176.

The motion for judgment as in case of nonsuit was properly overruled; and the prayer for a directed verdict was correctly denied. These are the only questions presented by the record.

No error.

ADAMS and BROGDEN, J.J., dissent.

EASTERN COTTON OIL COMPANY v. NEW BERN OIL AND FERTILIZER COMPANY, JOHN S. WESKITT, W. J. SWAN AND H. G. SWAN.

(Filed 15 March, 1933.)

1. Abatement and Revival B b—Subject-matter of actions held not the same and plea in abatement to second action was bad.

An action on an alleged contract will not support a plea in abatement in an action brought by the defendant in the first action against the plaintiff therein to recover damages for matters which were not set up by him as a counterclaim in the first action, since final judgment in the first pending action would not support a plea of *res judicata* in the second action.

2. Venue A c—

Where a corporation institutes an action for damages in the county in which it maintains its principal place of business the denial of defendant's motion for removal to the county of its residence is properly denied. C. S., 469.

APPEAL by defendants from *Parker, J.*, at December Term, 1932, of PERQUIMANS. Affirmed.

This action was heard on defendants' plea in abatement and motion for removal to the Superior Court of Craven County, for trial, on the ground that at the date of its commencement in the Superior Court of Perquimans County there was pending in the Superior Court of Craven County an action between the parties to this action, in which the cause of action alleged in the complaint is founded on the same transactions as those on which the cause of action alleged in the complaint in this action is founded. From judgment overruling their plea in abatement and denying their motion for removal, the defendants appealed to the Supreme Court.

Tazewell Taylor and McMullan & McMullan for plaintiff.
L. I. Moore for defendants.

CONNOR, J. The defendants' plea in abatement was properly overruled. The action pending in the Superior Court of Craven County at the date of the commencement of this action in the Superior Court of Perquimans County was instituted by the defendants in this action, as plaintiffs in that action, to recover of the plaintiff, as defendant in that action, damages for a breach of the contract alleged in the complaint in that action. The plaintiff as defendant in that action, in its answer denied the contract as alleged in the complaint; it did not plead the matters and things alleged in the complaint in this action as a counterclaim in that action. A final judgment in the action pending in the

Superior Court of Craven County would not support a plea of *res judicata* in this action. This is one of the tests applied to determine the identity of the causes of action where the defendant in an action pleads the pendency of another action in abatement of the action subsequently begun. *Brown v. Polk,* 201 N. C., 375, 160 S. E., 357; *Bank v. Broadhurst,* 197 N. C., 365, 148 S. E., 452. Although the parties in the two actions are identical, the causes of action are not the same, nor are they founded on the same transactions. This renders the plea in abatement bad. *Brown v. Polk, supra.*

The motion of the defendants for the removal of the action from the Superior Court of Perquimans County to the Superior Court of Craven County, for trial, was properly denied. The plaintiff is a corporation organized under the laws of this State, with its principal place of business in Perquimans County. The action was properly begun in the Superior Court of Perquimans County, C. S., 469, and there was no error in the denial of defendants' motion for its removal to the Superior Court of Craven County for trial. The judgment is

Affirmed.

EASTERN COTTON OIL COMPANY v. NEW BERN OIL AND FERTILIZER COMPANY, JOHN S. WESKITT, W. J. SWAN AND H. G. SWAN.

(Filed 15 March, 1933.)

(For digest see *Oil Co. v. Fertilizer Co., ante,* 362.)

APPEAL by defendants from *Parker, J.,* at December Term, 1932, of PERQUIMANS. Affirmed.

From judgment overruling their plea in abatement, and denying their motion for the removal of the action to the Superior Court of Craven County, for trial, the defendants appealed to the Supreme Court.

Tazewell Taylor and McMullan & McMullan for plaintiff.

L. I. Moore for defendants.

CONNOR, J. The questions presented by this appeal are identical with the questions presented by the appeal docketed in this Court as No. 17.

The judgment is affirmed on the authority of the decision in that appeal. See opinion in *Oil Co. v. Fertilizer Co., ante,* 362.

Affirmed.

EASTERN COTTON OIL COMPANY v. NEW BERN OIL AND FERTILIZER COMPANY, JOHN S. WESKITT, W. J. SWAN AND H. G. SWAN.

(Filed 15 March, 1933.)

(For digest see *Oil Co. v. Fertilizer Co., ante*, 362.)

APPEAL by defendants from *Parker, J.*, at December Term, 1932, of PERQUIMANS. Affirmed.

From judgment overruling their plea in abatement, and denying their motion for the removal of the action to the Superior Court of Craven County, for trial, the defendants appealed to the Supreme Court.

Tazewell Taylor and McMullan & McMullan for plaintiff.
L. I. Moore for defendants.

CONNOR, J. The questions presented by this appeal are identical with the questions presented by the appeal docketed in this Court as No. 17.

The judgment is affirmed on the authority of the decision in that appeal. See opinion in *Oil Co. v. Fertilizer Co., ante*, 362.

Affirmed.

GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. BANK OF ROSE HILL, v. H. J. BONEY AND WIFE, INEZ C. BONEY, A. McL. GRAHAM, ADMINISTRATOR OF J. A. BANNERMAN, DECEASED, AND GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. BANK OF ROSE HILL, AND S. D. PITTMAN, TRUSTEE, v. HARVEY J. BONEY AND INEZ C. BONEY, HIS WIFE.

(Filed 15 March, 1933.)

Limitation of Actions E c—

In an action on a note under seal a mere allegation that defendant was a surety on her husband's note, without supporting evidence, will not support her plea of three-year statute of limitations.

APPEAL by H. J. Boney and Inez C. Boney, his wife, from *Harris, J.*, at January Term, 1933, of DUPLIN. No error.

Oscar B. Turner for appellants.
George R. Ward for plaintiff.

ADAMS, J. This is an action to recover judgment on two notes executed by the defendants to the Bank of Rose Hill. The execution of the notes

and the amounts due are admitted, but the defendant Inez C. Boney alleges that she is a surety and pleads the three-year statute of limitations in bar. The notes are under seal. Action was brought within ten years. The defendants offered no evidence and excepted to an instruction that upon the evidence the issues should be answered in favor of the plaintiff. We find no error entitling the defendants to a new trial.

No error.

STATE OF NORTH CAROLINA ON RELATION OF A. J. MAXWELL, COMMISSIONER OF REVENUE, v. KENT-COFFEY MANUFACTURING COMPANY.

(Filed 15 March, 1933.)

1. **Taxation C g—Locus of sales of foreign corporation operating manufacturing plant here is not determinative in allocating its income.**

   The income of a corporation from a unitary business may be allocated for the purpose of assessing income taxes against it to different states in which its activities are carried on, but such allocation must be based upon apportionment of productive capital, investment or employment, or some logical reference to the production of income, and the locus of its sales may not alone be made the basis of such distinction, the income from its sales being determined in relation to its capital, organization or efforts producing the sales, and where our State statute prescribes allocation in accordance with the corporation's capital outlay the statutory method will be deemed constitutional, with the burden on the corporation to show by evidence any outside factors rendering the application of the statutory method unconstitutional.

2. **Same—Locus of capital stock of foreign corporation is immaterial in allocating its income taxable by the State.**

   An income tax assessed against a corporation is not a tax upon its capital stock or franchise, and may be imposed in addition to a property tax, and in the allocation of its taxable income the locus of its capital stock need not be considered.

3. **Taxation A c—**

   The provision of Art. V, sec. 3, of our State Constitution that property shall be taxed according to its true value in money does not apply to income taxes.

4. **Taxation A h—Tax on net income of corporation doing interstate business is not a burden on interstate commerce.**

   An income tax on a corporation doing an interstate business is not a burden on interstate commerce, such tax being a tax on net income allocated to the State in accordance with a proper apportionment of the corporation's operations and business in this State, and the State may set up the formula for determining the allocation of income.

5. Statutes A e—Presumption in favor of constitutionality of statutes applies to taxing statutes.

Ordinarily, the constitutionality of a taxing statute is to be determined upon its inspection, and those matters of which the court may take judicial notice, with the burden on the taxpayer to show that it is unconstitutional in its application to him, the presumption being in favor of constitutionality.

6. Taxation C f — Burden is on appealing corporation to show that statutory assessment of income tax against it is unconstitutional.

Where the Commissioner of Revenue has assessed an income tax against a foreign corporation operating a manufacturing plant in this State in accordance with the provisions of secs. 311(a), (c), of the Revenue Act of 1929, allocating its income taxable by the State in accordance with the ratio between its tangible property within the State and its total tangible property without regard to its intangible property, consisting of capital stock, cash, accounts receivable, etc., the Commissioner's assessment will be upheld by the courts upon appeal where the corporation has failed to show that such method of allocation is unconstitutional in its application to the corporation, and the corporation's showing that its intangible property was not included in determining the ratio between its property within and without the State is not sufficient for this purpose, such intangible property being considered as the result and profits of its manufacturing operations in this State in the absence of proof that it resulted from operations without the State.

STACY, C. J., concurring.

APPEAL by plaintiff from *McElroy, J.*, at May Term, 1932, of CALDWELL. Reversed.

The following judgment was rendered by the court below: "In this cause, pursuant to the authority granted to counsel for Kent-Coffey Manufacturing Company, at the May Term, 1932, of this court, the defendant above named was granted permission to file its amendment to the petition by alleging that the tax charged was and is obnoxious to the provisions of the Interstate Commerce Clause of the United States Constitution.

And a hearing in said action having been had by consent of the parties plaintiff and defendant, at a regular term of the Burke Superior Court on 13 May, 1932, the parties having theretofore agreed to waive all technicalities, and that hearings might be had outside of the county in which the controversy was pending and having agreed that all such orders could be made at Burke Superior Court as fully as they could have been made at Caldwell Superior Court.

And the matter having been heard upon agreed facts as set forth in the petition and the exhibits thereto, and upon the whole record certified from the office of the Commissioner of Revenue, and the subsequent record made in this Court.

It is now considered and adjudged by the court that the basis of taxation adopted by the Commissioner of Revenue is arbitrary and unreasonable and in conflict with the Interstate Commerce Clause and the Fourteenth Amendment of the United States Constitution; and that the proper method of taxation would be to allot as income to the State of North Carolina such proportionate part of its entire income as the total of all of its tangible property in North Carolina bears to the total, tangible and intangible, properties in North Carolina and elsewhere.

It is thereupon considered and adjudged that the Kent-Coffey Manufacturing Company have and recover of the State of North Carolina on the relation of A. J. Maxwell, Commissioner of Revenue, the sum of $4,295.27, as shown from the report of Jack B. Phelps, acting chief income tax division, together with interest on said sum from 9 August, 1930, until paid."

The plaintiff excepted and assigned error to the judgment as signed and appealed to the Supreme Court. The necessary facts will be stated in the opinion.

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

Mark Squires, L. H. Wall, Houston D. Squires and W. C. Erwin for defendant.

CLARKSON, J. The defendant paid to plaintiff the tax assessed against it—$4,295.27—under protest, excepted to the ruling of the Commissioner of Revenue, and appealed to the Superior Court of Caldwell County, waiving jury trial. Public Laws 1929, chap. 345, sec. 341.

The sole question involved on this appeal is: Was the basis of taxation adopted by the Commissioner of Revenue arbitrary and unreasonable and in conflict with the Interstate Commerce Clause and the Fourteenth Amendment of the United States Constitution? We think not.

This is an action to review an assessment of income taxes against the defendant Kent-Coffey Manufacturing Company, made by the Commissioner of Revenue.

The appellee, Kent-Coffey Manufacturing Company, is a Delaware corporation carrying on a manufacturing business in Caldwell County, North Carolina. All of its manufacturing is done in this State.

The appellee filed its income tax return for the year 1929, showing therein a net income of $230,138.76 for the taxable year. In filing its return, it allocated to North Carolina 58.538 per cent of its net income and upon that allocation paid to the Commissioner of Revenue, for the State, an income tax of $6,062.34. In reaching this result, it used the

value of its tangible property in North Carolina and the value of all of its property, tangible and intangible, both within and without the State.

When the return of the taxpayer came before the Commissioner of Revenue for review, he assessed an additional tax against the appellee which, with interest, amounted to $4,295.27. It is this latter sum, and that only, which is in controversy in this action.

The cause was certified by the Commissioner of Revenue to the Superior Court of Caldwell County and there heard at May Term, 1932, the court holding "that the proper method of taxation would be to allot as income to the State of North Carolina such proportionate part of its entire income as the total of all of its tangible property in North Carolina bears to the total, tangible and intangible, properties in North Carolina and elsewhere."

The court thereupon adjudged that Kent-Coffey Manufacturing Company recover of the State the sum of $4,295.27, the amount in controversy.

The reassessment made by the Commissioner of Revenue was based upon the language of section 311(a), chapter 345, the Revenue Act of 1929. The business of the defendant comes within the type of that described in that section. The allocation formula set up in that section for the apportionment of net income to this State is "such proportion of its entire net income as the fair cash value of its real estate and tangible personal property in this State on the date of the close of the fiscal year of such company in the income year is to the fair cash value of its entire real estate and tangible personal property then owned by it, with no deductions on account of encumbrances thereon."

Section 311(c) of the Revenue Act of 1929, defines "tangible personal property" as follows: "The words 'tangible personal property, shall be taken to mean corporeal personal property, such as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean money deposits in bank, shares of stock, bonds, notes, credits, or evidence of an interest in property and evidences of debt."

The Commissioner of Revenue found, and the agreed facts in the record show, that the appellee owned real estate and tangible personal property, both within and without the State, of the fair cash value of $555,418.61, of which, such property of the value of $550,961.48 was situated in North Carolina. Applying the statute to the facts as so ascertained, the Commissioner of Revenue found that 99.2 per cent of the net income of the defendant was apportionable to North Carolina. The additional tax of $4,295.27 was assessed by the Commissioner and paid by the appellee under protest. The case comes here by appeal from the judgment of the Superior Court of Caldwell County in the regular way.

In support of its contentions, appellee sets up that it had a paid-up capital stock of $652,500. With respect to this capital stock, its position is stated in its petition as follows: "The said capital stock was employed by your petitioner for the purpose of manufacturing and, as your petitioner is advised and believes, had its situs within the State of its domicile, or the State of Delaware. Petitioner had also reserved and set aside as surplus or working capital $140,354.06; all of which surplus was employed in the business of your petitioner as a manufacturer, and all of which sum had a taxable situs, as your petitioner is informed and believes, in the State of Delaware and not in the State of North Carolina."

Appellee contends that the formula properly applicable to it is the relation of its tangible property in North Carolina to all of its property, tangible and intangible, both within and without the State. These intangibles consist of the following items:

Cash	$ 61,349.91
Accounts receivable	203,933.08
Notes receivable	70,821.10
Stock in other corporations	13,100.00
Prepaid expense	36,585.04
Making a total of	$385,789.13

Of these items, the cash is made up of deposits of $41,220 in banks without the State and deposits of $20,121.91 in banks in North Carolina. The inclusion of these bank deposits in North Carolina is evidently upon the theory that such intangibles have their situs within the domiciliary state of the corporation upon the maxim, *"mobilia sequuntur personam."*

It is also set up in the record, as a part of the appellee's petition to the Commissioner of Revenue, upon which this case is being reviewed, that "as a statement of fact rather than a contention for the allocation of petitioner's taxes, the sales for the period of the report made without the State were the sum of $1,545,485.95, or 99.8 per centum of the total sales; and within the State the sum of $3,021.13, or 00.2 per centum of the total sales."

It is admitted in the brief for appellee that its business is unitary. That term is simply descriptive, and primarily means that the concern to which it is applied is carrying on one kind of business—a business, the component parts of which are too closely connected and necessary to each other to justify division or separate consideration, as independent units. By contrast, a dual or multiform business must show units of a

substantial separateness and completeness, such as might be maintained as an independent business (however convenient and profitable it may be to operate them conjointly), and capable of producing a profit in and of themselves.

Conceding that a unitary business may produce an income which must be allocated to two or more states in which its activities are carried on, such a business may not be split up arbitrarily and conventionally in applying the tax laws. It would seem to be necessary that there should be some logical reference to the production of income; the distinction should be founded on a corresponding difference in apportionment of productive capital, investment or employment, within the unitary business.

The mere statement of a witness as to the income separately derived from purchase, from manufacture, and from sale, without supporting data, showing the influence of each factor in producing profit, gain or income from the separate operations—such as should be allocated to it independently—is merely an arbitrary guess. The bare fact of sale produces no income. It is merely the act by which the income is captured; the capital, the organization or efforts which produce the sale, are the things to be considered in ascertaining the amount of income to be credited to the sale. Certainly, in a unitary business, we must look further back than to the sale itself, or the activities which actually produce it. The tangible property element of capital outlay is cared for in the tangible property ratio set up by the statute. If there is anything beyond that of sufficient magnitude to affect the constitutionality of the application of this rule, it must be shown in the evidence, the burden resting upon the taxpayer to do so.

But, it is not necessary to apply any of these principles in finding the correct solution of the problem before us. No effort was made in the evidence to break up the business of appellee into the separate or component elements of buying, manufacturing and selling, as was done in the *Hans Rees case,* 199 N. C., 42, 283 U. S., 123, 75 L. Ed., 879.

Appellee is a foreign corporation, but employs its capital in manufacturing in this State. As one part of its case, it relies upon the contention that the whole of its capital stock is located at its home office in Delaware. But the tax here imposed is not one upon the capital stock of the corporation or its franchise; *Petroleum Company v. Bliss,* 43 R. I., 244; *Adams Express Company v. Kentucky,* 166 U. S., 171, 41 L. Ed., 960; *Bank of California v. San Francisco,* 142 Cal., 276, 64 L. R. A., 918.

The tax here in question is one upon income or net profits. That such a tax may be imposed, in addition to that on property, is now too well established to admit of debate. It is now universally regarded as one of the most just methods of apportioning the burdens of government.

The tax on income, imposed by the Revenue Acts of this State, is not a tax on property, within the meaning of the requirement of Constitution, Article V, section 3, that property shall be taxed according to its true value in money. *Tea Company v. Doughton,* 196 N. C., 145, 149; *Clark v. Maxwell,* 197 N. C., 604, 606; *State v. Gulf M. and N. R. Company,* 138 Miss., 70, 104 So., 689; *Ludlow-Saylor Wire Company v. Wollbrinck,* 275 Mo., 339, 205 S. W., 196; *Hattiesburg Gro. Company v. Robertson,* 126 Miss., 34, 88 So., 4, 260 U. S., 710, 67 L. Ed., 475; *Lawrence v. Tax Commission,* 162 Miss., 338, 137 So., 503, 286 U. S., 276, 76 L. Ed., 1102.

As to the general nature of such taxes, see *Doyle v. Mitchell Bros. Company,* 247 U. S., 179, 62 L. Ed., 1054; *Bowers v. Kerbaugh-Empire Company,* 271 U. S., 170, 70 L. Ed., 886.

A state may not impose any tax which results in laying a direct burden upon interstate commerce. But, a state may, in levying a general income tax, include within the taxable status so much of net income derived from interstate commerce as is properly apportionable to operations and business within the State. *U. S. Glue Company v. Oak Creek,* 247 U. S., 321, 62 L. Ed., 1135; *Shaffer v. Carter,* 252 U. S., 37, 64 L. Ed., 445; *Travis v. Yale & Towne Mfg. Company,* 252 U. S., 60, 64 L. Ed., 460.

A tax upon the net income of such corporation is not a burden on interstate commerce, simply because the products of the business are shipped and sold out of the State. The distinction between a tax on gross receipt and a tax on net income is thus stated by *Justice Pitney* in *U. S. Glue Co. v. Oak Creek, supra,* p. 328: "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude, and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and

general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the Federal Constitution because they happen to be engaged in commerce among the states."

A state may tax the net income of a foreign corporation doing business within its taxing jurisdiction, and may include therein a portion of such net income arising from interstate commerce, properly apportionable to the State. *Underwood Typewriter Co. v. Chamberlain,* 253 U. S., 113, 65 L. Ed., 165; *Bass, Ratcliff and Gratton v. State Tax Commission,* 266 U. S., 271, 69 L. Ed., 282; *Hans Rees Sons v. North Carolina,* 199 N. C., 42, 283 U. S., 123, 75 L. Ed., 879.

A state may set up a formula for determining that portion or net income properly attributable to business within the State, including that from interstate operations. In *Atlantic Coast Line Railroad v. North Carolina,* 262 U. S., 413, 67 L. Ed., 1051, the Supreme Court of the United States sustained allocation of net income to the State based upon an equal mileage proportion of gross operating revenues from interstate business. In *U. S. Glue Co. v. Oak Creek, supra,* it sustained the Wisconsin Act, which apportioned net income upon the relation of gross business and the value of corporeal property within the State to total gross business and the value of such property both within and without the State. In *Underwood Typewriter Co. v. Chamberlain, supra,* it sustained the Connecticut statute identical with that of North Carolina, which used the value of real estate and tangible personal property within the State as the numerator and the value of real estate and tangible personal property, both within and without the State, as the denominator of the formulatory fraction.

Ordinarily, the constitutionality of the taxing statute is to be determined upon its inspection, and those matters of which the court may take judicial notice. *Stevenson v. Colgan,* 91 Cal., 649, 14 L. R. A., 459; *People v. Durston,* 119 N. Y., 569; *Hovey v. Foster,* 118 Ind., 502; 1 Cooley Const. Lim. (8 ed.), p. 376, note 3.

The burden rests upon the appellee here, as in all cases where one attacks the constitutionality of a statute in its applicability to him, to overcome that presumption of facts supporting constitutionality which attaches to all legislative acts. *Roberts v. Emmerson,* 271 U. S., 50, 70 L. Ed., 827; *Gorieb v. Fox,* 274 U. S., 603, 71 L. Ed., 1228; *Lawrence v. State Tax Commission, supra.* The appellee relies upon *Hans Rees Son v. North Carolina, supra,* as supporting its contentions. The difference is that in the *Hans Rees case,* evidence was presented breaking up the business into the separate elements of buying, manufacturing and selling. No effort of that kind was made in the instant case.

In the *Underwood Typewriter case,* it appeared that $1,293,643.95 of the net profits of the taxpayer was received from sales of its products in other states, while only $42,942.18 of such net profits was received from sales made in Connecticut, the taxing State. Approximately 99 per centum of the net profits in the *Underwood Typewriter case* arose from sales in other states. By the allocation formula of the statute, 47½ per centum of the net income of the corporation was apportioned to Connecticut. In the instant case, it appears that 98.4 per centum of the products of the taxpayer were sold to customers without the State. By the allocation formula used, identical with that of the Connecticut statute, sustained in the *Underwood Typewriter case,* 99.2 per centum of such income was assigned to North Carolina. The Supreme Court of the United States sustained the constitutionality of the Connecticut statute. In doing so, it said, at p. 121: "The legislature, in attempting to put upon this business its fair share of the burden of taxation, was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It therefore adopted a method of apportionments which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the state. 'The plaintiff's argument on this branch of the case,' as stated by the Supreme Court of Errors, 'carries the burden of showing that 47 per cent of its net income is not reasonably attributable, for purposes of taxation, to the manufacture of products from the sale of which 80 per cent of its gross earnings was derived after paying manufacturing costs.' 94 Conn., 47, 108 Atl., 159. The corporation has not even attempted to show this; and, for aught that appears, the percentage of net profits earned in Connecticut may have been much larger than 47 per cent. There is, consequently, nothing in this record to show that the method of apportionment adopted by the state was inherently arbitrary, or that its application to this corporation produced an unreasonable result."

The situation presented in the *Hans Rees case* is entirely different from that in the *Underwood Typewriter case,* or the one now before the Court. In the *Hans Rees case,* the taxpayer did not rely for his defense upon the bare assertion that the act, as applied to it, produced arbitrary and unreasonable results, and was, therefore, unconstitutional, as taking its property without due process of law, or as being a burden upon interstate commerce. By an elaborate series of calculations, it presented to the Court facts upon which it undertook to separate or break up its business into the component elements of buying, manufacturing and selling. These facts and figures tended to show that while only 17 per centum of its net income arose from manufacturing within the State of North Carolina, the allocation formula resulted in taxing 83 per centum of its net income. This evidence was rejected in the court

below, but assumed to be correct in reaching the result in the Supreme Court of the United States.

Always, then, the burden rests upon the taxpayer to show that the allocation formula, set up in the statute, produces such an arbitrary and unreasonable result as to be unconstitutional, as applied to the facts of the particular case. In the *Bass, Ratcliff and Bretton case, supra,* it was said by the Court, p. 283: "It is not shown in the present case, any more than in the *Underwood case,* that this application of the statutory method of apportionment has produced an unreasonable result." The statute on its face carries that presumption of constitutionality which attaches to all legislative acts. That it is constitutional upon its face is sustained by the opinion of the United States Supreme Court, in the *Underwood Typewriter case, supra,* in passing on the statute of the State of Connecticut, identical with the one here in question.

The appellee has not undertaken to sustain the burden of supporting unconstitutionality by presenting evidence or facts sufficient for that purpose. The amount and situs of its capital stock has no relation to the problem. No evidence is presented undertaking to separate the business, the cost or expense thereof, or the income therefrom, into separate units of buying, manufacturing and selling. The larger portion of appellee's intangible assets are without the State. They are evidently the results and profits of the manufacturing processes which took place in North Carolina. They may be held without the State at the home office of the company in Delaware, as a matter of convenience. Standing alone, and without other evidence, the keeping of the larger portion of its intangible assets in another State does not indicate or show that these items of cash, notes and accounts receivable arose from business activities or operations elsewhere than in North Carolina. It may be noted here that this corporation, with a capital stock of $652,500, made net profits in the tax year amounting to $230,138.76, or a net return on its invested capital of 35 per centum, and that the income tax imposed at the moderate rate of 4½ per centum is, as contended for by the State, $10,243.39.

The appellee has had full opportunity to present any evidence it might have had, showing that its net profits arose from business conducted elsewhere. The Revenue Act, sections 340 and 341, gives full opportunity for the taxpayer to be heard by the Commissioner of Revenue upon application and petition for a revision of its return. That opportunity was afforded this taxpayer. The case was heard on appeal from the Commissioner of Revenue by the judge of the Superior Court, at which time the taxpayer had another opportunity to present evidence, as was done in the *Hans Rees case.* But it appears from the record that the appellee did not, at either of these hearings, undertake to present

such evidence. There is nothing in the record which shows that the allocation formula, as applied to it, works an arbitrary and unreasonable result, deprives it of its property without due process of law, or imposes any burden upon interstate commerce. The judgment of the Superior Court must therefore be

Reversed.

STACY, C. J., concurs on the ground that the case is controlled by the decision in *Underwood Typewriter Co. v. Chamberlain*, 254 U. S., 113, rather than by the decision in *Hans Rees Sons v. North Carolina*, 283 U. S., 123.

FARMVILLE OIL AND FERTILIZER COMPANY v. FANNIE V. BOWEN.

(Filed 15 March, 1933.)

1. Ejectment B a—Justice of the peace has jurisdiction of summary ejectment to determine questions of tenancy and holding over.

A justice of the peace has jurisdiction of a summary action in ejectment, C. S., 2365, 2376, and may determine the questions of tenancy and holding over, and while he has no equitable jurisdiction, he may consider equitable defenses set up in summary ejectment in so far as they relate to the issue of tenancy.

2. Courts A d—

In appeals from justices of the peace the jurisdiction of the Superior Court is entirely derivative and it must try the case as constituted in the justice's court.

3. Ejectment B e—On appeal to Superior Court in summary ejectment the court is confined to matters within jurisdiction of justice.

In appeals from the justice of the peace in summary ejectment the Superior Court's jurisdiction is exclusively derivative and it may not consider equities between the parties except in so far as they relate to the issue of tenancy, and where in the justice's court the defendant denies the tenancy and alleges that she was in possession under a contract of purchase made by plaintiff when it purchased the property at foreclosure sale, and on appeal the one issue as to tenancy is submitted to the jury and answered in defendant's favor, the issue determines the controversy, leaving the rights of the parties in respect to the equitable matters set up as a defense to be determined by a court of competent jurisdiction.

APPEAL by plaintiff from *Harris, J.*, at October Term, 1932, of PITT. No error.

Summary proceedings in ejectment. The plaintiff alleged that the defendant's term as tenant expired 31 December, 1931, and that the

defendant held over. The defendant denied tenancy and alleged that she was in possession under a contract of purchase. The justice of the peace gave judgment for the plaintiff and upon appeal to the Superior Court the jury found that the defendant was not a tenant of the plaintiff. Meantime, the defendant had been evicted and the Superior Court rendered judgment restoring her to the possession of the premises. The plaintiff appealed.

F. M. Wooten and Albion Dunn for plaintiff.
S. J. Everett for defendant.

ADAMS, J. Justices of the peace have jurisdiction of summary proceedings in ejectment. C. S., 2365. In this case the complaint, or "oath of the plaintiff," conforms to the statute. C. S., 2376. The president of the plaintiff testified: "I rented the premises described in the deed to Mrs. Fannie Bowen for the year 1931 under an oral contract; she was to pay $360 and one year's taxes. There was an agreement with respect to the manner in which supplies were to be furnished. She took charge of the land under the rental contract and agreed to pay the $360 and taxes. She farmed the land in 1931 but did not pay the rent. I gave her notice to vacate the premises in 1932. She failed to give possession on 1 January, 1932."

The defendant denied the rental contract and contended that she and her husband had executed a mortgage and a deed of trust on the land in controversy, and that at a sale under the deed of trust the president of the plaintiff had bought the land for her benefit under an agreement that she should have ten years in which by annual installment to pay the amount due. She testified that she had never rented the land from the plaintiff and had never given up her possession.

The magistrate found from the evidence before him that the relation of landlord and tenant existed between the parties and that the defendant held possession of the land after her term had expired. Upon these findings he adjudged that the plaintiff was entitled to possession.

These were the only questions of which the magistrate had jurisdiction. In appeals from justices of the peace the jurisdiction of the Superior Court is entirely derivative. If the justice has no jurisdiction the Superior Court can derive none by appeal. It is the jurisdiction of the justice which, on appeal, gives jurisdiction to the Superior Court; the appellate court tries *de novo* the action as constituted in the justice's court. *Ijames v. McClamroch*, 92 N. C., 362; *Cheese Co. v. Pipkin*, 155 N. C., 394; *McLaurin v. McIntyre*, 167 N. C., 350; *Comrs. v. Sparks*, 179 N. C., 581; *Sewing Machine Co. v. Burger*, 181 N. C., 241, 248; *Trust Co. v. Leggett*, 191 N. C., 362.

In recognition of this principle the trial court submitted to the jury only one issue: "Was the defendant the tenant of the plaintiff and did she hold over after the expiration of the tenancy?"—and the jury answered the issue in the negative. The verdict put an end to the plaintiff's cause of action of which the justice had original and the Superior Court derivative jurisdiction. A justice of the peace has no equitable jurisdiction but he may consider an equity which is set up as a defense to the plaintiff's action. *Lutz v. Thompson,* 87 N. C., 334; *Dougherty v. Sprinkle,* 88 N. C., 300; *Cotton Mills v. Cotton Mills.* 116 N. C., 647; *Kiser v. Blanton,* 123 N. C., 400; *Levin v. Gladstein.* 142 N. C., 482. In *McAdoo v. Callum,* 86 N. C., 419, it was shown that the lessor of a storeroom agreed that at the expiration of a subsisting lease the lessee should have the right to renew the lease for another year. The Court held that the agreement, while not a renewal of the lease, created an equity which could be pleaded as a defense in summary proceedings in ejectment.

The subject was again considered in *Jerome v. Setzer,* 175 N. C., 391, in which it was said that summary proceedings in ejectment will not lie if the tenant holds an interest in the property itself; but if the interest is only an option to purchase the tenant has no such equity in the land as will deprive the justice's court of its jurisdiction or the Superior Court of its derivative jurisdiction. In the present case the character of the defendant's alleged interest need not be determined because the defense is primarily an absolute denial of the tenancy, dissevered from the nature and quantity of the defendant's interest. Compare *Ins. Co. v. Totten,* 203 N. C., 431.

In the case at bar the defendant's allegation of the plaintiff's agreement to sell her the land was not made the basis of a prayer for affirmative relief but merely a defense to the action brought in the magistrate's court. In effect her defense was restricted to a denial of the rental contract; in consequence, such questions as the creation of a parol trust, or a contract to convey title to the defendant, or a tenancy at will or by sufferance pending a treaty of purchase were incidental to the main defense and evidently were so considered. The position that a tenancy existed pending a treaty of purchase is substantially an admission that a contract of purchase had been executed; and if so, the relation of the parties would require the administration of equitable principles.

We have given all the exceptions due consideration and in our opinion none of them should be sustained. The issue determined the whole controversy. The defendant neither asked nor obtained affirmative relief upon any of the matters set up in her answer. As the relation of landlord and tenant did not exist the rights of the parties may yet be litigated in a court of competent jurisdiction.

No error.

FARMERS BANK, INCORPORATED, v. MERCHANTS AND FARMERS BANK, INCORPORATED, TYRRELL MANUFACTURING COMPANY, INCORPORATED, D. O. NEWBERRY, J. H. SWAIN, J. H. BATEMAN, S. M. COMBS, AND A. MELSON.

(Filed 15 March, 1933.)

1. Appeal and Error A d—Appeal in this case held premature as being from interlocutory order not affecting substantial rights.

Where a cause is referred to a referee and exceptions taken to his report, and the cause is continued for hearing upon the exceptions and the matter remains passive for several years, an order of the trial court allowing a certain sum to the referee in payment of his services is an interlocutory order in a pending cause within the power of the trial court which is not reviewable, and the order will be affirmed on defendant's appeal, no substantial right of the parties being affected and the matter being reviewable upon appeal from final judgment upon exceptions duly taken.

2. References E b—

The claim of a referee for payment of services rendered in the cause which is still pending in the courts upon exceptions to his report is not barred by C. S., 441(8), nor is C. S., 1226, applicable thereto.

STACY, C. J., and BROGDEN, J., dissenting.

APPEAL by defendants S. M. Combs and J. H. Swain from *Moore, Special Judge,* at December Term, 1932, of TYRRELL. Affirmed.

The agreement of facts are somewhat vague. In 1921 a suit was brought by plaintiff against the defendants. A judgment was rendered for plaintiffs against defendants by Judge George W. Connor, January Term, 1923, Tyrrell Superior Court. In that judgment is the following: "It is further, by consent, ordered, decreed and adjudged that all matters in controversy between the defendants as endorsers and the defendant trustee, Merchants and Farmers Bank of Columbia, *be and the same is hereby referred to W. S. Privott, who shall state an account between the defendants,* showing what amount, if any, is in the hands of the trustee or ought to be in his hands from the sale of any property made under deed of trust set out above or the assignment, that the sale made by the said trustee be what is known as the Branning property and the personal property conveyed either in the deed of assignment or deed of trust is hereby ratified and that the attempted sale of the real estate is hereby annulled. *The difference between the defendants endorsers is to be taken in account by the said referee in stating his account,* showing what money, if any, either one has which belongs to be credited or accounted for on this indebtedness, that the defendants, or either of them upon motion before the referee, may have the right to file any additional pleadings as to their accounts, showing their claims as to any differences to the same applicable to this indebtedness, that the referee shall give

notice to all parties interested ten days before the hearing and make his report at the next term of this Court with his findings of fact and conclusions of law." "W. S. Privott under order of the court duly heard the contentions between the parties and made his report back to the court as of the Term, 1924. . . . That, no order has been signed by any judge allowing or fixing the fee of the said W. S. Privott. . . . That, W. S. Privott made his motion at the December Term, 1932, of the Superior Court of Tyrrell County, asking that a fee be allowed him in this action, after giving due notice. That, on 5 January, 1925, the said W. S. Privott wro e the clerk of the Superior Court of Tyrrell County, in which he stated in part, the following: 'Will you please let us know the exact status of the above entitled action? Have the exceptions filed to my report been passed on by the judge? If so, did he approve my bill as referee, and for what amount?' The referee submitted with his report to the court a bill for services and expenses as referee in connection with the above entitled action for $500, which bill was with the referee's report and in the clerk's hands since that time. . . . There was an order signed by Judge F. A. Daniels, at the April Term, 1927, of the Tyrrell County Superior Court, *in which it was ordered that the hearing upon the exceptions filed to the report of the referee and all other matters open for determination in this cause be and the same were continued. And, no hearing has ever been held on the exceptions to the report of the referee, and the said report has never been confirmed*, but the judgment rendered at the January Term, 1923, has been paid, as above mentioned, and the referee has had no personal notice of any settlement of the matters submitted to him for adjudication."

The court below made an order that the clerk tax as cost a fee to W. S. Privott, referee, in the sum of $200, to be paid by the defendants. W. S. Privott lived at Edenton, N. C.

Privott & Privott for appellee.
H. L. Swain for appellants.

CLARKSON, J. It is not disputed on the record that W. S. Privott had rendered his bill as referee and had performed the full duties required of him by the court as referee and has never been paid. There were exceptions filed to the report of the referee and the matter remained passive until April Term, 1927. At that term the cause was continued to hear exceptions to the referee's report and no hearing has ever been held on the exceptions to the report of the referee. The report of the referee has never been passed upon by the court below and the case seems now to be on the docket for hearing on the exceptions to the referee's report.

In *Coburn v. Comrs.*, 191 N. C., at p. 74, is the following: "'This cause is retained upon the civil docket of Swain County to the end that the court may make such further orders or decrees as may become necessary for the protection of the rights of all parties.' This consent judgment left a discretionary power in the court to make such orders or decrees *for the protection of the rights of all parties.*"

In N. C. Practice & Procedure in Civil Cases (McIntosh), part sec. 649, at p. 733, speaking to the subject, we find: "Interlocutory judgments or orders are under the control of the court, and may be corrected or changed at any time before final judgment, to meet the exigencies of the case."

In *Hosiery Mill v. Hosiery Mills*, 198 N. C., at p. 598, we find: "Ordinarily, no appeal lies to this Court from an interlocutory order made in an action pending therein by the Superior Court. An exception to the order, taken in apt time, will be considered on an appeal from the final judgment in the action, when such exception is duly presented on said appeal. If, however, an interlocutory order affects a substantial right of a party to the action, and is prejudicial to such right, he may appeal therefrom to this Court, and his appeal will be heard, and decided on its merits. *Skinner v. Carter*, 108 N. C., 106, 12 S. E., 908. If the order does not affect a substantial right of the appellant, his appeal therefrom to this Court will be dismissed. *Warren v. Stancill*, 117 N. C., 112, 23 S. E., 216; *Leak v. Covington*, 95 N. C., 194."

We do not think C. S., 441, sec. 8, which is as follows, is applicable: "For fees due to a clerk, sheriff or other officer, by the judgment of the court; within three years from the rendition of the judgment, or the issuing of the last execution thereon." Nor is C. S., 1226 applicable.

From the meager record, we conclude that the cause was still pending and the court below had the power to render the judgment, which is

Affirmed.

STACY, C. J., and BROGDEN, J., dissenting.

JAMES CRESWELL v. CHARLOTTE NEWS PUBLISHING COMPANY AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY.

(Filed 15 March, 1933.)

Master and Servant F a—Newsboy held not an employee of newspaper within meaning of Compensation Act.

Under the facts of this case a newsboy engaged in selling papers is held not to be an employee of the newspaper within the meaning of that term as used in the Workmen's Compensation Act, the newsboy not being

on the newspaper's payroll and being without authority to solicit subscriptions and being free to select his own methods of effecting sales, although some degree of supervision was exercised by the newspaper.

CIVIL ACTION, before *MacRae, Special Judge,* at May Term, 1932, of MECKLENBURG.

James Creswell, a fourteen-year old boy, was engaged in selling newspapers for the defendant, Charlotte News Publishing Company. The plaintiff was engaged by Van Austin, supervisor of sellers of newspapers published by the defendant company, who turned over to him and other newsboys a certain number of papers to sell each day. The papers were delivered to them on credit, and they settled for such papers at the rate of three cents each. The newsboys retained as their own the selling price above three cents, and all unsold papers were returned to the defendant at the end of the day. The newsboys, including the plaintiff, were assigned a regular territory, and the supervisor of defendant told them what the headlines were in the papers and checked up the boys in order to ascertain if they were on the job or needed additional papers. If they did not stay on the beat assigned and were not active in the effort to sell papers, they lost their jobs. The plaintiff was not on the payroll of the defendant, did not solicit subscriptions to the paper and solicited sales in his territory from anyone he chose, and otherwise conducted the selling according to his own notions and methods. On Sunday morning, 22 November, 1932, the plaintiff, as usual, was in his territory selling papers. A Negro hit him on the head with a brick and inflicted injury.

Claim was duly filed with the Industrial Commission, and there was an award by the hearing Commissioner, and upon appeal to the full Commission the award was affirmed. Thereupon the defendant appealed to the Superior Court. The trial judge, being of the opinion that the plaintiff was not an employee of the defendant, News Publishing Company, annulled the award, and the plaintiff appealed.

Ralph V. Kidd for plaintiff.
Thomas W. Ruffin for defendant.

BROGDEN, J. Was the plaintiff an employee of the defendant within the purview of the Workmen's Compensation Act?

The act defines employee to mean "every person engaged in the employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written," etc. The plaintiff was not on the payroll of the defendant and although he was assigned a specific territory and required to remain therein and actively engaged in an effort to sell newspapers, notwithstanding he conducted the sales according to

his own methods. Thus, he solicited sales from such persons as he desired. Apparently he was not required to solicit every person within the territory, nor were instructions given him as to the manner of securing purchasers. While there was certain supervision exercised by the agent of defendant with respect to the territory assigned, the control over the methods of selling was too uncertain, indefinite, and remote to constitute the relationship of employer and employee. The Supreme Court of California in *New York Industrial Company v. Industrial Accident Corporation*, 1 Fed. (2d), 12, has discussed and decided the identical question presented by this appeal upon facts practically identical. Moreover, the definition of employee in the Workmen's Compensation Act of California is practically the same as contained in the North Carolina act. The Court said: "The undisputed evidence discloses that aside from the question of control the relation created by the daily series of contacts between Eustace and the newspaper publishers, through their legal representative, the district manager, while somewhat difficult of definition as that of an independent contractor, was more nearly allied to the relation of a sales agent, under the authorities to which we have been cited, than to that of an employee and employer as these terms are defined in the Workmen's Compensation, Insurance and Safety Act." Other cases in point and supporting the decision are *Associated Indemnity Corporation v. Industrial Accident Corporation*, 2 Pac. (2d), 51; *Hartford Accident & Indemnity Co. v. Industrial Accident Commission*, 10 Pac. (2d), 1035; *State Compensation Insurance Fund v. Industrial Accident Commission*, 14 Pac. (2d), 306; *Gall v. Detroit Journal Co.*, 158 N. W., 19, 36 A. L. R., 1164.

Affirmed.

SMITHFIELD MILLS, INCORPORATED, v. E. S. STEVENS AND J. V. OGBURN, COPARTNERS, TRADING AS STEVENS AND OGBURN.

(Filed 15 March, 1933.)

1. Evidence J a—Parol evidence in this case held competent as being of unwritten part of contract and consistent with written terms.

Parol evidence is admissible to establish the unwritten part of a contract when such evidence does not contradict the written terms, and the contract is not required by law to be in writing, and in this case parol evidence is held competent to establish an agreement that defendant would put up margin to protect plaintiff from a drop in the price of cotton although each purchasing order was in writing and made no reference to the agreement to put up margin.

2. Appeal and Error J c—Where party introduces evidence relative to parol agreement he waives exception to adversary's parol evidence.

Where a party objects to the admission of certain evidence on the ground that it is parol evidence in contradiction of the written terms of a contract, and later introduces testimony denying the matters sought to be established by parol, he waives his exception to the admission of the parol evidence.

3. Jury C c—

Where the judgment of the court states that the parties stipulated that the court should find the facts upon exceptions to the referee's report, objections that the issues were not submitted to the jury are untenable.

CIVIL ACTION, before *Grady, J.*, at Spring Term, 1933, of JOHNSTON.

The plaintiff alleged and offered evidence tending to show that on various days in September and October, 1927, it had purchased through the defendants, cotton brokers, several hundred bales of cotton, and that an arrangement for price fixing and marginal requirements, in the event of a decline in the market price of cotton, had been agreed upon. It was further alleged and there was evidence in support of such allegation that the defendants refused to put up the necessary margin, and that as a result the plaintiff was compelled to sell the cotton at a loss amounting to $4,353.66. The defendants denied any breach of contract and specifically denied that they had agreed to put up any margin, and also asserted a counterclaim against the plaintiff.

The cause was referred to Honorable Murray Allen as referee. The parties appeared before the referee and offered proof supporting their respective contentions. The cotton was purchased on written orders which appear in the record. These orders disclose no written agreement to put up margin to protect the plaintiff. The referee filed a clear and comprehensive report setting forth the findings of fact and conclusions of law thereon. In said report it was found that the defendants had breached the contract, and that the plaintiff had suffered damage by reason thereof in the sum of $4,353.66. The referee denied any recovery on the counterclaim. The defendants filed certain exceptions to the findings of fact and conclusions of law, and tendered issues to be answered by a jury. Exceptions 2, 3, 4, and 5 assert that the findings of fact were "contrary to the evidence and against the greater weight thereof. There was evidence in the record to support such findings and these exceptions are not sustained. Exceptions 6, 7, and 8 are based upon the assertion that the findings of fact involved, were deduced from incompetent evidence.

The cause was heard by the trial judge, who declares in the judgment that "it was stipulated by all parties that the presiding judge might review the evidence, consider the exceptions, and render judgment out

of term, to have the same effect as if rendered at term time." Thereupon the trial judge approved and affirmed the findings of fact and conclusions of law made by the referee and rendered judgment for the plaintiff, from which judgment the defendants appealed.

No counsel for plaintiff.
L. G. Stevens and E. J. Wellons for defendants.

BROGDEN, J. The plaintiff purchased cotton through the defendants and offered evidence tending to prove that they had agreed to put up margin in the event of a decline in price. Each sale was evidenced by a written agreement or sales contract tending to show the number of bales, grade, staple, etc. None of these sales agreements referred to margin or specified that the defendants should undertake to supply the same in the event of a decline in price. The president of plaintiff testified that he notified the defendants about 12 December, that "they would have to put up margin. We had been called on for margin by our New York brokers, and it was their job to put up margin with us to protect us. In consequence of this talk over the phone, Stevens and Ogburn came to Greenville to see us; I told them that we were drawing a draft on them for margin to protect us before they left for Greenville. Upon reaching Greenville, they asked us to accept a note for this margin. I told them that we would be willing to do this provided they would give us a note which we could endorse over to the bank without recourse."

The defendants objected to this testimony upon the theory that it tended to vary, alter or contradict a written agreement. The evidence was competent. The competency of parol evidence, upon states of fact involving written contracts was discussed in *Miller v. Farmers Federation,* 192 N. C., 144, 134 S. E., 407. The Court said: "If the contract is not one which the law requires to be in writing and a part thereof is oral, evidence of the oral portion is admissible, if it does not contradict or vary the writing, for the purpose of establishing the contract in its entirety. If a parol agreement and a written agreement, dealing with identical subject-matter, are totally inconsistent, the written agreement must stand." See, also, *Greene v. Bechtel,* 193 N. C., 94, 136 S. E., 294. The alleged agreement to put up margin in the event of a decline in price is not totally inconsistent with the sales agreements introduced in evidence. Consequently, the ruling of the referee and the trial judge was correct. Furthermore, the defendants offered evidence on direct examination with reference to the agreement for margin. The defendant, Stevens, testified: "We never had any agreement with Mr. Long or anyone representing him, that we would put up margin or keep up any margin with respect to this sale." So that if the evidence was in-

competent in the first instance, the defendants waived the exception when they undertook to introduce evidence on direct examination about the same matter. The governing principle was written in *Willis v. New Bern,* 191 N. C., 507, 132 S. E., 286, in these words: "In other words, the rule is, that if evidence offered by one party is objected to by the adverse party and thereafter the objecting party elicits the same evidence, the benefit of the objection is lost," etc.

Complaint is also made that the issues were not submitted to a jury. However, in the judgment of the Superior Court is the following declaration: "And it was stipulated by all parties that the presiding judge might review the evidence, consider the exceptions and render judgment out of term, to have the same effect as if rendered at term time." Therefore, objections founded on the failure to submit issues to a jury are untenable.

Affirmed.

G. E. HARRIS, ADMINISTRATOR OF ROBERT HESTER HARRIS, v. JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 15 March, 1933.)

Insurance R a—Death in this case held caused by accidental means within terms of insurance policy sued on.

Where the insured, voluntarily engaging in a basketball game, is hit in the chest when he and one of his opponents collide, and the blow causes traumatic pneumonia resulting in the death of the insured in a few days, the death is caused by accidental means within the terms of a life insurance policy providing for double indemnity if the insured should die of bodily injury inflicted solely through external, violent, and accidental means or from bodily poisoning or infection occurring simultaneously with and in consequence of such bodily injury, for although collisions with opponents could have been foreseen and the game was voluntarily engaged in, no such injury as suffered by the insured was probable or foreseeable, and, since the death was through accidental means, the distinction noted by some jurisdictions between accidental death and death by accidental means is inapplicable.

APPEAL by defendant from *Daniels, J.,* at August Term, 1932, of PERSON. No error.

Plaintiff's intestate, Robert Hester Harris, died on 18 March, 1931. At the date of his death, two policies of insurance both issued by the defendant, one on 24 February, and the other on 1 April, 1924, each in the sum of $5,000, were in full force and effect. By virtue of the provisions of these policies, the defendant has paid to the plaintiff as the beneficiary named in each of said policies, the sum of $10,000. This sum is the face amount of said two policies of insurance.

Each of the policies contains a clause in words as follows:

"Double Indemnity. The company will pay the beneficiary in full settlement of all claims hereunder double the face amount of this policy if, during the premium paying period, and before default in the payment of any premium, and before waiver of any premium on account of disability and before any nonforfeiture other than automatic premium loan is in effect, the death of the insured results from bodily injury within ninety days after the occurrence of such injury provided death results directly and independently of all other causes, from bodily injury effected solely through external, violent and accidental means, while the insured is sane and sober. Except, these provisions do not apply if the insured shall engage in military or naval service, or any allied branch thereof, in time of war, or in case death results from bodily injury inflicted by the insured himself, or intentionally by another person; or from engaging in aeronautic or submarine operations, either as a passenger or otherwise; or from any violation of law by the insured; or from a state of war or insurrection; or self-destruction, whether during the first policy year or afterwards; or directly or indirectly from bodily or mental infirmity, poisoning or infection other than that occurring simultaneously with and in consequence of bodily injury."

This action is to recover of the defendant under the provisions of the double indemnity clauses in both the policies of insurance issued by the defendant on the life of Robert Hester Harris, deceased, the sum of $10,000.

The insured, Robert Hester Harris, died at the home of his father in Person County, on 18 March, 1931. The physician, who attended him during his fatal illness, first saw him on 11 March, 1931. This physician testified that in his opinion the insured died of pneumonia, which was the result of a traumatic condition. Other physicians who testified as expert witnesses for the plaintiff, were of the opinion that the insured died of traumatic pneumonia. All the evidence at the trial was to the effect that the insured died of pneumonia, which followed a bodily injury suffered by him while he was playing in a game of basketball on the night of 10 March, 1931.

At the date of his death, the insured, Robert Hester Harris, was about nineteen years of age. He was a student at the Roxboro High School, and was a member of the basketball team of said school. On the night of 10 March, 1931, while playing with his team in a game of basketball, he was injured by a player on the opposing team. This player had the ball, and was running with it toward the goal. In accordance with the rules of the game, the insured undertook to prevent this player from throwing the ball into the basket, which was his goal. In the collision between them, the insured was struck by his opponent in his side or on his chest.

The injury was not inflicted intentionally, but was the result of the collision between the insured and his opponent. The insured fell to the floor, and complained immediately of pain in his side or chest. In response to inquiries made by his friends, who urged him to return to the game, the insured said that one of his ribs was broken, and that he could not continue in the game. He retired to the side lines, and was in great pain until the conclusion of the game. He then left in his automobile and drove to the home of his sister, who lived some distance from Roxboro. His mother was waiting for him there. As soon as she discovered that her son was ill, she insisted upon taking him to her home. His condition grew worse from the time they reached their home, until the physician was called to see him the next day. This physician at once suspected that the insured had pneumonia, and later definitely diagnosed his illness as due to pneumonia. From his first visit to the insured on 11 March, 1931, until his death on 18 March, 1931, the physician treated him for pneumonia. As a witness for the plaintiff, this physician testified that the insured died of pneumonia, resulting from a traumatic condition.

The issues submitted to the jury were answered as follows:

"1. Was the plaintiff's intestate, while sane and sober, injured in the chest while engaged in playing a basketball game on the night of 10 March, 1931, as the result of a collision with another player in said game, as alleged in the complaint? Answer: Yes.

2. If so, was said injury effected solely through violent, external and accidental means? Answer: Yes.

3. If so, did plaintiff's intestate's death result within ninety days from 10 March, 1931, directly and independently of all other causes, from said injury? Answer: Yes."

From judgment that plaintiff recover of the defendant the sum of $10,000, with interest from 12 May, 1931, and the costs of the action, the defendant appealed to the Supreme Court.

F. O. Carver, L. M. Carlton, W. D. Merritt, Pou & Pou and J. L. Emanuel for plaintiff.

Brooks, Parker, Smith & Wharton and Cooper A. Hall for defendant.

CONNOR, J. The defendant on its appeal to this Court contends that there was error in the refusal of the trial court to allow its motion made at the close of all the evidence, that the action be dismissed by judgment as of nonsuit, for that there was no evidence at the trial tending to show that the death of the insured was the result of a bodily injury effected solely through accidental means. The defendant concedes that there was evidence tending to show that the death of the insured was acci-

dental in the sense that it was the unexpected and unforeseen result of the injury suffered by the insured while he was playing in the game of basketball. It contends, however, that the bodily injury which the insured suffered was not accidental in that sense, but was the probable result of the game in which the insured had voluntarily engaged, and that for this reason the defendant is not liable to the plaintiff in this action under the provisions of the double indemnity clauses in the policies issued by the defendant and insuring the life of Robert Hester Harris, deceased.

The distinction between an accidental death and a death by accidental means has been recognized and applied by courts of other jurisdictions in actions to recover on provisions in policies of insurance similar to those contained in the double indemnity clause involved in this action. No case involving such distinction has heretofore been presented to this Court. The distinction, however, was recognized and applied by the Supreme Court of California in *Rock v. Travellers Insurance Co.*, 156 Pac., 1029, L. R. A., 1916E, 1096, by the Supreme Court of Rhode Island in *Kimball v. Massachusetts Accident Co.*, 117 Atl., 228, 24 L. R. A., 726, and by the Supreme Court of Tennessee in *Stone v. Fidelity & Casualty Co.*, 133 Tenn., 673. In each of these cases, it was held that where the death of the insured resulted from his voluntary act, although such death was both unexpected and unforeseen, and for that reason accidental, the death was not caused by accidental means, within the meaning of these words as used in the policy of insurance on which the action was brought. This distinction, if conceded to be sound, is not applicable to the instant case. The insured in this case did not by his own act cause the injury which resulted in his death. He engaged voluntarily in the game of basketball, and while he anticipated collisions during the progress of the game with players on the opposing team, no such injury as that which he suffered by the act of his opponent was probable as the result of the game. This injury was effected by accidental means within the meaning of these words as used in double indemnity clauses in his policies of insurance.

The contention of the defendant that there was error in the refusal of the trial court to allow its motion for judgment as of nonsuit cannot be sustained.

There was no error in the trial of this action. The judgment is affirmed.

No error.

JOE BUTTS, EMPLOYEE, v. MONTAGUE BROTHERS, EMPLOYER, AND PUBLIC INDEMNITY COMPANY, INSURANCE CARRIER.

(Filed 15 March, 1933.)

1. Master and Servant F i—

An appeal from an award under the Workmen's Compensation Act operates as a supersedeas, and the award is not enforceable until the questions of law involved have been determined by the courts.

2. Abatement and Revival C c—Proceedings under compensation act do not abate upon death of claimant employee.

An award inadvertently entered by the Industrial Commission after the death of the claimant is irregular, but not void, and the proceedings do not abate, the Compensation Act providing that upon the death of an employee from any cause other than the injury for which he was entitled to compensation, payment of the unpaid balance should be made to his next of kin dependent upon him at the time of his death. N. C. Code, 8081(ss).

3. Master and Servant F j—Where it appears on appeal that claimant died pending filing of award the proceeding should be remanded.

In a proceeding under the Compensation Act an award in favor of the claimant was entered and the employer and his insurance carrier appealed to the Superior Court. It appeared on appeal that the award was inadvertently entered after the death of the claimant. The Superior Court remanded the proceedings with direction that the Industrial Commission ascertain the next of kin dependent upon the employee at the time of his death. The Commission refused to hear the matter on the ground that it was deprived of jurisdiction by the appeal. Thereafter the employee's widow was made a party by order of the clerk of the Superior Court. The appeal was then heard in the Superior Court and dismissed on the ground that the proceeding abated upon the death of the employee, and the widow appealed. *Held*, the order dismissing the appeal was erroneous, and the Industrial Commission should have heard the matter as directed, and the cause is remanded to the Superior Court with direction that the Industrial Commission, after notice to the parties, find who was the next of kin of the deceased employee at the time of his death to the end that they may be made parties to the proceedings in the Superior Court and the appeal determined on its merits by judgment binding upon all parties.

APPEAL by Lucy Butts, administratrix of Joe Butts, deceased, from *Grady, J.*, at November Term, 1932, of WAYNE. Reversed.

On 20 May, 1931, Joe Butts, an employee of Montague Brothers, notified the North Carolina Industrial Commission that he and his employers had been unable to agree upon compensation to be paid to him by his employers for an injury which he had suffered on 27 January, 1931, and which he alleged was compensable under the provisions of

the North Carolina Workmen's Compensation Act, because the insurance carrier of his employers had denied liability for such compensation.

The claim of Joe Butts for compensation for his injury was heard by Commissioner Dorsett at Goldsboro, N. C., on 30 July, 1931. On the facts found by said Commissioner at said hearing, the claim was denied, and the claimant thereafter gave notice to his employers and to their insurance carrier that he would apply to the full Commission for a review of the award of Commissioner Dorsett. The proceeding was docketed for such review on or about 1 September, 1931.

After notice to the parties, the proceeding was heard by the full Commission at Raleigh, N. C., on 21 September, 1931. After said hearing, an award was made by the full Commission, reversing the award of Commissioner Dorsett, and ordering the payment of compensation to Joe Butts by his employers, Montague Brothers, and the Public Indemnity Company, their insurance carrier, in the sum of $14.01, from 20 February, 1931, for a period not to exceed 400 weeks, and for all medical and hospital expenses incurred by him on account of his injury. This award was filed by the full Commission on 6 October, 1931.

Notice of this award was served on the parties to the proceeding on 3 February, 1932, and on 26 February, 1932, both the employers and their insurance carrier appealed from said award to the Superior Court of Wayne County.

At March Term, 1932, of the Superior Court of Wayne County, the employers and their insurance carrier moved that the proceedings be dismissed, for that, while the proceeding was pending before the North Carolina Industrial Commission, and before the award was made by said Commission, the employee, Joe Butts, had died. This motion was heard at June Term, 1932, of the Superior Court of Wayne County by Judge Harris. At this hearing it was ordered by the court that the proceeding be and the same was remanded to the North Carolina Industrial Commission for the purpose of enabling the employers and their insurance carrier to suggest to the said Commission the death of the employee at the date of the award made by the Commission on 6 October, 1931, and the irregularity of said award for that reason. It was further ordered that the appeal from the award then pending in the Superior Court of Wayne County be and the same was retained in said court to be heard and determined on its merits, after such action by the Industrial Commission as it might take.

On 28 June, 1932, the proceeding was heard by the Industrial Commission pursuant to the order of the Superior Court. The Commission declined to make an order in the proceeding on the ground that it was without jurisdiction so long as the appeal was pending on its merits in the Superior Court.

BUTTS *v.* MONTAGUE BROS.

On 30 June, 1932, Lucy Butts, widow of Joe Butts, was appointed by the clerk of the Superior Court of Wayne County administratrix of Joe Butts, deceased, and on 25 July, 1932, the said Lucy Butts, administratrix of Joe Butts, was made a party to the proceeding by an order of the clerk of the Superior Court of Wayne County. At the date of this order the proceeding was pending in the Superior Court of Wayne County, on the appeal of the employers and their insurance carrier from the award of the full Commission, filed on 6 October, 1931.

This appeal was heard at November Term, 1932, of the Superior Court of Wayne County by Judge Grady. On the facts disclosed by the record, the court was of opinion that the proceeding abated upon the death of Joe Butts on 21 September, 1931, and in accordance with said opinion, it was ordered and adjudged that the proceeding be and the same was dismissed, and that the costs be taxed against Lucy Butts, administratrix of Joe Butts, deceased. From this order, Lucy Butts, administratrix of Joe Butts, deceased, appealed to the Supreme Court.

Kenneth C. Royall and Allen Langston for appellant.
Langston, Allen & Taylor for appellee.

CONNOR, J. It appears from the record in this proceeding that at the date of its award, reversing the award of Commissioner Dorsett, and directing the payment of compensation by the employers and their insurance carrier to the employee, to wit: 6 October, 1931, the North Carolina Industrial Commission was inadvertent to the fact that the employee, Joe Butts, had died on 21 September, 1931. Neither the employers nor the insurance carrier were advertent to this fact, when the award was made by the Industrial Commission, or when the notice of appeal from said award was given by the employers and the insurance carrier. The appeal by the express provision of the North Carolina Workmen's Compensation Act operated as a supersedeas, and neither the employers nor the insurance carrier were required to make any payment on the award until the questions of law involved in the appeal had been determined. Section 60, chapter 120, Public Laws, 1929, N. C. Code of 1931, sec. 8081(ppp). The award in this proceeding was not void, although it was made after the death of the employee. It was at most only irregular. The proceeding did not abate because of the death of the employee, prior to the filing of the award.

It is provided in the North Carolina Workmen's Compensation Act that when an employee is entitled to compensation under the provisions of said act, and died from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made to his next of kin dependent upon him for support, in lieu of the compensation the employee would have been entitled

to had he lived. Section 37, chapter 120, Public Laws, 1929, N. C. Code of 1931, sec. 8081(ss).

In this cause, on the facts appearing in the record, the North Carolina Industrial Commission, upon the suggestion of the death of the employee pending the proceeding, should have found the facts with respect to the next of kin of the deceased employee, dependent upon him for support, as it was directed to do by the order of Judge Harris. These findings should have been entered in the record, and certified to the Superior Court, to the end that said court could hear the appeal of the employers and their insurance carrier upon the questions of law involved in their appeal.

There was error in the judgment dismissing the proceeding. The proceeding is remanded to the Superior Court of Wayne County, with direction that the Industrial Commission proceed after notice to the parties to hear evidence and find therefrom who are the next of kin of Joe Butts, deceased, dependent upon him for support at his death. Such next of kin, if any, should be made parties to the proceeding. When that has been done, the appeal of the employers and their insurance carrier should be heard by the Superior Court on its merits, and judgment rendered accordingly.

If the injury suffered by Joe Butts on 27 January, 1927, is compensable under the provisions of the North Carolina Workmen's Compensation Act, neither the employers nor their insurance carrier, should be relieved of liability for compensation, because the employee died before the award for such compensation was made and filed by the Industrial Commission. In that event the compensation should be paid to the next of kin of the deceased employee, who should be made parties to the proceeding to the end that they may be bound by the award by the Commission and affirmed by the Superior Court. The judgment dismissing the proceeding is

Reversed.

STATE v. NEALIE BROWN.

(Filed 22 March, 1933.)

1. Homicide G a—Evidence of defendant's guilt of homicide pursuant to conspiracy held sufficient to be submitted to the jury.

The direct and circumstantial evidence in this case tended to show that defendant had quarreled with deceased and had entered into a conspiracy to kill him, that deceased was murdered and that all the conspirators, including the appealing defendant, were present, aiding and abetting in the commission of the crime: *Held*, the evidence was sufficient to be submitted to the jury and the appealing defendant's exception to the refusal of her motion as of nonsuit cannot be sustained. C. S., 4643.

2. Conspiracy B b—

The manner and time in which the evidence is introduced to prove a conspiracy is in the sound discretion of the trial court.

3. Criminal Law G k—

Where testimony as to acts and declarations of one conspirator in the absence of the other conspirators is properly restricted to the issue of his guilt, the exception of the other conspirators to the admission of the evidence cannot be sustained.

4. Criminal Law G i—Opinion evidence that parties to conversation were mad held competent.

In a prosecution for homicide, testimony of a witness from his observation of the defendant and deceased while they were conversing that "they were mad" is held competent.

5. Criminal Law I i—

Conflicting evidence is for the determination of the jury.

6. Criminal Law L e—

Exclusion of evidence relative to defendant's kinship to deceased and of deceased's financial condition as tending to support theory of suicide is held not prejudicial on the whole record in this prosecution for homicide.

7. Criminal Law—L d—

A broadside exception to the charge as given will not be considered.

8. Homicide H e—Acceptance of verdict of "guilty of manslaughter" after poll of jury held not prejudicial under facts of this case.

Where upon the return of the jury in a prosecution for homicide one of the jurors answers "guilty of murder in the third degree," and, upon the jury being polled gives the same answer, but later explains that he intended to say "guilty of manslaughter," and all the other jurors properly return a verdict of "guilty of manslaughter" both in their general verdict and upon being polled: *Held*, an exception to the court's acceptance of the verdict of "guilty of manslaughter" will not be sustained, the record failing to disclose any prejudicial or reversible error.

9. Criminal Law L d—

Under the facts and circumstances of this case the trial court's finding upon the order of the Supreme Court for a correction of the minutes, that the record as formerly certified spoke the truth as the records then existed, *is held* within his discretion.

APPEAL by defendant from *Cranmer, J.*, and a jury, at July Criminal Term, 1932, of DUPLIN. No error.

The defendant, with Hubert Lanier and Adolph Edwards, was indicted for the murder of Ambrose Lanier. The evidence was to the effect that Ambrose Lanier kept a store on the road from Chinquapin to Onslow County, N. C. He was a widower, 54 years old, and lived and slept in the store. On Monday morning, 16 November, 1931, about sunrise he was found dead in the center of the store, his head was lying

south, and was on the left side on his arm, kind of face down, his rifle was on the pool table and an automatic pistol was lying beside him. He was shot in his left temple and through his right arm, the other shot was in his left arm. The pistol lying by his side was just a few inches from his body, where his right hand was lying, like it had been dropped there. There was a sack of change, six or eight dollars, near his hip, with a little blood on it. There was an empty cartridge and a loaded one beside the pistol, there was an empty cartridge jammed in the barrel. There were three in the magazine of the pistol. The cartridges there were by the pistol and were the same that were in the chamber. They were forty-five, steel jacket bullets. There was a .38 rifle lying across the pool table unloaded, and the cartridges lying on the table. The bullet which hit him in the head could not have been fired from the window, but the bullet which hit him in the arm could have been fired from the window. The bullet went through his head almost perfectly level.

J. H. Crumpler, testified, in part: "I live in Clinton and am engaged in the furniture business and am an undertaker. I was called to prepare Mr. Ambrose Lanier's body for burial Monday, 16 November (1931), I had two or three local people to assist me. Tom Griffin was one of them. Sometime during the process of embalming I found this pistol bullet, or one like it, as it fell on the embalming board. It fell from his body somewhere."

Dr. R. C. Williams testified, in part: "There was a difference in the size of the wound in his head and the one in his arm, the one in his head was larger. . . . The wound in the arm was made by a .32 calibre bullet—no burns on the head or on the arm. . . . His death was caused by the bullet wound through his head."

R. C. Seawell testified, in part: "There was a bullet hole in the wall. In looking through the window to the bullet hole in the side you could see the box that the ball struck and went through the wall. . . . A shot could have been fired from the window to that bullet hole in the box." The .32 calibre Smith and Wesson pistol belonged to Davis Batchelor.

Norman Edwards testified, in part: "I am 17 years old. I am a first cousin to Adolph Edwards (defendant). I lived about a mile from Adolph, about two and a half miles from the store of Ambrose Lanier, to the north. Adolph lives northwest from the store. I know Hubert Lanier and Nealie Brown (defendants). I saw them on Friday before Ambrose Lanier was killed on Sunday night. I went down to Rafe Lanier's just across the road from Ambrose Lanier's store. I carried some corn there to be ground and got to the mill about the middle of the day. I carried a bushel of corn in an automobile and when I got

there I saw Hubert and Adolph and they said 'Let's walk about.' We walked down to Nealie Brown's house, about 100 yards from the mill. I saw Nealie Brown at her house. They said 'Let's go to ride,' and we all went to ride, we got in Nealie's automobile, Adolph and Hubert, and I stood on the running board, Nealie was sitting under the steering gear and Hubert was in the front seat and Adolph in the rear. She drove down to Muddy Creek Church, about 150 yards from her house in a westward direction. When we got down to the church Nealie said she was going to kill Ambrose Lanier and she had two pistols lying in the front seat, said she was going to kill him Saturday night. Adolph was sitting on the back seat. Hubert was on the front seat and I was standing on the ground, and they asked me if I would help. She said if I would help kill him, she would assure me of a hundred dollars in money and I said, I don't have anything against him and I was not going to help do it. Hubert said he would measure the windows and see if she could shoot him from the window. He said he would measure it to her height and see if she could shoot him from the rear window. He left and came back in fifteen minutes and he said that her height would be about this high above the window. She measured herself to him and she struck him about this high, and walked up side of one another and measured. Hubert said he would be at Lanier's store and she was to go after Adolph and they had two pistols and one of them was Ambrose Lanier's. Nealie said it was Ambrose Lanier's. I have seen it before, it was a big black automatic. The other one was a .32. Hubert said it was Davis Batchelor's. Nealie said she would kill him from the back window with the small calibre pistol so it would not make so much noise, and she took Davis' pistol and Hubert took Ambrose's. We rode on the automobile to her house and I went back to the mill. That was on Friday about the middle of the day. Hubert took Lanier's pistol from Nealie. This is Ambrose Lanier's pistol. The pistol that they called Davis' was loose. This looks just like it. After I came back to her house, I came back to the mill and went home, that was Friday. I saw them again on Saturday at a corn shucking at Uncle Joe Edwards', this was about four o'clock. I do not know what time the corn shucking broke up, I got in a fight and left about five o'clock. Adolph and Hubert were there. I don't know when they left, this was Saturday night. . . . Ambrose Lanier was in the store when I was talking to him about sunset. It was the last time I saw him alive. . . . We drove by Ambrose's and stopped and Hubert was the first man we saw. Elmer asked 'What was the matter?' and Hubert said 'Uncle Ambrose killed himself last night.' After he told us that, we stayed until the inquest was over. Then Hubert got up in the truck with us and went to Dails to carry the tobacco. He said 'I will tell you all something if you won't

tell it.' Q. Did you hear them make any statement at Ray Batchelor's? (Objection and exception as to Nealie Brown.) Q. Who was present? A. Hubert and Adolph, and Hubert said 'Adolph, you be ready, you know what time,' and he got out and went in Ray Batchelor's house. Q. Did Adolph go with you anywhere then? A. He brought me home. Q. What did you tell him, if anything? A. I asked him to stay with me that night. I told him if he would stay with me, he would stay out of trouble, and he said he would have to go home, that his mother would be uneasy about him. (Defendants objected and excepted.) Court: It is only evidence against the one speaking at the time and not evidence as against Lanier and the female defendant Brown. Elmer Brown was with us, Hubert said he went to Nealie's one morning that week and was sitting with his arm around her and his Uncle Ambrose walked in and asked Nealie for his hand-saw and stick-broom, and she got it and said that Ambrose told him, Hubert, never to come in his store any more. (The defendants object on the ground that Mr. Lanier is dead and cannot be cross-examined.) Court: It is only competent as against Hubert Lanier. (The defendant and each of them except.) Q. What did Hubert say happened there? A. He told Ambrose that he would go in the store if he had to kill him to get in. (The court instructed the jury that the evidence could only be considered against the defendant Hubert Lanier.) The defendants and each of them objected and excepted to each and every question in regard to the conversation between the dead man and Hubert Lanier.) We brought him back to the store that morning and put him out. I saw Hubert again and had a conversation with him about Ambrose being killed. One night we were 'possum hunting, me and Henry Byrd and Hubert and Adolph and Clarence Byrd. We went down Lindy Swamp. I went with Hubert Lanier to carry his mule and when we got to Hubert's stockade, I asked him how they got along that night. I asked him how they got along with the killing. He said that 'Nealie went around the back window and got on the fish box and shot him, he was sitting on the edge of that pool table and said when she shot at him it hit him in the left arm.' And he said 'Lord, have mercy, she shot me.' And he said he was standing near the window and Adolph was standing on the porch and he said Ambrose fell towards him and he shot him in the head, said he was standing against the counter when he shot him. He said they went there that night about 12 or 12:30. He said that afterwards, Adolph and him went behind Muddy Creek Church and stayed and came back to the store and then Adolph stood on the porch and Nealie went around to his pocket and got some money, $542. That she put the money in her pocket, placed the pistol in his hand, moved the pool table. That he jumped up when she shot him and when he fell they moved the box to one side. When

she ran her hand in his pocket she got blood on the sleeve of her dress and when they got away from the store she put on another dress and burned that one. After she burned the dress she came on by Hubert Jackson's and brought Adolph into Muddy Creek. This was a conversation that I had with Hubert that night. I got up with Adolph and asked him about it. I was going with him one night, walking between Bill Guy's and T. R. Quinn's store and I asked him how he got along with the killing, and asked did he help do it and he said, he reckon so. I told him that I asked Hubert about it and he said I reckon he is about right. . . . Nealie said that they would kill him Saturday night if they could make the plans right. Hubert told me afterwards that everybody was there and they stayed up so late that they just didn't have time, that they could not get it right to kill him on Saturday night. (The defendant objected and excepted.)"

As to the foregoing evidence, the court said: "I instruct you that any statement made by one defendant in the absence of the other one or the other two is only evidence against the person making the statement and you will not consider it as evidence against the others."

Beatrice Mobley testified, in part: "I know Nealie Brown when I see her and had a conversation with her before Mr. Ambrose Lanier was found dead in his store. I do not know exactly when it was, but it was when we were housing tobacco. She told me that Ambrose was jealous of her and her fellows and before she would allow that she said 'I will kill him,' and she said to me 'You don't think I have got the nerve do you,' and I said, 'I don't know.' She said that he was the cause of Archie Brown leaving her and said that he was going to have her to feed."

Elmore Bell testified, in part: "I passed by Ambrose Lanier's store on Sunday night before he was found dead Monday morning. It was sometime between 11:30 and 12 o'clock. Roscoe Jones was with me. I know Nealie Brown's automobile when I see it and I saw her automobile that night setting in Nealie's yard. And I called attention of Roscoe Jones about it. The automobile was setting about six feet off from the porch of Nealie Brown's house."

Dorothy Lanier testified, in part: "I live close to Ambrose Lanier's store and I saw Nealie Brown at the store on Thursday of the week before he was killed. I heard a conversation between her and Ambrose Lanier, they were fussing. I could not understand what they were saying. . . . Q. Did you hear any word that one said to the other? (The defendants objected and excepted.) A. I don't remember what they said but I know that they were mad."

Joe Mobley testified, in part: "I know Ambrose Lanier and Nealie Brown. I was down there on Thursday before he was found dead on

Monday. Nealie Brown was there in the store and I was on the front porch. They were quarreling with one another about something."

There was other circumstantial evidence as to the defendant having killed Ambrose Lanier.

The defendants' evidence was to the effect that they were not guilty. That they accounted in a rational way for all of their acts and doings on the night of the death of Ambrose Lanier, and that neither of them, were present at the death of Lanier, and know nothing about it. They further denied the material part of the testimony of Norman Edwards.

The jury returns to the court room and when asked by the clerk, if they had arrived at a verdict, one juror answered, we find all guilty of manslaughter, another answers guilty of third degree murder. Attorney for defendants asked that the jury be polled, each juror asked as to each of defendants, R. J. Alphin being the first juror polled answered third degree murder. Attorney for the defendant requested that the record speak what they say. *The juror, Mr. Alphin, said he intended to say manslaughter. All the jurors then polled as to each defendant and all answered guilty of manslaughter.*

To the foregoing verdict, the defendants in apt time objected and excepted. A motion was made in this court for an order correcting the minutes. The return to this court, after setting forth certain facts, was as follows: "The court further finds as a fact, that the record heretofore sent to the Supreme Court by the clerk of this court spoke the truth as the records then existed."

The defendant duly made exceptions and assignments of error to the above objections and exceptions and other exceptions and assignments of error and appealed to the Supreme Court.

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

J. T. Gresham, Jr., for defendant.

CLARKSON, J. The defendant, Nealie Brown, together with Hubert Lanier and Adolph Edwards, before his Honor, Judge E. H. Cranmer and a jury, at July Term, 1932, Duplin Superior Court, were jointly tried upon a bill of indictment charging them with the murder of Ambrose Lanier. Each of the three defendants were convicted of the crime of manslaughter and from the judgment of the court, Nealie Brown alone appeals.

At the close of the State's evidence and at the close of all the evidence the defendant Nealie Brown made motions to dismiss the action or for judgment of nonsuit. C. S., 4643. The court below overruled these motions and in this we see no error.

We have set forth some of the evidence on the part of the State. It was direct and circumstantial, sufficient to have been submitted to the jury, as to all the defendants, the probative force was for them. The evidence was to the effect that the defendants entered into a conspiracy to kill Ambrose Lanier and pursuant to said purpose were present, aiding and abetting in the crime.

The manner and time in which the evidence is introduced to prove a conspiracy is in the sound discretion of the court below.

In *S. v. Boswell,* 194 N. C., at p. 264-5, citing numerous authorities, it is held: "It is thoroughly established law in this State that the declaration of one conspirator continues, even though made in the absence of the other conspirator. Usually the conspiracy must first be established before such evidence is competent, 'but this rule is often parted from, though it is an inversion of the order, for the sake of convenience, and the prosecution allowed either to prove the conspiracy, which makes the acts of the conspirators admissible in evidence against each other when done in furtherance of the common object, or he may prove the acts of different persons, and thus prove the conspiracy." N. C. Handbook of Evidence, 2d ed. (Lockhart), p. 185, sec. 152.

The testimony of Norman Edwards was restricted by the court below as against the party defendant with whom the alleged conversation took place. We think none of these exceptions, to which assignments of error were made by defendants, can be sustained, they were limited in their scope. The answer "I know that they were mad," was competent. In *Moore v. Ins. Co.,* 192 N. C., at p. 582, we find: "A witness may say that a man appeared intoxicated, or angry or pleased. *Bane v. R. R.,* 171 N. C., 328; *S. v. Leak,* 156 N. C., 643; McKelvey on Evidence, p. 220 *et seq.* Manifestly upon this principle, a witness may say that a man appeared sane and sober."

The defendant went to the stand and denied the material evidence introduced by the State. The conflict of evidence was a fact for the jury to determine. We think none of the exceptions and assignments of error made on the trial as to the admission or exclusion of evidence can be sustained. We do not think the exclusion of evidence as to defendant's kinship to deceased, nor his financial condition to support suicide theory on the whole record, prejudicial.

We find in the record no specific exceptions and assignments of error to the charge. The record discloses the following exception and assignment of error, which cannot be sustained: "To the charge of the court in its entirety, the defendant in apt time objected on the grounds that the judge in his charge did not declare and explain the law arising upon the evidence given in the case, and did not state in a plain and correct manner the evidence in the case."

In *Rawls v. Lupton,* 193 N. C., at p. 430, citing a wealth of authorities, we said: "Errors must be specifically assigned. An 'unpointed, broadside' exception to the 'charge as given,' will not be considered. *McKinnon v. Morrison,* 104 N. C., 354. Exception to the charge of the court in general terms, not sufficiently specific to call the attention of the court to the particular point claimed to be erroneous, cannot be considered by an appellate court."

We do not think the charge impinged on C. S., 564. The exception and assignment of error as to "alibi" cannot be sustained. This matter is fully discussed in *S. v. Casey,* 201 N. C., at p. 209.

As to the verdict of the jury on the trial, the record discloses: "The jury returned to the court room and when asked by the clerk, if they had arrived at a verdict, one juror answered, we find them all guilty of manslaughter, another answered guilty of third degree murder. Attorney for defendants asked that jury be polled, each juror asked as to each of the defendants, R. J. Alphin being the first juror polled answered third degree murder. Attorney for the defendant requested that the record speak what they say. The juror, Mr. Alphin, said he intended to say manslaughter. All the jurors then polled as to each defendant and all answered guilty of manslaughter. To the foregoing verdict, the defendants in apt time, objected and excepted."

In the order correcting the minutes, it appears that there were no minutes to be corrected. "The court further finds as a fact, that the record heretofore sent to the Supreme Court by the clerk of this court, spoke the truth as the records then existed."

The record discloses that on the trial of defendant the jury as polled answered "guilty of manslaughter." We see no prejudicial or reversible error. The juror no doubt was thinking of murder in the first degree murder in the second degree and manslaughter was third degree. The juror said he intended to say manslaughter. The court below had, under the facts and circumstances of this case, discretion to do what was done to make the record speak the truth and have it so recorded. The cases cited by the defendant are not applicable to the facts of record.

The learned and painstaking judge in the court below, in a long charge, gave all the contentions on both sides fairly, set forth the law carefully, applicable to the facts. We find no prejudicial or reversible error.

No error.

STATE v. CLAY FOGLEMAN.

(Filed 22 March, 1933.)

1. Criminal Law I i — Functions of court and jury are separate and distinct.

The functions of the court and jury are separate and distinct, and neither may invade the province of the other, it being the exclusive province of the court to explain the law and the exclusive province of the jury to determine the facts and apply the law as explained by the court to the facts as found.

2. Criminal Law G p—Evidence of identity of defendant as perpetrator of the crime charged held sufficient.

Where in a prosecution for homicide the deceased's wife testifies that upon hearing shots she rushed from a back room into the storeroom where her husband had been shot, that two lights were burning in the room, and that she saw the defendant over a curtain between the two rooms before entering the storeroom, and saw him after entering the storeroom while he was standing with a pistol in his hand about seven feet from her, that the defendant left the store and got into an automobile waiting with the motor running and driven by another, and minutely describes the automobile owned by defendant, and positively identifies the defendant as the man who had committed the crime: *Held*, the evidence of the defendant's identity as the perpetrator of the crime is sufficient to be submitted to the jury, the weight and credibility of the wife's identification of the defendant being for their determination, and defendant's motion as of nonsuit on the ground that her testimony was based upon imagination and auto-suggestion was properly refused.

3. Criminal Law I h—Held: trial court fully corrected improper comments of counsel in argument to jury.

Where counsel for the private prosecution, in his argument to the jury, comments upon the defendant's failure to testify in his own behalf and intimates that defendant's wife had also failed to testify in his behalf, and the court immediately upon each improper remark stops the argument, directs the counsel to desist, and instructs the jury not to be influenced by the improper remarks, and in his charge specifically and emphatically instructs the jury not to allow defendant's failure to testify to prejudice them and instructs them to exclude from their minds everything except the evidence and the law as declared by the court, the defendant's exceptions to the remarks of counsel will not be sustained.

4. Homicide G d—Testimony in this case held competent on issue of premeditation and deliberation.

Testimony that defendant's car contained, among other implements, tools adapted to robbery and burglary is held competent in this prosecution for homicide where the evidence tended to show that defendant killed deceased at deceased's store while attempting to rob him, and that after the crime defendant escaped in the car, the testimony being of a circumstance tending to show a design or plan on the part of the defendant,

and the fact that several days elapsed between the date of the killing and the seizure of defendant's car is not sufficient to render the testimony incompetent, the probative force thereof being for the jury.

5. Homicide H a—Indictment under C. S., 4614, is sufficient to support charge, based on evidence, relative to murder in attempt to rob.

An indictment charging the essential facts of murder as required by C. S., 4614, is sufficient to sustain the court's charge based upon the evidence in the case relative to murder committed in the perpetration of robbery or other felony.

BROGDEN, J., dissents.

APPEAL by prisoner from *Stack, J.*, at September Term, 1932, of ROCKINGHAM. No error.

The prisoner, indicted for the murder of W. J. Carter, was convicted of murder in the first degree, and from judgment of death by electrocution he appealed, assigning error. He neither testified nor introduced any witnesses. The evidence for the State tends to show the facts to be as follows:

The deceased was 61 years old. He conducted a mercantile business near a hard-surfaced highway 3 miles south of Leaksville, the direction of the highway being north and south. Parallel with the highway was a storeroom (occupied by the deceased) the length of which was about 30 feet and the width about 17 feet. The store porch was about 20 feet from the road. In the front part of the building were two doors—a single door on the north side and a double door near the center. Outside there was an oil pump near the south edge of the porch; another just north of the double door; and another at a break in the level of the porch. There were also lights outside; one of them would be over an automobile standing in front of the door. Back of the store, separated by a partition were 3 rooms occupied by the deceased and his family as a living apartment. Between the store and the first of these rooms was a screen door, the lower part of which, about five feet, was covered with a curtain; above the curtain there was an open space through which a person in the room could look into the storeroom.

On 30 April, 1932, between 9 and 10 o'clock at night, while her husband was closing the windows, Mrs. Carter, who was then in the room adjoining the one just referred to, heard a car drive up in front of the store. At this time there were two lights outside and two inside the store. She heard some one say "Stick 'em up," and immediately a volley of shots was fired. Seven or eight bullets entered the body of the deceased; his death was instantaneous.

Mrs. Carter rushed through the screen door into the store. Looking over the curtain as she passed she saw a man inside the store door looking at her husband as the latter made his last step behind the stove. The

man who had done the shooting got into the automobile on the right side of the seat, the motor yet running, and quickly started in the direction of Leaksville.

Mrs. Carter identified the prisoner as the man who had killed her husband. She also described the car.

There was evidence that only a few hours before the deceased had been shot the defendant had been seen near Danville in a car the appearance of which was similar to that of the car seen by Mrs. Carter at the store; that it had been seen by others; and that it had subsequently been repainted.

Reeves Cooper, an uncle of the prisoner by marriage, testified that on 8 May, 1932, the prisoner had come to his house at about 9 o'clock at night and had left a car of the description given by Mrs. Carter, except as to the color, which the State contended, had been changed by repainting. That night an officer took the car into his possession and found in it the following articles: A sawed-off shot gun, a brace and bit, a chisel, a flat iron, a wrench, a square and block, hammers, files, wire cutters, gun shells, overalls, shirts, and North Carolina, Virginia, and Kentucky license plates. The prisoner was arrested in Cincinnati, Ohio, in the month of June.

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

Glidewell & Gwyn for prisoner.

ADAMS, J. The prisoner neither testified nor introduced any witness, and at the close of the evidence offered by the State he moved to dismiss the action as in case of nonsuit. C. S., 4643. The ground upon which the motion was made is the insufficiency of the testimony tending to identify the prisoner as the man who shot and killed the deceased; and the asserted insufficiency is based upon the assumption that the testimony of identity, as given by Mrs. Carter, is the product of imagination in part and in part of auto-suggestion. Whence it is argued that this Court should recognize the failure of the jury to perceive the fallacy of the testimony and should hold as a matter of law that the evidence is insufficient to sustain the verdict—"otherwise," it is said, "a great and irreparable injury will be done."

Mrs. Carter, the wife of the deceased, was the only witness who attempted to identify the assailant. On this point she was minute, as will appear from the following summary of her testimony: "As I went through the screen door I looked over the curtain and saw a man standing there just a step from the door, inside the door. He was looking at my husband . . . I asked him what he meant. He was about seven

feet from me . . . My husband was standing behind the stove. That was about 8 or 10 feet, I guess, from where I was. The lights were burning at that time . . . The automobile was standing right in front of the door. I think the lights of the automobile were burning at the time. The motor was running; I saw into the car; another man was sitting right under the wheel. It was a roadster, a dark bodied car with a light top, built for speed. So far as I know, I had never before seen the man that was in the car . . . As to whether I had seen the man who was standing in the door before that time, I was not acquainted with him, but I think I had seen him, most sure I had. I have seen him since that time. I saw him in Greensboro and I see him here, here in the courthouse. I see him here today; there he sits, right over there . . . His name is Clay Fogleman. No one else was in the room at the time I got there except him and my husband. Clay Fogleman, at the time I came in the room had a gun in his right hand; I can't describe the gun; it was a pistol . . . Clay Fogleman went to the automobile; he got in the automobile . . . He got in on the right side . . . When I heard the shooting I went in as quickly as I could. My husband was on my mind. The first man I saw was that man sitting right there at the table. I saw him before I came out of the bedroom over the screen door. As to whether I was asked about the identification of the prisoner at the preliminary hearing, I told you I identified him . . . I was going to my husband all the time as fast as I could. I was looking at both; looking at the man standing there with the gun and looking at my husband, also. . . . When the man went out of the door his back was to me . . . I got a good right side view of his face . . . I saw enough to know this was the man. Yes, I saw the right side of his face and the outline of his body; I saw enough to know this is the man. . . . I knew I was going (to Greensboro) to identify Fogleman; I knew they said he was there. I was not shown any other prisoner except Fogleman. I didn't have to be shown any other one; he was the man I saw that night standing in the door; I am positive."

It may be doubted whether our system of jurisprudence contains any principle more strictly defined than that which separates the functions of the courts from those of the jury. According to a custom that formerly prevailed evidence was submitted to a jury probably as a supplement to their own knowledge; but in a later period the custom was abandoned, and the jury assumed the character, since maintained, of a determining agency whose sole function is "to give a true verdict according to the evidence." The discharge of this duty implies the necessity of examining the testimony, finding the facts, and applying the law to the facts as found.

The judge lays down and explains the law, and the jury is under obligation to accept and apply the law as thus explained. The determination of the facts is the exclusive province of the jury; the elucidation of the law is the exclusive province of the judge. The jury cannot exercise the prerogatives of the judge; the judge cannot exercise the prerogatives of the jury. The two are distinct, and neither has the right to invade the field of the other. *S. v. Walker,* 4 N. C., 662; *S. v. Hildreth,* 31 N. C., 429; *S. v. Matthews,* 78 N. C., 523; *S. v. Murphrey,* 186 N. C., 113; *S. v. Lawrence,* 196 N. C., 562. Not only is the judge forbidden by C. S., 564 to "give an opinion whether a fact is fully or sufficiently proven" (*S. v. Windley,* 178 N. C., 670; *S. v. Sullivan,* 193 N. C., 754); he is prohibited from finding the determinative facts in a criminal action even by consent of the defendant or his counsel. *S. v. Allen,* 166 N. C., 265. He may grant relief from an unfortunate result by setting aside the verdict; but in the present case the trial judge denied the prisoner's motion to vacate the verdict and award a new trial. Evidently he saw no satisfactory reason for discrediting the verdict which was based principally on the testimony of Mrs. Carter. Indeed, her identification of the prisoner was clear, direct, and positive. We are aware of no recognized theory upon which the trial judge should have assumed, or upon which this Court should now assume, as a matter of law that the testimony attacked by the prisoner was either imaginary or fallacious.

There was no error in the court's denial of the motion to dismiss the action.

In addressing the jury, counsel for the private prosecution used language indicating that the wife of the prisoner knew what clothes the prisoner had worn on the night of the homicide, thereby intimating, it is contended, that she had not testified in his behalf. Attention has frequently been called to the fact that remarks of this character justify the award of a new trial in case of conviction unless the error is cured by the prompt action of the court. Upon objection by the prisoner, the court stopped the argument, directed the attorney to desist, and instructed the jury not to be influenced by the remarks to which objection had been made. In his charge his Honor specifically instructed the jury to exclude from their minds everything except the evidence and the law as declared by the court.

The same counsel suggested, also, that the prisoner had not testified in his own behalf by saying to the jury that the prisoner knew whether he had been in the automobile below the Dix home; but again the court promptly interposed. It is admitted in the prisoner's brief that the argument was stopped; and thereafter, at least three or four times in the charge, the court plainly instructed the jury not to permit the

prisoner's failure to testify to prejudice their minds against him; that he was presumed to be innocent; and that the State had the burden of proving his guilt beyond a reasonable doubt.

According to the decisions of this Court the error of counsel in referring to the prisoner's declining to testify was cured by the immediate action of the court and the emphatic and repeated instruction given to the jury. *S. v. Harrison,* 145 N. C., 408. In this case it is said: "We undertake to correct the errors of the judge and not those committed by attorneys. Their errors are to be corrected by the trial judge, and when he fails in his duty it becomes a ground of exception." So, also, as to the intimation that the prisoner's wife had not testified in his behalf. The court instantly suspended the argument and afterwards instructed the jury to disregard everything but the evidence and the law. The course thus taken conforms to the principle laid down in *S. v. Spivey,* 151 N. C., 676. The comment of counsel was improper, but as said in the case last cited his Honor fully corrected the error.

On the evening of 8 May, at about 9 o'clock, the prisoner went to the home of Reeves Cooper and put his car in the shed. He left it there and immediately went away; he did not return. That night the car was seized by an officer. The description of it agreed in details with that of the car that had been stopped in front of the store on the evening of the homicide. Meanwhile no change had been made in its contents. The officer found in it the gun, the shells, and the implements above described. He testified to this effect and the prisoner excepted.

The exception is without merit. Evidence of this character is admissible on the principle that it tends to show a design or plan. The existence of such design or plan may be proved circumstantially as well as by direct utterance. In Wigmore on Evidence, it is said that in the production of such proof two sorts of circumstantial evidence are available: (1) Conduct as indicating the inward existence of a design; (2) prior or subsequent existence of the design, as indicating its existence at the time in question. Accordingly, "the acquisition or possession of instruments, tools, or other means of doing the act is admissible as a significant circumstance; the possession signifies a probable design to use; the instruments need not be such as are entirely appropriate, nor such as were actually put in use." Vol. 1, secs. 88, 237, 238. Bishop says that it is competent to prove the possession of tools by a person charged with crime, even those not adapted to the crime if found with others which are adapted to its commission; and, according to Underhill, all the details of the finding may be proved, it being immaterial that the tools found were not adapted to the commission of a specific act. 3 Bishop's New Crim. Procedure, sec. 151; Underhill's Crim. Evidence, sec. 570.

If the gun, the shells, and the several implements in the prisoner's car had been discovered immediately after the homicide, evidence of the fact would unquestionably have been competent; and under the principles stated above the discovery a few days afterwards is not so remote as to impair its competency, the probative force of which was submitted to the jury.

These significant facts should be kept in view: The prisoner owned the car; some of the tools were suitable for use in burglary; the gun and shells, for use in burglary or robbery. A difference in the use to which the various articles were adapted does not preclude the admission of proof that they were in the prisoner's possession.

The indictment contains two counts, the first charging the essential facts of murder as required by C. S., 4614, the other charging murder committed in the perpetration of or in the attempt to perpetrate robbery. The prisoner excepted to an instruction referring to murder committed in the perpetration of robbery "or other felony." The first count in the indictment is sufficient; it contains "every averment necessary to be made." *S. v. Arnold,* 107 N. C., 861; *S. v. R. R.,* 125 N. C., 666. The instruction complained of was relevant upon the matters involved in the first count.

We have considered the prisoner's exceptions with care, and find no error in the trial. In no view of the evidence was there any provocation on the part of the deceased, who was ruthlessly slain while in the prosecution of his daily task. The doctrine of manslaughter was eliminated, the question being whether the prisoner was guilty of murder in the first or second degree, or not guilty.

No error.

BROGDEN, J., dissents.

W. V. PARKER, ADMINISTRATOR OF MAGGIE F. GROVES, v. F. L. POTTER, ADMINISTRATOR OF JOHN A. GROVES, ET AL.

(Filed 22 March, 1933.)

Executors and Administrators G e—Administrator's bond held liable for money erroneously paid administrator under color of his office.

The bond of an administrator covers "all moneys received under color of official authority," and where the administrator is paid the proceeds of an insurance policy on the life of his intestate, and it is later determined by judgment of the Superior Court affirmed by the Supreme Court that the proceeds of the policy were the property of the estate of the intestate's wife, and the administrator fails to account therefor to her estate, his bond as administrator is liable therefor, although the funds

were improperly paid into his hands as administrator, and the liability of the surety on his administration bond may be determined in the original action to which the surety has later been made a party defendant.

APPEAL by defendant United States Fidelity and Guaranty Company from *Cranmer, J.*, at September Term, 1932, of DUPLIN. No error.

The agreed statement of facts pertinent to the defendant's appeal is as follows:

That J. A. Groves, on 4 April, 1929, wrongfully and feloniously shot and killed his wife, Maggie F. Groves, and then shot and killed himself.

That at the time of their deaths, J. A. Groves had a policy of life insurance on his life in the Mutual Life Insurance Company of Maine, for $1,000, payable to his wife, Maggie F. Groves.

That F. L. Potter, Sr., duly qualified as administrator in Duplin County on the estate of J. A. Groves, deceased, and gave an administration bond in the sum of $12,000 with the defendant, the United States Fidelity and Guaranty Company of Maryland as surety on his said bond and entered immediately upon the administration of said estate, and on or about 1 May, 1929, the said F. L. Potter, Sr., as such administrator, collected from the Mutual Life Insurance Company of Maine the said policy of $1,000, which he used as a part of the estate of J. A. Groves, deceased, in administering said estate.

That soon thereafterwards, W. V. Parker, the plaintiff, duly qualified as administrator on the estate of his sister, Maggie F. Groves, deceased, and made demand upon F. L. Potter, Sr., administrator of J. A. Groves, deceased, for the said $1,000 collected on said policy, which demand was refused and the said plaintiff instituted action for the recovery of the same, and the court adjudged that the estate of J. A. Groves, deceased, on account of his wrongful and felonious slaying of his wife could not recover said insurance and that the same belonged to the estate of Maggie F. Groves, his dead wife. The facts and the law regarding the same being set out in the case of *Parker v. Potter et al.*, 200 N. C., 348, which is incorporated as a part of this finding of fact.

That the administration bond of F. L. Potter, Sr., on which the defendant, the United States Fidelity and Guaranty Company of Maryland, is surety, shall be copied and hereto attached as a part of the findings of fact.

That F. L. Potter, Sr., administrator, died on 5 January, 1930, and thereupon his son, F. L. Potter, Jr., duly qualified as his administrator in Duplin County and gave an administration bond in the sum of $12,000, with the defendant, the United States Fidelity and Guaranty Company as his surety.

That Nellie Susan Outlaw, sister of J. A. Groves, deceased, duly qualified in Duplin County as the administrator *d. b. n.* of J. A. Groves, deceased, upon the death of F. L. Potter, Sr., administrator.

That after the rendition of the decision in the Supreme Court in the original cause, 200 N. C., 348, an order was made in the cause making F. L. Potter, Jr., administrator of F. L. Potter, Sr., and Nellie Susan Outlaw, administratrix *d. b. n.* of John A. Groves, deceased, and the United States Fidelity and Guaranty Company, surety on the administration bond of F. L. Potter, Sr., on the estate of J. A. Groves, deceased, parties defendants to the action and additional pleadings ordered filed, and process was issued against these new parties and additional pleadings duly filed herein.

That in the original action and before the United States Fidelity and Guaranty Company was made a party hereto, there was an agreed statement of facts signed by all the counsel, the second paragraph of which is the following:

"That at the time of their deaths, J. A. Groves had a policy of life insurance in the Mutual Life Insurance Company of Maine for $1,000, which had been collected by F. L. Potter, administrator; said policy of insurance being payable to Maggie F. Groves, wife of J. A. Groves."

That in the seventh article of the original complaint against F. L. Potter, administrator, is the following allegation:

"That at the time of his death, the defendants' intestate, J. A. Groves, had in force a policy of life insurance on his life in the Mutual Life Insurance Company of Maine, for the sum of $1,000, which policy was payable to his wife, Maggie F. Groves, as beneficiary . . . and the defendant, F. L. Potter, administrator of J. A. Groves, has collected the said policy of $1,000 from the aforesaid Mutual Life Insurance Company and now has the said $1,000 in his possession. . . ."

The defendant, F. L. Potter, administrator, filed answer under oath to said complaint and in his answer to the seventh article above we quote as follows:

"The allegations of paragraph 7 of the complaint are admitted. . . ."

That after the new parties were made herein, including the United States Fidelity and Guaranty Company as one of the defendants, the plaintiff filed a new complaint herein, under oath, in the 3rd article of which is the following:

"That the said F. L. Potter, Sr., as such administrator, after giving said bond, entered upon the administration of said estate and took into his possession and collected on or about 1 May, 1929, as such administrator, a policy of life insurance for $1,000 on the life of J. A. Groves, his intestate, in the Mutual Life Insurance Company of Maine, which policy was payable to Maggie F. Groves, his wife, plaintiff's intestate, and has unlawfully failed to pay said money or any part thereof to the plaintiff administrator, although a former judgment in this cause ren-

dered by his Honor, Judge Grady, said $1,000 was adjudged the property of the plaintiff administrator, which judgment was affirmed in the Supreme Court and reported in 200 N. C., 348."

That the defendant, United States Fidelity and Guaranty Company filed answer under oath to said complaint on 21 October, 1931, and the answer to the said 3rd article of the complaint is as follows:

"It is admitted that F. L. Potter, Sr., administrator of J. A. Groves, entered upon the administration of said estate and took possession of and collected on or about 1 May, 1929, as such administrator, a policy of life insurance for $1,000 on the life of J. A. Groves, his intestate, in the Mutual Life Insurance Company of Maine, and it is admitted that by a former judgment of this Court the said $1,000 life insurance was adjudged the property of the plaintiff administrator, but the answering defendant says that it was not a party to said action to which said judgment was rendered."

That neither the defendant, F. L. Potter, administrator, during his life, nor the defendant, the United States Fidelity and Guaranty Company, surety on his administration bond, nor any of the other defendants in this action, nor any other person has ever paid to the plaintiff the said $1,000 insurance money or any part thereof.

Upon the contested issues the jury returned the following verdict:

1. Did the defendant's intestate, John A. Groves, wrongfully and feloniously kill his wife, Maggie F. Groves, the plaintiff's intestate, as alleged in this complaint: Answer: Yes.

2. If so, what damages, if any, is the plaintiff administrator entitled to recover of the defendant administrator on account of the wrongful and felonious slaying of the plaintiff's intestate, Maggie F. Groves, as alleged in the complaint? Answer: $500.

3. At the time of his death, did the defendant's intestate, John A. Groves, have in force a policy in the Mutual Insurance Company of Maine for the sum of one thousand dollars, payable to his wife, Maggie F. Groves, and has the defendant administrator collected same, as alleged in the complaint? Answer: Yes.

4. Has the defendant Potter, administrator, paid said sum, or any part thereof, to the plaintiff? Answer: No.

The court adjudged upon the verdict and the facts agreed that the plaintiff recover of Nellie Susan Outlaw, administratrix *de bonis non* of John A. Groves, the sum of $500 with interest thereon from 5 September, 1932, and of the administrator of F. L. Potter, Sr., and the United States Fidelity and Guaranty Company of Baltimore, Md., surety on his administration bond, $1,000 with interest from 1 May, 1929, the amount of the insurance policy paid by the Mutual Life Insurance Company of Maine.

John A. Gavin for appellant.
Butler & Butler for appellee.

ADAMS, J. John A. Groves took out a policy in the Mutual Life Insurance Company of Maine for $1,000, payable to Maggie Groves, his wife. After killing her he killed himself. In *Parker v. Potter,* 200 N. C., 348, we held that Mrs. Groves was the beneficiary in the policy and that her administrator is entitled to the whole amount of the insurance money. The administrator of John A. Groves collected the amount due on the policy and has refused to account for it. The appellant is the surety on his bond.

The administrator of Mrs. Groves brought suit against the administrator of John A. Groves and the appellant, as surety, to recover the amount paid the latter administrator by the insurance company, and was awarded judgment. The appellant says that the court committed error for the reason that the funds derived from the policy were not a part of John A. Groves's estate; that the insurance company made payment with knowledge of this fact; and that the administrator of Mrs. Groves has never demanded payment of the insurance company.

The administrator of John A. Groves admits the collection and nonpayment of the money. In its first answer the appellant made the same admission, but denied it in the second. The bond on which it is surety is set out in the record, and it is manifest that the administrator of John A. Groves collected the policy under color of his office and not in his individual capacity as trustee. Indeed, he applied the money as a part of the estate of John A. Groves. The surety on his bond is therefore liable for the misapplication. "All moneys received under color of official authority are covered by the bond." *Lafferty v. Young,* 125 N. C., 296.

No error.

STATE v. HERMAN CASEY.

(Filed 22 March, 1933.)

1. Criminal Law G m—Admission of transcript of former trial held not error under facts of this case.

Where a defendant in a criminal action is granted a new trial for newly discovered evidence, and a witness at the former trial has died, the admission of the transcript of his testimony at the former trial will not be held for error where the court stenographer who had transcribed the evidence at the former trial has testified under oath that the transcript was substantially correct and contained all the answers of the witness at the former trial.

2. Criminal Law G t—Where contents of writing is collateral to the main fact sought to be proven, parol evidence thereof is competent.

Where in a criminal prosecution the fact that one corporation had bought out another corporation becomes relevant and material, there being evidence that defendant had made threats against the employees of one of them as a class, it is not required that such connection be shown by the written instruments, but parol evidence thereof is competent, the matter being collateral.

3. Homicide G d—Evidence of threats against class to which deceased belonged held competent to show malice, motive, etc.

In a prosecution for homicide, evidence that defendant had made threats against a class of persons generally, in which class the deceased was included, in this case the employees of a certain corporation, is held competent to show malice, motive, premeditation and deliberation.

APPEAL by defendant from *Cranmer, J.*, and a jury, at October Special Term, 1932, of LENOIR. No error.

At September Term, 1930, of Lenoir Superior Court, the defendant, Herman Casey, was tried upon a bill of indictment charging him with murder in the first degree of James C. Causey. A verdict of guilty of murder in the first degree on the bill of indictment was returned by the jury, and the defendant was thereupon sentenced by the court below to death by electrocution. The defendant appealed to this Court and no error was found in the trial in the court below. *S. v. Casey,* 201 N. C., 185.

At August Term, 1931, of Lenoir Superior Court, a motion by the defendant for a new trial was made on the grounds of disqualification of certain jurors by reason of alleged fraud and prejudice, and for newly discovered evidence. This motion was made in the Superior Court at the next succeeding term following affirmance of judgment on appeal to this Court. This motion was refused by the court below and on appeal to this Court "error and remanded." *S. v. Casey,* 201 N. C., 620. Later a new trial was awarded defendant by the court below and he was tried at October Special Term, 1932, Lenoir Superior Court. The verdict was "not guilty of murder in the first degree, but is guilty of murder in the second degree and beg the mercy of the court." The judgment of the court below is: "Let the defendant be confined in the State prison at hard labor for an indeterminate sentence of not less than twenty-five nor more than thirty years."

The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be considered in the opinion.

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

Shaw & Jones and W. C. Douglass for the defendant.

CLARKSON, J. The defendant's counsel in his argument of this cause well says that if there is error in the record on this appeal it is immaterial how often the defendant has been tried—he is entitled to a trial according to law.

On the first appeal of defendant (201 N. C., 185), it being a case involving life and death, this Court went into the case thoroughly, setting forth the material facts in detail and discussing fully the questions of law involved. The facts in the present case are practically the same as in the former case. The eye witness to the killing again testified in substance to what he had testified to on the former trial, and the testimony corroborating this witness did not vary to any extent. On the present trial there was more evidence of corroboration and contradiction.

The defendant contends that on the first trial this case was tried "upon the theory that there was a controversy between Casey and the Atlas Plywood Corporation, which had merged with the Utility Manufacturing Company, and that Casey killed Causey, who was the man who came in the woods and stopped him from cutting timber and that the Atlas Plywood Corporation was the company holding up the payment of the check." The evidence on the present record, which was admitted as competent, we think is susceptible of the same construction. Broadly there was a controversy between John H. Sutton, Sr., and the Utility Manufacturing Company. The action was to determine the ownership of the land in dispute, upon which defendant and his employees had cut certain timber off of this land and the payment held up.

E. H. Graham, who has died since the last trial, testified in part, on the former trial: "Prior to 3 July, 1930, I lived in Goldsboro, N. C., and was connected with Utility Manufacturing Company, in 1929, up until October, at which time Utility Manufacturing Company was bought by Atlas Plywood Corporation, and after 1 October, 1929, I was manager of Atlas Plywood Corporation; I knew Mr. J. C. Causey and he was also employed by the company. He was in charge of the logging operations. He has been with the company since 15 September, 1929. . . . Mr. Causey drove a Hudson coach, and it belonged to the Atlas Plywood Corporation. . . . I know Mr. Herman Casey; he has been in the office at Goldsboro on a number of occasions. The last time he was in the office to my knowledge was the latter part of May or first of June. He came over there to see about some money that had been withheld at Goldsboro Lumber Company. He did make a statement in reference to it. . . . Q. What was it? (Defendant objects unless it refers to Mr. Casey.) He said 'I am going to have my money, somebody is going to pay me.' (Defendant objects to answer and asks that it be stricken out; overruled; defendant excepts.) I did refuse to pay him the money and did not permit him to be paid. . . . (Court

questions.) Mr. Casey was in the office the latter part of May or first of June to see about some money that was being held back. Mr. Casey knew who was holding up the money. I explained to him it was held up by my company. I don't know whether Mr. Casey knew Mr. Causey or not. As I recall it, I told Mr. Casey that Mr. Causey had charge of the logging operations. I had quite a conversation with Mr. Casey, 10 or 15 minutes. I had known him several years and we talked about logging in general. (Re-cross.) Yes, sir, I am positive that I told Mr. Casey of Mr. Causey's relations to the company, because Mr. Casey asked if we had any logging operations that we could put him on and I told him he would have to see Mr. Causey, that he had charge of the logging operations."

Mrs. G. C. Andrews on the present trial testified, in part, that she was court reporter at the former trial of the defendant: (Court.) "Q. Is your transcript substantially correct, Mrs. Andrews? Yes, sir, I say it is. My transcript is a full and complete transcript of the *direct and cross-examination.* I might say that the evidence is written in narrative form and that all questions do not appear, but the answers are all in there. *Everything stated by the witness Graham is in this transcript.*" The defendant excepted and assigned error. We think the evidence competent.

Speaking to this question in the case of *Mattox v. U. S.*, 156 U. S., at p. 244, *Associate Justice Brown* said: "That all the authorities hold that a copy of stenographic report of his entire former testimony, supported by the oath of the stenographer that it is a correct transcript of his notes and of the testimony of the deceased witness, is competent evidence of what he said." And the principle is approved by us in *Settee v. R. R.*, 171 N. C., 440. *S. v. Maynard,* 184 N. C., at p. 657; *S. v. Levy,* 187 N. C., 588. We think the testimony of the court reporter comes within the rule.

Other evidence than that of Graham as to threats was introduced on this and the former trial of this case. For example, on the present record, the testimony of S. L. Brown, was in part: "He (defendant) was hauling stave blocks there first time I ever saw him to know him, sometime during the year 1930. . . . Yes, sir, the defendant, Herman Casey made a statement to me. Q. What was it? A. He said that they had held up the payment on his blocks, and that he made two trips to Goldsboro to see Mr. Graham and he would not give him any satisfaction about it. Q. What else did he say? A. He said he was going to shoot hell out of some of them if they did not pay him." Defendant excepted and assigned error, and for the reason also that there was no production of the writing—the best evidence—was to the two corporations being connected, and contended that therefore the threats should have been excluded. We cannot so hold.

In *S. v. Ferguson,* 107 N. C., at p. 847, is the following: "We do not think the note in question comes within the general rule excluding parol evidence of the contents of written instruments, and the evidence should have been admitted. *S. v. Credle,* 91 N. C., 648; *S. v. Wilkerson,* 98 N. C., 696; 1 Greenleaf Ev., sec. 89 and cases cited."

When the contents of a writing come collaterally in question, such writing need not be produced, but parol evidence as to its contents will be received. *Pollock v. Wilcox,* 68 N. C., 47; *Carden v. McConnell,* 116 N. C., 875; *Ledford v. Emerson,* 138 N. C., 502; *Hall v. Griessell,* 179 N. C., 657; *Miles v. Walker,* 179 N. C., 479; Wigmore on Evidence, 2d ed., sec. 1253.

This very matter of class threats was held competent in the former trial. 201 N. C., at p. 206. 30 C. J., part sec. 417(2), at p. 190. Sec. 418: "Threats made by defendant against a class to which deceased belonged, and prima facie referable to deceased, although his name is not mentioned, are admissible against defendant," etc. *S. v. Mills,* 91 N. C., 596; *S. v. Hunt,* 128 N. C., 584. Lockhart on Ev., 2d ed. part sec. 147, is as follows: "And general threats are admissible to show malice, motive, premeditation, conspiracy and the like."

We see no error in the charge taken as a whole. The jury was merciful in its verdict. No doubt the sympathy arose from the anger engendered in defendant against one whom he took as connected with the wrong done him—suddenly meeting him in the woods. The dead man seems to have been the victim without provocation on his part.

The matter was largely one of fact for the jury to determine. On the entire record we see no prejudicial or reversible error.

No error.

W. D. GRANT AND A. W. SMITH, TRADING AS GRANT AND SMITH, v. J. L. BORDEN.

(Filed 22 March, 1933.)

1. Landlord and Tenant D g—

Where the terms of a lease fully provide for the rights of the parties upon destruction of the property by fire such rights will be determined in accordance with the written agreement, without reference to C. S., 2352 or the common law.

2. Evidence A c—Courts will take judicial notice of tobacco-selling season.

The courts will take judicial notice of the fact that the season for producer's sales of tobacco in North Carolina begins about 1 September and closes about 1 February, and that the crop is chiefly sold during September, October and November, and that only a small portion is sold during December and January.

3. Landlord and Tenant D g—Under terms of lease and facts lessee held not entitled to recover rent paid upon destruction of property by fire.

Where the lease of a tobacco warehouse for a term of years is executed in May and provides for the payment of the yearly rental in four equal installments on 15 September, 1 October, 15 October, and 1 November, and provides that if the premises are destroyed by fire a just proportion of the rent should be paid and the lease terminated, provided that if the fire occurs after the close of the season then the lessor shall not be called upon to refund any part of the rents paid, in an action between the parties to determine their rights upon destruction of the premises by fire on 30 December: *Held*, the contract did not contemplate a rental by the month, and the lessee is not entitled to recover any part of the rent paid, since the provision for the adjustment of the rent upon destruction of the property by fire did not require the lessor to refund any part of the rent paid during the tobacco season.

APPEAL by defendant from *Grady, J.*, at October Term, 1932, of WAYNE. Reversed.

On or about 1 May, 1929, the plaintiffs and the defendant entered into an agreement which is in writing, and which is as follows:

"North Carolina—Wayne County.

This agreement, made and entered into this 1 May, 1929, by and between J. L. Borden, of the county of Wayne and State of North Carolina, party of the first part, and W. D. Grant and A. W. Smith, of the county of Wayne, and State of North Carolina, trading as Grant and Smith, hereinafter designated as party of the second part:

Witnesseth: That the said party of the first part has agreed to lease and does hereby let and the said party of the second part has agreed to take and does hereby take, those certain premises known as the Tobacco Growers Warehouse situate at 512 to 520 on the east side of North John Street, Block No. 72, Goldsboro, N. C., together with all appurtenances thereto belonging, and the sole and uninterrupted use and occupation thereof, for the period of five years to commence on 1 May, 1929, and end on 30 April, 1933, upon the following terms and conditions, to wit:

1st: The party of the second part agrees to pay as rent the sum of $5,000 per year for the said period, which amount shall be payable as follows:

$1,250 on 15 September, 1929, 1930, 1931, 1932, 1933.
$1,250 on 1 October, 1929, 1930, 1931, 1932, 1933.
$1,250 on 15 October, 1929, 1930, 1931, 1932, 1933.
$1,250 on 1 November, 1929, 1930, 1931, 1932, 1933.

Said amount shall be evidenced by notes in the sum of one thousand two hundred and fifty dollars ($1,250) each, which shall be signed by Grant and Smith and delivered to the party of the first part upon the execution of this agreement, said notes not to bear interest until maturity. In addition to this amount of rent, it is understood and agreed that the party of the second part shall pay the sum of one dollar ($1.00) per thousand pounds for all over four million (4,000,000) pounds of tobacco, farmers first sale, that is on sales made for customers at the first offerings not including rehandling or resales, during each tobacco season, and in order to determine the exact amount of said additional rent, it is agreed that an accurate record of all purchases and sales shall be kept and that the books of the party of the second part shall be open to examination by the party of the first part at the close of the season, to be audited by him, or such other person as he may designate to look over said books for the purpose of ascertaining the amount of tobacco sold. This additional rent, if any, shall be payable at the close of the tobacco season or as soon thereafter as it can be determined how much tobacco has been handled during the season, but in this connection it is understood and agreed that resales of tobacco bought by the warehouse, shall not be counted.

2nd: It is mutually agreed that the party of the second part shall not sublet these premises or any portion thereof, nor assign this lease, without the written consent of the party of the first part, and upon the expiration of the period over which said lease extends, the party of the second part agrees to surrender possession without notice on the part of the party of the first part.

3rd: It is further mutually agreed that in case the party of the second part shall not pay the rents as herein stipulated, then upon failure to pay any one or more installments of the same, such failure shall, at the option of the lessor, work, as a forfeiture of this lease and it shall be lawful for him, without prejudice to other rights or remedies, or without any further notice or demand to enter into and take possession and peaceably hold and enjoy the same henceforth.

4th: It is further agreed that in the event the building hereinbefore referred to shall be substantially or totally destroyed by fire, then a just portion of the rent shall be paid and this lease then terminate, provided, however, that if a fire occurs after the close of the tobacco season, then the party of the first part herein shall not be called upon to refund any of the rents paid.

5th: The party of the first part agrees to maintain said warehouse in good usable condition and at his own expense to repair said warehouse as and when required to keep it in such condition. Said party of the first part further agrees to pay all *ad valorem* taxes assessed against said

property and to pay insurance premiums on the buildings on said premises.

6th: The party of the second part agrees, at the expiration of this lease, to return the premises to the party of the first part in as good condition as at present, reasonable wear and tear excepted, and excepting any damage to said buildings caused by a failure of party of the first part to make reasonable and necessary repairs.

In witness whereof the parties have hereunto set their hands and seals, causing this instrument to be executed in duplicate, this the day and year first above written.

J. L. BORDEN. (Seal.)
A. W. SMITH. (Seal.)
W. D. GRANT. (Seal.)"

It is alleged in the complaint and admitted in the answer in this action:

1. That the plaintiffs entered into possession of the premises described in the foregoing agreement on or about 1 May, 1929, and paid the rent for said premises as stipulated in said agreement for the years 1929, and 1930, respectively, to wit: the sum of $5,000, for each year, in accordance with the provisions of paragraph 1 of said agreement.

2. That from the opening of the tobacco selling season of 1930 to 30 December, 1930, the plaintiffs sold in the warehouse located on said premises, at farmers' first sale, 4,287,000 pounds of tobacco; and that plaintiffs have not paid to defendant the sum of $287.00, due as additional rent under the provisions of paragraph 1 of said agreement.

3. That the warehouse located on the premises described in said agreement was totally destroyed by fire on 30 December, 1930; that under the provisions of paragraph 4 of said agreement, the lease for said premises contained therein, terminated at said date; and that the tobacco selling season for the year 1930, had not closed at the date of said fire.

This action arises out of a controversy between the plaintiffs and the defendant as to what amount if any should be paid to the plaintiffs by the defendant under the provisions of paragraph 4 of the agreement.

The court was of opinion that said agreement contemplated that the rental contract contained therein should be construed as a rental by the month and that on the facts admitted in the pleadings the plaintiffs are entitled to recover of the defendant the sum of $1,680.55, less the sum of $287.00.

From judgment that plaintiffs recover of the defendant the sum of $1,393.55, with interest from 30 December, 1930, and the costs of the action, the defendant appealed to the Supreme Court.

Kenneth C. Royall, Carlisle Smith and Allen Langston for plaintiffs.
Langston, Allen & Taylor for defendant.

CONNOR, J. The rights and liabilities of the parties to this action must be determined in accordance with their agreement, which is in writing, and not in accordance with the statute, C. S., 2352, or with the common law. The validity of the judgment in the action involves the construction of paragraph 4 of the agreement entered into by and between the parties on or about 1 May, 1929. This paragraph is as follows:

"4. It is further agreed that in the event the building hereinbefore referred to shall be substantially or totally destroyed by fire, then a just portion of the rent shall be paid, and this lease then terminate, provided, however, that if a fire occurs after the close of the tobacco season, then the party of the first part herein shall not be called upon to refund any part of the rents paid."

The building referred to in this paragraph was a tobacco warehouse designed and used for the sale of tobacco during the tobacco selling season. The rent for the premises for each year of the term of the lease was due and payable on 15 September, 1 October, 15 October and 1 November of said year. The courts will take judicial notice of the well known fact that the tobacco selling season of each year in Eastern North Carolina begins about 1 September and closes about 1 February of the following year, that the annual crop of tobacco is sold chiefly during the months of September, October and November, and that only a small portion of the crop is sold during the months of December and January. The notes executed by the plaintiffs and payable to the defendant matured during the season, the last note falling due on 1 November.

It was manifestly the intention of the parties to this agreement, as shown by the provisions of paragraph 4, construed in the light of all the provisions of said agreement, that if the warehouse located on the premises described in the agreement should be destroyed by fire before the notes executed by the parties of the second part in payment of the rent for the year in which the fire occurred, were due and paid, and before the close of the tobacco selling season for that year, then and in that event the parties of the second part should pay to the party of the first part only a just portion of the rent for which the notes were executed. There is no provision in the agreement for a refund by the party of the first part to the party of the second part of any sum in the event the warehouse was destroyed by fire, during the tobacco selling season of any year included in the term of the lease, and after the notes were due and paid. It is expressly provided that if a fire occurs after the close of the tobacco selling season of any year included in the terms of the lease, the party of the first part shall not be called upon to refund

any part of the rent paid for the preceding year. This proviso does not enlarge the liability of the party of the first part, or confer upon the party of the second part a right to recover any part of the rent paid during the preceding tobacco selling season.

There is error in the judgment which is founded upon the court's opinion that the agreement contemplated a rental by the month.

On the facts admitted in the pleadings, the plaintiffs are not entitled to recover of the defendant any sum as a refund for the rent paid for the year 1930. The defendant is entitled to recover of the plaintiffs the sum of $287.00, with interest from 30 December, 1930, and the costs of the action. The action is remanded to the Superior Court of Wayne County that judgment may be entered in accordance with this opinion. The judgment is

Reversed.

E. R. JOHNSON v. HOFFLER AND BONEY TRANSFER COMPANY, A CORPORATION.

(Filed 22 March, 1933.)

1. **Jury A d—Plaintiff is entitled to question jurors in good faith relative to their connections with liability insurance companies.**

   In an action involving negligence in causing an automobile collision, counsel for plaintiff is entitled to ask the jurors whether they are connected with any liability insurance companies when such questions are asked in good faith and solely for the purpose of ascertaining whether the jurors are affected by partiality or bias, and whether good faith is exercised must ordinarily be left to the sound discretion of the trial court, and in this case defendant's objections to the questions are not sustained, there being nothing in the record to show bad faith.

2. **Highways B o—Nonsuit is properly refused where more than one inference can be drawn from evidence on issue of contributory negligence.**

   In this action to recover damages resulting from a collision on a highway there was evidence tending to show that plaintiff ran his automobile into defendant's truck which was parked across the hard surface at an angle without lights. Defendant moved for a nonsuit on the ground that plaintiff could have seen the truck and would have avoided the injury had he used due care: *Held*, the motion as of nonsuit was properly refused, since more than one inference could be drawn from the evidence as to whether plaintiff was guilty of contributory negligence.

APPEAL by defendant from *Daniels, J.*, at September Term, 1932, of MARTIN. No error.

This is an action to recover damages for injury to person and property, growing out of a collision of the plaintiff's car with a truck owned by the defendant and operated by its employees.

The plaintiff offered evidence tending to show that on 3 November, 1931, between eight and eleven o'clock at night he was traveling southward in a Chevrolet car on Highway No. 40 between Wilson and Fremont at about 35 miles an hour; that his lights were burning; that his car was on the right side of the paved road and was under control; that he could have stopped within the range of his lights; that the defendant negligently left its truck, more than 26 feet in length, standing diagonally on the highway without lights; that its flat body was thirty-eight inches from the ground and extended more than eight feet behind the rear axle; that by reason of the defendant's negligence his car struck the truck and was badly damaged and that he was seriously and permanently injured.

The defendant denied negligence, denied that the truck had obstructed the part of the highway on which the plaintiff should have been traveling, and alleged that owing to a sudden and unexpected break in the electrical apparatus the front and rear lights went out and the truck rolled to the left side of the road onto the shoulder, leaving a small part of the body on the pavement; that an extension dash light, still burning, was affixed to the rear of the truck; that the defendant was in no respect negligent; and that the collision and consequent injury were due to the contributory negligence of the plaintiff.

Issues of the defendant's negligence, the plaintiff's contributory negligence, and damages were answered in favor of the plaintiff, and the defendant appealed.

W. S. Wilkinson, R. D. Johnson and Coburn & Coburn for appellant.
J. C. Smith, Hugh G. Horton and A. R. Dunning for appellee.

ADAMS, J. For the purpose of ascertaining whether the jury was affected by partiality or bias, counsel for the plaintiff inquired whether any juror represented an automobile liability insurance company or any insurance company, or worked for an agent of either of such companies, or had sold liability insurance. The defendant's objection to the evidence was overruled. We find nothing in the record to indicate that the questions were asked in bad faith or from improper motives. When such questions are asked in bad faith a recovery by the plaintiff should not be allowed to stand; but whether good faith has been exercised is a matter which must ordinarily be left to the sound discretion of the trial court. *Featherstone v. Cotton Mills,* 159 N. C., 429; *Goss v. Williams,* 196 N. C., 214, 223. In *Fulcher v. Lumber Co.,* 191 N. C., 408, it is said: "We cannot hold, where an attorney for a party to an action, in the performance of his duty, and in the exercise of his right, as such attorney, inquires of jurors tendered to plaintiff, if any of them sustains

such relation to an association or corporation, not a party to the action, which he knows or in good faith believes has an interest in the verdict which may be rendered, by reason of a contract, indemnifying the adverse party from loss by reason of such verdict, as would render the juror incompetent if such association or corporation was a party to the action, that the inquiry is in itself so prejudicial to defendant that defendant is entitled to have an adverse verdict set aside and the judgment reversed for this reason alone. The association or indemnity company is not ordinarily a proper party to the action, *Clark v. Bonsal,* 157 N. C., 270; it has, however, such an interest in the result of the action that no agent or employee can be held a competent juror to pass upon the issues between the plaintiff and the defendant of record. Plaintiff is entitled to know before the jury is empaneled, whether any juror is an agent of such a corporation, or a member of such an association." The first seven exceptions are, therefore, overruled.

The motion for nonsuit is without merit. It is founded on the theory, not that there is no evidence of the defendant's negligence, but that the plaintiff's negligence was the proximate cause of his injury. The defendant contends as a matter of common knowledge that the plaintiff could not have driven his car under the conditions described by him without seeing the truck in time to avert the collision by the exercise of due care. This position is taken in disregard of the fact that more than one inference may be drawn from the testimony and of the fact that it was permissible for the jury to find, as the verdict establishes, that the plaintiff was not negligent.

There is an exception to one clause in the instructions given the jury but it is so obviously untenable as to require no discussion. The case was carefully tried and the defendant was given the full benefit of such principles of law as were applicable to its defense.

No error.

STATE v. DAN HARRIS.

(Filed 22 March, 1933.)

Criminal Law L c—The regularity of the trial in the lower court is presumed, with the burden on appellant to show prejudicial error.

Where the allegations in defendant's motion for a new trial for misconduct affecting the jury and the solicitor's affidavit filed in response thereto are conflicting as to whether the jury knew of the alleged misconduct, and the trial court overrules the motion without finding the facts, there being no request therefor, the Supreme Court will not attempt

to find the facts from the conflicting averments, but it will presume that the trial court found facts supporting his action, and his judgment refusing the motion for a new trial will be upheld, the regularity of the trial being presumed with the burden on appellant to show prejudicial error.

APPEAL by defendant from *Sinclair, J.*, at December Term, 1932, of WAKE. No error.

The defendant was indicted and convicted of having carnal knowledge of a female child under the age of sixteen years, in breach of C. S., 4209. From the judgment pronounced he appealed.

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

Charles U. Harris and R. E. Parris for defendant.

ADAMS, J. The exceptions taken by the defendant, eliminating those which are formal, relate to an incident which occurred during the trial. A witness for the State testified on the cross-examination that she had reported the defendant's conduct to the chief of police at the request of the girl's mother. The inference was that the request had been communicated to the witness by letter. In arguing the case to the jury the defendant's counsel referred to the fact that no letter had been introduced and that no explanation of its absence had been made. The court took a recess until the next morning, and when it reconvened the solicitor gave the opposing counsel a letter and remarked, "There is the letter referred to in your speech to the jury yesterday." It is not known that any member of the jury heard the remark.

After the verdict was announced the defendant made a motion for a new trial and set out in writing his version of the transaction, and the solicitor filed an opposing affidavit. The court overruled the defendant's motion, to which exception was entered, and pronounced judgment. The defendant excepted and appealed.

The regularity of the trial is presumed and the burden is upon the appellant to show prejudicial error. *Quelch v. Futch*, 175 N. C., 694; *Blevins v. R. R.*, 184 N. C., 324; *Rawls v. Lupton*, 193 N. C., 428. The allegations made in the motion for a new trial and those in the affidavit differ in material respects. We cannot determine from conflicting averments just what the facts are, and the appellant did not request the presiding judge to find the facts in regard to the letter. Under these circumstances we cannot assume that the contents or the existence of the letter was known to the jury. In overruling the motion for a new trial the court presumably found the facts against the defendant's contention. In *Commissioner of Revenue v. Realty Co., ante*, 123, it was

said, "The court found no facts, but in the absence of a request to this effect by the appellant, we must assume that the judgment is based upon such facts as are essential to support it." Likewise in *Holcomb v. Holcomb,* 192 N. C., 504: "In the absence of such finding, it is presumed that the judge, upon proper evidence, found facts sufficient to support his judgment. *McLeod v. Gooch,* 162 N. C., 122. Hence, there is nothing for us to review. *Osborn v. Leach,* 133 N. C., 428. 'We do not consider affidavits for the purpose of finding facts ourselves in motions of this sort.' *Gardiner v. May,* 172 N. C., 192. It would have been error for the judge not to have found the facts, had he been requested to do so. *McLeod v. Gooch, supra.* But he is not required to make such finding in the absence of a request by some of the parties. *Lumber Co. v. Buhmann,* 160 N. C., 385. See *Norton v. McLaurin,* 125 N. C., 185, for full discussion of the subject." We find

No error.

FLORENCE KELLY McGEE v. CONTINENTAL LIFE INSURANCE COMPANY.

(Filed 22 March, 1933.)

Insurance J b—Evidence of payment of premium held insufficient to be submitted to the jury in this case.

Evidence tending to show that a person other than the insured placed in an envelope, addressed to the insurer and bearing the sender's return address, cash equal to the semiannual premium on insured's policy of life insurance, without more, is held insufficient to be submitted to the jury on the question of payment of the premium.

CLARKSON, J., dissents.

APPEAL by defendant from *Grady, J.,* at Second September Term, 1932, of HARNETT.

Civil action to recover on a life insurance policy.

After receiving several letters during the summer and fall of 1931, calling his attention to the fact that the policy in suit had lapsed for nonpayment of premiums, and suggesting that application for reinstatement be filed, the assured, Howard K. McGee, did, on 5 December, 1931, with the assistance of the then local agent, R. E. Davis, execute application for reinstatement. The assured was killed in an automobile accident four days thereafter, before his application had been acted upon by the defendant company.

The father of the deceased testified that he paid the semiannual premium of $24.02, due 13 May, 1931, on 6 June, within the 30-day period of grace, by placing two $10 bills, four $1 bills and two cents in an envelope addressed to the company at Saint Louis, Mo., with his return address thereon, and mailing the same in the United States post-office at Angier, N. C. R. E. Davis corroborated this testimony.

Upon this evidence, the jury found that the premium of $24.02, due on the policy in suit, 13 May, 1931, was "paid to and received by the defendant company on or before 13 June, 1931, as alleged in the complaint." If this be true, the policy was in force at the time of the death of the assured.

Judgment on the verdict for plaintiff, from which the defendant appeals, assigning errors.

Dupree & Strickland and J. R. Baggett for plaintiff.
Young & Young for defendant.

STACY, C. J. The case turns on whether the semiannual premium of $24.02, due 13 May, 1931, on the policy in suit, was paid within the 30-day period of grace. We agree with counsel for defendant that the evidence is not sufficient to go to the jury on this question.

The mailing of currency in an envelope, addressed to an insurance company, with return address thereon of one other than the assured, and with nothing therein to indicate what it is for, nothing else appearing, will not suffice to show payment of premium due on a particular policy.

This accords with the general holdings on the subject. Annotation, 47 A. L. R., 886, 48 C. J., 594; *Campbell v. Supreme Lodge,* 47 N. E. (Mass.), 109; *Gurney v. Howe,* 75 Mass., 404; *Crane v. Pratt,* 78 Gray, 348; *Donald v. Ins. Co.,* 4 S. C., 321; 3 Couch on Insurance, sec. 601.

Nor are our own decisions at variance with the general rule. *Coile v. Com. Travelers,* 161 N. C., 104, 76 S. E., 622; *Hollowell v. Ins. Co.,* 126 N. C., 398, 35 S. E., 616; *Whitley v. Ins. Co.,* 71 N. C., 480. The motion to nonsuit should have been allowed.

Reversed.

CLARKSON, J., dissents.

DAISY V. KOONCE AND HER HUSBAND, F. P. KOONCE, v. HENRY K. FORT.

(Filed 29 March, 1933.)

1. Mortgages H g—Under facts of this case order that bidder at sale under decree of foreclosure make cash deposit held valid.

Where under decree of foreclosure the lands have been repeatedly resold under the provisions of N. C. Code, 2591, and the commissioners in their report of the sixth resale call the court's attention to the number of resales and suggest that the demands for resale had not been made in good faith but to hinder and delay the plaintiff: *Held*, the court has the power in its discretion to order upon the hearing of the report that the last and highest bidder at future sales be required to deposit twenty-five per cent of the amount of his bid in cash or secured by bond to show his good faith. *Alexander v. Boyd, ante* 103, cited and distinguished.

2. Mortgages H n—Order of resale under sec. 2591 releases bidder at prior sale from liability.

Where the last and highest bidder at a sale of lands under decree of foreclosure has been required under order of court to deposit a certain per cent of his bid in cash to show his good faith, he is entitled to receive his deposit back upon the entering of an order of resale by the clerk under the provisions of N. C. Code, 2591, upon the placing of an advanced bid and cash deposit by another.

APPEAL by plaintiffs from *Harris, J.*, at December Term, 1932, of CARTERET. Affirmed.

This is an action to recover judgment on a note for $15,000, which was executed by the defendant and payable to the plaintiff, Daisy V. Koonce, and for the foreclosure of a mortgage by which the defendant conveyed to the said plaintiff the land described therein to secure the payment of said note at its maturity.

The action was begun in the Superior Court of Carteret County. At December Term, 1931, of said court, judgment was rendered that the plaintiff Daisy V. Koonce, recover of the defendant the sum of $15,000, with interest from 1 January, 1930, and the costs of the action. It was further ordered and decreed in said judgment that if the same was not paid within thirty days from the date of its rendition, the commissioners appointed by the court for that purpose, after due advertisement as required by law, should sell the land described in the mortgage at the courthouse door in Carteret County, to the highest bidder for cash, and report said sale to the court for confirmation.

Pursuant to the order and decree contained in said judgment, the commissioners named therein, filed their report in the Superior Court of Carteret County, showing that they had offered the land described in the mortgage for sale at the courthouse door in Carteret County, on 2

May, 1932, when and where the plaintiff, Daisy V. Koonce, was the last and highest bidder in the sum of $2,010. The commissioners reported that the said sum of $2,010, was, in their opinion, a full, fair and adequate price for said land at the date of said sale, and recommended that said sale be confirmed by the court.

After the said report had been filed, and before the said sale had been confirmed, a resale of the land was ordered by the clerk of the Superior Court of Carteret County, under the provisions of N. C. Code of 1931, section 2591. This resale was had on 30 May, 1932, when the plaintiff was again the last and highest bidder in the sum of $4,000. The commissioners reported this sale to the court and recommended that the sale be confirmed.

After the said report had been filed, and before the said sale had been confirmed, another resale was ordered by the clerk of the Superior Court of Carteret County, under the provisions of N. C. Code of 1931, section 2591. This resale was had on 27 June, 1932, when F. R. Davis was the last and highest bidder in the sum of $4,500. The commissioners reported this sale to the court, and recommended that the sale be confirmed.

After the said report had been filed, and before the said sale had been confirmed, another resale was ordered by the clerk of the Superior Court of Carteret County, under the provisions of N. C. Code of 1931, section 2591. This sale was had on 25 July, 1932, when F. R. Davis was again the last and highest bidder in the sum of $5,300. The commissioners reported this sale to the court, and recommended that the sale be confirmed.

After the said report had been filed, and before the sale had been confirmed, another resale was ordered by the clerk of the Superior Court of Carteret County, under the provisions of N. C. Code of 1931, section 2591. This sale was had on 22 August, 1932, when F. R. Davis was again the last and highest bidder in the sum of $5,900. The commissioners reported this sale to the court, and recommended that the sale be confirmed.

After the said report had been filed, and before the sale had been confirmed, another resale was ordered by the clerk of the Superior Court of Carteret County, under the provisions of N. C. Code of 1931, section 2591. This sale was had on 19 September, 1932, when F. R. Davis was again the last and highest bidder in the sum of $6,350. The commissioners reported this sale to the court and recommended that the sale be confirmed.

After the said report had been filed and before the sale had been confirmed, another resale was ordered by the clerk of the Superior Court of Carteret County, under the provisions of N. C. Code of 1931, section

2591. This sale was had on 17 October, 1932, when F. R. Davis was again the last and highest bidder in the sum of $6,850. The commissioners reported this sale to the court and recommended that the sale be confirmed.

In their report of this last sale the commissioners called the attention of the court to the number of resales of the land which they had been ordered to sell, each of said resales having been made under an order of the clerk of the Superior Court of Carteret County, made by him under the provisions of N. C. Code of 1931, section 2591, and suggested that the demands for such resales had not been made in good faith, but had been made at the instance of the defendant in order to hinder and delay the plaintiff in collecting her judgment against the defendant.

This report of the commissioners was heard at October Term, 1931, of the Superior Court of Carteret County, when and where an order was entered in the action as follows:

"This cause coming on to be heard, and being heard before his Honor, Clayton Moore, judge, upon the motion of T. D. Warren and R. A. Nunn, commissioners heretofore appointed herein, for authority to require the last and highest bidder at the sale of the lands ordered to be sold by them herein, to deposit as evidence of good faith and to insure compliance with the terms of sale by such bidder, if declared the purchaser of said lands, the sum of 25 per cent of such bid:

"It is considered by the court and ordered that said commissioners be and they are authorized and directed in future sales of said lands to require the last and highest bidder for the same to deposit with the said commissioners at the time of sale an amount equal to 25 per cent of such bid in cash, or 10 per cent of such bid in cash, and a good and sufficient bond in the additional sum of 15 per cent, to insure compliance by such bidder with the terms of sale, if such bidder be declared purchaser of said lands."

After the said report had been filed and before the sale had been confirmed, another resale was ordered by the clerk of the Superior Court of Carteret County. This sale was had on 14 November, 1932, when F. R. Davis was again the last and highest bidder in the sum of $7,400. Pursuant to the order of Judge Moore, the bidder, F. R. Davis, deposited with the commissioners the sum of $1,850, in cash, said sum being 25 per cent of the amount of his bid. The commissioners reported the said sale to the court, and recommended that the sale be confirmed.

After the said report had been filed, and before the sale had been confirmed, another resale was ordered by the clerk of the Superior Court of Carteret County, under the provisions of N. C. Code of 1931, section 2591. This resale was ordered upon the demand of Joseph F. Markley, who at the time of his demand for such resale, deposited with the said

clerk the sum of $415, in cash, as required by the statute. The said Joseph F. Markley did not deposit with the commissioners an amount equal to 25 per cent of his raised bid for the land. Pursuant to the order of the clerk of the Superior Court, the commissioners advertised the land for sale on Monday, 12 December, 1932. Thereafter, F. R. Davis, the last and highest bidder at the sale had on 14 November, 1932, made a demand, in writing, on the commissioners for the return to him of the amount of his deposit with said commissioners, made pursuant to the order of Judge Moore. This demand was refused by the commissioners who thereafter reported to the court the demand of the said F. R. Davis, and their refusal of such demand. The commissioners requested the court to advise them in the premises.

This report was heard by Judge Harris, at the December Term, 1932, of the Superior Court of Carteret County. On the facts appearing in the record, the court was of opinion that the sale had on 14 November, 1932, was vacated by the order of resale made thereafter by the clerk of the Superior Court, and that F. R. Davis was thereby released and discharged of all liability as a bidder at said sale and is entitled to the return of his deposit made pursuant to the order of Judge Moore, at October Term, 1932, of said court.

From the order that the commissioners return to F. R. Davis the sum of $1,850, deposited with them by him as the last and highest bidder at the sale had on 14 November, 1932, the plaintiffs appealed to the Supreme Court.

R. A. Nunn and Warren & Warren for plaintiffs.
W. B. Snow for F. R. Davis.

CONNOR, J. The only question presented by this appeal for decision by this Court is whether there was error in the order of Judge Harris directing the commissioners to return to F. R. Davis the sum of $1,850, deposited with them by him as the last and highest bidder at the sale made by the commissioners on 14 November, 1932. This sum was deposited by F. R. Davis with the commissioners pursuant to the order of Judge Moore. This was a valid order, made by Judge Moore in the exercise of his judicial discretion. *Alexander v. Boyd, ante,* 103, 167 S. E., 462, is not applicable to this order. In that case, we held that where land was sold by a trustee under the power of sale contained in a deed of trust, a requirement by the trustee that the last and highest bidder at the sale deposit with him at the time of the sale, as an evidence of his good faith, and of his financial ability to comply with the terms of his bid, a sum equal to 25 per cent of the amount of his bid, was arbitrary and unreasonable. The requirement was not authorized by the

terms upon which the power of sale was conferred upon the trustee, and deprived the mortgagor of the protection provided by N. C. Code of 1931, section 2591. In the instant case, the requirement was made by the judge, after notice to the parties to the action, in the exercise of his judicial discretion, and was valid. There is nothing in the statute which deprives the court of its power to prescribe the terms upon which land or other property shall be sold under its orders, judgments or decrees.

The order of resale made by the clerk of the Superior Court of Carteret County in the instant case, under the provisions of N. C. Code of 1931, section 2591, vacated the sale made by the commissioners on 14 November, 1932. *Pringle v. Loan Association,* 182 N. C., 316, 108 S. E., 914. F. R. Davis, who was the last and highest bidder at said sale, and who as such complied with the order of Judge Moore, was released from all liability by reason of his bid, by the order of resale. *Trust Co. v. Powell,* 189 N. C., 372, 127 S. E., 242. When the resale was ordered by the clerk, he was entitled to the return of his deposit. There was no error in the order of Judge Harris that the commissioners return to him the amount of his deposit. The order is

Affirmed.

DAISY V. KOONCE AND HER HUSBAND, F. P. KOONCE, v. HENRY K. FORT.

(Filed 29 March, 1933.)

1. Appeal and Error A e—

Where the question sought to be presented on appeal has become academic the appeal will be dismissed.

2. Appeal and Error A d—

Appeals from interlocutory orders entered in this cause which is still pending upon exceptions to commissioners' report of the sale of the lands are dismissed as premature.

APPEAL by defendant from *Frizzelle, J.,* at Chambers, in Snow Hill, N. C., on 2 January, 1933. Appeal dismissed.

This is an action to foreclose a mortgage executed by the defendant to secure his note payable to the plaintiff, Daisy V. Koonce.

Pursuant to a judgment and decree rendered in the action at December Term, 1931, of the Superior Court of Carteret County, and in obedience to an order made by the clerk of said court, for a resale, under the provisions of N. C. Code of 1931, section 2591, the commissioners appointed by the court advertised the land described in the mortgage for sale on 3 January, 1933.

On 29 December, 1932, on the motion of the defendant, an order was made in the action by Judge Frizzelle, at his Chambers, in Snow Hill, N. C., by which the commissioners were restrained from selling the land on 3 January, 1933, or thereafter pending an appeal by the defendant from an order made by Judge Harris, at December Term, 1932, of the Superior Court of Carteret County. This order was dissolved and vacated by Judge Frizzelle, at his Chambers, in Snow Hill, N. C., on 2 January, 1933.

The commissioners offered the land for sale on 3 January, 1933, pursuant to their advertisement, and thereafter filed with the court their report of said sale. The action is now pending in the Superior Court of Carteret County, before the judge, on exceptions filed to said report. These exceptions have not been considered or passed upon by the judge of the Superior Court of Carteret County.

The defendant appealed from the order of Judge Frizzelle, dated 2 January, 1933, to the Supreme Court.

R. A. Nunn and Warren & Warren for plaintiffs.
W. B. Snow for defendant.

CONNOR, J. This appeal must be dismissed. The question as to whether there was error in the order of Judge Frizzelle dated 2 January, 1933, is now academic. It appears from the record filed in this Court that after the order signed by Judge Frizzelle on 29 December, 1933, was dissolved and vacated by him on 2 January, 1933, the commissioners offered the land for sale on 3 January, 1933, and thereafter filed with the court a report of said sale. The action is now pending in the Superior Court of Carteret County, before the judge, on exceptions duly filed to said report.

The appeals from the order of Judge Moore, at October Term, 1932, and from the order of Judge Harris, at December Term, 1932, of the Superior Court of Carteret County, are premature. These orders are interlocutory. There has been no final judgment in the action, confirming the sale of the land described in the mortgage. Until such judgment has been rendered, this Court will not consider or pass upon the questions of law discussed on the argument and in the briefs filed on this appeal. See, however, the opinion filed this day in the appeal by the plaintiffs in this action. (*Koonce v. Fort, ante,* 426.)

Appeal dismissed.

S. B. PARKER COMPANY, AND OTHERS AS INTERVENERS, v. THE COMMERCIAL BANK OF HIGH POINT, N. C., THE CENTRAL TRUST COMPANY OF CHARLESTON, W. VA., THE UNION MORTGAGE AND INVESTMENT COMPANY, AND EAST CAROLINA MOTOR COMPANY.

(Filed 29 March, 1933.)

Mortgages C d—Under facts of this case mortgagee is held entitled to rents and profits collected from land by receiver.

While ordinarily a mortgagee is not entitled to the rents and profits from the mortgaged lands even after default, where the foreclosure of the land has been restrained, and a commissioner to sell the land has been appointed by the court, and the land, pending the sale, has been placed in the hands of a receiver, the rents and profits from the land collected by the receiver pending the action should be applied to the payment of the mortgage debt as against the other creditors of the mortgagor where the sale by the commissioner brings an amount insufficient to discharge the mortgage indebtedness.

APPEAL by the defendant, the Union Mortgage and Investment Company, from *Frizzelle, J.*, at October Term, 1932, of CRAVEN. Reversed.

This action was begun by the plaintiff, S. B. Parker Company, a judgment creditor of the defendant, East Carolina Motor Company, to restrain the sale of land conveyed by said defendant to its codefendants, the Commercial Bank of High Point, N. C., and the Central Trust Company of Charleston, W. Va., as trustees, to secure the payment of its note for the sum of $28,000, payable to bearer, and now owned by the defendant, the Union Mortgage and Investment Company. Default having been made in the payment of said note, the land conveyed by the deed of trust had been advertised for sale by the defendant trustees, under the power of sale contained in said deed, on 13 October, 1930.

The action was begun in the Superior Court of Craven County on 11 October, 1930, and thereafter, on motion of the plaintiff, Geo. H. Roberts was appointed by the court as receiver of the defendant, East Carolina Motor Company. The said receiver took possession of the land described in the deed of trust, and of the building located thereon, and under the orders of the court collected the rents for said land and building during the pendency of the action.

At May Term, 1932, of the Superior Court of Craven County, judgment was rendered in the action, by consent, that the defendant, the Union Mortgage and Investment Company, recover of the defendant, East Carolina Motor Company, on the note secured by the deed of trust, the sum of $12,000, with interest from the date of said judgment. It was ordered and decreed in said judgment that the land described in the deed of trust, together with the building located thereon, be sold by the commissioner appointed by the court for that purpose, and that the pro-

ceeds of said sale, when the sale had been reported to and confirmed by the court, be applied to the payment (1) of the costs and expenses of the sale, and the unpaid costs of the action; (2) of the unpaid taxes on said land and building due to the city of New Bern, and the county of Craven; and (3) of the judgment in the action. It was further ordered that the remainder of the proceeds of said sale, if any, should be paid to the receiver of the defendant, East Carolina Motor Company.

Pursuant to the order and decree of the court, the commissioner appointed therein, sold the land described in the deed of trust, together with the building located thereon, on 5 September, 1932, to the Metropolitan Realty Company, the last and highest bidder at said sale, in the sum of $12,000. This sale was duly reported to and confirmed by the court, and thereafter the commissioner conveyed the said land and building to the Metropolitan Realty Company, upon its compliance with its bid. After the payment of the costs and expenses of the sale, and the costs of the action, and of the unpaid taxes due the city of New Bern and the county of Craven, the commissioner paid the remainder of the proceeds of the sale, to wit: the sum of $3,200.59, on the judgment for $12,000, rendered in the action in favor of the defendant, the Union Mortgage and Investment Company and against the defendant, East Carolina Motor Company.

There is now in the hands of Geo. H. Roberts, receiver of the defendant, East Carolina Motor Company, the sum of $1,219.05, which sum is the balance of the amounts collected by him, during the pendency of the action, as rents for the land described in the deed of trust and for the building located thereon. These amounts were collected by said receiver under orders of the court. He has paid out of said amounts, under orders of the court, sums due for fire insurance premiums, and for repairs to the building, while the same was in his possession.

At October Term, 1932, of the Superior Court of Craven County, the motion of the defendants, other than East Carolina Motor Company, that the receiver be ordered to pay the said sum of $1,219.05 on the judgment rendered in this action at May Term, 1932, was heard by Judge Frizzelle and denied. It was ordered by the court that the receiver distribute said sum among the general creditors of the East Carolina Motor Company, whose claims had been filed and approved.

From this order, the defendant, the Union Mortgage and Investment Company appealed to the Supreme Court.

H. P. Whitehurst, R. E. Whitehurst and W. B. R. Guion for plaintiff.
W. H. Lee and Moore & Dunn for defendant.

CONNOR, J. There was error in the order denying the motion of the defendant, the Union Mortgage and Investment Company, and directing

the receiver appointed by the court in the action to distribute the sum of money now in his hands and collected by him during the pendency of the action, as rents from the property conveyed to trustees by the defendant, East Carolina Motor Company, to secure its note recited in the deed of trust, among the general creditors of the East Carolina Motor Company.

Ordinarily, a mortgagee or creditor secured by a deed of trust, has no right to collect the rents or other income from property conveyed by the mortgage or deed of trust, even after default in the payment of the secured indebtedness. This right arises only after the mortgagee or trustee has taken possession of the property conveyed by the mortgage or deed of trust, by consent or pursuant to an order or decree of a court of competent jurisdiction; but, where, as in the instant case, a receiver appointed by the court in an action involving the right to foreclose the mortgage or deed of trust, has taken possession of the property and collected the rents or income from the property during the pendency of the action, under the orders of the court, such rents or income should be applied as a payment on the secured indebtedness, when the amount realized from the sale of the property is not sufficient to pay the indebtedness or the judgment for the same.

If the law were otherwise, a grave injustice to the creditor would result.

On the facts appearing on the record in this appeal, the rents collected by the receiver, should be applied as a payment on the judgment. The order to the contrary is

Reversed.

HETTIE MATHIS, ADMINISTRATRIX OF WATSON MATHIS, DECEASED, v. CAMP MANUFACTURING COMPANY.

(Filed 29 March, 1933.)

1. Death B a—

An action for wrongful death must be brought within one year of the accrual of the cause of action, and plaintiff must prove that the action was brought within the prescribed time, and this provision is not a statute of limitation but a condition affecting the cause of action. C. S., 160.

2. Same—Action instituted in Superior Court for wrongful death will not be considered continuation of proceedings under Compensation Act.

Where a proceeding for compensation is instituted before the Industrial Commission by the dependent widow of a deceased employee against the employer and its insurance carrier, and the proceeding is dismissed, an action thereafter begun in the Superior Court by the widow as administratrix against the employer to recover for the employee's wrongful

death will not be considered a continuation of the proceedings before the Industrial Commission so as to relate back to the time of the institution of such proceedings, and the action instituted in the Superior Court is barred if not brought within one year from the employee's death. C. S., 160, there being a distinction between dismissal of proceedings under the Compensation Act and a nonsuit entered in an action instituted in the Superior Court entitling plaintiff to institute a new action within one year, C. S., 415.

APPEAL by plaintiff from *Devin, J.*, at October Term, 1932, of PENDER. Affirmed.

Watson Mathis, husband of Hettie Mathis, died intestate on 2 October, 1930, while in the employ of the defendant as skidder foreman. Soon after his death Hettie Mathis brought a proceeding before the North Carolina Industrial Commission entitled "Hettie Mathis, dependent wife of Watson Mathis, deceased, plaintiff, *v.* Camp Manufacturing Company, employer, and Consolidated Underwriters, carrier." From an order of the Industrial Commission an appeal was taken to the Superior Court and at the December Term, 1931, of Gates County Judge Frizzelle made an order that the proceeding be remanded to the Industrial Commission for the purpose of being dismissed, on the ground that the deceased at the time of his death was a railroad employee and was not bound by the Workmen's Compensation Act. From this order there was no appeal. The proceeding was dismissed.

On 15 June, 1931, Hettie Mathis qualified as administratrix of the estate of her deceased husband and on 20 August, 1932, brought this action in the Superior Court of Pender County to recover damages for the wrongful death of her husband. The defendant filed a plea in abatement on the ground that the action cannot be maintained. Judge Devin sustained the plea and dismissed the action. The plaintiff excepted and appealed.

George R. Ward for plaintiff.
J. J. Best and Herbert McClammy for defendant.

ADAMS, J. Any person who causes the wrongful death of another is liable to an action for damages to be brought by the personal representative of the deceased within one year after the death. C. S., 160; *Davis v. R. R.*, 200 N. C., 345. The provisions as to time is not a statute of limitation but a condition affecting the cause of action. *Gulledge v. R. R.*, 148 N. C., 567. It follows, not only that the plaintiff must bring his action within one year after the death; he must at the trial make proof of the fact. *Hanie v. Penland*, 193 N. C., 800; *Hatch v. R. R.*, 183 N. C., 617; *Bennett v. R. R.*, 159 N. C., 345. The plaintiff complies with this provision of the statute if he begins his action within the

prescribed time, takes a nonsuit, and institutes a new action within one year after nonsuit. C. S., 415; *Trull v. R. R.*, 151 N. C., 545; *Brooks v. Lumber Co.*, 194 N. C., 141. The second action would thus relate back to the beginning of the first. *Quelch v. Futch*, 174 N. C., 395. Compare *Loan Co. v. Warren, ante*, 50.

The plaintiff's intestate died 2 October, 1930; the proceeding first instituted was dismissed in December, 1931; the plaintiff brought this suit 20 August, 1932. The action is therefore tolled unless it can be construed as a continuation after nonsuit of the proceedings begun before the Industrial Commission. This is the position on which the plaintiff relies, but we are of opinion that it cannot be maintained.

Only for the purpose of the argument, we may accede to the proposition that the judgment dismissing the proceedings before the Industrial Commission did not necessarily prevent the plaintiff from beginning anew. *Pescud v. Hawkins*, 71 N. C., 299. Another fact, however, must be kept in mind. Section 415 applies only to actions instituted in the regular course of civil procedure and not to collateral or incidental proceedings. "This appears from the legal meaning of the terms employed and the obvious implication arising upon them, taken together, to express the legislative intent. The leading important words are 'an action,' 'an action commenced within the time prescribed therefor,' 'a judgment therein,' 'reversed on appeal,' or 'arrested,' 'the cause of action survived,' 'a new action.'" *McIlhenny v. Trust Co.*, 108 N. C., 311. The two suits must be for substantially the same cause and the parties must be identical. *Quelch v. Futch, supra.*

In the pending case these conditions are not met. The tribunals are diverse in their origin, their jurisdiction, their purpose. The Industrial Commission is the creature of statute; the Superior Court is grounded in the Constitution. The Commission administers compensation without regard to fault as the basis of liability. *Conrad v. Foundry Co.*, 198 N. C., 723. Under section 160 the Superior Court awards damages only when the death of a person is caused by the wrongful act, neglect, or default of another. The distinction between the administrative functions of the one and the judicial functions of the other is pointed out in *Brown v. R. R.*, 202 N. C., 256.

The parties and causes are distinct. The proceedings before the Industrial Commission were brought by Hettie Mathis, as dependent wife, against the Camp Manufacturing Company and Consolidated Underwriters, carrier, for an award of compensation under the terms of the Workmen's Compensation Act. The present action is prosecuted to recover damages, which would be disposed of under the statute providing for the distribution of personal property in case of intestacy. The judgment is

Affirmed.

IN RE WILL OF M. T. HOWELL.

(Filed 29 March, 1933.)

1. Attorney and Client D a—Ordinarily attorney's fee may not be allowed as element of damages or costs.

Ordinarily, counsel fees may not be included as an element of damages, nor allowed as a part of the costs in a civil action or special proceeding, although the court may under statutory or chancery powers allow attorney fees in certain instances where the attorney is appointed by the court.

2. Wills D m—

An order allowing fees for attorneys for caveators out of the estate pending further proceedings after a mistrial in the caveat proceedings is erroneous.

APPEAL by propounders and executor from *Sinclair, J.*, at November Term, 1932, of FRANKLIN.

Issue of *devisavit vel non,* raised by a caveat to the will of M. T. Howell, late of Franklin County, based upon alleged mental incapacity and undue influence, heard upon issue of mental capacity, which resulted in a mistrial; whereupon allowance out of the estate of counsel fees to attorneys for caveators was made over objection of propounders and executor, from which order they appeal.

E. F. Griffin and Yarborough & Yarborough for propounders and executor.

W. L. Lumpkin and Thos. W. Ruffin for caveators.

STACY, C. J. After probate in common form, a caveat was filed to the will of M. T. Howell, based upon alleged mental incapacity and undue influence. The matter was transferred to the civil issue docket for trial. The case was heard and a mistrial ordered when the jury failed to agree. There was evidence pro and con on the issue of mental capacity, but none to support the allegation of undue influence. From an order directing the executor to pay out of the estate counsel fees to attorneys for caveators pending further proceedings, the propounders and executor appeal.

Under the Revised Code of 1854, chap. 102, sec. 16, it was permissible to include certain attorney's fees, definitely fixed by the statute, as a part of the costs in civil suits, but this was repealed by chap. 41, Laws, 1879. *Clifton v. Wynne,* 81 N. C., 160. Accordingly, it may be stated as the general rule in this jurisdiction that counsel fees, as such, are not allowed as a part of the costs in civil actions or special proceedings.

Ragan v. Ragan, 186 N. C., 461, 119 S. E., 882; *Byrd v. Casualty Co.,* 184 N. C., 226, 114 S. E., 172; *Roe v. Journigan,* 181 N. C., 180, 106 S. E., 680; *Durham v. Davis,* 171 N. C., 305, 88 S. E., 433; *Midgett v. Vann,* 158 N. C., 128, 73 S. E., 801; *Donlan v. Trust Co.,* 139 N. C., 212, 51 S. E., 924; *R. R. v. Goodwin,* 110 N. C., 175, 14 S. E., 687; *Gay v. Davis,* 107 N. C., 269, 12 S. E., 194; *Patterson v. Miller,* 72 N. C., 516; *Ralston v. Telfair,* 22 N. C., 414.

Speaking to the subject generally in *Mordecai v. Devereux,* 74 N. C., 673, *Pearson, C. J.,* delivering the opinion of the Court, said: "This Court has never interfered between attorney and client in making allowance for professional services, and we are not inclined at this late day to assume the power to do so. We make allowance to a clerk for stating an account or to a commissioner for making sales, on the ground that the work is done by order of the court. But we have never supposed that we could be called on to settle fees between client and attorney, although there be a fund in the keeping of the court."

Nor is it permissible ordinarily to award as an element of damages, attorney's fees incurred in the course of litigation. *Parker v. Realty Co.,* 195 N. C., 644, 143 S. E., 254; *Knights of Honor v. Selby,* 153 N. C., 203, 69 S. E., 51; *Hyman v. Devereux,* 65 N. C., 588.

A stipulation in a promissory note, mortgage, or deed of trust, authorizing the collection of attorney's fees in the event of foreclosure or suit, has been held to partake of the nature of a penalty or forfeiture, to savor of usury, and to be contrary to the public policy of the State. *Bank v. Land Co.,* 128 N. C., 193, 38 S. E., 813; *Turner v. Boger,* 126 N. C., 300, 35 S. E., 592; *Williams v. Rich,* 117 N. C., 235, 23 S. E., 257; *Brisco v. Norris,* 112 N. C., 671, 16 S. E., 850; *Tinsley v. Hoskins,* 111 N. C., 340, 16 S. E., 325.

It is true, that in the exercise of chancery powers, or by express statute, the court may make an allowance for attorney's fees as reasonable expenses incurred by a personal representative, trustee, or person appointed by the court for a particular purpose, as next friend or guardian *ad litem* for an infant or insane person. In such cases the amount to be paid does not depend upon the agreement of the parties, but is within the control of the court. *In re Stone,* 176 N. C., 336, 97 S. E., 216; *Overman v. Lanier,* 157 N. C., 544, 73 S. E., 192; *Kelly v. Odum,* 139 N. C., 278, 51 S. E., 953; *Graham v. Carr,* 133 N. C., 449, 45 S. E., 847; *Young v. Kennedy,* 95 N. C., 265; *Moore v. Shields,* 69 N. C., 50; *Mariner v. Bateman,* 4 N. C., 350; *Central Railroad v. Pettus,* 113 U. S., 122; *Trustees v. Greenough,* 105 U. S., 527; *Harrison v. Perea,* 168 U. S., 311.

The authorities on the precise question here presented are variant, as will appear by reference to Annotations in 10 A. L. R., 783, and 69

A. L. R., 1052, where the whole subject is elaborately discussed. There seems to be no precedent in this jurisdiction for ordering an executor, pending the proceedings, to pay out of the estate counsel fees to attorneys for caveators. Nor is the authority supported in tendency by our decisions. They point in the other direction. The order appealed from will be stricken out or vacated.

Error.

SUSIE CRUMP v. SOUTHERN-DIXIE LIFE INSURANCE COMPANY.

(Filed 29 March, 1933.)

Insurance D b—Evidence that insured was half-sister of beneficiary held insufficient alone to establish insurable interest.

Evidence tending to show that the beneficiary to whom the policy of insurance was issued and who paid the premiums thereon was the half-sister of the insured, the insured being the illegitimate daughter of the beneficiary's father, is held insufficient, standing alone, to establish the beneficiary's insurable interest in the life of the insured, and the policy is void.

APPEAL by the defendant from *Moore, Special Judge,* at January Special Term, 1932, of WAKE. Reversed.

This is an action by the plaintiff as the beneficiary named therein to recover on a policy of insurance issued by the defendant on the life of Ellen Wilson, deceased.

The policy sued on was issued on 22 August, 1932. The insured, Ellen Wilson, died on 5 October, 1932. On 27 July, 1932, she was discharged from a hospital in the city of Raleigh, N. C., where she had been confined as a patient since 28 May, 1932. Before she was discharged from the hospital her physician informed the plaintiff, who had called to see her at the hospital, that Ellen Wilson was suffering from an incurable disease and that she could not get well. The evidence offered by the defendant showed that she had cancer of the liver, in the last stage, at the time she was discharged from the hospital.

The application for the policy was signed in the home of the plaintiff, in the city of Raleigh, on 8 August, 1932, Ellen Wilson was not present at the time the application was signed in her name. There was no evidence tending to show that she knew that the application for the policy would be made or that the policy would be issued. There was conflict in the evidence as to whether she was ever informed that the policy had been issued by the defendant. The policy was delivered to the plaintiff at her home, and remained in her possession at all times

thereafter until the death of Ellen Wilson. The first and all subsequent weekly premiums on the policy were paid by the plaintiff or by her husband.

The relationship of the insured, Ellen Wilson, to the plaintiff, as stated in the application and in the policy was that of sister. At the trial, the plaintiff testified that she and Ellen Wilson had the same father, but did not have the same mother; that Ellen Wilson was the illegitimate child of plaintiff's father; and that she did not live in the home of the plaintiff at the time the policy was issued or at her death. Neither the plaintiff nor her husband attended the funeral of Ellen Wilson.

The issues submitted to the jury were answered as follows:

"1. Did Susie Crump fraudulently obtain the issuance of the policy of insurance sued on, as alleged by the defendant? Answer: No.

2. Did the insured, Ellen Wilson, die from a cancer as alleged by the defendant? Answer: No.

3. In what sum, if any, is the defendant indebted to the plaintiff? Answer: $132.50."

From judgment that plaintiff recover of the defendant the sum of $132.50 and the costs of the action, the defendant appealed to the Supreme Court.

A. W. Crawley and Douglass & Douglass for plaintiff.

A. J. Fletcher for defendant.

CONNOR, J. There was error in the refusal of the trial court to allow the motion of the defendant, at the close of all the evidence, for judgment as of nonsuit. All the evidence at the trial shows that the policy sued on was a wagering contract between the plaintiff and the defendant, and for that reason void. The plaintiff had no insurable interest in the life of the insured, Ellen Wilson. Conceding that her testimony was competent as evidence tending to show that Ellen Wilson was the illegitimate daughter of plaintiff's father, and, therefore, the natural half-sister of the plaintiff, this relationship alone was not sufficient to support the policy as a valid contract. See *Rogers v. Insurance Company* (S. C.), 133 S. E., 215, 45 A. L. R., 1172, and note.

A policy of insurance on the life of another issued to the beneficiary, who has no insurable interest in the life insured, is void, as against good morals and sound public policy, where the premiums are paid by the beneficiary. *Slade v. Ins. Co.*, 202 N. C., 315, 162 S. E., 734; *Hinton v. Ins. Co.*, 135 N. C., 314, 47 S. E., 474; *College v. Ins. Co.*, 113 N. C., 244, 18 S. E., 175. This action should be dismissed. To that end the judgment is

Reversed.

COMMISSIONER OF BANKS, EX REL. GOLDSBORO SAVINGS AND TRUST COMPANY, v. PAUL YELVERTON AND WIFE, ANNIE H. YELVERTON.

(Filed 29 March, 1933.)

1. Statutes A c—N. C. Code, 6464(a) cannot be given retroactive effect.

N. C. Code of 1931, sec. 6464(a), providing that the beneficiary named in a policy of life insurance, or an assignee of such policy if the transfer is not made with intent to defraud creditors, shall be entitled to the proceeds of the insurance free from the claims of creditors of the insured cannot affect policies written before the effective date of the statute.

2. Executors and Administrators B a—

Under our Constitution and statutes the law favors exemption of the proceeds of life insurance from the claims of creditors of the insured as against the interests of the insured's wife and children. Art. X, sec. 7, N. C. Code, secs. 6464.

3. Execution B e—Judgment debtor is entitled to personal property exemption as often as pressed with execution.

The five-hundred-dollar personal property exemption prescribed by Art. X, sec. 1, of our Constitution entitles a judgment debtor to the amount of the exemption at all times, and such sum may be set apart for the comfort and support of the judgment debtor as often as the judgment debtor may be pressed with executions.

4. Same—Judgment debtor may apply $300 monthly income from disability insurance to monthly living expenses under personal property exemption.

Where supplemental proceedings are instituted upon return of execution unsatisfied on a judgment against a husband and wife, C. S., 721, and it appears that the husband is totally and permanently disabled and has no property upon which execution could be levied, but is receiving the sum of three hundred dollars a month under disability insurance: *Held*, the judgment debtor is entitled, under his personal property exemption, to the three hundred dollars each month if such amount is necessary for the support of himself and wife, and an order appointing a receiver to collect the sum each month and apply it to the judgment after setting apart the personal property exemption, C. S., 722, is erroneous, it not being permissible for the monthly payments to be thus pyramided.

5. Same—Personal property exemption can be claimed in supplemental proceedings.

While the statute prescribes the manner in which a judgment debtor's personal property exemption must be set aside, C. S., 737, the exemption exists by virture of the Constitution, and where the judgment debtor has not waived his exemption he is entitled to claim it in supplemental proceedings instituted by the judgment creditor.

CONNOR, J., dissenting.

APPEAL by defendants from *Grady, J.*, at Chambers, 20 December, 1932. From WAYNE. Reversed.

This was an appeal by the plaintiff from a judgment of the clerk of the Superior Court, entered herein, upon petition in supplemental proceedings, on 2 December, 1932. The court below found the facts as follows and rendered judgment thereon:

"Plaintiff holds a valid judgment against both defendants for the sum of $3,650, which was entered in the Superior Court on 13 July, 1931; execution has been issued on said judgment and returned unsatisfied by the sheriff of Wayne County; no part of said judgment has ever been paid, and plaintiff has caused a warrant in supplementary proceedings to be issued herein, all of which will appear by reference to the judgment roll.

Paul Yelverton owns a life insurance policy, in the sum of $10,000, issued to Annie H. Yelverton, his wife, in which the right to change the beneficiary is not reserved. The interest of Annie H. Yelverton in said policy is vested, and cannot be changed by her husband. On said policy, Paul Yelverton is receiving a monthly allowance of $100, due to his health conditions, which have been passed upon by said insurance company.

Paul Yelverton owns another policy of life insurance in the sum of ten thousand dollars, payable to his wife, with the right to change the beneficiary reserved to him. Said policy has no cash surrender value; but said Paul Yelverton is receiving from said company, under the health benefit clause of said policy the sum of $100 per month. This latter policy was issued by Ætna Life Insurance Company.

Paul Yelverton also has two other policies issued by Ætna Life Insurance Company, from which he is receiving the sum of $50.00 each per month, on account of disabilities.

The court finds that Paul Yelverton is permanently and totally disabled to earn a living from any kind of labor, mental or physical.

The defendants have no property which is subject to seizure and sale under execution.

The defendants contend that their interests in said policies are not subject to condemnation by the court, and that they cannot be reached in this proceeding. The cash surrender value of the $10,000 policy, issued by the Northwestern National Life Insurance Company, and the monthly stipends now being paid to the defendant, Paul Yelverton, are property; that have a value in law. Under section 721 of the Code of this State that 'any property, whether subject or not to be sold under execution (except the homestead and personal property exemptions of other person, or due the judgment debtor), may be ordered applied upon services at any time within sixty days next preceding the order; and also, for sale of public policy, the salaries of public officers and employees of the State, are exempt from seizure under supplementary proceedings.'

Therefore, upon the admitted facts, it is now considered by the court—ordered, adjudged and decreed that the conclusions of law of said clerk be, and the same are overruled; and this cause is remanded to said clerk for the following purposes, to wit: Upon application of the plaintiff he will appoint some competent and disinterested person as receiver of the property and assets of the defendants; and said receiver will qualify by entering into bond in the sum of $1,000, conditioned as required under the statutes in cases of receivers; and he shall have the power to enter suit against the defendants, or any insurance company referred to in the judgment of the clerk, and in this judgment, and recover of such company or companies any sum to which he shall be adjudged entitled; and all of the moneys so collected by him, saving and excepting the personal property exemptions of the two defendants, he will apply upon the judgment heretofore recovered in this action against the defendants."

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

Kenneth C. Royall, Carlisle Smith and Allen Langston for plaintiff.
Dickinson & Freeman for defendants.

CLARKSON, J. The question involved: Where an insured being totally disabled is receiving three hundred dollars ($300) per month for total and permanent disability under the provisions of life insurance policies, payable to the wife of the insured, may the court under judgment against both the insured and his wife, under supplementary proceedings have a receiver appointed to collect the disability payments and apply the same to the judgment? Under the facts and circumstances of this case we think that Paul Yelverton is entitled to the personal property exemption out of the $300 paid him each month as part of the $500 personal property exemption allowed him by the Constitution of North Carolina, if it was necessary for him to spend the $300 each month for his and his family's support and comfort.

Article X, sec. 7, Constitution of North Carolina, is as follows: "The husband may insure his own life for the sole use and benefit of his wife and children, and in case of the death of the husband the amount thus insured shall be paid over to the wife and children, or to the guardian if under age, for her or their own use, free from all the claims of the representatives of her husband, or any of his creditors."

C. S., 6464, N. C. Code, 1931 (Michie), sec. 6464, is as follows: "When a policy of insurance is effected by any person on his own life, or on another life in favor of some person other than himself having an insurable interest therein, the lawful beneficiary thereof, other than himself or his legal representatives, are entitled to its proceeds against

the creditors and representatives of the person effecting the insurance. The person to whom a policy of life insurance is made payable may maintain an action thereon in his own name. Every policy of life insurance made payable to or for the benefit of a married woman, or after its issue assigned, transferred, or in any way made payable to a married woman, or to any person in trust for her or for her benefit, whether procured by herself, her husband, or by any other person, and whether the assignment or transfer is made by her husband or by any other person, inures to her separate use and benefit and to that of her children if she dies in his lifetime." *Pearsall v. Bloodworth,* 194 N. C., 628; *Teague v. Ins. Co.,* 200 N. C., 450.

N. C. Code, 1931 (Michie), sec. 6464(a), Public Laws, 1931, chap. 179, sec. 1, is as follows: "If a policy of insurance, whether heretofore or hereafter issued, is effected by any person on his own life or on another life, in favor of a person other than himself, or, except in cases of transfer with intent to defraud creditors, if a policy of life insurance is assigned or in any way made payable to any such person, the lawful beneficiary or assignee thereof, other than the insured or the person so effecting such insurance, or his executor or administrator, shall be entitled to its proceeds and avails against creditors and representatives of the insured and of the person effecting same, whether or not the right to change the beneficiary is reserved or permitted, and whether or not the policy is made payable to the person whose life is insured if the beneficiary or assignee shall predecease such person: *Provided,* that subject to the statute of limitations, the amount of any premium for said insurance paid with intent to defraud creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy; but the company issuing the policy shall be discharged of all liability thereon by payment of its proceeds in accordance with its terms unless before such payment the company shall have written notice by or in behalf of the creditor, of a claim to recover for transfer made or premiums paid with intent to defraud creditors, with specifications of the amount claimed."

The new statute of 1931 above, expressly applies to policies of insurance heretofore or hereafter issued. The courts, however, will not permit it to prejudice the rights of existing creditors in previously issued policies. *Bank of Minden v. Clement,* 256 U. S., 126, 41 Sup. Ct., 408, 65 L. Ed., 857, 9 N. C., Law Rev., 377. *Andrews v. Masons,* 189 N. C., at p. 701. This action was instituted prior to the act of 1931, *supra.*

Paul Yelverton, defendant, has three policies in the Ætna Life Insurance Company, of Hartford, Conn., one dated 10 April, 1929, for $10,000, two dated 13 May, 1929, for $5,000 each. The permanent total disability provisions in these policies are as follows: "If, before default

in payment of premium, the insured becomes totally and permanently disabled by bodily injuries or disease and is thereby prevented from performing any work or conducting business for compensation or profit, the following benefits will be available: When such disability occurs before age sixty—A waiver of the payment of premiums falling due during such disability, and an income of ten dollars a month for each one thousand dollars of the sum insured *payable to the life owner each month in advance during such disability.*"

One policy in the Northwestern National Life Insurance Company, Minneapolis, Minn., dated 12 May, 1927, for $10,000, "Total and permanent disability benefit—upon receipt at the company's home office, before the anniversary of the policy on which the insured's age at nearest birthday is sixty and before the maturity of the policy as an endowment and before default in payment of premium, of due proof that the insured has become totally and permanently disabled as defined below, the company will grant the following benefits during the remaining lifetime of the insured so long as such disability continues: Benefits: (a) Waiver of premium—the company will waive the payment of each premium falling due during the period of continuous total disability. (b) Monthly income—the company will also pay to the insured, or if the insured is insane to the beneficiary, a monthly income of $100 ($10 per $1,000 of face amount of policy) *per month for each completed month from the commencement of and during his continuous total disability.*"

Under the Constitution and statutes of this State, the law seems to favor the wife and children, where the husband takes out insurance policies for their benefit, free from the husband's creditors. In the $10,000 policy above of Paul Yelverton, Annie H. Yelverton, his wife, is beneficiary and the right to change the beneficiary is not reserved.

Plaintiff holds a valid judgment against both defendants for the sum of $3,650, with interest from 13 July, 1931. It goes without saying that every honest debt a person owes he or she ought to pay, if humanly possible. In the present case the court below finds "that Paul Yelverton is permanently and totally disabled to earn a living from any kind of labor, mental or physical."

It will be noted that the monthly payments under the policies in the Ætna Life Insurance Company, the provisions are "payable to the life owner each month in advance during such disability." The provision in the Northwestern National Life Insurance Company, "from the commencement of and during his continuous total disability." The provisions are practically the same. At the present time Paul Yelverton is permanently and totally disabled to earn a living from any kind of labor mental or physical. Under this kind of insurance indemnity, is there any law to deprive the sick man and perhaps his wife and children

of this peculiar fund, payable during his disability? Shall we call it a contingent trust fund, not property but a mere expectancy? Can it be reached by a creditor under supplemental proceedings? C. S., 711, *et seq. Osborne v. Wilkes,* 108 N. C., at p. 673; *Parker v. Potter,* 200 N. C., at p. 355.

C. S., 721, is as follows: "The court or judge may order any property, whether subject or not to be sold under execution (*except the homestead and personal property exemptions of the judgment debtor*), in the hands of the judgment debtor or of any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within sixty days next preceding the order, cannot be so applied when it appears, by the debtor's affidavit or otherwise, that these earnings are necessary for the use of a family supported wholly or partly by his labor."

C. S., 722, makes provision for a receiver to be appointed. Whether this sick fund can be reached by supplemental proceedings we do not think it necessary to decide on this record.

C. S., 717, says: "The court or judge may, by order, forbid a transfer or other disposition of, or any interference with, the property of the judgment debtor *not exempt from execution.*"

The court below, among other things, found: "(1) The defendants have no property which is subject to seizure and sale under execution; (2) All the moneys so collected by him *saving and excepting the personal property exemptions* of the two defendants, he will apply upon the judgment heretofore recovered in this action against defendants."

C. S., 721, *supra,* in part, says "except the homestead and personal property exemptions of the debtor."

C. S., 722, *supra,* in part provides for appointment of receiver "except the homestead and personal property exemptions."

Constitution of North Carolina, Article X, sec. 1, is as follows: "The personal property of any resident of this State, to the value of five hundred dollars, to be selected by such resident, *shall be and is hereby exempted from sale under execution or other final process of any court, issued for the collection of any debt.*" C. S., 728. McIntosh N. C. Practice and Procedure in Civil Cases, sec. 756, *et seq.* p. 875.

In *Frost v. Naylor,* 68 N. C., at p. 326, speaking to the subject: "It does not mean any property, *but exempts 'personal property of the nature of five hundred dollars, to be selected by the debtor.' A chose in action is property, and, if selected by the debtor, it must be exempt.* The second question is, whether the debtor is restricted to the first allotment of exempted property, *or whether he may have it renewed from time to time, so as to keep constantly about him exemptions to the value of five*

hundred dollars? A like question arose under the former statute of exemptions, *supra;* and it was decided that the allotment should be made from time to time, *and as often as the debtor might be pressed with executions;* the policy being to enable the debtor not only to have the exemptions allotted to him once, *but to keep them about him all the time, for the comfort and support of himself and family. Dean v. King.* 13 Ired., 20. And such is the policy of our constitutional provision; and it allows the debtor to select what he may think most useful. In this it differs from the former law, which either named the articles which might not be the most useful in certain cases, or allowed the 'freeholders' to name the articles."

In *Campbell v. White,* 95 N. C., at p. 345, we find: "The words of the Constitution, that personal property of the value of $500 and belonging to any resident, 'shall be, and is hereby exempted from sale under execution or other final process of any court, issued for the collection of any debts' (Art. X, sec. 1), is *a continual mandate to the officer to leave so much of the debtor's personal estate untouched for his use,* and of course, the diminution from use, loss, or other cause, *must be replenished with other,* if the debtor has such, up to the prescribed limits. *It is plainly meant that when any final process against the debtor's estate is to be enforced, that much of his estate must be allowed to remain with him, as not liable to seizure." Gardner v. McConnaughey.* 157 N. C., at p. 483; *Befarrah v. Spell,* 178 N. C., at p. 233 "at the last moment."

Conceding that this disability or sick fund is personal property and comes within C. S., 3949, subsec. 6, which in part is as follows: "The words 'personal property' shall include moneys, goods, chattels, choses in action and evidences of debt, including all things capable of ownership, not descendible to the heirs at law. The word 'property' shall include all property, both real and personal"; we think defendant Paul Yelverton would be entitled to his personal property exemption. The right is personal to the debtor and it has not been transferred. *Lane v. Richardson,* 104 N. C., 642.

In *Lockhart v. Bear,* 117 N. C., at pp. 302-3, we find: "But as to personal property, under Article X, sec. 1, of the Constitution $500 worth *is absolutely free from any and all process for the collection or the enforcement of payment of debt.* The creditor had no lien upon this amount of his debtor's personal property; nor can he have *unless it is created by the debtor himself.* There is no judgment lien that attaches; there is no lien by execution until levy, and there can be no levy on this. *So, it is absolutely free from all process for debt.* It may be claimed, and is claimed, that plaintiff was not entitled to this protection until it is laid off and allotted and assigned to him. *We do not think so. It is*

not the allotment of the appraisers that gives the debtor this protection, but the vigor and force of the Constitution. And if it should be levied before, the debtor is still entitled to have it laid off and assigned to him."

C. S., 737, is as follows: "When the personal property of any resident of this State is levied upon by virtue of an execution or other final process issued for the collection of a debt, and the owner or an agent, or attorney in his behalf, demands that the same, or any part thereof, be exempt from sale under such execution, the sheriff or other officer making the levy shall summons three appraisers, as heretofore provided, who, having been first duly sworn, shall appraise and lay off to the judgment debtor such articles of personal property as he or another in his behalf selects and to which he is entitled under this article and the Constitution of the State, in no case to exceed in value five hundred dollars, which articles are exempt from said levy, and return thereof shall be made by the appraisers, as upon the laying off of a homestead exemption." The above statute outlines a method, but no statute can override the mandate of the Constitution.

In an attachment the defendant is entitled to claim his exemptions out of the attached property at any time before it is appropriated to the payment of the debt. *Chemical Co. v. Sloan,* 136 N. C., 122.

We think the defendant Paul Yelverton has the right to select the $300 due to him from the insurance companies each month as part of his $500 personal property exemptions allowed to him by the Constitution, and this selection can be made as indicated in the *Frost* and *Campbell cases, supra.* The amounts due him cannot be pyramided in this proceeding so as to deprive this sick man and his family of support and comfort. The Constitution and decisions are to the effect that at all times he is entitled to $500 exemptions. The $300 due by the insurance companies to him each month, he can select as his exemptions and can spend said amount on the support of himself and family each month.

In the affidavit of Paul Yelverton, in reply to affidavit of plaintiffs' liquidating agent, he says: "That affiant has not unjustly refused to apply any property toward the execution of the judgment set out in the judgment against him; *that as he is informed and believes none of said life insurance policies is subject to seizure or to be applied on the said judgment or execution thereunder."*

Paul Yelverton has waived no right to his personal property exemptions. In fact, the court below especially excepts the personal property exemptions being taken by the receiver. If in an attachment case the debtor can claim his exemption, we can see no reason why he cannot do so in this supplemental proceeding. The accumulation of the funds under the supplemental proceeding and receivership cannot enure to the benefit of a creditor or creditors against Paul Yelverton's personal

property exemptions allowed him by the Constitution. If it was necessary for him to spend the $300 each month for his and his family's support and comfort, the receiver has no valid claim to this personal property exemption. The judgment of the court below is

Reversed.

CONNOR, J., dissenting. I think that the judgment in this action should be affirmed. There is nothing in the judgment which deprives the judgment debtor of his personal property exemption, or of his right to have the sums now due or which may become due, from time to time, on the policies of insurance included in his personal property exemption.

The judgment directs the clerk to appoint a receiver in the supplementary proceeding in execution, and authorizes such receiver to collect from the insurance companies sums of money due to the judgment debtor on the policies, not included in his personal property exemption, at the time such sums are due. I think there is no error in the judgment and that it should be affirmed.

H. M. WADE MANUFACTURING COMPANY v. ABE LEFKOWITZ, TRADING AND DOING BUSINESS AS MEARS JEWELRY COMPANY.

(Filed 29 March, 1933.)

1. Evidence J a—Written terms of contract may be waived by conduct clearly showing an intent to waive its provisions.

Nothing else appearing, a written contract merges all prior negotiations between the parties and the writing abides unless modified, set aside or rescinded according to law, but the written contract may be waived or abandoned by the parties, and while waiver is dependent upon the intent of the parties, such intent may be established as a result of their conduct, and is generally a question for the jury.

2. Sales F d—Evidence of seller's waiver of provisions of contract as to manner and time for making complaint held sufficient for jury.

The parties entered into a written contract whereby plaintiff agreed to sell and defendant to buy certain store fixtures. The contract provided for partial down payment and the execution of notes for the balance of the purchase price, and that the use of the fixtures for a period of five days should constitute an acceptance thereof as being in conformity with the specifications of the contract, and that all complaint as to quality should be made in writing within ten days from delivery. Defendant's evidence tended to show that upon delivery of the goods he entered complaint that they were not up to the specified quality and were not made in a good and workmanlike manner, that plaintiff's secretary, treasurer and general manager made repeated visits to defendant's store and repeatedly promised to remedy the defects to defendant's satisfaction, and

that no reference was made in such conferences to the stipulations in the contract relative to complaints. In an action to recover the balance of the purchase price: *Held*, the evidence viewed in the light most favorable to defendant was sufficient to be submitted to the jury on the question of whether plaintiff had waived the provisions of the contract prescribing that complaints as to quality should be made in writing and that use of the property for five days should constitute acceptance thereof.

CIVIL ACTION, before *MacRae, Special Judge*, at June Term, 1932, of MECKLENBURG.

The plaintiff brought suit against defendant for the sum of $1,820, alleging that on or about 26 September, 1930, the plaintiff and the defendant entered into a written contract in which the plaintiff contracted and agreed to manufacture and furnish certain store fixtures for the defendant. A portion of the purchase price was to be paid in cash upon delivery of the fixtures and the balance of $2,582 was to be secured by a chattel mortgage upon the same. The defendant made payments from time to time until the claim was reduced to a balance of $1,820.

The defendant admitted the agreement to purchase the fixtures, but alleged that the plaintiff had "agreed and warranted to deliver and install in the defendant's store the . . . fixtures and materials . . . and represented, warranted and agreed that the same would be of first-class in quality, and would be installed in a careful, workmanlike manner; that in violation of said agreement, the plaintiff failed and refused to install furniture, fixtures and material of the character and in the manner which the plaintiff had agreed to furnish . . . in that the glasses and tops of two of the show cases were improperly fixed . . . and projected beyond the line of the other show cases, . . . and that four of the said show cases and all of the panelling had ugly dark stains scattered all over the surface thereof; . . . that too much glue had been applied with the result that the said glue had exuded upon the said show cases . . . to cause ugly dark splotches and stains upon the surface thereof; that the show case doors were improperly made and installed, the construction . . . being such that there are large cracks and openings between the said show cases and the said doors with the result that dust, dirt and insects get in the inside of the show cases; that the doors to the show cases were affixed . . . in such a loose, careless and unworkmanlike manner that they had a tendency to fall to the floor when subjected to the slightest sort of jar or movement." By reason of the breach of contract in various particulars, as described in the answer, the defendant asks for damages in the sum of $2,000 by way of offset.

The written contract referred to in the pleadings, among other provisions, contains the following in substance: (1) That the entire agree-

ment for the purchase of the goods is stated in the contract and is not modified by any verbal agreement. (2) The title to the fixtures are to remain in the vendor until the purchase price is paid. (3) It is understood that the use of the furniture described in this contract or any portion thereof for a period of five days constitutes acceptance of same as complying with all the terms and specifications of this contract, and all claims for damages, errors, or shortage not filed within that time are thereby waived. (4) No salesman or agent of the company shall have the right to change or modify this contract.

The plaintiff offered evidence tending to show that the fixtures were manufactured in accordance with the specifications agreed to by the defendant, and that delivery was made about 27 November, 1930, and that upon delivery the defendant paid a certain sum in cash and executed nineteen notes for the balance of the sales contract. The first note was for $152.00, due 24 December, 1930, and the other notes of $140.00 each fell due each thirty days thereafter.

The defendant testified that the fixtures were brought to the store by the agent of plaintiff on or about 23 November, 1930, and that said agent refused to deliver the property or to permit an inspection thereof until the notes and the contract had been signed. Thereupon the defendant telephoned the general manager of plaintiff and protested the refusal to deliver. Referring to the conversation with plaintiff's general manager, defendant said: "I asked him what assurance he would give me that the fixtures were as I bought them. He said: 'You know H. M. Wade Manufacturing Company will make good.' He assured me that I was getting exactly what I had bought and not to have any worries about it. With that assurance I decided to sign the papers." After the papers were signed the agent for the plaintiff began installing the fixtures, and this work was completed about 3 December, 1930. The defendant complained to the agent installing the fixtures upon the ground that they were not properly manufactured or installed. The defendant testified: "It seems that I saw Mr. Webb (general manager of plaintiff), just a few days after that. I saw Mr. Webb about a week after December 3. Mr. Webb came in the store and said he was sorry we had had any controversy and he wanted to see what was wrong. I first directed his attention to the glue or cement running out of the cases which got all over our clothes. Cement was oozing out of the glass top inside of the cases and all over the glass, and it was impossible to keep it off our clothes. I next directed his attention to the glass projecting out of the two circular cases. . . . Then I directed his attention to the bad, dark spots below the moulding. . . . I asked him about a chair and a little table for those front cases. . . . I told him they were short. . . . I directed his attention to the glass mirror against

the wall; I think it was chipped. I also directed his attention to those small doors. I told him they were not fitting good at all; that some were real wide open and some would fall out. . . . When I directed his attention to that particular door it fell out on his foot. . . . I was right in the midst of our holiday Christmas trade. He assured me that those matters would be taken care of as he had promised me on the phone. . . . He called back sometime later and said, 'We can't do that work now, but just as soon as the season is over we will take care of it.' When I directed his attention to those matters about which I have testified, Mr. Webb made no demand that I put this complaint in writing."

The first note fell due about 24 December, 1930, and the defendant wrote a letter to the plaintiff. Defendant said: "I think I saw Mr. Webb a short time after that and he said, 'Go on and put the goods in the store.' He assured me that the defects would be taken care of satisfactorily. I paid the note later after his last assurance." Subsequently a workman from the plaintiff's office came to defendant's store and undertook to repair the defects. In January, 1931, Webb, the general manager of the plaintiff, came into the defendant's store and looked over the work. The defendant was still complaining of defects in the equipment. Defendant said: "I again directed his attention to the defects which I had reminded him of, and he said, 'We can't get at it right now. We are going to have some of the work done over there and I will have my man come in and take care of that later on.'" Afterwards a man did come from the office of plaintiff to refinish the cases. Defendant further said: "I stopped payment on the notes once or twice because they were not making any progress toward doing what they had promised me. Mr. Webb was coming in and out of the store continually from December until I stopped paying them. I paid five notes, paying the last one in March or April, 1931. . . . During the time between the installation of the job and the payment of that note Mr. Webb was in and out of my store fifteen or twenty times."

The defendant offered much evidence at the trial tending to show serious defects in the equipment and the impaired value thereof by reason of such defects.

At the conclusion of the evidence the trial judge charged the jury as follows: "You are instructed, if you believe the evidence and find the facts to be as the evidence and testimony tend to show, you will answer the issue $1,820 with interest from 24 November, 1930."

From judgment upon the verdict the defendant appealed.

John M. Robinson and Hunter M. Jones for plaintiff.

Ira Julian and Tillett, Tillett & Kennedy for defendant.

BROGDEN, J. Substantially the case is this: A manufacturer of store fixtures and the store owner agree in writing for the purchase and installation of certain fixtures, made to order. The written contract excludes verbal modification, eliminates the right of an agent to change the agreement, and further provides that the use of the property or any portion thereof for a period of five days constitutes an acceptance of same as complying with all the terms and specifications of this contract and all claims for damages, errors, or shortage not filed within that time. There is evidence that the equipment was materially defective and oral complaint made during the progress of installation. Repeated promises were made by the general manager of the vendor that all defects would be remedied. The purchaser, acting upon such assurances, continues to pay and then declines to pay the balance, and suit is instituted by the vendor.

The law as expounded in this jurisdiction has declared with unbroken uniformity that, nothing else appearing, all prior negotiations are presumed to be merged into a written instrument thereafter executed by the parties, and that the written word so chosen shall abide unless and until the writing is modified, set aside or rescinded upon grounds deemed by the law as sound and adequate. Notwithstanding, it is also well established that a written contract may be waived or abandoned. The general principles establishing such rights are classified in *Bixler v. Britton,* 192 N. C., 199, 134 S. E., 488. The doctrine of waiver, in proper cases, is now as firmly established as the doctrine of the rigidity and inflexibility of the written word. For instance, it is stated in *Highway Commission v. Rand,* 195 N. C., 799, 141 S. E., 892: "Provisions in a contract may be waived." A waiver has been variously defined and applied. See *Makuen v. Elder,* 170 N. C., 510, 87 S. E., 334; *Allen v. Bank,* 180 N. C., 608, 105 S. E., 401. An extensive discussion of the principle is found in *Manufacturing Co. v. Building Co.,* 177 N. C., 104, 97 S. E., 718. The court assembles various definitions of the term, including the following from Herman on Estoppel: "A waiver takes place where a man dispenses with the performance of something which he has a right to exact. A man may do that not only by saying that he dispenses with it, that he excuses the performance, or he may do it as effectually by conduct which naturally and justly leads the other party to believe that he dispenses with it. There can be no waiver unless so intended by one party, and so understood by the other, or one party has so acted as to mislead the other." And further, "the intent to waive may appear as a legal result of conduct. The actuating motive, or the intention to abandon a right, is generally a matter of inference to be deducted with more or less certainty from the external and visible acts of the party and all the accompanying circumstances of the transaction,

regardless of whether there was an actual or expressed intent to waive, or even if there was an actual but undisclosed intention to the contrary. The decisions declaring intent to be the essence of waiver recognize that the intent may be inferred from a party's conduct." Moreover, it is further said: "Since intent is an operation of the mind it should be proven and found as a fact and is rarely to be inferred as a matter of law." See, also, *Fairbanks v. Supply Co.*, 170 N. C., 315, 86 S. E., 1051; *Ferry Co. v. Fairbanks-Morse & Co.*, 201 N. C., 485.

In the case at bar Webb, disclosing the wide range of his authority to act for the plaintiff, said: "I am secretary and treasurer of the Wade Manufacturing Company and am the next man in rank after Mr. Wade in the management of the company. I occupy the position of general manager in Mr. Wade's absence. I regularly deal with matters connected with the business of the corporation with Mr. Wade's full knowledge and authority." The evidence of defendant, construed in a favorable light, tends to show that Webb came to his place of business fifteen or twenty times; that repeated promises were made by him to repair defects in the equipment and frequent assurance was given that the complaints of defendant would be arranged in a satisfactory manner. No mention was made in these conferences of the provisions of the written contract, and particularly of that clause prescribing that the use of the fixtures for a period of five days constituted an acceptance of same; nor was mention made of the provision in the conditional sales agreement that all claims for damages for defects "must be presented in writing to the vendor within ten days from the receipt of said goods."

Was the conduct of Webb, whose authority as general agent is established by the evidence, of such a nature and quality as to warrant an inference of waiver or intention to waive the rigid clauses of the written instruments? This inquiry must be submitted by proper issue and instruction to a jury. Consequently, the peremptory instruction of the trial judge must be held for error.

New trial.

IN THE MATTER OF THE LIQUIDATION OF HOME SAVINGS BANK: CLAIM OF U. S. FIDELITY AND GUARANTY COMPANY.

(Filed 29 March, 1933.)

Banks and Banking H d—Funds paid guardian by Veteran's Bureau under War Risk Insurance Act held not to constitute preferred claim.

The U. S. Veterans' Bureau paid the proceeds of certain War Risk Insurance to a bank which had been duly appointed guardian for the deceased soldier's minor children and which had duly executed guardianship bond with sufficient surety. The bank deposited the sums in its sav-

ings department and commingled them with its regular deposits, and later was placed in a receiver's hands for liquidation. A substitute guardian was appointed, and the surety on the bank's guardianship bond paid the amount of the deposit to the substituted guardian and was assigned the substituted guardian's rights against the bank. *Held*, the surety was not entitled to a preference for the amount of the guardianship deposit, such sum not being an amount due the U. S. Government (31 U. S. C. A., sec. 191), the Government having discharged its obligation by payment of the sum to the guardian, and the title to the sum having passed to it. C. S., 2169.

APPEAL by petitioner, U. S. Fidelity and Guaranty Company, from *Devin, J.*, at October Term, 1932, of NEW HANOVER. Affirmed.

The agreed facts: United States Fidelity and Guaranty Company, and Gurney P. Hood, Commissioner of Banks, agree to the following facts:

1. That United States Fidelity and Guaranty Company is a Maryland corporation, and authorized to execute guardian bonds in North Carolina. That on 20 January, 1931, and for a long time prior thereto, Home Savings Bank was a North Carolina banking corporation.

2. That on 20 January, 1931, the Corporation Commission of North Carolina, under and by virtue of the provisions of section 218(c), Consolidated Statutes, took charge of said Home Savings Bank, on account of insolvency or for one or more other causes set out in section 218(b) and paragraph 1 of section 218(c), Consolidated Statutes, and Robert Strange was appointed as liquidating agent.

3. That thereafter by virtue of the provisions of chapter 243, Public Laws of 1931, and section 218(c), Consolidated Statutes, Gurney P. Hood, Commissioner of Banks, took charge and Robert Strange continued as his agent until 1 January, 1932, when L. P. Harrell was appointed agent.

4. That the liquidating agent does not have in his possession assets belonging to said bank of sufficient value to pay all the debts due by said bank in full—and this condition existed at the time the Corporation Commission took charge.

5. Letters of guardianship were issued to Home Savings Bank as guardian for Benj. Morris Clay, Dorothy Lucile Clay and Thomas Judson Clay, minor children of Benjamin M. Clay (also known as Bennie Clay) a deceased World War veteran, who carried a policy of War Risk Insurance issued by the United States on his life. Said guardian was appointed by the clerk of the Superior Court of Pender County, North Carolina, on 25 July, 1930, and posted bond in the sum of $2,000 for the faithful performance of its trust, with United States Fidelity and Guaranty Company as surety.

6. That, by reason of an award of compensation and insurance, under the compensation and insurance laws of the United States relating to

World War veterans, the guardian received on 4 November, 1930, from the United States Veterans' Administration the sum of $171.85, for and on behalf of each of said beneficiaries. Also, thereafter, monthly payments of $13.33 compensation, and $8.33 insurance, up until the closing of said bank. That, on 4 November, 1930, Home Savings Bank, as guardian, deposited said funds in three separate savings accounts in Home Savings Bank as an investment for and on behalf of said beneficiaries, and made deposits with said bank at various times of the funds received, and on 20 January, 1930, when the Corporation Commission took charge, the records of said bank showed the balances in the various accounts as follows:

Savings Account No. 18112, 'Home Savings Bank, guardian for Dorothy Lucile Clay' balance of $179.08.

Savings Account No. 18113, 'Home Savings Bank, guardian for Benjamin Morris Clay,' balance of $179.08.

Savings Account No. 18114, 'Home Savings Bank, guardian for Thomas Judson Clay,' balance of $169.56.

Total deposits of $527.72. It is agreed that the claims may be consolidated and heard together.

7. That the officers of said bank knew at the time of the receiving of the deposits, from what source they came, and that they were the proceeds of War Risk Insurance, paid by the United States Veterans' Bureau. That all funds involved in this suit were derived from payments made by the United States Veterans' Bureau for and on behalf of said beneficiaries, under an insurance policy issued upon the life of Bennie Clay, a soldier in the United States Army. That all checks were issued in the name of the guardian as legal guardian of the beneficiary in question. Copy of one of the checks follows:

117,617

United States Veterans' Bureau.

Washington, D. C.

V Treasurer of the United States.

(Seal.) 15-51 28 October, 1930.

Pay in dollars one hundred five 21/100 ..... $105.21

To the order of Home Savings Bank of Wilmington, N. C.
XC 3466. As LGL GDN of Thomas Judson Clay, Wilmington, N. C.
Adj. to 30 Sept., 1930

J. B. Schommer, Disbursing Clerk.
By C. A. Ball, Deputy Disbursing Clerk.

Object for which drawn: Compensation. 11-666.

8. That, on or about 31 March, 1931, the liquidating agent filed an account of 'Home Savings Bank, guardian for Benjamin Morris Clay, Dorothy Lucile Clay and Thomas Judson Clay,' showing that said bank was indebted to the owners of the listed deposits in the total amount of $527.72—said accounts showed that the receipts were derived from the United States Veterans' Bureau. At the same time the liquidating agent tendered resignation of Home Savings Bank, guardian as aforesaid, and asked the appointment of a new guardian to protect the estate. Letters of guardianship were issued on or about 1 April, 1931, to North Carolina Bank and Trust Company as guardian for said minors.

9. That North Carolina Bank and Trust Company, guardian, filed with the liquidating agent of Home Savings Bank on forms furnished for such purposes, its certificates of proof of claim in the sum of $527.72. That United States Fidelity and Guaranty Company, petitioner, paid $527.72, the amount on deposit, to the guardian and took an assignment and subrogation receipt on 24 July, 1931. That petitioner filed the assignment with the liquidation agent on the regular form furnished for such purpose on 4 August, 1931. That, in the claim so filed, no claim was made that the moneys were government funds and entitled to priority as such.

10. That said claims were duly classified by the liquidating agent as ordinary claims for deposit and the owners thereof were declared entitled to participate in all dividends as general or unsecured creditors of said bank. That the question as to whether such funds were government funds and entitled to priority was not raised nor determined.

11. That a dividend of 10 per cent was declared by the liquidating agent on 9 October, 1931, but petitioner did not accept said dividend. That a petition of intervention was filed by United States Fidelity and Guaranty Company on 1 April, 1932, asking for the priority to which it believed the claims were entitled. That a second dividend of 10 per cent was declared on 8 April, 1932, but petitioner did not accept same.

12. That the subject-matter of this controversy consisting of cash only was received by the Home Savings Bank, by it intermingled with other moneys of said bank, and was at no time separated or set aside from its deposits.

13. That at the time the said bank failed and the Corporation Commission took charge thereof, there was on hand in cash and passed to the liquidating agent, the sum of $3,404.09. That at no time after the receipt of said funds was cash on hand less than $527.72. After the said liquidating agent took charge, and before the filing of the petition in this cause, there has been filed with the liquidating agent claims seeking a preference, which had been allowed and paid, aggregating $3,319.97.

14. It is agreed further that the petition of intervention of United States Fidelity and Guaranty Company, the answer of Gurney P. Hood,

and the reply of petitioner, be incorporated in and made a part of these agreed facts, and that the petitioner and respondent be allowed to exhibit to the court in the hearing of this cause such papers and orders that may be pertinent to a full and clear understanding of the facts herein.

This 28 October, 1932."

The judgment of the court below was as follows: "This cause coming on for hearing before his Honor, W. A. Devin, judge, at the October Term, 1932, of the Superior Court of New Hanover County, upon the agreed facts attached to and made a part hereof, and being heard; it appears to the court that petitioner seeks to have its claim adjudged as a preferred claim against the assets of said Home Savings Bank superior to other depositors on the ground that the funds in question are government funds and entitled to priority as such within the contemplation of section 3466 of the Revised Statutes of the United States (31 U. S. C. A., sec. 191), and other statutes; and, after hearing the same, the court being of the opinion that the claim of petitioner is not entitled to priority, it is therefore ordered, adjudged and decreed by the court that the petition be and the same is hereby dismissed at the cost of the petitioner. W. A. DEVIN, *Judge Presiding.*

The petitioner, United States Fidelity and Guaranty Company, excepted, assigned error to the judgment as signed, and appealed to the Supreme Court.

Robt. D. Cronly, Jr., for petitioner, appellant.
Woodus Kellum for respondent, appellee.

CLARKSON, J. Petitioner, appellant, contends that it is agreed that appellant paid the amount of the deposit and took an assignment and subrogation receipt. If the court decides that the deposit was money of the United States and was entitled to priority as such within the contemplation of section 3466, Rev. Stat. of U. S., the appellant will be subrogated to all priority rights of the United States. Appellee concedes this.

The respondent, appellee, contends that having elected to file its assignment and subrogation receipt without claiming a preference, petitioner is now estopped from seeking a preference.

The Home Savings Bank of Wilmington, N. C., was guardian of the minors concerned in this controversy, and gave bond in the U. S. Fidelity and Guaranty Company, as surety for the faithful performance of its trust. The bank intermingled the guardian money with its other money in its vaults. The bank is insolvent. It is settled in this jurisdiction that the U. S. Fidelity and Guaranty Company is liable on its bond. *Bank v. Corporation Commission,* 201 N. C., 381.

It is contended by petitioner, appellant, U. S. Fidelity and Guaranty Company, that the money the bank received, it knew was the proceeds of War Risk Insurance paid by the U. S. Veterans' Bureau and that all funds involved in this suit were derived from payments made by the United States Veterans' Bureau for and on behalf of said beneficiaries, under an insurance policy issued upon the life of Bennie Clay, a soldier in the United States Army. That the money on deposit in the Home Savings Bank of Wilmington, N. C., was put there by said Savings Bank as guardian was money of the United States and entitled to priority as such within the contemplation of section 3466 Revised Statutes of the United States (31 U. S. C. A., sec. 191) and other U. S. Statutes. We cannot so hold.

The matter was decided in the U. S. Supreme Court to the contrary, in a decision for the Court written by *Mr. Justice Butler,* 13 March, 1933. "Petitioner was a United States soldier in the World War and while in the service suffered permanent mental incompetency. He became entitled to receive from the United States War Risk Insurance and disability compensation. 10 September, 1919, the county court of Breathitt County, Kentucky, appointed for him the guardian above named who qualified and has ever since acted as such. The United States paid to the guardian the installments due his ward. The guardian deposited them in the Hargis Bank and Trust Company. It became insolvent and 5 February, 1930, conformably to the laws of the State, all its assets were taken over by respondent acting as special deputy banking commissioner and liquidating agent. At that time the guardian had on deposit $6,070.80 derived from such payments. The assets of the bank were not sufficient to pay more than one-half the total owing to depositors. Claiming priority under R. S., sec. 3466, the guardian demanded payment of his deposit in full. Respondent held that petitioner was only entitled to share ratably with other creditors and refused to pay. Petitioner brought this suit in the circuit court of Breathitt County to enforce the asserted priority. That court gave him judgment as prayed. The court of appeals reversed on the ground that the bank was not indebted to the United States on account of the deposit by the guardian. 244 Ky., 68. The question has not been considered here and, decisions upon it in the state courts being in conflict, we granted a writ of *certiorari.* 287 U. S., ... Petitioner relies upon the clause of section 3466 declaring that whenever any person indebted to the United States is insolvent the debts due to the United States shall first be satisfied. He asserts that, under acts of Congress later to be considered, the War Risk Insurance and disability compensation paid to the guardian of an incompetent veteran remains the money of the United States so long as it is subject to his control and suggests that the guardian is a mere instrumentality of the United States for the disbursement of such

money for the benefit of the veteran. And he maintained that the deposit here involved is money of the United States and that the bank is indebted to it therefor. . . . The guardian, appointed by the county court, was by the laws of the state given the custody and control of the personal estate of his ward and was authorized to collect and receive the money in question. Ky. Stat., sec. 2030. And unquestionably payment to the guardian vested title in the ward and operated to discharge the obligation of the United States in respect to such installments. . . . He was not an agent or instrumentality of the United States. (Citing authorities.) It results that the deposit in question does not belong to the United States and, as indebtedness to it is essential to priority, the guardian's claim under that section is without merit." Our statute C. S., 2169, is similar to the Kentucky statute above referred to. For the reasons given, the judgment below is

Affirmed.

W. L. BURNETT, TRADING AS BURNETT MOTOR COMPANY, v. TEXAS COMPANY.

(Filed 29 March, 1933.)

1. Contracts B e—Under terms of contract dealer could hold refining company liable only for defects in pumps at time of installation.

Plaintiff and defendant entered into a contract whereby plaintiff was to sell at retail gasoline bought from defendant at wholesale, and defendant was to furnish and install certain pumps and equipment necessary to such retail distribution, and plaintiff was to keep such equipment in repair. Plaintiff brought suit for loss occasioned by a defect in the pumps which caused them to deliver more gasoline than was indicated on the dial thereof. *Held*, defendant would be liable only for such loss as was occasioned by a defect in the pumps at the time of their installation, it being plaintiff's duty under the contract to keep the equipment in repair.

2. Indemnity A a—Refining company held indemnified against loss caused dealer by defects in pumps under the contract between the parties.

Where a contract for the retail distribution of gasoline bought by the dealer from a refining company provides that the refining company should furnish certain pumps and equipment for such retail distribution, and stipulates that the dealer should exonerate the refining company and hold it harmless from all claims, suits and liabilities arising from the existence of such equipment: *Held*, by the terms of the agreement the dealer was barred from bringing action against the refining company for loss alleged to have been caused by a defect in the pumps which caused them to deliver more gasoline than was indicated on the dial thereon.

CLARKSON, J., dissenting.

CONNOR, J., concurs in the dissent.

CIVIL ACTION, before *Small, J.*, at February Term, 1932, of COLUMBUS.

The defendant owned a filling station near Chadbourn, and on or about 12 December, 1930, entered into a written agreement with the plaintiff by the terms of which the plaintiff was to operate the filling station. The written instrument stipulates:

1. "The company leases to the dealer for installation and use . . . three Wayne Motor Pumps; three 550 U. G. tanks; one metal day sign complete, one certified service sign, one gold motor oil sidewalk sign; four M-15 lube oil units. Said equipment is leased at dealer's request to be used by him on said premises for storage and sale of petroleum products purchased solely from the company, but at all times is to remain the property of the company."

2. "The dealer shall at his expense, keep said equipment in good order and repair and not encumber or remove said equipment, or do or permit anything to the prejudice of the company's title; . . . exonerate the company and hold it harmless from all claims, suits and liabilities of every character whatsoever and howsoever arising from the existence of such equipment."

3. "The dealer shall return said equipment to the company at the termination of this agreement in good condition."

It was further provided that "the expense of installing this equipment shall be made by the dealer. . . . The company acknowledges receipt of one dollar from dealer for such expense. If actual installation costs exceed the amount above specified, the dealer shall pay the company the amount of such excess promptly upon completion of the installation. If amount above specified exceeds actual cost of installation, the company shall promptly refund to dealer such excess."

The evidence tended to show that the plaintiff began the operation of the filling station and on 11 May, 1931, brought this suit, alleging that the defendant had negligently furnished the plaintiff Wayne Electric Pumps for the sale of gasoline, but that such pumps were defective in that they did not correctly measure gasoline purchased by customers, and that as a result of such defect, plaintiff had suffered loss in the sum of $1,500. It was also alleged that the defendant had required the plaintiff to buy a certain uniform for the sum of $13.00.

The defendant set up the written agreement as a bar to plaintiff's right to recover and denied all negligence alleged in the complaint.

The plaintiff testified that the tanks were installed and had been used previously by another person, and that he was required to buy gasoline exclusively from the defendant and was to receive two cents per gallon. He further testified that "the measuring apparatus was out of repair and would give over and the dial would stick and not even turn. . . . I lost about one-third of the gasoline I sold."

Another witness for plaintiff testified about the tanks and said: "They did not measure correctly. . . . The motor would not start part of the time. There was nothing broken about the pumps. . . . I was there when these pumps were installed by Mr. Foster. He did not leave them all right. I think it gave about one point over 5 gallons when it first started off. The pumps were installed about 2 weeks before Burnett got it."

The plaintiff further testified that when he discovered that the equipment did not correctly measure gasoline that he made complaint to the defendant, and that it sent an agent to "fix the tank. . . . They measured all right while he was there, but he only worked on one tank, and the other was not right. They would freeze up at night and would not work, and we would have to wait until a mechanic came the next morning and start them up. People came there to work on these tanks in response to my complaints around a dozen times and up until the new tanks were put in."

The following issues were submitted to the jury:

1. "Did the defendant furnish to the plaintiff for use at the Chadbourn Filling Station electric pumps and gas tanks?

2. "If so, did such pumps operate so as to deliver more gas to the customer than shown on the indicator thereon?

3. "If so, what damages, if any, is plaintiff entitled to recover on account thereof?

4. "In what sum, if any, is the defendant indebted to the plaintiff on account of money deposited for the suit of clothes, set out in the complaint?

5. "Did plaintiff execute the agreement, or contract, dated 12 December, 1930, and marked Exhibit 2?"

By consent the court answered the first issue "Yes," the fourth issue "$13.12 with interest from 31 April, 1931," and the jury answered the second issue "Yes," the third issue "$400.00," and the fifth issue "Yes." The court being of the opinion that the answer to the fifth issue constituted a bar to recovery, rendered judgment that the plaintiff recover the sum of $13.00 with interest and costs, from which judgment the plaintiff appealed.

E. Manley Toon, and Varser, Lawrence, McIntyre & Henry for plaintiff.

Powell & Lewis for defendant.

BROGDEN, J. The records of this Court and of courts generally, disclose a variety of contracts between oil companies and the operators of filling stations. The written contract between the parties specified that

the defendant leased the equipment to the plaintiff "for installation and use." Although the contract further provided that the alleged lessee should keep the equipment in repair, nevertheless it was the duty of the defendant to furnish to the plaintiff equipment reasonably suitable for the purposes contemplated by the parties. The defendant was desirous of selling its products, if possible, and undertook to furnish equipment for hire to facilitate such sale. Consequently it knew that the installation or furnishing of defective equipment would occasion loss to the operator or dealer. Manifestly, if defects developed after installation and furnishing, it was the duty of the plaintiff to make repairs, but there is no evidence in the record tending to show that the equipment so furnished was defective at the time it was placed in the custody of the plaintiff. See *Andrews v. Oil Company, ante*, 268, 12 A. L. R., 766, *et seq.*: 61 A. L. R., 1333, *et seq.*, and *Rushing v. Texas Co.*, 199 N. C., 173, 154 S. E., 1.

Notwithstanding the liability imposed by law, the plaintiff signed an agreement contracting to "exonerate the company and hold it harmless from all claims, suits and liabilities of every character whatsoever and howsoever arising from the existence of such equipment." There is no allegation of fraud or mistake, or other available equity, and hence the contract which the parties have made, must be interpreted according to its terms. The language referred to is broad and comprehensive and clearly imports a release from claims arising from the existence of the equipment. Therefore, the principle of law declared in *Singleton v. R. R.*, 203 N. C., 462, is applicable and determinative.

No error.

CLARKSON, J., dissenting: I find no fault in this part of the opinion of the Court: "Although the contract further provides that the alleged lessee should keep the equipment in repair, nevertheless it was the duty of the defendant to furnish to the plaintiff equipment reasonably suitable for the purposes contemplated by the parties." Nor in the opinion of the Court that "there is evidence in the record tending to show that the equipment so furnished was defective at the time it was placed in the custody of the plaintiff." It was so found by the jury that heard the evidence, and the verdict should be upheld.

That there is a liability, under the evidence and the finding of the jury, I am in agreement, but I cannot assent to the fatal conclusion of the court that the plaintiff is estopped by his contract with the defendant to claim damages arising from the equipment by reason of the defective condition at the time it was taken over by him, as the evidence tended to show and as the jury in its verdict found. It is true that the plaintiff did sign an agreement to "exonerate the company and hold it harm-

less from all claims, suits and liabilities of every character whatsoever and howsoever arising from the existence of such equipment." I think the context of the written contract clearly shows that this had reference to claims, suits and liabilities, which might arise from third parties and not to the parties to the contract.

The entire section of the contract reads as follows: "The dealer shall at his expense, keep said equipment in good order and repair and not encumber or remove said equipment, or do or permit anything to the prejudice of the company's title; comply with all laws, ordinances and regulations, applicable to such equipment and the premises on which it is installed; exonerate the company and hold it harmless from all claims, suits and liabilities of every character whatsoever and howsoever arising from the existence of such equipment."

While there is no allegation of fraud or mistake, or other available equity, as the court's opinion states, it is not necessary to resort to an equitable remedy. In my opinion a plain construction of the above section of the contract shows that it referred to what took place after the equipment was taken over, with reference to third parties, and did not refer to the parties to the contract.

If it be granted that the contract is susceptible of the interpretation placed upon it by the court, it cannot be denied that it is also susceptible of the interpretation herein stated that it referred only to third parties and not to the parties to the contract. And if the latter proposition be granted, then the conclusion of the court should not prevail, for the contract was written by the defendant, all that the plaintiff had to do was to "sign on the dotted line." There is no evidence that he did more than that. All of the evidence is to the effect that all he had to do to the contract was to sign it. It is elementary learning that in an ambiguous contract the courts will construe the words most strongly against the party who wrote and used them. Clark on Contracts (4th ed.), sec. 223, p. 562; *Woods v. Postal Telegraph-Cable Co.*, 205 Ala., 236, 87 So. 681, 27 A. L. R., 834; 6. R. C. L., 854.

As was said in *Gillet v. Bank of America*, 55 N. E., 292, 160 N. Y., 549 (head note), "Where there is any uncertainty as to the meaning of the agreement, the language is to be construed against the party who proposes it rather than against the party who is invited to accept it." The reason for this is succinctly stated in Clark on Contracts (4th ed.), at pp. 562-3, as follows: "The principle on which this rule is based has been said to be that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will adopt a construction by which they would mean another thing more to his advantage."

This principle is not at variance with the holding of the court in the recent case of *Andrews v. Oil Co., ante*, 268, that an agreement ought to receive that construction which will best effectuate the intention of the parties to be collected from the whole of the agreement, but is in accord with what was held in that decision.

In my opinion, there was error in the court below declining to render judgment in accordance with the verdict of the jury.

CONNOR, J., concurring in dissent.

IN THE MATTER OF R. H. WRIGHT ESTATE. T. D. WRIGHT AND R. H. WRIGHT, JR., EXECUTORS, AND M. W. BALL, ADMINISTRATOR, C. T. A., AND R. H. WRIGHT, JR., AND T. D. WRIGHT, EXECUTORS OF THE LAST WILL AND TESTAMENT OF R. H. WRIGHT, DECEASED, v. M. W. BALL AND OTHER HEIRS AT LAW AND NEXT OF KIN OF R. H. WRIGHT.

(Filed 5 April, 1933.)

Executors and Administrators E e—"Family agreement" relating to "remainder of estate" held to apply to both real and personal estate.

Under the facts and circumstances of this case it is held that an agreement entered into by the heirs at law of the testator providing for the distribution "of the remainder of the estate" of the testator, applied to both the real and personal estate, and under its terms the respondents were entitled to the proportion designated in the agreement of the rents and profits from the testator's lands as against the life tenant under the will.

APPEAL by respondents, the "Ball Group," from *Small, J.*, at March Term, 1933, of DURHAM. Reversed.

The findings of facts and judgment of the court below are as follows:

"This cause coming on to be heard before Honorable Walter L. Small, judge presiding and holding the courts of the Tenth Judicial District, and being heard at Durham, in said district, on 2 March, 1933, upon the pleadings and the evidence offered by the parties, a jury trial having been waived, the court finds the following facts:

1. That R. H. Wright died on 4 March, 1929, leaving a last will and testament which was admitted to probate in common form in Durham County, a copy of said will being attached to the petition of the Durham Loan and Trust Company, receiver, in this cause and made a part of these findings of fact.

2. That a caveat to the will of R. H. Wright was filed in the Superior Court of Durham County, and on 19 November, 1929, a judgment was

entered in said cause by Honorable E. H. Cranmer, judge presiding, a copy of said judgment being attached to the petition of the receiver filed in this cause, and it is hereby made a part of these findings of fact.

3. That prior to the rendition of said judgment passing upon the validity of said will, and construing the same, all the heirs at law and next of kin of the said R. H. Wright, deceased, entered into an agreement referred to as the 'family agreement,' dated 5 November, 1929, for the purpose of determining the method of administration of the estate and its ultimate division among the parties to said agreement. A copy of said agreement is also attached to the petition of the receiver in this cause and is hereby made a part of these findings of fact.

4. That after the execution of said agreement, the executors named in the will of R. H. Wright, Sr., were removed and the First National Bank of Durham, North Carolina, was appointed receiver of said estate. That on 18 January, 1932, the said First National Bank of Durham suspended business and on 29 January, 1932, the Durham Loan and Trust Company was appointed receiver of said estate, and is now acting as such.

5. That several months after the execution of the 'family agreement,' the question arose between the representatives of Mrs. Lucy W. Ball, owning a one-third interest in the estate, and the representatives of Miss Mary E. Wright, the life tenant in two-thirds, and the children of T. D. Wright, the owner of the remainder of the two-thirds interest, as to the distribution of certain income derived from the property of the estate in the interval between 4 March, 1929, and the date of the 'family agreement,' 5 November, 1929. That without prejudice to the rights of either group, this income, about which the controversy arose, to wit: $21,620.95, was distributed, one-third to the Ball group and two-thirds to the Wright group, it being agreed that the question as to how said income should be distributed was to be finally passed upon by the Superior Court of Durham County.

6. That Miss Mary E. Wright, the life tenant, died on 16 June, 1932, leaving a last will and testament which has been duly admitted to probate in Durham County, in which will T. D. Wright and R. H. Wright are named as executors, and each of them have qualified and are now acting as such.

7. That the executors of the last will and testament of R. H. Wright opened an account upon their books as such executors entitled 'R. H. Wright and T. D. Wright, agents of Mary E. Wright,' and on said account they credited all income collected from the real estate of the R. H. Wright estate between the dates 4 March, 1929, and 5 November,

1929, and on the latter date, the total amount of said income was $21,620.95. That no part of said amount came from any source except the real estate which, by the last will and testament of R. H. Wright, was devised to Miss Mary E. Wright for her life.

That during said period the executors likewise kept a separate account on their books of the income from personal property, but the money received by them from both sources was deposited in one bank account. The item of $2,402.25 referred to in subsection (d), section 2, of the family agreement was paid by the executors out of the commingled income bank account and was set up on the books of the executors as an advancement to her.

8. That upon the appointment of the First National Bank of Durham, N. C., as receiver of the estate of R. H. Wright, it was duly notified of the claim of Miss Mary E. Wright to the entire amount of $21,620.95, and thereafter, upon the appointment of the Durham Loan and Trust Company, as receiver of said estate, it was likewise notified of such claim. That the estate of R. H. Wright was at the time of his death and still is amply solvent.

9. That the Ball group contend that under the terms of the 'family agreement' the said sum of $21,620.95 was distributable two-thirds to Miss Mary E. Wright, or her executors, and one-third to the Ball group. The executors of Miss Mary E. Wright contend that all of said income should have been paid to Miss Mary E. Wright during her life time, and after her death that the same is payable to said executors.

Upon the foregoing findings of fact the court being of the opinion that under the last will and testament of R. H. Wright, deceased, Miss Mary E. Wright was owner of a life estate in all of the real estate of the said R. H. Wright, deceased, and as such, was entitled to all of the income therefrom, and that no provision was made in the 'family agreement' which required her to surrender any part of said income.

It is now, therefore, ordered, adjudged and decreed that the executors of the last will and testament of Miss Mary E. Wright, have and recover of the receiver the sum of $21,620.95, with interest thereon from 5 November, 1929, until paid; and that the receiver of the estate of R. H. Wright pay the cost of this proceeding, to be taxed by the clerk. The payment of this judgment and costs shall be accounted for by the executors as a proper expense of the administration of said estate."

To the judgment as signed, the respondents, appellants, excepted, assigned error and appealed to the Supreme Court.

B. M. Watkins and McLendon & Hedrick for appellees.
Brawley & Gantt for respondents, appellants.

CLARKSON, J. The question involved: Does the "family agreement" set forth in the record require that the rent collected from real estate, between the death of the testator and the date of said agreement, be distributed in accordance with the terms of said agreement, or did such rents remain the property of the life tenant Miss Mary E. Wright, under the will of R. H. Wright, Sr.? We think it should be distributed in accordance with the terms of the "family agreement."

R. H. Wright, Sr., died on 4 March, 1929, leaving a last will and testament, containing the following provision: "Item I. I give, devise, and bequeath unto my sister, Mary E. Wright, for her natural life, all of my property of every kind and character." The other provisions of the will are not necessary to be stated. A caveat to said will was filed, and a "family agreement" entered into in reference to the property of R. H. Wright, Sr. From 4 March, 1929, the date of R. H. Wright, Senior's death, until the "family agreement," on 5 November, 1929, the income from the real estate left to Mary E. Wright for life under the will, amounted to $21,620.95. If there had been no "family agreement" under the will this income would have gone to Mary E. Wright.

The controversy is thus stated in the findings of fact (9): "That the Ball group contend that under the terms of the 'family agreement' the said sum of $21,620.95 was distributable two-thirds to Miss Mary E. Wright, or her executors, and one-third to the Ball group. The executors of Miss Mary E. Wright contend that all of said income should have been paid to Miss Mary E. Wright during her life time, and after her death that the same is payable to said executors."

The "family agreement" was entered into on 5 November, 1929, by Mary E. Wright and the Ball group and others. The "family agreement" seems to have been carefully drawn and goes into minute detail, the sections which we think material for a decision of this controversy are: "2. Subject to the above provisions for Miss Mary E. Wright, *the remainder of the estate of R. H. Wright* shall be divided into *three equal parts, one-third* of which shall be delivered, conveyed or paid to *Mrs. Lucy W. Ball,* or her legal representatives, in fee simple, and *two-thirds* to the First National Bank of Durham, N. C., trustee, in trust for the use of *Miss Mary E. Wright,* for the term of her natural life, etc. . . . (d) The sum of $2,402.25 heretofore paid to Miss Mary E. Wright shall be charged by the executors in their full settlement as disbursed for a debt and she shall not be required to account for the same."

What does the language mean "the remainder of the *estate* of R. H. Wright?" In Black's Law Dictionary (2d ed.), p. 439, is the following: "*Estate.* 1. The interest which any one has in lands, or in any other subject of property," etc., citing numerous authorities. At p. 440: 2. In another sense, the term denotes the property (real or personal) in which

one has a right or interest; the subject-matter of ownership; the corpus of property. Thus, we speak of a 'valuable estate,' 'all my estate,' 'separate estate,' 'trust estate,' etc. This, also, is its meaning in the classification of property into 'real estate' and 'personal estate.'"

In *Hunter v. Husted,* 45 N. C., at p. 142, *Nash, C. J.,* for the Court, said: "The word estate means ordinarily the whole of the property owned by any one, the realty as well as the personalty."

Then again, the detail of the $2,402.25 is set forth. This sum had been paid Mary E. Wright. It was specially provided in the "family agreement" that she should not be required to account for same. If the entire $21,620.95 income from the real estate was to go to Mary E. Wright, why was it not mentioned in the "family agreement"—*expressio unius est exclusio alterius?* On the contrary it was specially set forth that the remainder of the estate of R. H. Wright, Sr., two-thirds to be distributed to the so-called "Wright group" and one-third to the "Ball group." Construing the "family agreement" as a whole, we think it was the intention of all parties to make a final settlement of the controversy and the language used so indicates. For the reasons given the judgment of the court below is

Reversed.

MRS. LOLA BAIRD v. M. W. BALL, TRUSTEE, AND M. W. BALL, INDIVIDUALLY, MRS. PATTIE B. RIDDICK, MRS. LUCY B. SPENCER, JAMES T. SPENCER, MRS. NELL C. SPENCER, T. F. THACKER, MRS. LUCY S. THACKER, LAWRENCE W. SPENCER, MRS. DOROTHY E. SPENCER, MISS SUE S. SPENCER AND MRS. M. W. BALL.

(Filed 5 April, 1933.)

1. Contracts F b—

In an action to recover damages for the breach of an executory contract the plaintiff can recover substantial damages only when he, at the time of defendant's breach, is ready, able and willing to perform the obligations therein imposed upon him, otherwise he may recover only nominal damages.

2. Trial G c—Where verdict is inconsistent court may direct jury to reconsider and return proper verdict.

Before a verdict is complete it must be accepted by the court, and where the verdict is inconsistent or conflicting the court may give additional instructions and direct the jury to again retire and bring in a proper verdict, and the court's action in so doing will not be held for error where such additional instructions do not contain any expression as to how the issues should be answered, but only explain the inconsistency and direct its correction.

BAIRD *v.* BALL.

APPEAL by plaintiff from *Barnhill, J.*, and a jury, at December Term, 1932, of DURHAM. No error.

The following judgment of the court below setting forth the issues, will indicate the controversy:

"This cause coming on to be heard before his Honor, M. V. Barnhill, judge presiding, and a jury (and the court having nonsuited the plaintiff as to all defendants except M. W. Ball), and the following issues having been submitted to the jury, to wit:

(1) Was the paper-writing set out and described in the complaint and offered in the evidence as plaintiff's Exhibit No. 1, executed and delivered by the defendant M. W. Ball to J. B. Mason, Jr.?

(2) If so, was the execution and delivery thereof procured by the fraudulent substitution by J. B. Mason, Jr., of said paper-writing for another and different paper-writing, as alleged in the answer?

(3) Was said contract delivered to J. B. Mason, Jr., on condition that same was not to be used unless a sale of the Duke Land and Improvement Company Land was likewise sold under the other contract delivered at the same time?

(4) Did J. B. Mason, Jr., agree to pay $10,000 cash the next day as a part of the purchase price, as alleged?

(5) If so, did J. B. Mason, Jr., breach said condition?

(6) Is the plaintiff the owner of said contract for value and without notice of any defect therein?

(7) Is the plaintiff the real party in interest in this cause?

(8) Has defendant breached said contract, as alleged?

(9) If so, was plaintiff, at the time of said breach, ready, able and willing to comply with the terms thereof?

(10) What damages, if any, is plaintiff entitled to recover?

And the jury having answered the first issue 'Yes,' the second issue 'No,' the third issue 'No,' the fourth issue 'No,' the fifth issue 'No,' the sixth issue 'Yes,' the seventh issue 'Yes' the eighth issue 'Yes' the ninth issue 'No,' the tenth issue 'Damages amounting to $1.00 in favor of Mrs. Lola Baird.'

It is therefore ordered, adjudged and decreed that the plaintiff have and recover of the defendant, M. W. Ball, the sum of one dollar ($1.00). It is further ordered, adjudged and decreed that the defendant, M. W. Ball, pay the costs of this action, to be taxed by the clerk of the court.

The said contract sued upon herein is hereby and herewith declared null and void and of no effect upon paying the judgment of one dollar ($1.00), and the costs of this action. It is further ordered that this judgment be recorded in the office of the register of deeds of Durham County. M. V. BARNHILL, *Judge Presiding.*"

The plaintiff in the court below made a motion to set aside the verdict on the 9th and 10th issues. The motion was denied. The court below signed judgment in accordance with the verdict. Plaintiff excepted, assigned error and appealed to the Supreme Court. The material matter in controversy will be set forth in the opinion.

W. S. Lockhart and McLendon & Hedrick for plaintiff.

Brawley & Gantt, Abernathy & Abernathy, V. S. Bryant and Robt. Moseley for M. W. Ball and other defendants.

CLARKSON, J. We think the only material exception and assignment of error on the part of plaintiff: Did the trial court commit error in resubmitting the 9th and 10th issues to the jury? We think not.

The following is in the record, which sets forth the real battle in this controversy: "After the jury had retired and had been out for some time it came into court and tendered its verdict to the court. After examining the same the court made the following statement to the jury: (g) 'Gentlemen of the jury, I notice that there is a conflict between your answers to the ninth and tenth issues. I instructed you that if plaintiff was ready, able and willing to comply with the contract, then she would be entitled to substantial damages, if you come to that issue, and that if she was not ready, able and willing to do so, she was entitled to only nominal damages. And you have answered the ninth issue 'Yes' and the tenth issue '$1.00,' awarding only nominal damages. I will let you retire and reconcile your verdict before accepting same.' (h). The jury retired and in a short while returned and submitted its verdict, having changed its answer to the ninth issue from 'Yes' to 'No.' The court accepted the verdict and directed that it be recorded. After the coming in of the verdict the plaintiff moved to set aside the verdict upon the ninth and tenth issues, and excepts to the resubmission of the issues to the jury. The latter exception was entered after the jury finally returned and its verdict was accepted by the court. The plaintiff likewise excepts to the refusal of the court to set aside the verdict upon the ninth and tenth issues. To the action of the court in instructing the jury as above quoted between the letters (g) and (h) and to the resubmission of the issues to the jury, the plaintiff excepts." We do not think the exceptions and assignments of error made can be sustained.

The following principle is laid down as the law of this jurisdiction in regard to correction of verdicts, in McIntosh N. C. Practice and Procedure, part of section 603, p. 665-6: "A verdict returned to the court by a jury must be accepted for record before it is complete, and it is the duty of the judge to look after the form and substance, to prevent a doubtful or insufficient finding. For that purpose the judge

may, at any time while the jury are before him or under his control, have them amend their verdict in form, so as to meet the requirements of law. If they have failed to find a material issue, or if the findings are indefinite or inconsistent, he may direct them to retire and bring in a proper verdict; but he cannot tell them what their verdict shall be. The judge may direct the jury to make such correction at the time the verdict is returned, or after they have separated, but are still in court, or when there has been no opportunity for outside influence to affect their verdict," etc. *S. v. Godwin*, 138 N. C., 582; *Allen v. Yarborough*, 201 N. C., 568; *Wilson v. Fertilizer Co.*, 203 N. C., 359; *Crane v. Carswell*, 203 N. C., 555; *Tucker v. Bank, ante*, 120.

Under the facts and circumstances of this case, we think the court below had discretion to have the jury retire and consider the ninth and tenth issues, and render a verdict consistent with the charge and the issues submitted. The statement of the court below "I will let you retire and reconcile your verdict before accepting same," was no indication as to what the jury's verdict should be. It was not prejudicial. The jury was left to decide either way without any intimation from the court how to decide. They decided against the plaintiff on material issues. They are the triers of fact.

The plaintiff's exceptions and assignments of error as to the court below sustaining the defendants' motion for judgment as of nonsuit, C. S., 567, as to all of the defendants except M. W. Ball, cannot be sustained. Without going into the matter in detail, we think the court below properly sustained the judgment as of nonsuit as to the other defendants except M. W. Ball. We see no error in the numerous exceptions and assignments of error made by plaintiff as to the other aspects of the case. In law we find

No error.

IN RE THE MERCHANTS BANK OF DURHAM, NORTH CAROLINA.

(MATTER RELATING TO THE APPLICATION OF A DEPOSIT OF ROYCROFT'S WAREHOUSE AND H. T. ROYCROFT WHICH WAS IN THE MERCHANTS BANK OF DURHAM, N. C., WHEN THE SAME CLOSED ON 4 JANUARY, 1932, AND WAS TAKEN OVER BY GURNEY P. HOOD, NORTH CAROLINA COMMISSIONER OF BANKS.)

(Filed 5 April, 1933.)

1. Banks and Banking H e—

A depositor in a bank later becoming insolvent may direct the receiver to apply his deposit to certain of his notes to relieve the endorsers thereon of liability, rather than to his note secured by collateral.

2. Judgments L b—Order directing receiver to apply deposit to certain notes held not to bar subsequent action to compel such application.

Where in an action against the receiver of a bank the main question decided is that the plaintiff individually owned a deposit in the bank, and an order is entered to that effect and directing the receiver to apply the deposit to certain notes of the depositor, upon the receiver's refusal to apply the deposit as directed, the order in the action will not bar the depositor from bringing a subsequent action to compel the application of the deposit to the notes as directed.

APPEAL by respondent Gurney P. Hood, North Carolina Commissioner of Banks, ex rel. The Merchants Bank of Durham, N. C., from *Barnhill, J.*, at Chambers, at Fall Term, 1932, of DURHAM. Affirmed.

The order of Judge Barnhill, is as follows: "This cause coming on to be heard before the undersigned judge presiding in the Tenth Judicial District, upon the petition of H. T. Royeroft filed herein, and answer filed by the liquidating agent of the Merchants Bank of Durham, N. C., and it appearing to the court that at the time of the closing of said bank H. T. Royeroft, who was trading and doing business under the style and firm name of 'Royeroft Warehouse,' had on deposit in said bank approximately $2,300, and that subsequent to the closing of said bank an order was made by the judge then presiding in the Tenth Judicial District, directing that the money on deposit to the credit of 'Royeroft Warehouse' be applied in payment of notes of H. T. Royeroft held by the Merchants Bank of Durham, N. C.; and it appearing to the court that prior to the signing of said order, the petitioner had requested D. F. Siler, liquidating agent of said bank, to apply the amount on deposit to the said 'Royeroft Warehouse' as a credit on the two notes which the petitioner had in said The Merchants Bank of Durham, N. C., in the sum of $1,100, one of which said notes was signed by W. A. Hinton, and the other of said notes signed by K. O. Veasey; and it further appearing to the court that said liquidating agent refused to credit the deposit on said notes of $1,100 as requested, but credited said deposit on a note of $15,000 which the said H. T. Royeroft had in said bank, which was secured by a deed of trust on the home of the said H. T. Royeroft and a farm in Granville County. It is now, therefore, ordered, adjudged and decreed, that the present liquidating agent of the said bank be and he is hereby authorized and directed to reverse the credit so made on said note of $15,000, and that the amount on deposit to the credit of 'Royeroft Warehouse' at the date of the closing of said bank be first credited on the note of H. T. Royeroft for $1,100 signed by W. A. Hinton, and the note of H. T. Royeroft for $1,100 signed by K. O. Veasey, and that after so crediting the said notes, that if any balance remains to the credit of the said 'Royeroft Warehouse,' that said

amount be credited to the note of $15,000 hereinbefore referred to. It is further ordered that the costs of this petition be paid by the liquidating agent."

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

Brawley & Gantt for respondent, appellant.
Fuller, Reade & Fuller for petitioner, appellee.

CLARKSON, J. The petitioner H. T. Royeroft had on deposit in the Merchants Bank of Durham, N. C., when it closed its doors and was taken over by the liquidating agent of the Commissioner of Banks, the sum of $2,136.64. It was in the name of *Royeroft Warehouse*. The evidence, undisputed, is that the deposit belonged to H. T. Royeroft individually. Royeroft also owed notes to the bank as follows: (1) $1,100 endorsed by W. A. Hinton, (2) $1,100 endorsed by K. O. Veasey. The endorsers had no security. (3) Note for $15,000 which is secured by a deed of trust on Royeroft's home in the city of Durham, N. C., and a farm of 179 acres in Granville County, N. C., which Royeroft in his affidavit stated "in the opinion of your petitioner said note is adequately secured."

To relieve his endorsers on the two notes of $1,100 each, Royeroft requested and directed that the $2,136.64 on deposit in the insolvent bank be applied on these two notes, which was refused by respondent appellant. The court below found the facts and we think there was sufficient competent evidence to sustain the findings and directed the $2,136.64 to be credited, as requested and directed by Royeroft. We do not think the exception and assignment of error made by respondent, appellant, Commissioner of Banks, can be sustained.

The question involved, as set forth by respondent, appellant, is as follows: "Whether or not a person (H. T. Royeroft, petitioner herein) has the right to have his deposit in an insolvent bank applied on a note or notes as he directs; said notes being owned and held by the bank." We think so.

In *Dameron v. Carpenter*, 190 N. C., at p. 598, citing many authorities, the law is thus stated: "A set-off is in the nature of a payment or credit when the debts are mutual. . . . Set-off exists in mutual debts, independent of the statute of set-off. Its flexible character is used in equity to prevent injustice."

In *Coburn v. Carstarphen*, 194 N. C., at p. 370, speaking to the subject, we find: "In *Davis v. Mfg. Co.*, 114 N. C., 321, it was held that an endorser on a note held by an insolvent bank against an insolvent principal, upon which the receiver had brought suit is entitled to avail

himself of his claim against the bank, upon a certificate of deposit issued by the bank, and held by him at the date of the bank's insolvency. In *Trust Co. v. Spencer,* 193 N. C., 745, it was held by this Court that a bank, notwithstanding that it had taken a note signed by the directors of a corporation which had become insolvent, in payment of the corporation's note to it, retaining, however, the corporation's note as collateral security for the note of the directors, had a right to apply a deposit to the credit of the insolvent corporation as a payment on the indebtedness for which the bank held the directors' note."

In the *Coburn case, supra,* it was held: "While ordinarily the right of equitable set-off does not exist where there is a want of mutuality or the one claiming it has no right of action against the other in his own name, this principle is not applicable to county funds officially deposited in a bank since in a receiver's hands, and for which the depositor officially remains liable to the county, and he may offset his personal liability to the bank with the amount he may receive as a depositor of the county funds." See *Burns v. Trust Co.,* 200 N. C., 260.

This very matter has been decided by the Supreme Court of Arkansas, *Hughes v. Garrett,* 234 S. W., p. 265: It is there held: "When a bank failed, and had made no appropriation of a general deposit to the payment of notes of the depositor due to the bank, the depositor may direct the receiver to apply the deposit on a note chosen by the depositor, and the remainder on other notes. Upon a bank becoming insolvent, a depositor indebted to the bank may set off the amount of his deposit in an action by the receiver or assignee to recover the indebtedness due the bank."

We think the order of the former judge was primarily to settle the fact that "H. T. Roycroft" was the owner of the deposit in the name of "Roycroft Warehouse." The liquidating agent did not do what the order stated and the court below on the evidence was fully justified in finding: "It appearing to the court that prior to the signing of said order, the petitioner had requested D. F. Siler, liquidating agent of said bank, to apply the amount on deposit to the said 'Roycroft Warehouse' as a credit on the two notes which the petitioner had in said The Merchants Bank of Durham, N. C., in the sum of $1,100, one of which said notes was signed by W. A. Hinton and the other of said notes signed by K. O. Veasey," etc.

We can see no estoppel in the order of the former judge, as argued by counsel for respondent. In fact, the question in respondent's brief does not raise this point, as will be seen from the question involved as set forth in respondent's brief which we quote above. For the reasons given, the judgment of the court below is

Affirmed.

L. J. CHESTNUT v. ALBERT SUTTON.

(Filed 5 April, 1933.)

1. Husband and Wife F c—Where husband assails wife's character in action for criminal conversation, the wife may testify to refute charges.

In an action for criminal conversation wherein the husband has testified to immoral relations between his wife and the defendant, the wife is a competent witness for the defendant for the purpose of refuting the charges made against her character. C. S., 1801.

2. Appeal and Error J d—

Where the answers which the witness would have made if allowed to testify are not in the record an exception to the exclusion of such testimony will not be considered on appeal.

APPEAL by defendant from *Cranmer, J.*, at September Term, 1932, of SAMPSON. New trial.

This is an action to recover damages, both actual and punitive, for the alienation by the defendant of the affections of plaintiff's wife, and for his criminal conversation with her.

The issues submitted to the jury were answered as follows:

"1. Did the defendant, Albert Sutton, alienate the affections of plaintiff's wife, as alleged in the complaint? Answer: Yes.

2. Did the defendant, Albert Sutton, have immoral relations with plaintiff's wife, as alleged in the complaint? Answer: Yes.

3. What amount of actual damages, if any, is the plaintiff entitled to recover? Answer: $1,500.

4. What amount of punitive damages, if any, is the plaintiff entitled to recover? Answer: $500."

From judgment that plaintiff recover of the defendant the sum of $2,000, with interest from the date of the judgment, and the costs of the action, the defendant appealed to the Supreme Court.

J. D. Johnson, Jr., for plaintiff.

Butler & Butler and R. D. Johnson for defendant.

CONNOR, J. The plaintiff and his wife were married in Sampson County, North Carolina, on or about 9 May, 1928. They lived together as husband and wife until about 22 April, 1931, when they separated. They have since lived separate and apart from each other. A child was born of their marriage sometime during the month of January, 1929. This child is now in the care and custody of the plaintiff.

Evidence offered by the plaintiff tended to show that on 22 April, 1931, the defendant, who was the landlord of the plaintiff, had sexual

intercourse with plaintiff's wife, and that plaintiff immediately separated himself from his wife. Plaintiff testified that he had not lived with or had access to his wife since the date of their separation. His wife gave birth to a child on 12 February, 1932. Plaintiff testified that he was not the father of this child. There was evidence tending to show that the defendant was the father of the child born to plaintiff's wife, after her separation from him.

Annie Ruth Chestnut, wife of the plaintiff, was sworn and examined as a witness for the defendant. On her direct examination, she was asked the following questions:

"Q. Has your husband been to see you or spent the night with you since your separation?"

Plaintiff's objection to this question was sustained, and defendant excepted.

The record shows that if she had been allowed to answer the question, the witness would have replied:

"He has been to see me several times. I don't know exactly how many times, about twice a week up until this suit was started; up until about a month before the baby was born, 12 February, 1932."

"Q. Did he stay in the same room with you and spend the night with you?"

Plaintiff's objection to this question was sustained and defendant excepted.

The record shows that if she had been allowed to answer this question, the witness would have replied, "Yes, sir."

"Q. Your husband has testified that you had a child in February of this year, and has further testified that he has not seen or spoken to you for nine months preceding the birth of this child. Who is the father of that child?"

Plaintiff's objection to this question was sustained and defendant excepted.

The record shows that if she had been allowed to answer the question, the witness would have replied: "Lonnie Chestnut, my husband."

"Q. Is the defendant, Albert Sutton, the father of your child?"

Plaintiff's objection to this question was sustained and defendant excepted.

The record shows that if she had been allowed to answer this question, the witness would have replied, "No."

"Q. The witnesses, Earl Lewis, William Hall and William Thornton have testified that they saw you in the filling station in a compromising position with the defendant, Albert Sutton. State whether or not those statements are true."

Plaintiff's objection to this question was sustained and defendant excepted.

The record shows that if she had been allowed to answer this question, the witness would have replied: "No."

Defendant's assignments of error based on the foregoing exceptions must be sustained.

The allegations of the complaint in this action which constitute the causes of action on which the plaintiff seeks to recover of the defendant damages for the alienation of his wife's affections, and for his criminal conversation with her, involve charges against the wife of the plaintiff, which assail her character. Evidence offered by the plaintiff at the trial, tended to sustain these charges. Plaintiff's wife, was, therefore, under the express provisions of the statute (C. S., 1801), competent as a witness to testify in refutation of these charges, although the charges are founded upon her alleged adultery with the defendant, and although her testimony would be evidence against her husband.

Nothing in the statute, which provides that on the trial of an action the husband or wife of a party thereto shall, except as stated therein, be competent and compellable to give evidence as any other witness, renders the husband or wife competent to give evidence for or against the other in an action for criminal conversation, "except that in actions for criminal conversation brought by the husband in which the character of the wife is assailed, she shall be a competent witness to testify in refutation of such charges."

At the time of her marriage to the plaintiff, his wife was about 16 years of age. She was in the custody of the superintendent of public welfare of Sampson County, under charges made by her brother affecting her moral character. Negotiations were being conducted by the superintendent of public welfare for her admission into a reformatory maintained by the State for delinquent girls. There was evidence tending to show that she was married to the plaintiff to avoid confinement in the reformatory.

Whether or not it was competent for defendant to show by the testimony of plaintiff's wife that she had no affection for the plaintiff at the time of her marriage to him or thereafter, in mitigation of damages, is not presented on this appeal. It does not appear from the record what her answers would have been to the questions addressed to her by defendant's counsel, with respect to her affection for the plaintiff at the time of her marriage to him, or while she lived with him as his wife.

For error in excluding answers to questions addressed to plaintiff's wife as a witness for the defendant, for the purpose of refuting the charges made against her, which assail her character, there must be a New trial.

E. McL. WILSON ET AL., V. O. O. ALLSBROOK, TRUSTEE, ET AL.

(Filed 5 April, 1933.)

Reference C a—Trial court may re-refer cause after Supreme Court has remanded appeal with direction that order of confirmation be vacated.

Where the Supreme Court has remanded a cause with direction that the order of the trial court in confirming the report of the referee be vacated and that further proceedings be had according to law, the trial judge has the power, the original reference having been by consent, to again refer the cause to the referee for additional findings in accordance with the opinion of the Supreme Court, such order being tantamount to vacating the order of confirmation, and the appellants being entitled to notice and a hearing before the referee with right of appeal.

APPEAL by plaintiffs from *Sinclair, J.*, at February Term, 1933, of NEW HANOVER.

Civil action heard on motion to vacate judgment confirming referee's report without more. Motion denied and plaintiffs appeal.

Isaac C. Wright and R. G. Grady for plaintiffs.
Chas. B. Newcomb and John A. Stevens for defendants.

STACY, C. J. This is the same case that was before us at the last term, 203 N. C., 498, opinion filed 9 November, 1932. Error having been found in the judgment of the Superior Court, the cause was remanded with direction that the order of confirmation be vacated and further proceedings had according to the usual course and practice of the court.

Plaintiffs moved, upon said opinion and judgment being certified down, that the order of confirmation be vacated, without more, thus seeking to have the case tried before a jury. The court declined to sign the judgment tendered on this motion, but remanded the cause "in accordance with the opinion of the Supreme Court" to the referee for additional findings and supplement report. This was within his authority, the original reference having been by consent. *Morisey v. Swinson*, 104 N. C., 555, 10 S. E., 754; *Driller Co. v. Worth*, 117 N. C., 515, 23 S. E., 427; *Flemming v. Roberts*, 77 N. C., 415.

The order sending the cause back to the referee was perforce tantamount to vacating the previous order of confirmation. Of course, the plaintiffs are entitled to notice and a hearing before the referee, with right of appeal to the court in case his additional findings are adverse. As thus construed, we perceive no cause for complaint on the part of the plaintiffs.

Affirmed.

MARY DAIL DIXON AND HUSBAND, J. W. DIXON, v. N. M. OSBORNE, W. B. NEWCOMB, PAUL F. SMITH, W. L. SPENCER, COMMISSIONER, ET AL.

(Filed 5 April, 1933.)

1. **Judgments L b—Consent judgment that mortgagee recover certain sum on mortgage note is bar to subsequent action for usury.**

A consent judgment entered by the parties in a suit to restrain the foreclosure of a mortgage, which judgment stipulates the amount the defendant should recover on the mortgage note and gives the plaintiff a certain length of time for its payment, is a waiver by the mortgagor of his right to set up the plea of usury, and his subsequent action for usury is properly nonsuited.

2. **Usury C a—**

Our usury statute will be strictly construed, and usury must be pleaded.

3. **Insurance E c—Mortgagor held entitled to recover loss by fire from mortgagee on his agreement to pay fire insurance premium.**

Where a mortgagee has agreed with the mortgagor to advance the premium for a fire insurance policy on the premises, and thus lulls the mortgagor into a sense of security, and thereafter the mortgagor pays a certain sum to the mortgagee or his accredited agent, and directs by an itemized statement that a part of the sum should be used to pay the fire insurance premium, the mortgagee may be held liable to the mortgagor for the loss occasioned by the failure to pay the premium and the consequent lapse of the policy prior to a fire destroying the property.

4. **Payment B a—**

Where a debt consists of more than one item the debtor has the right to direct the application of moneys paid his creditor to a specific item thereof.

5. **Principal and Agent C b—**

An agent authorized to compromise a debt has the power to accept payment from the debtor in accordance with the debtor's directions as to the application of the payment to the items of the debt.

6. **Mortgages H g—Where appeal is taken to order of confirmation and appeal bond is filed purchaser is not entitled to immediate possession.**

The last and highest bidder at a sale under decree of foreclosure of a deed of trust is but a proposed purchaser until the sale is confirmed by the judge, and upon confirmation the purchaser's title relates back to the date of sale, but where an appeal is taken from the order of confirmation and an appeal bond is filed to stay execution, C. S., 653, 654, 655, and the judgment of the lower court is reversed on appeal, the purchaser at the sale may be held liable to the mortgagor for the former's taking of immediate possession of the property after the confirmation appealed from.

APPEAL by plaintiffs from *Moore, Special Judge*, at January Special Term, 1933, of WAKE. Affirmed in part and reversed in part.

The evidence was to the effect that plaintiff, Mary Dail Dixon, owned a large body of valuable land near the city of Raleigh, N. C., about three or four hundred yards from the corporate limits, on highway No. 50—U. S. 1 (Wake Forest Road), the hard-surfaced highway going through the property. On same were a grist mill in operation (a miller in charge) and a brick house with 13 rooms, in which plaintiffs lived. The land was cultivated by tenants.

The plaintiffs made application through the agents in Raleigh, N. C., of the Guaranty Title and Trust Company, of Norfolk, Va., to borrow $15,000 on the property, which loan was approved. The plaintiffs made a deed of trust on the property 5 November, 1926, to secure the amount evidenced by certain bonds *payable to bearer* and due on 5 November, 1929. These bonds with coupons attached bore 6 per cent interest payable *semiannually from* date. The bonds, coupons and deed in trust were signed in Raleigh, N. C., but payable at the Trust Company's office in Norfolk, Va. The deed of trust was duly recorded in the register of deeds office for Wake County, N. C. The interest was payable semiannually on the 5th day of May and November in each year. Mary Dail Dixon received from the Guaranty Title and Trust Company the sum of $14,100. She paid $150 to each of the Trust Company agents, a total of $1,200, out of the $15,000 borrowed from the Trust Company, and paid attorney's fees. The interest at 6 per cent was paid on the $15,000 loan until 5 March, 1930. Plaintiffs thought the $900 was deducted for interest in advance until it was later discovered. At the time the loan was made $2,500 of insurance was taken out on the brick house and plaintiffs paid the premium—some $50.63. In 1928 these bonds were purchased by defendants N. M. Osborne and W. B. Newcomb, and plaintiffs became aware of that fact a short time thereafter. When the bonds became due, on 5 November, 1929, plaintiffs were unable to pay same, but up to 5 November, 1929, the interest was paid to the Trust Company. In February, 1930, the property was advertised for sale under the deed of trust. The plaintiffs brought suit to restrain the sale.

At February Term, 1930, a judgment and decree was entered by consent. It was adjudged therein that defendants recover of the plaintiffs the sum of $13,500, with interest from 5 March, 1930. At that time plaintiffs paid $2,500, as will be hereafter set forth. It was ordered, considered and decreed that said judgment was a lien upon the land described in the complaint, and if plaintiffs failed to pay said judgment on or before 1 January, 1931, the commissioners appointed by the court should sell said land, and report their sale to the court for confirmation. Upon plaintiffs' default in the payment of said judgment on 1 January, 1931, the commissioners, after advertisement, sold the land as directed

by the court on 23 February, 1931. This sale was reported to the court and because of defects in the publication of the notices of sale, was not confirmed. At March Term, 1931, there was a decree, directing the commissioners to sell the land at the courthouse door in Wake County on 4 May, 1931, and to report said sale within ten days to the clerk, or to the assistant clerk of the Superior Court of Wake County, for confirmation. On 5 May, 1931, the commissioners filed their report showing that they had sold the land as directed by the court. Plaintiffs filed objections to the confirmation of this sale. These objections were heard by the assistant clerk of the court, who overruled the same, and on 16 May, 1931, confirmed the sale and ordered the commissioner to convey the land to the purchasers. From the order of the assistant clerk of the court, plaintiffs appealed to the judge holding the Superior Court of Wake County.

This Court, in *Dixon v. Osborne,* 201 N. C., at p. 493, held: "The judge holding the May Term, 1931, of the Superior Court of Wake County heard this action on plaintiffs' appeal from an order of the assistant clerk of said court. After the appeal was dismissed, it was error for the judge to confirm the order of the clerk, and also the sale made by the commissioners on 5 May, 1931. Having dismissed the appeal, the judge was without jurisdiction to further consider the matter. The action is remanded to the Superior Court in order that plaintiffs' appeal may be heard by the judge, and decided on plaintiffs' exceptions to the order of the assistant clerk."

In *Dixon v. Bank,* 202 N. C., at p. 841, this Court said, in a *Per Curiam* opinion: "There is no error in the judgment confirming the sale of the lands described in the complaint. The exceptions of the plaintiffs were considered and overruled. The court found that the sale was fairly conducted in all respects and that the amount bid is a fair price for the lands. The sale was confirmed by the court in its discretion. The only assignment of error is based upon an exception to the judgment. It cannot be sustained. The judgment is affirmed."

J. W. Dixon testified, in part: "At the time we secured this loan, we had insurance, fire insurance, $2,500 on brick house. At that time we paid the premium, $50.00 and some cents. At the time the policy for which we paid premium ended, we were not able to renew the policy and pay the premium. We owed the interest too on the notes. Prior to that time, we knew who had secured these notes that we signed. Dr. Newcomb and Mr. Osborne. When we found we were unable to pay the premium I went to Norfolk to see Dr. Newcomb and Mr. Osborne. . . . Mr. Osborne came to Dr. Newcomb's office and we went into his office and I told the same thing. All three of us were there together. It was about the same conversation I had with Mr. Osborne, and they said

they would pay the premium. They agreed to extend time for paying interest twenty days. I came back to Raleigh. We secured another loan, separate from this loan. Q. Did you turn any money over to Dr. Newcomb and Mr. Osborne? A. To Mr. Smith, their representative. . . . Q. Mr. Dixon, state whether or not there was an itemized list made out as to what should become of the money you turned over to Newcomb and Osborne? A. Yes, sir. Q. Did you see the list? A. Yes, sir, helped make it out. Q. Did that list contain this premium you understood that Newcomb and Osborne had paid? (Objection by defendant, overruled, exception.) A. I saw this list and helped make it out. This list, to my knowledge, contained this statement that this insurance premium should be paid. That accompanied the money that was turned over to the attorneys. I saw that list in the possession of the attorneys. Mr. Paul Smith was their attorney. I saw copy of that list in his file and possession. Prior to that time I had the conversation with Dr. Newcomb and Mr. Osborne in Norfolk, I received bills and statements from Bagwell and Bagwell, insurance agents for the premium. After I had this conversation with them, I did not receive any other statement from Bagwell and Bagwell. I did not know that it had not been paid. I did not know that there was not any insurance on that building at the time. At that time the building had not been destroyed by fire. It was, about six weeks after that, the house was burned, completely destroyed. When I went to Norfolk and talked with Dr. Newcomb and Mr. Osborne, and returned home, I told Mrs. Dixon what had happened. . . . After we took appeal, after the property was sold under this deed of trust and we took an appeal, *we gave a bond to stay the execution pending appeal to the Supreme Court.* Notwithstanding that they put a deed on record and gave these notices (speaking in reference to the miller and tenants being notified to vacate the land). That bond was accepted by the clerk!

Mary Dail Dixon testified, in part: "I did not know that the $900 which was deducted was not interest. I was never given credit for the $900 on interest. I found out that was not interest just before we started this suit. That is why we started the suit. . . . I realized that this $900 had not been credited to me as interest. It was then that I employed Mr. Jackson to assist me in checking this up. I did pay interest on the $15,000 up until the 15th (5th) of March, 1930. At the time we secured the loan, we purchased a fire insurance policy on the residence, a brick building—13 rooms. At the end of the period of that fire insurance policy, we were not able to renew it and pay the premium again. Mr. Dixon went to Norfolk to interview the people about what could be done. He told me they were taking care of the fire insurance and we would reimburse them when we paid the interest. He said the fire insurance must be paid and that there was no question about that,

that that must be paid, and they gave us an extension of 20 days in which to make a sale and we were positive of making a sale. . . . After he came home and told me that, I set about trying to secure money on another loan. Prior to his going to Norfolk, and interviewing Dr. Newcomb and Mr. Osborne, I received statements from the insurance company that the premium was due. After he went and came back and told me that he had made arrangements, I did not receive any further statements from the insurance company. I never received notice of cancellation of the insurance policy. After Mr. Dixon came back and told me about the arrangements that he had with Dr. Newcomb and Mr. Osborne, I borrowed some other money, $2,500. We made a list of the things that should be paid, the first, insurance, the taxes, the cost of the court in the former case and the interest due, were items I put down on a paper. I directed my attorneys that this $2,500 should be applied on the items I wrote out on this list. When Mr. Dixon came back from Norfolk and told me that Dr. Newcomb and Mr. Osborne were going to take care of the insurance when I borrowed the money, I designated to attorneys that the premiums should be paid out of the $2,500. Q. Did that list that you made up designate where this money should be put and applied, accompanying the money that was turned over to Dr. Newcomb and Mr. Osborne? A. Yes sir. I saw the list in the courthouse, at the time we paid the money. At that time, the building upon which that policy was issued was standing. It was in good condition. It could have been better. We were living in it. We were comfortable. It was completely destroyed on 20 April by fire. About six weeks after this money was paid over to Dr. Newcomb and Mr. Osborne. After the building was destroyed, I set about to collect the fire insurance policy. Mr. Dixon came in to see Mr. Smith about it to see if he had the check and learned that there was no insurance on the building. I have never collected anything by reason of any fire insurance policy. . . . In the meantime I had borrowed some money from Mr. Shaw, $2,500 for this. . . . When that consent judgment for $13,500 was entered, that gave me almost a year more. When I paid over the $2,500 in March, I had until the first of January, not quite a year. . . . At the time I borrowed the money and directed its delivery to Mr. Newcomb and Mr. Osborne, I directed my attorneys that the money be applied to the list I gave them. The attorneys (Newcomb's and Osborne's) and my attorneys were all present when that money passed. I was in the courthouse when the money was paid and I saw the list again. Mr. Dixon told me that he had seen that list in the possession of the attorneys for Dr. Newcomb and Mr. Osborne, after the fire."

The other necessary facts will be set forth in the opinion.

N. Y. Gulley, D. R. Jackson, Palmer E. Bailey and H. L. Swain for plaintiffs.

Joseph B. Cheshire, Jr., and Murray Allen for Osborne and Newcomb.

CLARKSON, J. The plaintiffs alleged in their complaint three causes of action and set forth the questions involved on this appeal, which we abbreviate as follows: (1) Do bonds tainted with usury retain their taint in the hands of third parties? (2) Are the holders of bonds, secured by mortgage liable for not paying premium on fire policy, when the mortgagors delivered them a sum of money accompanied by a list directing its application, which list contained an item for insurance premium which they thought the holders had paid as agreed, until the house burned six weeks later? (3) Are holders of bonds secured by deed of trust liable to mortgagors for taking immediate possession of property sold under foreclosure and bid in by them when appeal was taken to Supreme Court, bond given to stay execution, and Supreme Court reversed the court below?

At the close of plaintiffs' evidence the defendants, N. M. Osborne and W. B. Newcomb, made motion for judgment as in case of nonsuit, C. S., 567, on plaintiffs' first, second and third causes of action. The court below granted the motion. We think this was error, as to the second and third causes of action.

As to the first cause of action: We do not think plaintiffs' contention on this record can be sustained. The present record and the record to this Court on the prior appeals, show that plaintiffs were fully cognizant of the consent judgment and of course was bound to know of the $900 deduction in the original loan. If not at the time of the consent judgment, long before this action was instituted. In fact when the $2,500 was paid, the $15,000 principal of the debt was past due from 5 November, 1929, with interest paid to 5 March, 1930. The plaintiffs were fully aware that the $2,500 payment reduced the principal of the indebtedness to $13,500. Of course this deduction of $900 from the $15,000, original loan does not appeal to a court of law or equity, yet plaintiffs were *sui juris* and compromised their differences. No fraud or mistake is alleged and they are bound by what was done and acquiesced in. We think the parties are estopped from the record and the principle as to the taint of usury extending to purchasers of the bonds payable to bearer in due course does not arise on this record.

The law enunciated in *Ward v. Sugg,* 113 N. C., 489, and *Bank v. Felton,* 188 N. C., 384, are not applicable to the facts on this record.

It is said in *Ector v. Osborne,* 179 N. C., at p. 669: "A borrower is not, however, compelled to plead usury, and as the defense is personal to him it may be waived. . . . (p. 670) 'The statutes of usury being

enacted for the benefit of the borrower, he is at liberty to waive his right to claim such benefit and pay his usurious debt, if he sees fit to do so. It is, therefore, held that when the debtor becomes a party to a general settlement of preceding usurious transactions, made fairly and without circumstances of imposition, his recognition and the amount agreed to be due as a new obligation will preclude his setting up the old usury in defense of the new debt. This rule is not held to apply, however, unless it is clear that the debtor has fully accepted the settlement as a just debt separate and distinct from the preceding usurious obligations.' 39 Cyc., 1024. 'The $600 thus paid to the plaintiffs became their money, and was in no way involved in the account. Its payment in final settlement of the usurious transaction simply purged it of the taint, or eliminated the usurious feature, and reduced the principal to $4,500. That was the new principal, and bore legal interest.' If, as was held, a compromise and settlement followed by the execution of a release purges the transaction of usury, surely the same effect should be given to a compromise and settlement, in which the usury is eliminated, and which is approved by a judgment of the court."

It will be noted that this settlement and compromise judgment was made by plaintiffs not with the Guaranty Title and Trust Company, from whom they borrowed the money, but with Osborne and Newcomb, purchasers, in due course. The bonds were *made to bearer*. See "Negotiable Instruments" C. S., 2982(4); C. S., 3010, 3033, 3038, and 3040. The usury statute 2306, should be strictly construed and has been by this Court. *Ripple v. Mortgage Co.*, 193 N. C., 422; *Pugh v. Scarboro*, 200 N. C., 59; *Trust Co. v. Redwine, ante*, 125. Usury must be pleaded. *Berger v. Stevens*, 197 N. C., at p. 237.

There is nothing more obnoxious than usury, it has been disapproved by stringent statutory provisions, by the General Assembly of this State from early times. The Mosaic Law condemned it. In the *Pugh case, supra*, at p. 64: "The humanities of all civilized nations has condemned usury, a species of ingenious oppression, especially in this day."

In the *Ripple case, supra*, at p. 428, the following charge of the court below was sustained: "'Now, gentlemen of the jury, if the place of payment was specified as in the State of Maryland, for the purpose of avoiding the usury laws of North Carolina, and if it were a scheme or method to avoid the usury laws of North Carolina, and that was the reason for the place of payment being provided in Maryland, then your answer to the second issue would be 'No'; that they were not to be performed in Maryland, because if providing the place of payment as Maryland was a scheme to evade and whip around the usury laws of North Carolina, and was not done in good faith, then the place of payment, so far as the law is concerned, would not be in Maryland.'"

As to the second cause of action: The evidence of plaintiffs was to the effect that insurance had been taken out on the property (the brick house) and the premium paid for by plaintiffs. It may be inferred to protect the bondholders with usual loss clause, otherwise in case of fire the insurance could not be collected. The insurance agents notified plaintiffs that another premium was due. The plaintiff J. W. Dixon had an agreement with defendants Osborne and Newcomb that they would advance the premium. They lulled plaintiffs into security by the promise and did not pay the premium. Then again, when $2,500 was paid directions were specifically made by plaintiffs that out of the amount, the insurance premium was to be paid. The exception in the record as to this question in relation to this matter cannot be sustained. If the agent or agents of Osborne and Newcomb could compromise in the action the claim against plaintiffs and which was ratified by Osborne and Newcomb, we see no good reason why the agent or agents did not have authority to accept the money, part of which was to pay the premium as designated by plaintiffs. The defendants Osborne and Newcomb, on the facts and circumstances of this case, cannot plead *nudum pactum* nor lack of authority on the part of their agent or agents.

The latter matter has been fully set forth in *Maxwell v. Distributing Co., ante,* 309, and need not be further discussed. It is well settled that the debtor has the right to direct the application of payment when he owes more than one debt. *Stone v. Rich,* 160 N. C., 161; *Supply Co. v. Plumbing Co.,* 195 N. C., at p. 633.

Without going further into the evidence as there will be a new trial, it is sufficient to say that the competent evidence on this aspect was plenary to have been submitted to a jury.

As to the third cause of action: If the evidence of plaintiffs did not show that they gave bond to stay execution we do not think that plaintiffs' contention could be sustained. No increased bid was placed on the land. The very question was decided in *Parker v. Dickinson,* 196 N. C., at p. 243: "Does confirmation of a sale or of an actual partition take effect upon the date of confirmation or at the date of the sale? 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 limitation prescribed by law, may give or withhold its consent in its discretion. *Harrell v. Blythe,* 140 N. C., 415, 53 S. E., 232. However, when the transaction is completed by confirmation, and thereupon title is conveyed to the purchaser, confirmation relates back to the day of the sale and the purchaser receives his title as of that time. *Farmer v. Daniel,* 82 N. C., 152; *Mc-*

Artan v. McLaughlin, 88 N. C., 391; *Vass v. Arrington*, 89 N. C., 10; *Joyner v. Futrell*, 136 N. C., 301, 48 S. E., 649."

Vass v. Arrington, supra, was an action brought to foreclose a mortgage as in the present, the Court said, at p. 14: "Where land is sold under decree of court, the purchaser acquires no independent right. He is regarded as a mere proposer until confirmation. *Attorney-General v. Roanoke Navigation Co., supra* (86 N. C., 408). But when confirmation is made, the bargain is then complete, and it relates back to the day of sale. Rorer on Jud. Sales, sec. 122."

The position here taken in no way conflicts with what was said in *Collins v. Bass*, 198 N. C., 99, where it was held that a purchaser at a foreclosure sale was entitled to possession as against a tenant of the mortgagor holding under a lease executed after the maturity of the mortgage indebtedness (see change—Public Laws, 1931, chap. 173), nor with the holding in *Mercer v. Bullock*, 191 N. C., 216, to the effect that the mortgagor is entitled to collect all rents due at the time of foreclosure, and the purchaser such as fall due thereafter.

The plaintiff J. W. Dixon testified "We gave a bond to stay the execution pending appeal to the Supreme Court." The court below sustained defendants' motion for judgment as in case of nonsuit on this third cause of action, and in this we think there was error. An appeal bond can be given to stay execution in matters of this kind. From plaintiffs' testimony it would indicate that plaintiffs gave bond in accordance with the statute. C. S., 653, 654, 655. See, also, C. S., 657. *Pruett v. Power Co.*, 167 N. C., 598. The case was ably argued by Dean N. Y. Gulley, the Gamaliel of the law.

Plaintiffs' testimony was to the effect that Osborne and Newcomb "notified all tenants to vacate and notified me too. . . . We did not collect any rent from them after that."

On the first cause of action, the judgment is affirmed, on the second and third causes of action it is reversed.

Affirmed in part and reversed in part.

I. P. SHELLY AND W. H. SHELLY v. GARFIELD GRAINGER AND WIFE, SALLIE GRAINGER.

(Filed 5 April, 1933.)

1. Ejectment C b—

Plaintiff in ejectment has the burden of proving by the greater weight of evidence his good title against the world or against the defendant by estoppel.

2. Same—Evidence of plaintiff's title by adverse user held sufficient to be submitted to the jury.

Where in an action in ejectment involving a dispute in the boundary between the parties as called for in their deeds, the plaintiff introduces evidence tending to establish the line claimed by him by agreement, acquiescence and adverse user, and the defendant introduces evidence tending to establish the line as claimed by him, the conflicting evidence is properly submitted to the jury under correct instructions from the court as to burden of proof.

3. Ejectment D b—Instruction to jury in this action in ejectment held to be free from reversible error.

In this action in ejectment the charge of the court to the jury in respect to adverse possession, lappage and constructive possession to the outermost boundaries of the deeds of the parties, and the statement of the respective contentions of the parties in respect to the evidence, is held to be free from reversible error.

4. Appeal and Error J e—Admission of evidence in this case held harmless in view of the whole record.

In this action in ejectment there was plenary evidence tending to support the line between the parties as claimed by the plaintiff and the admission in evidence of a deed to defendant's predecessor in title tending to establish the line as claimed by plaintiff is held harmless on the present record.

5. Appeal and Error J d—

The burden is on appellant to show prejudicial error, the presumption being against him.

APPEAL by defendants from *Devin, J.*, and a jury, at November Term, 1932, of COLUMBUS. No error.

This is a civil action in ejectment, brought by the plaintiffs against the defendants to recover lands described in the complaint, as follows: "Farms Nos. 1, 2 and 7 on plat of land formerly belonging to R. J. C. Ward, plat of which is on record in Columbus County, register of deeds office in Book D-3, page 600. . . . All three tracts containing 76.68 acres, more or less."

The answer denied plaintiffs' title, set up ownership in fee simple to part of the land, and pleaded the 7-, 21- and 30-year statute of limitations in bar of any recovery. Only lot 1 was in dispute at the trial.

The issues submitted to the jury and their answer thereto, was as follows: "Are the plaintiffs owners and entitled to the possession of the land in controversy, designated on the court map by the letters and figures A, B, C, D, E, 4 and A? Answer: Yes."

This was shown on the court map as Lot 1. The court below signed judgment in accordance with the verdict. Defendants made numerous

exceptions and assignments of error and to the judgment as signed, and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

Tucker & Proctor for plaintiffs.
E. M. Toon and R. G. Grady for defendants.

CLARKSON, J. The defendants made motions for judgment as of nonsuit at the close of plaintiffs' evidence and at the close of all the evidence. C. S., 567. The court below overruled these motions and in this we can see no error.

The defendants claim that the burden was on plaintiff to show adverse possession and there was no sufficient evidence to be submitted to the jury on this aspect, therefore plaintiffs ought to have been nonsuited. We cannot so hold.

It is well settled in this jurisdiction that in an action of ejectment, plaintiff must recover, if at all, on the strength of his own title, and not on the weakness of his adversary. Plaintiff in ejectment must show title good against the world or good against defendant by estoppel, weakness or defendant's title making no difference.

The evidence on the part of plaintiffs was to the effect that "A" to "B" which was a road, was the well defined boundary of Lot 1, in dispute, and defendant Garfield Grainger, and those through whom he claimed, so recognized this as the dividing line by agreement, acquiescence and conduct. That their deed called for 76.68 acres and it was a body of farm and timber land, and the line in controversy in the deed called for from "A" to "B," was the true dividing line. That defendants did not know where the Carteret line was when Grainger purchased the land, that defendants' deed covered about 30 acres, that "A" to "B" was the dividing line and if the Carteret line as contended by defendants was from "E" to "4" the defendants would have some 60 acres instead of 30 acres of land—his deed called for about 30 acres.

On the other hand the evidence on the part of defendants was to the effect that the line from "E" to "4" was the Carteret line and the true line called for in his deed. The plaintiffs' evidence was to the effect that at numerous times and periods much timber had been cut on the 30-acre tract (No. 1) and some near defendants' home, without objection at any time and within 4 feet of the road "A" to "B." On the other hand, defendants' evidence was to the effect that north of the line from "A" to "B" from "E" to "4" was the true dividing line—the Carteret line; Garfield Grainger, defendant, testified, in part, that "In the fall of 1931, after I got moved there, I put three buildings on the

disputed land; two automobile sheds, a shelter and a barn for peas and plunder. I built it especially to put peas in. I have had hog pens and hog lots on this disputed land since I have been there. I have continued to use the disputed land. I have cut wood on it and cross ties, and did not hear no dispute until Mr. Shelly bought it. I have cleared about three-quarters of an acre, or something like that, north of the cart path in front of the house and had it in cultivation."

The evidence of both plaintiffs and defendants in regard to the true dividing line, were questions of fact for the jury to determine.

The court below charged fully as to the burden of proof being on plaintiffs to establish title by the greater weight of the evidence. The court also charged fully the law as to the several ways of establishing title in this State. The court charged: "I used the phrase 'adverse possession,' and it is necessary for you to understand what that means. The best definition I have seen is given by our Supreme Court in the case of *Locklear v. Savage,* in 159 N. C., 236 (at pp. 237-8) in which the Court uses this language: Adverse possession 'consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner. . . . The possession must of course be not only adverse, as we have defined it, but open, notorious and continuous, and the extent of it must be shown by known and visible boundaries."

In *Locklear v. Savage, supra,* it is further said, at p. 239: "It is true that in proving continuous adverse possession under color of title nothing must be left to mere conjecture. The testimony must tend to prove the continuity of possession for the statutory period, either in plain terms or by 'necessary implication.'"

The court below further charged: "So, where a person offers a deed or paper-writing purporting to convey title setting out metes and bounds and enters into the actual occupancy of a portion thereof, and holds it continuously for seven years, the law extends the possession to the outermost bounds set out in his deed; where there are known and visible lines and boundaries. There is this rule of law; that where contesting claimants have deeds both of which cover the same land, and where each claimant is in the adverse possession of a portion of the land, then that

invokes the rule of law with respect to lappage, which has been very succinctly expressed by our Court in the case of *Penry v. Battle,* in 191 N. C., 220 (at p. 224, quoting from *McLean v. Smith,* 106 N. C., at p. 176), in which this language is used, and which I charge the jury is law with respect to that feature: 'It is settled that where the title deeds of two rival claimants to lands lap upon each other, and neither is in the actual possession of any of the land covered by both deeds, the law adjudges the possession of the lappage to be in him who has the better title. If one be seated on the lappage and the other not, the possession of the whole interference is in the former. . . . But if both have actual possession of the lappage, the possession of the true owner, by virtue of his older title, extends to all not actually occupied by the other.' "

The court then applied the principle to the evidence adduced by plaintiffs, defendants excepted and assigned error. We do not think this exception and assignment of error can be sustained. When the court came to consider the evidence adduced by defendants, it applied the same principle of law as to defendants' evidence: "The defendants contend you ought to find from the testimony of Long and others that the land line E-4 is the Carteret line referred to in the pleadings, and that he has shown possession of a portion of the land, *that should carry his possession to the outermost bounds of his deed, and that he is entitled to extend that possession to that line;* that he has been cutting timber and gathering wood and straw and exercising possession upon the lands in dispute, building a garage, barn and hog pen, and that he has raised tobacco and potatoes, and that even if the plaintiffs' deed covers it, *that his deed covers it also, and there is a lappage, and that he is seated on the lappage, and that you should answer this issue No,* the plaintiffs are not entitled to it, and that you should not find from the greater weight of the evidence that the plaintiffs have made out their title by the greater weight of the evidence." Defendants' contention cannot be sustained.

Conceding, but not deciding, that the charge was error in regard to constructive possession, although the plaintiffs' evidence was to the effect that it was purchased as a whole, 76.68 acres, and a deed made to it as a whole. *Basnight v. Meekins,* 121 N. C., 23; *Mintz v. Russ,* 161 N. C., 538; *Lumber Co. v. Cedar Works,* 168 N. C., 344. Under the evidence and the facts and circumstances of this case, it was not prejudicial or reversible error as the plaintiffs' evidence was to the effect that "A" to "B," the road, was the established line between plaintiffs and defendants. The evidence of defendants was to the contrary. In the charge both were "fed out of the same spoon." Then, outside of this charge,

on constructive possession, there was sufficient competent evidence on the part of plaintiffs that "A" to "B" was long recognized as the true dividing line between plaintiffs and those through whom they claimed and defendants. In fact, this evidence on the part of plaintiffs was sufficient to indicate an estoppel to claim north of the road from "A" to "B." On plaintiffs' evidence the use of a small portion of an acre by defendants was negligible.

The defendants' exception and assignment of error to the following portion of the charge of the court below, cannot be sustained: "The plaintiff also offers in evidence deed of Todd and wife to Jesse Hinson, dated 16 November, from whom Joshua Norris acquired the Grainger land, which calls for a boundary from the Bull Hole back to the point designated by the letter "A." Upon this testimony the plaintiffs contend that their allegations have been made good and that they have shown the true location of the line to be from 'A' to 'B'; that there had been agreement forty years or more ago, in which the agreed line was established from "A" to "B," and that both sides occupied and possessed the land up to that line, and if Mr. Grainger and those under whom he claims have crossed that line, it was merely as an occasional trespasser, and that there were no acts of possession, nor any attempt to possess until Mr. Grainger cultivated a fraction of an acre beyond the line "A" to "B," and that was beyond the bounds of the Grainger deed, and his possession there was not open sufficiently to ripen."

If the introduction of the Todd deed was error, we think it harmless on this record. There was much evidence on the part of plaintiff that the agreed line between the lands in controversy was the road between "A" and "B."

From a careful reading of the record, it seems that the able and learned judge in the court below tried this case with care, plumbing the law as laid down by this Court applicable to the facts. We have examined the well prepared briefs of both sides of this controversy. The question to be decided was mainly one of fact for the jury to determine. It has been long settled in this jurisdiction that the presumption as to error is against appellant and that error must be affirmatively established. The burden of showing error and that it is material is on appellant. *In re Ross,* 182 N. C., at p. 478. We see in law, on the record, no prejudicial or reversible error.

No error.

IN THE MATTER OF THE ESTATE OF R. H. WRIGHT, DECEASED, AND R. H. WRIGHT, JR., AND T. D. WRIGHT, EXECUTORS OF THE LAST WILL AND TESTAMENT OF R. H. WRIGHT, DECEASED, V. M. W. BALL, ADMINISTRATOR C. T. A., AND OTHERS, DEVISEES AND LEGATEES OF R. H. WRIGHT, DECEASED.

(Filed 5 April, 1933.)

Appeal and Error J b—

An order denying a petition to require the receiver of an estate being administered under order of the court "to take such steps as may be necessary to complete the administration" of the estate is entered in the sound discretion of the trial court which is not subject to review in the absence of abuse.

APPEAL by petitioner, Lucy B. Spencer, from *Small, J.*, at March Term, 1933, of DURHAM. Dismissed.

The above entitled causes were heard on the petition of Lucy B. Spencer, one of the devisees and legatees of R. H. Wright, deceased, for an order requiring the receiver of the estate of R. H. Wright, deceased, "to take such steps as may be proper and necessary under the law to complete the administration of the estate of R. H. Wright, deceased, in order that the personal and real property belonging to said estate may be properly divided among those entitled to it."

The estate of R. H. Wright is now being administered by a receiver appointed by the judge presiding in the Superior Court of Durham County, under the orders of said court. See *In re Estate of Wright and Wright v. Ball,* 200 N. C., 620, 158 S. E., 192.

From an order denying her petition, the petitioner appealed to the Supreme Court.

Robert Moseley for petitioner.

PER CURIAM. The order in this cause, made by the judge presiding in the Superior Court of Durham County, is not reviewable by this Court. The petition was addressed to and the order was made by the judge, in his discretion. No matter of law or legal inference is involved in the petition or in the order. On the facts found by the judge, from the record and from affidavits filed by the petitioner and by the receiver, there was no abuse by the judge of his discretion. It is not so contended by the petitioner on her appeal to this Court. The appeal mus be

Dismissed.

ERNEST H. COOKE v. THE GREAT ATLANTIC AND PACIFIC TEA COMPANY AND A. T. SHEPARD.

(Filed 5 April, 1933.)

Negligence A c—Plaintiff must show negligence on part of store in order to recover for injuries sustained in fall therein.

Neither the owner nor the manager of a store is an insurer of the safety of its customers, and in order for a customer to recover for injuries resulting from slipping and falling on a banana peeling on the floor of the store he must establish negligence.

APPEAL by plaintiff from *Barnhill, J.*, at October Term, 1932, of GRANVILLE. Affirmed.

This is an action to recover damages for personal injuries caused by the negligence of the defendants.

On Saturday night, 24 October, 1931, the plaintiff while leaving the store of the defendant, the Great Atlantic and Pacific Tea Company, in Oxford, N. C., where he had purchased of the said defendant groceries and other merchandise, stepped on a banana peeling which was lying on the floor just outside the door, slipped and fell. The banana peeling was on the floor of the entrance to the store from the sidewalk, about 18 inches from the door. The door was 5 or 6 feet from the sidewalk. There were many customers in the store at the time of the accident. Defendant's clerks and salesmen were busy waiting on these customers. The defendant had bananas in its store as a part of its stock of merchandise. The defendant, A. T. Shepard, was the manager of the store, and in charge of the business of his codefendant.

There was no evidence tending to show who threw the banana peeling on the floor of the entrance to the store, just outside the door, or how long the banana peeling had been there before the plaintiff stepped on it, slipped and fell. There was evidence tending to show that plaintiff was injured by his fall, and that he sustained damages resulting from his injuries.

At the close of the evidence for the plaintiff, the action was dismissed by judgment as of nonsuit, and plaintiff appealed to the Supreme Court.

T. Lanier for plaintiff.
Guthrie & Guthrie for defendants.

PER CURIAM. There was no evidence at the trial of this action tending to show that the plaintiff was injured by the negligence of the defendants, or of either of them.

Neither defendant was an insurer of the plaintiff, while he was in the store as a customer, or while he was leaving with the groceries and merchandise which he had purchased in the store. *Bowden v. Kress,* 198 N. C., 559, 152 S. E., 625. In the absence of any evidence tending to show that the defendants were negligent, there was no error in the judgment dismissing the action as of nonsuit. The judgment is

Affirmed.

LOUISE A. HAMBRIGHT v. SARAH ELIZABETH CARROLL, EXECUTRIX, AND JOHN W. TURRENTINE, EXECUTOR, OF THE LAST WILL AND TESTAMENT OF W. H. TURRENTINE, DECEASED.

(Filed 12 April, 1933.)

1. Wills E b—Devisee held to take fee under devise in this case.

The testator devised the remainder of his property to his three children and one grandchild, to be equally divided among them, with a later clause directing the executors to hold the share of the grandchild in trust and give her the proceeds from the estate until in their judgment she is able to manage it wisely herself, "but should she die without children, then what remains of her share becomes a part of my estate and is to be divided equally among my children." *Held,* the grandchild takes a fee in the property upon the termination of the trust, the first clause devising the land to the children and grandchild in fee, and the second clause not being inconsistent with the fee to the grandchild, there being no certain and express terms limiting it to a life estate, and the phrase "what remains of her share" connotating that nothing may remain and implying an unrestricted power of disposition.

2. Wills E a—General rules for construction of wills.

A devise will be construed to be in fee unless a contrary intention is plainly expressed in the will, C. S., 4162, and the fee generally passes upon a devise of the proceeds of land when an intention to separate the income from the principal is not expressed, or where the devise is general and the devisee is given the power of disposition, or a limitation over is made of such part as may not be disposed of by the first taker.

3. Wills E b—Devise held to convey absolute fee and not defeasible fee.

A fee may be limited after a fee by executory devise, but no remainder may be limited after a grant of an estate in fee simple, and where a devisee is devised certain lands in fee with power of disposition, and not merely a life estate with a naked power of disposition, with a limitation over of what remains of the estate to others if she should die without children, the devise conveys the absolute fee simple to the first taker, and the purported limitation over is void, there being no estate which the testator could limit over as a remainder.

APPEAL by defendants from *Hill, Special Judge,* at November Term, 1932, of ALAMANCE. Affirmed.

W. H. Turrentine died leaving a will containing the following clauses, which for convenience of reference we have designated (a) and (b):

(a) I give to my son, John William Turrentine, my home place where I now live, consisting of 118 acres lot of the estate of Samuel Chapman and 7 acres lot of Daniel Worth, and my watch and chain. All the remainder of my property, I want divided equally between my children, Sarah Elizabeth Carroll, Imogene Louise Faucette, John William Turrentine, and my granddaughter, Louise Hambright.

(b) The share Louise Hambright will receive I want my executors to hold the same in trust and give her the proceeds until such a time as they may in their judgment think she is able to manage it wisely herself; but should she die without children, then what remains of her share becomes a part of my estate and is to be divided equally among my children above named.

The plaintiff brought suit claiming to be the absolute owner or the owner in fee of the property devised to her. The defendants deny that she is entitled to the corpus of the property and ask that the action be dismissed. The trial court construed the clauses set out as a devise to the plaintiff in fee "to the extent that she may use and dispose of same in fee simple as she see fit; provided, however, if she die without children and any of said property remain, then such remaining property to go to and be divided equally among the children of said testator."

J. Elmer Long and Clarence Ross for plaintiff.
W. H. Carroll and A. M. Carroll for defendants.

ADAMS, J. Is the trial court correct in its construction of the will with respect to the quantity of interest devised to the plaintiff? This is the only question for decision. In effect it is alleged in the complaint that the defendants will not convey the property in controversy to the plaintiff, conceding her capacity "to manage it wisely," for the reason that as a matter of law she is not entitled to the fee or absolute ownership. All questions of fact as to the plaintiff's condition, as to the exercise of a sound discretion by the defendants, and as to their arbitrary disregard of the plaintiff's interests are withheld by consent. That these questions may be determined hereafter is pointed out in the judgment.

In clause (a) the testator expressed his intention to distribute "all the remainder" of his property equally among his three children and his granddaughter, who is the plaintiff. Is the intention thus expressed contravened by the language used in clause (b)? We think not.

The latter clause directs the executors to hold the property in trust and to give the proceeds to the plaintiff. In the absence of an intention to separate the income from the principal an absolute devise of the

income from land as a rule passes the land itself. One of the means employed to indicate an intent to separate income from principal is the appointment of a trustee. *Benevolent Society v. Orrell,* 195 N. C., 405. W. H. Turrentine, the testator, appointed trustees of the property for a specified period—"until such a time as they may in their judgment think she is able to manage it wisely herself." The trust is not perpetual. The words used involve the implication that when she is able wisely to manage the property she shall have the right of actual possession; and from this it follows that the appointment of the executors as trustees for such purpose is not inconsistent with an intent to devise the property absolutely or in fee.

It is provided by statute that real estate, when devised to any person, shall be held and construed to be devised in fee simple unless the devise shall in plain and express words show, or it shall be plainly intended by the will or some part thereof, that the testator intended to convey an estate of less dignity. C. S., 4162. An unrestricted devise of real property carries the fee. *Roane v. Robinson,* 189 N. C., 628; *Lineberger v. Phillips,* 198 N. C., 661. So it is when an estate is devised generally with a power of disposition or appointment, or with a gift over to another of such part as may not be disposed of by the first taker. *Patrick v. Morehead,* 85 N. C., 62; *Carroll v. Herring,* 180 N. C., 369. In the latter case it is said: "Where real estate is given absolutely to one person, with a gift over to another of such portion as may remain undisposed of by the first taker at his death, the gift over is void, as repugnant to the absolute property first given; and it is also established law that where an estate is given to a person generally or indefinitely with a power of disposition, or to him, his heirs and assigns forever, it carries a fee, and any limitation over or qualifying expression of less import is void for repugnancy. The only exception to such a rule is where the testator gives to the first taker an estate for life only, by certain and express terms, and annexes to it the power of disposition. In that particular and special case the devisee for life will not take an estate in fee, notwithstanding the naked gift of a power of disposition."

On two grounds the defendants deny that the general rule is applicable to the present case: (1) the plaintiff takes only a life estate, or (2) if a fee simple, the fee is defeasible, and the plaintiff's title is not free from limitation.

We cannot yield our assent to the proposition that the plaintiff is given nothing more than a life estate. To his three children the testator gave a fee or absolute title; the plaintiff was to have an equal share—a share equal in quantity with the others. The phrase "what remains of her share" carries the connotation that nothing may remain; and this implies an unrestricted power of disposition. As stated in *Carroll v.*

Herring, supra, the only exception to the rule therein given is "where the testator gives to the first taker an estate for life only, by certain and express terms, and annexes to it the power of disposition." In the will there are no certain and express terms limiting the plaintiff's interest or estate to a life tenure, and the cases dealing with limitations after the express grant of a life estate may be treated as inapposite. The plaintiff does not take an estate only for life.

In considering the contention that the plaintiff acquired a defeasible fee, we must keep in mind two clearly established principles: (1) a fee may be limited after a fee by way of executory devise; but "if one devises in fee simple, he cannot make a limitation over by way of executory devise without cutting down the first fee, in order to make room for the second." *McDaniel v. McDaniel,* 58 N. C., 351. (2) No remainder can be limited after the grant of an estate in fee simple.

These principles are aptly illustrated in a number of our decisions. In *Whitfield v. Garris,* 131 N. C., 148, the fact was that the testator had devised real estate to one of his grandsons in fee and had annexed a condition that if this devisee died leaving no heirs of his body the devised estate should go to three other grandchildren or to the survivors of them, and if the last survivor died leaving no heir or heirs of his body the property should be equally divided between all the grandchildren of the testator. The court held that the devise should be read as if it had been written to the first devisee (the grandson), his heirs and assigns, but upon condition that if he should die without leaving heirs of his body, then to the other grandchildren; also that as the grandson had conveyed the land by deed and had died leaving heirs of his body his conveyance passed the fee. A petition to rehear was filed and after a critical and exhaustive review of the authorities the court adhered to the decision that the devise vested a fee in the first taker defeasible on condition that he died without leaving heirs of his body. 134 N. C., 24. The principle has been maintained in several subsequent cases.

In *Carroll v. Herring, supra,* the devise was as follows: "I give, bequeath, and devise to my son, James A. Carroll two hundred dollars ($200), to be paid by my executors, and I devise to him the ten acres of land known as the Pearce land, on which he has built a house where he lives. Also, 37 acres which I bought of Warren Carver, and lying east of the Holly land, both said tracts to said James A. Carroll in fee, but if he die without heirs possessing the lands, or either tract, with remainder to the heirs of J. W. Carroll." The Court construed the words "in fee" and "or either tract" as indication of an intent that James A. Carroll should "have a fee-simple estate in the land devised to him, and to do with and dispose of as he saw fit." The power of disposition passed the fee and the pretended limitation over by way of remainder was void for repugnancy. The fee simple had no remainder.

This principle is controlling in the present appeal. The intended equality of the several devises and the purported limitation over of "what remains" imply a power of disposition which, in the absence of an express gift for life only, carried the fee and left in the testator no estate which he could limit over as a remainder. *Daniel v. Bass,* 193 N. C., 294. It may be noted that in *Herring v. Williams,* 158 N. C., 1, real and personal property was given to the first taker for life with a limitation over and as we have pointed out the decision is not applicable to the devise under consideration. Judgment

Affirmed.

IN THE MATTER OF THE ESTATE OF R. H. WRIGHT, DECEASED, AND R. H. WRIGHT, JR., AND T. D. WRIGHT, EXECUTORS OF R. H. WRIGHT, DECEASED, V. M. W. BALL AND OTHERS, DEVISEES AND LEGATEES OF R. H. WRIGHT, DECEASED.

(Filed 12 April, 1933.)

Executors and Administrators B a—Beneficiaries of insurance policy held entitled to have sum borrowed on policy paid out of general assets.

The insured and the beneficiaries in a policy of life insurance executed a note to the insurer for borrowed money and assigned the policy to the insurer as security therefor. The insured received the proceeds of the note and used same for his exclusive benefit, carried the note on his books as a personal liability, and paid the interest thereon during his lifetime. Upon his death, the beneficiaries, as his executors named in his will, paid the note out of the general assets of the estate and received from the insurer the full amount of the policy. *Held,* the executors could not be made to account to the estate for the amount of the note, the note being a personal liability of the testator, and there being no provision in the policy that upon the maturity of the policy any sum due on account of a loan on the policy should be deducted in the settlement with the beneficiaries, and the fact that the executors and the beneficiaries were the same is immaterial.

APPEAL by Durham Loan and Trust Company, receiver of the estate of R. H. Wright, deceased, and others, from *Small, J.,* at March Term, 1933, of DURHAM. Affirmed.

The above entitled causes having been theretofore consolidated for all purposes were heard at the March Term, 1933, of the Superior Court of Durham County, on the petition of the Durham Loan and Trust Company, receiver of the estate of R. H. Wright, deceased. The facts alleged in the petition and found by the court are as follows:

On 12 November, 1901, R. H. Wright, Sr., applied to the State Mutual Life Assurance Company of Worcester, Mass., for a policy of insurance on his life. The policy was issued by the said company in accordance with the application. By its terms the company agreed in consideration of the payment by the insured of the premiums as stipulated therein, to issue and deliver to R. H. Wright, Jr., and T. D. Wright, at the death of the insured, thirty bonds, each for the sum of one thousand dollars, bearing interest at four per cent from the date of issuance, and payable twenty-five years after said date. It was stipulated in said policy that when the same had matured, on the request in writing of the persons legally entitled to receive the bonds issuable under the policy, the company would commute the said bonds and pay in lieu thereof the sum of thirty-three thousand dollars.

The insured, R. H. Wright, Sr., paid the premiums on said policy until his death on 4 March, 1929. The policy was in full force at said date. By his last will and testament, which was duly probated and recorded in the office of the clerk of the Superior Court of Durham County, the insured, R. H. Wright, Sr., named as his executors, the beneficiaries in said policy, to wit: R. H. Wright, Jr., and T. D. Wright. The said executors duly qualified for the discharge of their duties, and until they were removed by the court, were engaged in the discharge of such duties.

On 2 January, 1926, R. H. Wright, Sr., R. H. Wright, Jr., and T. D. Wright, executed and delivered to the State Mutual Life Assurance Company of Worcester, Mass., a note for the sum of $18,500. This note bore interest from date, payable semiannually, and was due on demand. As collateral security for the payment of said note, R. H. Wright, Sr., as the insured and R. H. Wright, Jr., and T. D. Wright, as beneficiaries, assigned to the State Mutual Life Assurance Company, the policy of insurance which the said company had issued on 12 November, 1901, on the life of R. H. Wright, Sr. The said R. H. Wright, Sr., received for his own use the proceeds of the said note, and during his life paid, out of his own funds, the interest due on the note. The said note was entered by the said R. H. Wright, Sr., on his books as his personal liability.

After they had qualified as executors of R. H. Wright, Sr., and before their removal by the court, R. H. Wright, Jr., and T. D. Wright, as executors, paid the note for $18,500, due to the State Mutual Life Assurance Company, out of the general funds of the estate, and thereafter as beneficiaries of the policy issued by the said company on the life of the said R. H. Wright, Sr., collected the full amount due under said policy, to wit: the sum of $33,000, with accrued interest.

The Durham Loan and Trust Company, receiver of the estate of R. H. Wright, Sr., after its appointment by the court as such receiver, at the request of certain legatees and devisees of R. H. Wright, Sr., deceased, demanded that R. H. Wright, Jr., and T. D. Wright account to the said receiver for the sum of $18,500 and interest, which had been paid by them as executors on account of the note held by the State Mutual Life Assurance Company and secured by the assignment of the policy of insurance on the life of R. H. Wright, Sr., in which they were named as beneficiaries. This demand was refused by R. H. Wright, Jr., and T. D. Wright.

The court was of opinion that R. H. Wright, Jr., and T. D. Wright, as executors, had rightfully and legally paid the note held by the State Mutual Life Assurance Company at the death of R. H. Wright, Sr., out of funds belonging to his estate, and had rightfully and legally collected, as beneficiaries, the amount due on said policy, and so adjudged. The Durham Loan and Trust Company, receiver, and certain legatees and devisees of R. H. Wright, Sr., deceased, appealed to the Supreme Court.

Brawley & Gantt for the receiver and others.

Basil Watkins and McLendon & Hedrick for R. H. Wright, Jr., and T. D. Wright.

CONNOR, J. There is no provision in the policy of insurance which was issued by the State Mutual Life Assurance Company on the life of R. H. Wright, Sr., the insured, that upon the maturity of the policy, any sum due to the company by the insured on account of a loan on the policy shall be deducted from the amount due under the policy in the settlement with the beneficiary. The company held the policy under an assignment executed by the insured and the beneficiaries, as collateral security for the payment of the note on which the insured was liable, personally, as principal, and the beneficiaries, personally, as sureties.

The executors of the insured paid the note out of the funds in their hands belonging to the estate of their testator; thereafter, the company paid to the beneficiaries the full amount due under the policy. The beneficiaries cannot be required to account to the estate of the insured for the sum which the executors paid in discharge of the note of their testator. The fact that in the instant case the executors of the insured and the beneficiaries under the policy are the same persons, is immaterial. See *Russell v. Owen,* 203 N. C., 262, 165 S. E., 687.

On the facts found by the court, there was no error in the judgment. It is

Affirmed.

STATE v. C. B. RAPER ET AL.

(Filed 12 April, 1933.)

Conspiracy B a—

One person alone may not be convicted of criminal conspiracy, and where all the defendants charged with conspiracy are acquitted except one, the one convicted is entitled to his discharge.

APPEAL by defendant Raper from *Clement, J.*, at January Term, 1933, of FORSYTH. Reversed.

The bill of indictment follows:

The jurors for the State, upon their oath, present: That C. B. Raper, C. R. Wilson, E. A. Brookshire, H. G. Myers, and George Hilton, late of the county of Forsyth, on 1 May, A.D. 1932, 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 laws:

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.

The appellant was convicted and from the judgment pronounced he appealed to the Supreme Court.

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

L. B. Williams for defendant.

ADAMS, J. The five defendants named in the indictment were tried in July, 1932, and Myers and Hilton were acquitted. *S. v. Raper,* 203 N. C., 489. These two conspired with neither of the others and neither

of the others conspired with them. At a later term Raper, Wilson, and Brookshire were put on trial and the jury acquitted Brookshire and Wilson and convicted Raper, who is charged with conspiring only with his codefendants. The acquittal of two of the defendants left open the question of a conspiracy among the other three; but when two of these were acquitted none was left with whom Raper could have conspired. The principle is stated in *S. v. Tom,* 13 N. C., 569, in which Tom, a slave, and Donum, a slave, were indicted for a conspiracy to murder. In holding that the acquittal of one was the acquittal of the other the Court said: "The other question is, whether the acquittal of one of two persons charged *nominatim* in the same indictment with a conspiracy, is an acquittal of the other. In this indictment six are charged. The case states that the evidence went only to a conspiracy between Tom and Donum, yet the jury found Tom guilty generally. That might well be done, though Donum were not guilty; because it is sufficient to show a conspiracy between Tom and any one of the others. If the case rested there, the judgment would be without difficulty affirmed; for this Court cannot grant a new trial, for the reason that the verdict is against evidence. But the court below instructed the jury that they might convict the prisoner, although they believed all the other persons, except Donum, to be not guilty, notwithstanding the previous acquittal of Donum upon the same indictment. The case is, therefore, upon the instructions given, the same as if Donum and the prisoner were the only defendants. . . . Now conspirators may be said to be coprincipals. The guilt of both must concur to constitute that of either; and it must consist of a joint act, and it makes one crime in both. As the trial of one need not precede that of the other, the trial of both ought to be concurrent. I think it more than probable that anciently such was the course. But, clearly, now it is otherwise. There are many precedents of the separate trial of persons indicted for offenses that could not be committed by less than two. *Rex v. Sudbury,* 1 Lord Raymond, 484; *S. c.,* 12 Mod., 262; *Rex v. Kinnersly,* 1 Str., 193; *Rex v. Niccolls,* 2 Str., 1227. It is too late now to question it. But it can never follow from those cases that where one of the persons, the establishment of whose guilt is essential to the conviction of the other, has been legally acquitted, the other does not thereby become discharged." The judgment is reversed. The appellant will be discharged.

Reversed.

T. C. BOWIE AND E. A. McNEILL v. H. C. TUCKER, TRUSTEE OF THE WEST JEFFERSON LAND COMPANY AND H. C. TUCKER.

(Filed 12 April, 1933.)

Arbitration and Award D c—Where parties do not object to award it is error for court to remand same to arbitrators on its own motion.

Where the court submits a cause to arbitrators with the consent of the parties under an agreement that the award should be final, judgment should be entered upon their award in the absence of exception or objection by either party when the report does not show on its face that the arbitrators exceeded their authority, and it is error for the court of its own motion to remand the same to the arbitrators for the finding of additional facts.

APPEAL by plaintiffs from *Stack, J.,* at October Term, 1932, of ASHE. Error.

This action was first tried by a referee appointed by the court, who filed his report at July Term, 1932. By consent of the parties, the report of the referee was set aside, and together with the order of reference stricken from the record.

It was thereupon by consent of the parties ordered by the court that the issues raised by the pleadings and the entire controversy between the parties involved in the action, be and the same were referred to arbitrators named in the order for final determination. The arbitrators filed their report and award at October Term, 1932, of the court. The award was based upon findings of fact made by the arbitrators. No exceptions were filed by the parties or by either of them, to the report or to the award. Nor did either of the parties move for time within which to file exceptions.

The judge presiding, of his own motion, ordered that the report and award be remanded to the arbitrators, with directions to the arbitrators to find other and additional facts, and to determine the rights and liabilities of the parties upon these additional facts.

From this order the plaintiffs appealed to the Supreme Court.

R. A. Doughton for plaintiffs.

W. B. Austin and Ira T. Johnston for defendants.

CONNOR, J. This action was referred by the court with the consent of the parties to arbitrators to determine the issues arising on the pleadings and the rights and liabilities of the parties involved in the controversy out of which the action arose. It was ordered that the report and award of the arbitrators should be a final determination of all

matters at issue between the plaintiffs and the defendants involved in the controversy. The report and the award filed with the court by the arbitrators does not show on its face that the arbitrators exceeded the terms of the consent order of the court by which they were named.

It was error for the court on its own motion, without objection or exception to the report and award filed by the arbitrators, to remand the same to the arbitrators, with directions that they find other and additional facts. In the absence of objection or exception filed by a party to the action, judgment should have been entered by the court on the award. *Robertson v. Marshall,* 155 N. C., 167, 71 S. E., 67; *Snell v. Chatham,* 150 N. C., 729, 64 S. E., 870; *Herndon v. Ins. Co.,* 110 N. C., 279, 14 S. E., 742.

Error.

BADIE H. CONYARD v. LIFE AND CASUALTY INSURANCE COMPANY OF TENNESSEE.

(Filed 12 April, 1933.)

1. Insurance R a—

A private one and one-half ton motor driven truck is a "private motor driven car" within the meaning of that term as used in a policy of accident insurance.

2. Insurance E b—

Where an insurance policy is reasonably susceptible of two interpretations, the one more favorable to the insured will be adopted.

APPEAL by defendant from *Cowper, Special Judge,* at January Term, 1933, of ALAMANCE.

Simon Conyard was fatally injured 19 April, 1932, by accidental means when the private Chevrolet one and one-half ton motor driven truck, in which he was driving at the time, struck the embankment of the highway and threw him violently to the hard surface portion of the road. The deceased held an insurance policy with the defendant company which provided an indemnity of $1,000 for death from accidental bodily injuries resulting from the "collision of or by any accident to any private drawn vehicle or private motor driven car in which the insured is riding or driving." The plaintiff, wife of the deceased, was named as beneficiary in said policy.

There was judgment for the plaintiff, from which the defendant appeals, assigning error.

Long & Long for plaintiff.

Long & Ross for defendant.

STACY, C. J. Is a private Chevrolet one and one-half ton motor driven truck a "private motor driven car" within the meaning of the policy in suit? The case was made to turn on the answer to this question in the court below, and we are disposed to agree with his Honor that it is.

The term "motor driven car" is broad enough to include a motor driven truck, and we cannot say a narrower interpretation was intended by the parties. The rule of construction is, that when an insurance policy is reasonably susceptible of two interpretations, the one more favorable to the assured will be adopted. "The policy having been prepared by the insurers, it should be construed most strongly against them." *Bank v. Ins. Co.*, 95 U. S., 673; *Jolley v. Ins. Co.*, 199 N. C., 269, 154 S. E., 400; *Underwood v. Ins. Co.*, 185 N. C., 538, 117 S. E., 790.

There was nothing said in *Lloyd v. Ins. Co.*, 200 N. C., 722, 158 S. E., 386, *Anderson v. Ins. Co.*, 197 N. C., 72, 147 S. E., 693, or *Gant v. Ins. Co.*, 197 N. C., 122, 147 S. E., 740, which militates against the position here taken.

Affirmed.

STATE v. EUGENE HINES.

(Filed 12 April, 1933.)

Criminal Law L a—

Where nothing is done to perfect the appeal of a defendant, although he was allowed to appeal *in forma pauperis*, and the appeal is not ready for argument at the call of the district to which it belongs, the appeal will be dismissed on motion of the State.

MOTION by State to docket appeal, affirm judgment and dismiss the appeal.

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

STACY, C. J. At the November Term, 1932, Forsyth Superior Court, Eugene Hines was tried upon an indictment charging him with the murder of one Lacy Weatherspoon, which resulted in a conviction and sentence of death. The prisoner gave notice of appeal to the Supreme Court, but this has not been prosecuted as required by the rules, albeit he was allowed to appeal *in forma pauperis*, and was given sixty days from 17 November within which to make out and serve statement of case on appeal, and the solicitor was allowed sixty days thereafter to prepare and file exceptions or countercase.

Apparently nothing has been done on behalf of the prisoner to perfect his appeal. The case should have been ready for argument at the call of the Eleventh District, 4 April, 1933, the district to which it belongs. The motion of the State will be allowed. Judgment

Affirmed. Appeal dismissed.

MAX PLOTKIN v. REALTY BOND COMPANY.

(Filed 12 April, 1933.)

1. Fraud A a—

The essential elements of actionable fraud are a representation, its falsity, knowledge and fraudulent intent on the part of the person making it, deception and injury.

2. Fraud A e—It is duty of grantee to read deed unless prevented by fraud.

It is the duty of the grantee in a deed to read the instrument unless prevented from so doing by fraud or misrepresentation on the part of the grantor, and where he fails to read the instrument after full opportunity he may not recover on the ground of fraud for the failure of the deed to convey certain adjoining land represented by the grantor to be included therein.

3. Fraud C e—Evidence in this case held insufficient to show deception or fraudulent intent, and nonsuit should have been granted.

A. conveyed certain land to B. B. conveyed the northern corner thereof to the city, and then conveyed the remainder to defendant by deed describing the whole tract and including in the description the part previously conveyed to the city. The defendant conveyed the land to plaintiff by deed erroneously containing the description in the original deed to B. Defendant's agent pointed out the land to plaintiff and represented that certain land adjoining the property on the west was included therein. All the deeds were recorded, and plaintiff given opportunity to investigate the title. The description in the deed would have disclosed that the land to the west was not included therein. There was no evidence that defendant's agents knew that a part of the property had been conveyed to the city, or that they knew the boundaries of the property. *Held*, the grantor's action to recover damages for fraud should have been nonsuited, there being evidence that the grantee should have discovered the error through proper diligence, and there being no evidence of knowledge or fraudulent intent on the part of the grantee's agents.

4. Deeds and Conveyances C f—

Where certain property not owned by the grantor is included in the description in the deed through the mutual mistake of the parties, the grantee may not recover therefor on the deed's covenant of seisin.

PLOTKIN *v.* BOND CO.

CIVIL ACTION, before *Harding, J.*, at February Term, 1932, of FORSYTH.

Couslar owned a rectangular lot at the corner of Walnut and Broad streets in the city of Winston-Salem. He conveyed to the city a portion of the lot for the purpose of rounding the intersection of said streets, and this space was paved and sidewalks built. The remaining portion of the lot, then owned by Couslar, was in the form of a triangle. Subsequently Couslar conveyed the lot to defendant by deed duly recorded. This deed described the original rectangular lot and hence included the portion owned and paved by the city.

The defendant and the plaintiff entered into an agreement to exchange certain lands or lots, and as a result the plaintiff received a deed from the defendant for the Couslar lot. The description of the land therein was the same as that contained in the deed from Couslar to the defendant. Hence the deed to the plaintiff included the portion owned by the city and then paved and used as a street.

The plaintiff's deed, executed by the defendant, was duly recorded on 25 March, 1927. Thereafter, on 14 July, 1928, the plaintiff instituted the present suit against the defendant. He alleged that the agent of defendant pointed out the land to him before the deed was executed, and that the lot so pointed out included an area west of and adjoining the lot described in the deed. It was further alleged that in pointing out said area that the defendant did not own, the plaintiff was misled, deceived and defrauded, and that the defendant intended to deceive and defraud the defendant by such false representation. The plaintiff further alleged that the deed from the defendant to him contained a covenant of seisin and warranty, and that there was a breach of the covenant of seisin for that portion of land described in the deed which was at the time covered by the street as aforesaid. Whereupon, the plaintiff prayed damages in the sum of $2,250.

The defendant filed an answer alleging that in executing the deed to the plaintiff the draftsman had followed the description in the deed from Couslar to the defendant, and through inadvertence and mistake had included in the description that portion of land theretofore conveyed by Couslar to the city and then covered by the street and sidewalk. The defendant further denied any and all false representations with respect to pointing out any boundaries of the lot or of an area adjoining and west of the triangular lot actually owned by the defendant at the time the deed was made.

The plaintiff testified: "We went to the property located at the southwest corner of Broad Street and Walnut Street. When we got to that property Mr. Wilkes took out a little book and read the dimensions, and

then he stepped it off to certain points. Mr. Pfaff sent Mr. Wilkes out with me to look at that piece of property. I have seen Mr. Wilkes in and around the place of business of Realty Bond Company. He was selling real estate for the Realty Bond Company or he was carrying a paper and showing different pieces of property. Mr. Wilkes stepped off from the sidewalk now there from that point on the southern line, going west 81 and some tenths feet to an old fence that stood there at that time; then he kept on stepping around from that point, going north, to a certain point at the sidewalk where the sidewalk looked a little newer than the old sidewalk on Walnut Street. . . . Then we went along Walnut Street with the sidewalk to a certain point 50 some feet; . . . then from that point back to the point of beginning around the curve. . . . After I went out there and looked at the property I appointed an attorney to look up the title. He made a report to me, and pursuant to that report I signed a deed to my property and received deeds from them for their property and $1,050 in cash. . . . I suppose I did state in the original complaint that a part of the property pointed out to me had been deeded to the city of Winston-Salem. . . . I may have stated to Mr. Pfaff that they had deeded me something that was in the street. . . . I had a reasonable time to investigate the title to the property before I got the deed. The deed was handed to an attorney of mine employed for the purpose of investigating the title. He did investigate the title. I probably had the deed a couple of days in all investigating the title. The deeds were signed after he finished his investigation. The attorney chosen by me had done some work for me before and I had confidence in him. He reported to me that the title was all right and I relied on his statement about it. Relying upon his statement about it I accepted the deed to this property. . . . Mr. Wilkes did not do anything to prevent me from having a surveyor to locate this lot, . . . nor did the Realty Bond Company do anything to prevent me from making inquiry as to the exact location of the property. The Realty Bond Company gave me time between the date of the contract and the delivery of the deed in which to examine the title and determine for myself. I suppose it was about a week from the date of the contract until the deeds were delivered. . . . After Mr. Wilkes had pointed out the area I relied on the representation that he made as to the piece of ground that was being deeded to me." The plaintiff also testified that the triangular piece of property actually conveyed by the deed was worthless.

The following issues were submitted to the jury:

1. "Did the defendant, through its agent, point out the boundaries F to J to H to E to G and back to F, as alleged in the complaint?"

2. "If so, was the plaintiff induced to accept his deed by fraud and deceit, as alleged in the complaint?"

3. "What amount of damages, if any, is plaintiff entitled to recover due to the misrepresentation by the defendant?"

4. "Did the defendant execute to the plaintiff a deed containing a covenant of seisin for the tract on the plat designated A, B, C, D?"

5. "Was the description inserted through the mutual mistake of the parties, and should it be corrected to contain tract designated 'F, to B, to E, to G, to F,' as alleged in the answer?"

6. "If not, what amount of damages, if any, has the plaintiff sustained due to breach of the covenant of seisin?"

The jury answered the first issue "Yes," the second issue "Yes," the third issue "$1,250 without interest," the fourth issue "Yes," and the fifth issue "Yes," and did not answer the sixth issue.

From judgment upon the verdict the defendant appealed.

Elledge & Wells for plaintiff.
Ingle & Rucker for defendant.

BROGDEN, J. Was there sufficient evidence of fraud and deceit to be submitted to the jury?

"The essential elements of actionable fraud or deceit are the representation, its falsity, scienter, deception, and injury. The representation must be definite and specific; it must be materially false; it must be made with knowledge of its falsity or in culpable ignorance of its truth; it must be made with fraudulent intent; it must be reasonably relied on by the other party; and he must be deceived and caused to suffer loss." *Electric Co. v. Morrison,* 194 N. C., 316, 139 S. E., 455; *Peyton v. Griffin,* 195 N. C., 685, 143 S. E., 525.

The evidence offered by the plaintiff tended to show that the agent of defendant pointed out a certain boundary of land, and that in preparing the deed only a portion of such lot pointed out was included therein. The plaintiff testified that he relied upon the representations so made by the defendant. Nevertheless a deed was tendered covering a portion of Walnut and Broad streets and not including the area west of the land described in the deed, which the plaintiff contended was pointed out to him. The plaintiff took the deed and turned it over to an attorney in whom he had confidence in order that a full investigation of the title could be made before the consummation of the transaction. Presumably, after a full investigation, the attorney approved the title, and the deal was closed. There is no evidence that the defendant resorted to any trick, scheme or artifice tending to prevent full and complete examination of the description of the property contained in the deed as

well as the title to the same. Such facts classify this case in the line of cases illustrated by the following: *Gatlin v. Harrell,* 108 N. C., 485, 13 S. E., 190; *Griffin v. Lumber Co.,* 140 N. C., 514, 53 S. E., 307; *Clements v. Ins. Co.,* 155 N. C., 57, 70 S. E., 1076; *Terault v. Seip,* 158 N. C., 363, 74 S. E., 3; *Pittman v. Tobacco Growers Asso.,* 187 N. C., 340, 121 S. E., 634; *Grace v. Strickland,* 188 N. C., 369, 124 S. E., 856; *Colt Co. v. Kimball,* 190 N. C., 169, 129 S. E., 406; *Peyton v. Griffin,* 195 N. C., 685, 143 S. E., 525. The prevailing principle declared in the aforesaid line of cases was expressed in *Griffin v. Lumber Co., supra,* as follows: "It is elementary learning that common prudence requires that before signing a deed the grantor should read it, or, if unable to do so, should require it to be read to him, and his failure to do so, in the absence of any fraud or false representations as to its contents, is negligence, for the result of which the law affords no redress. . . . But when fraud or any device is resorted to by the grantee which prevents the reading, or having read, the deed, the rule is different." In like vein *Varser, J.,* wrote in *Colt v. Kimball, supra,* the following: "Defendant's testimony shows that he is a man of education and prominence, accustomed to the transaction of business, and of much experience, with more than an average education; who has served on the board of education for Vance County for many years. It was his duty, unless fraudulently prevented therefrom, to read the contract, or, in case he was not able to read the fine print without stronger glasses, to have it read to him. This rule does not tend to impeach that valuable principle which commands us to treat each other as of good character, but rather enforces along with it, the salutary principle that each one must 'mind his own business' and exercise due diligence to know what he is doing. Having executed the contract, and no fraud appearing in the procurement of the execution, the Court is without power to relieve the defendant on the ground that he thought it contained provisions which it does not."

Furthermore, in *Terault v. Seip, supra,* the Court said: "An essential element of actionable fraud is the scienter or knowledge of the wrong on the part of the vendor. Where the representation is made as a part of the warranty, the vendor is held liable for his statement, whether he knew it to be true or not, but where the action is for fraud the burden is upon the party setting it up to prove the scienter."

There is no evidence in the record tending to show that the agent of defendant knew that a part of the original lot had been conveyed to the city, nor does it appear that he knew the exact boundaries of the land owned by the defendant. While it is true that the deed accepted by the plaintiff covered land belonging to the city, the jury found that such portion was incorporated through the mutual mistake of the parties.

Such finding of course eliminates the right to recover upon the breach of the covenant of seisin.

The Court is therefore of the opinion, and so holds that the motion for nonsuit, duly made upon the cause of action sounding in fraud and deceit, should have been granted.

Error.

JOHN C. SHARPE, ADMINISTRATOR D. B. N. OF LUTHER DALTON, DECEASED, v. MART CARSON ET AL.

(Filed 12 April, 1933.)

1. Descent and Distribution B c—

Under statutory modification of the common law, the mother and brothers and sisters of a bastard may inherit from him, but the rule extends no further, and the brothers and sisters of the bastard's mother may not inherit from him.

2. Insurance N a—Proceeds of War Risk Insurance held to escheat to the University under the facts of this case.

In an action to determine conflicting claims to the proceeds of War Risk Insurance in the hands of the deceased soldier's administrator it appeared that the soldier was a bastard, and that the funds were claimed by the brothers and sisters of the soldier's mother, the U. S. Government, and the University of North Carolina, the deceased soldier's wife being incapable of claiming the funds because of marital misconduct. Judgment was entered in the lower court in favor of the soldier's uncles and aunts, and the Government did not appeal. Upon the University's appeal it *is held:* the uncles and aunts of the deceased soldier are incapable of inheriting from him, and the funds escheat to the University, and the rights of the Government under Title 38, U. S. C. A. need not be determined, the Government not having appealed, nor can the Government's rights be set up by the uncles and aunts to defeat the University's claim.

3. Appeal and Error F d—

Where the U. S. Government, claiming the proceeds of War Risk Insurance under section 514, Title 38, U. S. C. A., does not appeal from a judgment in favor of certain individual claimants, and on appeal it is decided that the funds escheat to the University, the question of whether the Government is estopped by the judgment is not presented for decision on the record.

CIVIL ACTION, before *MacRae, Special Judge,* at February Term, 1932, of IREDELL.

Luther Dalton, a soldier, died on or about 1 October, 1918, covered by a policy of War Risk Insurance in the amount of $10,000. The beneficiary named in the policy was Will Dalton. Will Dalton died on 21 February, 1929. Thereafter, John C. Sharpe, the plaintiff, was appointed administrator, *d. b. n.* of the estate of Luther Dalton, the de-

ceased soldier. Said administrator has in his hands for distribution, arising from said policy, the sum of $4,580.33, and instituted this action for the purpose of settling said estate and distributing the money. Luther Dalton, the soldier, was the illegitimate son of Isabel Carson, who predeceased him, and he changed his name from Carson to Dalton. In 1912, Luther Dalton married Daisy Allen. They separated soon after the marriage and Daisy Dalton died on or about 25 February, 1921, leaving no children born to her as a result of the union.

At the time of his death the soldier left no surviving children, mother, brothers, sisters, or the descendants of such, but he left the defendants, Mark Carson and William Carson, uncles, and Maria Martin, an aunt, and the children of an uncle, Thomas Carson, who died in 1917, and the children of an aunt, Mollie Carter, who died in 1927, and other children of uncles and aunts.

When the suit was instituted various claimants came into court in order to get the money.

(1) Some of the petitioners, who were the children of Thomas Carson, a deceased uncle, assigned their interest in the estate of Nick Dalton.

(2) The uncles and aunts and the children of deceased uncles and aunts, both legitimate and illegitimate, filed an answer claiming the fund.

(3) A. D. Folger, administrator of Daisy Dalton, the deceased wife, filed an answer claiming the fund.

(4) The University of North Carolina was duly made a party to the cause and claimed the fund upon the theory of an escheat.

(5) The United States of America filed an answer claiming the fund by virtue of section 514, Title 38, War Veterans Act.

Daisy Dalton, the wife of the soldier, was living at the time of his death, but it was alleged that by reason of misconduct on her part she had forfeited her right to share in the estate of her husband.

The following issues were submitted to the jury:

1. "Did Daisy Dalton, wife of Luther C. Dalton, elope with an adulterer?"

2. "Did the said Daisy Dalton, wife of Luther Carson Dalton, wilfully and without just cause abandon her husband and refuse to live with him and was not living with him at the time of his death?"

The jury answered both issues "Yes."

Upon the verdict judgment was entered directing that the estate be distributed in seven equal shares to the living uncles and aunts of the deceased and the children of deceased uncles and aunts.

From the foregoing judgment A. D. Folger, administrator of Daisy Dalton, the United States of America, and the University of North Carolina appealed.

However, these appeals were not perfected, and the only appellant before the Court is the University of North Carolina.

J. W. Van Hoy and Buren Jurney for University of North Carolina.
Manly, Hendren & Womble, W. A. Bristol and DuBose & Weaver for distributees of Luther Dalton.

BROGDEN, J. Two questions of law are presented for decision:

1. Are the brothers and sisters and representatives of deceased brothers and sisters of the mother of a deceased illegitimate soldier, the next of kin of such soldier, and thus entitled to the proceeds of the insurance in the hands of the administrator?

Before this Court was ten years old as a separate and independent entity of government, it had occasion to discuss the legal status of a bastard, in the case of *Kimborough v. Davis,* 16 N. C., 71. *Taylor,* the first *Chief Justice,* said: "According to the law of England, bastards are incapable of being heirs. They are considered as the sons or children of nobody, and no inheritable blood flows to their veins, and therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the lord. They can have no other heirs than the issue of their own bodies; for as they are considered the children of nobody, there can be no ancestors by whom a kindred or relation can be made. The reason of excluding them from the right of inheritance, is on account of the uncertainty of their ancestors. But our Legislature, wisely considering that this rule ought not to extend to cases where there is no uncertainty, as the mother of a bastard, has made them inheritable to their mothers, and to each other." In like vein *Pearson, C. J.,* spoke in *Walker v. Johnston,* 70 N. C., 576, saying: "We think the University is entitled to the one-fourth part, given to 'James Walker,' his sister Jane's son." James was a bastard, and died intestate and without children, and has no kin. By the common law a bastard was *nullius filius,* he was the child of no one in contemplation of law; and even his mother was not supposed to be kin to him. This rigidness of the common law has been relaxed by statute, so as to recognize the brothers and sisters of a bastard and his mother, as being of kin to him; but it cannot be extended, by even a strained construction, to the children of the brothers and sisters of his mother." Also, *In re Estate of Damon Bullock,* 195 N. C., 188, 141 S. E., 577, *Stacy, C. J.,* said: "True, it is provided by C. S., 140, that every legitimate child of a mother dying intestate shall be considered among her next of kin, and as such shall be entitled to share in her personal estate; and, further, that illegitimate children, born of the same mother, shall be considered legitimate as among themselves, but this is as far as the statute goes." See, also, *Powers v. Kite,*

83 N. C., 156; *Bettis v. Avery,* 140 N. C., 184, 52 S. E., 584; *In re Estate of Wallace,* 197 N. C., 334, 148 S. E., 456. The *Walker case, supra,* expressly decides the proposition of law in controversy relating to the right of uncles and aunts and the issue of such to distributive shares in the estate of the deceased soldier.

The collateral claimants, however, contend that the *Walker case* must be read in connection with chapter 64, part 2, sections 5 and 6. The *Walker case* was decided in January, 1874. Battle's Revisal went into effect on 1 January, 1874, and chapter 45, sections 107 and 108 thereof, is practically identical with C. S., 140. Manifestly, it is to be assumed that the Court had in mind the statute existing at the time the decision was rendered.

However, the claimants assert that the University of North Carolina has no interest in the cause of action or in the proceeds of the insurance by reason of the proviso in section 514, Title 38, U. S. C. A., which is as follows: "In cases when the estate of an insured would escheat under the law of the place of his residence the insurance shall not be paid to the estate but shall escheat to the United States and be credited to the military and naval insurance appropriation. This section shall be deemed to be in effect as of 6 October, 1917." Consequently, it is argued that the money belongs to the United States by express provision of the Federal statute, and hence the University has no standing in court.

The United States of America was a party to the action. A judgment was rendered by a court of competent jurisdiction and the United States did not appeal. Furthermore, the proviso of said section 514 declared that if the estate of the insured was subject to escheat, "the insurance shall not be paid to the estate but shall escheat to the United States," etc. The money was paid by the Federal Government to the administrator of the insured. A serious question would arise if it were necessary in this case to determine how far the sovereign is estopped by a judgment of a court of competent jurisdiction or as to whether estoppel or waiver can be asserted against the Federal Government by virtue of the fact that the money was actually paid to the estate of the insured. See *Taylor v. Shufford,* 11 N. C., 116; *Candler v. Lunsford,* 20 N. C., 542; *Wallace v. Maxwell,* 32 N. C., 110; *S. v. Williams,* 94 N. C., 891.

Such a question is not now before this Court. The only appellant is the University of North Carolina, and the solution of the case depends upon the relative rights of the University and of the collateral claimants of the deceased upon the present record. Upon such record the Court concludes that the University of North Carolina is entitled to the fund, subject, however, to the payment of costs and other expenses and charges duly allowed by the court.

Reversed.

JOE DALLAS v. ELIZABETH MARGARET WAGNER, TRADING AND DOING BUSINESS AS GREENSBORO LOAN COMPANY AND CHARLES L. WAGNER AND ELIZABETH WAGNER, INDIVIDUALLY.

(Filed 19 April, 1933.)

1. Fraud A a—

The elements of actionable fraud are a false statement, knowledge of its falsity or culpable ignorance on the part of the person making it, intent to deceive, and deception and damage.

2. Same—Plaintiff held not entitled to recover for fraud under facts of this case, his remedy, if any, being for breach of contract.

Where in an action for fraud the evidence is to the effect that plaintiff purchased a diamond pin and ring which defendant guaranteed in writing were genuine, and that the written guarantee also contained a stipulation that defendant would loan thereon a certain sum at any time within twelve months, and that defendant refused to loan the amount stipulated within the specified time upon demand, but there is no evidence that the diamonds were not genuine: *Held*, the plaintiff's action for fraud should have been nonsuited, the plaintiff's remedy, if any he has, being for breach of the contract to loan the amount stipulated.

APPEAL by defendants from *Stack, J.*, and a jury, at January Term, 1933, of GUILFORD. Reversed.

The plaintiff purchased of the defendants (1) a man's diamond pin, (2) a man's diamond ring. At the time the following agreement was entered into:

"Greensboro Loan Company.

Greensboro, N. C.

Guarantee No. 533.

113 East Market Street.

Guarantee.

This is to certify that we have this day sold to Joe Dallas, Greensboro, N. C.

(Article) Men's Dia. Pin.

And we guarantee the above genuine diamond.

(Special remarks) Will loan $250.00.

Greensboro Loan Company.

Date: 25 December, 1930. Per Chas. L. Wagner.

(Amount) $350.00.

Greensboro Loan Company.

Greensboro, N. C.

Guarantee No. 535.

113 East Market Street.

Guarantee.

This is to certify that we have this day sold to Joe Dallas, Greensboro, N. C.

(Article) Men's diamond ring.

And we guarantee the above genuine diamond.

(Special remarks) Will loan $250.00.

Greensboro Loan Company.

Date: 26 December, 1930. Per Chas. L. Wagner.

Amount $400.00. (Within one year from above date.)"

The complaint of plaintiff, with the amendment allowed by the court below, was an action for actionable fraud or deceit in the sale of the diamond pin and ring. The defendants denied the allegations of the complaint as to fraud or deceit.

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

"1. Did the defendants induce the plaintiff to purchase of them the scarf pin and ring in question by false and fraudulent representations, as alleged in the complaint? Answer: Yes.

2. If so, what amount of damages, if any, is the plaintiff entitled to recover of the defendants on account thereof? Answer: $490.00.

3. When the plaintiff pledged the pin and ring to the defendants had the diamond stones been changed and the ones pledged not the ones that the plaintiff had bought of the defendants? Answer: No.

4. If the stones in question were not the same, in what amount, if any, is the plaintiff indebted to the defendants? Answer: ....."

The total sale price of the diamond pin and ring was $750.00. Plaintiff, according to the evidence, had borrowed from defendants $110.00 on the diamond pin and $150.00 on the diamond ring—a total of $260.00, and set up a counterclaim for same—($265.00). The judgment of the court below is the difference between the purchase price of the diamond ring and pin and the money loaned on same, viz.: $490.00.

The allegations of the complaint and answer are lengthy, but we think the above sufficient to set forth the controversy. At the close of plaintiff's evidence the defendants moved for judgment as of nonsuit. Motion denied. Exception by the defendants.

The defendants introduced no evidence and again reviewed their motions for judgment as of nonsuit. Motions denied, exception by defendants. The defendants duly assigned error and appealed to the Supreme Court.

The necessary facts will be set forth in the opinion.

A. Stacey Gifford for plaintiff.
Shelley B. Caveness for defendants.

CLARKSON, J. The question involved: "Did the trial judge commit error in refusing to grant the defendants' motion for judgment as of nonsuit at the close of plaintiff's evidence?" We think so.

The contract as to the (1) man's diamond pin and (2) man's diamond ring, was as follows: "And we guarantee the above genuine diamond—special remarks: Will loan $250.00 . . . within one year from above date."

A guarantee is he to whom a guaranty is made. The contracts were special guaranties to plaintiff. If the diamond pin and ring were not genuine diamonds, the plaintiff had a cause of action on the contract of guaranty. Plaintiff when he elected to purchase the diamond took a guarantee that the diamonds were genuine and also the contract was to the effect that on the diamond pin and ring that he could borrow $250.00 on each—a total of $500.00.

In Pollock on the Law of Torts (1923), 12 ed., p. 283-4, the rule is well stated: "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 occur: (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." *Corley v. Griggs*, 192 N. C., 171, 173.

The plaintiff testified, in part: "So we goes on back in the store, and then he says this is the best one here, Joe, so I says what is the price, he says $350.00, so I says what will you give me on this Mr. Wagner, if I get broke, he says, well, Joe, I will give you $250.00 on it if you go broke. I says, will you give me a contract, he says, yes, *so he wrote the contract, so I bought the pin.* I was in the store about an hour maybe. *He said it was a genuine diamond pin, said he guaranteed it to be a genuine diamond pin.* That was all that was said, *the deal was*

closed when he signed the contract. I had another transaction with Mr. Wagner on the next day. I went in and told him I wanted to look at a ring so he showed me one and so he looked at it and taken it out to the light, the stone was about that same size, and he carried me through the same test with it another time. He wanted to know did I know the best stone so I taken the wrong stone the second time. I finally bought the diamond ring and paid $400.00. *He told me that it was one of the best stones that he had in stock that size, that he would lend me $250.00 any time I got ready in twelve months.* He said it was valued $400.00 and I was getting a bargain in it at the price and so I asked him, well, *now suppose I get busted at any time, Mr. Wagner, and need some money. He says well, Joe, I will let you have $250.00 any time on it. Any time within twelve months you come with it and he executed a written contract."*

Plaintiff further testified to the effect that defendants would not lend him on the diamonds as much as was promised under the above mentioned contracts. "I have never secured the balance of the loans." On cross-examination, he said: "I have been up for running a lottery and have been found guilty. I have been up in court for gambling. . . . Mr. Wagner said the price of the ring was $400.00 and I bought it. *He said that he would lend me $250.00 on each one of them and that was all that was said."*

The wife of plaintiff testified, in part: "My husband called me on long distance and told me to get the ring and take it down to Mr. Wagner and get $250.00. Mr. Wagner left word with his wife and when I went down to get the money she only gave me $150.00 and I was to call back the next day and get the remainder."

We find no evidence on the part of plaintiff that the diamonds were not genuine as guaranteed by defendants. In plaintiff's brief he says: "It is true that the plaintiff did not allege or prove any technical defects in the quality of the diamonds purchased by him." The plaintiff did testify: "Mr. Wagner told me at the magistrate's trial that the diamonds has been taken out and some others replaced, and that the stones that were in the ring and pin when I returned them were cloudy and had specks in them, this was the first time I heard this contention."

Plaintiff's witness, Howard Reynolds, on cross-examination, testified: "I have been arrested twice for having whiskey in my possession. Have not worked regularly in five years. I don't know whether the stone was changed before it got in my hands or not. *Mr. Wagner stated before the magistrate that the reason the pin was worth only $110.00 and the ring $150.00 was because the diamonds had been changed.* That the stones were originally blue white and perfect and that they now had defects in them and were cloudy. Mr. Wagner also testified before the magistrate

that the reason he only loaned $110.00 on the pin and $150.00 on the ring at the time was because he wanted a chance to examine them and didn't have a chance right then."

Plaintiff's own testimony is to the effect that he relied on the guarantee and further that he could not borrow $250.00 from defendants on each diamond, in accordance with the contracts.

We do not think there was sufficient evidence of actionable fraud or deceit to have been submitted to the jury. We think the remedy of plaintiff, if any, was an action on his contracts. *Potter v. Miller,* 191 N. C., 814. For the reasons given, the judgment is

Reversed.

T. B. DIXSON v. C. E. JOHNSON REALTY COMPANY.

(Filed 19 April, 1933.)

1. **Vendor and Purchaser G b—Evidence in this action to recover for breach of contract to purchase held sufficient to be submitted to the jury.**

   Defendant gave plaintiff a written agreement to repurchase certain land at the contract price within a year if the plaintiff should be dissatisfied with the lot. In the plaintiff's action to recover for defendant's refusal to repurchase the land in accordance with the agreement there was evidence that plaintiff demanded that defendant repurchase the land, and that plaintiff was ready, able and willing to execute a deed therefor: *Held,* the evidence was sufficient to be submitted to the jury.

2. **Vendor and Purchaser C a — Extension of agreement to purchase for definite time at defendant's request held not to relieve him of liability.**

   Defendant was under obligation to purchase certain lands at plaintiff's option at any time within one year. At defendant's request the agreement was extended for a year in order to give defendant time to dispose of the lot, and a memorandum of the extension was made on the bottom of the agreement: *Held,* the defendant was not relieved of his obligation under the agreement by plaintiff's failure to insist on performance within the time stipulated in the original agreement, the modification of the agreement being at defendant's request and by agreement with him.

3. **Principal and Agent C b—**

   Under the evidence in this case the question of whether defendant's agent had authority to agree to a modification of the contract between the parties is held a question of fact for the determination of the jury.

APPEAL by plaintiff from *Sink, J.,* at February Term, 1933, of FORSYTH. Reversed.

The evidence on the part of plaintiff: "In the negotiation of the contract alleged in paragraph three of the complaint, I dealt with M. A. Biggs, salesman for the C. E. Johnson Realty Company, and Mr. Russell Johnson, secretary of the company; I purchased the lot from the C. E. Johnson Realty Company through Mr. Biggs as salesman. Before the contract expired I asked Mr. Biggs to make arrangements to relieve me of the lot, that I was not satisfied with it, would not retain the lot and that I wanted to deed the lot back to them, and they to refund the money in accordance with the terms of the contract. Mr. Biggs asked me to give him further time in which to turn the lot and if I would do that he would extend the contract for another twelve months, that he would confirm the contract for another twelve months. After argument, then, or request that I make this extension or give him further time in which to comply with the contract, he made this notation on the bottom of the contract, extending the time for the fulfillment of the contract for another twelve months. (At this point in the testimony of the witness, Dixson, the plaintiff introduced the memorandum of agreement referred to in the testimony. It is as follows: 'We sell the earth—C. E. Johnson Realty Company—Real Estate and Fire Insurance—Reputation our capital—Reliability and Promptness—Winston-Salem, N. C., 6 November, 1928. . . . C. E. Johnson Realty Company hereby agrees to refund to T. B. Dixson, the full purchase price of $4,837.80 for lot No. 14, in "Stratford Place," with 6 per cent interest, on 6 November, 1929, in the event the above named purchaser should not be entirely satisfied with purchase of said lot. Yours very truly, C. E. Johnson Realty Company, by C. E. Johnson, pres. Attest: R. C. Johnson, Sec. . . . We hereby agree to renew the above contract and extend the terms and guarantee for another twelve months to 6 November, 1930. C. E. Johnson Realty Company, by R. C. Johnson, treas. M. A. Biggs, witness.'

Before the expiration of that amendment I made further demands on Mr. Biggs that he take up the lot and refund the money, and he came back and asked that I allow him a little further time in which to complete the sale of the lot as he had several folks in view that he could sell it to and he would then refund the money to me, stating then that if I would do that he would get the contract renewed for another twelve months. I agreed with Mr. Biggs to allow him to do that. Mr. Biggs stated he would get Mr. Russell Johnson to make notation on the books of the C. E. Johnson Realty Company and also make notation on the original contract and that he would have Mr. Johnson call by my office and give me this confirmation. After some time had elapsed Mr. Johnson had not come in, I called Mr. Biggs' attention to it again and he said Mr. Johnson had already told him he would attend to it and had made nota-

tion on the books and would bring the necessary papers by my office at the first opportunity. I called on Mr. C. E. Johnson in the latter part of October, 1931, or the first of November. I called by C. E. Johnson Real Estate Company's office and asked him what he was intending to do in relation to complying with the terms of the contract he had given me. Mr. Johnson replied that he didn't know anything about a contract. I said 'Mr. Johnson, do you mean to tell me that you don't know anything about the contract you signed?' He said, no, that he didn't know anything about it. I said, 'Well, I have a contract signed by you, unless it is a forgery, agreeing to take back a lot from me and refund the purchase price.' He asked me where it was. I said 'I have it in my pocket.' He said 'Let me see it.' I showed it to him. He admitted then he had signed it. He said 'That is some of Biggs' and Russell's foolishness; had no business making a contract like that.' I said 'I can't help that. I was depending on the integrity and reliability of the C. E. Johnson Realty Company to live up to a contract made by them, signed by you as president, and never once questioned it and would like to know what you are going to do about it. I am ready to comply with my part of the contract.' Mr. Johnson replied 'Those boys lost enough money for me already. I just can't afford to lose any more money. I am sorry for you but I can't comply with it.' I said, 'Mr. Johnson, I think you ought to look at it in a different light from that. You made a contract, admit that you signed it, and I was relying on that to protect me and I expect you to live up to your part of the contract.' Mr. Johnson said, 'I am sorry but I have lost all the money I can afford to lose and I am not going to do it.' I saw Mr. Biggs at least once a month during the year after the execution of the contract. He would come by the store. I would ask him how he was getting along with the sale of the lots so he could relieve me and he would tell me he had so many prospects for it and so forth, and that he could turn it in a short time. It was in September or October, 1929, that I first advised him that I would want to exercise my option to sell to the C. E. Johnson Realty Company. During the year I had other conversations with him in which I told him I had bought the lot for an investment with his promise to refund the money and I expected him to refund it at the expiration of the contract. Mr. Biggs stated to me he had several good prospects for buying the lot and that if he didn't close the deal before the contract date he would live up to the contract and refund the money, but in case he didn't, if I would give him a few more months in which to work on the lot he was sure he could turn it at a nice profit, and if I would do that, in case he didn't turn the lot, he would have the C. E. Johnson Realty Company to renew or confirm the original contract that they would refund the purchase price at the end of another year, provided he had not been able to turn the lot."

On cross-examination, plaintiff testified: "I made the following payments on the indebtedness on the property I have just testified about: On 29 February, 1929, $105.00; on 29 February, 1930, $439.80; on 29 February, 1931, $439.80; on 29 August, 1929, $439.80; on 29 August, 1930, $439.80; on 29 August, 1931, $439.80—I made two payments of $439.80, each in 1932."

Redirect examination: "I made the payments that I have just mentioned to Wachovia Bank and Trust Company, except a payment to C. E. Johnson Realty Company on 29 February, 1929. It was in the amount of $800.00 and was past due from the former owners, Hardin C. Graham and wife. It was a part of the cash payment. I am and have always been ready, able and willing to make a conveyance of this property to the defendant."

Plaintiff rested. At the close of the plaintiff's evidence the defendant moved for judgment as of nonsuit. Motion allowed. Plaintiff excepted. The plaintiff excepted to the signing of the judgment as of nonsuit, assigned error and appealed to the Supreme Court.

Ingle & Rucker for plaintiff.
Parrish & Deal for defendant.

CLARKSON, J. At the close of plaintiff's evidence the defendant made motion in the court below for judgment as in case of nonsuit. C. S., 567. The court below allowed the motion and in this we think there was error.

The questions involved: (1) Defendant admits its agreement to buy, at the plaintiff's option, a residential lot or parcel of land. Upon a motion of nonsuit, is there sufficient evidence of plaintiff's exercise of his option and his readiness and ability to convey to the defendant upon its payment of the price? We think so. (2) Is the defendant relieved of the obligation of its contract by failure of strict performance by the plaintiff, where, at the defendant's request, a modification of the contract was agreed to by the plaintiff extending the time for defendant's performance? We think not. (3) Was there sufficient evidence to be submitted to the jury as to the authority of M. A. Biggs, salesman for defendant company, to modify the contract by plaintiff's extending the time for defendant's performance? We think so.

We think the principle in *Alston v. Connell,* 140 N. C., 485, where a wealth of authorities are set forth, applicable. At p. 491-2, we find: "These facts, so established, declare that the plaintiff had arranged or was arranging to raise the money within the time required by the option, when he was notified and requested by the defendant that a postponement was desired for a year, until 1 January, 1901, and the plaintiff

agreed to the proposition. Within the time fixed by the postponement, the plaintiff went to the defendant with the money, tendering the amount required by the agreement and the same was refused. The plaintiff, having consented to the delay at the request of Thomas Connell, will be taken to have been ready and willing to perform at the time stipulated in the written agreement; having tendered the amount due within the period fixed by the postponement, he is in no default, and the extension having been given at Thomas Connell's request and for his convenience, when the extended agreement itself and all the circumstances clearly implied that he regarded it as a valid and binding contract and that he intended to live up to its terms, the law will not permit him now to repudiate its obligations, invoke for his protection the statute of frauds and defeat the plaintiff's recovery, who had forborne a timely performance by reason of Thomas Connell's request and in reasonable reliance on his assurance. This position is in accord with sound principles of justice and is well sustained by authority."

The defendant contends that the plaintiff knew that Biggs had no authority to bind defendant. We think, under the evidence in this case, that this is a question of fact for the jury to determine. *Powell v. Lumber Co.*, 168 N. C., 632; *Bobbitt v. Land Co.*, 191 N. C., 323; *Maxwell v. Distributing Co., ante*, 309. For the reasons given the judgment of the court below is

Reversed.

M. V. GURGANOUS v. CAMP MANUFACTURING COMPANY.

(Filed 19 April, 1933.)

1. Master and Servant G a—The Legislature has liberalized rules of liability in favor of employees of railroads and logging roads.

In recognition of the imminently dangerous and hazardous character of railroad operations the General Assembly has provided by statute that in actions by employees of railroads to recover for injuries the fellow-servant rule shall not apply thereto, C. S., 3465, that contributory negligence shall not be a complete bar, C. S., 3467, and that the statutes should apply to logging roads and tramroads, C. S., 3470, but the acts apply only to employees who are engaged in duties connected with or incidental to the operation of such roads.

2. Same—Under facts of this case defendant was not a logging road and employee guilty of contributory negligence could not recover.

Where the uncontradicted evidence discloses that defendant had operated a logging road, but that the tracks had been taken up at the time of plaintiff's injury, and all locomotives removed, and that plaintiff was injured while operating a motor engine on defendant's spur track around

its manufacturing plant, and that plaintiff was engaged in dismantling defendant's lumber plant and machinery preparatory to transporting it to another point: *Held*, the defendant was not engaged in the business of a logging road at the time of the injury, and plaintiff may not recover for the injury so sustained when the jury has found that he was guilty of contributory negligence; spur tracks maintained in a mill yard for shipping, loading and unloading, being essentially plant facilities and not railroad.

CIVIL ACTION, before *Cranmer, J.*, at August Term, 1932, of DUPLIN.

The evidence tended to show that the defendant had at one time been engaged in operating a lumber manufacturing plant near Wallace, and that in connection with the operation of said plant it owned and operated a standard gauge railroad, with iron rails, extending from the Atlantic Coast Line Railroad Company's main track into the mill plant, and from the mill plant westwardly 20 to 30 miles into the woods, and that logs were transported by means of said railroad to the mill plant at Wallace. In the mill yard of defendant at Wallace there were several spur tracks or short tracks branching off from the main line of the Atlantic Coast Line, and one of these spur or short tracks ran to the planing mill. At the end of the planing mill track a discarded gasoline engine and shanty car had been left standing on said track. Prior to 15 January, 1931, the defendant had ceased to operate its plant or its railroad line. The plaintiff said: "They had ceased to operate them and were not sawing any more lumber. They had shipped off all the manufactured lumber. All that they were doing was to tear down the mill and haul the machinery out. The locomotives were gone, and there was nothing to be operated except the gas motor cars." On the date of his injury the plaintiff was operating a gas motor car on a track in the mill yard. The narrative of the injury is substantially as follows: "We were tearing down a building and loading it on cars, machinery and everything. We used all these seven spur tracks in tearing down the mill. . . . Kimball gave me orders to drive it. On the trip on which I was injured we started above the scale track where we were unloading to go down to the planing mill. . . . The motor car was pulling two transfers. I was backing the motor car, and the transfer car was in front of them. . . . I was going backwards toward the planing mill and my back was in that direction. . . . He signed me back to get the dust collector out of the way across the track. They wanted it on the opposite side of the mill. There was nothing in the way when I first stopped. . . . Kimball stepped off the motor car and signed me back, and he stopped signing me, and I reached up and stopped the motor car. . . . When he did this I stepped out with my left leg first, and when I turned loose the lever I stepped like this and my

foot over behind me, and the motor car rolled backwards and caught me between the motor car and the coupling on the gas engine. The whole butt of the motor car pressed against me. I commenced hollering, and they pulled it off. . . . I had charge of the motor car, knew how to start and stop it. . . . I never saw the gasoline engine until the Camps brought it out of the woods and put it on the switch. . . . I knew it was there. I helped carry it there and store it up. . . . The only way is to get on the end and off the end. If the car had not rolled it would not have caught me. . . . If I had known it was rolling, I would not have kept my leg out of there. . . . When I turned off the motor I attempted to put on the brakes. I had the brakes on when I got off, but they would not hold."

There was evidence that plaintiff's leg was broken and that he sustained serious injury. The usual issues of negligence, contributory negligence and damage were submitted to the jury, and in addition a fourth issue as follows: "Was the defendant at the time of the injury set out in the complaint, operating a railroad or log road within the meaning of the law governing actions brought by railroad employees for personal injury or actions of this nature?" The jury answered the issues of negligence and contributory negligence "Yes," and the trial judge directed the jury to answer the fourth issue "Yes," as a matter of law. Damages were awarded in the sum of $3,416.30.

From judgment upon the verdict the defendant appealed.

George R. Ward for plaintiff.
Beasley & Stevens for defendant.

BROGDEN, J. Was the plaintiff engaged in the operation of a logging road at the time of his injury?

Recognizing that the risk and hazard of railroad operations were of such imminently dangerous character, the liberal and enlightened thought of the State undertook to protect and safeguard workmen who, in the pursuit of their daily bread, were constantly subjected to such hazards. The first step toward such liberalization was taken by the courts, and thereafter the law-making body began to extend it further by statute. Consequently, subsequent to 1897 an employee of any railroad company, operating in this State, is no longer barred of recovery for negligence by reason of the application of fellow-servant doctrine. C. S., 3465. Thereafter the full rigor of the defense of contributory negligence was modified and softened by C. S., 3467. In 1919, by C. S., 3470, it was declared that the statutory interpretation of contributory negligence, as applied to "a common carrier by railroad" should also apply to logging roads and tramroads.

In the case at bar the jury has found that the plaintiff was guilty of contributory negligence. Such finding bars recovery unless the plaintiff at the time of his injury, was engaged in a railroad operation as understood and defined by the court. The trial judge so held as a matter of law. There is no contradiction in the evidence, and hence the correctness of the ruling is determinative of the controversy.

The uncontradicted evidence discloses that the defendant at one time had been engaged in a manufacturing project, and as an incident thereto, operated a log road upon tracks extending some twenty miles into the woods, and further, that all of said tracks had been torn up and removed, all locomotives removed, and on the date of the injury the defendant was in the act of dismantling and tearing down the lumbering plant and machinery for the purpose of transporting the same to another point. The plaintiff was operating a motor car upon a spur track on the mill yard, ostensibly hauling the dismantled material to the main line of the Coast Line Railroad for transportation.

It appears from the charge that the spur tracks upon which the motor car was operated, were owned by the defendant. It is not deemed to be particularly important or material whether the plaintiff was operating a locomotive or a motor engine, or the size of the rail, or length of the spur tracks in the mill yard. The avowed purpose of the law, as expressed in statute and decision, was to protect employees engaged in railroad operations, or in such work, service, or employment reasonably incidental to a railroad operation. This thought prevailed in the decisions construing the applicability of the fellow-servant doctrine. For instance, in *Nicholson v. R. R.*, 138 N. C., 516, 51 S. E., 40, discussing the fellow-servant statute, the Court said: "But the act applies only to employees of a railroad operating, not that such employees must be operating the trains, but they must be employees, in some department of its work, of a railroad which is being operated. Such business is a distinct, well known business, with many risks peculiar to itself, and all the employees in such business, whether running trains, building or repairing bridges, laying tracks, working in the shops, or doing any other work in the service of an operating railroad, are classified and exempted from the rule which requires employees to assume the risk of all injuries which may be caused by the negligence of a fellow-servant. It is not necessary to show that the plaintiff was injured by a fellow-servant while operating a train, but he must show that he was injured while performing a service necessary to or connected with the use and operation of the road. . . . Here the railroad was being constructed, not operated. . . . It does not matter that elsewhere the same employer was operating a railroad. It was not doing so at this point. Here it was not a railroad at all. It was constructing, building, what later would become

a part of an operating railroad." See, also, *O'Neal v. R. R.*, 152 N. C., 404, 67 S. E., 1022; *Bailey v. Meadows Company*, 152 N. C., 603, 68 S. E., 11; *Twiddy v. Lumber Co.*, 154 N. C., 237, 70 S. E., 282. Moreover, in *Williams v. Mfg. Co.*, 175 N. C., 226, 95 S. E., 366, this Court said: "Both railways and logging roads are railroads, *i. e.*, roads whose operations are conducted by the use of the rails, and come within the general term 'railroad.'" See, also, *Stewart v. Lumber Co.*, 193 N. C., 138, 136 S. E., 385; *Lilley v. Cooperage Co.*, 194 N. C., 250, 139 S. E., 369.

The determining inquiry is whether the dismantling of a mill and its machinery and hauling the same by motor bus on spur tracks in the mill yard to the point of shipment, is a railroad operation or a logging road operation. It has been definitely decided in this State that the construction of a railroad is not a railroad operation, and hence by logical analogy it would seem manifest that the destruction or dismantling of a railroad and lumber plant would not constitute a railroad operation. Spur tracks, maintained in a mill yard for shipping, loading and unloading material, are essentially plant facilities and not railroad. Thus, it would not ordinarily be assumed that a cotton mill operating spur tracks in the mill yard, for loading and unloading purposes, was engaged in railroad operations.

Therefore, the Court is of the opinion that the ruling of the trial judge upon the fourth issue must be held for error.

Reversed.

MRS. RUTH CLARK v. CAROLINA COTTON AND WOOLEN MILLS, AND ÆTNA LIFE INSURANCE COMPANY.

(Filed 19 April, 1933.)

1. Master and Servant F i—

The findings of fact of the Industrial Commission are conclusive when based on any competent evidence.

2. Master and Servant F b—Evidence held sufficient to support finding that disability occurring after injury was the result thereof.

Where in a hearing before the Industrial Commission there is evidence that the claimant injured her back in an accident arising out of and in the course of her employment, that the insurer paid two weeks disability, and that thereafter claimant returned to her work, but collapsed after a period of almost twelve months after the injury, and became wholly disabled, that she complained of pain in her back throughout the period, together with medical expert opinion evidence that the claimant was suffering with myelitis and that it was the result of the injury to

her back which arose out of and in the course of her employment, *is held* sufficient to sustain the award of compensation by the Industrial Commission, although there was conflicting expert testimony that the myelitis was not the result of the injury.

3. Master and Servant F d—

The admission of incompetent evidence in a hearing before the Industrial Commission will not be held prejudicial where there is sufficient competent evidence to support the Commission's findings of fact.

APPEAL by defendants from *Harding, J.*, at August Term, 1932, of GUILFORD. Affirmed.

The hearing Commissioner's findings of fact (which were adopted and affirmed by the full Commission), are as follows:

"1. The parties to this cause are bound by the provisions of the North Carolina Workmen's Compensation Law and the Ætna Life Insurance Company is the insurance carrier.

2. The plaintiff, while regularly employed by the defendant, employer, at an average weekly wage of $15.00, suffered an injury by accident on 20 January, 1930, which arose out of and in the course of her employment.

3. The injury was caused when the plaintiff fell down a flight of stairs injuring her back.

4. An agreement for the payment of compensation was entered into by the parties to this cause and compensation paid in the amount of $18.00 for two weeks disability immediately following the fall in January, 1930, and the plaintiff returned to work on 10 February, 1930.

5. The plaintiff has continuously complained of her back since the date of the accident on 20 January, 1930. Prior to that time she had had no trouble with her back.

6. The plaintiff has been totally disabled since 18 January, 1931. She has been in the hospital and under the care of doctors most of the time.

7. The disability complained of by the plaintiff has been diagnosed as myelitis. This myelitis is the result of the injury by accident sustained on 20 January, 1930.

8. While the plaintiff returned to work on 10 February, 1930, after the injury on 20 January, 1930, her disability as the result of this accident has never terminated. According to the evidence in this record she has continuously suffered all during that period although she returned to work and earned wages during the time from 2 February, to 18 January, 1931.

9. The plaintiff's complete collapse in church on 18 January, 1931, was within twelve months from the date of her accident on 20 January, 1930."

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

Fagge & Walker for plaintiff.
Sapp & Sapp for defendants.

CLARKSON, J. The questions involved: (1) Did the plaintiff's injury arise out of and in the course of the employment? (2) Was the award as made by the Commission in accordance with the rules and regulations governing the North Carolina Workmen's Compensation Act? We think both questions must be answered in the affirmative.

The Workmen's Compensation Law, chap. 120, Public Laws of 1929, section 2(f) (N. C. Code, 1931 (Michie), sec. 8081(i), subsec. (f), is as follows: "'Injury' and 'personal injury' shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident."

The material finding of fact by the Industrial Commission, as above set forth, is as follows: "The plaintiff, employee, while regularly employed by the defendant, employer, at an average weekly wage of $15.00, suffered an injury by accident on 20 January, 1930, which arose out of and in the course of her employment."

The following is also in the record: "The Commissioner respects a great deal the medical opinion of every doctor who has testified in this case. Under the circumstances, however, we cannot take the view of all the doctors. We have cast our ballot with that group of doctors who have taken the position that the myelitis has resulted from the injury by accident sustained on 20 January, 1930. We believe that there has been established a causal connection between the condition complained of at the present time known as myelitis and the fall the plaintiff suffered on 20 January, 1930."

It is well settled that if there is any sufficient 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. *Kenan v. Motor Co.*, 203 N. C., at p. 110; *Johnson v. Bagging Co.*, 203 N. C., 579; *Richey v. Cotton Mills*, 203 N. C., 595; *Massey v. Board of Education, ante*, 193, 196.

There is much testimony pro and con as to the cause which produced the myelitis with which plaintiff is afflicted. We think the findings of fact by the Commission can be sustained from the evidence and report of Dr. John T. Burrus, which the record states "in the form of testimony in this case," viz.: "24 November, 1931, Mrs. Ruth Clark was admitted to this hospital for study by the group connected with this hospital.

She remained in the hospital until 11/26/31, and was discharged in the same condition as on admission. Complete examination by Dr. H. L. Brockman, P. W. Flagg, and myself was made, including laboratory work, complete X-ray, review of the history and records. Conclusions reached in this case, after a careful review of the case is as follows: There is a subluxation of the first lumbar vertebra. There is a distinct right lateral rotation of the body of the fourth lumbar vertebra. The articular surface of the left side is wider than that shown on the right. The fifth lumbar vertebra is dislodged and shows a possible fracture. The pelvis shows no abnormality. At this time there is pressure on either the nerve roots or cord and at the first and second there is a disalignment with subluxation of the fourth and fifth lumbar vertebræ. There is a myelitis which has followed injury to the spinal column and a resulting injury to the cord and nerve roots. . . . The only thing in the world that we could find that would lead to the causation of myelitis in this case was that she had had the injury and that she did show a definite injury to the spinal column. . . . I have seen myelitis develop months after injuries, which injuries had been thought of as responsible for the myelitis."

Dr. H. L. Brockman testified, in part: "I would even go so far as to say the X-ray might not show it and I would still believe the injury caused it. . . . From my examination, including the laboratory and X-rays, there was nothing to suggest that there was any other cause of her disability other than injury."

The assignment of error in regard to the hearsay testimony we do not think on the record prejudicial. *Brown v. Ice Co.*, 203 N. C., 97; *Johnson v. Bagging Co.*, 203 N. C., 579.

The Industrial Commission said: "This is a very interesting case. It has given the trial Commissioner much concern. The plaintiff is in a pitiful condition. The defendant insurance carrier has been very liberal from a medical standpoint and has been interested in this very complicated case. They have authorized hospital treatment and observation by eminent physicians and surgeons at their expense for a number of months in order to properly diagnose this plaintiff's condition. They are to be commended for their attitude on their part. There is in this record a division of medical opinion." This humanitarian conduct by defendant carrier to plaintiff is rightly commended. The able and learned brief of defendants is persuasive, but not convincing, under the holdings of this Court. For the reasons given, the judgment of the court below is

Affirmed.

STATE v. HERBERT GILLESPIE, BLAINE WARD AND JOHNNIE HOUCK.

(Filed 19 April, 1933.)

Robbery B c—Exclusion of testimony offered by defendants in this case held to constitute reversible error.

The State's evidence tended to show that defendants went to the home of the prosecuting witness in the daytime, and robbed him of money at the point of a pistol. Defendants denied the robbery and offered testimony that they went to the home of the prosecuting witness for the purpose of buying whiskey. The trial court excluded the testimony and defendants excepted: *Held*, the exclusion of the testimony constituted prejudicial error, the testimony being in explanation of defendants' presence in the home of the prosecuting witness.

APPEAL by defendants from *Stack, J.*, at September Term, 1932, of ALLEGHANY. New trial.

The defendants were convicted on an indictment charging them with robbing J. E. Vernon, on 20 August, 1932, of two fifty-dollar bills.

The testimony of the prosecuting witness, J. E. Vernon, was to the effect that on 20 August, 1932, the defendants, about six o'clock in the evening, drove up in front of his home in a car and stopped. The house was about 20 feet from the road. The defendants Houck and Gillespie got out of the car and, on the invitation of Vernon, went in the house and defendant Ward stayed in the car and kept the engine running. The prosecuting witness, Vernon, testified, in part: "We walked into the sitting room. I said 'Have chairs,' and they didn't take chairs. Houck looked up there. I had a .22 rifle on the wall. Houck looked up and said, 'You got a dandy looking little gun.' I said 'Yes,' and about that time I sat down and Gillespie was standing in the door. This little boy (Paul Vernon) and the little kids were in the room. Houck took the gun down, whirled it on me. I got up and said, 'What do you fellows mean?' When I said that Gillespie came around and said, 'If you move another time I will cut you in two,' and I looked around and he had an automatic pistol in his hand. I said, 'You all are not officers,' and about that time my wife ran in. Houck took the rifle and says, 'Be quiet, Mrs. Vernon.' About this time Gillespie said 'Search him there,' and Houck searched me and got two fifty-dollar bills out of my pocket and put it in his pocket. Then they marched us out into the yard, and Gillespie said, 'If you ever tell this you are a dead man.' They ran to the car, got into it and drove away. Ward stayed in the car and kept the engine running. The car was driving off when they got there. I had seen the boys before; have been knowing Houck for twelve or fifteen years. I went into the house for about five minutes. I had had that money for about a year.

Houck, at Galax, one day, wanted to borrow a dime to play a game of pool with, and I told him I didn't have but thirty cents and had to get some sugar for my wife with that, and I told him I had these bills wrapped up in a paper, and I told him I didn't want to have them changed for a dime."

On cross-examination, he testified, in part: "I knew Houck and he knew me well. He had been in my house before. Yes, it was broad daylight when they came there. Did not have any mask on their faces. Walked in like anybody else. Gillespie had an automatic pistol. I knew Gillespie. I have known him two or three years. I have seen him from time to time. He has been in my house. He has been out there two or three different times. Don't know what he came for. Had no business to transact with him. Don't know why he stopped at my house. Have no idea why he stopped. First one thing and another. I did not know the gentleman out in the car. May have seen him but didn't know him. . . . I do not make my living blockading, selling, and handling liquor. I have been convicted one time for violation of the liquor law. That was at Dobson, in Surry County. I was convicted; I don't know how many times or how they did it. I don't know how many cases I was tried on that term or how many cases they had against me. I got five months, and served time in Rockingham County. Yes, I escaped from the chain-gang and didn't finish my sentence. Yes, I suppose I am a fugitive from justice."

The exceptions and assignments of error made by defendants on the trial, are as follows: "(1) For that the court erred in refusing to permit the following question and answer: Q. What did you go there for? A. To purchase a quart of liquor. Mrs. Vernon told me I could get some whiskey. I went with her out into the cornfield and she drew a quart of whiskey out of a five-gallon keg which was almost full. I paid her for the whiskey and left. (2) For that the court erred in refusing to permit the following question and answer: Q. Where did you go and what did you do the second time you went to Vernon's house? A. I and the other defendants went to the home of Vernon on this occasion to buy and did buy four gallons of whiskey from the prosecuting witness, Vernon. (3) For that the court erred in refusing to permit the following question and answer: Q. For what purpose did you go up there? A. to purchase a drink."

Judgment was rendered on the verdict. Defendants duly excepted and assigned error to the exclusion of the above evidence offered on the trial by defendants, and appealed to the Supreme Court.

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

R. A. Doughton and Sidney B. Gambill for defendants.

CLARKSON, J. The defendants were charged with a serious offense of robbing the prosecuting witness in his home of two fifty-dollar bills, about six o'clock in the evening. The State's contentions were to the effect that one of the defendants knew that the prosecuting witness, Vernon, had this money. That defendants went there to rob and did rob him. On the other hand, the defendants' contentions were to the effect that they did not rob him and that their presence in the home of the prosecuting witness was to buy liquor. This latter evidence was excluded by the court below. We think, under the facts and circumstances of this case, the evidence competent, material and relevant. Defendants were at the home of the prosecuting witness. Was their purpose there to rob, and did they rob him, or were they there to buy liquor and did not rob him? These questions must be determined by a jury, under proper instructions. The evidence excluded was competent.

Mr. Justice Blackstone said in his Commentaries (III, 367): "Evidence signifies that which makes clear or ascertains the truth of the very fact or point in issue, either on the one side or the other." *S. v. Hall,* 132 N. C., 1094. For the reasons given, there must be a

New trial.

STATE v. L. C. DULA.

(Filed 19 April, 1933.)

Criminal Law G m—

The pleadings and judgment in a civil suit are not admissible in evidence in a criminal prosecution against the same defendant although the same transaction is involved, and their admission constitutes reversible error. C. S., 533.

APPEAL by defendant from *Stack, J.,* at October Term, 1932, of FORSYTH. New trial.

This is a criminal action in which the defendant was convicted of the embezzlement of certain moneys which he had collected from the sale of pianos received by him from the Lester Piano Company under a contract of consignment.

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

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

John D. Slawter and Richmond Rucker for the defendant.

CONNOR, J. At the trial of this action, for the purpose of supporting its contention that the defendant had received from the Lester Piano Company thirteen pianos, which he had sold without accounting to said company for the money which he had collected from the sales, as he had undertaken to do by the contract of consignment, the State offered in evidence the complaint, answer, verdict, and judgment in a civil action lately pending in the Superior Court of Forsyth County, in which the Lester Piano Company was the plaintiff, and the defendant in this action was the defendant.

It was alleged in the complaint in that action that from about 28 October, 1929, to about 3 February, 1931, the Lester Piano Company, under a contract of consignment, had delivered to the defendant thirteen pianos which were specifically described in the complaint. This allegation was admitted in the answer; the defendant, however, alleged in his answer that he had settled in full for the said pianos with an agent of the plaintiff, Lester Piano Company, on or about 20 March, 1931. On the verdict in that action, it was adjudged that the plaintiff was the owner and entitled to the possession of the pianos described in the complaint. There was evidence at the trial of this action tending to show that the pianos described in the complaint in the civil action are the identical pianos involved in this action.

The defendant in apt time objected to the introduction as evidence in this action of the pleadings and judgment in the civil action. These objections were overruled, and defendant excepted. On his appeal to this Court, the defendant relies on his assignments of error based on these exceptions.

It is provided by statute in this State that "no pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged therein." C. S., 533.

It is generally held that "a judgment in a civil action is not admissible in a subsequent criminal prosecution although exactly the same questions are in dispute in both cases, for the reason that the parties are not the same, and different rules as to the weight of the evidence prevail." 15 R. C. L., 1004. It has been said that it would not be just to convict a defendant in a criminal action by reason of a judgment obtained against him in a civil action by a mere preponderance of evidence. *S. v. Bradneck,* 69 Conn., 212, 37 Atl., 492, 43 L. R. A., 620.

The error in overruling defendant's objections to the admission in evidence of the complaint and answer and of the judgment in the civil action, was prejudicial to the defendant, and entitled him to a new trial. *S. v. Smith,* 164 N. C., 475, 79 S. E., 979, is not an authority to the contrary. In that case, the defendant's exception to the admission of a pleading in a civil action to which he was a party was abandoned on his

appeal to this Court, and for that reason was not considered in the decision of the questions involved in the appeal.

As the defendant is entitled to a new trial for the error in the admission as evidence of the pleadings and judgment in the civil action, we do not discuss other assignments of error relied on by defendant in this appeal.

New trial.

BASKETERIA STORES, INCORPORATED, v. PUBLIC INDEMNITY COMPANY.

(Filed 19 April, 1933.)

Contracts A d—

Defendant set up a contract under seal, indicating detriment suffered by defendant and benefit accruing to plaintiff, in bar of plaintiff's right to recover: *Held*, the contract is not void for lack of consideration, the seal importing consideration, and detriment suffered by one party or benefit accruing to the other being a valuable consideration.

APPEAL by plaintiff from *Sink, J.*, at February Term, 1933, of FORSYTH. Affirmed.

The judgment of the court below was as follows: "The above case coming on to be heard and being heard before his Honor, H. Hoyle Sink, judge presiding at the February 13th Term, 1933, of the Superior Court of Forsyth County, upon an appeal from a judgment rendered in favor of the plaintiff at the December 5th Term, 1932, of the Forsyth County Court, upon an agreed statement of facts, and the court having considered the record, together with the defendant's assignment of error, and after hearing the argument of counsel, being of the opinion that the plaintiff is not entitled to recover of the defendant upon the agreed statement of facts, except the sum of $250.00 tendered by the defendant and costs of county court with interest on amount tendered from 9 January, 1931, and that there was error in the judgment of the Forsyth County Court; now, therefore, it is ordered, decreed and adjudged that the defendant's assignment of error be and the same is hereby sustained; the plaintiff is taxed with the costs of this appeal, and the case is hereby remanded to the Forsyth County Court for judgment to be entered therein in accordance herewith."

Parrish & Deal for plaintiff.

Manly, Hendren & Womble for defendant.

CLARKSON, J. The questions involved on this appeal: (1) Is the assured protected under an automobile insurance policy, which provides

that the company will not be liable if the car is driven or manipulated by a person under the age of sixteen years, when the car is driven by a person under the age of sixteen years, not the agent of the assured, and without the knowledge or consent of the assured? (2) Was there valid consideration to support the contract pleaded by the defendant?

The first question need not be decided. As to the second question, we think the contract pleaded by defendant valid, and plaintiff cannot recover in this action. The agreement was under seal, which imports consideration. *Thomason v. Bescher,* 176 N. C., 622, 625. The agreement recites "in consideration of the mutual promises herein contained and other valuable consideration."

The contract indicated that there was detriment to the defendant and benefit to the plaintiff, either of which is recognized as valuable consideration. "Any benefit to the promisor or any loss or detriment to the promisee is a sufficient consideration to support a contract." *Fawcett v. Fawcett,* 191 N. C., 679, 681; *Warren v. Bottling Co., ante,* 288, 291.

The cases cited by plaintiff are not applicable under the facts in this case. We do not think the solemn agreement, under seal, with recitals, is a "scrap of paper," but a valid and binding agreement. The judgment of the court below is

Affirmed.

C. L. HARDY AND COMPANY, BANK OF FARMVILLE, FARMERS GUANO COMPANY, NEW BERN COTTON OIL AND FERTILIZER COMPANY, AYDEN LOAN AND INSURANCE COMPANY, POLLARD AUTO COMPANY, AND PINETOPS BANKING COMPANY, CREDITORS OF THE ESTATE OF T. J. WORTHINGTON, IN BEHALF OF AND TO THE USE OF THEMSELVES AND ALL OTHER CREDITORS OF THE ESTATE OF T. J. WORTHINGTON, *v.* J. R. TURNAGE, ADMINISTRATOR C. T. A. OF THE ESTATE OF T. J. WORTHINGTON AND NEW AMSTERDAM CASUALTY COMPANY, AND J. R. TURNAGE, ADMINISTRATOR OF THE ESTATE OF T. J. WORTHINGTON, *v.* S. J. WORTHINGTON, J. V. WORTHINGTON, H. T. WORTHINGTON, STAMEY WORTHINGTON, MARY MARGARET WORTHINGTON AND MRS. LENA V. WORTHINGTON, WIDOW.

(Filed 19 April, 1933.)

1. Executors and Administrators C c — Pending caveat proceedings, executor may operate property, or apply to court or clerk for such authority.

Where a caveat is filed to a will the executor is required by statute to suspend all operations relating to the settlement of the estate and to preserve the property until a decision of the issue is had, C. S., 4161, and in the observance of the mandate to preserve the property the executor may operate and manage the property in the exercise of that degree

of care, diligence and honesty which he would exercise in the management of his own property, or he may institute a civil action in which all persons having an interest are made parties and request the court in its equity jurisdiction to authorize such operation, or he may apply to the clerk in his probate jurisdiction for such authorization.

2. Clerks of Court C c—Clerk has probate jurisdiction to hear and determine petition by executor for power to operate estate.

Although the clerks of the Superior courts have no equity jurisdiction, they are given probate jurisdiction, C. S., 925, and in the exercise of their probate jurisdiction they may hear and rule on a petition of an executor for authorization to operate the estate's farms to preserve the property pending the determination of caveat proceedings.

3. Executors and Administrators C h—Executor held not personally liable for loss sustained in operation of farm under clerk's order.

Where an executor of an estate consisting mainly of farm lands has applied to the clerk for authority to operate the farms pending the determination of caveat proceedings filed in the cause, and has obtained an order therefor approved by the judge of the Superior Court, and has operated the farms through tenants as was the testator's custom, making the necessary advancements to them, and has exercised due diligence and good faith therein, neither the executor nor his bondsman may be held liable to the estate or its creditors for loss occasioned in such operation, such loss being paid out of the cash assets of the estate, nor can they be held liable for expenses incurred in marketing the crop or the purchase of equipment used in the cultivation of the farms, or for personal property of the estate used therefor, and all such items having been paid out of the assets of the estate, the principle that an executor has no authority to create a posthumous debt has no application.

APPEAL by defendants, J. R. Turnage, administrator, and New Amsterdam Casualty Company, surety, from *Cranmer, J.*, at May Term, 1932, of PITT.

T. J. Worthington died in Pitt County on 28 September, 1928, leaving a paper-writing purporting to be a last will and testament, naming his wife executrix thereof. She declined to qualify and on 6 October, 1928, a caveat was filed to the will. Thereafter, on 9 October, 1928, J. R. Turnage was duly appointed administrator of the estate and gave bond in the sum of $60,000 with the defendant, New Amsterdam Casualty Company, as surety. The administrator received from the proceeds of life insurance and other cash items the sum of approximately $28,248.80, together with certain other personal property. Claims were filed aggregating the sum of $47,304.27. At the time of his death the testator left certain farms, containing 974 acres, four houses and lots and two vacant lots in the town of Ayden. He also left eighteen mules and a large quantity of farming implements of various types. The testator had been largely engaged in farming and his farms were in a high state of cultivation and operated largely on a share cropper basis.

On 22 November, 1929, the administrator filed a petition with the clerk of the Superior Court setting out in substance that a caveat had been filed to the will and that the cause could not be heard for sometime. Whereupon the administrator requested an order permitting him to operate the farms for the year 1929, according to the methods theretofore used by the testator. He further requested that the court permit him to make advances to such tenants as could not furnish themselves and to purchase such additional farming implements and teams as might be reasonably necessary for the proper cultivation of the farms. The clerk, after hearing the petition, found "that it would be for the best interest of said estate to permit said administrator to rent the real estate privately, and on shares, and furnish the tenants as had been customary in that community, as may appear to said administrator to be to the best advantage of said estate." Thereupon the clerk made an order allowing the administrator to cultivate the land for the years 1929 and 1930, and to make advances to tenants and purchase such equipment and teams as he found necessary to properly cultivate the land. The order so made by the clerk was duly approved by the resident judge of the fifth judicial district. Pursuant to the order the administrator called in the tenants and authorized them to proceed with cultivating the land and assured them that reasonable advances would be made to those who were unable to furnish themselves.

The year 1929 was a bad crop year and the administrator lost $11,270.35 in the farming operation. Similar orders were made for the year 1930, and the operations for this period showed a profit of $224.22. In December, 1930, the administrator called a meeting of creditors and the widow and heirs at law. The administrator announced at the meeting that all the personal assets of the estate except $663.69 had been expended. The creditors demanded that the estate be closed, and thereupon on 5 December, 1930, the administrator instituted a special proceeding to sell land to make assets. In this proceeding the widow and heirs at law filed an answer denying the right of the administrator to sell lands until the personal estate properly applied, should prove insufficient. The proceeding was then transferred to the civil issue docket, and on 17 March, 1931, certain creditors instituted a suit against the administrator and his surety, seeking to recover the losses incurred by the administrator in operating the farm, claiming that such operation constituted *a devastavit*. The suits were consolidated and referred to Honorable D. H. Bland, referee. The referee heard the evidence and filed a comprehensive report dealing with all phases of the administration. He found that the tillable land was sufficient to maintain a thirty-horse crop, although no more than twenty-five teams were worked thereon, and that the widow and heirs at law knew of the operation of

the farms and consented thereto. He further found with reference to the administration: "There is no suggestion of bad faith on his part in the evidence. However, your referee cannot escape the conclusion that authority to carry on the business of a decedent is a matter that calls for the exercise of the general equity jurisdiction with all interested parties before the court. The clerk has no equity jurisdiction except such as is expressly prescribed by statute. Your referee is unable to find any statute authorizing the clerk to make such orders."

The referee held that the administrator was liable personally for losses sustained in operating the farm during the year 1929, amounting to $11,270.35. Exceptions were filed by both parties and were heard by the trial judge, who was of the opinion that the administrator was liable personally for the following items, to wit: (1) loss in operating the farm for the year 1929, $11,270.35; (2) amounts expended for new equipment, teams, etc., $2,096.92; (3) value of personal property consisting of mules, household and kitchen furniture, etc., amounting to $4,346.49. The actual value of this property was not fixed and it was ordered that this value be determined by a jury, and that the administrator be charged with such value so fixed.

From the judgment so rendered the administrator and his bondsman appealed.

W. A. Lucas and Albion Dunn for plaintiffs.

F. G. James & Son and L. I. Moore for Turnage, administrator, and New Amsterdam Casualty Insurance Company.

BROGDEN, J. When Worthington died in September, 1928, and the defendant qualified as administrator in the following October, what was the status of the estate?

There were two farms in a high state of cultivation, containing 947 acres, apparently provided with a number of tenant houses and a number of tenants actually lived upon the land. There were eighteen mules and a variety of farming equipment. The administrator could not sell the property because a caveat had been filed to the will and C. S., 4161, spoke to him in the cold and rigid words of a public statute and said: "Suspend all further proceedings in relation to the estate except the preservation of the property and the collection of debts and the payment of all taxes and debts that are a lien upon the property of decedent as may be allowed by order of the clerk of the Superior Court until a decision of the issue is had." Thus "preservation of the property . . . until a decision of the issue is had" was the mandate of the law. Was the land to be "preserved" by abandoning it to the swift erosion of wind and weather pending the uncertain outcome of litiga-

tion? Were the mules to starve or become worthless for lack of care and feeding? Was the farm equipment to be exposed to depreciation and loss?

In discharging the peremptory duty of "preservation . . . until a decision of the issue" three roads were open:

First, the administrator could rely upon the ancient principle long declared and long prevailing that an administrator or executor is required to exercise that degree of care, diligence and honesty which a prudent and faithful man would use in the management of his own property, and while so acting, losses to the estate, however grievous, impose no personal liability. The books are not lacking in concrete illustration of this sound and salutary standard. For example, an administrator can spend money to condition raw materials or commodities so as to make them more salable. *Whitley v. Alexander,* 73 N. C., 444.

Again, he can pay out money to keep in force a life insurance policy securing a note due the estate, although the estate suffers a loss thereby. *Overman v. Lanier,* 157 N. C., 544, 73 S. E., 192. In this case the Court said: "It is true that this turned out a loss to the estate. But it is found that the administrator acted in good faith, and it cannot be held that a reasonably prudent man would have acted differently under the circumstances. It has been forcibly said by some one that 'Our hindsights are better than our foresights.'" Also, where a "debtor to an estate, being in failing circumstances, the administrator made a further advance in money to him and took a mortgage to secure the entire amount . . . and the debtor became utterly insolvent, and the mortgaged property was insufficient to pay the entire debt: *Held,* that the administrator was not liable to the estate for the loss." *Torrence v. Davidson,* 92 N. C., 437, third headnote. In *Davis v. Davis,* 184 N. C., 108, 113 S. E., 613, the administrator "instead of proceeding to settle the estate, continued the business of his intestate and engaged in farming, merchandising, running sawmills and cottongins." In that case the referee found that the administrator was chargeable with $1,809.50 for feeding mules. Upon exception the judge decreed that as the administrator "had acted conscientiously and honestly, at considerable sacrifice of his personal interest and without gain to himself, and that the estate benefited by his administration, doth find and adjudge that the defendants are not liable to the plaintiffs." Upon appeal to the Supreme Court the point was made that the trial judge had overruled the referee with respect to the item of feeding, and the Court said: "No specific allusion is made to this item in the administration account of $1,809.50 for feeding the mules, and there is no finding, and certainly no adequate statement of the facts to sustain the judgment, or to enable us properly to consider and pass upon it." The opinion of the Supreme Court

concludes as follows: "The judgment will be set aside, which will leave the report of the referee before the court for its further consideration, but with special reference to the item of $1,809.50 for feeding the mules, about which the judge may adopt the referee's findings of fact, and his conclusion of law in favor of the plaintiffs, or he may reverse or modify the same and find the facts himself, or take such other action as may conform to the course and practice of the court." It is significant that no point was made of the right of the administrator to continue the business, and the Court expressly recognizes the right of an administrator to feed and care for livestock under proper circumstances.

Second, the administrator might have instituted a civil action in the Superior Court bringing in all creditors, resident and nonresident, if any, and requested a duly constituted court of equity to permit him to feed the livestock and take care of the farm or preserve the property "until a decision of the issue is had." The delay incident to such a proceeding would have been fatal. Certainly, the mules would have been dead before a court of equity could have acted according to the usual course and practice. No tenants would have been available even if the permission had been granted because at that season of the year it was essential for men to know promptly whether they were going to make a crop or not.

Third, he could have applied by petition to the clerk of the Superior Court and invoked the probate jurisdiction of the court, which is direct and summary.

The administrator chose to follow the third road. On 22 November, 1928, he filed a petition for permission to rent the land for the year 1929 in accordance with the method and custom theretofore employed by the testator. After hearing the petition the authority was granted and the order so made was approved by the proper judge of the Superior Court. Acting upon such authority, the administrator proceeded to cultivate the land and to use the stock and to purchase other tools and equipment necessary for the careful and prudent prosecution of the undertaking. He called a meeting of all the tenants and laid his plan before them, informing them that he desired a tenant who could do so, to furnish himself, and as an aid to that end, he would release the tenant's portion of the crop, but could not release the estate's portion of such crops. The supplies furnished were purchased from a corporation of which the administrator was president and the referee finds as a fact "that the amount charged at this store, whether as advances to tenants or supplies for the farm, was the price generally prevailing in the community, the evidence showing no instance of excessive charge, and said administrator directed that upon settlement a discount of five per cent be allowed, which was done." The referee further found that

"due to the excessive rains which began in May and continued with only slight interruptions for a period of about six weeks, practically all crops were a failure. A number of farmers of this locality were examined at the hearing before your referee and without exception, testified that the farming operations for this year resulted in a loss to them." It was further found that the loss resulting from cultivating the land and feeding the stock for the year 1929, amounted to $11,270.35, and the judgments of both the referee and the trial judge imposed this loss upon the administrator personally. Similar orders and decrees were secured by the administrator for operating the farms during the year 1930, but despite depression and unfavorable crop conditions, such operations resulted in a profit of $224.22. It is also significant that creditors find no fault with this operation and the said profit is actually turned into the estate as an asset.

This loss is imposed upon the administrator personally upon the theory that the orders of the clerk, approved by the proper Superior Court judge, were wholly void. The major reasons given for such conclusion are: First, that an administrator cannot create a posthumous debt, enforcible against the estate of decedent. This is a well established principle, but has no application to this case. The administrator did not undertake to borrow money or create a debt to carry on the operation, but used the funds belonging to the estate for such purpose.

Second, that the clerk of the Superior Court has no equitable jurisdiction.

This principle is also well established and conceded. However, the clerk of the Superior Court, under the law, has an original and independent jurisdiction in matters of administration, whether such be called equitable, legal or otherwise. Mordecai in his Law Lectures, Volume 2, page 1190, says: "That the clerk in the exercise of his probate jurisdiction is an independent tribunal of original jurisdiction is settled." Furthermore, in *Pegram v. Armstrong,* 82 N. C., 328, this Court said: "The probate court confessedly had jurisdiction of the suit of a creditor to compel an administrator to account, and to direct the application of the assets to the debts of the estate, and clearly had jurisdiction of the matters in this action." Of course, the Superior Court has concurrent jurisdiction, and such was expressly recognized and applied in the case of *In re Estate of Wright,* 200 N. C., 620, 158 S. E., 192. While the office of probate judge, which was formerly set up in the Constitution of 1868, Article IV, sections 16 and 17, has been abolished, the jurisdiction of the probate court, as a separate entity, has been retained. Thus C. S., 925, declares that "the duties heretofore pertaining to clerks of the Superior Court as judges of probate shall be performed by the clerks of the Superior Court as clerks of said court," etc. The performance of

a judicial act necessarily implies a court with both jurisdiction and discretion to hear and rule.

There is an item of $2,096.92 classified by the referee as group 6. These items consisted of expenses incurred in marketing the crop of 1928, and the price of certain mules and equipment purchased by the administrator for cultivating the farm in 1929 in accordance with the orders heretofore referred to. The trial judge charged the administrator personally with the payment of these items. However, for the reasons heretofore set out in this opinion, this ruling was erroneous.

There is also an item of $4,046.49, covering the value of certain personal property which the administrator received, a portion of which, at least, was used by the administrator in cultivating the farms. If the administrator had the right to use any of the personal property in prosecuting the farming operations under orders of the probate court, certainly he cannot be chargeable with the value of such property so used.

There is no proof that the administrator failed to exercise good faith or ordinary business prudence in prosecuting the farming operations or in using livestock and farming equipment for such purpose. Manifestly the administrator engaged in such undertaking at his peril and at the peril of his bondsman; but when it is established that such acts were not only done in the exercise of good faith, but in the further exercise of ordinary business prudence, and in addition, in conformity with an order of the probate court, approved by the proper judge of the Superior Court, it cannot be held that he incurred personal liability arising from losses sustained through the vicissitudes of the seasons and the uncertainties of the weather.

Reversed.

STATE v. P. Q. MOORE AND J. J. FURLONG.

(Filed 19 April, 1933.)

1. Indictment C c—Indictment will not be quashed for admission of incompetent evidence if there was competent evidence before grand jury.

Where it appears that some of the witnesses before the grand jury were qualified and some disqualified, or some of the testimony was competent and some incompetent, the courts will not go into the barren inquiry of how far evidence which was incompetent or witnesses who were disqualified contributed to the findings of a true bill, and defendant's motion to quash will not be allowed unless all the witnesses were disqualified or all the evidence was incompetent.

2. Blackmail B d—Evidence of guilt of violation of C. S., 4291, held sufficient to overrule defendants' motions of nonsuit.

In this prosecution for sending letters through the United States mail demanding that large sums of money be placed in an envelope addressed to a fictitious person and left at a certain filling station in violation of C. S., 4291, the evidence of the guilt of both defendants is held sufficient to be submitted to the jury.

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

APPEAL by defendants from *Devin, J.*, at September Term, 1932, of NEW HANOVER. No error.

At September Term, 1932, of the Superior Court of New Hanover County, a bill of indictment in words as follows, was returned by the grand jury, as a true bill:

"State of North Carolina—County of New Hanover.

Superior Court—September Term, 1932.

The jurors for the State upon their oath present, that P. Q. Moore and John J. Furlong, late of the county of New Hanover, on 30 May, 1932, both before, and since said date, with force and arms, at and in the county aforesaid, did unlawfully and wilfully and feloniously, secretly and in malice, with intent to deceive and to defraud without probable cause or excuse, knowingly send, or cause to be delivered, through the U. S. mail, to Mrs. J. K. Wise, Wilmington, N. C., two certain letters, one dated 30 May, 1932, and the other 9 June, 1932, containing menaces demanding that the said Mrs. J. K. Wise, in the first deposit the sum of $25,000, and in the second letter the sum of $20,000, at a designated filling station, threatening death or serious bodily harm to herself and other members of her family, all with the intent to extort or gain from the said Mrs. J. K. Wise, the said sums of money, against the form of the statute in such case made and provided, and against the peace and dignity of the State.

And the jurors for the State, upon their oath, do further present: That on said days and at said dates, in said county and State, with force and arms, the said P. Q. Moore and John J. Furlong, and others unknown to the jurors, did unlawfully and wilfully and feloniously combine, confederate, conspire and agree, each with the other, secretly and in malice, with intent to deceive and to defraud, without probable cause or reasonable excuse, and in furtherance and confirmation thereof, on 30 May, 1932, and on 9 June, 1932, knowingly send or cause to be sent and delivered through the U. S. mails to Mrs. J. K. Wise, Wilmington, N. C., two certain letters containing menaces demanding that the said Mrs. J. K. Wise, in the first letter deposit the sum of $25,000, and in the second letter the sum of $20,000, at a designated filling sta-

tion, threatening death or serious bodily harm to herself and other members of her family, all with intent to extort or gain from the said Mrs. J. K. Wise, the said sums of money, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

On the back of this bill of indictment there were endorsed the names of thirty-four persons as witnesses for the State. A check against each of these names indicated, as shown by an endorsement by the foreman of the grand jury, that each of these witnesses had been sworn by the foreman and had testified before the grand jury.

Before the indictment was read, and before the defendants or either of them had otherwise pleaded thereto, and before the jury had been selected and empaneled for the trial of the action, the defendant, P. Q. Moore, who was present in court, filed his plea in abatement, and motion to quash the indictment, which was in writing and is as follows:

"Now comes the defendant, P. Q. Moore, through his counsel, L. Clayton Grant and Aaron Goldberg, and moves the court that he be permitted to file his plea in bar before pleading, and to have the same disposed of according to law, that is:

This defendant, P. Q. Moore, avers that the bill of indictment in this cause returned by the grand jury was, according to his information and belief, obtained by the reading before said grand jury while considering said bill, the stenographic notes as transcribed and read by the court reporter of the testimony of John J. Furlong, codefendant of the said P. Q. Moore, before Honorable H. A. Grady, judge sitting as a committing magistrate on the preliminary hearing of this cause.

Wherefore, this defendant avers that the bill of indictment was obtained by improper and incompetent testimony, and that being predicated upon incompetent testimony as aforesaid, that such fact does bar the further prosecution under said bill of indictment, and that this plea is a complete bar to this action.

Wherefore, the defendant, P. Q. Moore, prays that this plea be accepted and adjudged a bar to further prosecution of this cause under said indictment."

The motion was overruled, and the defendant excepted.

Before the indictment was read, and before the defendants or either of them had otherwise pleaded thereto, and before the jury had been selected and empaneled for the trial of the action, the defendant, John J. Furlong, who was present in court, filed his plea in abatement, and motion to quash the indictment, which was in writing and is as follows:

"Now comes the defendant, John J. Furlong, and through his counsel, Herbert McClammy and John A. Stevens, offers this plea in abatement, and moves the court to quash the indictment in this action, upon the following grounds:

1. That the bill of indictment in this cause was found upon incompetent and disqualified testimony, to wit:

The declaration of John J. Furlong given at the hearing before Honorable Henry A. Grady, sitting as committing magistrate, and stated before the grand jury by Dwight McEwen, court stenographer.

2. And defendant further submits to this Honorable Court that under the law of North Carolina, where there are two defendants on trial, a bill of indictment cannot be found by the testimony of one of the defendants against the other, and that this principle is especially applicable to a case like this when the testimony of one defendant is recited by a stenographer who took the notes of such testimony."

The motion was overruled, and the defendant excepted.

After the pleas and motions of the defendants had been overruled, the court at the request of counsel for each of the defendants, directed Dwight McEwen, the court reporter, to furnish to counsel for the record a statement of what transpired before the grand jury, while he was present as a witness for the State. This statement appears in the record, and is as follows:

"While I was testifying before the grand jury as a witness for the State in this action, I was asked if I had the testimony of Mr. J. J. Furlong, taken before his Honor, Henry A. Grady, judge, sitting as a magistrate, in the preliminary hearing. I replied that Mr. Furlong, upon the advice of his counsel, voluntarily tendered himself for examination by the solicitor, and that the transcript which I then held in my hands, was a true and accurate transcript of Mr. Furlong's testimony given at the preliminary hearing, under oath, and by me personally transcribed. I was asked whether or not it was admissible as evidence. I replied that I was a witness before the grand jury under a subpœna, and had no authority to offer any legal advice, and would not attempt to do so. I suggested that the solicitor or the judge was available to advise the grand jury. I was then instructed by the foreman to read to the grand jury the evidence of Mr. J. J. Furlong, which I did. I also read portions of the evidence of other witnesses at the preliminary hearing before Judge Grady. I did this under the instructions of the foreman of the grand jury.

I had the evidence taken at the preliminary hearing with me when I went before the grand jury, under a subpœna, as a witness for the State. I took the evidence with me under the instructions of the solicitor."

After their pleas in abatement, and their motions to quash the indictment, on the grounds stated therein, had been overruled by the court, each of the defendants entered a plea of "Not Guilty," and the trial of the issues raised by these pleas proceeded.

The evidence at the trial showed that two letters were delivered by United States mail carriers, one on or about 30 May, and the other on

or about 9 June, 1932, at the home of Mrs. J. K. Wise, in the city of Wilmington, N. C. Both letters were in envelopes addressed in typewriting to Mrs. Wise, and had been received in the mail at the United States postoffice in Wilmington, and there delivered to the carriers whose routes in the city included the home of Mrs. Wise. The letters were typewritten, and directed Mrs. Wise to place large sums of money—one, $25,000, and the other $20,000—in packages addressed to Captain Raynee, and to deliver said packages to R. L. Johnson at his filling station, located on a public highway in New Hanover County, about seven miles from Wilmington. Each letter contained threats of death or serious bodily harm to Mrs. Wise or to members of her family, if she did not comply with the directions contained in the letters. These directions were specific and in great detail. Mrs. Wise was warned not to communicate or attempt to communicate with the police or with friends in an effort to discover or apprehend the writers of the letters. She was warned of the fate of the Lindbergh baby, whose parents had disobeyed instructions, and sought the aid of the police in their efforts to find their baby, without paying the ransom demanded by its abductors. Mrs. Wise received these letters and promptly consulted her attorney and a friend, to whom she delivered the letters. The matter was reported to the sheriff of New Hanover County, who at once began an official investigation. Both the letters were identified, and offered in evidence by the State.

A package was prepared and addressed to Captain Mal Raynee and on or about 11 June, 1932, delivered to R. L. Johnson at his filling station as directed in the letters received by Mrs. Wise. This package did not contain either of the large sums of money demanded in the letters, but did contain money. During the morning of 15 June, 1932, some person who gave his name as "Willie Wilson," called R. L. Johnson, at his filling station, by telephone, and asked if he had a package for Captain Raynee. Upon being informed by Mr. Johnson that there was a package at the filling station for Captain Raynee, this person requested Mr. Johnson to take good care of the package, saying that he would call for it during the afternoon or the next morning.

About two hours after the telephone conversation, in which the person who had called Mr. Johnson was informed by him that there was a package at the filling station for Captain Raynee, William Bennett, a Negro, who is a resident of the city of Wilmington, called at the filling station and presented to Mr. Johnson a note. This note was typewritten, was addressed to "Mr. Johnson," and was signed "Captain Raynee." The note, which was offered in evidence by the State, is as follows: "Send the package for me by bearer. Enclosed find five dollars for your trouble. There will be more later." Mr. Johnson retained the five dollars which was enclosed with the note, and delivered the package to

William Bennett, who left the filling station at once, driving in the direction of Wilmington. After his return to Wilmington he was arrested. The package had been delivered to him by Mr. Johnson, was found by the officers in his home.

There was evidence tending to show that the note which was delivered to Mr. Johnson at the filling station was delivered to William Bennett, in Wilmington, by the defendant, John J. Furlong, in the presence of the defendant, P. Q. Moore; that the note was written on the same typewriter as that on which the letters received by Mrs. Wise were written; and that both the letters and the note were written on a typewriter in the office of the defendant, P. Q. Moore. There was also evidence tending to show that the defendants were and had been for many years residents of the city of Wilmington, and close and intimate friends. They were together during the morning of 15 June, 1932, and from time to time during the day. The defendant, P. Q. Moore, gave to the defendant, John J. Furlong, the money which the latter gave to William Bennett at the time he delivered to him the note addressed to Mr. Johnson.

The defendant, John J. Furlong, as a witness in his own behalf, testified that the defendant, P. Q. Moore, gave him the note and the money which he gave to William Bennett. This defendant denied that he had written or caused to be written the letters received by Mrs. Wise, and testified that he did not know the contents of the said letters or of the note which he delivered to William Bennett, at the request of the defendant, P. Q. Moore.

The defendant, P. Q. Moore, as a witness on his own behalf, denied that he had given to the defendant, John J. Furlong, the note which the latter had delivered to William Bennett. He testified that he had not written or caused to be written the letters which were received by Mrs. Wise, or the note which was delivered by William Bennett to R. L. Johnson, at the filling station.

At the close of all the evidence, each defendant moved for judgment as of nonsuit. The motions were denied, and both defendants excepted.

There was a verdict of guilty as to each defendant, with a recommendation by the jury to the court of mercy.

From judgment that the defendants be confined in the State's prison, the defendant, P. Q. Moore, for a term of three years, and the defendant, John J. Furlong, for a term of two years, both defendants appealed to the Supreme Court.

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

L. Clayton Grant and Aaron Goldberg for defendant, Moore.

Herbert McClammy and John A. Stevens for defendant, Furlong.

CONNOR, J. The assignments of error on this appeal cannot be sustained. There was no error in the refusal of the trial court to hear or consider the pleas in abatement and the motions to quash the indictment, upon the grounds stated therein, although the pleas were tendered and the motions were made in apt time; nor was there error in the refusal of the court to allow the motions of the defendants at the close of all the evidence for judgment as of nonsuit, as to each defendant.

It is well settled as the law of this State that when a bill of indictment has been returned by the grand jury as a true bill, upon testimony all of which was incompetent, or upon the testimony of witnesses all of whom were disqualified by statute or by some well settled principle of law in force in this State, the indictment will be quashed on the motion of the defendant made in apt time; but when some of the testimony was competent and some incompetent, or some of the witnesses heard by the grand jury were qualified and some disqualified, the court will not go into the barren inquiry of how far testimony which was incompetent or witnesses who were disqualified contributed to the finding of the bill of indictment as a true bill. *S. v. Levy,* 200 N. C., 586, 158 S. E., 94; *S. v. Mitchem,* 188 N. C., 608, 125 S. E., 190; *S. v. Coates,* 130 N. C., 701, 41 S. E., 706. This is the general rule in other jurisdictions. 31 C. J., 808, and cases cited.

The evidence offered at the trial was sufficient to support the allegations in the indictment. It tended to show a violation of C. S., 4291, by the defendants and was properly submitted to the jury. The judgment is affirmed. C. S., 4173.

No error.

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

MRS. FLOYE MYRTLE THIGPEN v. JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 19 April, 1933.)

1. Trial D a—

On a motion as of nonsuit the evidence is to be considered in the light most favorable to the plaintiff. C. S., 567.

2. Insurance R c—

Whether an insured has suffered disability within the meaning of a disability clause in a life insurance policy is ordinarily a question for the jury, but where facts are admitted which establish that the insured had not suffered disability as defined by the policy the question is for the court.

3. Same—Action to recover on disability insurance held properly nonsuited on admission that insured received $40.00 a month as court crier.

In order for an insurer to be liable on a clause in a life insurance policy providing for the payment of a certain sum monthly in case the insured should become "wholly and continuously disabled . . . and wholly prevented thereby from pursuing any occupation whatsoever for remuneration or profit" the insured must suffer a disability preventing him not only from pursuing his usual employment but any other regular employment, and where in an action on the disability clause the plaintiff admits that the insured received $40.00 a month as court crier during the term of the alleged disability, the defendant's motion as of nonsuit is properly allowed.

CIVIL ACTION, before *Grady, J.*, at January Term, 1933, of PITT.

On 18 April, 1922, the defendant issued to Alexis Lawrence Thigpen its policy of life insurance for $2,000, in which the plaintiff, wife of the insured, was named as beneficiary. The policy contained total and permanent disability provisions, together with a clause waiving the premium in the event of described disability. The disability clause in controversy is as follows: "Or that he has been wholly and continuously disabled by bodily injuries or disease other than mental, and will be permanently, continuously and wholly prevented thereby from pursuing any occupation whatsoever for remuneration or profit."

The insured died on 10 June, 1932, at the age of fifty-three years. No proofs of disability were ever filed and no demand made for such benefits until after the death of the insured. The evidence tended to show that about 1 October, 1929, the deceased suffered a stroke of paralysis and that his health gradually declined. He suffered a second stroke in December, 1931. The policy of insurance was found after his death "in an old shed room in an old drawer" where the deceased kept some papers. On 20 February, 1929, the deceased borrowed from the defendant company on said policy the sum of $318.00 and executed and delivered a note therefor upon the prescribed form. The plaintiff joined in the execution of the note. On 18 March, 1930, the insured executed a policy lien note upon the policy for $48.00. Neither the insured nor any person for him paid the annual premium on the policy of insurance maturing on 18 April, 1930, nor was such premium paid within the grace period of thirty days thereafter.

The defendant alleged that the policy lapsed on 29 May, 1930, by reason of failure to pay the premium, and furthermore, that neither the plaintiff, beneficiary, nor the insured had at any time given the defendant any notice of disability as provided by the terms of the policy.

The testimony offered by the plaintiff and her witnesses tended to show that after the insured suffered the first stroke of paralysis in 1929,

that he was mentally and physically unable to attend to his farm or to do any other work whatever, or to give notice of disability. The plaintiff, beneficiary, said: "Mr. Thigpen was not able to look after the farm. He didn't have the strength and didn't have the mind to do anything at all. That's why we left the farm. When we moved from the farm into town my daughter and I looked after everything. . . . He had to execute a crop lien in 1932, but he didn't know any more what he was doing than anything in the world. . . . I don't know whether he had mind enough on 18 March, 1930, to request a loan on his policy to keep it in force. (Witness is shown a note for $318.00 payable to the defendant, signed by the insured and the plaintiff.) He signed it, but didn't know what he was signing. That is my husband's signature on the paper." The daughter of the insured testified: "He came to Greenville to live with my husband and myself in January, 1932, and moved back to the farm in May, just a little while before he died. . . . I didn't know that my father had this policy. . . . If I had known that these provisions existed in this policy, I would have made application for the benefits when he first became affected in October, 1929. . . . He gradually grew worse all the time. . . . He knew me. He didn't have mind enough to tell his tenants what to do. . . . I attended to the marketing and selling of the tobacco grown on my father's land in 1930 and 1931, because he was not able to attend to it." A brother of the insured said: "I know that my brother did not have sufficient mental capacity on and after 18 April, 1931, up until his death, to know and understand the provisions in this insurance policy and its scope and effect, or he would certainly have collected it." A physician, testifying for the plaintiff, said that he saw the insured in October, 1929, "and that at the time he had high blood pressure, a chronic Bright's disease, and hardening of the arteries. . . . I knew that his vocation was farming. His physical condition would certainly have prevented him from taking any part in the work on the farm. Mr. Thigpen's condition, as I found it, prevented him from fitting himself for any other vocation. . . . He knew me. He told me his symptoms, how his head hurt, how he had dizziness and all the symptoms, the usual symptoms which a man with high blood pressure and that type of Bright's disease has. . . . He paid me in cash. He knew a $5.00 bill from a $10.00 bill. From time to time he did pay me for services rendered. His condition had changed mentally to some extent, and he had fallen into a sort of fantastical and don't-care attitude." Another physician testified that the insured "had a cerebral hemorrhage which had produced a paralysis of the rectus muscle; that he gradually thereafter grew worse in body and mind; that thereafter he was unable to follow his vocation and unable to perform with sub-

stantial continuity the duties incident to such vocation; that he suffered lapse of memory; that his entire mentality was changed."

The undisputed evidence for plaintiff also disclosed the following facts: (1) The insured served as tax lister for Belvoir Township for the years 1930 and 1931. He signed some of the lists, although his wife and daughter testified that they looked over them to see if they were correct and frequently made changes therein. (2) He drove an automobile, although a witness said that on one occasion the insured had forgotten how to shift the gears. (3) He was a member of the public school board for at least two years preceding his death. (4) He was appointed court crier for the county court on 1 January, 1932, and held the position until a few days before his death in June, 1932, and received for his services a salary of $40.00 per month. There was much evidence that the insured was not able to perform the duties of court crier; that frequently other persons performed such duties for him, although he was always present at his post of duty.

There was much evidence in behalf of defendant from physicians and neighbors tending to show that the insured was an intelligent man and able to carry on conversation about the general happenings of the day. Witnesses were offered, who testified that they had listed taxes while the deceased was tax lister, and that he attended meetings of the school board, discussing with other members thereof matters relating to the school. A farmer and minister and neighbor of deceased testified that the insured attended the meetings of the school board in 1931, and took part in discussions relating to the election of the principal of the school and other business matters, and that "his mental condition seemed to be all right except his legs, and he did not look right out of his eyes."

At the conclusion of the evidence the trial judge entered a judgment of nonsuit and the plaintiff appealed.

Albion Dunn for plaintiff.
Brooks, Parker, Smith & Wharton for defendant.

BROGDEN, J. If an insured receives $40.00 per month for services as court crier, is he entitled to recover upon an insurance policy providing disability in the event "that he has been wholly and continuously disabled by bodily injuries or disease other than mental, and will be permanently, continuously, and wholly prevented thereby from pursuing any occupation whatsoever for remuneration or profit?" Stripping the proposition to the bone, does the receipt of $40.00 per month for services constitute an occupation "for remuneration or profit?"

There is abundant evidence that the insured, a farmer, suffered a stroke of paralysis in 1929, and as a result thereof both his body and

mind were seriously impaired to such an extent that he was wholly unable to attend to his farm or to perform any physical labor whatsoever. Although there was a sharp conflict in the evidence, notwithstanding upon a judgment of nonsuit, the evidence for plaintiff must be construed in its most favorable light.

The interpretation of the meaning of the words in the policy or words of like import has produced a wide divergence of opinion among text-writers and courts of last resort. Similar language was construed by the Supreme Court of Tennessee in *Pacific Mutual Life Insurance Company v. McCrary,* 32 S. W. (2d), 1042. The Court said: "The phrase 'total disability' has a well understood meaning in the law of insurance. It does not mean a state of absolute helplessness. The decisions, almost without conflict, define that condition as an inability to do the material acts necessary to the prosecution of insured's business or occupation (and substantially all the material acts) in (substantially) his usual or customary manner. Cases so holding are too numerous to be set out." See, also, *Metropolitan Life Insurance Co. v. Lambert,* 128 Southern, 750. The logic of these decisions is that such contracts undertake to insure the usual and customary occupation of the policyholder, or, at least, that the insured shall at all times be reasonably qualified physically and mentally to perform the material duties of his present occupation. Courts adopting a different view proceed upon the theory that contracts are made by the parties and not by the judges, and that if the words creating or eliminating liability are clear, plain, and unambiguous, the contract must be enforced according to its terms.

Notwithstanding the views of courts in other jurisdictions or the power and persuasiveness of the reasoning, this Court has spoken upon this type of contract. Thus, a farmer procured a policy, providing disability benefits in language practically identical with that contained in the policy now under consideration. See *Lee v. Ins. Co.,* 188 N. C., 538, 125 S. E., 186. The trial judge charged the jury as follows: "Now, you will want to know what is meant by the language in the contract 'wholly incapacitated and thereby permanently and continuously prevented from engaging in any avocation whatsoever for remuneration or profit' It does not mean merely that this disability may incapacitate him from pursuing his usual avocation, from working on his farm with his hands, but that it must incapacitate him from engaging in any avocation for remuneration or profit. . . . Our courts hold that the act shall be in force as it reads and that the insured cannot recover because totally disabled for his own trade or business, if he retains health, strength and physical ability sufficient for the pursuance of other avocations by which he might engage for profit or remuneration." The *Lee case* was submitted to the jury, but it is to be noted that there was

no evidence in the record that the insured actually received money for performing the acts described in the evidence. See, also, *Buckner v. Ins. Co.*, 172 N. C., 762, 90 S. E., 897; *Brinson v. Ins. Co.*, 195 N. C., 332, 142 S. E., 1; *Metts v. Ins. Co.*, 198 N. C., 197, 151 S. E., 195; *Bulluck v. Ins. Co.*, 200 N. C., 642, 158 S. E., 185. The interpretation adopted by this Court is supported by the following declaration in 6 Cooley's Briefs on Insurance, page 5548: "The provision may limit total disability to the inability to carry on any and all kinds of business. Under such a clause the insured must be unable to perform not only the duties of his usual occupation, but the duties of any other occupation." See *Hurley v. Bankers Life Co.*, 37 A. L. R., p. 146, and Annotation; *Metropolitan Life Ins. Co. v. Bovella*, 51 A. L. R., 1048; *Mo. State Life Ins. Co. v. Snow*, 47 S. W., 600; *Metropolitan Life Ins. Co. v. Wann*, 28 S. W. (2d), 196; *Du Rant v. Ætna Life Ins. Co.*, 164 S. E., 881.

The ultimate question is whether the infirmities and disabilities of the insured wholly prevented him "from pursuing any occupation whatsoever for remuneration or profit." Must such a question be submitted to a jury, or upon admitted facts, is it a question of law for the court? Ordinarily, such questions must be submitted to a jury, but in the case at bar it is admitted that from January until June, a few days prior to his death, the insured received $40.00 per month as compensation for his services as court crier for the county court of Pitt County. It is true that physicians and many other prominent citizens of the community testified that the insured was neither physically nor mentally capable of discharging such duties. Nevertheless it is beyond question that the services of the court crier were satisfactory to the public authorities, because they actually paid him his monthly stipend of $40.00. The law is designed to be a practical science, and it would seem manifest that a plain, everyday fact, uncontroverted and established, ought not to be overthrown by the vagaries of opinion or by scientific speculation.

A somewhat similar situation developed in the case of *Hickman v. Life Ins. Co.*, 164 S. E., 878. The physician testified that the plaintiff had high blood pressure, a chronic kidney condition, and a nervousness attributable to high blood pressure. Furthermore, she had pellagra and myocarditis. The physician also testified that she was totally disabled. However, the evidence disclosed that the insured continued to work in the mill intermittently for several years thereafter. The South Carolina Court, referring to the testimony of the physician, said: "Exactly what he meant by that expression is not clear. The Court will assume, in the face of certain physical facts, that he did not intend to imply that she was reduced to a state of utter helplessness; he clearly had in mind some less strict standard of total disability. If he meant, however, the

language used to have the significance given to the expression 'total permanent disability' by this Court in its construction of that term as used in insurance contracts of this kind, then the admitted fact that plaintiff continued to do her customary work in the usual manner, though perhaps intermittently, for several years thereafter, shows his statement to be absolutely erroneous. In other words, in the face of this fact, the statement of the witness was a mere assertion or expression of opinion of no probative value, and could not create an issue of fact as to plaintiff's total disability."

Upon a consideration of the entire record, the Court is of the opinion that the trial judge ruled correctly.

Affirmed.

STATE v. DOCK INGRAM AND ODELL NORMAN.

(Filed 19 April, 1933.)

1. Criminal Law G m—

A defendant is presumed to understand the significance of his plea of guilty entered in a prosecution in the municipal court in the absence of explanatory evidence, and his plea is admissible against him in his trial in the Superior Court.

2. Gaming B d—Exceptions to the admission of evidence in this prosecution for operating a lottery are not sustained.

In establishing by circumstantial evidence the promotion of a lottery in violation of C. S., 4428, it is permissible for the State to show the association between the defendants and their financial relation to the transactions, and to this end testimony of declarations of one of them made in the presence of the other tending to establish such association and the participation of the defendants in the transactions is competent, and testimony of defendants' possession of certain slips of paper with numbers on them is competent where the evidence shows that they were essential to the consummation of the lottery, and testimony of the receipt and disbursement of money by one of them is also competent.

APPEAL by defendants from *Clement, J.*, at January Term, 1933, of FORSYTH. No error.

The defendants were indicted for a breach of C. S., 4428, which provides: "If any person shall open, set on foot, carry on, promote, make or draw, publicly or privately, a lottery, by whatever name, style, or title the same may be denominated or known; or if any person, by such way and means, expose or set to sale any house, real estate, goods, chattels, cash, written evidence of debt, certificates of claims or any other thing of value whatsoever, every person so offending shall be guilty

of a misdemeanor, and shall be fined not exceeding two thousand dollars or imprisoned not exceeding six months, or both, in the discretion of the court. Any person who engages in disposing of any species of property whatsoever, including money and evidences of debt, or in any manner distributes gifts or prizes upon tickets or certificates sold for that purpose, shall be held liable to prosecution under this section."

The specific charge in the warrant is that the defendants "did unlawfully and wilfully promote, set on foot, publicly or privately, a certain lottery where money is spent and a game of chance is taken." The defendants were convicted and from the judgment pronounced they appealed.

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

John D. Slawter and Richmond Rucker for defendants.

PER CURIAM. The defendants offered no evidence. There is proof that they were engaged in the operation of a lottery. When arraigned in the municipal court Odell Norman pleaded guilty of the offense charged in the warrant, and in the absence of explanatory evidence is presumed to have understood the significance of his plea. His plea was admissible against him upon his trial in the Superior Court. 16 C. J., 630, sec. 1254(7). The trial court was therefore correct in refusing to dismiss the action. Exceptions to the admission of evidence and to the charge of the court comprise the remaining assignments of error.

Odell Norman was the owner and proprietor of the premises. In the rear of his barber shop there was a pool room in which it is contended the gambling device was situated. The lottery seems to have been conducted after this fashion: Ingram "picked up the business"; he sold the books, collected the money for them, and received from customers the sealed envelopes containing the numbers for the drawing. The device held out the possibility of receiving for a few cents a much larger sum of money. The documents found in the room consisted of several hundred slips of paper containing numbers, the slips in the envelopes being yellow slips bearing from five to fifteen numbers with a printed number at the bottom; they consisted in part of booklets containing yellow and white sheets with thin tissue sheets between them, some of which were numbered. The account books contained various names and figures.

The State offered evidence that Norman had frequently said in the presence of Ingram that the latter was the "pick-up man" who went around and got work from different places—*i. e.,* collected money and brought in bags of sealed envelopes; also that he had received money from Norman. The defendants excepted to the admission of this evi-

dence. In establishing the promotion of the lottery by circumstantial evidence it was permissible for the State to show the association of the defendants together with their financial relation and transactions. This was substantive. The declaration of Norman as to Ingram's participation in the enterprise and as to their protection if they were caught (Exceptions 21-23) was competent upon the principle set forth in *S. v. Jackson,* 150 N. C., 831; and his statement that he intended to turn over to Ingram certain papers bearing numbers, when he checked them up was competent at least against himself.

Exceptions 15-19 relate to slips which were disposed of; the receipt of the money by Norman; the way in which he paid it out; and a patron's potential receipt of ten dollars for two cents "if the number hit." In these exceptions we discover no cause for a new trial. The papers which are the subject of the twenty-fourth exception were admissible in evidence. There is testimony from which it may reasonably be inferred that the defendants were engaged jointly with others in an illegal enterprise, both making use of the papers which were essential to the consumption of this purpose. The charge is free from error and the remaining exceptions are formal.

No error.

AMERICAN AGRICULTURAL CHEMICAL COMPANY, ASSIGNEE OF W. L. REASON v. C. GRIFFIN.

(Filed 26 April, 1933.)

1. Appeal and Error G b—

Where an appeal is taken from the ruling of the trial judge as to the admission of certain testimony, but the appeal thereon has not been perfected, and no point is made in the brief with respect thereto, this particular aspect of the appeal is eliminated from consideration.

2. Evidence D b—Payee's agent who had guaranteed note held not party interested in event under C. S., 1795, under the facts of this case.

A father endorsed his son's note as guarantor and was sued thereon by the payee. Upon the trial the father was allowed to testify as to transactions with the payee's agent, who had died prior to the trial, that the note was for fertilizer sold the son the previous year and that his guarantee was solely in consideration of the payee's agreement to furnish the son fertilizer on open account the ensuing year, and that the payee had wrongfully refused to so furnish the fertilizer under the agreement. It appeared that the agent guaranteed all notes to the payee. *Held,* the father's testimony was not incompetent under C. S., 1795, the payee's agent not being a party interested in the event within the meaning of the statute, since the father would have no right of action against the agent had he lost

the suit, and the release of the father upon the ground that the payee had wrongfully breached the contract would also release the agent on his guarantee to the payee, his principal.

CIVIL ACTION, before *Daniels, J.*, at Spring Term, 1933, of EDGECOMBE.

During the year 1928, C. Roy Griffin operated a farm in Edgecombe County and purchased certain fertilizer from the plaintiff corporation through its agent, W. L. Reason. He was unable to pay for same. C. Roy Griffin testified that in the latter part of 1928, or in the early part of 1929, he had a conversation with the agent, Reason, with respect to furnishing fertilizer for the year 1929. In this conversation Reason agreed to furnish fertilizer for the year 1929 on open account, upon condition that C. Griffin, the father of C. Roy Griffin, would endorse a note for the amounts due for fertilizer furnished in 1928. Subsequently Reason approached C. Roy Griffin for further conversation about the matter. C. Roy Griffin said: "I sent down there and Mr. Vinton Fountain was in the office and talked it over, the terms on which he would ship it, that my father endorse the note for $2,600. . . . I asked Mr. Reason to get me something in writing to show they would do that, the American Agricultural Chemical Company would. Mr. Fountain said: 'I am their attorney. I will write it for you.' I said, 'No, I prefer it from the company.' He said, 'All right, that he would get it in a few days.' Mr. Reason called me and told me he had a letter from the company. I went down there again. Mr. Reason gave me the letter and gave me the writing showing that he would furnish it with the company, gave me the letter to my father to take to him with the note showing he would furnish it. . . . I took the note and carried it to my father with that letter and read the letter to him. He didn't have his glasses, and he signed the note. I took it back to Mr. Reason and waited until sometime in March and gave him order for fertilizer. Up to the time of this transaction father had not assumed any liability for my indebtedness to the Chemical Company. . . . After the note was signed and delivered to Mr. Reason I went back and gave order for it and he sent it in to the Chemical Company people and they wrote him back that they would not ship the fertilizer unless they had a mortgage on my team and a crop lien. They never sold me any fertilizer in 1929. They refused to sell me fertilizer." The letter from the plaintiff, addressed to the agent, Reason, is as follows: "Dear Mr. Reason: Our attorney, Mr. V. E. Fountain, at Tarboro, has just informed us that Mr. Roy Griffin at Pinetops wants you to furnish him his fertilizers for the year 1929. This is to advise that we will be glad to make shipment to Mr. Griffin as per your orders. Yours very truly, The American Agricultural Chemical Company, Norfolk Sales Dept., By: W. L. Nichols."

The defendant, C. Griffin, testified in substance to the same facts as

his son, C. Roy Griffin, and said: that Reason had approached him "and told me Roy (C. Roy Griffin) had failed to pay for his fertilizer, and told me if I would go on his note for the past year (1928) he would furnish him fertilizer for 1929 on open account as he did the year before. . . . After that I was down there one day at Webb's store and Roy and I were there in front of Reason's store, and Roy had a note and letter. I looked at the letter, but did not read it. I signed the note with the expectation of getting him his fertilizer for the coming year as he did the year before. . . . I signed it on account of what Mr. Reason told me. I had no other reason for signing it. I did not get one cent out of signing this note." The note was offered in evidence and was a plain promissory note for $2,600, dated 1 January, 1929, payable to the "American Agricultural Chemical Company or order on or before December, 1929." On the back of the note was a notation signed by the defendant, C. Griffin, as follows: "For value received, the undersigned . . . hereby guarantees the payment of the within note at maturity," etc. The agent, W. L. Reason, in a contract between him and the plaintiff, had guaranteed "payment when due of all accounts and notes representing proceeds of sales of all fertilizers consigned to you hereunder. All notes shall be made by the purchasers on blanks furnished by us, payable to our order at some bank or express office."

The evidence tended to show that Reason died 9 December, 1930, and this action was instituted on 21 July, 1930.

The following issues were submitted to the jury:

1. "Did the defendant endorse and guarantee the payment of the note to plaintiff as alleged in the complaint?"

2. "Did the plaintiff contract and agree as a consideration for the endorsement of said note by the defendant, Charlie Griffin, to sell fertilizer to C. Griffin for 1929, on open account as alleged by the defendant?"

3. "If so, did the plaintiff fail and refuse to furnish C. Roy Griffin fertilizer on open account as alleged by defendant?"

The jury answered all the issues "Yes." The record recites: "All the issues set out in the record were submitted to the jury, and the court fully and properly instructed the jury thereupon." There was a verdict in favor of defendant and motion for judgment on the verdict. The plaintiff made a motion to set aside the verdict upon two grounds: First, that C. Roy Griffin, had been permitted to testify concerning a personal transaction with W. L. Reason, who was dead at the time of the trial. Second, that the court permitted the defendant, C. Griffin, to testify as to the conversation with W. L. Reason, deceased. The court, being of the opinion that the testimony of defendant, C. Griffin, was incompetent by virtue of C. S., 1795, set the verdict aside as a matter of law, and

the defendant appealed. It appeared that at a former term of the Superior Court judgment had been entered against C. Roy Griffin, and also, that the personal representatives of W. L. Reason were not parties to the suit.

V. E. Fountain and Henry C. Bourne for plaintiff.
Gilliam & Bond for Griffin.

BROGDEN, J. Notice of appeal was given by the plaintiff from the ruling of the trial judge that the testimony of C. Roy Griffin was competent. The appeal, however, on this phase of the case was not perfected, and no point is made in the brief with respect thereto. Hence this aspect is eliminated. Consequently the sole question relates to the competency of the conversation between C. Griffin and the plaintiff's agent, Reason, by virtue of the application of C. S., 1795. Many years ago the stream of interpretation of C. S., 1795 forked. One branch was made up of cases coming within the letter of C. S., 1795, or the express words of the statute. The other branch was made up of cases coming within the spirit of said statute. The case at bar lies in the latter branch and is represented by such decisions as *Bryant v. Morris*, 69 N. C., 444; *McGowan v. Davenport*, 134 N. C., 526, 47 S. E., 27, and *Honeycutt v. Burleson*, 198 N. C., 37, 150 S. E., 634. These cases proceed upon the theory that C. S., 1795, not only applies to parties but to any person having a pecuniary interest in the result of the action.

Did Reason have such a pecuniary interest so far as the defendant, C. Griffin, is concerned as to render the evidence incompetent? Both were guarantors of the payment of the note of C. Roy Griffin. The sole consideration for the guaranty of C. Griffin was the furnishing of fertilizer to his son on open account, for the year 1929. The jury found that the plaintiff breached the contract, and hence there was a total failure of consideration for the guaranty of Griffin. Consequently he was released. *Chemical Co. v. Griffin*, 202 N. C., 812, 164 S. E., 577; *Trust Co. v. Clifton*, 203 N. C., 483.

If C. Griffin had lost and been compelled to pay the note, obviously there was no claim he could assert against Reason or his estate after his death. As C. Griffin wins and is thereby released, can the plaintiff maintain a suit against Reason or his estate by virtue thereof? Manifestly, the release of C. Griffin was the result of the wrongful act of the plaintiff, and the law does not permit a creditor to profit by his own wrong or to breach a contract and thereby release one guarantor and at the same time hold another.

Therefore, the court is of the opinion that the evidence was competent, and that judgment should be entered upon the verdict.

Reversed.

MRS. D. LUMPKIN v. DURHAM BUILDING AND INVESTMENT COMPANY.

(Filed 26 April, 1933.)

1. Building and Loan Associations D a—

A borrowing stockholder of a building and loan association occupies a dual relationship to the association, and his rights and liabilities in each capacity are independent and must be determined by his contracts with the association.

2. Same—Borrowing stockholder held entitled to have payments made prior to specified date applied to loan under the terms of his contract.

Where the deed of trust executed by a borrowing stockholder of a building and loan association provides that the monthly sums paid by the borrower and entered on his pass book should be credited to his indebtedness on the last days of June and December of each year, and the parties have so construed the contract by applying the payments in accordance therewith, and the stock subscribed to by the borrower was its optional payment stock issued under its by-laws which imposed no fine for failure to make regular payments thereon, C. S., 5177: *Held*, upon the placing of the association in the hands of a liquidating agent, during the first part of December, 1932, the borrower was entitled to have all monthly payments made by him prior to 1 July, 1932, applied on his loan, and all subsequent payments after 1 July, 1932, should be applied to the payment of the stock subscribed for by him. *Rendleman v. Stoessel*, 195 N. C., 640, distinguished on the basis of the contract between the parties.

CLARKSON, J., concurs in the result.

APPEAL by Claud Currie, liquidating agent of the defendant, from *Small, J.*, at January Term, 1933, of DURHAM. Affirmed.

This action was begun by the plaintiff, a stockholder of the defendant corporation, in the Superior Court of Durham County on 30 November, 1932. At December Term, 1932, of said court, Claud Currie was appointed liquidating agent of the defendant. He is now engaged in the performance of his duties as such liquidating agent under the orders of the court.

The action was heard at the January Term, 1933, of said court on the petition of Dr. Foy Roberson, a stockholder and borrower of the defendant, for an order authorizing and directing the liquidating agent to accept from the petitioner the balance due on his indebtedness to the defendant in full discharge of the same, and upon the payment of the said sum by the petitioner, to cancel the deed of trust by which the said indebtedness was secured.

On the facts agreed upon at the hearing, it was adjudged by the court that the balance due by the petitioner on his indebtedness to the de-

fendant, secured by the deed of trust, is $18,083.99, with interest from 1 July, 1932.

It was ordered by the court that the liquidating agent be and he was authorized and directed to accept from the petitioner, in full discharge of his indebtedness to the defendant, the sum of $18,083.99, with interest from 1 July, 1932, and upon the payment by the peritioner of said sum, to cancel the deed of trust by which said indebtedness was secured.

From this order, Claud Currie, liquidating agent of the defendant, appealed to the Supreme Court.

Morehead & Murdock for the petitioner.
McLendon & Hedrick for the liquidating agent.

CONNOR, J. The defendant is a corporation organized under the laws of this State, and prior to the commencement of this action, engaged in business as a building and loan association, C. S., 5169-5193. As authorized by its by-laws, which were duly adopted by its board of directors, the defendant issued three classes or kinds of stock: Serial stock; (2) prepaid stock; and (3) optional payment stock. The defendant was authorized by statute to issue as many series, or classes and kinds of stock as were provided for in its charter or by-laws. C. S., 5177. No entrance or withdrawal fee was charged to subscribers for its optional payment stock, nor were any fines or penalties imposed upon the holders of such stock for failure to make regular payments on their shares.

During February, 1927, Dr. Foy Roberson subscribed for 290 shares of the optional payment stock of the defendant, and thereby became a member of the defendant association. As such stockholder and member, he applied to the defendant for a loan of $29,000, to be paid in accordance with the provisions of defendant's by-laws, and to be secured by a deed of trust executed by Dr. Roberson and his wife. The loan was made on 12 March, 1930, in accordance with the application, and the deed of trust was duly executed, and recorded. The terms upon which the loan was made, and upon which it was to be paid are fully set out in the deed of trust.

In accordance with his contract with the defendant, Dr. Roberson paid to the defendant, each month after the loan was made, the sum of $290.00. These monthly payments were entered in the pass book issued to Dr. Roberson by the defendant, and also on the books of the defendant, as they were made by him. On the last days of June and December of each year, in accordance with the provisions of the deed of trust, the aggregate amount of these monthly payments for the preceding six months, was applied by the defendant as a payment on the loan. No part of such amount was applied as a payment on the shares of stock for

which Dr. Roberson had subscribed. The amount due by Dr. Roberson on his loan on the first days of July and January of each year, was thus ascertained and determined in accordance with the provisions of the deed of trust. Interest was computed on such amount at the date of each subsequent payment.

The amount due on the loan, as shown by the pass book in the hands of Dr. Roberson, and by the books of the defendant, on 1 July, 1932, was $18,083.99. None of the monthly payments made by Dr. Roberson after 1 July, 1932, and prior to the commencement of this action, had been applied as a payment on the loan. The aggregate amount of such payments is $1,449.99.

It does not appear from the statement of facts agreed submitted to the court at the hearing of the petition filed by Dr. Roberson in this action, that the defendant corporation was insolvent at the date of the commencement of this action, or that it is now insolvent.

The court was of opinion and so adjudged that Dr. Roberson, as a borrower of the defendant, was entitled to have all the monthly payments made by him prior to 1 July, 1932, applied as credits on the amount of his indebtedness to the defendant but that payments made since 1 July, 1932, and prior to the commencement of the action, should be applied on the shares of stock for which he had subscribed. In this, there was no error.

The petitioner, Dr. Roberson, at the date of the commencement of the action, occupied a dual relation to the defendant. He was both a stockholder and a borrower. These relations are independent, the one from the other. His rights and liabilities growing out of each of these relations are determined by his contracts with the defendant. Only his rights and liabilities as a borrower of the defendant are involved in this appeal. Both are fixed by his contract, as appears in his deed of trust. Under this contract all the monthly payments made by him were to be applied on the last days of June and of December of each year, as credits on the amount of his indebtedness to the defendant.

This case is readily distinguishable from *Rendleman v. Stoessel,* 195 N. C., 640, 143 S. E., 219. In that case, all payments made by the defendant were made on the shares of stock for which he had subscribed, while in the instant case, all payments made by the petitioner were made on the amount of his indebtedness to the defendant, and were applicable to such indebtedness on the last days of June and December of each year. This is the construction of the contract made by the parties thereto prior to the commencement of this action. *Lewis v. Nunn,* 180 N. C., 159, 104 S. E., 470. There is no error in the order. It is

Affirmed.

CLARKSON, J., concurs in result.

CENTRAL HANOVER BANK AND TRUST COMPANY, GURNEY P. HOOD, COMMISSIONER OF BANKS, ET AL., v. F. H. COOKE AND WIFE, JULIA C. COOKE.

(Filed 26 April, 1933.)

Justices of the Peace E b—Refusal of recordari upon finding from conflicting evidence that appellant was guilty of laches is upheld.

While an appellant has the right to a writ of *recordari* to bring up an appeal from the justice's court to the Superior Court where the appeal is not docketed in time through fault of the court or its officers, where the trial court finds upon conflicting evidence upon a motion for *recordari* that the appellant had been guilty of inexcusable neglect and laches in failing to perfect and docket his appeal, and that the petition for *recordari* was not applied for until execution had been issued and the judgment docketed more than sixteen months, the finding of the court upon the conflicting evidence is conclusive, and his order refusing to grant the writ of *recordari* will be affirmed.

CIVIL ACTION, before *Sinclair, J.*, at November Term, 1932, of FRANKLIN.

On 21 April, 1931, the plaintiffs secured a judgment against the defendants for the sum of $150.00 in a court of the justice of the peace. Immediately after the judgment was rendered and in open court, the defendants gave notice of appeal to the Superior Court and paid the justice of the peace all legal fees and all fees required for having the appeal docketed in the Superior Court. The defendant, F. H. Cooke, immediately thereafter went to the office of the clerk of the Superior Court of Franklin County and gave a justified bond to stay execution on said judgment, which was accepted and filed by the clerk. Execution was duly issued upon the judgment and served upon the defendants. Thereupon the defendants, discovering that the appeal from the justice of the peace had never been properly docketed, filed a petition on 21 October, 1932, requesting a writ of *recordari*. The plaintiffs filed an answer to the motion and petition, and the cause was heard by the trial judge.

The justice of the peace, who tried the case in April, 1931, made an affidavit stating that the defendant paid the fees allowed him by law for sending the said appeal and the papers in connection therewith to the office of the clerk of the Superior Court of Franklin County . . . and at the same time, or immediately thereafter he advised the defendants that the said appeal had been sent to the office of the clerk of the Superior Court. The defendant, in his petition for *recordari*, stated that at various times he had visited the office of the clerk and had been informed that the case would be on the trial calendar. The clerk made an

affidavit, stating that the defendant came to his office inquiring about the case afterwards, and that he was advised on each occasion that the appeal had not been received and had not been docketed.

The trial judge found the following facts: "That the defendants herein have been guilty of inexcusable neglect and laches in perfecting and docketing their appeal from the magistrate's judgment to the Superior Court of Franklin County, and that said writ and petition for *recordari* was not applied for by the defendants until after execution had been issued against the defendants more than sixteen months after the docketing of said judgment in the Superior Court of Franklin County, and that several terms of court had intervened during said period of time."

Upon denial of the petition for *recordari* the defendants appealed.

W. L. Lumpkin for plaintiffs.
Gulley & Gulley and C. P. Green for defendants.

BROGDEN, J. The law requires an appeal from a judgment of a justice of the peace to be taken to the next term of Superior Court. "The next term means any term, civil or criminal, which begins after the expiration of the ten days allowed for serving a notice of appeal. An attempted docketing at a subsequent term is a nullity. If the magistrate fails to perform his duty in sending up the appeal, or if the judge is unable to attend the court, the appellant, if in no default, may apply for a *recordari* at the term first convening after the appeal is taken and thereby preserve his rights." *S. v. Fleming, ante,* 40.

It has been frequently held that appellant is entitled to a writ of *recordari* or even of *certiorari,* in those cases in which the failure to perfect the appeal was due to some error or act of the court or its officers and not to any fault or negligence of the appellant or of his agent. *Winborne v. Byrd,* 92 N. C., 7; *Johnson v. Andrews,* 132 N. C., 376, 43 S. E., 926; *Bank v. Miller,* 190 N. C., 775, 130 S. E., 616.

The evidence submitted to the trial judge was conflicting. There was evidence tending to show that the justice of the peace mailed the papers to the clerk, and that they had been received by him. However, the clerk denied that any papers had been filed in his office. Hence the findings of fact by the trial judge supported by competent evidence, are conclusive. While the findings are not stated in full detail, nevertheless it cannot be said that they are inadequate as a matter of law. *Eley v. R. R.* 165 N. C., 78, 80 S. E., 1064.

Affirmed.

MAX E. HAGAR, BY HIS NEXT FRIEND, C. E. HAGAR, v. RED BAND COMPANY, INCORPORATED, AND ARTHUR BLACK, DOING BUSINESS AS ARTHUR BLACK'S GARAGE, AND C. E. HAGAR v. RED BAND COMPANY, INCORPORATED, AND ARTHUR BLACK, DOING BUSINESS AS ARTHUR BLACK'S GARAGE.

(Filed 26 April, 1933.)

Negligence A d—Held, injury in this case was from accident which could not have been foreseen in exercise of due care, and nonsuit was proper.

A father and son each brought action to recover damages sustained by them by reason of injury to the minor son. The evidence tended to show that defendants were attempting to repair a wheel on a truck which the driver had parked on the highway because, due to the defective wheel, he was unable to move it, and that while one of the defendants held an iron or steel bar against the wheel the other hit it with a sledge hammer in order to take the wheel off for repairs, that the son approached the truck and was hit in the eye by a particle which flew off the iron or steel bar. *Held,* judgment as of nonsuit was properly entered in each action, the evidence showing that the injury was caused by an accident which could not have been anticipated in the exercise of due care.

APPEAL by plaintiffs from *Harding, J.,* at September Term, 1932, of DAVIDSON. Affirmed.

Each of the above entitled actions was instituted by the plaintiff therein to recover damages for injuries suffered by Max E. Hagar, the eleven-year-old son of C. E. Hagar, and alleged to have been caused by the negligence of the defendants, or their employees.

By consent, the actions were consolidated for trial of the issues raised by the pleadings. Evidence was offered by both the plaintiffs and the defendants.

From judgment as of nonsuit, at the close of all the evidence, in each action, the plaintiff therein appealed to the Supreme Court.

Spruill & Olive for plaintiffs.
McCrary & DeLapp for defendants.

CONNOR, J. On 12 August, 1931, Max E. Hagar, the eleven-year-old son of C. E. Hagar, while passing a truck owned by the defendant, Red Band Company, Incorporated, and standing on a highway in the town of Thomasville, N. C., was struck in the left eye by a small piece of metal, with the result that his eye was painfully and seriously injured. It was subsequently removed by a surgeon to whom he was taken for treatment. The injuries suffered by Max E. Hagar, are permanent. His father, C. E. Hagar, was required to pay out large sums of money for

medical and surgical treatment of his son's injuries. Both plaintiffs have sustained damages resulting from the injuries suffered by Max E. Hagar.

The truck was standing on the highway, with its front wheels near the curb, and its rear wheels about eleven feet from the curb. One of the rear wheels had suddenly failed to turn, and the driver of the truck had called an employee of the defendant, Arthur Black, to his aid. This employee and the driver of the truck undertook to remove the wheel for the purpose of repairing it. While they were at work, Max E. Hagar, who was walking on the highway, approached the truck. The highway is forty feet wide. When he was within five or six feet of the truck, he was struck in the eye by a small piece of metal, and cried out: "There is something in my eye. I cannot see." Neither of the employees of the defendants had seen him as he approached the truck.

There was evidence tending to show that the piece of metal, which struck the boy in his eye, flew from the iron or steel bar, which the driver of the truck was holding against the wheel, and which the employee of the defendant, Arthur Black, was striking with a sledge hammer. There was no evidence, however, tending to show that either the bar or the hammer was defective, or that the employees of the defendants were negligent in doing their work. All the evidence showed that the injuries which Max E. Hagar suffered, were the result of an accident, for which neither of the employees of the defendants was responsible. The driver did not park the automobile, voluntarily, on the highway; he was unable to move it because of the defective wheel. Neither he nor the employee of the defendant, Arthur Black, knew or had reason to anticipate that a pedestrian on the highway would approach the truck, while they were at work repairing the wheel.

There was no error in the judgment dismissing the action as of nonsuit. *Miller v. Mfg. Co.*, 202 N. C., 254, 162 S. E., 925. The judgment is

Affirmed.

ARVILLE MASTEN AND LILLIE MASTEN v. THE TEXAS COMPANY, H. C. WEAVIL AND C. B. YOKELEY.

(Filed 26 April, 1933.)

Appeal and Error L c—Decision on former appeal as to the sufficiency of the evidence is controlling at subsequent trial on same evidence.

Where on an appeal the question of the sufficiency of the evidence to be submitted to the jury is decided by the Supreme Court according to the contentions of the plaintiff, and no petition for rehearing is filed, the decision of the court constitutes the law of the case both in subsequent

proceedings in the trial court and on subsequent appeal to the Supreme Court, and where the evidence on the subsequent trial is practically identical with the evidence on the first trial, the defendant may not again raise the question of its sufficiency.

APPEAL by defendant, the Texas Company, from *Harding, J.*, at June Term, 1932, of FORSYTH. Affirmed.

The issues submitted to the jury in the Forsyth County Court and their answers thereto, were as follows:

"1. Has the defendant, the Texas Company, polluted the subterranean water and well of the plaintiffs, as alleged in the complaint? Answer: Yes.

2. If so, what amount of permanent damages, if any, are the plaintiffs entitled to recover of the defendant? Answer: None.

3. If so, what amount of temporary damages, if any, are the plaintiffs entitled to recover of the defendant? Answer: $400.00."

On the verdict the Forsyth County Court rendered judgment for plaintiffs. The defendant, the Texas Company, made numerous exceptions and assignments of error and appealed to the Superior Court; and defendant's exceptions and assignments of error were overruled and no error found in the trial in the Forsyth County Court and the judgment of the court below sustained. The defendant made numerous exceptions and assignments of error to the ruling of the Superior Court and appealed to the Supreme Court.

Elledge & Wells for plaintiffs.

Fred S. Hutchins and H. Bryce Parker for defendants.

CLARKSON, J. We think the question to be decided in this action is set forth in plaintiffs' brief, as follows: "After an appellate court of the highest jurisdiction has passed upon a given statement of facts and found that a plaintiff is entitled to go to the jury on those facts, and no rehearing is requested, can the defendant again raise the question of the sufficiency of the evidence on almost identically the same evidence upon a second appeal, after the court has directed that that evidence be submitted to the jury?" We think not.

This case was here at the Fall Term, 1927, and the decision is reported in 194 N. C., 540. In that case the Forsyth County Court had nonsuited the plaintiffs in regard to the liability of the defendant the Texas Company. Upon an appeal from the judgment of nonsuit to the Superior Court, the Forsyth County Court was reversed by the Superior Court and the case remanded with instructions to submit the evidence to the jury. From this judgment of the Superior Court the defendant, the Texas Company, appealed to the Supreme Court. The judgment of

the Superior Court was affirmed by this Court. In the decision of this Court in this action, above set forth, the question of the liability of the defendant, the Texas Company, was fully discussed. The question of whether there was sufficient evidence to be submitted to the jury as to the defendant, the Texas Company, for the injuries complained of by plaintiffs, as well as the sufficiency of the evidence on the proximate causes of the damage to plaintiffs' well was fully considered.

The evidence in the present action is practically the same as passed on in the former appeal in this action. The able judge in the Forsyth County Court tried the case in accordance with the former decision of this Court, and on appeal to the Superior Court all the exceptions and assignments of error on the part of the Texas Company were overruled. It made numerous exceptions and assignments of error and appealed to this Court. There was no petition on the former appeal for a rehearing. Rules of Practice in the Supreme Court, 44—200 N. C., at p. 838. We think the whole matter is *res judicata.*

"His Honor charged the jury in almost the identical language of our former opinion. The decision on the first appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal here. *Harrington v. Rawls,* 136 N. C., 65; *Gordon v. Collett,* 107 N. C., 362." *Nobles v. Davenport,* 185 N. C., 162, 163. *Mfg. Co. v. Hodgins,* 192 N. C., 577; *Jessup v. Nixon,* 199 N. C., 122.

We see no error in the admission or exclusion of evidence on the trial. In the judgment of the court below, we find no error.

Affirmed.

R. LESTER CRANE v. GUY T. CARSWELL.

(Filed 26 April, 1933.)

New Trial B g—

Although the discretionary ruling of the trial court upon an application for a new trial for newly discovered evidence is not reviewable on appeal, where the applicant fails to make out a showing of "newly discovered evidence" sufficient in law to invoke the discretionary ruling, the granting of the application will be held for error.

APPEAL by defendant from *Harding, J.,* at February Term, 1933, of UNION.

Civil action to recover damages for alleged negligent injury, tried at the March Term, 1932, which resulted in a verdict and judgment for defendant, affirmed on appeal, 203 N. C., 555.

Thereafter, at the next succeeding term of the Superior Court of Union County, following affirmance of judgment on appeal, the plaintiff moved for a new trial on the ground of newly discovered evidence. Motion allowed and defendant appeals, for that, the showing made by plaintiff on the hearing of said motion was not sufficient to warrant favorable action on the part of the court.

No counsel appearing for plaintiff.
J. Laurence Jones and Vann & Milliken for defendant.

STACY, C. J. No appeal lies to this Court from the discretionary determination of an application for new trial on the ground of newly discovered evidence. *S. v. Lea,* 203 N. C., 316. But where the applicant fails to make out a showing of "newly discovered evidence," as this phrase is defined in the law (*S. v. Casey,* 201 N. C., 620, 161 S. E., 81), no occasion arises for the exercise of the court's discretion. *Stilley v. Planing Mills,* 161 N. C., 517, 77 S. E., 760. We agree with the defendant that plaintiff's showing on his application for new trial on the ground of newly discovered evidence was insufficient to invoke a discretionary ruling in his behalf. *Stilley v. Planing Mills, supra.*

Error.

STATE v. FARLEY LOWE.

(Filed 26 April, 1933.)

Receiving Stolen Goods D b—

Recent possession of stolen property, without more, is insufficient to raise a presumption of guilt of the statutory charge of receiving said property knowing it to have been stolen. C. S., 4250.

APPEAL by defendant from *Clement, J.,* at February Special Term, 1933, of GUILFORD.

Criminal prosecution tried upon an indictment charging the defendant (1) with the larceny of an automobile, valued at $500, the property of one Boyd C. Royalls, and (2) with receiving said automobile, valued at $500, the property of the said Boyd C. Royalls, knowing it to have been feloniously stolen or taken in violation of C. S., 4250.

The evidence tends to show that on the night of 14 July, 1930, the prosecuting witness' automobile was stolen in High Point. Eight days thereafter it was found in Chesterfield, S. C. The defendant had been arrested as the suspected thief and lodged in jail. The defendant told

the prosecuting witness that Bill Payne came by his home with the car and brought him to South Carolina with the promise that he would get some money and pay him what he owed him.

Verdict: Guilty of receiving.

Judgment: Two years on the roads.

Defendant appeals, assigning errors.

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

George A. Younce, Adam Younce and John R. Hughes for defendant.

STACY, C. J. Conceding that the recent possession of the stolen automobile (if, indeed, the evidence establishes such possession, which may be doubted) was a circumstance tending to show the larceny thereof by the defendant (*S. v. Best,* 202 N. C., 9, 161 S. E., 535), still it is the holding with us that the inference or presumption arising from the recent possession of stolen property, without more, does not extend to the statutory charge (C. S., 4250) of receiving said property knowing it to have been feloniously stolen or taken. *S. v. Adams,* 133 N. C., 667, 45 S. E., 553.

There was not sufficient evidence to justify a conviction on the second count in the bill.

Reversed.

MABEL NORFLEET v. FRANK P. HALL, JR.

(Filed 26 April, 1933.)

1. Highways B c—Driving at speed in excess of statutory maximum is negligence per se, and is actionable when proximate cause of injury.

Where there is evidence that defendant was driving his automobile on the highway at a speed of sixty-five miles per hour and that the injury in suit was proximately caused by such excessive speed, it is sufficient to be submitted to the jury on the issue of actionable negligence, since such speed, being in violation of N. C. Code, 2621(46), is negligence *per se*, regardless of the condition of the road, the weather or traffic, and the question of proximate cause is ordinarily for the jury.

2. Highways B k—Failure of guest to remonstrate as to excessive speed held not contributory negligence under evidence in this case.

The fact that plaintiff, who was riding as a guest in defendant's automobile, failed to remonstrate with him as to the excessive speed at which he was driving, is held not to constitute contributory negligence under the evidence in this case, it appearing that defendant increased his speed at the beginning of the journey, and that the car skidded suddenly before

plaintiff had an opportunity to remonstrate with him, and since defendant's wilful and intentional violation of the speed law could not have been anticipated by plaintiff when she entered the car.

3. Trial F a—

The trial court's refusal to submit issues tendered will not be held for error where there is no supporting evidence and the issues are not material to the trial. C. S., 584.

STACY, C. J., and BROGDEN, J., dissenting

APPEAL by defendant from *Daniels, J.*, at October Term, 1932, of EDGECOMBE. No error.

This is an action to recover damages for personal injuries suffered by the plaintiff, when the automobile in which she was riding as the invited guest of the defendant, and which he was driving on a State highway in Gaston County, suddenly skidded, ran off the highway, and turned over.

It is alleged in the complaint that "on the night of 1 August, 1931, plaintiff was riding with the defendant in his automobile near the town of Belmont, N. C., on a paved highway leading from said town to Gastonia, N. C., and beyond; that it was a dark and rainy night, and the surface of the highway was wet and slippery; that there was much traffic on said highway at the time, and the weather conditions, the wet condition of the highway, the glare of approaching automobiles, and other circumstances, combined to make driving at the time and place of the catastrophe and injuries hereinafter mentioned hazardous and dangerous."

"3. That notwithstanding the hazard and danger incident to driving on said highway at the time and place mentioned, and in disregard of the rights of the plaintiff and her safety, the defendant was driving his automobile at the negligent and reckless speed of sixty-five miles per hour, when suddenly the defendant lost control of his said automobile and permitted it to skid and turn over, causing permanent injuries to the plaintiff as hereinafter set forth."

"4. That the aforesaid skidding and turning over of defendant's automobile, and the consequent injuries to plaintiff resulted proximately from the negligent acts of the defendant in driving his automobile at an unlawful, reckless and dangerous speed on a wet and slippery highway; that the highway at the point where the skidding occurred was about forty feet wide, and had the defendant been operating his said automobile at a moderate and reasonable speed, the skidding of the automobile would not have been serious, as there was ample space within which to have righted it, but that due to the high rate of speed at which the automobile was driven by the defendant, he completely lost control

of his said automobile, and that as a proximate result plaintiff was seriously and permanently injured as hereinafter set forth."

In his answer the defendant denied that the plaintiff was injured by his negligent operation of the automobile in which she was riding. He alleged that the wheels of his automobile ran onto an oily or slick spot on the highway, which he did not see and could not have seen, and that this caused the automobile to skid and turn over, and thereby to injure the plaintiff. In further defense to the cause of action alleged in the complaint, the defendant alleged in his answer:

"1. That the skidding of defendant's automobile on the slick spot on the cement highway was nothing more than an unforeseeable accident, which is a hazard attending every journey, and is assumed by every journeyer, including the plaintiff. The defendant pleads this assumption of the hazards of the journey by plaintiff in bar of her recovery in this action."

"2. The plaintiff was as thoroughly advertent to the weather conditions, to the type and width of the highway, to the manner in which defendant was operating his automobile and to every other fact which she now alleges as negligence, as was the defendant; and that plaintiff, without protest or remonstrance, but with her signified approval, elected voluntarily to continue her journey, thereby voluntarily assuming the risk of the skidding of the automobile, and all its resulting consequences. The defendant pleads this assumption of risk by the plaintiff in bar of her recovery in this action."

The only evidence offered at the trial, tending to show the circumstances under which the plaintiff was injured, was her testimony. She testified as follows:

"I am 30 years of age, and reside at Tarboro, N. C. During the summer of 1931 I was visiting friends at Charlotte, N. C. I have known the defendant, Frank Hall, for some time. He called to see me frequently while I was visiting at Charlotte, and did what he could to make my visit pleasant.

"On 1 August, 1931, the defendant and I went from Charlotte to Belmont, in his automobile, to visit a friend who was sick. Belmont is sixteen miles from Charlotte. We left Belmont at about 11:30 o'clock at night. I was riding with the defendant in his automobile. He was driving. We were riding in the automobile on the State highway from Belmont to Gastonia. This highway is hard surface and is about forty feet wide. There are four traffic lanes, two for fast driving, and two for slow driving. We were riding on the lane for fast driving from Belmont to Gastonia. The accident occurred when we were about a mile from Belmont. It was about 11:30 o'clock at night and pouring rain. We were not meeting automobiles at the time of the accident. The traffic

was not dense. I knew that the defendant was driving fast—at a speed not less than fifty miles per hour. The automobile skidded suddenly, turned and twisted, and ran off the highway and down the embankment. I was thrown from one side of the automobile to the other. When the automobile stopped, I was so dazed I did not know what had happened. The automobile ran off the right side of the highway. I was sitting on the right side of the automobile. After the accident, the defendant in reply to a question from a by-stander, as to what caused the accident, said: 'I was running too fast. I was driving sixty-five miles per hour.' I knew that the defendant was driving too fast. I did not request him to slow down. I was satisfied with the operation of the automobile by the defendant. The whole story about the accident is that the automobile was running along and suddenly began to skid. That is all that there is to the way the accident happened. That is all I know about it. The defendant and I were engaged in conversation at the time the automobile skidded."

There was evidence tending to show the nature and extent of the injuries suffered by the plaintiff, as the result of the accident and the amount of the damages sustained by her caused by her injuries.

No evidence was offered by the defendant in contradiction of the testimony of the plaintiff as to the facts and circumstances leading up to and surrounding the accident. The defendant, for the purposes of the trial, admitted that these facts and circumstances were as the plaintiff had testified. There was no exception to the evidence offered by the plaintiff tending to show the nature and extent of her injuries, or the amount of her damages.

The issues submitted to the jury were answered as follows:

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

2. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $8,542."

From judgment that plaintiff recover of the defendant the sum of $8,542, and the costs of the action, to be taxed by the clerk, the defendant appealed to the Supreme Court.

Gilliam & Bond for plaintiff.
Spruill & Spruill for defendant.

CONNOR, J. The uncontradicted evidence at the trial of this action showed that immediately before and at the time the automobile in which the plaintiff was riding, and which the defendant was driving, skidded and ran off the highway, the defendant was driving, knowingly and wilfully, at a greater rate of speed than forty-five miles per hour.

He was driving at a rate of sixty-five miles per hour. He was, therefore, violating the statute, which provides that it shall be unlawful for any person to drive an automobile on a highway in this State at a greater rate of speed than forty-five miles per hour. N. C. Code of 1931, sec. 2621(46). The violation of this statute was in itself negligence. The conditions with respect to the weather, the traffic on the highway, or the surface and width of the highway, were immaterial. The speed at which the defendant was driving his automobile was unlawful, and therefore constituted negligence. All the evidence showed further that this negligence on the part of the defendant was the proximate cause of the skidding of the automobile and the consequent injuries suffered by the plaintiff.

In *Godfrey v. Coach Company,* 201 N. C., 264, 150 S. E., 412, it is said: "The violation of a statute intended and designed to prevent injury to persons or property, or the failure to observe a positive requirement of the law, is under a uniform line of decisions, negligence *per se, Dickey v. R. R.,* 196 N. C., 726, 147 S. E., 15; *Ledbetter v. English,* 166 N. C., 125, 81 S. E., 1066, and when a violation or failure of this kind is admitted or established, it is ordinarily a question for the jury whether such negligence was the proximate cause of the injury. *Stultz v. Thomas,* 182 N. C., 470, 109 S. E., 361." See *Butner v. Whitlow,* 201 N. C., 749, 161 S. E., 389.

There was, therefore, no error in the refusal of the court at the trial of this action to allow the motion of the defendant for judgment dismissing the action as of nonsuit, unless, as contended by the defendant, the plaintiff is barred of recovery because she failed to remonstrate with the defendant as to the speed at which he was driving the automobile in which she was riding as his invited guest, and to request him to lessen the speed, which she knew was too fast. The defendant does not contend that plaintiff contributed to her injuries by her own negligence in riding with him in his automobile under the conditions as to the weather, the traffic on the highway, and its width and surface, as shown by the evidence. His sole contention is that plaintiff assumed the hazards of a journey in an automobile, including the wilful negligence of the driver in violating a statute which prescribes the maximum speed at which an automobile may be lawfully driven on a highway in this State.

It is conceded that there are circumstances under which even an invited guest riding in an automobile driven by his host, owes the duty to himself to remonstrate against the excessive speed at which his host is driving his automobile, and to request him to lessen his speed, and that a failure on the part of such guest to discharge this duty bars his recovery of damages caused by the negligence of his host. *King v. Pope,*

202 N. C., 554, 163 S. E., 447, *Nettles v. Rea*, 200 N. C., 44, 156 S. E., 159. This principle, however, is not applicable to the facts shown by all the evidence in the instant case.

It does not appear from the evidence that plaintiff had an opportunity to discharge the duty imposed upon her by the law to remonstrate with the defendant and to request him to lessen his speed. Plaintiff and defendant had been driving only about a mile, when the defendant increased his speed to sixty-five miles per hour. His negligence, while probably not gross or wanton, was wilful and intentional, and could not have been anticipated by the plaintiff, when she entered defendant's automobile as his guest.

Under the circumstances as shown by all the evidence, plaintiff was not required to remonstrate with the defendant, or to request him to lessen his speed, although she knew that he was driving too fast. The automobile skidded suddenly, before the plaintiff had an opportunity to protest to the defendant as to his speed. It cannot be held that she voluntarily assumed the risk of defendant's wilful, and intentional negligence. There was no error in the refusal of the court to dismiss the action as of nonsuit.

Nor was there error in the refusal of the court to submit the issues tendered by the defendant. There was no evidence tending to support defendant's contentions with respect to these issues, which were not material to the trial. C. S., 584. The judgment is affirmed.

No error.

STACY, C. J., and BROGDEN, J., dissenting opinions.

STACY, C. J., dissenting: This is a hard case. It carries the doctrine of *sic utere tuo ut alienum non lædas* to its severest implications, and apparently runs counter to the maxim *volenti non fit injuria*. The correct application of sound principles ought not to end in such a clash.

The rules applicable to the facts of the instant case are generally stated as follows:

First, with respect to the negligence of the driver: The owner or operator of an automobile owes the duty to an invited guest to exercise reasonable care in its operation, and not unreasonably to expose him to danger and injury by increasing the hazard of travel. 20 A. L. R., 1014; 26 A. L. R., 1425; 40 A. L. R., 1338; 47 A. L. R., 327; 51 A. L. R., 581; 65 A. L. R., 952. Just what constitutes "increasing the hazard of travel" is not altogether clear from the decisions.

Second, with respect to the contributory negligence of the guest: A person riding in an automobile driven by another, even though not chargeable with the driver's negligence, is not absolved from all personal care for his own safety, but is under the duty of exercising

reasonable or ordinary care to avoid injury, *i. e.*, such care as an ordinarily prudent person would exercise under like circumstances. 18 A. L. R., 309; 22 A. L. R., 1294; 41 A. L. R., 767.

True, in the instant case, the defendant has confused his plea of contributory negligence with assumption of risk, but the facts are set out, and the plaintiff says she "was satisfied with the operation of the car and the way it was being driven. I knew we were going fast—not less than fifty miles an hour. I did not protest or request that he slow down. The whole story about the accident is that the car was running along and suddenly began to skid. That is all there is to the way the accident occurred." Therefore, according to the plaintiff's own testimony, she voluntarily consented to the speed of the car; she knowingly acquiesced in the way it was being driven; she willingly took a chance and lost; she ought not to recover. *Clark v. Travers,* 200 N. Y. S., 52.

A guest who sits beside the host with full knowledge that the car is being driven in excess of the lawful rate of speed, and makes no protest, voluntarily joins in testing the dangers, and is chargeable with contributory negligence. *Curry v. Riggles,* 153 Atl. (Pa.), 325; *Herold v. Clendennen,* 161 S. E. (W. Va), 21.

It is proper to nonsuit the case when the plaintiff's contributory negligence is established by his own evidence, for he thus proves himself out of court. *Wright v. R. R.,* 155 N. C., 325, 71 S. E., 306.

BROGDEN, J., dissenting: I do not dissent upon the ground that the decision of the Court is not in full accord with the precedents heretofore established in this jurisdiction. I do not concur in either the reasoning or the righteousness of the precendents. In the case at bar the plaintiff testified expressly that she was satisfied with the operation of the car, and certainly, she was satisfied with the driver. Hence I see no particular reason why the Court should be more solicitous for her welfare than she was for her own safety.

No court would permit an employee to recover damages for the mere negligence of his employer if the employee selected, according to his own notion and judgment, the tools and appliances with which to perform his work, and also, selected, according to his own notion and judgment the place of the work and the methods of discharging his duties. Notwithstanding, a gratuitous passenger or thumb-rider can voluntarily select, according to his own notion and judgment, the vehicle in which to make the journey, the equipment of same, the driver thereof, and the route of travel. Moreover, if he is injured by the negligence of his own driver, or the defect of his own vehicle, or its equipment, so selected and approved, he may recover damages. Thus, a thumb-rider or guest receives the full blessing of the law, although the same,

under similar circumstances, is promptly denied to a workman who toils and sweats in the field or factory. Lapsing into the muddy language of the back alley, it is rather difficult to be reconciled to the idea that a person can recover damages for being bitten by his own dog.

Our decisions upon the subject are to the effect that the driver of a car owes the duty of ordinary care to a thumb-rider or guest; that is, to furnish a reasonably safe place or vehicle in which to travel and a reasonably safe driver. This is identically the duty that an employer owes to an employee. So that, under the law, when a thumb-rider steps into an automobile, thereupon he becomes the employee of the driver so far as liability is concerned. If there is a defective bolt or screw, unknown to the driver, and as a result there is a collision, the driver pays in terms of his own life or limb and is without legal remedy, but not so with the thumb-rider who sits by his side. He is the favorite of the law, and can recover damages.

The implications arising from the application of liability for injuries to guests has resulted in sharp divergence of judicial reasoning upon the subject, and this divergence within the past few years, has found pen and tongue and voice in the courts and law-making bodies throughout the country.

Obviously the driver of an automobile ought not to be permitted to accept another person as a guest and then proceed to break him to pieces along the route of travel. At the outset, however, it is not to be supposed that the driver is less careful for the safety of the guest than he is for his own for the reason that they usually suffer the same fate. Some courts dealing with the question, in order to approve liability—perhaps as a method of curbing and discouraging reckless driving—have undertaken to work out the rights of the parties upon the theory of treating the rider as a licensee. Thus, if a person enters upon the premises of another, while he must take the premises as he finds it, the owner of the premises must refrain from doing anything to increase the hazard of the licensee while upon the premises. Extending this analogy to automobiles, we have this situation: The automobile is the premises. Hence, when the guest steps into an automobile, he is upon the premises of the owner or driver, and such driver or owner must not, by active negligence, increase the hazard while such licensee is upon such premises. But it seems to me that the analogy disintegrates. The so-called premises is a moving vehicle, changing its position at every instant of time. The guest wants the premises to move, and ordinarily, as in the case at bar, is not averse to fast movement. Thus it would seem that the driver is as much a permanent condition of moving premises as bolts and screws, and valves and tubes. If the rider assumes the risk of such bolts and tubes and valves, it is hard to understand

why he does not also accept the risk of the driver, who must be a permanent part of the "premises" of a moving vehicle, for without the driver, the vehicle would not move at all. The analogy strikes me as an effort to put new wine in old bottles, and the fallacy of that experiment was pointed out about two thousand years ago.

Furthermore, if a thumb-rider or guest is deemed to be a licensee, he is no more than a bare or permissive licensee, because he comes "upon the premises" ordinarily for his own exclusive pleasure and benefit, and in such event is denied recovery, except in automobile cases, unless there was wilful or wanton negligence.

Some courts have denied recovery, by rule of law or bare judicial decision, unless there was evidence of wilful and wanton negligence or gross negligence. This position is now maintained in Massachusetts, Georgia, Virginia, and Washington. See *Massaletti v. Fitzroy* (Massachusetts), 118 N. E., 168; *Slaton v. Hall* (Georgia), 158 S. E., 747; *Boggs v. Plybon* (Virginia), 160 S. E., 77. The Virginia Court in the *Boggs case, supra,* states the principle in these convincing words: "To hold that a guest who, for his own pleasure, is driving with his host, may recover from him for injuries suffered where there is no culpable negligence, shocks one's sense of justice. The driver is often not an expert and makes no implied representations beyond these, namely, that he will not knowingly or wantonly add to those perils which may ordinarily be expected and that there are no known defects in the car which makes its operation particularly hazardous. Beyond this all risks are assumed. While automobiles in themselves may not be dangerous instrumentalities, yet their use carries with them dangers that cannot be forgotten."

The Michigan Court, in *Naudzius v. Lahr,* 234 N. W., 581, 74 A. L. R., 1189, in approving the constitutionality of a statute denying liability to a guest "unless such accident shall have been caused by the gross negligence or wilful and wanton misconduct of the owner or operator of such motor vehicle," etc., said: "It would be threshing old straw to discuss the accepted fact that the motor car has presented social, financial, and governmental problems which justify the Legislature in reasonably classifying it apart from other vehicles in the enactment of laws. . . . Generally, gratuitous passengers are relatives or friends. Exceptionally, they are mere acquaintances, invited chance pedestrians, or those who deliberately solicit rides. Since the rule of liability was announced . . . there has been considerable litigation between guests and hosts. Some between husband and wife or other close relatives has found its way to this Court. . . . In many, probably most, of the cases between relatives or friends the real defendant is an insurance company. Ordinary negligence is not hard to prove if guest and host cooperate to that end. It is conceivable that such actions are not always

unattended by collusion, perjury, and consequent fraud upon the court. While we may accept the contention that paid insurers are not objects of special consideration by the Legislature, it is inadmissible for the court to consider a law from the viewpoint that they are not entitled to a proper trial, and honest determination of liability in a lawsuit. Nor are insurance companies alone interested in the question. The results of verdicts are mirrored in insurance rates, and the law provides a possible reason in the purse of the motor owning public, most of whom carry liability insurance. It is not inconceivable that some passengers who solicit rides may manufacture claims for liability. Groups of young folks, engaged upon a joint enterprise of social enjoyment in a borrowed car, have been known to combine to charge the owner for an accident. The law also has social features. It is well known that drivers hesitate to take neighbors for a ride or to assist on his way a weary traveler because of potential liability for injuries. Few, if indeed any, of these features seem to have manifested themselves in the use of other vehicles than motor cars."

The Supreme Court of the United States, in *Silver v. Silver,* 280 U. S., 117, 74 L. Ed., 221, in upholding the constitutionality of the Connecticut statute, said: "In this day of almost universal highway transportation by motor car, we cannot say that abuses originating in the multiplicity of suits growing out of the gratuitous carriage of passengers in automobiles do not present so conspicuous an example of what the legislature may regard as an evil, as to justify legislation aimed at it, even though some abuses may not be hit."

The reasoning of the Michigan Court and the Supreme Court of the United States is based upon the idea that automobile transportation lies in a new and practical field of law and should be dealt with as such, without attempting to force analogies under the concept of licensor, licensee, invitor, invitee, or whatnot.

Many other states in recent years have by statute denied the right of a thumb-rider or guest to recover against the owner or operator of the car unless there was gross negligence, wilful or wanton misconduct or reckless disregard for the rights of others or intoxication. These states are as follows: California Laws of 1931, Colorado Laws of 1931, chapter 118, Connecticut Laws of 1927, Delaware Laws of 1929, chapter 270, Idaho Laws of 1931, Illinois Laws of 1931, Kentucky Laws of 1930, Indiana Laws of 1929, Iowa Laws of 1927, Kansas Laws of 1931, Michigan Laws of 1929, Montana Laws of 1931, chapter 195, Oregon Laws of 1927, South Carolina Civil Code, 1932, Volume 3, section 5908, Texas Laws of 1931, chapter 225, Vermont Laws of 1929, Wyoming Laws of 1931, chapter 2. Thus there are approximately twenty states that limit recovery by statute and four states that accomplish the same result by rule of law. Therefore, it can no longer be said that the

majority view favors recovery. Indeed, it would seem to be clear that there is a rising tide of judicial and legislative determination to put an end to thumb-rider philosophy of recovery. Certainly, if this philosophy had been known in ancient times, it would doubtless have subjected the Good Samaritan to a damage suit in the event his beast had been a bit unruly or lacking in ordinary surefootedness on the Jericho road. See American Bar Association Journal, April, 1933, page 231; Ill. Law Review, March, 1932, page 829.

STATE EX REL. J. R. THORNTON, GUARDIAN OF GLADYS BARBOUR ET AL., v. L. E. BARBOUR, GUARDIAN, NEW AMSTERDAM CASUALTY COMPANY ET AL.

(Filed 26 April, 1933.)

1. **Guardian and Ward H a—Guardianship bond is liable for defalcation during any period of the relationship.**

   The office of the ordinary guardian is not for a definite term although his bond is required to be renewed every three years, C. S., 2165, but is usually for the nonage of the ward, and where successive bonds have been given with different sureties, the sureties among themselves become additional sureties, and upon default of the guardian they are liable to contribution among themselves proportionate to the amount of their respective bonds, though the default may have occurred prior to the time any particular bond may have been executed. Cases of liability upon the bonds of clerks of the Superior Court, cited and distinguished.

2. **Same—Clerk has no power to release sureties on guardianship bond.**

   There is no statutory power given a clerk of the Superior Court to release the liability of sureties on a guardianship bond, and such an order made by the clerk, especially after default of the guardian, is beyond his authority and of no effect.

CIVIL ACTION, before, *Harris, J.*, at May Term, 1932, of JOHNSTON.

On 30 October, 1925, L. E. Barbour duly qualified as guardian of Nadine Barbour Thornton, Gladys Barbour, Festus Barbour, and D. D. Barbour, Jr. The guardian received the sum of $2,000 belonging to said infant wards and duly gave bond for the sum of $4,000 with the defendant, New Amsterdam Casualty Company, as surety thereon. Immediately upon receiving said money the guardian commingled the same with his own funds by depositing the money in the bank in his individual name. Soon thereafter the guardian loaned the sum of $1,000 to his son, receiving as security a second mortgage upon certain real property. The first mortgage had been foreclosed and the security worthless. On 19 January, 1927, the guardian again qualified as guardian of such wards in the same manner as if no prior guardianship bond

had been made, and J. B. Hargis, C. P. Stewart and E. A. Benson became sureties on his guardianship bond in the penal sum of $2,000. On 14 February, 1928, the guardian applied to the clerk of the Superior Court for permission to change the sureties on his bond, stating in the petition "that the reason assigned for a change of bond is that he believed that such change will better enable him to preserve and protect the interest of said wards." Thereupon the clerk of the Superior Court made an order decreeing "that the personal bond referred to in the penal sum of $2,000 be, and the same is hereby canceled, and all other bonds heretofore executed by L. E. Barbour, guardian, as aforesaid, which have been filed in this cause, be, and the same are hereby canceled; that the guardian be, and he is hereby authorized and empowered to execute a new bond with the National Surety Company in the sum of $4,000." In compliance with the order of the clerk the guardian gave a new bond in the sum of $4,000 with the National Surety Company as surety thereon. On 21 October, 1930, a citation was served on the guardian to file an annual account. Thirty days thereafter he filed a report "showing that all assets belonging to said estate had been lost through investments, which had proved to be worthless, and that he, the said L. E. Barbour, guardian, personally was insolvent." Thereafter and prior to 24 March, 1931, Barbour was removed as guardian, and the plaintiff, Thornton, was duly qualified as guardian of said minors, and brought this suit against the guardian and all of the sureties. The cause was committed to a referee, who found the facts substantially as above stated, and who also found as a fact that on 28 January, 1929, the defendant, National Surety Company, paid to Nadine Barbour Thornton, who had attained her majority, the sum of $585.05, being the full amount due by said guardian to said ward. Barbour filed voluntary petition in bankruptcy on 6 April, 1928.

The defendant, Amsterdam Casualty Company, contended that it was not liable for the default of the guardian for the reason that the liability of said surety had been released by an order of the clerk of the Superior Court, made on 19 January, 1927. The defendant, Stewart, contended that the individual sureties were not liable for the reason that the bond given by them had been canceled by order of the clerk as aforesaid. The defendant, National Surety Company, contended that it was not liable for the reason that the guardian had dissipated and misapplied the entire fund at the time it became surety, and furthermore, that while it had paid one of the wards in full, such payment had been made through mistake, and requested that said ward be made a party to the suit in order that it might recover the amount so paid. The trial judge approved the findings of fact of the referee, and the conclusions of law, and, after denying commission to the guardian, pronounced liability

as follows: (a) "New Amsterdam Casualty Company, for the sum of $800.00, with interest on same, compounded annually from 30 October, 1925; J. B. Hargis, C. P. Stewart and E. A. Benson, jointly, the sum of $400.00, with interest as aforesaid; the National Surety Company for the sum of $800.00 with interest aforesaid, subject, however, to a credit of $585.05, paid 28 January, 1929, to Nadine Thornton."

(b) "It is further ordered and adjudged that the judgment against New Amsterdam Casualty Company and the National Surety Company be each credited with one-half of the total annual premium amounting to $80.00, with interest from the date of guardianship until the final report."

From the foregoing judgment the corporate sureties appealed.

W. H. Strickland and L. L. Levinson for plaintiff.

Parker & Lee for New Amsterdam Casualty Company.

Winfield H. Lyon and S. Brown Shepherd for National Surety Company.

BROGDEN, J. Two primary questions of law are presented by the record.

(1) What is the liability of sureties on successive guardian bonds upon default of the guardian?

(2) Does the clerk of the Superior Court have power to release sureties on guardian bonds?

The evidence produced before the referee and the trial judge is not included in the record. Consequently, it is to be assumed that the evidence fully justified the findings of fact and the conclusions of law.

More than eighty years ago this Court undertook the consideration of the first question of law involved in this appeal in the case of *Jones v. Hays*, 38 N. C., 502. The headnote of the opinion capitulates the essential principles of law contained therein and is as follows: "Where a guardian gives several successive bonds for the faithful discharge of his trust, the sureties on each bond stand in the relation of cosureties to the sureties on every other bond; the only qualification to the rule being, that the sureties are bound to contribution only according to the amount of the penalty of the bond, in which each class is bound." In the course of discussion, *Ruffin, C. J.*, declared: "The case of a guardian and of his successive bonds, is therefore precisely like that of clerks and their bonds; as to which it has been held, that the office was not annual, though the bond be given annually, but that all the bonds, given through the several years for which the office continues, are cumulative securities for the performance of the duties of the office, and particularly for the payment of money received at any time before or after the giving of a new bond."

It is now settled beyond question that each bond of a clerk, register of deeds, or other public officer, having a fixed term, is liable only for defalcations occurring during the term for which the bond is given, even though the principal and surety may be the same for all terms. *Stacy, C. J.*, in *S. v. Martin*, 188 N. C., 119, 123 S. E., 631, remarked: "Each term, like every tub of Macklinian allusion, must stand upon its own bottom." *Gilmore v. Walker*, 195 N. C., 460, 142 S. E., 579; *Jacksonville v. Bryan*, 196 N. C., 721, 147 S. E., 12; *Pender County v. King*, 197 N. C., 50, 147 S. E., 695. Consequently it becomes important to inquire: What is the term of a guardian under the law of North Carolina? An examination of the pertinent statutes discloses that the ordinary guardian has no fixed term of office. While the statute requires a renewal of the bond every three years (C. S., 2165), there is no requirement for a new appointment; nor does C. S., 2160, apply to the facts of the case.

Indeed, the precise question was answered in *Jones v. Hays, supra*, where it is written: "The office of guardian is not for a definite period of three years, or temporary at all, that is to say, within the nonage of the ward. . . . It was, therefore, in its creation, one office for the whole minority of the ward, unless it was expressly for a shorter period, or unless subsequently shortened by an order of removal. The sureties, given at first, continued through the term, and could be relieved only by the removal of the guardian, or getting counter securities from him, by way of indemnity." See, also, *Bell v. Jasper*, 37 N. C., 597; *Jones v. Blanton*, 41 N. C., 115; *Hughes v. Boone*, 81 N. C., 204. The authorities are assembled in the opinion and appended thereto in the case of *New Amsterdam Casualty Co. v. Bookhart*, 76 A. L. R., 897.

In considering the second question of law presented, this Court has consistently held that county commissioners have no authority to release the sureties on a bond of a sheriff. Beginning with *Commissioners v. Clark*, 73 N. C., 258, the right of the commissioners to release sureties on the bond of a public officer has been denied upon the theory that the commissioners exercise delegated power only, and a release without express statutory authority was invalid. A clear statement of the rule is found in *Fidelity Co. v. Fleming*, 132 N. C., 332, 43 S. E., 899, as follows: "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 plaintiff, then the act of the commissioners was invalid, no matter how clearly and explicitly they expressed their intention to release. An act which places in the power of the board of

commissioners of a county the approval of the official bonds of certain officers does not confer upon it the power to release sureties on those bonds on presentation of a new bond." *Reade, J.*, writing in *Harris v. Harrison,* 78 N. C., 202, construing *Foye v. Bell,* 18 N. C., 475, pointed out that an order in the *Foye case* expressly releasing sureties was of no avail. Disposing of the contention, he said: "Nothing can be clearer from that case than that the ward had his remedy against both sets of sureties, and it was for them to settle their liabilities among themselves."

These principles of law, discussed and applied approximately a hundred years ago, are fortified by an examination of our statute. The clerk is not empowered by any express statute to release sureties, upon bonds approved by him, certainly at a time when the principal is in default. C. S., 2166, provides a remedy for dissatisfied sureties upon guardian bonds, but release is not one of the remedies therein contemplated.

Cases in point from other jurisdictions are cited by the defendant, National Surety Company, in support of its contention that where there are several sets of sureties that such who were on the bond at the time of defalcations are the only ones liable for the loss. See *Lowry v. State,* 64 Ind., 426; *Williams v. State,* 89 Ind., 571; *State v. Hardy,* 200 Mo. App. Court, 405, 206 S. E., 904. Some of these cases involve the liability on the bond of a public guardian who is elected for a specific term of office, but whatever may be the strength or weakness of judicial reasoning in other courts, this Court, for more than one hundred years, has been committed to the doctrine delineated in the foregoing decisions. Moreover, they are built upon sound principles of conduct and liability, and their age in nowise impairs their fundamental correctness in solving the pertinent problems of modern life.

Affirmed.

L. C. ROACH, TRADING AND DOING BUSINESS UNDER THE FIRM NAME OF CITY PLUMBING AND HEATING COMPANY, v. CITY OF DURHAM, AND J. T. STILL, PLUMBING AND HEATING INSPECTOR FOR THE CITY OF DURHAM.

(Filed 26 April, 1933.)

1. Constitutional Law C b—Ch. 52, Public Laws of 1931, regulating plumbers and heaters is a valid exercise of police power.

Chapter 52, Public Laws of 1931, which provides that persons desiring to engage in the plumbing and heating business shall apply to a State board therein created for examination and license and that applicants shall pay a certain fee which shall be used to pay the expense of the

State Board, and that any surplus remaining shall be paid into the State Treasury, shows the intent of the Legislature to impose a privilege or license tax for the maintenance of the State Board, and the act is not primarily a revenue measure, and it is a valid exercise of the police power of the State for the protection of the health, comfort and safety of the public by regulating this specialized business in the interest of sanitation and proficiency.

2. Statutes B a—

Where a statute does not in express words state that it is in the exercise of the police power, but such intention plainly appears from a proper construction, it will be so declared, and the Legislative intent given effect with the least interference with the rights of individuals.

3. Taxation A c—Uniform rule applies to privilege and license taxes.

While the Constitution, Art. V, sec. 3, does not expressly apply to trades and professions, it is held that the rule of uniformity in taxation also applies to them, but the rule does not prohibit the classification of trades and professions for taxation when the classification applies uniformly to all of a class and the classification is not arbitrary or unjust.

4. Same—Classification of plumbers according to population of cities in which they operate held valid.

A statute imposing a license or privilege tax on persons engaged in the plumbing and heating business, but exempting from its operation persons engaged in the business in towns under a certain population is held not to be unconstitutional as creating an unjust, unreasonable or arbitrary classification, the classification by population not being of itself unjust, unreasonable or arbitrary, and the tax being levied equally and uniformly on all persons of the same class.

5. Constitutional Law G c—

A statute requiring the examination and licensing of persons engaged in the plumbing and heating business in towns over a certain population does not create a monopoly, all persons being entitled to apply for license and being entitled thereto if they possess the required degree of skill and knowledge.

6. Constitutional Law C b—

The provisions of chapter 52, Public Laws of 1931, that a firm or corporation may engage in the plumbing and heating business provided one or more persons connected therewith is registered and licensed is valid.

APPEAL by plaintiff from *Barnhill, J.*, at Chambers. From DURHAM. Affirmed.

This is a suit for a mandatory injunction to compel the defendants to issue the plaintiff a license to enter into or carry on the business of plumbing in the city of Durham.

At the session of 1931 the General Assembly passed an act to license persons engaging in the plumbing and heating contracting business. Public Laws, 1931, chap. 52.

Under an ordinance of the city a person engaged in the business of plumbing is required to secure a permit from the city inspector. On 27 September, 1932, the plaintiff applied for a permit and the inspector under direction of the city council refused to issue it for the reason that the plaintiff had not complied with the act of 1931, *supra,* and had not procured a license after examination by the State Board.

The plaintiff then brought this suit and Judge Barnhill found the facts and rendered the following judgment:

The city of Durham is a municipal corporation having a population in excess of 5,000; the plaintiff is a citizen and resident of the city of Durham and has been engaged in the plumbing business in said city for several years and was so engaged prior to 27 February, 1931, the date on which chapter 52 of the Public Laws of 1931, became effective. The plaintiff has never been licensed by the State Board of Examiners of Plumbing and Heating Contractors as required by chapter 52 of the Public Laws of 1931. On 27 September, 1932, he made application to the defendant, city of Durham, through its plumbing and heating inspector for a permit to install certain plumbing in a building in the city of Durham; the defendant city, acting through the said plumbing and heating inspector, declined to issue said permit for the reason that the plaintiff had not complied with chapter 52 of the Public Laws of 1931.

Upon the foregoing findings of fact the court is of the opinion that chapter 52 of the Public Laws of 1931, is constitutional, and for that reason the court is of the opinion that the plaintiff is not entitled to a mandatory injunction, and this action is dismissed and the plaintiff will pay the cost to be taxed by the clerk.

The plaintiff excepted and appealed to the Supreme Court.

Brawley & Gantt for plaintiff.
S. C. Chambers for city of Durham.
McLendon & Hedrick for State Board of Examiners.

ADAMS, J. At the session of 1931 the General Assembly enacted a series of statutes entitled "An act to create a State Board of Examiners of Plumbing and Heating Contractors, and to license persons engaging in the Plumbing and Heating Contracting Business." Public Laws, 1931, chap. 52.

The act provides that the board shall consist of five members to be selected as therein provided, shall have a common seal, shall formulate rules to govern its actions, shall keep a record of its proceedings and a register of all applicants for examination, and on or before the first

day of March of each year shall submit to the Governor a report of its activities for the preceding year and file a copy of its report with the Secretary of State.

Section 6 is as follows: "All persons, firms or corporations desiring to enter into or carry on the plumbing and/or heating contracting business, shall first apply to the board for examination and license, at least thirty days prior to engaging in said business, said application to be accompanied by certified check in the sum of fifty dollars; *Provided*, that the requirements of this section shall not apply to persons engaged in the plumbing and/or heating business, in towns or cities having a population of not more than thirty-five hundred." (Durham has a population of more than 50,000.)

Licenses may be issued, renewed, revoked, and reissued; but any person, firm, or corporation carrying on the business of plumbing or heating without a license shall be guilty of a misdemeanor. A corporation or partnership may engage in the business, provided one or more persons connected with the corporation or partnership is registered and licensed as the act requires. License fees must be paid in advance and out of this fund shall be paid the compensation and expenses of the members of the board, the salaries of its employees, and other expenses; but upon payment of the necessary expenses of the board and the retention by it of twenty-five per centum of the remainder collected, the residue, if any, shall be paid to the State Treasurer. The fee of those doing business in towns of less than five thousand inhabitants is twenty-five instead of fifty dollars.

The plaintiff contests the validity of this act on the ground that it was enacted in violation of the organic law both of the State and of the United States, and rests his argument on these two propositions: (1) The act is not within the police power of the State; (2) it creates an unreasonable, unjust, and arbitrary classification of persons engaging in the designated business.

The first proposition raises the question whether the tax imposed by the act is a privilege tax, or a revenue measure. If it is designed primarily to raise revenue it is not within the scope of the police power. *S. v. Bean*, 91 N. C., 554. In the determination of this question we should give the statute such a construction as will carry out the purpose and intention of the Legislature with the least interference with the rights of the plaintiff. Black on Interpretation of Laws, 482; *Manly v. Abernathy*, 167 N. C., 220.

Construing chapter 52 in its entirety we are unable to discover a legislative intent to raise revenue by the levy of a tax. By reference to section 13 it will be seen that all license fees shall be held as a fund for the use of the State Board of Examiners. This fund is reserved for

the payment of all expenses incurred by the board under the terms of the act, and only the residue, if any, is to be paid into the treasury of the State. It is obvious, in our opinion, that the pervading intent is to provide for the maintenance of the board and not to impose a tax as a part of the general revenue of the State and thereby exclude the operation of the police power. This power is broad and comprehensive, and upon its proper exercise depend the life, safety, health, morals, and comfort of the citizen. It is justified by the maxim, *salus populi suprema lex,* and the fundamental law is the only limit to its exercise. *S. v. Moore,* 113 N. C., 698; *S. v. Vanhook,* 182 N. C., 831. It is true that the act does not in express words authorize the exercise of this power, but in our opinion it appears by implication that the exercise of such power was intended.

The manifest purpose of the law is to promote the health, comfort, and safety of the people by regulating plumbing and heating in public and private buildings. The business of putting into buildings tanks, pipes, traps, fittings and fixtures for conveying water, gas, and sewage requires proficiency and skill, the want of which is the source of epidemics, as the lack of proper heating is the source of danger, discomfort and disease. To require proficiency and skill in the business mentioned is, as this Court has said, an exercise of the police power "for the protection of the public against incompetents and impostors." *S. v. Call,* 121 N. C., 643. It is upon this principle that the Legislature has required a license of physicians, surgeons, osteopaths, chiropractors, chiropodists, dentists, opticians, barbers, and others, and the right to exercise the power is generally conceded to be unquestionable. Public Laws, 1931, chap. 427, sec. 109; Public Laws, 1929, chap. 345, sec. 140 *et seq.; S. v. Call, supra; S. v. Lockey,* 198 N. C., 551.

The second proposition involves the question whether the act makes an arbitrary and unjust classification for the purpose of taxation.

All taxes on property in this State for the purpose of raising revenue are imposed under the rule of uniformity. In express terms the Constitution requires that laws shall be passed taxing real and personal property, except such as is exempt, by a uniform rule. Art. V, sec. 3. The same section provides that the General Assembly may tax trades and professions; and while this clause does not expressly apply the rule of uniformity to taxes imposed on trades and professions it has been judicially determined that the rule applies to these taxes as well as to taxes on property. *Gatlin v. Tarboro,* 78 N. C., 119; *Worth v. R. R.,* 89 N. C., 291; *S. v. Williams,* 158 N. C., 611; *Tea Co. v. Doughton,* 196 N. C., 145; *Tea Co. v. Maxwell,* 199 N. C., 433.

If the classification of the subjects of taxation, provided for in the act under consideration, is not arbitrary and unjust it cannot be re-

garded in law as a breach of the rule of uniformity. The plaintiff bases his argument in support of unreasonable discrimination chiefly on the provision that the act does not apply to persons engaged in the business of plumbing or heating in towns or cities having a population of not more than thirty-five hundred. This, he says, is class legislation.

Uniformity of taxation is accomplished when the tax is levied equally and uniformly on all subjects in the same class. The right to classify imports a difference in the subjects of taxation. "It is within the legislative power to define the different classes and to fix the license tax required of each class. All the licensee can demand is that he shall not be taxed at a rate different from others in the same occupation as classified by the legislative enactment." *S. v. Stevenson,* 109 N. C., 730. Classification by population is not in itself arbitrary, unreasonable, or unjust. It was approved in *S. v. Lockey, supra,* in which an act to regulate the practice of barbering was made applicable only to barber shops maintained in cities and towns having a population of "two thousand or more." Public Laws, 1929, chap. 119, sec. 23. Similar classifications were approved in *Douglas v. People* (Ill.), 8 L. R. A. (N. S.), 1116, and in *Beltz v. Pittsburgh* (Pa.), 61 Atl., 78.

The act does not create a monopoly. As was said in *S. v. Call, supra,* "The door stands open to all who possess the requisite age and good character and can pass the examination which is exacted of all applicants alike." Upon the principle stated in the same case persons engaged in the business at the time the act went into effect were entitled to a license or to a renewal thereof upon payment of the annual fee. Referring to the subject the Court said: "It was fair to assume that those already in the practice (of medicine), many of whom have grown gray in the service of humanity and the alleviation of suffering, had already received that public approbation which was a sufficient guaranty of their competency."

The provision that a corporation or partnership may engage in the business of plumbing and heating provided one or more persons connected with such corporation or partnership is registered and licensed is justified on the principle that a corporation or partnership may, for example, carry on the business of a druggist provided one or more persons connected with the business is a licensed pharmacist. C. S., 6658.

We are of opinion that the act in question is not in conflict with the State or Federal Constitution. Judgment

Affirmed.

SALLIE MITCHELL v. HOME SECURITY LIFE INSURANCE COMPANY.

(Filed 26 April, 1933.)

Insurance N a—

A "facility of payment" clause in a policy of life insurance which provides for discharge of the insurer by payment to the executor or administrator of the insured, any relative by blood or marriage, or to any other person appearing to the company to be equitably entitled thereto by reason of having incurred expense on account of illness or death of the insured, is valid.

CIVIL ACTION, before *Moore, Special Judge,* at January Term, 1933, of WAKE.

On 31 August, 1925, the defendant issued a policy of life insurance upon the life of Henry Jones for $250.00. On 23 April, 1928, an endorsement was stamped on the policy changing the beneficiary to Sallie Mitchell. On 31 August, 1929, the insured, Henry Jones, made application to the defendant to name Hattie Grimes as beneficiary in said policy. In the application for change the insured certified "that the above described policy is destroyed or lost and hereby applies for duplicate." The defendant accepted notice of change but never made an endorsement on the policy for the reason that the policy was never delivered for such purpose. Henry Jones died about September, 1929. The evidence tended to show that the insured owed Sallie Mitchell certain money, and that she had paid the premiums on the policy and had possession of same. The evidence further tended to show that the insured boarded with Hattie Grimes, for several months prior to his death, and that she took care of him during his last illness. At his death he owed her $136.11, and Hampton Bonner and Sons, undertakers, buried the insured, and their bill was $122.50. The defendant paid the proceeds of the policy to Hattie Grimes and Hampton Bonner and Sons in full settlement of all liability under the policy. Such payment was made by virtue of the "Facility of Payment" clause in the policy, the pertinent portion of which is as follows: "The company may make payment to the executor or administrator of said insured, or to any relative by blood or connection by marriage, or to any other person appearing to the company to be equitably entitled to the same by reason of having incurred expense on account of illness or death of the insured, and the receipt of any such person shall be conclusive evidence that payment has been made to the person or persons entitled thereto, and that the claims under this policy have been fully satisfied."

The trial judge instructed the jury to answer the issue in favor of defendant. From judgment upon the verdict the plaintiff appealed.

A. W. Crawley for plaintiff.
Thomas W. Ruffin for defendant.

PER CURIAM. A clause in an insurance policy of similar wording and import, to that in the case at bar, was held to be valid in *Walser v. Ins. Co.*, 175 N. C., 350, 95 S. E., 542. The decision in that case is determinative. See, also, *Wooten v. Order of Odd Fellows*, 176 N. C., 52, 96 S. E., 654.

Affirmed.

JOHN W. KELLEY v. LIFE AND CASUALTY INSURANCE COMPANY OF TENNESSEE.

(Filed 26 April, 1933.)

Insurance R a—Evidence failed to show that insured was injured by collision while riding in truck, and nonsuit was proper.

A policy providing for liability if the insured is injured "by collision or accident to . . . any motor driven truck" in which insured was riding, and requiring that there should be some external or visible injury to the vehicle, will not warrant a recovery where plaintiff's evidence tends only to show that his hand was crushed between the side of a truck and a frigidaire loaded therein when the frigidaire slid across the truck body when the truck was driven rapidly around a curve.

APPEAL by plaintiff from *Stack, J.*, at January Term, 1933, of GUILFORD. Affirmed.

The plaintiff brought suit on a life and casualty policy of insurance to recover damages for the loss of a hand.

By permission of the driver of a large six-wheel truck the plaintiff got into the body of the truck to ride from North Street in Greensboro to White Oak. There was no convenient place for sitting and he stood about midway near a frigidaire and some other articles that had been put in the truck for transportation. Turning from Lindsay Street into Chestnut Street the driver, in the words of the plaintiff, "Turned awful short at a fast rate of speed, and it caused the body of the truck to give and shove the frigidaire and caught my hand between the truck body and the frigidaire. The truck started at such speed and force and caused the frigidaire to move and caught my hand between the frigidaire and the truck body. It skidded over against my hand. The best I know it cut the first three fingers out, and as a result the doctor had to take my hand off. The frigidaire weighed 500 pounds. . . . I was over against the wall when it struck my hand. It slung me over against the wall. I did not stop the truck. After my hand was hurt I hollered. There was a noise and I could not make the driver hear. Two walls,

the truck body wall and the cab wall, were between the driver and me. I jumped out of the truck and went to the Wesley-Long Hospital. I don't know whether or not the truck struck anything at the time it turned the corner. I could not see; I was in the back. I did not see the truck any more after the injury."

At the close of plaintiff's testimony, he being the only witness, the court dismissed the action as in case of nonsuit, and the plaintiff appealed.

William E. Comer for plaintiff.
A. C. Davis for defendant.

PER CURIAM. The policy insures the plaintiff against the result of bodily injuries received while it is in force and effected solely by external, violent, and accidental means "by collision of or any accident to . . . any motor driven truck inside of which the insured was riding or driving; . . . provided, that in all cases referred to in this paragraph there shall be some external or visible injury on the said vehicle or elevator of the collision or accident."

The trial court was correct in holding that the evidence offered by the plaintiff does not bring his case within the terms of the policy. There was neither such collision or accident nor such external or visible injury to the truck as comes within the contemplation of the parties to the contract. The judgment is

Affirmed.

W. I. PAUL, JAMES W. PAUL, E. R. H. PAUL, JAMES T. TARLTON, G. B. TARLTON, FRANCIS TARLTON, W. B. TARLTON, O. ANNA MEACHUM AND HER HUSBAND, C. B. MEACHUM; J. R. TEAL, N. J. BAILEY AND HER HUSBAND, H. BAILEY; ARLIE MELTON AND HER HUSBAND, GEORGE MELTON; FLORENCE JONES AND HER HUSBAND, C. T. JONES; CORRINA KNOTTS AND HER HUSBAND, TOM KNOTTS; EARLE TEAL, CHARLES TEAL, DAISY STEWART, NELLIE KING, DORA McLEAN AND HER HUSBAND, ERNEST McLEAN; MARY BROOKS, DAISY HENRY AND HER HUSBAND, ... HENRY; JAMES T. TEAL, W. A. TEAL, MARTHA ELIZA TEAL, FRED TEAL, BESSIE McDUFFIE AND HER HUSBAND, T. L. McDUFFIE; ED TEAL, ANDREW TEAL, NANNIE HANNAH AND HER HUSBAND, BOSS HANNAH, v. HELEN WILLOUGHBY AND HER HUSBAND, STEVE WILLOUGHBY.

(Filed 3 May, 1933.)

1. Wills E b—Illegitimate child is entitled to inherit property devised to its mother in fee defeasible upon mother dying without heirs.

A devise to the testator's daughter "for her sole and separate use and benefit during the period of her natural life, and at her death to descend to the legal heirs of her body, if any, and if she should leave no legal

heirs of her body surviving her" then to the other children of the testator, is held to convey the defeasible fee to the testator's daughter, and where the daughter leaves her surviving an illegitimate child such child is her legal heir, N. C. Code, 1654, and is entitled to the property as against the other children of the testator claiming under the will, although the child was born prior to the execution of the will.

2. Wills E a—

Although the intent of the testator as gathered from the whole instrument is controlling in the interpretation of a will, where there is no ambiguity in the language of the will it must be given effect.

APPEAL by plaintiffs from *Oglesby, J.*, at September Term, 1932, of ANSON. Affirmed.

This was a civil action heard by his Honor, John M. Oglesby, judge presiding at a regular term of Anson County Superior Court, for the trial of civil causes begun and held on 12 September, 1932. The parties agreed that the case might be heard upon the record and the admissions of the parties, to wit: That the facts are set out in the pleadings and the further admission that Helen Willoughby, the *feme* defendant, was born prior to 28 September, 1882, said date being the date of the execution of the last will and testament of Isham Teal, which is attached to the complaint, and it was further admitted that the said Helen Willoughby was the illegitimate daughter of Eliza Jane Teal, daughter of Isham Teal, mentioned in the fourth paragraph of said will.

The court below rendered the following judgment: "This cause coming on to be heard before his Honor, John M. Oglesby, judge presiding, and the plaintiffs and defendants having agreed that the case might be heard upon the record, and the facts being admitted in the pleadings, and the cause having been heard, and the court being of the opinion that the plaintiffs are not entitled to recover; it is therefore upon motion of F. E. Thomas and John A. McRae, attorneys for the defendants, ordered and adjudged and it is hereby ordered and adjudged that the plaintiffs are not entitled to the lands and personal property described in the pleadings or any interest therein and that the defendant Helen Willoughby is the owner of the said lands described in the pleadings in fee simple and is also the owner of the personal property described in the pleadings and is entitled to the possession of said land and the personal property." From the judgment as signed, plaintiffs excepted, assigned error and appealed to the Supreme Court.

Robinson, Pruette & Caudle and McLendon & Covington for plaintiffs.
F. E. Thomas, John A. McRae and Howard Arbuckle for defendants.

CLARKSON, J. The only question raised in this appeal is whether the illegitimacy of the defendant, Helen Willoughby, the only child and heir

at law of Eliza Jane Teal, prevents her from taking the property in controversy. We think not.

The part of Isham Teal's will for us to construe, is as follows:

"It is further my will and desire, that at my death my wife, Sarah Teal and my daughter, Eliza Jane Teal, shall hold in common, all my real estate and all my personal property not necessary to the discharge of the debts and charges against my estate, during the natural life of my said wife, Sarah Teal, should she survive me.

It is further my will and desire that at the death of my wife, Sarah Teal, if she shall survive me and otherwise at my death, all my property including the tract of land on which I live, containing 225 acres, more or less, with all the improvements thereon and the appurtenances thereunto belonging, and all the residue of my personal property *shall descend to my daughter, Eliza Jane Teal, for her sole and separate use and benefit during the period of her natural life, and at her death to descend to the legal heirs of her body, if any, and if she should leave no legal heirs of her body surviving her,* then and in that case it is my will and desire that said property shall descend to my daughter, Sarah Paul, wife of George Paul, my daughter Lavinia Tarlton, wife of Davis L. Tarlton, my son Rowland Teal, and my son Isham Teal, to them and the legal heirs of their bodies, to each an equal portion.

I have already given to my son, Isham Teal, and to my daughter Lavinia Tarlton, wife of Davis L. Tarlton, and Sarah Paul, wife of George Paul and Rowland H. Teal, their respective portions which I wish them to have out of my estate—unless they shall inherit that portion hereby given to my daughter, Eliza Jane Teal, according to the foregoing provisions of this will."

We think in construing the will, it is a determinable or defeasible fee. In 2 Page on Wills (2d ed.), sec. 690, we find: "Like other estates a fee may be given defeasible upon conditions subsequent. Such an estate is a fee with all the incidents thereof, subject to be divested upon the happening of the condition subsequent. Such a condition does not cut a fee down to a life estate, even if the gift over is to the descendants of the first taker. Such an estate is often spoken of as a base, determinable, qualified or defeasible fee."

"Defeasible fee" or "determinable fee," is one which may continue forever, but is liable to be determined by some act or occurrence limiting its duration or extent. *West v. Murphy,* 197 N. C., 488, 149 S. E., 731, 732. A "determinable fee" is an interest which may continue forever, but the estate is liable to be determined without the aid of a conveyance, by some act or event, circumscribing its continuance or extent; it necessarily indicates that there must be some place where the fee simple will

become vested and the element of uncertainty will be terminated. *Burche v. Neal,* 149 S. E., 611, 612, 107 W. Va., 559.

The plaintiffs contend that "the only heirs at law and next of kin of the ulterior devisees named in the last will and testament of Isham Teal are the owners of the property devised therein upon a proper construction of his last will and testament." We cannot so hold.

It is conceded that Helen Willoughby, the *feme* defendant, was the illegitimate daughter of Eliza Jane Teal, daughter of Isham Teal, the devisor, and was born prior to 28 September, 1882, when Isham Teal made and published his last will and testament—the subject of this controversy.

The pertinent inquiry for us is this language in Isham Teal's will: "For her sole and separate use and benefit during the period of her natural life, and at her death to descend to the legal heirs of her body, if any, and if she should leave no legal heirs of her body surviving her." etc.

What is the meaning of "legal heirs of her body?" The term "heirs" and "heirs of the body" used in a will or deed, without other language changing or modifying their meaning, are to be given their technical sense to designate the persons who are related by blood to a decedent and who would take his real estate if he died intestate. *Lobe v. Goldheim,* 138 Atl., 5, 153 Md., 248.

In 2 Schouler on Wills, Executors and Administrators (6th ed.), sec. 990, at p. 1147, it is said: "Where the expression 'legal heirs' or 'lawful heirs' is used the meaning is the same as when the word 'heirs' is used alone, and where the expression is used 'heirs and legal representatives' they both mean the same thing. 'Right heirs at law' means only heirs by blood," citing *Stisser v. Stisser,* 235 Ill., 207, 85 N. E., 240; *Harrell v. Hagan,* 147 N. C., 111, 60 S. E., 909 (lawful does not mean "legitimate").

N. C. Code (Michie), chap. 29, sec. 1654, Rule 9: "Illegitimate children inherit from mother. Every legitimate child of the mother and the descendants of any such child deceased shall be considered an heir; *Provided, however,* that where the mother leaves legitimate and illegitimate children such illegitimate child or children shall not be capable of inheriting of such mother any land or interest therein which was conveyed or devised to such mother by the father of the legitimate child or children; but such illegitimate child or descendant shall not be allowed to claim, as representing such mother, any part of the estate of her kindred, either lineal or collateral." This rule provides only for descendants from a mother who leaves surviving an illegitimate child or descendants of such child. Such a child is an heir of the mother, without regard to whether she leaves or does not leave a legitimate child. *Wilson v. Wilson,* 189 N. C., 85, 126 S. E., 181.

In *Battle v. Shore,* 197 N. C., 449, 450, it is said: "Upon the death of Harriet Battle, her sons, James Battle and Joe Battle, although illegitimate, by virtue of the statute, became her heirs. C. S., 1654, Rule 9. *Wilson v. Wilson,* 189 N. C., 85, 126 S. E., 181. Under the will of Horace Battle, they therefore became the owners as tenants in common of an undivided one-half interest in said land."

It is well settled, as said in *Ellington v. Trust Co.,* 196 N. C., at p. 755: "The guiding star in the interpretation of wills, to which all rules must bend, unless contrary to some rule of law or public policy, is the intent of the testator, and this is to be ascertained from the four corners of the will, considering for the purpose the will and any codicil or codicils as constituting but one instrument. 28 R. C. L., 211, *et seq.*"

There is no ambiguity in the language of the present will. The language is clear "legal heirs of her body." We must take the language as written. Testator could have used other language in making his will, but this he did not do. If seeming hardship and injustice is done, to plaintiffs, this is testator's fault in the preparation of his will. We cannot make a will, we must construe it as written by the testator. The judgment of the court below is

Affirmed.

FIRST NATIONAL BANK OF DURHAM, TRUSTEE (JEFFERSON E. OWENS, SUBSTITUTED TRUSTEE), v. ALEX. THOMAS AND WIFE, ROMA THOMAS, AND I. W. WOOLLEY AND WIFE, ELLIE WOOLLEY.

(Filed 3 May, 1933.)

Parties A a—Trustee may not bring action for reformation of deed of trust without joinder of holders of notes secured thereby.

An action for the reformation of a deed of trust for mutual mistake of the parties in the stipulation of the amount of the indebtedness may not be maintained by the trustee without the joinder of the holders of the mortgage notes, the notes being made payable to bearer and being negotiable, C. S., 2976, 2982, and in an action brought by the trustee alone the defendant's demurrer *ore tenus* on the ground that plaintiff was not the real party in interest, C. S., 446, 511, should have been sustained, and the provisions of C. S., 449, do not alter this result, the statute not being applicable to the facts of the case.

APPEAL by defendants I. W. Woolley and wife, Ellie Woolley, from *Cowper, Special Judge,* at Special September Term, 1932, of MECKLENBURG. ERROR.

We think that for the determination of the present appeal the prayer of plaintiff sufficiently sets forth the facts: "The plaintiff prays the court that it receive affirmative relief to the effect that the said deed of trust to

it as trustee and recorded in said registry in Book 738, page 74, be reformed and corrected so that the sum of $3,000 be inserted therein in place of the figure $2,000, that the figure of $34.50 be substituted thereon for the figure of $24.00 showing the monthly payments to be made upon such loan and indebtedness and that the figure of $45.00 be substituted therein for the figure $30.00 showing the amount of each of the eight short term notes described in said deed of trust, and for such further relief as to the court may seem just, fair and equitable, and that the costs of this action be paid by the defendants as assessed by the clerk."

The pertinent parts of the deed in trust are as follows: "That whereas, the parties of the first part are the owners of the land and premises hereinafter described and have decided and determined to create the indebtedness hereinafter referred to and have executed a certain promissory negotiable long term first mortgage note in the principal sum of $2,000, payable 12½ years after date and bearing interest at the rate of six per cent per annum, said interest beginning two years after date and payable semiannually and continuing until the said long term first mortgage note is fully paid; and eight short term mortgage notes in the amount of $30.00 each, and payable respectively three, six, nine, twelve, fifteen, eighteen, twenty-one and twenty-four months after date, bearing no interest until after maturity; *said long term first mortgage note and the said short term first mortgage notes all being payable to bearer* at the First National Bank in the city of Durham, North Carolina, and being secured without priority or distinction except as hereinafter expressly provided by this deed of trust upon the land and premises hereinafter described:

And whereas, the said parties of the first part are desirous of securing and have determined to secure the prompt payment of the principal and interest of said notes by executing and delivering to the trustee, hereinbefore named, this deed of trust conveying to said trustee all of the property hereinafter described, . . . but in trust nevertheless for the following uses and purposes, to wit: (1) To secure the full, true, complete and final payment of the long term first mortgage note hereinbefore described aggregating the principal sum of two thousand and no/100 dollars ($2,000) and the semiannual interest thereon, and also the eight short term first mortgage notes," etc.

The defendants, I. W. Woolley and wife, Ellie Woolley, appellants, demurred *ore tenus* to the complaint on the ground of defect of parties plaintiffs.

Scarborough & Boyd and Fred H. Hasty for plaintiff.

William Milton Hood for defendants I. W. Woolley and wife, Ellie Woolley.

CLARKSON, J. The question of law involved: Did the court below err in overruling defendants' I. W. Woolley and wife, Ellie Woolley's demurrer *ore tenus* to the plaintiffs' complaint? We think so.

C. S., 446, in part, is as follows: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided," etc.

C. S., 511: "The defendant may demur to the complaint when it appears upon the face thereof, either that: . . . (2) The plaintiff has not legal capacity to sue. . . . (4) There is a defect of parties plaintiff or defendant."

In *Fishell v. Evans,* 193 N. C., 660, 662, we find: " 'Where a bill or note is made payable to several persons, or is endorsed or assigned to several, they are joint holders and must sue jointly as such.' 8 C. J., 846. In *Sneed v. Mitchell,* 2 N. C., 292, it is said: 'The reason why a contract made with several persons jointly must be sued by all is because if they were to sue severally they could recover only their several proportions; no one could recover all to the exclusion of the others; and if each could recover only his proportion, then the defendant upon one contract would be subject to as many suits as there were persons with whom he made it. If one might sue alone, by the same reason, each of them might sue alone. All this mischief is avoided by one joint action brought by all.' " *Plotkin v. Bank,* 188 N. C., 711; 10 R. C. L., at p. 298, part sec. 42, is as follows: "One of the most common classes of cases in which relief is sought in equity, on account of mistake, is that of written agreements, either executed or executory. In all such cases, if the mistake is mutual and is clearly made out by proofs entirely satisfactory, relief may be obtained therefrom in equity by reformation, or rescission."

This is an equitable action brought by a substituted trustee, alleging that there was a mutual mistake and the deed of trust was written $2,000 and should have been $3,000, and made to secure a $3,000 note and certain other notes, and prays for reformation and correction. Suppose that the substituted trustee loses, if the note was made for $3,000, would this bind the holder of the $3,000 note, who is not a party to this action, or the other holders of the smaller notes? We think not. The notes are to bearer, and, therefore, negotiable. C. S., 2976, C. S., 2982. The holders are necessary parties.

In *Guy v. Harmon, ante,* at p. 227, it is written: "The minor owners of the land were not made parties to the suit unless newspaper publication be sufficient for such purpose. Foreclosure is an equitable proceeding and the law as interpreted and applied in this State, has uniformly commanded a day in court for parties in interest, *Gammon v. Johnson,* 126 N. C., 64, 35 S. E., 185; *Jones v. Williams,* 155 N. C., 179, 71 S. E., 222; *Madison County v. Coxe, ante,* 58. Indeed, this Court in

Hines v. Williams, 198 N. C., 420, 152 S. E., 39, in approving a judgment divesting the interest of minors in a tax foreclosure, declared: 'It appears that the infant defendants and all persons having a vested or contingent interest in the land have had their day in court!' "

It has long been the usual practice and settled law that actions must be prosecuted and defended by the real parties in interest. Notice is due process and fundamental in principle.

But plaintiff relies on C. S., 449, which reads as follows: "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, includes a person with whom, or in whose name, a contract is made for the benefit of another."

The cases relied on by the plaintiff are not applicable to the facts in the present action. In *Mebane v. Mebane,* 66 N. C., 334: "The plaintiff declared upon a promissory note given by the defendants and made payable to 'Susan Mebane, guardian of E. S. Mebane.' The said note was delivered to the said E. S. Mebane and her husband, upon their marriage, in settlement of the guardian account and without endorsement. Suit was brought in the name of the guardian, to the use of the owners of said note—the husband and wife. . . . (p. 335.) Certainly a guardian who takes a note payable to himself and describing himself as guardian, is trustee of an express trust within the very words of this section." *Biggs v. Williams,* 66 N. C., 427; *Jones v. McKinnon,* 87 N. C., 294. The matter is discussed fully in *Martin v. Mask,* 158 N. C., 436. *Sheppard v. Jackson,* 198 N. C., 627.

In *Barbee v. Penny,* 172 N. C., 653, the matter is thoroughly discussed (and C. S., 449, *supra,* is construed). At pp. 657-8, we find: " 'Trustees and *cestuis que trustent* are the owners of the whole interest in the trust estate; and, therefore, in suits in equity in relation to the estate by or against strangers both the trustee and *cestuis que trustent* must be parties representing that interest.' Perry on Trusts (5 ed.), sec. 873. In a case substantially like this in principle, it being a suit by a trustee to remove a cloud from the title, the Court said: 'It is presented as fundamental error that Mrs. Rice and her children were necessary parties to the suit by the trustee. It is a general and well established rule that in suits by or against a trustee for the recovery or defense of property the beneficiaries are necessary parties. There are exceptions to this rule, as where the number of the beneficiaries would render it inconvenient to make them parties and where it may be presumed that it was the intention to invest the trustee with power to prosecute or defend suits in his own name. This case does not come within the exceptions. The deed does not

clothe the trustee with authority to prosecute or defend suits for the property and the circumstances do not raise a presumption that it was intended to give him such power. This was a proceeding in equity to cancel certain transfers and enforce a trust, and a chancery court will not entertain a bill unless all the parties in interest are before it. This is a wise and salutary rule, for, without it, the trustee might by collusion, through the medium of a court, deprive the beneficiaries of the trust of valuable rights, when, if notified of the suit, they might protect themselves.' *Monday v. Vance,* 32 S. W., 559, citing authorities. 'The general rule in cases of this sort is that in suits, respecting the trust property, brought either by or against the trustees, the *cestuis que trustent,* or beneficiaries as well as the trustees also, are necessary parties. And when the suit is by or against the *cestuis que trustent,* or beneficiaries, the trustees are also necessary parties; and trustees have the legal interest, and, therefore, they are necessary parties; the *cestuis que trustent,* or beneficiaries, have the equitable and ultimate interest, to be affected by the decree, and, therefore, they are necessary parties,' " citing a wealth of authorities.

For the reasons given, the demurrer *ore tenus* made by appellants should have been sustained. It is not necessary for us to consider the other questions involved. In the judgment of the court below there is

Error.

FRANK G. FURST AND FRED G. THOMAS, COPARTNERS, TRADING AS FURST AND THOMAS, v. J. F. TAYLOR, CLEVELAND CAGLE, GEORGE D. CARTER AND D. S. BLUE.

(Filed 3 May, 1933.)

Sales H f—In action for purchase price the burden of establishing breach of warranty and payment is on purchaser.

In an action to recover the purchase price for goods sold and delivered the burden is on defendants to prove their defenses of breach of warranty and payment, and plaintiff is entitled to a new trial for the trial court's failure to so instruct the jury, although no request for such instructions was submitted, since the matter affects a substantial right of plaintiff.

APPEAL by plaintiffs from *Oglesby, J.,* at December Term, 1932, of MOORE. New trial.

This is an action by Furst and Thomas, distributors of the McNess' sanitary line of products, which is composed of proprietary medicines,

flavoring extracts, spices, coffee, some food products, stock remedies, dip disinfectants and brushes, a "fly killer" preparation, against J. F. Taylor, dealer; and D. S. Blue, George D. Carter and Cleveland Cagle, guarantors; and is based upon a breach of a contract wherein the plaintiffs agree to sell the dealer on credit at wholesale prices, and the guarantors guarantee payment of goods thus purchased by the dealer.

Plaintiffs' prayer for judgment: "That the plaintiffs recover from the defendants, J. F. Taylor, Cleveland Cagle, George D. Carter and D. S. Blue, the sum of $891.59, with interest thereon from 13 August, 1929, until paid."

The answer and further answer of defendants, are not as definite as they should be, but, under our liberal practice and the theory on which the action in the court below was tried, the plea of defendants seems to be payment and breach of warranty.

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

"1. Is the defendant, J. F. Taylor, indebted to the plaintiffs, and if so, in what amount? 2. Are the defendants, D. S. Blue, George D. Carter and Cleveland Cagle, indebted to plaintiffs, and if so, in what amount? And the jury, for their verdict, answered the first issue $178.59, with interest; and the second issue $178.59, with interest."

Judgment was duly rendered for plaintiffs on the verdict. Numerous exceptions and assignments of error were made by plaintiffs, and appeal taken to the Supreme Court. The necessary ones and facts will be set forth in the opinion.

C. H. Dearman, Statesville, N. C., and Samuel R. Hoyle, Carthage, N. C., for plaintiffs.

H. F. Seawell, Jr., for defendants.

CLARKSON, J. We think it only necessary to consider one exception and assignment of error.

The defendant, J. F. Taylor, on 2/9/ 1929, wrote plaintiffs: "Dear Sir: I have checked over my account with your statement showing that I owe you a balance of $884.66 on 1 January, 1929. I approve this as being correct."

On 29 August, 1929, he also wrote plaintiffs: "Just received your letter in regard to what I owe you. Will say I have not the money to pay it now, but if you will be so kind as to give me time, I think I can collect enough to pay up all right. I have got out on my books over $2,000. I will get out as soon as the tobacco market opens. The tobacco market will open 24 September. It is impossible to collect now as money is so scarce. I think I can pay you up by the first of the year with my

collections. Hope you will be so good as to wait and not push my sureties for it. Write and let me know about it. Yours for a fair deal."

In J. F. Taylor's testimony, on cross-examination, he said: "Sure, I promised to pay it. That was my intention."

The plaintiffs except and assign error "to the charge of the court to the jury for that his Honor failed to charge the jury that the burden of establishing the breach of warranty was upon the defendants; and his Honor further erred in failing to charge the jury that the defendants having admitted owing to the plaintiffs the sum sued for and promising to pay the same, the burden was upon the defendants to show payment."

In *Ashford v. Shrader,* 167 N. C., 45, 46, the court below charged the jury: "The burden is upon the plaintiffs on this issue to satisfy you by the greater weight of the evidence that there was any warranty in the sale of the goods. If they have so satisfied you, you will answer the issue 'Yes,' if they have not, you will answer 'No.'" At p. 50, this Court said: "We are, therefore, of the opinion that his Honor's charge was correct; that there was an implied warranty in the sale of the oranges that they should be at least salable, and the question as to the waiver of the warranty was submitted to the jury under instructions which were fair to both parties."

In 55 C. J., p. 837-8, part sec. 833, we find: "The burden of proof is on the party relying on a breach of warranty to show the warranty, and the breach thereof. The burden of proof is also on such party to show the damages resulting from the breach," etc.

It is well settled that the plea of payment is an affirmative one and the burden of showing payment is on the one who relies on same. The burden of proof is a substantial right. *Collins v. Vandiford,* 196 N. C., 237.

In *Construction Co. v. Wright,* 189 N. C., 456, 460, it is said: "Whenever the trial court attempts to state the rule of law applicable to the case, he should state it fully and not omit any essential part of it. The omission of any material part is, necessarily, error of an affirmative or positive kind. Therefore, it may be taken advantage of on appeal, by an exception to the charge, without a special request for the omitted instruction." *McCall v. Lumber Co.,* 196 N. C., 597, 602.

The learned judge in the court below overlooked this matter, as there was no prayer for instruction, but as it is a substantial right we cannot ignore it when exception and assignment of error has been properly made, as in this case. The other questions presented on the record we need not now consider. For the reasons given, there must be a

New trial.

STATE v. DAVID McNAIR.

(Filed 3 May, 1933.)

Criminal Law I h—Court held to have properly met objection to argument of solicitor in this case.

In this prosecution for murder committed in an attempt to rob, the solicitor in his argument to the jury referred to another case where a merchant in the same neighborhood was held up, robbed and murdered, and the perpetrators convicted. The trial court, upon objection by defendant, instructed the jury that counsel had a right to argue the law, but that the jury should take the law from the court and that they should not consider the facts in the case referred to by the solicitor. *Held*, the instruction was sufficient to meet defendant's objection, and his exception to the solicitor's argument is overruled.

APPEAL by defendant from *Stack, J.*, at January Term, 1933, of GUILFORD.

Criminal prosecution tried upon indictment charging the defendant, and another, with the murder of Mrs. J. W. McCown.

Verdict: Guilty of murder in the first degree.

Judgment: Death by electrocution.

Defendant appeals, assigning errors.

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

A. Stacy Gifford and Caffey & Stanley for defendant.

STACY, C. J. The record discloses that on 11 November, 1932, about seven o'clock in the evening, the defendant, a colored man, and two other Negroes, referred to as Slim and Sam, went to the McCown filling station on the High Point road, Guilford County, to stage a "stick-up" in order to get funds with which to "pitch a party" in Durham, according to the vernacular of the defendant and his confederates. In the melee that ensued, Mrs. J. W. McCown, wife of the proprietor, was killed by a shot from the prisoner's pistol, and the defendant was also shot, though not mortally wounded. Slim and Sam made their escape and have not been apprehended. The prisoner stands convicted of murder in the first degree.

The defendant admitted his presence in the filling station when the shooting took place, but contended that he was not a party to the conspiracy. He further testified that Slim shot the deceased, and that his only purpose in going in with his comrades was to get something to eat. He said the command to "stick 'em up," given either by Slim or Sam, was a surprise to him, and that immediately following, Slim and Sam

on the one side, and the proprietor and his wife on the other, opened fire upon each other, which resulted in his injury and Mrs. McCown's death.

The record contains a number of exceptions, but the only one, not thoroughly covered by prior adjudication, relates to the reference made by the solicitor in his closing argument to the *Andrews case* (*S. v. Donnell,* 202 N. C., 782, 164 S. E., 352), where a merchant in the same neighborhood was held up, robbed and murdered, and the perpetrators of the crime duly convicted and electrocuted. Counsel for the prisoner objected to the remarks of the solicitor; whereupon the court instructed the jury as follows:

"Gentlemen of the jury, lawyers have a right to argue the law as well as the facts before you. They have a right to discuss other cases, but the law in this case you will take from the court and apply to the facts in this case. Now, as to what were the facts in the *Andrews case* you will not consider. You will decide this case here according to the evidence in this case, and according to the law given you by the court."

This instruction differentiates the case from *S. v. Phifer,* 197 N. C., 729, 150 S. E., 353, cited and relied upon by defendant, and was sufficient, we think, to meet the prisoner's objection. *S. v. Tucker,* 190 N. C., 708, 130 S. E., 720, and cases there cited.

A careful scrutiny of the record leaves us with the impression that the sentence of death is the due command of the law, and that the verdict and judgment should be upheld. *S. v. Donnell, supra.* It is so ordered.

No error.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND v. BOARD OF EDUCATION OF PENDER COUNTY ET AL.

(Filed 3 May, 1933.)

Appeal and Error K c—

Where it appears from the record that the Court made an error in calculating the amount recoverable by plaintiff a petition to rehear will be granted and the error corrected.

PETITION to rehear.

I. C. Wright for plaintiff.

C. E. McCullen and Bryan & Campbell for Board of Education.

BROGDEN, J. The cause was considered in *Fidelity Co. v. Board of Education,* 202 N. C., 354, 162 S. E., 763. The petition to rehear as-

serts that the writer of the opinion made an error of calculation in assuming that the amount of retained percentage in controversy was $4,375.20, whereas in fact the retained percentage based upon the contract price, would amount to $7,442.70. A reëxamination of the record discloses that the contention of the plaintiff is correct and that such error was made. The plaintiff is therefore entitled to recover the sum of $4,375.20, and it is so adjudged.

Petition allowed.

R. L. MILLER v. CHARLOTTE COCA-COLA BOTTLING COMPANY.

(Filed 3 May, 1933.)

1. Appeal and Error J d—

Where it does not appear of record what excluded testimony would have been an exception to its exclusion will not be considered.

2. Appeal and Error F c—

An unpointed exception to the charge will not be considered on appeal.

APPEAL by plaintiff from *Cowper, Special Judge,* at September Special Term, 1932, of MECKLENBURG.

Civil action for damages.

Plaintiff alleges that he was paralyzed in his left side, arm and leg, from drinking coca-cola, bottled by the defendant, which contained a spider and a fly.

The issue of negligence was answered in favor of the defendant, and from the judgment entered thereon, the plaintiff appeals.

H. L. Strickland and J. E. Woolard for plaintiff.
John M. Robinson and Hunter M. Jones for defendant.

STACY, C. J. We have examined the assignments of error appearing on the record and find none of sufficient merit to warrant a new trial.

The exceptions addressed to the exclusion of evidence do not show what the answers to the questions would have been. The effect of the rulings, therefore, whether hurtful or other, is not apparent. "Where the record shows exceptions to unanswered questions, without more, the exceptions will not be considered on appeal." *Hubbard and Co. v. Brown,* 186 N. C., 96, 118 S. E., 896; *Allred v. Kirkman,* 160 N. C., 392, 76 S. E., 244.

The tenth assignment of error is as follows: "The court erred in his charge to the jury as will appear in the charge, record pages 35 to 45."

It was said in *S. v. Moore,* 201 N. C., 618, 161 S. E., 91, that a broadside exception "to the charge as given" would not be considered. Unpointed exceptions to the charge are unavailing on appeal. *Rawls v. Lupton,* 193 N. C., 428, 137 S. E., 175; *Roberts v. Davis,* 200 N. C., 424, 157 S. E., 66. The remaining exceptions are equally untenable.

No error.

THE BRUNSWICK-BALKE-COLLENDER COMPANY v. CAROLINA BOWLING ALLEYS, INCORPORATED, MRS. MAE S. CAVINESS, J. M. BROUGHTON AND L. N. WEST.

(Filed 3 May, 1933.)

1. Sales I d—

Where personal property is sold under a registered conditional sales contract and the purchase price is not paid in accordance with the agreement, the seller is the owner thereof and is entitled to possession as against the purchaser and all persons claiming under him. C. S., 3312.

2. Fixtures A b—Seller to lessee under conditional sales contract held entitled to removal of chattels upon reimbursement of lessor.

Where the lessee of real property purchases certain personal property under a registered conditional sales contract and installs same in the leased premises, the lessee being under contract with the lessor to make all alterations in the building necessary for the purpose to which the lessee was to use the property and to pay for all equipment required therefor, and the lessee fails to pay for the personal property installed in the building, and it appears that the personal property cannot be removed without substantial damage to the building, but that such damage can be fully and adequately compensated in money: *Held,* in the suit of the seller of the personal property to have same sold for the payment of the balance due thereon he is entitled to have an issue as to the amount of money necessary to restore the premises to their original condition submitted to the jury, and the rights of the lessor may be protected by judgment of the court requiring the seller to reimburse him for the damage to the building, since the proceeds of the sale of the personal property will be distributed under the orders of the court.

APPEAL by plaintiff from *Sinclair, J.,* at November Term, 1932, of WAKE. New trial.

This action was begun in the Superior Court of Wake County on 30 January, 1931. On the facts alleged in its complaint, the plaintiff prayed judgment (1) that the plaintiff recover of the defendants, Carolina Bowling Alleys, Incorporated, and Mrs. Mae S. Caviness, the sum of $435.00, with interest from 21 September, 1928, and the costs of the action; (2) that by virtue of the conditional sale contract alleged in the complaint, the plaintiff is the owner and entitled to the possession of the

articles of personal property described therein; (3) that the said articles of personal property be sold by a commissioner appointed by the court for that purpose; and (4) that the proceeds of said sale be applied under the orders of the court to the payment of the judgment.

After the action was begun and while the same was pending, to wit: on 11 March, 1932, J. M. Broughton and L. N. West, on their motion, were made parties defendant. They filed an answer in which they denied that the plaintiff is the owner and is entitled to the possession of certain of the articles of personal property described in the complaint. They alleged that the articles of personal property described in their answer had been and are now affixed to the building in which they were installed by the defendant, Carolina Bowling Alleys, Incorporated, and which is owned by them, and that the same cannot now be removed from said building without material injury to the same.

The issue involving the controversy between the plaintiff and the defendants, J. M. Broughton and L. N. West, was submitted to the jury and answered as follows:

"5. Is the plaintiff entitled as against the defendant, J. M. Broughton and L. N. West, to the possession of the following portion of the property described in the complaint, to wit: Ten No. 1, up-to-date regulation bowling alleys, with leatheroid bed and kick back plates? Answer: No."

From judgment that the plaintiff is not entitled to the possession of the property described in the 5th issue, as against the defendants, J. M. Broughton and L. N. West, the plaintiff appealed to the Supreme Court.

Barwick & Leach for plaintiff.
J. Crawford Biggs for defendants.

CONNOR, J. The only errors assigned by the plaintiff on its appeal to this Court are based on its exceptions at the trial with respect to the 5th issue. There are no exceptions in the case on appeal with respect to the other issues. The plaintiff does not contend that there were errors in the trial of the issues arising on the pleadings and involving matters in controversy between the plaintiff and the defendants, Carolina Bowling Alleys, Incorporated, and Mrs. Mae S. Caviness. It appears from the answers of the jury to these issues that the said defendants are indebted to the plaintiff in the sum of $435.00, with interest from 21 September, 1928, and that the defendant, Mrs. Mae S. Caviness, is entitled to recover of the plaintiff on her counter-claim, the sum of $275.00. The plaintiff is, therefore, by virtue of the conditional sale contract, the owner and entitled to the possession of the articles of personal property described in the complaint, which include the articles

described in the 5th issue, as against both the defendant, Carolina Bowling Alleys, Incorporated, and the defendant, Mrs. Mae S. Caviness, notwithstanding the negative answer of the jury to the third issue. There is no judgment in the record determining the rights of the plaintiff as against the defendant, Carolina Bowling Alleys, Incorporated, or the defendant, Mrs. Mae S. Caviness. The only judgment in the record is that rendered on the answer of the jury to the 5th issue. It is from this judgment that the plaintiff has appealed to this Court. It assigns as error the instructions of the trial court to the jury that "if you find the facts to be as shown by all the evidence, you will answer the 5th issue, No."

The facts pertinent to the 5th issue as shown by all the evidence at the trial are as follows:

The defendants, J. M. Broughton and L. N. West, are now and have been continuously since 15 August, 1928, the owners of a lot located at 120 West Davie Street in the city of Raleigh, N. C. There is situate on this lot a brick building which was designed and constructed for use as a garage. The building is 100 feet long and 82 feet wide. It is a one-story building, and has a concrete floor, containing about 6,000 square feet. The building cost about $25,000.

On or about 15 August, 1928, the said defendants leased this property to the defendant, Carolina Bowling Alleys, Incorporated. By the terms of the lease, it was agreed that the lessee should make all alterations in the building required to adapt it for use as a bowling alley, and should purchase and install in the building all equipment required for that purpose. It was expressly agreed that the owners of the building should bear no part of the expense of making the alterations, no part of the cost of the equipment, and no part of the expense of installing the equipment in the building. The owners of the property were induced by this agreement on the part of the lessee to lease the building for use as a bowling alley.

On 21 September, 1928, the plaintiff entered into a contract with the defendant, Carolina Bowling Alleys, Incorporated, by which the plaintiff agreed to sell and deliver to the said defendant certain articles of personal property, described in the contract, and constituting the necessary equipment for a bowling alley. The said defendant agreed to pay to the plaintiff, on the purchase price for said articles of personal property, in cash, the sum of $6,591.50, and to execute and deliver to the plaintiff, in payment of the balance due on the purchase price, fifteen notes, each for the sum of $435.00. These notes were to be due and payable, with interest, consecutively, on the 21st day of each month after the date of the contract. It was expressly agreed by and between the plaintiff and the defendant, Carolina Bowling Alleys, Incorporated,

that the title to the articles of personal property described in the contract should be and remain in the plaintiff until all the said notes had been paid. This contract was in writing, and was executed and recorded in the office of the register of deeds of Wake County.

Pursuant to said contract, the defendant, Carolina Bowling Alleys, Incorporated, paid to the plaintiff the sum of $6,591.50, in cash, and executed and delivered to the plaintiff fifteen notes, each for the sum of $435.00, in accordance with the terms of said contract. Thereupon the plaintiff delivered to the said defendant the articles of personal property described in the contract, as follows:

"Ten No. 1, up-to-date regulation bowling alleys, with leatheroid bed, and kick back plates, simplex pin spotters, one electric floor machine, rite lite reflectors, and 60 ever-hold steel chairs, and playing equipment complete."

These articles of personal property were installed at once by the defendant, Carolina Bowling Alleys, Incorporated, in the building owned by the defendants, J. M. Broughton and L. N. West, and in its possession as their lessee. They were and are now so affixed to said building that they cannot be removed therefrom without material injury to the building. If said articles should be removed from said building it will cost not less than seven or eight hundred dollars to restore the building to the condition in which it was in at the time they were affixed to said building. Holes were bored into the concrete floor in order that the equipment might be anchored thereto. A wooden floor was constructed over the concrete floor, and platforms for seats were erected in said building. If the equipment for the bowling alley is removed from the building, it will be necessary to fill up the holes, and to remove the wooden floor and the platform. This will require the expenditure of a considerable sum of money.

After the equipment was installed in the building, the defendant, Carolina Bowling Alleys, Incorporated, used the same, as lessee of the building, for the operation of a bowling alley, in said building, until 16 October, 1930, when the said defendant sold said equipment to the defendant, Mrs. Mae S. Caviness. The bill of sale for said equipment was drawn by the defendant, J. M. Broughton, who is an attorney at law. The said equipment is described in said bill of sale as personal property. As one of the terms of the sale, the defendant, Mrs. Mae S. Caviness, assumed the payment of the note sued on in this action. Contemporaneously with the execution of the bill of sale to her, Mrs. Caviness executed a deed of trust, by which she conveyed the said equipment, as personal property, to secure her indebtedness to the defendants, J. M. Broughton and L. N. West. This deed of trust was drawn by the defendant, J. M. Broughton. There was no evidence at the trial tending

to show that Mrs. Caviness has made any change in the building or in the bowling alley since she purchased said equipment from her codefendant, Carolina Bowling Alleys, Incorporated. She has continued to operate the bowling alley, as lessee of the building.

The articles of personal property described in the 5th issue were delivered to the defendant, Carolina Bowling Alleys, Incorporated, by the plaintiff under and pursuant to its contract with said defendant. This contract was in writing, was duly executed, and was duly recorded prior to the installation of said property by the said defendant, as lessee, in the building owned by the defendants, J. M. Broughton and L. N. West, as lessors. It was agreed by the parties to said contract that the title to said property should be and remain in the plaintiff until all the purchase money notes had been paid. The last of said notes has not been paid. The plaintiff is, therefore, the owner and entitled to the possession of said property as against the defendant, Carolina Bowling Alleys, Incorporated, and all persons claiming under said defendants (C. S., 3312, *Finance Co. v. Weaver,* 199 N. C., 178, 153 S. E., 861) unless the plaintiff has lost its right to the possession of said property because it cannot now be removed from the building without material and permanent damage to said building. All the evidence shows that the property cannot now be removed from the building without material damage to the same. The evidence also shows that the damage can be fully and adequately compensated by money. By the expenditure of a sum of money the building, after the property has been removed, can be restored to the condition in which it was in at the time the property was installed therein. The rights of the defendants, J. M. Broughton and L. N. West, can be fully protected without depriving the plaintiff of its property.

An issue may be submitted to the jury in order that it may be determined what sum, if any, will be required to repair the damage to the building caused by the removal of the personal property described in the 5th issue, if said issue shall be answered in the affirmative. The trial court may, and doubtless will, in its judgment require the plaintiff to fully indemnify the defendants, J. M. Broughton and L. N. West, the owners of the building and the lessors of their codefendants, for all damage caused by the removal of the property from the building under its judgment, *Cox v. Lighting Co.,* 151 N. C., 62, 65 S. E., 648. When the property has been removed from the building and sold, the proceeds of the sale will be distributed under the orders of the court. Thus the rights of all interested parties will be protected.

There was error in the instruction of the court with respect to the 5th issue. The plaintiff is entitled to a new trial. It is so ordered.

New trial.

L. M. HAM, JR., ADMINISTRATOR OF SARAH CATHERINE HAM, v. GREENSBORO ICE AND FUEL COMPANY.

(Filed 3 May, 1933.)

1. Highways B h—

The violation of a safety statute is negligence *per se*, but is not actionable unless there is a causal relation between the negligence and the injury in suit, and this causal relation is not presumed from the fact of injury.

2. Highways B h—

The fact that a driver of a truck did not have a license and had parked the truck at an angle instead of parallel to the curb, both in violation of municipal ordinance, does not warrant a recovery for an injury caused by the truck in its subsequent movement, there being no evidence of causal relation between the violation of the ordinances and the injury.

3. Highways B g—Failure of driver to look under truck before starting it held not negligence under the evidence in this case.

Where the evidence tends to show that the deceased, a child two years old, had crawled under defendant's standing truck, and was killed when the truck was backed over her, that the driver of the truck and the person riding with him, upon returning to the truck, looked forward and backward and through the rear window of the truck before starting and backing it, and that they could not have seen under the truck without bending over, their failure to look under the truck before starting it cannot be held for actionable negligence, they having observed the ordinary and reasonable elements of a prudent lookout and inspection.

4. Highways B h—Evidence of causal relation between injury and act of backing truck in violation of ordinance held insufficient.

The evidence tended to show that the deceased, a child two years old, without being observed, crawled under defendant's truck, that the driver, upon his return to the truck, remounted and looked forward and backward before starting and backing it, and that the front wheel of the truck ran over and killed the deceased before the truck had backed its length. The act of backing the truck was in violation of a municipal ordinance. *Held*, the evidence of causal relation between the violation of the ordinance and the injury was insufficient to be submitted to the jury, the question of whether the injury would not have resulted except for the violation of the ordinance being in the realm of bare conjecture, and the testimony of a person riding with the driver that the injury would not have occurred had the truck moved forward does not alter this result, the testimony being a mere expression of opinion by the witness.

CLARKSON, J., dissents.

CIVIL ACTION, before *Harding, J.*, at August Term, 1932, of GUILFORD.

It was alleged that the plaintiff is the father and administrator of the estate of the deceased, Sarah Catherine Ham, an infant of about two years of age. On 6 February, 1932, a truck owned by the defendant killed plaintiff's intestate in front of the residence of plaintiff on East Radiance Drive in Greensboro. The defendant was engaged in deliver-

ing ice to the home of the plaintiff and the ice truck was operated by a colored man named Harry Chavis. The father of the driver, to wit, Louis Chavis, was also in the truck. There were no eye witnesses to the fatal accident. A description of the injury as given by Louis Chavis, is as follows: "When we drove up to the curbstone at Mr. Ham's house . . . I gets out of the truck and goes up to the house. I met a colored girl and asked her how much she needed. She said fifty pounds. . . . . I told this boy (Harry Chavis, the driver) to bring me fifty pounds of ice. He brought it and I put it in the ice box, and he turned around as he handed me the ice and goes on back to the truck. I went on back out to the truck myself; saw this pile of little children over on the left playing in the sand. So I told the boy (driver), I says: 'Now, Harry, don't head out toward those little children, you might frighten the children. Back back so as not to frighten the little children.' So then we went back. I looked out on the opposite side of the truck next to Mr. Ham's house myself. He had to look on the other side. I too, looked back through the glass. I saw no one driving up and no one walking up, so we backed back out of the way of these little children. In the meantime I suppose this little child must have been under the back of the truck, I didn't see her, and the left front wheel of the truck ran over the little baby's head. The truck bumped. I says, 'Harry, wait a minute, you have run over some of those little children's toys.' I got out, looked in front of the truck wheel beside of the truck wheel, and saw this little child. I grabbed it and rushed into the house. . . . I goes on up the steps with the little child and met the colored girl. . . . I handed the little girl to her. Mrs. Ham met her on the front porch. I goes on in the house with Mrs. Ham. I saw she was just terribly upset at that time. The little child was falling out of her arms and she was trying to wipe the blood out of its face. I taken the towel from Mrs. Ham and tried to clean the dirt off. A gentleman, I don't know, came up, felt the little child's pulse, and says: 'The baby is gone.' "

The evidence tended to show that opposite the Ham home on East Radiance Drive there was a sand pile on the sidewalk and partially in the street, and that a number of little children were playing in this sand pile at the time the accident occurred. Witness said: "They were playing in the sand pile, playing over to the left on the sand pile a great crowd of them. . . . Sure, if I had took time to get down on my hands and knees I could have seen, looked under the automobile, I did not look under the truck. I looked to the rear of the truck." The driver, Harry Chavis, testified that when he returned to the truck from delivering the ice . . . "I went in front of the truck and looked and did not see no one. I got in the truck, looked out the back glass,

and did not see any one, and started backing the truck. When I backed the truck about the length of the truck, the left wheel jumped over something. I got out immediately and looked, and the child was under the wheel. That was the left front wheel. . . . I saw some children on the opposite side of the street playing in the sand in the sand box. . . . I saw some little tricycles out there. . . . When I looked I did not see any children about my truck. . . . I looked when I was on the ground and my father looked, and I did not see her. . . . I was backing over there to dodge the kids on the other side. They were running all around in the street, some running around and some playing out there. . . . The body of this truck is a big wooden body, about three or four feet from the ground. By looking you could not see all under the truck. . . . Before getting into the truck you would have to bend down to look under it. (Witness illustrates to the jury, bending down about half way), and then you could see under the entire truck."

None of the foregoing evidence was controverted or disputed.

The plaintiff based the right to recover, chiefly upon four elements of negligence, to wit: (a) that the driver of the truck had no license; (b) that he did not park the truck at the curb in accordance with the provisions of the city ordinance; (c) that the truck backed, in violation of a city ordinance, instead of moving forward; (d) that the driver did not keep a proper lookout.

The following issues were submitted to the jury:

1. "Was the plaintiff's intestate, Sarah Catherine Ham, injured and killed by the negligence of the defendant, as alleged in the complaint?"

2. "Did L. M. Ham, Jr., father of Sarah Catherine Ham, by his own negligence, contribute to the injury and death of the said Sarah Catherine Ham, as alleged in the answer?"

3. "Did Sarah E. Ham, mother of Sarah Catherine Ham, by her own negligence, contribute to the injury and death of the said Sarah Catherine Ham, as alleged in the answer?"

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

The jury answered the first issue "Yes," the second issue "No," the third issue "Yes," and the fourth issue "$2,000."

From judgment upon the verdict the defendant appealed.

S. J. Stern for plaintiff.
Sapp & Sapp for defendant.

BROGDEN, J. The distressing details to be interpreted are substantially as follows: An ice truck drives up to a home to deliver ice. The street is paved and thirty feet wide. On the opposite side of the street a crowd

of little children are playing in a sand pile on the sidewalk and in the edge of the street. The deceased, unattended by any older person, is in the group. Apparently, the children have their toys with them. The driver and his father take the ice into the home and return to the truck. Before they get into the truck they look to the front and back and see no children. The truck is so constructed that they could not see under it without bending half way down. They mount the truck, and then look forward and backward, and through the glass in the rear thereof. The father suggests to the driver that it is wiser to back the truck than to move forward for the reason that to move forward the truck would have to be operated through a group of children, but by moving backward away from the children this danger would apparently be avoided. Consequently, they backed the truck, and before the truck had moved the space of its own length, the driver hears a bump. He immediately stops, and upon investigation, finds the little two-year old child under the front of the truck with its head crushed.

Upon the foregoing facts, the first question of law to arise is: Was there sufficient evidence of negligence to be submitted to a jury?

It was admitted that the driver, in violation of an ordinance, was operating the truck without a license. It was admitted that when the truck drove up to the residence it was not parked exactly parallel with the curb but at a slight angle, and thus violating a city ordinance. It was admitted that the truck backed away from the home instead of moving forward, thus violating another city ordinance.

All of the decisions of this State since *Ledbetter v. English,* 166 N. C., 125, 81 S. E., 1066, concur in the view that the violation of an ordinance or of a statute designed for the protection of life and limb, is negligence *per se.* Notwithstanding, the same decisions do not permit recovery for the mere violation of the statute, unless there was a causal relation between the violation and the injury. In other words, mere negligence does not warrant recovery. Recovery must grow out of actionable negligence, and negligence is not actionable until there is evidence of causal relation between the negligent act and the resulting injury. Moreover this causal relation is not presumed from the injury itself. Thus, in *Rountree v. Fountain,* 203 N. C., 381, where a truck backed over a child in an alley, the Court said: "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." The breach of a statute as an element of negligence was construed in *Austin v. R. R.,* 197 N. C., 319, 148 S. E., 446. The Court said: "There is evidence that the deceased was required to work in breach of this statute. But this requirement did not make the defendant unconditionally liable in damages. The necessary element of liability

is some causal relation between the employee's working over time and the injury he receives." The bare fact that the driver of a truck or automobile was not licensed does not create liability for personal injury. *Peters v. Tea Co.*, 194 N. C., 172, 138 S. E., 595. The failure to park a truck alongside a curbing rather than at a small angle would apparently have no bearing on an injury sustained by the subsequent movement of the truck.

The evidence leaves no doubt as to the fact that the little child crawled under the truck while the driver was delivering ice and was concealed thereunder when the driver returned to resume the operation thereof. The evidence of careful lookout is uncontradicted, and the failure of the driver to bend down and look under the truck cannot be held for actionable negligence when all other ordinary and reasonable elements of prudent lookout and inspection have been observed.

The final inquiry is whether backing the truck, under the circumstances, in violation of the statute was sufficient evidence of proximate cause to be submitted to the jury. The evidence discloses that the front wheel of the backing truck killed the child. If the driver had moved forward, doubtless the rear wheel of the moving truck would have accomplished the same unfortunate result. The father of the driver said: "If we had gone forward, we would not have run over this little child." Manifestly, such statement was a conclusion of the witness and is to be interpreted in the light of all the uncontradicted evidence. What was the position of the child when the truck moved? Did the position change while the truck was in motion? Inferences, theories, and deductions rise and run with the shifting turns of interpretation, but the proof of actionable negligence must rest upon a more solid foundation than bare conjecture. *Grimes v. Coach Co.*, 203 N. C., 605. Therefore, it is the opinion of the Court that the motion for nonsuit should have been allowed.

Reversed.

CLARKSON, J., dissents.

TOWN OF ROCKINGHAM v. GURNEY P. HOOD, COMMISSIONER OF BANKS EX REL. THE BANK OF PEE DEE.

(Filed 3 May, 1933.)

1. Taxation B c—Tax on bank stock is payable by the bank and not by stockholders.

The tax on shares of stock of a bank is payable by the bank under the provisions of statute, it being required that the cashier or other proper officer of the bank pay the tax to the municipality levying it when the corporate excess is certified to the municipality by the State Board of

Assessment, the tax being in the nature of a statutory garnishment against the bank, and the tax is a lien upon the land, N. C. Code, 7987. Public Laws of 1929, chap. 344.

2. Taxation C c—Where bank does not appeal from assessment of its stock it may not escape liability for tax thereon because of insolvency.

Where a bank does not appeal from the amount of the assessment on its stock as certified by the State Board of Assessment, the bank may not thereafter show that the amount of the assessment was erroneous because of the insolvency of the bank at the time of the assessment, and the tax duly levied prior to the closing of the bank may be collected from the bank's statutory receiver.

3. Same—Commissioner of Revenue may not order town to strike out assessment on bank stock duly certified by State Board of Assessment.

Where the State Board of Assessment has certified the excess value of bank stock to the municipality in which the bank conducted its business, the Commissioner of Revenue has no authority to direct the tax accountant of the town to strike from his records the amount so certified because the bank stock was worthless by reason of the insolvency of the bank when the bank has not appealed from the assessment in the manner provided by the statute.

APPEAL by defendant from *Schenck, J.*, at November Term, 1932, of RICHMOND. Affirmed.

The judgment of the court below is as follows:

"This cause coming on to be heard and being heard at the November Term, 1932, of the Superior Court, before the undersigned, Michael Schenck, judge presiding; and counsel for the plaintiff and defendant having waived a jury trial and having consented that the court find the facts; and after considering the statements and admissions of the parties and the evidence offered, the court finds the facts to be as follows:

1. That the Bank of Pee Dee is a banking corporation, organized under the laws of the State of North Carolina, and previous to 8 December, 1930, conducted a banking business in the town of Rockingham. That on said date said bank was closed by reason of insolvency and its assets and affairs are now in the hands of the Commissioner of Banks of North Carolina for the purpose of liquidation.

2. That at all times during the year 1930, and subsequently thereto, the Bank of Pee Dee was insolvent.

3. That the Bank of Pee Dee, for the year 1930, duly listed the real and personal property of said bank in the town of Rockingham amounting to $47,500, with the proper tax-listing authorities of the town of Rockingham, and that the taxes computed upon such valuations of real and personal property as listed by the Bank of Pee Dee have been duly paid.

4. That at all times during the year 1930 and subsequent thereto, the stock held by the stockholders of the Bank of Pee Dee was valueless.

5. That A. J. Maxwell, as chairman of the State Board of Assessment, certified to the proper tax authorities of the town of Rockingham on 1 August, 1930, 'valuation in excess of assessed value real and personal property of the Bank of Pee Dee $136,738.'

6. That the board of commissioners of the town of Rockingham made a tax levy for the year 1930 of $2.35 for each $100.00 assessed valuations of all property in the town of Rockingham for the year 1930.

7. That, in accordance with said tax levy in the town of Rockingham for the year 1930, the taxes assessed against the valuation in excess of assessed valuation of the real and personal property of the Bank of Pee Dee in the amount of $138,738 for the year 1930 amounted to $3,260.34.

8. That after the taxes had been computed on the valuation in excess of assessed, value real and personal property of the Bank of Pee Dee as certified by the State Board of Assessment on the first day of August, 1930, A. J. Maxwell, Commissioner of Revenue, on 17 February, 1931, wrote a letter to the tax accountant of Rockingham, North Carolina, directing him to strike from the records the valuation in excess of assessed value real and personal property of the Bank of Pee Dee for the year 1930.

9. That the Bank of Pee Dee had an outstanding capital stock of $100,000, and that a stock assessment of $100,000 was levied against the stockholders on account of the stock liability as provided by law, and that about 65 per cent of the same has been collected or is collectible. That all the assets of the Bank of Pee Dee augmented by any and all sums collected or that may be collected from the assessment against the stockholders will be insufficient to pay the depositors in full.

10. That the tax collector of the town of Rockingham made demand upon P. E. Dukes, local liquidating agent for the Bank of Pee Dee for the sum of $3,260.34, which represented the taxes assessed on the valuation in excess of assessed value real and personal property of the Bank of Pee Dee hereinbefore referred to of $138,738, and that the payment of the same has been refused and that this action was thereupon instituted for the collection of said amount representing the taxes due the town of Rockingham for the year 1930 on the valuation in excess of assessed value real and personal property of the Bank of Pee Dee on the sum of $138,738, as certified by the State Board of Assessment to the town of Rockingham on 1 August, 1930.

From the foregoing findings of fact, and on motion of counsel for the town of Rockingham, it is considered, ordered and adjudged by the court that the plaintiff, town of Rockingham, recover of the defendant, Gur-

ney P. Hood, Commissioner of Banks, *ex rel.* the Bank of Pee Dee, the sum of $3,260.34, with interest thereon at the rate of 6 per cent per annum from 2 June, 1931, together with the costs of the case, to be taxed by the clerk.

It is further considered and adjudged that the aforesaid amount be and constitute a first and prior lien upon any and all assets of the Bank of Pee Dee until paid."

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

M. C. McLeod for plaintiff.
W. R. Jones for defendant.

CLARKSON, J. The questions involved: (1) Is the bank stock tax of North Carolina a tax on the shares of stock to be paid by the stockholders or by the bank itself? We think by the bank. (2) Can the taxing units require the liquidator of an insolvent bank to pay such tax duly levied before the bank was closed? We think so.

Public Laws of 1929, chap. 344, Art. VI, sec. 600, subsec. 6, is as follows: "The taxes assessed upon the shares of stock of any such banking association, institution or trust companies shall be paid by the cashier, secretary, treasurer, or other officer or officers thereof, and in the same manner and at the same time as other taxes are required to be paid in such counties, and in default thereof such cashier, secretary, treasurer, or other accounting officer as well as such banking association, institution or trust company shall be liable for such taxes and in addition thereto for a sum equal to ten per cent thereof. Any taxes so paid upon any such shares may, with the interest thereon, be recovered from the owners thereof by the banking association, institution, or trust company, or officers thereof paying them, or may be deducted from the dividends accruing on such shares. The taxation of such shares of capital stock shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of this State, coming in competition with the business of such banking associations, institutions or trust companies."

Section 603, subsec. 4, gives a right to appeal from the assessment.

Section 603, subsec. 6, is as follows: "The State Board of Assessment shall, on or before the first day of August of each year, certify to the register of deeds of the county in which such corporation, limited partnership or association has its principal office or place of business, the total value of the capital stock of such corporation, limited partnership or association as determined in this section; and such corporation, limited partnership or association shall pay the county, township, city or town tax upon the valuation so certified."

The above and other relevant statutes were duly complied with as set forth in the findings of facts by the court below.

There was no appeal from the State Board of Assessment and defendant is now precluded from raising the question. *Mfg. Co. v. Comrs.*, 196 N. C., 744.

In *Comrs. v. Tobacco Co.*, 116 N. C., 441, 448, we find: "The tax on the shares is a separate matter, and is a tax on the shareholders on their property whether they reside in or out of the State collected through the medium of a *quasi*-statutory garnishment on the corporation. 'It has long been the common, if not the only mode in many states, and indeed is the only mode to collect taxes on the shares of nonresident shareholders.' *Bank v. Commonwealth*, 9 Wall., 353, 361, approved in Delaware R. R. Tax, 18 Wall., 206, 230; 2 Thomp. Corp., 2849." *Trust Co. v. Lumberton*, 179 N. C., 409; C. S., 7971(59).

In Vol. 8, Banks & Banking (Michie), at p. 194-5, is the following: "It is clearly within the power of the State Legislature to provide, as is done in a number of jurisdictions, that the taxes assessed on shares of bank stock shall be paid by the bank. . . . In at least one jurisdiction, it has been held that under an act taxing a bank on the shares of its stock, such tax was payable out of the common funds of the bank." *Attorney-General v. Bank*, 21 N. C., 216; *Attorney-General v. Bank*, 40 N. C., 71. This question was raised in the first case, *supra*, nearly 100 years ago, and seems not to have been questioned since the above decisions. The tax is a lien on the land. N. C. Code, 1931 (Michie), sec. 7987.

We think the case of *Chowan County v. Comr. of Banks*, 202 N. C., 672, similar to the present one. At p. 675 this Court said: "It is mandatory on the bank to pay the taxes on the shares of stock." Conceding that the bank was insolvent when the tax was assessed by the State Board of Assessment, yet it did not follow the procedure mapped out by law and it cannot now be heard to complain. It would be a like hardship on a municipality relying on this tax regularly assessed to now be deprived of it. The municipality is not in fault, it is the fault of the bank in not appealing if the assessment was incorrect.

The rule as to insolvent National Banks is different, as there is a statute on the subject: U. S. Code, Anno., Title 12, Banks & Banking, sec. 570: "Whenever and after any bank has ceased to do business by reason of insolvency or bankruptcy, no tax shall be assessed or collected, or paid into the Treasury of the United States, on account of such bank, which shall diminish the assets thereof necessary for the full payment of all its depositors; and such tax shall be abated from such national banks as are found by the Comptroller of the Currency to be insolvent; and the Commissioner of Internal Revenue, when the facts

shall so appear to him, is authorized to remit so much of said tax against insolvent State and savings banks as shall be found to affect the claims of their depositors. (1 March, 1879, chap. 125, sec. 20, 20 Stat., 351; 3 March, 1883, chap. 121, sec. 1, 22 Stat., 488.)"

The statute "was passed for the undoubted purpose of relieving depositors in national banks from the payment of certain taxes, not assessed upon them, but upon the banks of which they are only customers; taxes which under the preëxisting law, they would indirectly be obliged to pay when a bank is so insolvent that all its capital is gone and it has nothing left with which to pay taxes, except the money of its depositors. . . . When, therefore, it was found that in case of insolvency of the bank, and the loss of its entire capital, and its inability to pay its depositors in full from all its assets, an enforcement of the taxes would result in the taxation of the depositors, the customers and creditors of the bank, this act to relieve them was passed." *Johnston v. U. S.* (1881), 18 Ct. Cl., 157.

The Commissioner of Revenue had no power to direct the tax accountant of Rockingham, N. C., to strike from the records the valuation in excess of assessed value real and personal property of the Bank of Pee Dee for the year 1930. *Chowan County case, supra,* p. 696. The judgment below is

Affirmed.

S. M. BROADWAY v. J. C. GRIMES AND W. T. GRIMES, TRADING AS LEXINGTON COCA-COLA BOTTLING COMPANY.

(Filed 3 May, 1933.)

1. **Food A a—Manufacturer may be held liable by ultimate consumer for deleterious substance negligently mixed with drink.**

   The manufacturer or bottler of drinks owes the duty of using due care to see that the bottled beverage contains no noxious substance, and where foreign and deleterious substances are negligently mixed with the drink which is bottled in opaque glass which would prevent the discovery of the noxious substance upon reasonable inspection by the consumer, the manufacturer may be held liable to the ultimate consumer who purchased it from an intermediate dealer for the injury caused thereby although there is no contractual relation between the manufacturer and the ultimate consumer

2. **Same—Evidence of negligence on part of manufacturer of bottled drink held sufficient to be submitted to the jury.**

   The mere fact of injury from the drinking of a bottled beverage is not proof of negligence on the part of the manufacturer or of proximate cause, but the evidence in this case is held sufficient to justify the verdict of the jury establishing negligent failure of inspection, injury, proximate cause and damage.

3. Same—Evidence that other bottles contained foreign substance held competent in consumer's action against manufacturer.

In an action by the ultimate consumer of a bottled drink to recover for injuries caused by a noxious substance contained therein, evidence that other drinks bottled by the defendant contained foreign substance is held competent when properly confined by the court.

APPEAL by defendants from *Shaw, Emergency Judge,* at October Term, 1932, of DAVIDSON. No error.

The plaintiff brought suit to recover damages for injury caused by drinking from a bottle of coca-cola which contained some noxious foreign substance. His allegations are that he drank a part of the contents and suffered a burning sensation in his throat, stomach, and other internal parts of his body; that he immediately became sick and upon examination found in the bottle a brown, green, and black substance, some of it floating and some adhering to the bottle; and that he was thereby poisoned.

The plaintiff bought the coca-cola from a retail dealer who had purchased it from the defendant, by whom it had been bottled. The contention was that the defendants had negligently permitted a poisonous substance to be intermixed with the coca-cola.

The defendants denied all the averred acts of negligence and alleged that they had used the best procurable machinery for cleansing and filling the bottles, had inspected every bottle, had employed skilled labor, and had exercised all reasonable care in the prosecution of their business.

The plaintiff testified in support of his complaint that the bottle contained green slime, half as long as his little finger; that the drink burned his mouth, throat, stomach, and caused nausea; that he could not sleep; that he lost in weight and was under treatment about four months.

A medical expert found sediment in the bottle and a large black lump about an inch in diameter, with flakes around it, floating in the solution. He testified that he had found the plaintiff's mouth red, congested, irritated; that he was sick, weak, and highly nervous; and that "some powerful irritant had upset him."

The defendants offered evidence in rebuttal, and the two issues of negligence and damages were answered by the jury in favor of the plaintiff.

Judgment for the plaintiff and appeal by defendants upon assigned error.

Spruill & Olive for plaintiff.
Raper & Raper for defendants.

ADAMS, J. It is not controverted that the defendants bottled the beverage and sealed it in "a regulation coca-cola bottle with a regulation cap," or that they sold it to a distributor, or that the plaintiff purchased it in due course of trade and ultimately became the consumer. The regulation bottle is opaque or colored to such extent that a noxious substance in it would not as a rule be readily observable. The verdict establishes the negligence of the defendants and the consequent injury suffered by the plaintiff. The first question is whether the defendants as manufacturers of the drink were under legal obligation to the plaintiff to exercise reasonable care that the article sold contained no substance likely to cause injury to health.

On this question there is divergence of opinion. There are decisions which in these circumstances hold the defendant to strict accountability; there are others which limit liability to injury caused by negligence connected with some contractual dealing or relation of the parties. The opposing views are set forth in exhaustive opinions recently delivered in the House of Lords in *M'Alister v. Stevenson,* (1932) Appeal Cases, Law Reports, 1932, 562. There a shopkeeper sought damages from a respondent, who was a manufacturer of aerated waters, for injuries she suffered as a result of consuming part of the contents of a bottle of ginger-beer which had been manufactured by the respondent, and which contained the decomposed remains of a snail. It was averred that the bottle had been purchased for the appellant by a friend in a cafe; that the bottle was made of dark opaque glass and that the appellant had no reason to suspect that it contained anything but pure ginger-beer; that the beer was poured into a tumbler and that the appellant drank some of the contents of the tumbler; that a friend was then proceeding to pour the remainder of the contents of the bottle into the tumbler when a snail, which was in a state of decomposition, floated out of the bottle; that as a result of the nauseating sight of a snail in such circumstances and in consequence of the impurities in the ginger-beer which she had already consumed the appellant suffered from shock and severe gastro-enteritis. The appellant further averred that the ginger-beer had been manufactured by the respondent to be sold as a drink to the public (including the appellant); that it had been bottled and labelled by the defendant and sealed with a metal cap. The negligence of the respondent was specifically set out. The Lord Ordinary held that the averments disclosed a good cause of action, but the Second Division of the Court of Sessions dismissed the action, and an appeal was taken.

Five opinions were delivered in which the various aspects of the case were considered and the judgment of the Second Division was reversed and that of the Lord Ordinary was restored. Special interest was attached to the subject, *Lord Atkin* observing, "I do not think a more

important problem has occupied your Lordships in your judicial capacity." The decision was rendered in 1932.

On the one hand it was said that the only safe rule is to confine the right to recover to those who enter into the contract, and that where the product of manufacturers is widely distributed throughout the country "it would seem little short of outrageous to make them responsible to members of the public for the condition of the contents of every bottle which issues from their works." It was argued that if such responsibility attached to manufacturers they might be called on to meet claims of damages which they could not possibly investigate or answer.

The approved principle was thus stated by *Lord Atkin:* "A manufacturer puts up an article of food in a container which he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer. Negligently, in the course of preparation, he allows the contents to be mixed with poison. It is said that the law of England and Scotland is that the poisoned consumer has no remedy against the negligent manufacturer. If this were the result of the authorities, I should consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House. I would point out that, in the assumed state of the authorities, not only would the consumer have no remedy against the manufacturer, he would have none against any one else, for in the circumstances alleged there would be no evidence of negligence against any one other than the manufacturer; and, except in the case of a consumer who was also a purchaser, no contract and no warranty of fitness, and in the case of the purchase of a specific article under its patent or trade name, which might well be the case in the purchase of some articles of food or drink, no warranty protecting even the purchaser-consumer."

In this opinion reference is made to the "illuminating judgment" of *Cardozo, J.,* in *McPherson v. Buick Motor Co.,* 217 N. Y., 382. The defendant in that case was a manufacturer of automobiles. It sold an automobile to a retail dealer. The retail dealer sold it to the plaintiff. While the plaintiff was in the car, it suddenly collapsed, and he was thrown out and injured. It was held that the defendant owed to the plaintiff the duty of care and vigilance. The manufacturer's liability for negligence, it was said, is not limited in principle to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction; and if the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. "If to the element of danger there is added knowledge that the thing will be used by persons other

than the purchaser, and used without new tests, then irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully."

It is upon this principle, by the decided weight of authority, that manufacturers and bottlers of beverages are held to be liable to consumers who purchase from intermediate dealers for injury caused by the drinking of a beverage which was unfit for human consumption because of negligence on the part of the manufacturer or bottler.

Those who manufacture or bottle beverages represented to be harmless and refreshing are subject to the duty of using due care to see that in the process of preparing the article for sale no noxious substance shall be mixed with the beverage. This is the prevailing doctrine. Accordingly recovery against the manufacturer or bottler has been allowed for injury suffered by swallowing pieces of glass, a cigar stub, the remains of a decomposed mouse, and other foreign substances negligently intermixed with the drink. *Watson v. Augusta Brewing Co.*, 1 L. R. A. (N. S.), (Ga.), 1178; *Jackson Coca-Cola Bottling Co. v. Chapman*, 64 So. (Miss.), 791; *Coca-Cola Bottling Co. v. Barksdale*, 88 So. (Ala.), 36; *Boyd v. Coca-Cola Bottling Works*, 177 S. W. (Tenn.), 80; *Rozumailski v. Philadelphia Coca-Cola Bottling Co.*, 145 At. (Pa.), 700.

This Court has had occasion to maintain the principle as applicable to injury resulting from the sale of unwholesome food (*Ward v. Sea Food Co.*, 171 N. C., 33; *Harper v. Bullock*, 198 N. C., 448), and from the explosion of glass bottles containing coca-cola, pepsi-cola, or ginger ale charged with gas to a high degree of pressure. *Dail v. Taylor*, 151 N. C., 285; *Cashwell v. Bottling Works*, 174 N. C., 324; *Grant v. Bottling Co.*, 176 N. C., 256.

In *Broom v. Bottling Co.*, 200 N. C., 55, the plaintiff was awarded damages for injury caused by swallowing broken glass negligently left in a bottle of coca-cola, the manufacturer being liable to the consumer although between them there was no contractual relation; and the mere failure of the purchaser to make an examination of the contents before drinking from the bottle does not as a matter of law defeat his right of recovery. *Atlanta Coca-Cola Bottling Co. v. Sinyard*, 164 S. E. (Ga.), 231.

It is true that the fact of injury is not proof of negligence or proximate cause; but the evidence offered on behalf of the plaintiff justifies the verdict, which includes a finding of negligent failure of inspection, injury, proximate cause, and damages. There was therefore no error in the court's refusal to dismiss the action.

Exception was taken to evidence tending to show that on several occasions preceding the act complained of foreign substances were found in

other bottles of coca-cola prepared by the defendant; but the admissibility of this evidence has often been approved and when properly guarded is not to be questioned. *Dail v. Taylor, supra; Grant v. Bottling Co., supra; Perry v. Bottling Co.,* 196 N. C., 175; *S. c., ibid.,* 691. We have examined all the exceptions and find

No error.

MRS. E. A. CLARK v. CLEVELAND DRUG COMPANY, INCORPORATED.

(Filed 10 May, 1933.)

Negligence A c—Plaintiff's act in stepping through door without stopping to look held contributory negligence as matter of law.

Plaintiff entered defendant's drug store and asked to use a telephone. Defendant's clerk showed her into a rear room of the store where there was a phone, turned on a small light and left her. There were two doors leading from the rear room, one to the front of the store and the other to the basement, and there was sufficient light for both to be visible, and plaintiff, after using the phone, sought to go back to the front of the store, opened one of the doors, and without stopping to look, fell through to the basement, sustaining serious personal injury. *Held,* plaintiff was guilty of contributory negligence as a matter of law rendering it immaterial whether she was an invitee or licensee or whether defendant was negligent in failing to instruct her as to the basement door, and defendant's motion as of nonsuit was properly allowed.

APPEAL by plaintiff from *Sink, J.,* at January Term, 1933, of MECKLENBURG. Affirmed.

The plaintiff brought suit to recover damages for personal injury and alleged:

3. That on or about 5 September, 1930, the plaintiff, while in the town of Shelby, North Carolina, went into the defendant's drug store to make some small purchases, and while in the store and before she had time to make a purchase, asked one of the defendant's agents and employees, in the said drug store, to be allowed to use a telephone, and was given permission to do so; that just as she was in the act of using the telephone on a counter in the front part of the store, one of the agents and employees of the defendant, told the plaintiff that there was a telephone in the rear end of the building, behind the prescription case, which would be more private and invited her in there to use that telephone.

4. That the plaintiff thereupon followed the defendant's agent and employee into the rear part of the drug store, behind the prescription case where the said agent turned on a light over a little table upon

which was a telephone and directed her to use the said telephone, which she did; that immediately after using the telephone, the plaintiff attempted to leave the rear room of the drug store, and in doing so, opened a door which led into the basement, that the door opened to the inside of the basement, and the plaintiff stepped in and fell to the cement floor beneath, nine or ten feet, and was seriously and permanently injured, as hereinafter more particularly set out.

5. That the defendant was guilty of gross negligence and carelessness, after having invited the plaintiff into the rear part of the drug store, in failing to instruct her that one of the doors leading out of the room opened into the basement; that there was no sign at or on the door to warn that it opened over a cavity beneath, and not having been instructed, the plaintiff opened the door and made a step as if to leave the room and fell to the cement floor beneath, breaking her left shoulder and arm and injuring her back.

6. That when the plaintiff finished using the telephone, as hereinbefore alleged, she attempted to leave the room; there were several doors leading out of the room, and the plaintiff, having received no instructions as to which was the proper exit, opened the door opening into the basement, and as hereinbefore alleged, took a step as the door opened, and fell into the basement, and was injured, as hereinbefore alleged.

7. That it was the duty of the defendant, after having invited the plaintiff into a dark room to allow her to use one of its telephones, to give her instructions about the door which opened into the basement of the building; that in failing to do this, the defendant was guilty of gross negligence, and on account of this negligence, the plaintiff opened the door leading into the basement and fell to the hard surface of the basement floor and was seriously and permanently injured, as hereinbefore set out.

The defendant filed an answer denying the material allegations of the complaint and pleaded the plaintiff's negligence in bar of her recovery.

At the close of the plaintiff's evidence the court dismissed the action as in case of nonsuit and the plaintiff excepted and appealed.

J. D. McCall and Ralph V. Kidd for plaintiff.
Tillett, Tillett & Kennedy for defendant.

ADAMS, J. The appellant's brief is restricted to the question of the defendant's negligence. It was no doubt prepared on the theory that the plaintiff entered the drug store as an invitee to whom the defendant owed the duty to exercise reasonable care; and to sustain this position the plaintiff relies on the general principle that the owner or occupant of premises who invites others to go thereon owes to such persons a duty in the exercise of due care to have his premises in a reasonably safe condi-

tion and to give warning of latent or concealed perils. *Ellington v. Ricks*, 179 N. C., 686; *Leavister v. Piano Co.*, 185 N. C., 152.

It is said in the brief of the appellee that the court held there was no evidence of negligence on the part of the defendant which should be submitted to the jury—a conclusion which may have been reached on the principle that the plaintiff, if an invitee at the time she entered the store, assumed, when she went into the prescription department for the purpose of using a private telephone, the character of a bare licensee, to whom the defendant was not liable for passive negligence. *Monroe v. R. R.*, 151 N. C., 374; *Money v. Hotel Co.*, 174 N. C., 508; *Brigman v. Construction Co.*, 192 N. C., 791.

From the appellee's brief we derive the further information that the trial court held that the plaintiff, according to her own testimony, proximately caused or contributed to her injury by her own negligence. If this is true, it is immaterial whether she was an invitee or a licensee when upon the defendant's premises.

The plaintiff related the circumstances under which she was injured. By permission of the clerk she went back to the prescription department through a little lattice way, and the clerk turned on the light. She used the telephone and walked directly out into the passage that led to the front of the building. On the direct examination she said: "I walked over to the door, which I judged I came out of, opened the door and took a step into a dark abyss of a basement, total darkness." And on the cross-examination she said: "After I stepped out of that lattice partition twelve or fifteen feet across I opened a door that led into the concrete basement; that is, I walked twelve or fifteen feet from the door that led out of the lattice work office and walked straight ahead of me toward the front of the store. I did not notice a prescription desk or counter there, only the two doors before me; they were directly in front of me, and one led into the basement. I could not say how close those doors were together; they may have been four or five feet apart. I opened only one of the doors. I saw both doors and they were facing toward the front of the store and were on the same line with each other. . . . I had no chance to look after I opened the door; it led into the basement; it was total darkness and I lost my balance. I did not stop to look as I opened the door."

The plaintiff testified that the space she entered after leaving the lattice partition was lighted sufficiently for her to see the two doors and that she walked to the door which she judged she had come through, opened it, and without "stopping to look as she opened the door" plunged into "total darkness." It is perfectly obvious that her unfortunate injury resulted directly from her want of judgment or her want of care.

Judgment

Affirmed.

MRS. A. M. FARRELL v. THOMAS AND HOWARD COMPANY.

(Filed 10 May, 1933.)

1. Pleadings D e—Upon demurrer the allegations of the complaint are taken as true and are to be liberally construed.

Upon a demurrer the allegations of the complaint and the reasonable inferences therefrom are deemed admitted, and the demurrer will be overruled if any part of the complaint presents facts sufficient to constitute a cause of action or such facts can be reasonably inferred therefrom by a liberal construction with a view to substantial justice between the parties. C. S., 535.

2. Negligence A c—Complaint held to state cause of action for negligent injury from unsafe condition of premises.

A complaint alleging in substance that plaintiff was an invitee on defendant's premises, that the steps leading from defendant's office were in an unsafe condition to defendant's knowledge, and that defendant knowingly failed to use due care to provide reasonably safe steps, and that plaintiff was injured as a proximate result thereof when she fell while attempting to leave defendant's office where she had gone on business as an invitee, is held to sufficiently allege a cause of action, and defendant's demurrer thereto was properly overruled.

3. Negligence D a: Pleadings D a—

Contributory negligence is a matter of defense and must be alleged and proven, C. S., 523, and it may not be taken advantage of by demurrer, and defendant's remedy to confine plaintiff to one of several acts of negligence is by application for a bill of particulars and not by demurrer.

APPEAL by defendant from *Cowper, Special Judge*, at October Term, 1932, of MECKLENBURG.

This is an action to recover damages for personal injury. The plaintiff owns and conducts a retail store on Highway 27 in Cabarrus County; the defendant is a corporation engaged in a general wholesale grocery business in the city of Charlotte. On 6 June, 1932, the plaintiff went to the defendant's place of business as a customer, and while going down the steps leading from the defendant's office to the sidewalk, she was thrown violently from the steps to the sidewalk and was injured.

The allegations of negligence are as follows:

6. That the above injuries and damages herein set forth were caused and occasioned by and followed as a direct and proximate result of the negligence of the defendant in that the said defendant maintained and kept the steps which lead from its office to the sidewalk in a dangerous and unsafe condition in that the bricks in said steps were badly worn and uneven and had dangerous holes therein, and that the bricks at the

edge of the steps were particularly badly worn and uneven, and that the mortar joints between the bricks were uneven and higher than the level of the bricks, and at the time this plaintiff fell thereupon they were in a most dangerous and unsafe condition, which condition was known to the defendant or should have been known by the exercise of reasonable care, and that the maintaining and keeping of said steps in such condition for the use of its customers, as the plaintiff was at the time of receiving said injuries, was gross negligence on the part of the defendant, and that said negligence was the direct and proximate cause of the injuries of the plaintiff as heretofore set forth.

7. That the above described injuries received by this plaintiff followed as a direct and proximate result of the negligence of the defendant in that said defendant knowingly, wilfully and negligently failed to use due care in providing its customers and other invitees, and more especially this plaintiff, with reasonably safe steps upon which to enter and leave its office, which customers are invited to come to its place of business, and that the defendant knew or should have known by the exercise of reasonable care that the said steps were in a dangerous and unsafe condition for the use of its customers and other invitees, and further that the defendant knowing the dangerous and unsafe condition of said steps negligently failed to warn or notify this plaintiff of the dangerous and unsafe condition of said steps and the impending danger of using the same.

8. That by having received the injuries above described, which was the direct and proximate result of the negligence of the defendant as hereinbefore set forth, this plaintiff has been greatly damaged.

The defendant demurred to the complaint on two grounds:

1. The complaint does not state facts sufficient to constitute a cause of action.

2. That there are no facts alleged in the complaint which facts, if true, constitute actionable negligence as the proximate cause of the injury which the plaintiff alleges she may have suffered.

The court overruled the demurrer and the defendant excepted and appealed.

Scarborough & Boyd and Fred H. Hasty for plaintiff.
James E. Gay, Jr., and J. F. Flowers for defendant.

ADAMS, J. The demurrer admits all the allegations of the complaint and all inferences that may reasonably be deduced from it under a liberal construction of its terms. *Hendrix v. R. R.*, 162 N. C., 9; *Brewer v. Wynne*, 154 N. C., 467. For the purpose of ascertaining its meaning and determining its effect as a pleading its allegations will be liberally

construed with a view to administering substantial justice between the parties. C. S., 535; *Bank v. Duffy*, 156 N. C., 83. In *Hartsfield v. Bryan*, 177 N. C., 166, it was held that a complaint will be sustained as against a demurrer if any part of it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be inferred by a liberal interpretation of the plaintiff's allegations.

Tested by these principles the judgment overruling the demurrer should be sustained. The material allegations are that the plaintiff went upon the premises of the defendant as an invitee; that the steps leading from the office to the sidewalk were in an unsafe condition; that the bricks in the steps were badly worn and uneven, some of them made particularly dangerous by the holes in them; that the mortar joints between the bricks were higher than the level of the steps; that the defendant knew that the entrance to the office was unsafe and dangerous to the defendant's customers and invitees; that the defendant knowingly, negligently, and wilfully failed to use due care in providing reasonably safe steps; that while on the steps and in the act of leaving the defendant's premises the plaintiff was thrown to the sidewalk and injured; that the heel of her shoe caught upon the steps and was pulled from her shoe; and that the negligence of the defendant was the direct and proximate cause of the plaintiff's injury.

The defendant owed to the plaintiff as its invitee the duty to exercise ordinary care for her safety in going into and retiring from the office. *Ellington v. Ricks*, 179 N. C., 686. Whether the plaintiff was negligent is a matter of defense and must be set up in the answer and proved on the trial. C. S., 523. If the defendant claims the right to confine the plaintiff to any one of the several acts of negligence set forth in the complaint its remedy is not a demurrer but an application for a bill of particulars. *Bristol v. R. R.*, 175 N. C., 509. Judgment

Affirmed.

V. B. HIGGINS v. CHIMNEY ROCK MOUNTAIN, INCORPORATED, L. B. MORSE, W. H. BIGGS, K. S. TANNER, S. B. TANNER, JR., S. E. ELMORE, J. H. THOMAS, T. F. OATES, AND B. B. DOGGETT.

(Filed 10 May, 1933.)

Execution J c—Funds paid to liquidator pursuant to criminal action held not subject to supplemental proceedings by civil judgment creditor.

Execution on a judgment against defendants was returned unsatisfied and plaintiff instituted supplemental proceedings. Plaintiff levied on certain funds in the hands of the liquidator of an insolvent bank and

obtained an order restraining the liquidator from disposing of the funds. The trial court found that the funds levied upon were paid into the hands of the liquidator by persons other than the defendants and were paid to him for distribution to the depositors and creditors of the bank pursuant to the terms and conditions suggested by the court for the disposition of criminal actions against defendants for violation of the banking laws. Upon the facts found the trial court adjudged that the funds were not subject to any lien by reason of the levy and that the restraining order be dissolved. *Held*, the facts found support the order, it appearing that the liquidator had no funds in his hands belonging to defendants and was not indebted to them, and an exception to the order cannot be sustained, there being no exception to the findings of fact.

APPEAL by plaintiff from *Harding, Resident Judge* of the Fourteenth Judicial District, at Chambers, in the city of Charlotte, on 28 October, 1932. Affirmed.

From an order made on 28 October, 1932, in a supplemental proceeding in execution instituted by the plaintiff in the above entitled action, denying his motion that certain funds in the hands of the respondent be applied to the payment of the judgment in the action, the plaintiff appealed to the Supreme Court.

J. F. Flowers for plaintiff.
I. M. Bailey for respondents.

CONNOR, J. At January Special Term, 1930, of the Superior Court of Mecklenburg County, the plaintiff recovered a judgment against the defendants in this action for the sum of $29,979.50, with interest from 9 January, 1928, and for the costs of the action. This judgment was duly docketed in the office of the clerk of said court. Thereafter a transcript of said judgment was duly docketed in the office of the clerk of the Superior Court of Rutherford County, in which county the defendants, S. E. Elmore, K. S. Tanner, T. F. Oates and B. B. Doggett reside. Executions were duly issued on said judgment and directed to the sheriffs of Mecklenburg and Rutherford counties. These executions were returned wholly unsatisfied. No payments have been made on the judgment, by the defendants or by either of them.

On or about 28 April, 1931, the plaintiff instituted a supplemental proceeding in execution in the action, and procured an order from the resident judge of the Fourteenth Judicial District for the examination of the defendants and other persons as to property owned by the defendants and each of them, which was applicable to the payment of the judgment. This examination was had before a referee appointed by the judge in Rutherford County. On 18 May, 1931, plaintiff caused notice to be served on John D. Biggs, liquidating agent of the Rutherford County Bank and Trust Company and of the Farmers Bank and Trust

Company, by the sheriff of Rutherford County, that said sheriff had levied, and did by said notice levy, upon certain funds in his hands, which had been paid to him by the Honorable H. Hoyle Sink, one of the judges of the Superior Courts of this State, for the benefit of the defendants, K. S. Tanner, S. E. Elmore, and B. B. Doggett. Both the Rutherford County Bank and Trust Company and the Farmers Bank and Trust Company are now insolvent banking corporations organized under the laws of this State, and are being liquidated by John D. Biggs as liquidating agent, under the supervision and orders of Gurney P. Hood, Commissioner of Banks of North Carolina.

On the facts found by Judge Harding, resident judge of the Fourteenth Judicial District, at his Chambers in the city of Charlotte, with respect to the funds in the hands of John D. Biggs, liquidating agent, it was considered, ordered and adjudged that said funds, now on deposit with the Union Trust Company subject to the orders of Gurney P. Hood, Commissioner of Banks, are not subject to any lien by reason of the levy made by the sheriff of Rutherford County. It was further ordered that the restraining order issued in the supplemental proceeding in execution be and the same was dissolved. From this order, the plaintiff appealed to this Court.

It appears from the facts found by Judge Harding and set out in his order that the funds now in the hands of John D. Biggs, liquidating agent, and subject to the orders of Gurney P. Hood, Commissioner of Banks, amounting to $49,814.68 and $7,500, were paid to said liquidating agent by Judge Sink on 15 May, 1931, for distribution by said liquidating agent as assets of the insolvent banking corporations now being liquidated by him, under the orders of the Commissioner of Banks of this State; that said funds were deposited with Judge Sink by various persons other than the defendants in this action, in compliance with terms and conditions suggested by Judge Sink for the disposition of certain criminal actions tried before Judge Sink at February Special Term, 1931, of the Superior Court of Rutherford County; that the defendants, K. S. Tanner, S. E. Elmore and J. F. Oates were convicted and the defendant, B. B. Doggett, entered a plea of nolo contendere in said actions; that the defendants in said actions were charged with violations of C. S., 224(g); and that upon the deposit of said funds with Judge Sink, the presiding judge at said trials, judgment against each of the defendants was suspended upon the payment of the costs. The funds were paid to John D. Biggs, liquidating agent prior to the date on which notice of the levy on said funds was served by the sheriff of Rutherford County on said liquidating agent. The said funds were received and are now held by John D. Biggs, liquidating agent in trust for the depositors of the insolvent banking corporations, and not for the defendants in this action, or either of them.

The plaintiff did not except to the findings of fact by Judge Harding. He excepted only to the order, and judgment. This exception was not well taken. The order is supported by the findings of fact. The respondents have no property in their possession belonging to the defendants. They are not indebted to the defendants. The defendants have no right, title or interest in or to the funds in the hands and subject to the orders of the respondents. The order restraining the defendants from disposing of said funds was properly dissolved. There is no error in the order. It is

Affirmed.

M. C. CARNES v. CARRIE MAIE CARNES.

(Filed 10 May, 1933.)

1. Divorce A e; D b: Appeal and Error E h—

Only the party injured is entitled to divorce *a mensa et thoro*, C. S., 1660, and the pleadings must be accompanied by the jurisdictional affidavit, C. S., 1661, but the questions are not presented on this appeal, only the record proper having been sent up and the verdict not being assailed.

2. Divorce E a—Wife is not entitled to alimony upon divorce a mensa where verdict establishes that she was at fault.

In order for the wife to be entitled to alimony in her action for divorce from bed and board she must allege and prove her grounds for such divorce and that the acts complained of were without provocation on her part, and where the verdict of the jury establishes that both parties had offered such indignities to the person of the other as to render his or her condition intolerable and life burdensome, and judgment is entered granting each a divorce *a mensa et thoro*, the wife is not entitled to alimony as long as the verdict stands undisturbed, and the granting of alimony and counsel fees to her is error.

APPEAL by plaintiff from *Schenck, J.*, at November Term, 1932, of RICHMOND.

Civil action by husband for divorce *a vinculo* on ground of wife's alleged adultery. Denial by the wife and cross-action for divorce *a mensa et thoro* because of such alleged indignities as to render her condition intolerable and life burdensome. Reply by the husband denying allegations of the wife and setting up further action for divorce *a mensa et thoro* on grounds similar to those alleged by the wife.

The case was tried on the following issues:

"1. Were the plaintiff, M. C. Carnes, and the defendant, Carrie Maie Carnes, married as alleged? Answer: Yes.

"2. Have the plaintiff, M. C. Carnes, and the defendant, Carrie Maie Carnes, been residents of the State of North Carolina for two years next preceding the institution of this action? Answer: Yes.

"3. Did the defendant, Carrie Maie Carnes, commit adultery as alleged in the complaint? Answer: No.

"4. Did the plaintiff, M. C. Carnes, offer such indignities to the person of the defendant, Carrie Maie Carnes, as to render her condition intolerable and life burdensome, as alleged in the answer? Answer: Yes.

"5. Did the defendant, Carrie Maie Carnes, offer such indignities to the person of the plaintiff, M. C. Carnes, as to render his condition intolerable and life burdensome, as alleged in the reply? Answer: Yes."

Judgment on the verdict granting each a divorce *a mensa et thoro* and awarding the defendant alimony and counsel fees. The plaintiff appeals from that portion of the judgment which awards to the defendant alimony *pendente lite* and counsel fees.

D. Emerson Scarborough for plaintiff.
Fred W. Bynum and Johnson & Johnson for defendant.

STACY, C. J. Nothing but the record proper—summons, pleadings, verdict and judgment—has been sent up as the case on appeal. It contains none of the evidence or the charge of the court. Hence, the anomaly of the judgment granting a divorce *a mensa et thoro* to both parties at the same time, is not before us for consideration. Only the party injured is entitled to a divorce from bed and board under C. S., 1660. *Sanderson v. Sanderson,* 178 N. C., 339, 100 S. E., 590. See, also, *Reeves v. Reeves,* 203 N. C., 792. Evidently, the jury took the view that both parties had been injured.

It may be doubted whether the plaintiff's "reply" is sufficient to warrant a decree in his favor. *Martin v. Martin,* 130 N. C., 27, 40 S. E., 822. It is not accompanied by the jurisdictional affidavit as required by C. S., 1661. *Nichols v. Nichols,* 128 N. C., 108, 38 S. E., 296. But as stated above, nothing is questioned except the order granting the wife alimony *pendente lite* and counsel fees. The verdict is not assailed.

In an action by a wife against her husband for divorce from bed and board, she must not only set out with particularity the acts of cruelty on the part of the husband upon which she relies, but she is also required to aver, and consequently to prove, that such acts were without adequate provocation on her part. *Dowdy v. Dowdy,* 154 N. C., 556, 70 S. E., 917; *Martin v. Martin, supra; O'Connor v. O'Connor,* 109 N. C., 139, 13 S. E., 887; *Jackson v. Jackson,* 105 N. C., 433, 11 S. E., 173; *White v. White,* 84 N. C., 340.

As long as the fifth issue stands undisturbed, it would seem that the defendant is not entitled to the relief demanded by her, certainly not to allowance for alimony and counsel fees. *Dowdy v. Dowdy, supra.*

Error.

STATE v. CLARENCE A. SMITH.

(Filed 10 May, 1933.)

Indictment E c—Proof of guilt of crime other than the one charged held erroneously admitted, entitling defendant to new trial.

Where the indictment charges the defendant with breaking and entering a certain store in a specified county and stealing certain property therefrom and with receiving stolen property, evidence of breaking and entering another store in another county is incompetent even upon the charge of receiving, since the receiving count applied to property alleged to have been stolen from the store specified in the indictment, the testimony not coming within any of the exceptions to the rule that evidence of guilt of a distinct and substantive offense is inadmissible to prove another and independent crime.

CRIMINAL ACTION, before *Stack, J.*, at October Term, 1932, of FORSYTH.

The defendant and another were indicted upon three counts. The first count charged that on 31 July, 1932, the defendants did break and enter a certain store house of S. E. Hauser and Company and did steal, take and carry away certain personal property. The second count charged stealing and transportation of certain articles from said store, consisting of cigarettes, smoking tobacco, dresses, etc. The third count was for receiving the said goods and chattels of S. E. Hauser and Company.

The evidence tended to show that the store house of Hauser and Company, was broken into and certain cigarettes, snuff, tobacco and shoes had been taken, and that the store of the defendant Smith was searched and certain snuff, cigarettes, and chewing tobacco were found in his store. The labels were torn off some of these boxes and cartons, and the brands of snuff, cigarettes, etc., corresponded with brands missing from the Hauser stores. The defendant Smith made no objection to the search. The evidence further tended to show that the defendant sold tobacco and cigarettes in his place of business and was generally considered as a wholesale tobacco dealer.

There was a verdict of guilty as to both defendants. Smith was sentenced to the State prison for not less than three nor more than five years, from which judgment he appealed.

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

Parrish & Deal for defendant.

BROGDEN, J. The State introduced evidence that a store owned by S. E. Hauser and Company at King, in Surry County, had been broken into, and certain tobacco, cigarettes, etc., had been stolen therefrom.

The defendant objected to all of this testimony because the bill of indictment charged the breaking and entering of the store of Hauser Brothers in Forsyth County, and stealing, transporting and receiving stolen goods therefrom. Evidence of the crime in Surry County was apparently admitted upon the theory that it was competent upon the count for receiving stolen goods. The pertinent rule of competency declared and adhered to in this State is that: "Evidence of a distinct, substantive offense cannot be admitted in support of another offense, as a general rule. . . . It is when the transactions are so connected or contemporaneous as to form a continuing action that evidence of the collateral offense will be heard to prove the intent of the offense charged. It is undoubtedly the general rule of law that evidence of a distinct substantive offense is inadmissible to prove another and independent crime, the two being wholly disconnected and in no way related to each other. *S. v. Graham,* 121 N. C., 523, 28 S. E., 537; *S. v. Dail,* 191 N. C., 231, 131 S. E., 573; *S. v. Deadmon,* 195 N. C., 705, 143 S. E., 514. There are certain exceptions to the general rule. However, the testimony assailed in this case cannot be classified within any of said exceptions. Nor was the evidence competent upon the count for receiving. The receiving count applied to personal property stolen or alleged to be stolen from the Hauser store in Forsyth County.

There are many other exceptions in the record, but it is deemed inadvisable to discuss them for the reason that the defendant is entitled to a new trial for the error suggested.

New trial.

FAY BOYETT v. THE FIRST NATIONAL BANK OF DURHAM, TRUSTEE, THE HOME MORTGAGE COMPANY, THE METROPOLITAN CASUALTY OF NEW YORK, V. S. BRYANT, SUBSTITUTED TRUSTEE, THE FIDELITY BANK OF DURHAM, N. C., SUCCESSOR TRUSTEE, J. M. BOYETT, R. L. BROWN, G. HOBART MORTON, TRUSTEE, G. D. B. REYNOLDS AND LEE M. BOYETT.

(Filed 10 May, 1933.)

1. Mortgages A c—

Where the private examination of a married woman is not taken to a deed of trust executed by her it is void. C. S., 997.

2. Mortgages B c—Purchase money borrowed by married woman held equitable lien on land although mortgage was void for improper acknowledgment.

The plaintiff and her husband executed a note and signed a receipt in the amount thereof and used the proceeds of the note as a part of the purchase price of land, and executed a mortgage on the land to secure

its payment. Plaintiff and her husband also signed an estoppel certificate stating that it was to be exhibited to prospective purchasers of the note and certifying that there were no defenses available to the payees against the payment of the note. The mortgage, although registered and regular on its face, was void because not properly acknowledged: *Held*, since a married woman has the power to contract under our present law, she can be held liable in equity for the return of the loan, and although equity will not compel the acknowledgment of the mortgage, it will declare the amount paid to her and used by her in the payment of the purchase price an equitable lien on the land prior to a valid but subsequently executed mortgage.

APPEAL by plaintiff from *Hill, Special Judge,* at September Term, 1932, of STANLY.

The plaintiff instituted this action to restrain the sale of real property described in a deed of trust which she and her husband executed and delivered to the First National Bank of Durham.

The case was heard upon the following agreed statement of facts:

1. That on or about 1 June, 1928, the plaintiff, Fay Boyett, together with her husband, J. M. Boyett, applied to the Home Mortgage Company for a loan of a certain sum of money, and the said Fay Boyett and husband agreed to pledge as security for such loan a tract of land located in Stanly County, North Carolina, and which is the same property as described in paragraph two of plaintiff's complaint; a copy of said application is hereto attached and made a part of this record.

2. That the said Fay Boyett, together with her husband, J. M. Boyett, did on or about 3 September, 1928, execute and deliver a deed of trust to the First National Bank of Durham, N. C., trustee, which said deed of trust was thereafter recorded in deed of trust Book No. 105, at page 86 of the office of the register of deeds for Stanly County, N. C.; a copy of said instrument is hereto attached and made a part of this findings of fact.

3. That the said Fay Boyett did not appear before a notary public and make acknowledgment of the execution of said deed of trust separate and apart from her husband as required by the statute, and neither was her private examination taken touching her voluntary execution of same as required by the statute.

4. That the said Fay Boyett, admitted in open court, in the presence of her husband, J. M. Boyett, that she did sign the instrument freely and voluntarily, and for the purposes as therein expressed.

5. That on or about 3 September, 1928, Fay Boyett and her husband, J. M. Boyett, signed a receipt for $3,500, a copy of which is attached hereto and made a part of this record.

6. That on or about 3 September, 1928, Fay Boyett and J. M. Boyett endorsed a draft payable to themselves and Brown and Sykes, attorneys,

in the sum of $3,500, same being drawn on the Home Mortgage Company of Durham, N. C., a copy of which is attached hereto and made a part of this record.

7. That on or about 3 September, 1928, Fay Boyett and J. M. Boyett signed and delivered an estoppel certificate, a copy of which is hereto attached and made a part of this record.

8. That Fay Boyett and J. M. Boyett executed notes aggregating the sum of $3,500, and as referred to in the above set forth deed of trust, payable to bearer, and due on or before twelve and one-half years after date.

9. That on or before 3 September, 1928, the property described in paragraph two of plaintiff's complaint was owned by, and in the possession of R. L. Brown, a citizen and resident of Albemarle, N. C., and when the proceeds of the $3,500 loan above referred to were paid by the Home Mortgage Company to the borrowers, it was in turn and on the same date paid to R. L. Brown as part of the purchase price of the real estate described in paragraph two of plaintiff's complaint, except so much thereof as was used in payment of fees and expenses of obtaining said loan.

10. That the deed for the property described in paragraph two of the complaint was filed for record in the office of the register of deeds for Stanly County on 4 September, 1928, from R. L. Brown and wife, to Fay Boyett, this being the same date on which the deed of trust to First National Bank of Durham, N. C., trustee, was also filed.

11. That on 4 September, 1928, Fay Boyett, together with her husband, J. M. Boyett, executed and delivered to G. Hobart Morton, as trustee, with R. L. Brown as beneficiary, a second mortgage or deed of trust, securing the principal sum of $3,000, and pledged as security therefor the property described in paragraph two of plaintiff's complaint, which said deed of trust appears of record in Book of Mortgages No. 89, at page 128, and said deed of trust recites that it is given subject to the mortgage of $3,500 to the First National Bank of Durham, N. C., as trustee; said second deed of trust or mortgage was not signed before a notary public, and private examination of Fay Boyett was not taken as required by law.

12. That on or about 1 January, 1929, Fay Boyett, together with her husband, J. M. Boyett, executed and delivered to Lee M. Boyett a deed of conveyance covering the said property described in paragraph two of the complaint, which said deed is regular on its face and is of record in the office of the register of deeds of Stanly County in Book 85, page 71. That said deed was not acknowledged before a notary public, and private examination of Fay Boyett taken as required by law.

13. That on or about 21 August, 1921, said plaintiff, Fay Boyett, together with her husband, J. M. Boyett, executed and delivered to G. D. B. Reynolds, a certain deed of trust securing an indebtedness of $1,000, and pledged as security therefor the tract of land described in paragraph two of plaintiff's complaint, which said deed of trust is regular on its face, and is of record in the office of the register of deeds of Stanly County in Book 119, page 69; that the same was duly acknowledged by Mrs. Fay Boyett before a notary public, Lula S. Shaver, and her private examination taken, in compliance with the statute.

14. That thereafter the plaintiff, Fay Boyett, made certain payments to the Home Mortgage Company on said indebtedness, evidenced by the above referred to promissory notes, but that there is now due thereon and which remains unpaid, the amount of three thousand nine hundred forty-seven and 84/100 dollars ($3,947.84), with interest thereon from 15 May, 1932, at the rate of 6 per cent per annum.

15. That the plaintiff, Fay Boyett, had some time prior to 3 September, 1928, delivered to her husband, J. M. Boyett, the sum of $1,500 with which to purchase a home for her, there being no evidence, however, that this $1,500 was used in the purchase price of the property in question.

16. That the Fidelity Bank and Trust Company as successor trustee, is now the owner and the holder of the notes executed and delivered, payable to bearer, by Fay Boyett and J. M. Boyett.

17. It is agreed between the parties that copies of the exhibits may be attached to this judgment and become a part thereof, and the originals are allowed to be withdrawn.

Upon the foregoing facts the court rendered the following judgment:

It is therefore ordered, adjudged and decreed, that the land together with the improvements located thereon, and which are described in paragraph one of the plaintiff's complaint, and also described in the deed of trust to First National Bank of Durham, N. C., as trustee, be, and the same are hereby impressed with a trust for the benefit of the holder of the notes executed by Fay Boyett and J. M. Boyett, and which are referred to in that deed of trust to First National Bank of Durham, N. C., as trustee, and which are of record in the office of the register of deeds of Stanly County in Book 105, at page 86, to the extent of the balance of the indebtedness remaining unpaid on said notes, together with interest thereon; and that said indebtedness to the amount of three thousand nine hundred forty-seven and 84/100 dollars ($3,947.84), with interest thereon from 15 May, 1932, as is evidenced by said notes and deed of trust, attached to and became impressed upon said land, and became a lien thereon as of the date of 3 September, 1928, and is a

prior lien thereon to all subsequent liens, deeds or deeds of trust, and is a prior lien to the right, title and interest of any and all other parties to this action.

It is further ordered and adjudged that the holders of said notes described in said deed of trust are entitled to have said land sold for the purpose of satisfying the balance remaining due thereon, and for that purpose V. S. Bryant is hereby appointed commissioner of the court, and is authorized, directed and empowered to make said sale at the courthouse door in Albemarle, after due advertisement as required by law, and report his proceedings to the court for the further orders of the court. And upon the confirmation of said sale that the proceeds derived therefrom be applied as follows:

1. To the cost and expense of said sale and this action, and the payment of taxes, if any, on said land, together with a reasonable allowance to the commissioner for his services;

2. To the payment of the notes secured by the deed of trust of the First National Bank of Durham, trustee;

3. If a balance then remains, to be paid to the clerk of the Superior Court of Stanly County, for application on the subsequent liens of record against said property in accordance with the further orders of this court with respect thereto.

It is further considered, ordered and adjudged by the court that nothing herein shall be considered or construed as adjudicating the rights between R. L. Brown, G. D. B. Reynolds and Lee M. Boyett and other parties to this action as to their respective claims or interests in said land.

It is further ordered and adjudged that the restraining order heretofore issued in this cause be, and the same is, hereby dissolved.

The plaintiff and the defendant, G. D. B. Reynolds excepted and appealed.

G. D. B. Reynolds for appellants.

R. L. Smith & Sons and Harkins, Van Winkle & Walton for appellees.

ADAMS, J. The plaintiff held title to the real estate in controversy. She and her husband executed and delivered the deed of trust, and a notary public who took the acknowledgment of the makers certified, as the law requires, to the private examination of the wife. The parties agree, however, that the notary never examined the wife while separate and apart from her husband touching her voluntary assent to the instrument. C. S., 997.

The plaintiff seeks a reversal of the judgment, and rests her appeal on two propositions: (1) the deed of trust is invalid and ineffective because

her private examination was not taken pursuant to law; (2) upon no legal or equitable principle can she be held liable for the return of the loan, or the real property described in the instrument be subjected in equity to the burden of a trust.

The first proposition may be conceded. *Scott v. Battle,* 85 N. C., 184; *Council v. Pridgen,* 153 N. C., 443; *Foster v. Williams,* 182 N. C., 632; *Hardy v. Abdallah,* 192 N. C., 45.

The second proposition must be considered in its relation to the statement of facts. The plaintiff and her husband signed a receipt for $3,500 for the sale or pledge of their note which was secured by the deed of trust and paid this sum, except fees and expenses, to R. L. Brown as a part of the purchase price of the land which he conveyed to the plaintiff. The plaintiff received the full benefit of the loan and now contends that the deed of trust is void and that she is free from any liability attaching to its execution. As to this position also, she relies on *Scott v. Battle, supra.* There the material facts are given as follows: "In the year 1845 the plaintiff intermarried with one T. H. Scott, and lived with him until the year 1850, when she separated herself from him, and from that time until his death in 1876 they lived apart with the exception of one short interval, he at no time after the day of their first separation assuming any control over her property. At the time of her marriage, the plaintiff was seized in fee of the land in controversy, and continued to possess the same until 7 December, 1858, when she conveyed it to her brother, the defendant L. F. Battle, by a deed to which her husband was not a party. The deed was attested by two witnesses, and in 1872 it was admitted to probate upon the oath of one of them, and registered without her being privily examined in regard thereto. At the time of the execution of the deed, the said L. F. Battle gave his note to the plaintiff for $600, upon which she brought suit and, at Spring Term, 1870, recovered judgment for the full amount of principal and interest, and in 1871 collected the same in full and used the money."

The trial court held that the plaintiff's deed to Battle did not convey her interest in the land, but that she was not entitled to recover possession thereof until she had repaid the purchase money. On appeal this Court held that the plaintiff's deed to Battle was "wholly inoperative" and that the defendant's demand for the restoration of the purchase money should be refused. The conclusion was stated in these words: "The plaintiff's right to the possession of the land cannot be questioned. The statute imperatively says that, in order to effectually pass the estate of a married woman in lands, the conveyance must be executed jointly with her husband and, after due proof or acknowledgment thereof as to him, she shall be privily examined as to her voluntary assent thereto.

Bat. Rev., chap. 35, sec. 14. To properly understand the effects of these provisions, it is necessary to remember that the statute is an enabling, not a disabling one. . . . The statute confers upon her the power to convey by a simple mode, but it prescribes the terms, and without their strict observance the act stands, as it would at common law, absolutely null and void. The instrument executed by the present plaintiff to the defendant Battle lacked both of the essential elements to constitute it her deed—its joint execution by the husband and her own private examination—and consequently it is wholly inoperative."

Scott v. Battle, supra, was decided in the year 1881. At that time it had been settled by uniform decisions of this Court that a married woman was incapable of making any executory contract whatever except in the cases mentioned in sections 1828, 1831, 1832, and 1836 of The Code. *Farthing v. Shields,* 106 N. C., 289. Afterwards the law was materially changed by the enactment of a statute which provides that every married woman, except as to conveyances and contracts with her husband, shall be authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried; but no conveyance of her real estate shall be valid unless made with the written assent of her husband as provided by section six of article ten of the Constitution and her privy examination as to her execution of the same be certified as now required by law. Public Laws, 1911, chap. 109. It has accordingly been held that a married woman may bind herself by a contract for the purchase of goods, by a contract of suretyship, and by a contract to convey real property. *Lipinsky v. Revell,* 167 N. C., 508; *Royal v. Southerland,* 168 N. C., 405; *Warren v. Dail,* 170 N. C., 406.

It is admitted that the plaintiff and her husband signed and delivered an estoppel certificate, which is made a part of the record. It contains this paragraph: "The undersigned has therefore executed this instrument in order that it may be exhibited to prospective purchasers of the said note to induce a purchase of the same, and do hereby represent and certify that there are no defenses available to the undersigned or any of them against the payment of said note, or the payment of the monthly sums set out in the deed of trust securing same, nor any offsets or equities between the undersigned and the holder thereof, and the said deed of trust and note thereby secured are valid and free from any and all infirmities of any nature whatsoever."

In *Scott v. Battle, supra,* it was said that a married woman's disability to contract distinguishes her case from one in which a purchaser under a parol contract, void under the statute, has been allowed his claim for a return of the purchase money; that the ruling in such case

proceeds on the idea that although the contract was void the party had capacity to make it; and that the ground of relief was that the vendor by inducing the vendee to spend his money on the land had obtained an unconscionable advantage which a court of equity would not permit him to use. As a married woman now has power to contract the principle applies to her as it applies to others. *Gann v. Spencer,* 167 N. C., 429.

The principle is exemplified in *Burns v. McGregor,* 90 N. C., 222. A married woman, her husband joining her in the execution of the deed, conveyed her land and received a deed for a tract of greater value, agreeing to execute a note and mortgage to the plaintiff on the latter tract to secure payment of the difference in the price. She signed the note and mortgage but refused to acknowledge the execution of the mortgage as her voluntary act. The court, disapproving her conduct, remarked: "The wife may, under an engagement not legally binding upon her, refuse to pay her debt, but if she does so, she cannot keep the property for which the debt was contracted. It would contravene the plainest principles of justice to allow a married woman to get possession of property under an engagement not binding upon her, and let her repudiate her contract and keep the property. She must observe and keep her engagement, or else return the property; if she will not, the creditor may pursue and recover it by proper action in her hands."

A court of equity will not undertake to compel a married woman to execute and acknowledge a deed freely and voluntarily but it can declare the price paid her to be an equitable lien on the land in favor of the other party. *North v. Bunn,* 122 N. C., 766.

The plaintiff received, accepted, and used the amount advanced as a loan and certified that no defenses were available to her against the payment of the note and that the deed of trust is valid and free from any and all infirmatives. To grant her the relief she seeks in this action would be inequitable and unjust. Judgment

Affirmed.

J. W. LITTLE v. FRANKLIN T. MILES.

(Filed 10 May, 1933.)

Constitutional Law G b: Execution K a—Execution against person of nonresident will not lie where resident would not be subject thereto.

Under the provisions of Article IV, sec. 2, Amendment XIV, sec. 1, of the Constitution of the United States, a state may not grant to its citizens privileges or immunities not afforded to those of other states, and a nonresident may not be held liable to arrest and bail in a civil action not arising out of contract in cases where a resident of the State would not

be subject thereto, and to the extent of the discrimination C. S., 768 is void, and execution against the person of a nonresident defendant may not issue in an action for damages resulting from an automobile collision in this State where the jury does not find that the injury was wilful or wanton, since a resident defendant would not be subject thereto.

APPEAL by plaintiff from *Cowper, Special Judge,* at February Term, 1933, of RICHMOND. No error.

The plaintiff brought suit to recover damages for personal injury caused by the negligence of the defendant resulting in the collision of automobiles on a highway near Rockingham. The jury returned the following verdict:

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

2. If so, were the acts of the defendant complained of, committed in a wilful and wanton manner as alleged in the complaint? Answer: No.

3. What amount of damages, if any, is plaintiff entitled to recover of the defendant. Answer: $1,250.

4. Is the defendant a nonresident of the State of North Carolina? Answer: Yes. (By consent.)

The plaintiff tendered a judgment authorizing an execution against the person of the defendant in the event of the return of an execution against the property of the defendant unsatisfied in whole or in part and his failure to pay the amount of the judgment. The court refused to sign this judgment, and adjudged that the plaintiff recover of the defendant the sum of $1,250 with interest and that the defendant, who had been held to bond under proceedings in arrest and bail, be discharged and that his bond be canceled and his sureties released from liability.

The plaintiff excepted and appealed.

W. R. Jones for plaintiff.

T. D. Bryson, E. C. Bryson and Frèd W. Bynum for defendant.

ADAMS, J. On a cause of action not arising out of contract the defendant may be arrested in a suit for the recovery of damages for injury to the person which has been inflicted intentionally or maliciously—that is, when the act is characterized by fraud, wilfulness, wantonness, or criminality, but not when it is merely negligent or accidental. *Oakley v. Lasater,* 172 N. C., 96; *Weathers v. Baldwin,* 183 N. C., 276; *Coble v. Medley,* 186 N. C., 479; *Short v. Kaltman,* 192 N. C., 154; *Braxton v. Matthews,* 199 N. C., 484.

The verdict establishes the fact that the defendant's conduct was not wilful and wanton; but it is provided by statute that the defendant may be arrested in a suit for damages founded on a cause of action

not arising out of contract "where he is not a resident of the State." C. S., 768. The validity of this provision, which is the basis of the plaintiff's action, is assailed and denounced by the defendant. It will be observed, therefore, that the controversy is reduced to the single question whether a defendant who in this State has negligently injured the person of another can be subjected to proceedings in arrest and bail on the sole ground that at the time of the injury he was a nonresident of North Carolina; and this question involves the constitutionality of the contested clause of the statute.

The Constitution of the United States provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several states, and that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Article IV, sec. 2; Amendment XIV, sec. 1.

The first of these provisions was designed to protect persons who were citizens of one of the States; it did not apply to citizens of the United States resident in an organized or unorganized territory of the United States. *Estate of Johnson*, 96 A. S. R., 161. The Fourteenth Amendment provided for the latter contingency. The clause quoted from Article IV, sec. 2, does not operate as a limitation of the authority of a State over its own citizens. *Cole v. Cunningham*, 133 U. S., 107, 33 L. Ed., 538; *Brown v. New Jersey*, 175 U. S., 172, 44 L. Ed., 119. As to citizens of this State the limitation is prescribed by Article I, sec. 7, of the Constitution of North Carolina prohibiting the grant of exclusive or separate emoluments or privileges but in consideration of public services; but in the second section of Article IV there is no limitation upon the right of a State to confer such immunities and privileges upon its own citizens as it may deem fit. "The clause of the Constitution under consideration is protective merely, not destructive, nor yet even restrictive. Over and over again has the highest court of the United States so construed this provision. Thus in the *Slaughterhouse cases*, 16 Wall., 36, it is said: 'The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the states. . . . Nor did it profess to control the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several states that whatever rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.'" In the interpretation of these and similar provisions it is generally held that when a State undertakes to impose a burden upon citizens of other states not imposed upon its own citizens

such effort is void and the discrimination is of no effect. *Estate of Johnson, supra; Black v. McClung,* 172 U. S., 239, 43 L. Ed., 432.

In *Conner v. Elliot,* 18 Howard, 593, 15 L. Ed., 497, it was said to be safer and more in accordance with the duty of a judicial tribunal to leave the meaning of the words "privileges and immunities" to be determined in each case upon a view of the particular rights therein asserted and denied; but the term has been defined with sufficient accuracy to justify its application to the facts in this case. The courts have generally accepted and followed the definition given by *Washington, Circuit Justice,* in *Corfield v. Coryell,* 4 Wash. C. C., 371, 6 Fed. Cases, 546. He observed in the course of his opinion that Article IV, section 2, relates to privileges and immunities which are fundamental in their nature; which belong of right to the citizens of all free governments; and which have at all times been enjoyed by the citizens of the several states from the time of their becoming free, independent, and sovereign. Among these principles he enumerated protection by the government, the enjoyment of life and liberty, and the right of a citizen of one state to pass through or reside in any other state, remarking that the clause referred to was calculated "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states." Similarly the purpose and scope of the clause were pointed out in *Paul v. Virginia,* 8 Wallace, 168, 19 L. Ed., 357: "It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminating legislation against them by other states; it gives them the right of free ingress into other states, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws."

It is obviously the purpose of this clause of the Constitution to confer upon citizens of the several states the privileges and immunities which citizens of the same State should be entitled to under similar circumstances, including the right of traveling in any other state subject, of course, to the laws applicable to its own citizens. *Commonwealth v. Milton,* 54 A. D., 522, 529. An Ohio statute made the nonresidence of a debtor a ground of arrest in a civil action; but in its interpretation the Court confined the operation of the statute to persons other than citizens of the United States, holding that the arrest of a citizen of another state for nonresidence only would be a violation of the Federal Constitution. *Morrow v. Finch,* 1 Ohio Dec. (Reprint), 7 Wes. Law Journal, 144.

A nonresident of the State may be arrested here in a civil action in like manner with a resident for sufficient cause (C. S., 768 *et seq.*); but he may not be arrested and held to bail in a civil action instituted in this State for no cause other than that of his nonresidence. For mere negligent injury to the person a resident of North Carolina is not subject to the provisional remedy of arrest and bail; to subject a nonresident to liability on the sole ground of his nonresidence would transgress his right of free ingress and egress and would abrogate his constitutional guaranty of immunity.

No error.

LEE FLAKE v. THE HIGH POINT PERPETUAL BUILDING AND LOAN ASSOCIATION ET AL.

(Filed 10 May, 1933.)

Mortgages H p—

Where a mortgagee has received the surplus after foreclosure and has rented the land from the purchaser, any rights he may have on account of alleged wrongful foreclosure are waived by ratification.

APPEAL by plaintiff from *Stack, J.*, at January Term, 1933, of GUILFORD.

Civil action to recover damages for alleged wrongful foreclosure of deed of trust on plaintiff's land.

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

Garland B. Daniel, S. G. Daniel and George A. Younce for plaintiff.

Dalton & Pickens for defendants, High Point Perpetual Building and Loan Association and V. A. J. Idol, trustee.

Walter E. Crissman for defendant, G. Edwin Hedrick.

PER CURIAM. The plaintiff has received benefit of the surplus proceeds derived from the sale of the property, and voluntarily rented the premises from the purchaser, hence, it would seem that any rights he may have had on account of the alleged wrongful foreclosure have been waived by his ratification.

Affirmed.

CUTTER REALTY COMPANY v. DUNN MONEYHUN COMPANY.

(Filed 17 May, 1933.)

1. Sales I b—Unregistered conditional sales contract is valid as between the parties.

An unregistered conditional sales contract is valid as between the parties, C. S., 3311, 3312, and where an automobile dealer sells cars under conditional sales contracts and assigns the contracts to a discount corporation for value, and the discount corporation repossesses the cars from the purchasers upon default in the payment of the purchase price, the discount corporation is the owner of the cars as against the purchasers and the dealer although the conditional sales contracts were not registered.

2. Bailment A a: Receivers C b—Held: contract was one of bailment, and bailor was entitled to possession as against bailee's receiver.

A discount corporation obtained possession of and title to certain automobiles by repossessing them under conditional sales contracts which had been assigned for value to the discount corporation by the dealer. The discount corporation delivered the cars to the dealer under a contract providing that the dealer should repurchase such cars from the discount corporation for the amount due under the conditional sales contracts, and that until demand by the discount corporation and actual payment of the amount due by the dealer the title to the repossessed cars should remain in the discount corporation and that the dealer's possession should remain that of bailee for storage with duty to redeliver to the discount corporation upon demand. *Held*, the contract under which the cars were delivered to the dealer by the discount corporation was not a conditional sales contract, but created the relation of bailor and bailee, and the contract was not required to be registered, C. S., 3312, and the discount corporation remained the owner thereof and was entitled to possession upon demand as against the receiver of the dealer appointed upon the latter's insolvency.

APPEAL by the receiver of the defendant corporation from *Cowper, Special Judge,* at October Special Term, 1932, of MECKLENBURG. Affirmed.

Prior to the commencement of this action, the defendant corporation was engaged in business at Charlotte, N. C., as a dealer in automobiles. The defendant sold automobiles to its customers for cash, and also on the deferred payment plan. When the defendant sold an automobile on the deferred payment plan, by agreement with the purchaser, it retained title to the automobile until all the deferred payments had been paid in accordance with the terms of the sale. These agreements were in writing, and were in the form of conditional sales contracts. They were not recorded.

In order to realize cash for the conduct of its business from the conditional sales contracts made by it with its customers, the defendant

entered into a contract with the General Contract Purchase Corporation, by which the said corporation agreed to purchase from the defendant, from time to time, such of the conditional sales contracts which the defendants had made with its customers, as should be offered to said corporation by the defendant, and should be in accord with its requirements. It was agreed that the defendant should transfer and assign to said corporation, without recourse, such conditional sales contracts with its customers as the corporation should purchase from the defendant; that if thereafter the purchaser should make default in his payments as provided in his contract, and the corporation as assignee and owner of the conditional sales contract should repossess or recover from the purchaser the automobile described in his contract, and deliver the same to the defendant, the defendant would pay the corporation, upon its demand, in cash, the amount due on the contract; that when the corporation had repossessed or recovered an automobile, and had delivered the same to the defendant, the defendant would store the automobile in its garage, and hold the same as bailee of the corporation, until, upon its demand, the defendant had paid to the corporation in cash the amount due by the purchaser under his contract; and that until such demand and payment, both the title to the automobile, and the right to its possession, upon demand, should remain in the General Contract Purchase Corporation. This contract was in writing. It was not recorded.

Prior to the commencement of this action, the General Contract Purchase Corporation had repossessed or recovered from purchasers whose conditional sales contracts had been transferred and assigned to it by the defendant, without recourse, ten automobiles. These automobiles had been delivered to the defendant by the said corporation, under the terms of its contract, and were in the possession of the defendant at the date of the commencement of this action. The defendant had not paid to said corporation any part of the amounts due to it under the conditional sales contracts, although demand had been made on the defendant by the said corporation for the payments due under the conditional sales contracts for four of said automobiles.

After the receiver of the defendant corporation had been appointed by the court in this action, the General Contract Purchase Corporation demanded of said receiver that he deliver to it the ten automobiles, which were then in his possession. This demand was refused by the receiver, who contended that he was entitled to hold said automobiles as the property of the defendant. It was then agreed by and between the said corporation and the receiver, that the receiver should sell the ten automobiles in his possession, and hold the proceeds of the sale, without prejudice to the claim of the corporation, and subject to the orders of the court.

Pursuant to this agreement, the automobiles were sold by the receiver, who now has in hand, as the proceeds of the sale, the sum of $1,060.

Thereafter, the General Contract Purchase Corporation filed a petition in this action, praying the court to make an order directing the receiver to pay to it the said sum of $1,060. The receiver filed an answer to the petition. The proceeding was then heard by the court on a statement of facts agreed.

On these facts the court was of opinion that the contract between the defendant and the General Contract Purchase Corporation was not a conditional sales contract, and that under the provisions of this contract the said corporation was the owner and entitled to the possession of the ten automobiles which were in the possession of the defendant at the date of the commencement of this action.

It was thereupon ordered by the court that the receiver pay to the petitioner, General Contract Corporation, the said sum of $1,060, and that the costs of the proceeding be paid by the receiver. From this order the receiver appealed to the Supreme Court.

Fred B. Helms and Frank E. Exum for petitioner.
H. C. Jones and Brock Barkley for receiver.

CONNOR, J. When the General Contract Purchase Corporation, from time to time, delivered to the defendant the ten automobiles described in its petition, the said corporation was the owner of each of said automobiles. Its title and right to the possession of said automobiles was not and could not have been challenged by the defendant, notwithstanding the provisions of its contract with the said corporation, under which the delivery was made. The said corporation had repossessed or recovered each of said automobiles from the purchaser, under and by virtue of the conditional sales contract which had been transferred and assigned to it by the defendant, without recourse. The failure of the defendant or of said corporation, to have the conditional sales contract recorded, did not render the said contract void as between the purchaser and the defendant, or as between the purchaser and the General Contract Purchase Corporation, the assignee of the defendant. It has been uniformly held that a mortgage or conditional sales contract although not recorded, is valid as between the parties. It is void only as against creditors or purchasers for value. C. S., 3311, 3312. *Ellington v. Supply Co.*, 196 N. C., 784, 147 S. E., 307.

The automobiles were delivered to the defendant under the provisions of its contract with the General Contract Purchase Corporation. It is provided in said contract that "the dealer will repurchase each repossessed or recovered car, after the car has been tendered or delivered

to the dealer at the dealer's place of business . . . and will pay G. C. P. at its office, upon demand in cash the amount of the unpaid balance due G. C. P. on the note or other obligation. Until demand followed by actual payment by the dealer and delivery of official bill of sale by G. C. P. title to the repossessed car remains in G. C. P. and dealer's possession remains merely that of a bailee with duty to safely store for G. C. P. and redeliver to G. C. P. on demand."

By reason of this provision, the contract between the defendant and the General Contract Purchase Corporation, under which the automobiles described in the petition were delivered to the defendant, is not a conditional sales contract. It is not subject to the provisions of C. S., 3312, which requires the registration of all conditional sales of personal property in which the title is retained by the bargainor. At the date of the commencement of this action, the defendant had acquired no right, title or interest, legal or equitable, in the automobiles, except that of a bailee for storage. For that reason, the instant case is distinguishable from *Trust Co. v. Motor Co.*, 193 N. C., 663, 137 S. E., 874, and cases cited in the opinion in that case. The General Contract Purchase Corporation was the owner and entitled to the possession of the automobiles described in its petition, at the date of its demand that the receiver of the defendant redeliver said automobile to it.

There was no error in the order of the court directing the receiver to pay to the petitioner, General Contract Purchase Corporation, the proceeds of the sale of the automobiles which were in the possession of the defendant at the date of the commencement of this action. The order is

Affirmed.

EDWARD POWELL, ADMINISTRATOR, v. WM. R. MOORE.

(Filed 17 May, 1933.)

Appeal and Error F g—Clerk must pass upon application for appeal in forma pauperis within ten days from expiration of the term.

The affidavit required for appeals *in forma pauperis* in civil cases must be filed during the term or within five days thereafter, and the application must be passed upon by the clerk within ten days from the expiration of the term, C. S., 649, and an order allowing an appeal *in forma pauperis* entered by the clerk after the expiration of the statutory time is beyond the clerk's authority and the Supreme Court is without jurisdiction to entertain the appeal and it will be dismissed, the provisions of the statute being mandatory and not directory. The statutory requirements for appeals *in forma pauperis* in civil and criminal cases discussed by STACY, C. J.

POWELL *v.* MOORE.

APPEAL by plaintiff from *Stack, J.*, at November Term, 1932, of ROCKINGHAM.

Civil action for wrongful death in which the issue of negligence was answered in favor of the defendant. Judgment signed 3 December, 1932, the last day of the term. Notice of appeal given in open court. Time allowed for preparing statement of case on appeal. Appeal bond fixed at $100.

Fifty-nine days thereafter, 1 February, 1933, the clerk of the Superior Court, upon affidavit of insolvency and certificate of counsel, entered an order allowing the plaintiff to appeal *in forma pauperis*.

Motion by appellee to dismiss appeal.

Wm. R. Dalton for plaintiff.
Glidewell & Gwyn for defendant.

STACY, C. J. The Court is without jurisdiction to entertain the appeal, and the same will be dismissed on authority of *McIntire v. McIntire*, 203 N. C., 631, *Hanna v. Timberlake, ibid.*, 556, and *S. v. Stafford, ibid.*, 601.

It is provided by C. S., 649, *inter alia*, the provisions of which are mandatory and not directory, that an appeal *in forma pauperis* "when passed upon and granted by the clerk shall be within ten days from the expiration by law of said term of court." The clerk, therefore, was without authority to enter the order, allowing the plaintiff to appeal *in forma pauperis*, fifty-nine days after the adjournment of the term.

It is not the policy of our law to deny to any litigant his right of appeal, but inasmuch as only questions of law are to be determined in the Supreme Court, when the party cast in a civil action is unable to make the deposit or give the security required by law for his appeal, he is reasonably required (1) to make affidavit, within five days, that he is unable by reason of his poverty to give the security required by law, and (2) that he is advised by counsel learned in the law there is error in matter of law in the decision of the Superior Court—which affidavit (3) must be accompanied by a written statement from a practicing attorney of said Superior Court that he has examined the affiant's case, and is of opinion that the decision of the Superior Court in said action is contrary to law, and (4) the appeal, when passed upon and granted by the clerk, shall be within ten days from the expiration by law of said term of court.

The statutory requirements for prosecuting an appeal without making deposit or giving security for costs in a criminal prosecution, C. S., 4651 and 4652, are different from those in a civil action, C. S., 649, as was pointed out in *S. v. Stafford, supra*, and *S. v. Marion*, 200 N. C., 715,

158 S. E., 406. The requirements of both statutes, however, are jurisdictional, and unless complied with in all respects, the appeal is not properly in this Court. *S. v. Smith,* 152 N. C., 842, 67 S. E., 965; *S. v. Parish,* 151 N. C., 659, 65 S. E., 762.

In a civil action the affidavit required by C. S., 649 must be made during the term or within five days thereafter, and the appeal, if granted by the clerk, is to be passed upon within ten days from the expiration of the term, the difference in time between the filing of the affidavit and the order of the clerk being allowed for investigation or opportunity of objection by the opposing side; while in a criminal prosecution, the affidavit required by C. S., 4651 is to be filed at any time during the term or within ten days from the adjournment thereof. C. S., 4652. It is also required in criminal cases, but not in civil actions, that the affidavit contain the averment "the application is in good faith." *S. v. Martin,* 172 N. C., 977, 90 S. E., 502.

We have had occasion recently to point out the necessity of observing and adhering to the provisions of the statutes, when appealing *in forma pauperis,* as will appear from the following cases: *McIntire v. McIntire, supra* (dismissed for failure to procure valid order allowing appeal *in forma pauperis*); *S. v. Stafford, supra* (dismissed for failure to file supporting affidavit and certificate of counsel as required by C. S., 4651); *Hanna v. Timberlake, supra* (dismissed for failure to aver in affidavit that affiant "is advised by counsel learned in the law that there is error of law in the decision of the Superior Court in said action"); *Hoover v. Indemnity Co.,* 203 N. C., 557 (dismissed for failure to file proper and adequate supporting affidavit); *Riggan v. Harrison,* 203 N. C., 191, 165 S. E., 358 (dismissed because of defective affidavit and for failure to send up necessary parts of record proper); *S. v. Golden,* 203 N. C., 440 (dismissed for failure to send up necessary parts of record proper); *Armstrong v. Service Stores,* 203 N. C., 231, 165 S. E., 680 (dismissed for failure to send up necessary parts of record proper); *Parks v. Seagraves,* 203 N. C., 647 (dismissed for failure to send up necessary parts of record proper); *S. v. Rector,* 203 N. C., 9 (dismissed for failure to comply with rules governing appeals). All of these cases appear in the 203rd Report. In addition, a number of others have been dismissed simply upon motion without written opinion, following the suggestion made in *Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126. The matter being jurisdictional, the appeal is not properly before us.

Appeal dismissed.

STATE OF NORTH CAROLINA ON THE RELATION OF LYDA MOSES, BY HER NEXT FRIEND, MARY GIBSON, V. BERTIE MAE MOSES, GUARDIAN, AND F. T. MOSES, BONDSMAN.

(Filed 17 May, 1933.)

Guardian and Ward B a: Clerks of Court C b—Ward may not *maintain* action in Superior Court to remove guardian appointed by clerk.

A ward may not bring an action in the Superior Court by her next friend to remove her guardian appointed by the clerk, appoint another, compel an accounting, and to recover damages against the guardian and the bondsman for breach of the official bond, the Superior Court in such instance being without jurisdiction, the ward's remedy being to ask for an accounting before the clerk, and then for cause to ask the clerk to remove the guardian appointed by him and to appoint another, which guardian could maintain an action against the former guardian and the bondsman.

APPEAL by plaintiff from *Finley, J.*, at March Term, 1933, of BURKE. Affirmed.

This action was instituted to compel the defendants to account for all moneys received by the guardian of Lyda Moses and applied by her in the management of the ward's estate, and to pay into court the full amount received by the guardian less the sum of $15.00; also to remove the guardian and to appoint another to take charge of the trust funds. The defendants filed an answer denying material allegations and pleading want of jurisdiction. The trial court dismissed the action and the plaintiff excepted and appealed.

D. L. Russell and D. L. Russell, Jr., for plaintiff.
S. J. Ervin and S. J. Ervin, Jr., for defendants.

ADAMS, J. The action was prosecuted in the Superior Court in the name of the State on the relation of the ward, who sues by her next friend, against the guardian and the surety on her official bond, the object being to remove the guardian, to require her to account for the trust funds, to compel her or her surety to pay into court the amount received by her in her fiduciary capacity, and to appoint another guardian to administer the estate. The appeal presents the question whether the plaintiff, a minor, can maintain an action in the Superior Court in term to remove her guardian, to appoint another, to compel an accounting, and to recover damages against the guardian and her surety for breach of her official bond. The court dismissed the action and we affirm the judgment.

In addition to the various kinds of guardians formerly recognized in courts of law there is another known as chancery guardians, or guardians

appointed by courts of equity. Not infrequently these courts exercise a general jurisdiction over the person and estate of infants, the assertion of jurisdiction usually depending upon the necessity of administering equitable principles. In such cases courts of chancery exert broad power in the appointment and removal of guardians, in superintending the management and disposition of estates, and in the protection of infants who cannot protect themselves; but as a general rule the matter of appointing and removing guardians and compelling them to account is remitted by statute to a particular tribunal as, for example, in this State to the clerk of the Superior Court. Madden on Domestic Relations, 461; 1 Schouler, Domestic Relations (6 ed.), sec. 816; C. S., 2150, 2158, 2159, 2183 *et seq.* In this event a ward may not maintain an action at law against his guardian during the existence of the guardianship or against the sureties on the guardian's bond until there has been an accounting. 12 R. C. L., 1148. The reason is stated by Tiffany as follows: "Where a guardian misappropriates his ward's funds, an action at law will not lie at the suit of the ward in *indebitatus assumpsit*. Nor can a bill in equity be brought, although a guardian has assets of the ward in his hands, to charge him for nonpayment of the ward's debts, since there is an adequate remedy at law on the guardian's bond. The relation being that of trustee and *cestui que trust* and not that of debtor and creditor, the guardian is subject to all the liabilities and is entitled to all the benefits incidental to his position, one of which is the right to an opportunity to render his account, and to have the same adjusted by the court." Persons and Domestic Relations (2 ed.), 371, sec. 188.

In this case the guardian was appointed, not by a court of chancery, but by a clerk of the Superior Court pursuant to statute, and was entitled to an "opportunity to render her account" before being subjected to a suit in equity or to an action at law on her official bond. The plaintiff's remedy was, first, to require an accounting by the guardian before the clerk. *Adams v. Quinn,* 74 N. C., 359; *Moore v. Askew,* 85 N. C., 199; *McLean v. Breece,* 113 N. C., 391. Upon default, or for other sufficient cause, the moving party could ask for her removal by the court which made the appointment (*Cooke v. Beale,* 33 N. C., 36); and in the event of her removal and the appointment of another the latter could maintain an action against the former guardian and the sureties on her bond. *Wilson v. Houston,* 76 N. C., 375. We have recently held that in the absence of other matters of which the court has jurisdiction the Superior Court in term has no jurisdiction to appoint an administrator and for this purpose must remand the cause to the clerk. *In re Estate of Styers,* 202 N. C., 715. The principle applies to the appointment of guardians. Judgment

Affirmed.

E. A. BRADY v. L. M. PRESNELL AND ROSANNA EVIE PRESNELL, HIS WIFE, C. C. CHEEK AND C. A. HAYWORTH.

(Filed 17 May, 1933.)

Mortgages C b—Held: whether mortgage in this case covered sum used to transport deceased's body here for burial was question for jury.

The grantee in a deed executed a contract-mortgage back to his grantor which provided that the grantee should support the grantor's mother, the grantee's mother-in-law, during her lifetime, pay all doctors' bills and provide her body a decent burial at her death, and the contract was made a charge upon the land and the instrument was duly registered. The mother died in Florida and the grantee borrowed a certain sum for the purpose of transporting her body back to North Carolina for burial in the family cemetery. After the burial the grantee obtained from the grantor the exact sum borrowed for the transportation, and repaid the lender, both parties construing the contract to include such transportation. *Held,* the sum was advanced in good faith by the grantor under the contract-mortgage, and the question of the reasonableness of the expenditure and whether the obligation to provide a decent burial reasonably included such transportation should have been submitted to the jury under instructions from the court.

APPEAL by defendant C. C. Cheek, from *Schenck, J.,* at Special January Term, 1933, of RANDOLPH. New trial.

This is an action brought by plaintiff against the defendants Presnells to recover $1,000, with interest from 6 April, 1927, secured by a mortgage to plaintiff of even date, on 68.8 acres of land in Randolph County, N. C., registered in the office of the register of deeds of Randolph County, on 12 April, 1927, subject to a credit of $89.00, 2 December, 1927.

Without setting out the complaint in detail, the facts are indicated in plaintiff's prayer for relief, as follows: "Wherefore, plaintiff asks judgment against L. M. Presnell and Rosanna Evie Presnell for the aforesaid debt, and that the aforesaid mortgage deed be foreclosed and the lands therein described sold and the proceeds thereof applied in discharge of the indebtedness due him by the defendants, L. M. Presnell and Rosanna Evie Presnell, his wife, after first paying off and discharging the sum due the defendant C. C. Cheek as aforesaid ($60.00 and interest from 21 September, 1921), together with any and all taxes that may be outstanding against said property; for such other and further relief as he may be entitled to; and for cost."

The defendants in their answer, without setting same out in detail, say: "Although these defendants do not admit that the plaintiff is entitled to foreclose the mortgage mentioned and described in the complaint

filed in this cause for the purpose expressed in said complaint still, in the event an order of foreclosure is made by the court, defendants pray that the above mentioned $60.00 and interest thereon since 21 September, 1921, and the above mentioned $278.77 and interest thereon from 21 January, 1926, be adjudged and declared to be a first and prior lien on said lands and the money derived from the sale thereof; and that said claims both be paid and satisfied before the said plaintiff or any other person shall receive any sums whatsoever from the sale of said lands, except for taxes, and defendants pray that they be given such other and further relief as they may be entitled to."

The prior contract-mortgage, on the same land, that C. C. Cheek claims under, is dated 21 September, 1921, and made by defendants Presnells to him, and duly recorded in the register of deeds office of Randolph County, N. C., on 22 January, 1925. The pertinent parts of this contract-mortgage are as follows:

"Witnesseth, that whereas, on or about 10 January, 1921, one, Cary R. Cheek, executed and delivered to C. C. Cheek a certain deed of conveyance, whereby she conveyed a tract of land hereinafter described for a term of her natural life, which said deed is recorded in the office of the register of deeds for Randolph County in Book 198, at page 115, for a consideration that the said C. C. Cheek was to support, maintain, care for, pay doctor bills, expenses for the remainder of the life of Cary R. Cheek, *and give her body a decent burial at death.*

And whereas, it is the purpose of C. C. Cheek and Annie Cheek, his wife, to sell said tract of land to L. M. Presnell and Rosanna Presnell for the consideration of one dollar, and the further consideration that the said L. M. Presnell and Rosanna Presnell shall support, maintain, care for, pay doctor bills and pay all expenses during the remainder of the natural life of Cary R. Cheek, *and pay her burial expenses at death.*

And whereas, it is the desire of the said L. M. Presnell and Rosanna Presnell, his wife, to secure the said support, maintenance, doctor bills *and burial expenses to the said C. C. Cheek and save him harmless from said expense* in consideration that they receive a deed from the said C. C. Cheek to the tract of land hereinafter to be described.

And whereas, the said C. C. Cheek has executed a deed to the said L. M. Presnell and Rosanna E. Presnell for the tract of land hereinafter described in consideration of the sum of sixty dollars, paid and expended by the said C. C. Cheek for the benefit and support of the said Cary Cheek. It is the purpose of the said L. M. Presnell and Rosanna E. Presnell, his wife, to secure the said C. C. Cheek for the said sum of sixty dollars by reason of said expenditures. . . .

But this deed is made on this special trust, and that if the said parties of the first part shall well and truly pay to the parties of the second

part, or his legal representatives, *the said sum of sixty dollars as aforesaid,* and shall furnish support, maintain, pay doctor bills and all expenses and care for the said Cary R. Cheek for the remainder of her natural life *and give her body a decent burial at their own expenses* then this deed shall be null and void.

But if default shall be made in caring for, supporting, maintaining, paying doctor bills and other expenses for the said Cary Cheek, *or in her burial at death,* then it shall be lawful for and the duty of the said C. C. Cheek, party of the second part, to sell said land hereinbefore described for cash at the courthouse door in Asheboro, N. C., after first advertising said sale by posting notice thereof at the courthouse door and three other public places in said county for thirty days immediately preceding such sale and also publishing said notice for four weeks immediately preceding such sale in a weekly newspaper published in said county and conveying the same to the purchaser in fee simple, *and out of the money arising from said sale to pay said sum of sixty dollars and such other sums the party of the second part has paid by reason of his contract and deed with the said Cary R. Cheek," etc.*

The only material issue submitted to the jury necessary to be considered on this appeal is as follows: "(2) What amount is due and owing to the defendant C. C. Cheek by the defendants L. M. Presnell and wife, Evie Presnell, by virtue of the mortgage, as alleged in the answer? Answer: $70.00 with interest on $60.00 from 21 September, 1921."

The court below charged the jury as follows: "Therefore, gentlemen of the jury, the court charges you, as a matter of law, that you will answer this second issue $60.00 plus $10.00, $70.00. That you will answer the second issue $70.00 with interest on $60.00 from 23 (21) September, 1921—$70.00 with interest on $60.00 from 23 (21) September, 1921."

The jury answered the issue as instructed by the court below. Judgment was duly rendered on the verdict, and an order of foreclosure, etc. The defendant C. C. Cheek excepted and assigned error to the charge of the court below, and to the judgment as signed, and appealed to the Supreme Court. The necessary facts will be considered in the opinion.

H. M. Robbins for plaintiff.
I. C. Moser for defendant C. C. Cheek.

CLARKSON, J. Plaintiff rightly contends that the question involved is the interpretation to be placed upon the provisions of the written instrument, a combined contract and mortgage, set forth in the record.

The evidence undisputed is to the effect that Cary R. Cheek had two children involved in the controversy (1) C. C. Cheek and (2) Rosanna Evie Cheek, who married L. M. Presnell. Cary R. Cheek made her home with L. M. Presnell and his wife Rosanna Evie Presnell from the time they gave the mortgage to C. C. Cheek, on 21 September, 1921, until her death on 21 January, 1926, at Okeechobee, Fla. The testimony of L. M. Presnell, in part, is as follows: "I have lived, since 1926, a year and a half in Asheboro. I lived on this farm until I got burned out. . . . She (Cary R. Cheek) was actually living with me at the time this paper was made to Mr. Cheek and she made her home with me from then until the time of her death. I paid her doctor bills and her other expenses during that time, and I supported and maintained her and cared for her during that time. I paid all of her expenses during the balance of her life. She died in my home at Okeechobee, Florida, on 21 January, 1926. . . . I told Cole (his brother-in-law) I wanted the money to pay for the old lady's funeral expenses and he let me have it for that purpose. After that I secured a check from C. C. Cheek for $230.00. It is dated, I notice, 25 January. I received it about this time. It was a day or so after I brought her in from Florida."

C. C. Cheek testified, in part: "The other expense that I paid was a charge for a hearse which was $10.00. . . . My mother died in Florida. Okeechobee was her home at the time she died. She was living down there. I do not happen to know how far it was from where she was buried. I cannot say that it was up towards 1,000 miles. I have never had occasion to estimate the distance. The $25.00 truck charge is for transportation from Aberdeen to Bennett. . . . This place was responsible for what he did. If he did not do it I was to take it up. . . . That check was paid by me. It is the amount of $230.00. The check was introduced in evidence, which reads as follows: 'Bennett, N. C., 25 January, 1926—Pay to the order of L. M. Presnell, $230.00—two hundred thirty dollars—To Peoples Bank and Trust Company, Bennett, N. C.—C. C. Cheek.' (The following was endorsed on the back of the check: 'Pay to E. B. Cole, L. M. Presnell.') Lacy (L. M.) Presnell told me he failed to get it as early as expected. In order to get away he had to make a schedule on train, and that he borrowed it from Edgar (E. B.) Cole and promised to replace it. He told me as soon as the funeral was over he was anxious to get that money back to Edgar and we went over to the office, little office at the planing mill at Bennett. It was just after the funeral. My mother was brought to Bennett and left at my sister's home. The $230.00 was never paid to me."

Edgar (E. B.) Cole was L. M. Presnell's brother-in-law, and no relation to C. C. Cheek. J. A. Purvis testified, in part: "I live at Ben-

nett, N. C. . . . I was cashier of the bank until it closed. . . . Mr. Cheek came to the bank and made arrangements for us to wire the money to L. M. Presnell in Florida. We did actually wire the money."

We think, under the evidence, that the $230.00 was advanced in good faith by C. C. Cheek, under the contract-mortgage and to aid in bringing his mother's body back to the old home burial ground. L. M. Presnell, at the time, did not have the money for the purpose. The temporary obtaining it by L. M. Presnell, under the circumstances, with a corpse to be transported, from his brother-in-law, Edgar (E. B.) Cole, and informing his brother-in-law that he thought he could get it from C. C. Cheek, was not such an obligation to Cole that would defeat Cheek's claim. This he did and returned the exact money (check) to E. B. Cole that he received from C. C. Cheek—$230.00.

The only serious question for us to determine is whether the language in the mortgage "and give her body a decent burial at death" would include the expense of bringing her body to the old home burial ground. Presnell, who owed that obligation to C. C. Cheek never questioned that this was his legal duty, under his contract-mortgage to Cheek. He was unable to finance it and called on Cheek, who did.

Plaintiff quotes Webster as follows: "Burial: The act of burying a deceased person; sepulture; interment; the act of depositing a dead body in the earth, in a tomb or vault, or in the water." Black's Law Dictionary defines burial: "The act of interring the human dead."

It is contended by C. C. Cheek that wherever Cary R. Cheek died, that the contract-mortgage would humanly and naturally contemplate that she would be buried in the old home burial ground, where others near and dear to her sleep, awaiting the resurrection. Presnell so construed the agreement.

We find, on examination of the question: The determination as to how a corpse shall be dressed for burial and the quality of the coffin and the box in which it is to be placed, as well as the depth of the grave, are matters for those who have the burial in charge, so that what is a "decent," "proper," or "respectable" burial will vary with the financial or social standing of the deceased and his relatives, the customs of the community, and the rules of religious, social, and political organizations to which he may have belonged. *Seaton v. Commonwealth,* 149 S. W., 871, 872, 149 Ky., 498, 42 L. R. A. (N. S.), 211.

In 11 R. C. L., part sec. 250, at p. 225, we find: "If a person having an ample estate dies while traveling in a foreign country, there is a legal liability on the part of his estate for services in connection with embalming and transporting his body from the place of death to the place of burial."

In 24 C. J., part sec. 927(4), at p. 308, it is said: "Special circumstances may justify an expenditure unusually great in one or more particulars, as where one dies far from his home or his proper burial place and transportation of the body becomes necessary and proper, or where kindred and friends are summoned from a distance to attend the funeral or accompany the remains from a distant point." *Barbee v. Green*, 92 N. C., 471.

In the ancient day Abraham purchased Machpelah "for a possession of a burying place." Gen. 23:20. Both he and his wife were buried there. Jacob, his grandson, died in Egypt and Joseph and his brethren took his body to Canaan "and buried him in the cave of the field of Machpelah." Gen. 5:13. No legal authorities on the subject have been cited to us in the briefs of the parties. Family burial grounds are everywhere in the State and in more recent times families have plots in cemeteries in the cities and towns. Taking into consideration all the facts and circumstances, what was the contemplation of the parties when the contract-mortgage was executed? The language used in the different places in the mortgage "and give her body a decent burial at death," etc. The usage or custom of the locality or community in relation to such matters; the reasonableness of the amount are for the jury to determine, under proper instructions by the court below.

There can be no question as to the $60.00 with interest from 21 September, 1921. This is conceded. Nor the charge for the hearse $10.00, and the charge of $25.00 truck for transportation of the corpse from Aberdeen to Bennett is also allowable. For the reasons given, there must be a

New trial.

LEE M. BRYSON ET AL. v. GLOUCESTER LUMBER COMPANY ET AL.

(Filed 17 May, 1933.)

1. Master and Servant F i—

The finding of the Industrial Commission that the deceased was an employee is binding if supported by any competent evidence.

2. Master and Servant A b—

One who represents another only as to the results of a piece of work, and not as to the means of accomplishing it, is an independent contractor and not a servant or employee.

3. Master and Servant F a—Evidence held to establish that deceased was an independent contractor and not an employee.

Evidence tending to show that the deceased was engaged in hauling logs to a pond for the defendant, and that deceased was at liberty to

haul the logs in his own way, employed his own assistants and owned the truck and trailer used by him in the work, and was paid a certain sum per thousand feet for the logs hauled, and that he was killed when his truck overturned in the performance of the work, *is held* to show that deceased was an independent contractor and not an employee, and the claim of his dependents for compensation should have been denied.

APPEAL by plaintiffs from *Townsend, Special Judge,* at December Term, 1932, of TRANSYLVANIA.

Proceedings brought under Workmen's Compensation Act by dependents of Lee M. Bryson, deceased, to determine liability of Gloucester Lumber Company, alleged employer, and American Mutual Liability Insurance Company, alleged carrier.

The gravamen of the complaint is that Lee M. Bryson was an employee of the Gloucester Lumber Company at the time of his injury and death. He was engaged in hauling logs from the woods and placing them in a pond, when the truck he was driving turned over and killed him. The deceased owned the truck and trailer. He was paid $7.00 per thousand feet for hauling the logs. He employed his own assistants, and was at liberty to haul the logs in his own way, without direction from any of the officials of the Lumber Company.

From an award by the Industrial Commission, the defendant appealed to the Superior Court, where judgment was entered dismissing the proceeding on the ground that the deceased was an independent contractor and not an employee of the defendant lumber company at the time of his injury and death.

Plaintiffs appeal, assigning errors.

Lewis P. Hamlin for plaintiffs.
Johnson, Smathers & Rollins for defendants.

STACY, C. J. The case turns on whether Lee M. Bryson was an independent contractor, or a servant or employee of the Gloucester Lumber Company at the time of his injury and death. The Industrial Commission found that he was an employee and awarded compensation, which finding, if supported by any competent evidence, is binding on the courts. *Winberry v. Farley Stores, Inc., ante,* 79; *Webb v. Tomlinson,* 202 N. C., 860, 164 S. E., 341.

The judge of the Superior Court, on the other hand, was of opinion that all the evidence tends to show the deceased was an independent contractor. With this view, we are constrained to agree.

Generally speaking, an independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the orders or control of the person for whom he does it,

and may use his own discretion in matters and things not specified. *Young v. Lumber Co.*, 147 N. C., 26, 60 S. E., 654; *Gay v. R. R.*, 148 N. C., 336, 62 S. E., 436; *Beal v. Fibre Co.*, 154 N. C., 147, 69 S. E., 834; *Denny v. Burlington*, 155 N. C., 33, 70 S. E., 1085; *Harmon v. Contracting Co.*, 159 N. C., 22, 74 S. E., 632.

One who represents another only as to the results of a piece of work, and not as to the means of accomplishing it, is an independent contractor and not a servant or employee. *Powell v. Const. Co.*, 88 Tenn., 696.

Tested by this standard, it would seem that the deceased was an independent contractor, and not an employee of the Gloucester Lumber Company, at the time of his injury and death.

Affirmed.

STATE v. BRYANT STONE.

(Filed 17 May, 1933.)

1. Homicide G a—

Testimony tending to show that defendant shot and killed deceased, together with testimony of the dying declaration of the deceased identifying defendant as his assailant, and other evidence of identity, motive, etc., is held sufficient to have been submitted to the jury, and their verdict of guilty of first degree murder is upheld.

2. Criminal Law L d—

Where defendant does not object to the admission of certain evidence upon the trial he may not complain for the first time in the Supreme Court on appeal, and *held further* the evidence complained of was favorable to defendant.

APPEAL by defendant from *Cowper, Special Judge*, at August Term, 1932, of WILKES.

Criminal prosecution tried upon indictment charging the prisoner with the murder of one Wayne Norman.

Verdict: Guilty of murder in the first degree (as shown by return to writ of *certiorari*).

Judgment: Death by electrocution.

Defendant appeals, assigning errors.

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

J. H. Whicker for defendant.

STACY, C. J. The evidence on behalf of the State—there was none offered by the defendant—tends to show that on Sunday, 12 June, 1932, about the half hour of noon, the prisoner fired a shotgun through a crack in the smoke-house and mortally wounded his son-in-law who was sitting on the front porch of his dwelling-house. The deceased was carried to the hospital and died the next day. In a dying declaration he told his wife that Bryant Stone shot him. There was other evidence of identity, as well as of motive, including threats, tending to establish the guilt of the defendant. In no view of the case could the demurrer to the evidence have been sustained.

Dr. F. C. Hubbard, who attended the deceased in his last illness, was allowed to testify: "He told me he was sitting on the porch when he was shot. He didn't know who shot him. Said he believed Stone shot him." This evidence might well have been excluded. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604. But as it was not objected to at the time, the defendant is in no position to complain for the first time in this Court. Furthermore, it was favorable to the defendant.

The record is free from reversible error. The verdict and judgment will be upheld.

No error.

VERNON CARSON, BY HIS NEXT FRIEND, J. J. CARSON, v. HENRIETTA MILLS, INCORPORATED, AND THE TRAVELERS INSURANCE COMPANY.

(Filed 17 May, 1933.)

Insurance P b—

In this action on a policy of group insurance the judgment as of nonsuit is affirmed, the plaintiff having failed to offer satisfactory proof that the premiums were paid in accordance with the terms of the policy, that the policy was ever delivered, that insured had completed three months service required by the policy, or that the death of insured occurred while the policy was in force.

APPEAL by plaintiff from *McElroy, J.,* at February Term, 1933, of RUTHERFORD. Affirmed.

M. P. Spears and J. R. Burgess for appellant.
Ryburn & Hoey for appellee.

ADAMS, J. On 3 May, 1927, the Travelers Insurance Company issued its certificate based on Group Life Policy No. G. 3670 on the life of Thomas Carson, in which the plaintiff was named as beneficiary. Under the terms of the certificate the sum of one thousand dollars was to be

paid if the death of the insured occurred during the continuance of the policy and while the insured, an employee of the Henrietta Mills, was protected by the certificate. At the close of the plaintiff's evidence the action was dismissed as in case of nonsuit, and the plaintiff excepted and appealed.

In our opinion the judgment should be affirmed. The plaintiff insists that his evidence makes a prima facie case for the jury; but we find no satisfactory proof that the premiums were paid in accordance with the contract, or that the policy was ever delivered, or that the insured completed three months of service as the agreement of the parties required, or that the death of the insured occurred while the policy was in force. There are other objections which would seem to bar the plaintiff's recovery. Judgment

Affirmed.

CHESTER BROWN, ADMINISTRATOR OF M. T. ASKEW, DECEASED, v. SOUTHERN RAILWAY COMPANY AND J. E. DIVELBLISS AND CHESTER BROWN.

(Filed 24 May, 1933.)

Master and Servant F a—Third person may set up negligence of employer in action by employer to recover sum paid as compensation.

In an action for wrongful death brought by the administrator of a deceased employee against a third person *tort-feasor*, and prosecuted for the benefit of the employer and his insurance carrier to recover the sum paid by them as compensation for the employee's death under the Compensation Act, N. C. Code, 8081(r), such third person may set up the employer's negligence in bar of recovery, since the employer will not be allowed to profit by his own wrong in causing the employee's death, and an order striking out the allegations in the answer setting up the employer's negligence is reversible error.

CONNOR, J., dissenting.

CLARKSON, J., concurs in the dissent.

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

This cause was considered by the court and the opinion reported in 202 N. C., 256, 162 S. E., 613, where the facts are set forth in detail.

After the decision was rendered the defendant filed an amended answer by leave of court alleging:

"1. That as stated in the affidavit of plaintiff administrator heretofore filed in this action, plaintiff's intestate, M. T. Askew, was at the time of his death an employee of Chester Brown, trading and doing business as Chero-Cola Bottling Company, and as such, the administrator of the said M. T. Askew, was entitled to receive and did receive and accept

compensation under the provisions of the Workmen's Compensation Act of the State of North Carolina, and that plaintiff herein, to wit: Chester Brown, administrator as aforesaid, pursuant to the terms and provisions of the said Workmen's Compensation Act of the State of North Carolina, accepted a settlement and award, on account of the fatal injury to the said M. T. Askew, made by the Industrial Commission of the State of North Carolina under the terms and provisions of the said act, and the amount so awarded by the said Industrial Commission has been paid to and accepted by the said Chester Brown, administrator aforesaid.

"2. That as stated in the opinion of the Supreme Court of North Carolina in this case (see 202 N. C., 256, 162 S. E., 613), the said Chero-Cola Bottling Company, or its insurance carrier, 'are primarily the beneficiaries in whose behalf the action is prosecuted by the plaintiff as the personal representative of the deceased employee.' That if an insurance carrier be the real party in interest in this case, then, and in that event, the rights of said insurance carrier would be such rights only as it acquired by way of subrogation from said employer, Chester Brown, trading and doing business as Chero-Cola Bottling Company.

"3. That the employer of the said M. T. Askew, to wit: the said Chester Brown, trading and doing business as the said Chero-Cola Bottling Company, was guilty of negligence which contributed to and proximately caused the death of the said M. T. Askew in the respects set forth in the original answer filed in this action by these defendants, and in the second and further answer and defense set forth therein; that the aforesaid negligence of the employer of the said M. T. Askew, to wit: Chester Brown, trading and doing business as said Chero-Cola Bottling Company, was the proximate cause of the death of the said M. T. Askew, and the said negligence of the said employer is here and now expressly pleaded in bar of any recovery in this action.

"4. That the aforesaid negligence of the said employer was the proximate cause of the death of the said M. T. Askew and the said negligence is here and now expressly pleaded in bar of any recovery in this action insofar as the said employer or its insurance carrier may be beneficiaries in whose behalf this action is prosecuted; that to allow any recovery in this action insofar as the case may be for the benefit of the said employer or the said insurance carrier, would be allowing the said employer (and the said insurance carrier to the extent that it may be subrogated) to profit by its own wrong, in that the negligence of the said employer as hereinbefore referred to contributed to and proximately caused the fatal injury and death of the said M. T. Askew."

Upon motion duly made by the plaintiff the trial judge struck out said amended answer for the reason that the same was "immaterial and irrelevant."

From the judgment so rendered the defendant appealed.

Harkins, VanWinkle & Walton for plaintiff.
R. C. Kelly and Jones & Ward for defendants.

BROGDEN, J. Is the defense of the contributory negligence of the employer available to a third party, in a suit by the employer against such third party to recover the sum paid by the employer as compensation for the negligent killing of an employee?

In the former decision in this case, reported in 202 N. C., 256, it was held that the employer was not a joint *tort-feasor* with the defendant so far as the rights of the estate of the deceased employee were concerned. The reason for such conclusion is that the compensation act established an exclusive remedy for an insured employee irrespective of his fault or negligence. Furthermore, the former decision was based upon the assumption that an award had been made by the Industrial Commission to the estate of the dead workman and that same was paid by the employer or his carrier. Consequently, this action is now prosecuted primarily for the benefit of the employer or his carrier for indemnity in the amount so paid.

The defendant by leave of court filed an amended answer as set out above and said to the employer in substance: "If it be conceded that I was negligent, you were also guilty of negligence. If I killed the deceased you participated actively in the killing, and sound public policy, sanctioned and adopted by decisions of the Supreme Court, forbids you to profit by your own wrong or to pluck good fruit from the evil tree of your own planting." The pertinent idea was declared in *Davis v. R. R.*, 136 N. C., 115, 48 S. E., 591, as follows: "The underlying principle in our view is that no one shall profit by his own wrong, and if the father's negligence, and not that of the railroad company, was the proximate cause of the death (under the doctrine of the 'last clear chance'), it would be obviously wrong to permit him to put money into his pocket for damages proximately caused by his own negligence, because sued for through an administrator (whether himself or another), yet for his benefit." The same thought was expressed in *Goldsmith v. Samet*, 201 N. C., 574, in these words: "In the instant case, therefore, if recovery were allowed, the amount would be divided between the two wrongdoers. This is also contrary to the policy of the law."

The identical question of law involved in this appeal has been considered in the following cases: *Graham v. City of Lincoln*, 183 N. W., 569 (Nebraska); *Fidelity Casualty Co. v. Cedar Valley Electric Company*, 174 N. W., 709 (Iowa); *Milo Serich Railway Co. v. Pacific Electric Ry. Co.*, 230 Pac., 15 (Cal.); *General Box Co. v. Missouri Utilities Co.*, 55 S. W. (2d), 442 (Missouri); *Thornton Bros. v. Reese*, 246 N. W., 527 (Minnesota); *Ryan Co. v. Sanitary District*, 236 Ill. Appellate, 511 (Ill.); *Otis Elevator Co. v. Miller & Paine*, 240 Fed., 376.

The foregoing decisions are based upon compensation statutes with variable wording, and the courts proceed to the judicial conclusion announced therein, upon divergent theories of liability. It is to be noted, however, that all of said decisions except the Minnesota and Illinois cases, *supra,* deny the applicability of the defense of contributory negligence in suits by the employer or his carrier against a third party. The Minnesota and Illinois decisions, *supra, adopt a different view upon the* facts disclosed by the records upon which the decisions were based.

It is needless to undertake to analyze the compensation act or to enlarge upon its fundamental theories of liability. Manifestly the statute was designed primarily to secure prompt and reasonable compensation for an employee, and at the same time to permit an employer or his insurance carrier, who had made a settlement with the employee, to recover the amount so paid from a third party causing the injury to such employee. C. S., 8081(r). Moreover, the statute was not designed as a city of refuge for a negligent third party. Nevertheless, when the employee or his estate has been satisfied, and the employer seeks to recover the amount paid by him, from such third party, his hands ought not to have the blood of the dead or injured workman upon them, when he thus invokes the impartial powers and processes of the law.

It is insisted that if contributory negligence of the employer be recognized as a defense that in such event the negligent third party would escape liability and impose the burden of his negligence upon the employer. Upon the other hand, if such defense be not recognized, an employer could by his own negligence participate in the killing or injuring of the workman, pay for it, and then wash his hands of his own wrong merely because he brought a suit against the third party, who also contributed to the injury or death.

Furthermore, when the injured workman sues a third party to recover for his injuries, the contributory negligence of the workman, is an available defense, and therefore it would seem equally reasonable that when the employer prosecutes the suit for his own benefit, the same defense should not be denied. Certainly an employer is entitled to no greater immunity than his injured employee.

Considering the cause as now presented, the Court is of the opinion that the trial judge erred in striking out the answer of the defendants.

Reversed.

CONNOR, J., dissenting. The question of law presented by this appeal was decided adversely to the appellants on the former appeal in this action. For that reason I think the judgment should be affirmed. I dissent from the decision in this appeal reversing the judgment.

CLARKSON, J., concurs in dissent.

NELLIE SETTLEMYER JOLLEY ET AL. v. J. T. HUMPHRIES ET AL.

(Filed 24 May, 1933.)

1. Wills E b—Held: the words "afore described real estate" applied only to the tract immediately before described in the will.

The testator devised three tracts of land to his wife, each tract being described separately and the words of disposition being prefixed to each description, and after the description of the third tract the will contained the following words: "to have and to hold the afore described real estate during the term of her natural life and at her death" to the testator's daughter. A later item devised the third tract to the daughter subject to the wife's life estate. *Held*, the words "afore described real estate" applied only to the tract immediately preceding, and the limitation over to the daughter applied only to the third tract, and the wife took the first two tracts in fee simple.

2. Wills E a—General rules for construction of wills.

A devise will be construed to be in fee simple unless an intention to convey an estate of less dignity is apparent from the will, C. S., 4162, and regard will be had to the natural objects of the testator's bounty, and the testator's intention as gathered from the whole instrument will be given effect unless it is contrary to some rule of law or public policy.

APPEAL by plaintiffs from *Finley, J.*, at Spring Term, 1933, of CLEVELAND.

Civil action in ejectment determined upon the construction of the following provisions in the will of S. R. Humphries, who died in 1909:

"2nd. I give and bequeath to my wife, Mary A. Humphries, the following described real estate, to wit: (Description by metes and bounds of homestead consisting of 208 acres). I also bequeath to my beloved wife my entire one-half interest in the following described tract of land owned by my brother, P. W. Humphries, and myself, to wit: (description by metes and bounds of tract consisting of 163⅝ acres). Also I bequeath to my wife my entire half interest (description by metes and bounds of tract consisting of 619½ acres). To have and to hold the afore described real estate during the term of her natural life and at her death to go to Nellie G. Settlemyer of Catawba County, North Carolina. 2nd. I bequeath to Nellie G. Settlemyer now with her mother in Catawba County, North Carolina, tract No. 3 the above described lands, and she is to have possession of said lands upon the death of my wife, Mary A. Humphries, and not before."

On 21 August, 1912, Mary A. Humphries, wife of the testator, sold the lands here in dispute, the first and second tracts, above described, to V. A. Humphries in fee, reserving a life estate unto herself, and remained in possession thereof until her death in June, 1917.

Nellie G. Settlemyer was a minor at the death of the testator. She married J. Floyd Jolley in 1915, and reached her majority in 1918 or 1919.

V. A. Humphries took possession of the two tracts of land here in controversy under the deed of Mary A. Humphries immediately following her death and remained in possession thereof until his death, which occurred 21 June, 1931. His heirs have been in possession of said lands since his death. This action was instituted 9 February, 1932.

The defendants deny that plaintiff took any interest in the first and second tracts, above described, under the will of S. R. Humphries, and they also plead the statutes of limitations.

From a judgment holding that plaintiff took no interest in the *locus in quo* under the will in question, she appeals, assigning error.

D. Z. Newton, Paul Boucher, Jennings L. Thompson and Quinn, Hamrick & Hamrick for plaintiffs.

J. C. Whisnant and Ryburn & Hoey for defendants.

STACY, C. J. Does the limitation, "To have and to hold the afore described real estate during the term of her natural life and at her death to go to Nellie G. Settlemyer," which follows the description of the third devise in item two of the will of S. R. Humphries, also apply to the first and second devises? Our answer is, that it does not. This is the interpretation which the parties themselves placed upon the will for more than twenty years.

In the first place, the ordinary signification of the words "afore described real estate" is the next preceding, which in the instant case would mean the third tract of 619½ acres immediately preceding the limitation. *McIver v. McKinney,* 184 N. C., 393, 114 S. E., 399.

Secondly, the first and second devises, standing alone, are unquestionably devises in fee to the testator's wife. She was the primary object of his bounty, and is entitled to be accorded consideration as such. *Mangum v. Trust Co.,* 195 N. C., 469, 142 S. E., 711. It is provided by C. S., 4162, that when real estate is devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity. *Lineberger v. Phillips,* 198 N. C., 661, 153 S. E., 118; *Washburn v. Biggerstaff,* 195 N. C., 624, 143 S. E., 210; *Barbee v. Thompson,* 194 N. C., 411, 139 S. E., 838.

Hence, if we give the language of item two its ordinary meaning, it would seem to accord with the interpretation heretofore placed upon the will by the interested parties. *Dunn v. Hines,* 164 N. C., 113, 80 S. E., 410.

But conceding the purpose of item two, standing alone, to be doubtful, the intention of the testator is apparently set at rest by the 3rd item of the will (erroneously numbered 2nd), where it is repeated Nellie G. Settlemyer is to have "tract No. 3 the above described lands," subject to the life estate of the testator's wife.

The will was drawn by a justice of the peace, who was perhaps more familiar with deeds than wills. After writing out the second item in long hand, he evidently read it over, and realizing the possible misconstruction which might result from its peculiar wording, he undertook to clarify its meaning by stating in the next item that Nellie G. Settlemyer was to have the third tract, subject to the life estate of the testator's wife. The fact that no further mention was made of the first and second tracts would seem to indicate that he regarded it clear they were to go as originally devised to the testator's wife in fee.

The pole-star in the interpretation of wills, to which all rules must bend, unless contrary to some rule of law or public policy, is the intent of the testator, and this is to be ascertained from the four corners of the will, considering for the purpose the will and any codicil or codiciles as constituting but one instrument. *Ellington v. Trust Co.*, 196 N. C., 755, 147 S. E., 286.

Giving expression to the same thought in *McIver v. McKinney, supra*, *Adams, J.*, delivering the opinion of the Court, said: "Nevertheless, it is generally conceded that in the construction of a will the cardinal purpose is to ascertain and give effect to the intention of the testator—not the intention that may have existed in his mind, if at variance with the obvious meaning of the words used, but that which is expressed by the language he has employed. The question is not what the testator intended to express, but what he actually expressed in his will, when all its provisions are considered and construed in their entirety," citing as authorities for the position: *Patterson v. Wilson*, 101 N. C., 586; *Francks v. Whitaker*, 116 N. C., 518; *Chewning v. Mason*, 158 N. C., 579; *Dunn v. Hines*, 164 N. C., 114; *Taylor v. Brown*, 165 N. C., 157; *McCallum v. McCallum*, 167 N. C., 310.

The case of *Hauser v. Craft*, 134 N. C., 319, 46 S. E., 756, cited and relied upon by plaintiffs, is not at variance with our present decision, for in the cited case, there was no further clause, as here, explaining the possible ambiguity.

Affirmed.

EARLEEN J. SOUTHERLAND, ADMINISTRATRIX OF I. B. SOUTHERLAND, DECEASED, *v.* J. A. HARRELL AND THE STANDARD OIL COMPANY OF NEW JERSEY.

(Filed 24 May, 1933.)

Master and Servant F a: Pleadings D c—Jurisdiction of Industrial Commission must appear from face of complaint to be available on demurrer.

In an action by an administrator to recover for the wrongful death of his intestate, a plea to the jurisdiction of the court on the ground that the Industrial Commission had exclusive jurisdiction of the cause is in effect a demurrer to the complaint, C. S., 511(1), and the facts appearing on the face of the complaint are determinative, and facts alleged in the plea may not be considered, and where it does not appear from the complaint that the defendant regularly employed more than five employees in this State, N. C. Code, 8081(u), the plea to the jurisdiction should be overruled.

APPEAL by plaintiff from *Cranmer, J.*, at August Term, 1932, of DUPLIN. Reversed.

This is an action to recover damages for the wrongful death of plaintiff's intestate. The action was begun in the Superior Court of Duplin County on 23 February, 1932, and was heard at the August Term, 1932, of said court, on the pleadings.

It is alleged in the complaint that at the date of his injuries and resulting death, to wit: 15 March, 1931, plaintiff's intestate was an employee of the defendant, the Standard Oil Company of New Jersey, and was engaged in the performance of his duties as such employee in this State; that said defendant is a corporation, with one of its principal offices in the city of Charlotte in this State; and that the death of plaintiff's intestate was caused by the negligence of said defendant in furnishing for his use a defective truck, and also by the negligence of the defendant, J. A. Harrell, an employee of his codefendant, who was superior in authority to plaintiff's intestate, in the operation of said truck. On the cause of action alleged in the complaint, plaintiff demands judgment that she recover of the defendants the sum of $50,000, as damages for the wrongful death of her intestate.

Both defendants in apt time filed pleas to the jurisdiction of the court, in which they alleged that at the date of the injuries and death of plaintiff's intestate, the defendant, the Standard Oil Company of New Jersey, had in its employment in this State more than five employees, and was, therefore, subject to the provisions of the North Carolina Workmen's Compensation Act, with respect to the matters and things alleged in the complaint as the cause of action on which plaintiff demands judgment in this action. Each defendant contended that the North Carolina Industrial Commission has exclusive jurisdiction of the

claim of plaintiff against the defendants on account of the death of her intestate, and that for this reason, the Superior Court of Duplin County has no jurisdiction of the cause of action alleged in the complaint. Both defendants demanded judgment that the action be dismissed. The pleas were sustained, and the action dismissed.

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

N. B. Boney, R. D. Johnson and J. T. Gresham, Jr., for plaintiff.

Rountree, Hackler & Rountree for defendant, the Standard Oil Company of New Jersey.

CONNOR, J. The pleas to the jurisdiction of the court filed by the defendants in this action are, in effect, demurrers to the complaint on the ground that the Superior Court of Duplin County, in which the action was begun, has no jurisdiction of the subject-matter of the action. C. S., 511(1). They present, therefore, only the question as to whether upon the facts appearing on the face of the complaint, the court has jurisdiction of the cause of action alleged therein. *Roebuck v. Short,* 196 N. C., 61, 144 S. E., 515. No facts alleged in the pleas can be considered in determining the correct answer to the question of law presented by the defendants. In *Latham v. Highway Commission,* 185 N. C., 134, 116 S. E., 85, it is said: "It is not the office or function of a demurrer to allege facts, and upon that allegation to challenge the adversary's legal right, or the validity of his claim, which is called a 'speaking demurrer,' but its sole purpose is to take the facts as they are stated in the opposite pleading, or to admit the truth of its allegations, and then to question their sufficiency in law to authorize the granting of the relief demanded, if directed against a complaint, or the soundness of the defense, if against an answer."

The judgment dismissing the action is reversed on the authority of *Hanks v. Utilities Co., ante,* 155, 167 S. E., 560. In that case the judgment overruling the demurrer was affirmed. It is said in the opinion that "it does not appear upon the face of the complaint that the Workmen's Compensation Act applies to the defendant. C. S., 8081(u) provides in subsection (b) that the Workmen's Compensation Act does not apply to casual employees, 'nor to any person, firm, or private corporation that has regularly in service less than five employees in the said business within this State.' *Aycock v. Cooper,* 202 N. C., 500, 163 S. E., 569. The face of the complaint does not disclose that the defendant employs more than five men. A demurrer cannot be sustained unless the vitiating defect appears upon the face of the pleadings assailed. *Justice v. Sherard,* 197 N. C., 237, 148 S. E., 241."

Reversed.

CINCINNATI BUTCHERS SUPPLY COMPANY, INCORPORATED, v. J. E. CONOLY AND P. C. HOWELL, DOING BUSINESS AS ECONOMY GROCERY COMPANY, ALIAS HOME PRIDE STORE.

(Filed 24 May, 1933.)

1. Sales H f—In this action on notes for purchase price of article, purchaser sufficiently alleged counterclaim for fraud.

In this action to recover the balance due on notes given by defendant for the purchase price of a case for the preservation and display of meats, defendant contended that the case was not as represented to him, and set up a counterclaim for loss sustained by reason of defects therein. *Held*, fraud may not be definitely defined by the courts, and defendant sufficiently alleged all the elements of fraud and deceit, and offered evidence sufficient to be submitted to the jury on the issue of whether defendant was induced to sign the notes by the false and fraudulent representations of plaintiff.

2. Evidence C a—"Greater weight of evidence" and "preponderance of evidence" are synonymous.

The terms "greater weight of the evidence" and "preponderance of the evidence" are synonymous, and the charge of the court that the burden was on defendant to prove by the greater weight of the evidence his defense of fraud set up in an action to recover the balance due on the purchase price of an article, will not be held for error on the plaintiff's exception on the ground that the court should have charged that the burden of proving the defense was by the preponderance of the evidence.

APPEAL by plaintiff from *Devin, J.*, and a jury, at January Term, 1933, of HOKE. No error.

This was a civil action. Plaintiff a Cincinnati, Ohio, corporation, entered into a written contract, by which plaintiff agreed to furnish, and did furnish, defendants a Koldo-matic counter, a case in which to keep meats, etc., for the price of $750.00 cash, $90.00 when the order was signed and $90.00 when the case was delivered and $27.00 per month thereafter until the last payment, which was $30.00. Plaintiff by the instrument signed was to retain title to the case until the case was fully paid for. Defendants set up fraud and deceit, and counterclaim, after paying all of plaintiff's claim except $202.55.

Claim and delivery proceedings were issued at the instance of the plaintiff on 8 March, 1931, with United States Fidelity and Casualty Company, Incorporated, as surety on the plaintiff's undertaking which was served on the defendants on 18 March, 1931, and the defendants replevied with Mrs. J. E. Conoly and Mrs. P. C. Howell, as sureties on the defendant's undertaking. The defendant, J. E. Conoly, doing business as Economy Grocery Company, signed a note in the sum of $570.00, and contract. Both contract and note were signed on 27 March, 1931,

and accepted by the plaintiff on 6 April, 1931. Plaintiff shipped to the defendants the Koldo-matic counter as per contract and note.

Defendants contended that plaintiff perpetrated a fraud on them and deceived them, in that the Koldo-matic counter, a case in which to keep meats, etc., was not as represented and was not properly constructed; that it would not circulate cold air and would leak from the outside. Defendants continued to pay plaintiff as each installment became due until all had been paid down to the sum of $202.55. Defendants further contended that they notified plaintiff that there was something wrong with the case and plaintiff, two or three times, sent a service man to service the case; that each time the service man came and worked on the case he represented that the company would fix the case properly; hence defendants continued to pay the monthly installment due on the note. That after the claim and delivery proceedings were issued, defendants made bond and continued to hold the case until the November Term of Court, 1931, at which time Judge Midyette ordered that the case be turned over to the plaintiff and the same be sold after 30 days notice of sale at the courthouse and three other public places in the county and the funds be held pending further orders of the court. It was admitted that the case was sold and same brought the sum of $50.00.

The defendants further contended that they were entitled to the sum of $680.58 (the amount they had paid to the plaintiff) and prayed for judgment against the plaintiff on their counterclaim and for the further sum of $500.00 as damages as a result of lost meats which they claim they lost by this case being faulty or not properly constructed. In addition to the above, they further contend that they ought to recover of the plaintiff the further sum of $175.00 for electric current which they claim they paid for which was in excess of the proper amount of current they contended they ought to have used had the case been what it ought to have been and what the agent claimed it was.

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

"1. Were the defendants induced to sign the note and contract sued on by the false and fraudulent representations of the plaintiff, as alleged in defendant's answer and counterclaim? Answer: Yes.

2. What damages, if any, are defendants entitled to recover, therefor? Answer: $180.00, and interest.

3. Are the defendants indebted to the plaintiff, and, if so, in what amount? Answer: Nothing.

4. Is the plaintiff entitled to the possession of the property described in the complaint? Answer: Yes.

5. What was the value of the said property at the time of its seizure under claim and delivery proceedings in this action? Answer: $50.00."

The following judgment was rendered by the court below: "This cause coming on to be heard before his Honor, W. A. Devin, and a jury, and the issues being answered in favor of the defendants; it is, therefore, upon motion of Hiram S. Kirkpatrick, attorney for the defendants, ordered and decreed by the court that J. E. Conoly and P. C. Howell have and recover of the plaintiff, Cincinnati Butchers Supply Company, the sum of $180.00, with interest from date of this action until paid, and for costs of this action, to be taxed by the clerk of this court. It is further ordered that upon compliance with this judgment plaintiff shall be entitled to the $50.00 now held under the order of this court." The plaintiff made numerous exceptions and assignments of error and to the judgment as signed, and appealed to the Supreme Court.

H. W. B. Whitley for plaintiff.
Hiram S. Kirkpatrick for defendants.

CLARKSON, J. After a careful review of the evidence and charge of the court below, we do not think plaintiff's exceptions and assignments of error can be sustained. All the elements of fraud and deceit were sufficiently pleaded by defendants, and the evidence on the trial sufficient to sustain defendants' allegations of fraud and deceit to avoid the contract and recover damages. On account of the sinister ramifications of fraud and deceit, courts seldom lay down any hard and fast rule. The general allegation of fraud and deceit and proof of same is sufficiently shown on this record. The fact, under conflicting evidence, was for the jury to determine.

The court below charged the jury: "Now, upon this issue the burden of proof is upon the defendant, Mr. Conoly, to satisfy you from the evidence and by its greater weight, that he was induced to sign this contract by the false and fraudulent representations of the plaintiff's agent, as alleged in this answer."

Plaintiff in its brief asks "Ought the judge to charge the degree of proof was on the defendants only by the greater weight or by the preponderance of the evidence?" As we understand it, plaintiff does not challenge the correctness of the court below in charging that the burden of proof, *onus probandi,* was on the defendants, but it contends that the proof should be by the preponderance and not by the greater weight of the evidence as charged by the court below. We think the contention is a distinction without a difference. They are synonymous.

In 10 R. C. L., Evidence, p. 1012, part sec. 204, we find: "There is no doctrine of the law settled more firmly than the rule which authorizes issues of fact in civil cases to be determined in accordance with the preponderance or weight of the evidence. The reason of the rule no doubt

is, that as between man and man, where a loss must fall upon one or the other, it is right that the law should cast it upon him who is shown to have been the cause of the loss, by proof establishing the reasonable probability of the fact." 23 C. J., p. 16, sec. 1749; *Newborn v. Smith*, 200 N. C., 532, 533.

In *Chaffin v. Mfg. Co.*, 135 N. C., 95, 99-100, it is said: "When the part of the charge of the court excepted to is considered and tested by this reasonable rule of the law, we think it sufficiently and indeed clearly appears that the jury were instructed, at least substantially, that the plaintiffs were required to make out their case by a preponderance of the evidence, and that the court explained to them with sufficient fullness and accuracy what it meant by the preponderance of the testimony and how the jury should apply the rule to the facts and circumstances of the case in order to determine whether plaintiff had met the requirement. The use of the word 'satisfied' did not intensify the proof required to entitle the plaintiffs to their verdict. The *weight* of the evidence must be with the party who has the burden of proof or else he cannot succeed. But surely the jury must be satisfied or, in other words, be able to reach a decision or conclusion from the evidence and in favor of the plaintiff which will be satisfactory to themselves. In order to produce this result or to carry such conviction to the minds of the jury as is satisfactory to them, the plaintiffs' proof need not be more than a bare preponderance, but it must not be less. The charge, as we construe it, required only that plaintiffs should prove their case by the greater weight of the evidence." We have examined the record and find no prejudicial or reversible error.

No error.

HOBART DAVIS, C. A. REDMON AND HIS WIFE, WINNIE REDMON, v. WAYNE BRIGMAN AND HIS WIFE, SALLIE BRIGMAN.

(Filed 24 May, 1933.)

1. Judgments K f—

An independent action to set aside a judgment may not be treated as a motion in the original cause where all parties to the prior action are not parties to the action to set aside the judgment.

2. Same—Remedy to set aside deed for failure to serve summons in tax foreclosure suit is by motion in the cause.

Where a tax certificate has been foreclosed and deed made to the purchaser's assignee, the remedy of the former owner to set aside the deed on the grounds that summons in the foreclosure action was not in fact served and that the land was not properly listed for taxation and was insufficiently described, is by motion in the original cause and not by

independent action, there being no allegation of fraud or any other ground of equitable relief, since, if the cause be treated as a suit to remove cloud upon title, it would be necessary to vacate the judgment in the foreclosure proceedings, and plaintiff's contention that he could not proceed by motion in the original cause because the grantee in the foreclosure deed was not a party to the original suit cannot be sustained, since the grantee is in privity with the foreclosure judgment and its validity could be attacked by motion in the cause after notice to the parties and their privies.

APPEAL by plaintiffs from *Clement, J.,* at October Term, 1932, of MADISON.

George M. Pritchard for plaintiffs.
John A. Hendricks for defendants.

ADAMS, J. When the complaint and answer were read the defendants made a motion to dismiss the action; the motion was allowed and the plaintiffs excepted and appealed. Whether the judgment is correct is dependent chiefly upon the allegations in the complaint.

On 29 June, 1931, or prior thereto, the county of Madison instituted an action against the plaintiffs to foreclose a tax certificate issued to the county pursuant to a sale of the land in controversy. No answer was filed and an interlocutory order was made in which a commissioner was appointed to sell the land. Disston Silver became the highest bidder and assigned his bid to the defendant Wayne Brigman. Afterwards a final decree was made and the commissioner by direction of the court executed and delivered a deed in fee simple to the assignee.

It is alleged in the complaint that the summons in the foreclosure proceedings purports to have been issued by the clerk of the Superior Court and to have been served on the plaintiffs, but that in fact it was never served, and that the return of the officer is incorrect. It is alleged, also, that the lands were not properly listed for taxation and were insufficiently described.

The defendant's motion to dismiss the action was based upon two grounds: (1) the plaintiffs brought an independent action to set aside a judgment taken before the Superior Court for want of an answer; (2) the plaintiffs' only remedy was by motion in the cause.

This action cannot be treated as a motion in the foreclosure proceedings for the reason that all the parties to the foreclosure are not parties to the present action. The remaining question is whether the relief sought by the plaintiffs can be administered in an independent action. The plaintiffs claim that the relief sought is the removal of a cloud on the title of their land; but in order to remove the alleged cloud it is necessary to vacate the judgment rendered when the tax certificate

was foreclosed. This Court has repeatedly held that when it appears from the officer's return that a summons has been served as required by law, when in fact it has not been served, the remedy is a motion in the cause to set aside the judgment and not an independent action. In such event the judgment cannot be collaterally attacked; relief must be sought in a direct proceeding to have the judgment set aside. *Doyle v. Brown*, 72 N. C., 393; *Brickhouse v. Sutton*, 99 N. C., 103; *Spencer v. Credle*, 102 N. C., 68; *Whitehurst v. Transportation Co.*, 109 N. C., 342; *Bailey v. Hopkins*, 152 N. C., 748; *Stocks v. Stocks*, 179 N. C., 285; *Caviness v. Hunt*, 180 N. C., 384; *Jordan v. McKenzie*, 199 N. C., 752. It will be observed that there is no allegation in the complaint of fraud or any other ground of equitable relief.

It is contended that the plaintiffs cannot proceed by motion in the cause for the reason that the defendants in the present action were not parties to the proceedings to foreclose the tax certificate. This position cannot be maintained because the purchaser claims under the judgment rendered in the foreclosure proceedings and is therefore in privity to the judgment. *Sills v. Ford*, 171 N. C., 733. If the judgment under which he claims should be set aside his deed would convey no title. By motion in the cause after notice to all the parties and privies the plaintiffs may contest the questions which they undertake to raise in the present action.

As now constituted the suit cannot be upheld as an independent action. The remedy is entirely at law; it involves no equitable principle; and as stated it cannot be treated as a motion in the cause. Judgment

Affirmed.

KATHERINE C. TIEDEMANN v. HERBERT A. TIEDEMANN.

(Filed 24 May, 1933.)

1. Appeal and Error J c—

An order supported by sufficient findings of fact based on the evidence will be sustained.

2. Divorce E b: Appeal and Error J b—

The amounts allowed for reasonable subsistence and counsel fees upon application for alimony *pendente lite* are determined by the trial court in his discretion and are not reviewable, although either party may apply for a modification before trial. C. S., 1667.

APPEAL by defendant from *Clement, J.*, at November Term, 1932, of BUNCOMBE. Affirmed.

This is an action for alimony without divorce. C. S., 1667.

Pending the trial and final determination of the issues involved in the action, on the application of the plaintiff, and after notice to the defendant, an order was made by the judge holding the Superior Courts of Buncombe County, that the defendant pay into the office of the clerk of the court, each month, *pendente lite,* the sum of $150.00, for the use of the plaintiff, and forthwith the sum of $1,200, on account of fees for her counsel in this action.

From this order, the defendant appealed to the Supreme Court.

Carter & Carter and James S. Howell for plaintiff.
George M. Pritchard for defendant.

PER CURIAM. The facts found by the judge are set out in his order. These facts are sufficient to support the order. There was evidence at the hearing tending to sustain the findings of fact. The amounts which the defendant is required to pay for the reasonable subsistence of plaintiff, *pendente lite,* and for compensation to her counsel were determined by the judge in the exercise of his sound discretion. They are not subject to review by this Court. *Anderson v. Anderson,* 183 N. C., 139, 110 S. E., 863. They may be modified at any time before the trial of the action upon the application of either party. C. S., 1667. The order is

Affirmed.

EILEEN GALER v. AUBURN-ASHEVILLE COMPANY.

(Filed 14 June, 1933.)

1. **Judgments K f: Taxation H c—Procedure to set aside judgment in tax foreclosure suit is by motion in the cause.**

   The proper procedure to set aside a judgment entered in favor of the county in an action against the owner for taxes is by motion in the original cause, and where such judgment has been set aside upon motion after notice to the parties, the owner, in an action to remove cloud upon title, is entitled to judgment canceling the tax deed, C. S., 1743, the judgment for the taxes having been set aside and the owner having paid into court the amount of the taxes plus interest.

2. **Taxation H c—Assignee of bid at tax foreclosure sale may be made a party upon motion to set aside the judgment in the proceedings.**

   Where a county has bid in certain property at a tax foreclosure sale and has assigned its bid to a third party, the assignee may be made a party to the action upon a motion in the cause by the owner to set aside the judgment for the taxes.

APPEAL by defendant from *McElroy, J.,* at December Term, 1932, of BUNCOMBE. Affirmed.

The case was heard in the General County Court and judgment tendered as follows:

"This cause coming on to be heard before the undersigned Guy Weaver, judge of the General County Court of Buncombe County and without the intervention of a jury, the court finds the following facts:

1. That prior to 4 September, 1928, Katherine B. Williamson was the owner of the lot of land described in the complaint in this action, same being Lot No. 2, in Block C-B, as shown on Plat Book 198, at page 101 of Plat Records of Buncombe County, N. C., and on said date the said lot was sold and transferred to Alice Morris free from encumbrances except the taxes for the year 1928.

2. That on 29 September, 1928, Alice Morris conveyed said lot to plaintiff in this case free from all encumbrances and was to pay the taxes of 1928, and that J. H. Morris, agent of Alice Morris, informed F. K. Gardner, agent of plaintiff, who resides in Washington, D. C., that he would pay the taxes as soon as the records were complete, and after said records were complete J. H. Morris assured F. K. Gardner that he had paid the taxes on said lot.

3. That plaintiff, after the purchase of said lot, expended some $10,000 on same in erecting a residence thereon.

4. That on 17 November, 1930, a suit was instituted by the county of Buncombe entitled, 'County of Buncombe *v.* Katherine B. Williamson and husband ..... Williamson,' for 1928 taxes which remained unpaid, and summons was placed in the hands of the sheriff and a return was made thereon, with a rubber stamp, as follows: 'Due search made, defendant not to be found in my county,' and thereupon affidavit for service of summons by publication was made and order granted and notice published in a newspaper for the statutory time.

5. That Katherine B. Williamson was at the time present in the city of Asheville and in Buncombe County, and has been in said county and city continuously since said date of said summons.

6. That after publication of summons for the required time, a judgment was entered against Katherine B. Williamson for the taxes of 1928, in the sum of $21.81, which included taxes and cost to that date; and thereafter a commissioner was appointed to sell the lot in question and same was sold for the sum of said taxes and cost, and the property was bid in by Buncombe County, and the bid of said county was thereafter assigned to the defendant, Auburn-Asheville Company, for the sum of $21.91, and a deed was made by the commissioner to said defendant for the property, on 12 May, 1932, which deed has been placed of record.

7. That plaintiff, through her agent, F. K. Gardner, was notified that defendant held a deed for the property about 12 May, 1932, and a

tender of the amount of taxes and costs was made to the defendant on that date and the same was refused.

8. That thereafter notice was given to defendant to show cause why the judgment entered in favor of Buncombe County and against Katherine B. Williamson for the taxes of 1928, should not be set aside, and said motion was held 5 July, 1932, and same was set aside by the clerk of the Superior Court of Buncombe County who had rendered said judgment, and notice of appeal was given by defendant from the order of the clerk setting aside the judgment.

9. That this present action was instituted about 6 July, 1932, to set aside and cancel the deed made to the defendant which had been placed on record, plaintiff contending that same constitutes a cloud on her title.

10. That at the trial of said cause, plaintiff again tendered into court for the use and benefit of the defendant, the amount of said tax and cost and accrued interest, and said tender was again refused in open court.

From the foregoing findings of fact by the court, based upon the evidence offered by the respective parties to the action, the court orders and adjudges:

That the deed made by the commissioner, J. C. Joyner, to the defendant, Auburn-Asheville Company, on 12 May, 1932, and registered in Deed Book No. 449, at pages 419 and 420, for the property of the plaintiff as set out and described in said deed and in the deed made to the plaintiff, is and constitutes a cloud upon the title of the plaintiff in this action.

It is therefore ordered and adjudged that the said deed be and the same is hereby declared null and void and that this judgment be recorded in the office of the register of deeds for Buncombe County.

It is further ordered and adjudged that the register of deeds of Buncombe County, N. C., be and he is hereby authorized and directed by this decree to make the proper entry of cancellation upon the pages of deed book where said deed is registered, as above set forth, and upon the cross-index of said deed records of said county.

It is further ordered that plaintiff pay into the office of the clerk of this court the sum of $22.50, being the amount of taxes, interest and costs in connection with the sale of said property for the unpaid taxes of 1928, for the use and benefit of the defendant in this action.

It is further ordered and adjudged that the defendant pay all the costs of this action. This 19 September, A.D. 1932."

Upon appeal by defendant to the Superior Court, exceptions and assignments of error were duly made. The court below rendered the following judgment:

"This cause coming on to be heard at this term of the court before the undersigned, P. A. McElroy, judge, holding the courts of the 19th Judicial District of North Carolina, upon an appeal taken by the defendant from a judgment rendered by the judge of the General County Court of Buncombe County, N. C., and upon exceptions taken and made by the defendant during the trial of said cause before said General County Court. And the said cause, on appeal, having been heard upon the record and the exceptions noted and taken thereto by the defendant from a judgment rendered by said judge of said General County Court in favor of the plaintiff, and after hearing the matter and the exceptions set out in the record and the argument of counsel for both plaintiff and defendant, it is adjudged by the court that there is no error in the judgment of the General County Court rendered in favor of the plaintiff and against the defendant, and said judgment is in all respects affirmed, and the cost of said action together with the cost of the appeal to this court be taxed against the defendant, and the terms of the judgment of the General County Court will be carried out as therein set forth. P. A. MCELROY, *Judge Presiding.*"

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

Welch Galloway for plaintiff.
Reed Kitchin for defendant.

CLARKSON, J. The findings of the General County Court on appeal by defendant and approved by the court below, has this in it: "That thereafter notice was given to defendant to show cause why the judgment entered in favor of Buncombe County and against Katherine B. Williamson for the taxes of 1928, should not be set aside, and said motion was held 5 July, 1932, and same was set aside by the clerk of the Superior Court of Buncombe County who had rendered said judgment, and notice of appeal was given by defendant from the order of the clerk setting aside the judgment."

This was the proper procedure. *Davis v. Brigman, ante,* 680. So far as it appears of record notice of appeal was given by defendant from the order of the clerk setting aside the judgment, but it does not appear that the appeal has been perfected. The defendant was not made a party in the procedure before the clerk, as he could have been. *Davis case, supra.*

This present action is to remove the cloud upon the title of the land (C. S., 1743), which defendant claims title to. The judgment against Katherine B. Williamson having been set aside and a nullity, we think the judgment of the court below is correct. The judgment is

Affirmed.

STATE v. GUS COLIN LANGLEY.

(Filed 14 June, 1933.)

1. Homicide B a—

Evidence tending to show that defendant killed the deceased with a deadly weapon while attempting to perpetrate a robbery is sufficient to be submitted to the jury on the issue of first degree murder, C. S., 4200, the credibility and probative force of the evidence being for the jury.

2. Homicide G c—Evidence of defendant's guilt of murder in the first degree held sufficient to be submitted to the jury.

Testimony of a witness, corroborated by other testimony, that defendant told him while both were in the county jail that defendant had killed the deceased and had prepared an alibi, with testimony of the witness's good character for truth and honesty, and testimony of the dying declaration of the deceased that he was killed by persons attempting to rob him, is *held* sufficient to be submitted to the jury on the issue of defendant's guilt of first degree murder, although defendant introduced testimony of himself and several witnesses that he was in another city the night the crime was committed, the conflicting testimony being for the determination of the jury.

3. Criminal Law L c—

The verdict of the jury, based upon correct and full instructions from the court, must stand as returned by the jury and recorded in the minutes of the court, and it may not be disturbed or set aside by the Supreme Court on appeal.

4. Homicide H f—Judgment upon conviction of first degree murder should recite the degree of murder for which sentence is entered.

Where in a prosecution for murder the jury returns a verdict of guilty of murder in the first degree, the judgment of the court, which alone is certified to the warden of the State prison, C. S., 4658, 4659, 4660, must recite that the defendant had been convicted of murder in the first degree, and where it recites that the prisoner had been convicted of murder, and sentences the prisoner to death by electrocution, the case will be remanded for the rendition of a proper judgment upon the verdict.

APPEAL by defendant from *McElroy, J.*, at December Term, 1932, of BUNCOMBE. No error in the trial; remanded for judgment on the verdict.

This is a criminal action in which the defendant, Gus Colin Langley, was tried on an indictment, which is as follows:

"The jurors for the State, upon their oath, present: That Gus Colin Langley, late of Buncombe County, on 19 December, 1932, with force and arms, at and in said county, did unlawfully and wilfully and feloniously, of his malice aforethought, with premeditation and deliberation, kill and murder one Lonnie G. Russell, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State."

The verdict returned by the jury at the trial is that the defendant is guilty of murder in the first degree. The verdict is so recorded in the minutes of the court. The judgment in the action as shown by the record is as follows:

"Gus Colin Langley, you have been indicted, tried and convicted by a jury of your county of the murder of Lonnie G. Russell. The law prescribes that the punishment for your crime is death. The judgment of the court, therefore, is that you be remanded to the common jail of Buncombe County, there to remain until the adjournment of this court, and upon the adjournment of this court,

It is ordered that you be conveyed by the high sheriff of said county of Buncombe to the penitentiary of the State of North Carolina, and by him delivered to the warden of said penitentiary;

And it is further ordered and adjudged that you remain in the custody of said warden until Friday, 10 February, 1933, and that on said day, between the hours of ten o'clock in the forenoon, and three o'clock in the afternoon, you be taken by the said warden to the place of execution in said penitentiary;

And it is further ordered and adjudged that the said warden then and there cause a current of electricity of sufficient intensity and voltage to cause death, to pass into and through your body until you are dead, and may God have mercy on your soul.

P. A. MCELROY, *Judge Presiding.*"

The defendant excepted to the judgment and appealed to the Supreme Court, assigning errors in the trial.

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

Styles & Styles for defendant.

CONNOR, J. The evidence offered by the State at the trial of this action was admitted without objection by the defendant. This evidence showed that Lonnie G. Russell was shot and fatally wounded at his filling station in the city of Asheville, N. C., between the hours of 7 and 9 o'clock, on Tuesday night, 27 September, 1932; that he ran out of the filling station, calling to the driver of a passing automobile, that he had been shot; that he got into the automobile, saying to the driver: "Go slowly by the filling station, and see if you can see those men who tried to rob me." The driver of the automobile took the wounded man to the Mission Hospital, in the city of Asheville, where he died at about 8:50 o'clock that night. His death was caused by an internal hemorrhage, which resulted from a gun shot wound. He was in a dying condition when he reached the hospital.

This evidence was sufficient to support the contention of the State that the homicide was murder in the first degree as defined by the statute. C. S., 4200. If believed by the jury, it showed that the homicide was committed with a deadly weapon, to wit: a gun. It further showed that the murder was committed in the perpetration, or in the attempt to perpetrate a robbery. *S. v. Lane,* 166 N. C., 333, 81 S. E., 620. The credibility of the evidence, and its probative effect to sustain the contention of the State, were, of course, for the jury to determine.

The evidence offered by the State, in support of its contention that the defendant is the man who shot and killed Lonnie G. Russell, at his filling station in the city of Asheville, on the night of 27 September, 1932, was sharply contradicted by the evidence offered by the defendant.

The defendant was in Asheville on Monday, 26 September, 1932. He was arrested in Wilmington, N. C., on the following Saturday morning, and was brought by the officers who arrested him to Asheville, where he was confined in jail until the December Term, 1932, of the Superior Court of Buncombe County.

A witness for the State testified that he was confined in the jail at Asheville with the defendant for about two weeks during the month of November; that during this time, the defendant talked constantly about the killing of Lonnie G. Russell, and said that the officers of Buncombe County were too dumb to catch any one; and that he was the man who shot Russell at his filling station, in Asheville, on Tuesday night, 27 September, 1932, but that he would have witnesses at his trial who would testify that he was in Wilmington at the time of the shooting. There was evidence tending to show that this witness, although he had been confined in jail under a criminal charge, is a man of good character, at least for truth and honesty. There was also evidence tending to corroborate his testimony.

The evidence offered by the defendant tended to show that he, with a companion, left Asheville during the morning of Monday, 26 September, 1932, in an automobile, and that they arrived in Wilmington, N. C., on Tuesday, 27 September, 1932, at about 1:30 o'clock, p.m., and that defendant was not, therefore, in Asheville on Tuesday night, 27 September, 1932, as contended by the State. The testimony of the defendant to this effect, was corroborated by the testimony of many witnesses who reside in Wilmington or its vicinity.

The conflicting evidence with respect to the guilt of the defendant as charged in the indictment, was properly submitted to the jury. There was no error in the refusal of the court to dismiss the action by judgment as of nonsuit at the close of all the evidence. The testimony of the witness for the State that the defendant told the witness in the jail at Asheville that he shot Lonnie G. Russell, and the statement of the

deceased to the driver of the automobile, that the men who shot him were trying to rob him, were sufficient as evidence to support the contention of the State that the defendant is guilty of murder in the first degree, as defined by the statute. C. S., 4200. No objection to this evidence was made by the defendant during the trial. There is no assignment of error in defendant's appeal to this Court based upon exceptions to the admission of this evidence. There was no error in its admission.

Nor was there error in the charge of the court to the jury. The jurors were properly instructed by the court with respect to the verdict, which they should return upon the facts as they might find them to be from the evidence. The charge was full, fair and correct. The verdict as returned by the jury, and as recorded in the minutes of the trial court cannot be set aside or disturbed by this Court. It must stand as returned by the jury and as recorded in the minutes of the trial court. *S. v. Jackson,* 199 N. C., 321, 154 S. E., 402.

There is error, however, in the form of the judgment in this action. It does not appear on the face of the judgment that the defendant has been convicted of a crime which is punishable by death, under the law of this State. It appears only that the defendant has been convicted of murder. It does not appear that he has been convicted of murder in the first degree. The crime of murder in the first degree is punishable by death, while all other kinds of murder are punishable by imprisonment in the State's prison. C. S., 4200. The judgment appearing in the record is not sufficient to justify the execution of the defendant by the warden of the State's prison. It should appear on the face of the judgment, which is alone certified to the warden that defendant has been convicted of a capital felony. C. S., 4658, 4659, 4660.

The action must be remanded to the Superior Court of Buncombe County, to the end that a proper judgment on the verdict as returned by the jury, and as recorded in the minutes of the trial court, may be rendered. See *S. v. Jackson,* 199 N. C., 321, 154 S. E., 402. It is so ordered.

Remanded.

JULIA LASALLE STEVENSON v. DR. JAMES M. NORTHINGTON ET AL.

(Filed 14 June, 1933.)

1. Libel and Slander B b—Actual malice terminates qualified privilege and such malice need not be directed against plaintiff personally.

Although falsity and actual or expressed malice must be shown to establish liability for an alleged libel where the defendant is under a qualified privilege, such malice need not be directed against the plaintiff personally, it being sufficient if the defendant was governed by a bad motive and did not act in good faith, and the instruction in this case

that defendant would not be liable "unless it was done with some malice, not necessarily ill-will; but without just cause or excuse, why then that would end the case—that is to say, if it was done in good faith, why then that would end the case" when taken in connection with other portions of the charge is held not erroneous as failing to draw the distinction between actual and implied malice.

2. Appeal and Error J c: J g—Defendant may not complain where recovery is correctly had on theory of trial favorable to defendant.

Where an action for libel is tried upon the defendant's theory that the publication was qualifiedly privileged and not upon plaintiff's contention that no privilege attached thereto, and the jury has found that the publication was false and made with actual malice, it is unnecessary to decide upon defendant's appeal whether the publication was qualifiedly privileged, and defendant has no just cause to complain, the case having been tried upon the theory most favorable to him.

3. Libel and Slander A b—In this action for libel plaintiff is held to have sufficiently proven damage.

Where in an action for libel the plaintiff not only proves losses of a financial nature, but also proves injury to her reputation and standing in the community tending to injure her in her calling or profession, defendant's contention that the action should be dismissed for failure to prove damages cannot be sustained.

4. Libel and Slander D b—

Evidence in this action for libel is held sufficient to be submitted to jury and overrule defendant's motion as of nonsuit.

APPEAL by defendants from *Alley, J.*, at March Term, 1933, of BUNCOMBE.

Civil action for libel. The Tri-State Medical Association was not served with summons.

The plaintiff, who testifies that she is a professional teacher of educational psychology, a lecturer on personality, beauty and charm, was pursuing her profession in Charlotte, N. C., during the summer of 1926, when the defendant, who is the editor of the official organ of the Tri-State Medical Association, "Southern Medicine and Surgery," published in said magazine, in the June and July issues, articles of and concerning the plaintiff, one under the heading: "For War on Medical Fakers: With Field Notes of a Skirmish: The Fantastic Cults and Isms Will be Energetically Opposed and Exposed at Every Opportunity," meaning thereby to charge the plaintiff with being a faker, a teacher of fantastic isms, and a member of fantastic cults. It was asserted in said article that the plaintiff had been arrested in Florida for practicing medicine without a license, which was true, but omitted to state that the case against her was dismissed. Defendant's publication also contained the statement that plaintiff advertised in McFerrin's Health Bulletin, "whose columns were patronized by either quacks or faddists, and doubtless 'Dr. Stevenson feels at home among this class."

Plaintiff testified that the defendant came to her hotel while she was in Charlotte and threatened to do her harm. He is alleged to have said, "I will find something, if I want to, against you, and I am going to"; whereupon the defendant was shown the door. Plaintiff lectured upon such subjects as "The Cause of Old Age," "How to Stay Young," "Rejuvenation Through Auto-Suggestion," "Eating Your Way Back to Health," "Forces Within You and How to Use Them," and other subjects of like nature.

Again, in the summer of 1931, while the plaintiff was lecturing in Asheville, N. C., or preparing to lecture before the Asheville Normal and Teachers College, the defendant wrote to Dr. John E. Calfee, president of said institution, and enclosed copies of his articles as "bits of information for whatever disposal you care to make," which said articles were read before the school, and the plaintiff's work brought to a close.

The defendants, other than the Tri-State Medical Association, pleaded the truth of the articles as a defense, also their qualified privilege and alleged that they were written in good faith, without any malice or ill-will towards the plaintiff.

The jury returned the following verdict:

"1. Did the defendant publish of and concerning the plaintiff the matters alleged in the complaint by writing letter and mailing clippings from his publication to Dr. John E. Calfee? Answer: Yes.

"2. Were such statements false and defamatory? Answer: Yes.

"3. Was such publication done in malice? Answer: Yes.

"4. What damage, if any, is plaintiff entitled to recover? Answer: $3,000."

Judgment on the verdict in the General County Court, from which the defendants appealed on questions of law to the Superior Court of Buncombe County where the judgment of the trial court was upheld.

From this latter judgment, the defendants appeal, assigning errors.

Kitchin & Kitchin and Weaver & Miller for plaintiff.
B. S. Whiting and Brock Barkley for defendants.

STACY, C. J., after stating the case: The trial court held that the original publication of the alleged defamatory articles was privileged, and limited the plaintiff to the subsequent publication of said articles in 1931, when the defendant mailed them to Dr. Calfee, president of the Asheville Normal and Teachers College, and caused plaintiff's work in Asheville to be stopped.

It is the contention of the defendant that this letter was, at least, qualifiedly privileged, and, therefore, both falsity and actual or express

malice must be shown to establish liability. *Ramsey v. Cheek,* 109 N. C., 270, 13 S. E., 775; *Brown v. Lumber Co.,* 167 N. C., 9, 82 S. E., 961; *Newberry v. Willis,* 195 N. C., 302, 142 S. E., 10; *Hartsfield v. Hines,* 200 N. C., 356, 157 S. E., 16.

The question is presented by exception to the following instruction on the third issue: "The court instructs you unless it was done with some malice, not necessarily ill-will; but without just cause or excuse, why then that would end the case—that is to say, if it was in good faith, why then that would end the case."

The contention is, that, in a case of this kind, express or actual malice must be proved, and not merely legal or implied malice; and *Ramsey v. Cheek, supra,* is cited as a controlling authority on the subject. There, it was said: "In this class of cases (qualified privilege), an action will lie only where the party is guilty of falsehood and express malice. 13 A. & E., 406. Express malice is malice in fact, as distinguished from implied malice, which is raised as a matter of law by the use of words libelous *per se,* when the occasion is not privileged. Whether the occasion is privileged is a question of law for the court, subject to review, and not for the jury, unless the circumstances of the publication are in dispute, when it is a mixed question of law and fact."

But taking the instruction in connection with other portions of the charge, we do not regard it as necessarily offending against the distinction between actual and implied malice, though it might have been clearer. Speaking to a similar instruction in *Gattis v. Kilgo,* 128 N. C., 402, 38 S. E., 931, it was said: "In his charge on the question of malice, his Honor was also correct in stating in substance that although the malice, which is a necessary ingredient in the constitution of a libel where the publication is privileged, is actual or express malice—that which is popularly called malice—and not malice in law, yet that it was not necessary that the ill-will or malice of the defendant should have been against the plaintiff personally, and that if the publication was not in good faith for the reason claimed, but from a wrongful, indirect and ulterior motive and was false, the same would be malicious. The request, therefore, of the defendants' counsel to the court for instruction that malice in fact means personal ill-will and a desire to injure the plaintiff was properly refused. *Ramsey v. Cheek,* 109 N. C., 270; Odgers Libel and Slander, 266, 267."

In actions for libel, it is not necessary that particular ill-will or malice should exist toward the plaintiff. *Savage v. Davis,* 131 N. C., 159, 42 S. E., 571. It may be otherwise in an action for malicious prosecution. *Brooks v. Jones,* 33 N. C., 260; *Dickerson v. Refining Co.,* 201 N. C., 90, 159 S. E., 446. Or where punitive damages are sought to be recovered. *Tripp v. Tobacco Co.,* 193 N. C., 614, 137 S. E., 871.

It will be observed that in the instruction here complained of the jury was told if the letter in question was written in good faith, "why then that would end the case." So, the jury must have found that the articles were false, and that the letter was mailed to Dr. Calfee maliciously or for no good purpose. The plaintiff was required to show that the defendant was governed by a bad motive, and that he did not act in good faith. *Riley v. Stone,* 174 N. C., 588, 94 S. E., 434. Malice in this connection is defined as "any indirect and wicked motive which induces the defendant to defame the plaintiff. If malice be proved, the privilege attaching to the occasion is lost at once." Odgers Libel and Slander, 267. The privilege attaching to the occasion in the instant case, therefore (if indeed any attached, which may be doubted), was at once lost upon the showing of malice. *Ramsey v. Cheek, supra; Bryd v. Hudson,* 113 N. C., 203, 18 S. E., 209.

The plaintiff contends that in mailing the letter to Dr. Calfee, the defendant was not actuated by any desire to protect the public, but was possessed of a spirit of unkindness, and sent the letter "with intent to injure her." The defendant, on the other hand, says that he was merely interested in the medical profession; that he acted in good faith, with no ulterior motive, and that he mailed the letter only in the interest of the public good. These contentions were fully given to the jury by the trial court in its instructions. Hence, viewed in the light of the whole charge, it would seem that the excerpt is free from reversible error. *Lewis v. Carr,* 178 N. C., 578, 101 S. E., 97; *Adcock v. Marsh,* 30 N. C., 360.

Having reached the above conclusion with respect to the exception to the charge, it is unnecessary to decide whether the occasion was in fact "unprivileged" as the plaintiff contends (*Alexander v. Vann,* 180 N. C., 187, 104 S. E., 360), or "qualifiedly privileged" as the defendant asserts. *Elmore v. R. R.,* 189 N. C., 658, 127 S. E., 710; *Fields v. Bynum,* 156 N. C., 413, 72 S. E., 449. The case was tried upon the defendant's theory, which was more favorable to him than the plaintiff's, thus leaving him without cause for complaint so far as the question of qualified privilege is concerned. Undoubtedly, the publication was actionable, if untrue and not privileged, for it tended to expose the plaintiff to ridicule or scorn, and was calculated to injure her in her calling or profession. *Pentuff v. Park,* 194 N. C., 146, 138 S. E., 616; *Riley v. Stone, supra.*

Finally, it is contended the action should be dismissed because no damage has been shown. The point is without merit. Plaintiff not only proved losses of a financial nature, but she also established injury to her reputation and standing in the community as a result of the publication in question. Her answer to this contention is one of philosophic paraphrase: "He who steals my purse steals trash, but he who robs me of my good name takes all that I have; takes that which enricheth him

not, but impoverisheth me." Verily, a good name is rather to be chosen than great riches. Prov. 22:1.

The evidence is quite sufficient to carry the case to the jury, and in no view of it, could the motion to nonsuit have been allowed. *Pentuff v. Park, supra; Ivie v. King,* 167 N. C., 174, 83 S. E., 339; 17 R. C. L., 294.

A careful perusal of the record leaves us with the impression that the case is free from reversible error. The judgment of affirmance entered by the Superior Court will be upheld.

Affirmed.

C. L. SMITH, AGENT FOR S. A. MOORE, v. P. L. GORDON.

(Filed 14 June, 1933.)

1. Judgments N b—Foreign judgment in rem in nature of attachment is conclusive only to value of property seized and sold.

A distress judgment of another state in a proceeding *in rem* in the nature of an attachment, obtained without personal service, is conclusive only to the amount of the value of the property seized and sold, and an action on the judgment may not be maintained in this State to recover the balance due on the judgment after deducting the amount brought by the sale of the property.

2. States A a—

In an action on a debt contracted in another state in which the statute of limitations is pleaded the statute of limitations of the forum must govern.

3. Limitation of Actions C b—

The three-year statute of limitations bars a simple action for debt, and where a letter relied on as arresting the running of the statute is written more than three years before the commencement of the action it is ineffective. C. S., 416.

4. Same—Letter in this case held not to remove bar of statute of limitations.

In order for a letter signed by the debtor to remove the bar of the statute of limitations it must contain an express, unconditional promise to pay or a definite, unqualified acknowledgment of the debt as a subsisting obligation, and a letter acknowledging the debt at the time defendant left plaintiff's city but claiming that it had been canceled by the creditor's action in selling the debtor's goods of a value greatly in excess of the debt, is not such an acknowledgment of a subsisting obligation as will repeal the statutory bar.

CIVIL ACTION, before *Cowper, Special Judge,* at May Term, 1932, of PASQUOTANK.

On 25 September, 1926, C. L. Smith, agent for S. A. Moore, in an action in the Circuit Court for Kanawha County, State of West Virginia, secured a judgment against the defendant for the sum of $710.00 with interest thereon. This judgment recites that on 2 September, 1926, an affidavit was filed as provided by statute and a distress warrant issued against the defendant, commanding the proper officer of the State of West Virginia "to distrain so much of goods and chattels of defendant as were found upon messuage and tenement described in the affidavit as shall be sufficient to satisfy the rent in arrears and the cost of the distress as claimed in the said affidavit," etc. Pursuant to such warrant certain personal property of defendant was seized and sold. The sale was made on 6 October, 1926, and the property, according to the return of the constable, brought $50.00.

On 23 May, 1930, the plaintiff Smith, as agent for said Moore, instituted an action against the defendant in Pasquotank County. The complaint recited the West Virginia judgment and said judgment was duly authenticated as provided by law. The defendant did not answer and a judgment by default was taken. However, this judgment was afterwards vacated on the ground of excusable neglect, and the plaintiff did not appeal. Hence this phase of the case is not relevant. The defendant filed an answer alleging that the plaintiff had secured a judgment against him in West Virginia without personal service and had seized and sold all of his office furniture and fixtures. The evidence tended to show that S. A. Moore owned an office building in Charleston, West Virginia, and that the defendant rented certain offices and vacated the premises and left the State. On 24 July, 1926, the defendant wrote the following letter: "Maple City, Mich., 24 July, 1926. Mr. S. A. Moore, Charleston, W. Va., Dear Mr. Moore: Your letter of the 21st just received and I am only answering it as I am sending to my friend George Brooks a copy of this letter so he will know just how I stand in reference to my indebtedness to you. When I left Charleston I owed you $378.00 up to the fifteenth of January, 1926, when I told you that I was leaving and where you said that you would have to hold my equipment for the debt, which was all that was said. Then in March you write me that you have me charged with rent to March first at the full rate on account of my stuff still being in the office, and thereafter you would have it moved to one room and only charge me thirty dollars a month storage, your rooms you must remember only rented for twenty dollars a month. I wrote you then that I would pay you the $378.00 from January the fifteenth interest added as fast as I could, and that I would pay no further attention to any communication until you sent me over your signature a statement of my true indebtedness. So far you have failed to do so, and that is the reason that I have made no effort to pay you anything. I also said in the same letter that you

be right sure of your legal rights to sell any of that equipment as you threatened to do. P. L. Gordon." On 19 December, 1929, the defendant also wrote the following letter: "Camden, N. C., 19 December, 1929. American Creditors Association, Cincinnati, Ohio. Gentlemen: Your form letter in regard to my indebtedness to Mr. S. A. Moore, of Charleston, W. Va., just received and in reply will say that I never owed Mr. Moore any such sum, but when I left Charleston on January, 1926, I did owe him $378.00, and the accompanying copy of a letter that I wrote to Mr. Moore from Michigan in July of that year will show you just how matters stood between us. Since the writing of that letter some two years ago he sold my equipment which was worth to me more than the indebtedness, and I consider that my debt to him has been automatically canceled therefor. Besides office furniture there was a library that was worth not less than five or six hundred dollars and all in all there was about a thousand or twelve hundred dollars worth of material that I left to secure an indebtedness of only $378.00. This has all been sold by order of court as I was notified by the authorities such action was being taken by Mr. Moore some time in 1926 or 1927. It would naturally embarrass me for you to do as you threaten, but do not think for one moment that I will not meet you in any court. P. L. Gordon."

At the close of plaintiff's evidence the defendant moved for judgment of nonsuit. A judgment of nonsuit was entered and the plaintiff appealed.

Geo. J. Spence for plaintiff.
W. I. Halstead for defendant.

BROGDEN, J. The two determinative questions of law presented by the record are:

1. What is the effect of the distress judgment rendered in West Virginia in September, 1926?

2. Do the letters written by the defendant prevent the bar of the statute of limitations?

The West Virginia judgment, upon its face, is a proceeding *in rem* in the nature of an attachment and was obtained without personal service upon the defendant. Such a judgment "is conclusive evidence that the debt sued on was due to the plaintiff in it, to the value of the property attached, but of nothing more." *Peebles v. Patapsco Guano Co.*, 77 N. C., 233; *Warlick v. Reynolds*, 151 N. C., 606, 66 S. E., 657; *Johnson v. Whilden*, 166 N. C., 104, 81 S. E., 1057. Consequently, the plaintiff's suit cannot be maintained upon the judgment, but must of necessity rest upon the debt. As against the debt the defendant pleads the statute of limitations. In actions of debt the statute of limitation of the forum

must govern. *Tieffenbrun v. Flannery,* 198 N. C., 397, 151 S. E., 857. Obviously the three-year statute of limitations bars the debt unless the letters set out in the record are sufficient to remove the bar and keep the debt alive. C. S., 416, prescribes the statutory method of arresting the running of the statute. The accepted principle of law was stated in *Phillips v. Giles,* 175 N. C., 409, 95 S. E., 772, as follows: "In order to revive a debt which is barred by the statute, there should be an express unconditional promise to pay the same or that there should be a definite, unqualified acknowledgment of the debt as a subsisting obligation and from which the law will imply a promise to pay." *Wells v. Hill,* 118 N. C., 900, 24 S. E., 771; *Irvin v. Harris,* 182 N. C., 647, 109 S. E., 867. Manifestly the letter of 24 July, 1926, even if it amounted to an express promise to pay the debt, was ineffective on 23 May, 1930, when the present suit was instituted. Moreover, the letter of 19 December, 1929, is not such an acknowledgment of a subsisting obligation as the statute or decisions contemplate as sufficient and adequate to tear down the bar of limitation. Therefore, the ruling of the trial judge was correct.

The court is not inadvertent to the fact that the action was instituted by Smith as agent for Moore, but it is not deemed necessary to discuss this phase of the case.

Affirmed.

W. V. DORRITY v. GREATER DURHAM BUILDING AND LOAN ASSOCIATION AND C. S. HOLLAND.

(Filed 14 June, 1933.)

Fraud A e—Evidence held not to bring case within exceptions to rule that failure to read instrument constitutes negligence.

Where in an action for fraud there is no evidence that plaintiff was illiterate or that he was prevented from reading the agreement by any trick, artifice, scheme or device, and no evidence of any misrepresentation on the part of defendant's agent, and it appears that the agreement signed by plaintiff clearly and in detail set forth the elements of the transaction, the defendant's motion as of nonsuit is properly allowed, the evidence failing to bring the case within any of the exceptions to the rule that the failure to read an instrument constitutes negligence barring a recovery for the failure of the instrument to contain the agreement as understood by plaintiff.

CIVIL ACTION, before *Barnhill, J.,* at September Term, 1932, of DURHAM.

The plaintiff instituted this action against the defendant alleging that an agent of defendant on or about 22 April, 1929, sold to the plaintiff

a membership certificate in the defendant Building and Loan Association for the sum of $250.00 and collected therefor in cash, whereas in truth and in fact the said agent represented to the plaintiff at the time of sale that he was selling stock in the corporation and the plaintiff thought he was buying stock therein. Plaintiff said: "Mr. Holland told me he wanted to sell me some stock in the Greater Durham Building and Loan at six per cent. He came to me two or three times and I did not buy. Well he come to me and wanted to sell me the stock and I bought one hundred shares of stock. I was paying $2.50 per share for it. I paid him $250.00. He told me he would send me my stock or bring it to me in a few days, and in two or three days he come up there and brought me a little book and something there. He said it was my stock. This is what he brought me." The document referred to by the plaintiff was the certificate of membership, stating among other things: "This is to certify that W. V. Dorrity, of Durham, North Carolina, has paid the sum of two hundred and fifty dollars as a membership payment and is hereby entitled to membership in, and is a member of the Greater Durham Building and Loan Association, subject to the by-laws of the association as they now are, or as they may be hereafter amended, and one hundred shares of the par value of fifty dollars ($50.00) each are reserved for said member in accordance with the by-laws, payments thereon to be made at the rate of not less than twenty-five cents per share per month," etc.

At the time the membership certificate was delivered the agent also delivered to the plaintiff a book purporting to be a passbook with spaces for deposits and withdrawals. The last page of the book states: "This certifies that W. V. Dorrity, of Durham, North Carolina, is a member of Greater Durham Building and Loan Association and is the owner of one hundred shares of stock therein," etc.

On 20 April, 1929, the plaintiff made a written application to the defendant company as follows: "The undersigned hereby subscribes for one hundred shares of the capital stock of Greater Durham Building and Loan Association, a body corporate, incorporated under the laws of the State of North Carolina, of the par value of $50.00 each, payable in cash herewith or in monthly installments of not less than twenty-five cents per share per month, the first of such installment accompanying this application. I also agree to pay with this subscription a membership payment of $2.50 per share to establish a fund from which you are authorized to defray expense of organization, extension, operation and equipment, such as rent, office expense, advertising, solicitors, salesmen, office help, etc., and to establish a reserve for the association, for which a membership certificate shall be issued. The membership certificate does not draw specified dividends but is fully participating in the sur-

plus earnings and profits of the association. The membership certificate is not withdrawable, but may be sold or transferred at any time by holders thereof, together with capital stock account. All other payments together with such dividends as shall have been declared thereon may be withdrawn in accordance with the by-laws of the association. No person is authorized to change or alter the terms of this subscription or to bind the association by any statement not contained herein. A copy of this application and subscription appears on the reverse side of the receipt issued in acknowledgment of this subscription. The Greater Durham Building and Loan Association reserves to itself the right to reject any or all applications for shares and to reduce or allot all applications for shares in the manner deemed by the association to be for its best interest. Signed: W. V. Dorrity."

At the conclusion of all the evidence the trial judge sustained the motion of nonsuit, and the plaintiff appealed.

R. O. Everett and J. Grover Lee for plaintiff.
Fuller, Reade & Fuller and E. C. Brooks, Jr., for defendant.

BROGDEN, J. There was no evidence that the plaintiff was illiterate or could not read and write, although he testified that he read poorly. The subscription agreement which the plaintiff signed, explained the transaction in detail and advised him positively that he was paying $250.00 for a membership in the defendant corporation, and that in addition to such membership fee he would be required to pay twenty-five cents per share for the stock in accordance with the by-laws of the company. Moreover C. S., 5176 authorizes in proper instances building and loan associations to prescribe an entrance fee to be paid by share holders.

The pertinent and governing principle of law was thus stated in *Colt v. Kimball,* 190 N. C., 169: "It is the defendant's duty to read the contract or have it read to him, and his failure to do so, in the absence of fraud, is negligence, for which the law affords no redress. The defendant's duty to read or have read to him the contract, is a positive duty of which he is not relieved, except in cases of fraud. . . . Having executed the contract, and no fraud appearing in the procurement of the execution, the court is without power to relieve the defendant on the ground that he thought it contained provisions which it does not." The same principle relating to contracts generally is applicable to stock subscription agreements. Thus in *Improvement Co. v. Andrews,* 176 N. C., 280, 96 S. E., 1032, the Court said: "The fact that this is a subscription to stock does not take the case out of the usual rule. It seems to be generally agreed that where a subscription contract is reduced to writing and signed, all oral agreements, whether prior or

cotemporaneous, are merged in it and parol evidence of them cannot be received to vary the legal purport of the writing." See *Hotel Corporation v. Overman,* 201 N. C., 337.

The negligence rule referred to in many of the decisions does not apply: (1) where the person signing the agreement was illiterate or otherwise incapable of understanding the writing; (2) where there is positive misrepresentation of contents of the paper-writing of such type and character as to deceive a person of ordinary prudence and the person signing such agreement reasonably relied upon such misrepresentation; (3) where the party procuring the signature resorted to some device, scheme, subterfuge, trick or other means of preventing or interfering with the reading of the paper or reasonably tending to throw a person of ordinary prudence off guard.

However, none of the foregoing elements appear in this case. There is no evidence that the agent misrepresented the contents of the subscription agreement which the plaintiff signed, nor was there any trick, artifice, scheme or device resorted to tending to prevent or interfere with the reading of the agreement. Therefore, the ruling of the trial judge is correct.

Affirmed.

JOSEPH S. FRANCIS, EMPLOYEE, BY HIS GUARDIAN, W. L. FRANCIS, v. CAROLINA WOOD TURNING COMPANY, EMPLOYER, AND CONSOLIDATED UNDERWRITERS, INSURANCE CARRIER.

(Filed 14 June, 1933.)

1. Master and Servant F i—Jurisdictional findings of Industrial Commission are not conclusive on appeal.

The findings of fact of the Industrial Commission in a hearing before it that the claimant was not an employee within the meaning of the act at the time of the injury is a jurisdictional finding and is not binding on the Superior Court on appeal, and the Superior Court's finding from conflicting evidence that the claimant was an employee will be upheld upon further appeal to the Supreme Court.

2. Same—Superior Court has no authority to order an award of compensation upon appeal from judgment of Commission dismissing the case.

Where upon appeal the Superior Court reverses the judgment of the Industrial Commission dismissing a proceeding under the Compensation Act on the ground that it was without jurisdiction for that the claimant was not an employee within the meaning of the act, the Superior Court should remand the case to the Industrial Commission for a finding as to whether the injury resulted from an accident arising out of and in the course of the employment, and judgment entered in the Superior Court ordering an award of compensation is erroneous.

FRANCIS *v.* WOOD TURNING CO.

APPEAL by defendants from *Sink, J.,* at October-November Term, 1932, of SWAIN. Modified and affirmed.

This is a proceeding begun and prosecuted before the North Carolina Industrial Commission for compensation under the provisions of the North Carolina Workmen's Compensation Act.

The facts found by Commissioner Wilson at a hearing before him on 9 May, 1932, and approved by the full Commission on plaintiff's appeal from his order dismissing the proceedings, are as follows:

"1. The Carolina Wood Turning Company and its regular employees are subject to the provisions of the North Carolina Workmen's Compensation Act.

2. The Consolidated Underwriters was, on 2 September, 1932, the insurance carrier which had insured the liability of the Carolina Wood Turning Company under the North Carolina Workmen's Compensation Act.

3. The plaintiff, Joseph S. Francis, on 2 September, 1932, sustained a serious injury while working at a table in the defendant employer's plant.

4. The plaintiff was totally disabled for sixty days immediately following the injury, and has lost the use of the first, second, third and fourth fingers of his left hand; his average weekly wage was $11.45.

5. The accident resulting in injury to the plaintiff did not arise out of and in the course of his employment, as plaintiff at the time of the accident was not an employee within the meaning of the North Carolina Workmen's Compensation Act."

On the foregoing facts, Commissioner Wilson concluded as a matter of law that the North Carolina Industrial Commission was without jurisdiction of the proceeding, and ordered that the same be dismissed for that reason. This order was affirmed by the full Commission, and the plaintiff appealed to the judge of the Superior Court of Swain County.

At the hearing of plaintiff's appeal, the judge of the Superior Court found as a fact from all the evidence that the plaintiff was an employee of the defendant Carolina Wood Turning Company at the time of the accident, and that his injuries were the result of an accident which arose out of and in the course of his employment. Upon these findings of fact, it was ordered and adjudged that the order of the North Carolina Industrial Commission dismissing the proceedings be and the same was reversed; and it was further ordered and adjudged that the plaintiff is entitled to compensation for his injuries to be paid by the defendants in accordance with the provisions of the North Carolina Workmen's Compensation Act.

From this judgment, the defendants appealed to the Supreme Court.

T. D. Bryson, Jr., and E. C. Bryson for plaintiff.
Johnston & Horner for defendants.

CONNOR, J. There was evidence at the hearing of this proceeding before Commissioner Wilson, tending to show that the plaintiff, Joseph S. Francis, was an employee of the defendant, Carolina Wood Turning Company, at the time of the accident which resulted in his injuries; and there was evidence to the contrary. Upon consideration of all the evidence, Commissioner Wilson found that the plaintiff was not an employee of the said defendant at the time of the said accident. This finding of fact was approved by the full Commission, which thereupon affirmed the order of Commissioner Wilson, dismissing the proceeding, for the reason that the North Carolina Industrial Commission had no jurisdiction of plaintiff's claim for compensation under the provisions of the North Carolina Workmen's Compensation Act. On plaintiff's appeal from the order of the full Commission to the Superior Court, the judge presiding reviewed all the evidence, and found that plaintiff was an employee of the defendant at the time of the accident, and thereupon reversed the order of the Commission dismissing the proceeding. The question presented by defendants' appeal from the judgment of the Superior Court to this Court, is whether the finding of fact made by Commissioner Wilson and approved by the full Commission was conclusive and binding on the parties to the proceeding.

In *Aycock v. Cooper*, 202 N. C., 500, 163 S. E., 569, it was held that "when the jurisdiction of the North Carolina Industrial Commission to hear and consider a claim for compensation under the provisions of the North Carolina Workmen's Compensation Act, is challenged by an employer, on the ground that he is not subject to the provisions of the act, the findings of fact made by the Commission, on which its jurisdiction is dependent, are not conclusive on the Superior Court, and that said court has both the power and the duty, on the appeal of either party to the proceeding, to consider all the evidence in the record, and find therefrom the jurisdictional facts, without regard to the findings of such facts by the Commission. A contrary holding might present a serious question as to the validity of the statutory provisions with respect to the effect of the findings of fact made by the Commission."

In the instant case where the evidence in the record with respect to a jurisdictional fact was conflicting, the finding by the Commission was not conclusive, and the judge had the power, upon his review of all the evidence, to find the said fact otherwise than as found by the Commission. There was no error in his judgment which is to the effect that the Commission has jurisdiction of this proceeding. In that respect the judgment is affirmed.

There is error, however, in the judgment directing that an award be made to the plaintiff for compensation to be paid by the defendants in accordance with the provisions of the North Carolina Workmen's Compensation Act. The North Carolina Industrial Commission, alone, has jurisdiction to find the facts on which the liability of the defendants must be determined. *Winberry v. Farley Stores, Inc., ante,* 79, 167 S. E., 475. The proceeding should be remanded by the Superior Court of Swain County to the North Carolina Industrial Commission, which will find whether or not the plaintiff was injured by an accident which arose out of and in the course of his employment. As modified in accordance with this opinion, the judgment is

Affirmed.

STATE v. SOPHIA E. LAYTON.

(Filed 14 June, 1933.)

1. Homicide G c—Foundation for admissibility of dying declaration held properly laid in this case.

Testimony that deceased declared she was going to die, and that at the time of the declaration she was desperately sick and that death ensued within two days, constitutes a proper foundation for the admissibility of her dying declaration, and since a dying declaration is judged by the same standards as other evidence and is not admissible unless the declarant could testify to the same facts if he were a witness, the testimony of declarant's attending physician as to whether declarant thought she was going to die at the time of the declaration is immaterial.

2. Same—

The fact that a dying declaration does not identify defendant does not render it incompetent where there is other sufficient evidence of defendant's identity as the perpetrator of the crime, the dying declaration being of a material fact connected with the crime.

3. Homicide G c—Evidence of defendant's identity as person who committed abortion resulting in death held sufficient.

In this prosecution for performing an abortion resulting in death there was evidence that defendant had agreed to perform an abortion upon deceased for a stated sum, that defendant visited deceased's room at a hotel and stated that she left an instrument with deceased which deceased could use if she desired, that defendant was seen leaving the elevator in deceased's hotel and that the witness immediately went to deceased's room and that deceased immediatly said that a lady had performed the operation, and that defendant received a sum of money from deceased's associate, *is held* sufficient to be submitted to the jury on the question of defendant's identity as the person who had committed the abortion.

STATE *v.* LAYTON.

CRIMINAL ACTION, before *Cranmer, J.*, at January Term, 1933, of WAKE.

The defendant was indicted for the murder of Celia Roberts. The evidence tended to show that Miss Celia Roberts, a young woman, about twenty years of age, became pregnant. Harris, a witness for the State, testified that he came to Raleigh on 11 July, and at the request of a man named Mangum made an appointment with the defendant "to see if she would perform an abortion on Miss Celia Roberts." The defendant informed him that the cost would amount to $30.00. Thereafter on the 14th or 15th of July Miss Roberts came to Raleigh and went to the Carolina Hotel and procured a room. Harris immediately informed the defendant that Miss Roberts was at the hotel. She went to the hotel with Mangum and a woman and went to the room of deceased. Harris thereafter paid to the defendant and she accepted $14.00 in cash. Mangum testified that the deceased Miss Roberts described the defendant to him and that on Tuesday he saw her get off the elevator at the hotel as he was getting on, to visit the deceased in her room. He testified that when he reached the room of the deceased she said: "it was all over, the operation. She said a lady did it" but did not know her name. He had seen the defendant go out. "I did not see Mrs. Layton in the room, but I saw her on the elevator." The State also offered evidence that the defendant stated to Harris that she had left an instrument that Miss Roberts could use, but that she could not perform the operation for the reason that the deceased was then five months pregnant. Dr. Thomas examined the deceased in the hospital on 22 July and found that she was suffering from an incomplete abortion, resulting in death on 24 July. The physician further testified: "She was desperately sick when she came there, and we so advised her. When I was taking her history she told me she knew she was going to die. You know, people talk sometimes when they are sick. She just said: 'I am so sick I am going to die.' I told her that she was very sick, but was not necessarily sick enough to die or something like that." At this point in the testimony the court asked the physician the following questions: "Did she appear to you to be in apprehension of impending death?" (A.) "Her temperature was very high and her pulse very rapid." (Q.) "When she made that statement that she thought she was going to die do you think she thought she was going to die?" (A.) "Yes." (Q.) "Did she make any statement to you, and, if so, what did she say?" (A.) "I asked her how long she had been sick? . . . (This was on Tuesday), and she said on last Friday she came to Raleigh and went to the Carolina Hotel, and some lady came to her room and inserted a tube into her womb about eleven o'clock, and at three o'clock in the morning she went to the bath room and the fetus passed. I made a blood test and

she was very sick." The defendant objected to the questions so propounded by the court and to the answers of witness, particularly to the answer containing the purported dying declaration of deceased.

There was evidence that the defendant had refused to perform the operation and that the deceased had stated to the witness Harris that "she had done it herself and the woman would not help her." The defendant denied that she had anything to do with the abortion or that she had ever seen the deceased or talked with Harris about performing the operation. Several witnesses testified that the character of the defendant was good. The jury convicted the defendant and recommended mercy. The trial judge imposed a sentence of five years in the State's prison, and from the judgment so pronounced the defendant appealed.

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

Thomas W. Ruffin and R. B. Templeton for defendant.

BROGDEN, J. (1) Was the dying declaration of deceased competent? (2) Was there sufficient evidence that the defendant committed the crime laid in the bill of indictment?

The general principle is that "dying declarations must be confined to the facts connected with the act of killing, facts attending the act and forming a part of the *res gestæ*." *S. v. Jefferson*, 125 N. C., 712, 34 S. E., 648. The competency of dying declarations is determined by the same standard as the testimony of a living witness in the court and subject to cross-examination. That is to say, the fact that a certain declaration is made by a dying person, does not make the declaration competent unless the same person could take the witness stand and testify to the identical fact contained in the declaration. Consequently it has been held with unbroken uniformity that the mere opinion and conclusions of a dying declarant are not admissible. *S. v. Mills*, 91 N. C., 594; *S. v. Jefferson*, 125 N. C., 712; *S. v. Beal*, 199 N. C., 278, 154 S. E., 604; *S. v. Stone, ante*, 666. Hence the opinion of the physician as to whether the deceased "thought she was going to die" is immaterial because the ultimate inquiry was not what the physician thought but what the deceased thought about her impending death. The testimony discloses that the deceased declared that she was going to die. She was then desperately sick and death ensued within two days. Such testimony constituted a proper foundation for the admissibility of her dying declaration. *S. v. Shelton*, 47 N. C., 360; *S. v. Jefferson, supra; S. v. Wallace*, 203 N. C., 284. Therefore, the opinion of the physician as to her state of mind, while immaterial, does not warrant the overthrow of the judgment. Nor is the dying declaration incompetent for the reason

that the deceased did not positively identify the defendant. *S. v. Beal, supra; S. v. Wallace, supra.* If there had been no evidence tending to connect the defendant with the crime except the dying declaration of deceased that "some lady came to her room and inserted a tube into her womb," the case should have been nonsuited, but the evidence discloses other pertinent facts and circumstances pointing to the accused. These may be capitulated from the State's evidence, as follows: (1) The defendant had agreed to perform an abortion upon the deceased for the sum of $30.00. (2) The defendant visited the deceased at the hotel and stated that she had left an instrument with the deceased which she could use if she so desired. (3) The defendant was seen coming down on the elevator and the State's witness went to the room of the deceased immediately and she said "it was all over, the operation. . . . a lady did it." (4) The defendant received $14.00 in money paid by the witness Harris.

The foregoing facts and circumstances are sufficient in probative value to warrant the submission of the disputed issue to the jury. The charge of the court is not in the record and it is therefore assumed that the jury was correctly instructed upon all phases of the case.

No error.

OCCIDENTAL LIFE INSURANCE COMPANY v. GEORGE LAWRENCE AND MARTIN O. LAWRENCE.

(Filed 14 June, 1933.)

Venue A c—Insurance company complying with C. S., 6411, acquires right to sue and be sued as domestic corporation.

Where a foreign insurance corporation has fully complied with the provisions of C. S., 6411, and has moved its head office to this State and has domesticated here, it acquires the right to sue and be sued in the courts of this State as a domestic corporation, C. S., 466, 467, 468, 469, and where it brings a transitory action in the county of its residence the defendants are not entitled to removal to the county of their residence as a matter of right, for although C. S., 1181, excludes insurance companies from its operation, the statutes will be construed in relation to their subject-matter, and the exception in C. S., 1181, being because insurance companies are exclusively dealt with elsewhere.

APPEAL by defendants from *Cranmer, J.*, at 20 April Term, 1933, of WAKE. Affirmed.

On 16 February, 1933, the Occidental Life Insurance Company instituted an action in the Superior Court of Wake County against George Lawrence and Martin Lawrence, who are citizens and residents of

Carteret County. The defendants filed a motion before the clerk of the Superior Court of Wake County before answer (C. S., 470) for change of venue and removal of the cause from Wake County to Carteret County, where the defendants reside. The clerk of the Superior Court of Wake County, N. C., found certain facts and rendered the following judgment:

"This cause coming on to be heard before the undersigned clerk of the Superior Court of Wake County upon motion of the defendants for change of venue for the above entitled cause from Wake County to Carteret County, and it appearing to the court, and the court finding facts as follows: (1) That the Occidental Life Insurance Company, plaintiff, is an insurance corporation, organized, created and existing under and by virtue of the laws of the State of New Mexico. (2) That the said Occidental Life Insurance Company has fully complied with the requirements of section 6411, C. S., and is duly domesticated as an insurance corporation in the State of North Carolina, with its head office and principal place of business in the city of Raleigh, county of Wake, and is duly authorized to conduct and to carry on an insurance business in North Carolina. (3) That all of the records of the said company are kept in its head office and principal place of business in Raleigh, North Carolina, county of Wake, which is the place of business of all of the offices of said company; that the by-laws of the said corporation provide that the principal and head office of the company shall be in the city of Raleigh, State of North Carolina, and that meetings of stockholders, directors and executive committee shall be held at the said office. (4) That the said Occidental Life Insurance Company, plaintiff herein, has duly qualified as a domestic company under the Revenue Act of the State of North Carolina, and is taxable as such, having in the State of North Carolina more than one-fifth of its assets, and pursuant to said act the said company has duly qualified with the Insurance Commissioner of the State of North Carolina a domestic insurance company. (5) That, therefore, for all intents and purposes, and pursuant to the statutes and laws of the State of North Carolina, the said Occidental Life Insurance Company is a duly qualified domesticated corporation with its principal office and place of business in the city of Raleigh, Wake County, North Carolina, and that Wake County is the proper venue for the above entitled action. Therefore, it is considered, ordered and adjudged that motion of defendants filed herein for change of venue be and the same is hereby denied."

To the signing of the foregoing judgment and to the refusal of the clerk to grant a change of venue for the above entitled cause from Wake County Superior Court to Carteret County Superior Court, the defendants except and appeal to the Superior Court of Wake County.

The judgment of the court below is as follows: "This cause coming on to be heard before the undersigned judge of the Superior Court presiding over the courts of Wake County, upon appeal of the defendants from judgment of the clerk of the Superior Court of Wake County denying defendants' motion for removal of the above entitled cause from Wake County to Carteret County, as a matter of right, and it appearing to the court that the judgment of the clerk, heretofore entered, is in all respects proper and in accordance with law, the same is hereby affirmed. This 20 April, 1933. E. H. CRANMER, *Judge Presiding.*"

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

Willis Smith and John H. Anderson, Jr., for plaintiff.
C. R. Wheatley for defendants.

CLARKSON, J. The question involved: Where a foreign insurance corporation has submitted to domestication in this State by filing its certificate of incorporation with the Insurance Commissioner, and by otherwise complying with the provisions of Consolidated Statutes, 6411, and has designated Wake County as the location of its principal office, and has more than one-fifth of its entire property located in this State, does such corporation thereby acquire the right to sue and be sued on a transitory cause of action in the courts of the county of its principal office? We think so.

C. S., 1181, in part, is as follows: "Requisites for permission to do business. Every foreign corporation before being permitted to do business in this State, insurance companies excepted, shall file in the office of the Secretary of State a copy of its charter or articles of agreement," etc.

In *Smith-Douglass Co. v. Honeycutt, ante,* 219, at p. 221, it is said: "Here the plaintiff submitted to domestication by complying with the requisites of permission to conduct its business in this State. C. S., 1181. It thereby acquired the right to sue and be sued in the courts of this State as a domestic corporation and as the place of its residence as defined by statute is the county of Pasquotank, the plaintiff had the right to bring its suit in that county." See C. S., 466, 467, 468 and 469.

C. S., 6411, under "Insurance," in part, is as follows: "Conditions of admission—A foreign insurance company may be admitted and authorized to do business when it: (1) Deposits with the Insurance Commissioner a certified copy of its charter or certificate of organization and a statement of its financial condition and business, in such form and detail as he requires, signed and sworn to by its president and secretary or other proper officer, and pays for the filing of this state-

ment the sum required by law. (2) Satisfies the Insurance Commissioner, that it is fully and legally organized under the laws of its State or government to do the business it proposes to transact. . . . (3) By a duly executed instrument filed in his office constitutes and appoints the Insurance Commissioner and his successor its true and lawful attorney, upon whom all lawful processes in any action or legal proceeding against it may be served. . . . (4) Appoints as its agent or agents in this State some resident or residents thereof. (5) Obtains from the Insurance Commissioner a certificate that it has complied with the laws of the State and is authorized to make contracts of insurance," etc.

Defendants contend that C. S., 1181, excepts *insurance companies.* So it does, as there were other statutes that dealt exclusively with insurance companies. The statutes must be construed in relation to the subject-matter. The clerk found, which was sustained on appeal by the court below, "That the said Occidental Life Insurance Company has fully complied with the requirements of section 6411, C. S., and is duly domesticated as an insurance corporation in the State of North Carolina," etc.

We think the findings of fact correct and by analogy the case of *Smith-Douglass Co. v. Honeycutt, supra,* controlling. The judgment of the court below is

Affirmed.

STATE v. ROBERT WHITESIDE, ALIAS WHITLOE, AND PETE CANNON.

(Filed 14 June, 1933.)

1. Conspiracy B a—

A conspiracy is an agreement to do an unlawful thing or to do a lawful thing in an unlawful manner or by unlawful means, and the agreement is the crime and not the execution of the agreement.

2. Conspiracy B b—Criminal conspiracy may be proven by circumstantial evidence.

The criminal offense of conspiracy may be proven by circumstantial evidence, which is usually the only proof obtainable, and the results accomplished, the divergence of these results from the course which would ordinarily be expected, the situation of the parties and their relations to each other, together with the surrounding circumstances and the inferences legitimately deductible therefrom may furnish ample proof of conspiracy even in the teeth of positive testimony to the contrary.

3. Same—Evidence of conspiracy in this case held sufficient to overrule motion as of nonsuit.

In this prosecution for criminal conspiracy there was testimony that the appealing defendant asked the State's witness whether a certain

place was a good place to rob several hours before the place was actually robbed by a codefendant, that the appealing defendant and his codefendant were traveling together, with other testimony tending to establish the appealing defendant's guilt of conspiracy to rob, *is held* sufficient to overrule defendant's motion as of nonsuit.

4. Criminal Law G r—

The credibility of a witness whose character has been impeached is a matter for the jury.

5. Criminal Law L e—

On appeal in a criminal case the Supreme Court is confined to matters of law or legal inference. Art. IV, sec. 8.

APPEAL by defendant, Pete Cannon, from *Alley, J.*, at February Term, 1933, of BUNCOMBE.

Criminal prosecution tried upon indictment charging the defendants with conspiracy to rob the Imperial Theatre in Asheville.

It is in evidence that the defendants live in McDowell County, and were acquainted with each other, having spent fifteen or twenty days in jail together during the fall of 1932. They "bummed" their way to Asheville on a freight train Friday, 27 January, 1933, and stayed at the Salvation Army that night. The next day, between 3:00 and 4:00 o'clock, they met Ralph McDuffie at the "Pastime Pool Room," and told him they were just traveling around together, going to Knoxville. Cannon asked McDuffie, who apparently was an old acquaintance, if the Imperial Theatre—about half a block away—would be a good place to hold up, or if there were any good places in Asheville which he or anybody might rob and get away with it. McDuffie saw the defendants together again that night about 7:30. At 9:45 when the manager of the Imperial Theatre went to get the money and tickets from the box office, the defendant, Robert Whiteside, stepped up with a gun in his hand and said: "Stick 'em up, and tell the cashier to push out the money." Just as the money was handed to Whiteside, he was covered by a member of the sheriff's office and arrested. He dropped the money on the sidewalk and the manager of the theatre picked it up.

The defendant Whiteside pleaded guilty and was offered as a witness for Cannon. He testified that Ralph McDuffie was mistaken in saying Pete Cannon was with him at the "Pastime Pool Room"; that he alone discussed the matter with McDuffie; and that McDuffie suggested the Imperial Theatre as a good place to rob, and said he would help do it himself. He further testified that Cannon had nothing to do with the hold-up and was not a party to any conspiracy; that he wrote a letter to Cannon while in jail because he knew he was innocent and did not want to see him convicted. He said Cannon was a stranger to him that he had never seen him before he came into the court room. "There was nobody with me at all when I held up the theatre. . . . Some-

body besides Pete Cannon conspired with me to hold it up. . . . I won't tell who he was. . . . I went to the 'Pastime Pool Room' (and talked with McDuffie) but Pete Cannon was not with me."

McDuffie was recalled, after Whiteside had testified, and he reiterated that Cannon was the one who talked with him in the Pastime Pool Room. "I have never had any conversation with Whiteside. I guess he heard the talk I had with Cannon, if he could hear me. He was sitting close by."

McDuffie reported the alleged conversation to the sheriff on Sunday morning following the attempted robbery, in consequence of which Cannon was arrested.

Verdict: "Guilty as charged."

Judgment: Imprisonment in the State's prison at hard labor for a term of not less than seven nor more than ten years.

The defendant, Pete Cannon, appeals, assigning errors.

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

Charles A. McCrea and Worth E. McKinney for defendant.

STACY, C. J., after stating the case: Robert Whiteside, apparently alone and unassisted, attempted to rob the Imperial Theatre in Asheville on Saturday night, 28 January, 1933. Did Pete Cannon aforetime agree to help him? This is the gist of the crime charged against him and of which he stands convicted.

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. Lea*, 203 N. C., 13, 164 S. E., 737; *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*, 168 N. C., 173, 83 S. E., 972.

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.

Direct proof of the charge is not essential, for such is rarely obtainable. It may be, and generally is, 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.

So, in the instant case, notwithstanding the positive testimony of Whiteside to the contrary and the rather "broken reed" upon which the State is compelled to rely, we think the evidence is sufficient to carry the case to the jury. Its credibility was for the twelve.

The keystone of the State's evidence is the alleged conversation had between Ralph McDuffie and the defendant Cannon at the "Pastime Pool Room," some five or six hours before the attempted robbery. It is suggested that McDuffie's interest in the case arises out of a guilty conscience, and a desire to shield himself, rather than from any urge to see the law enforced. He was asked on cross-examination if he had not had a fight with Cannon over a girl in Charlotte sometime prior thereto. His reply was, that he had not. The general reputation and character of the State's witness, like that of the defendant's, seems to have been somewhat shady or spotted. He is well known to the "law," to use his vernacular, which means he is well known to the officers of the law, who regard him as a suspicious character. His testimony is not very impressive, but its credibility was for the jury.

If the defendant has been erroneously convicted, as he contends, he must attribute it to his evil associations. His appeal was to the jury, and we are not able to help him. Our jurisdiction is limited to reviewing, upon appeal, decisions upon any matter of law or legal inference. Const., Art. IV, sec. 8.

No error.

MINNIE SWAINEY, ADMINISTRATRIX OF JAMES SWAINEY, DECEASED, v. THE GREAT ATLANTIC AND PACIFIC TEA COMPANY AND B. M. BEALER, JR.

(Filed 14 June, 1933.)

1. Death B a—Action for wrongful death may be maintained within one year from nonsuit in first action brought within time limit.

Where an action for wrongful death has been instituted within one year from the accrual of the cause of action, and a nonsuit has been entered therein, and plaintiff has paid all costs charged against her

in the action, the plaintiff may maintain another action commenced within one year from the date of the nonsuit, C. S., 415, although more than a year has elapsed since the accrual of the cause of action, C. S., 160, and the fact that the plaintiff has been assessed with additional costs upon motion for reassessment made in the second action and has not paid the cost so reassessed is immaterial.

2. Evidence D k—

Where a defendant has been examined after the filing of the complaint in the action, but before trial in accordance with C. S., 900, his answers to the questions propounded on the examination are competent as evidence at the trial.

3. Judgments L a—

A judgment as of nonsuit will not bar a subsequent action on the same cause of action where the evidence in the second action is not identical with the evidence in the first action.

4. Negligence D c—

Where the evidence is sufficient to support the allegations in the complaint alleging a cause of action for negligent injury, defendant's motion for judgment as of nonsuit is properly refused.

APPEAL by defendants from *Alley, J.*, at April Term, 1933, of BUNCOMBE. Affirmed.

This is an action to recover of the defendants damages for the death of plaintiff's intestate.

The action was begun and tried in the General County Court of Buncombe County on the issues raised by the pleadings. These issues were answered by the jury as follows:

"1. Was the plaintiff's intestate injured and killed by the negligence of the defendant, B. M. Bealer, Jr., as alleged in the complaint? Answer: Yes.

2. Was the plaintiff's intestate injured and killed by the negligence of the defendant, The Great Atlantic and Pacific Tea Company, as alleged in the complaint? Answer: Yes.

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

4. What amount, if any, is the plaintiff entitled to recover? Answer: $4,500."

From judgment that plaintiff recover of the defendant the sum of $4,500, with interest and costs, the defendants appealed to the Supreme Court, assigning errors in the trial.

At the hearing of this appeal, defendants' assignments of error were overruled. The judgment was affirmed, and defendants appealed to the Supreme Court.

Braxton Miller and Zeb F. Curtis for plaintiff.

Little, Smith, Kitchin & Auten for defendant, The Great Atlantic and Pacific Tea Company.

Carl W. Greene for defendant, B. M. Bealer, Jr.

CONNOR, J. On 22 October, 1930, James Swainey, plaintiff's intestate, about 16 years of age, while riding on his bicycle on a street in the city of Asheville, N. C., was struck and fatally injured by an automobile which was owned by the defendant, The Great Atlantic and Pacific Tea Company, and driven by the defendant, B. M. Bealer, Jr., an employee of his codefendant. He died from his injuries on 25 October, 1930.

This action was begun on 27 June, 1932. It was not begun within one year from the date of the death of plaintiff's intestate. The plaintiff, however, instituted an action in the General County Court of Buncombe County in November, 1930, to recover of the defendants damages for the death of her intestate on the identical cause of action as that alleged in the complaint in this action. That action was dismissed by judgment as of nonsuit on 6 March, 1932. See *Swainey v. Tea Co.*, 202 N. C., 272, 162 S. E., 557. The plaintiff was entitled to maintain this action, therefore, notwithstanding the provision of C. S., 160, if prior to its commencement, she had paid the costs of the former action which had been taxed against her. C. S., 415. It was admitted at the trial of this action, that the plaintiff had paid all the costs on the former action, which had been taxed against her, prior to the commencement of this action. After this action was commenced, defendants' motion in the former action to retax the costs in that action was allowed, and an additional sum was taxed against her as part of the costs in the former action. She has not paid this additional sum. This, however, is immaterial on the question as to whether the plaintiff can maintain this action, and there was no error in the ruling of the trial court to that effect. See *Hunsucker v. Corbitt*, 187 N. C., 496, 122 S. E., 378. This action, although begun more than a year after the death of plaintiff's intestate, was begun within one year after the former action was dismissed by judgment as of nonsuit, and after the plaintiff had paid all the costs taxed against her in the former action. This was sufficient to entitle plaintiff to maintain this action. C. S., 415.

On their appeal to the Superior Court from the judgment of the General County Court of Buncombe County, the defendants assigned as errors rulings of the trial court on their objections to the admission and rejection of evidence at the trial. These assignments of error were properly overruled by the judge of the Superior Court. The examination of the defendant, B. M. Bealer, Jr., at the instance of the plaintiff, before the judge of the General County Court, after the complaint was filed

and before the trial of the action, was authorized by statute. C. S., 900. The answers to the question propounded to him on this examination were competent as evidence at the trial when offered by the plaintiff. C. S., 900.

The cause of action alleged in the complaint in this action is identical with that alleged in the complaint in the former action. The evidence at the trial of this action, however, tending to show the liability of defendants for the damage sustained by plaintiff by the death of her intestate, was not the same as the evidence at the former trial. For that reason the judgment dismissing the former action as of nonsuit, does not preclude plaintiff's recovery in this action. *Hampton v. Spinning Co.*, 198 N. C., 235, 151 S. E., 266.

We find no error in the rulings of the judge of the Superior Court on defendants' assignments of error based on exceptions at the trial in the General County Court. There was evidence at the trial tending to support the allegations of the complaint, and there was therefore no error in the refusal of the trial court to dismiss the action by judgment as of nonsuit. There is no error in the judgment. It is

Affirmed.

FLORA COLBOCH v. INDEPENDENT LIFE INSURANCE COMPANY.

(Filed 14 June, 1933.)

Insurance R a—Evidence that assured was killed by being struck by a gasoline propelled vehicle held sufficient to be submitted to jury.

The assured was found dead on the streets of a city. The plaintiff brought suit on a policy of accident insurance in which she was named beneficiary, and which provided for the payment of a certain sum if the assured was killed by being struck by a gasoline propelled vehicle: *Held*, the evidence that the assured met his death by being struck by a vehicle propelled by gasoline was sufficient to be submitted to the jury and uphold their verdict in plaintiff's favor.

APPEAL by defendant from *Alley, J.*, and a jury, at February Term, 1933, of BUNCOMBE. No error.

The complaint of plaintiff is as follows:

"1. That the plaintiff is a resident of Buncombe County, North Carolina.

2. That the defendant is a corporation duly organized and existing under the laws of the State of Tennessee, but authorized to do business and doing business in the State of North Carolina.

3. That on 22 June, 1931, the defendant entered into a contract of insurance with Walter Colboch, son of this plaintiff, under the terms

of which and among other provisions the life of said Walter Colboch was insured by the defendant against accidental death in the amount of $1,000, and this plaintiff was named beneficiary, all of which is specifically evidenced by insurance policy No. 611866, a copy of which is hereto attached and asked to be considered a part of this paragraph.

4. That on 20 April, 1932, all premiums provided for in said policy were fully paid, and said policy was in full force and effect.

5. That on or about the said 20 April, 1932, at about 10 o'clock p.m., as this plaintiff is advised, informed and believes, and so alleges, the said Walter Colboch was riding a bicycle on Patton Avenue, a public street in the city of Asheville, North Carolina, and thereby met his death through external violent and accidental means, occasioned by the collision of said bicycle with some vehicle propelled by gasoline, the identity of which said vehicle is not known to this plaintiff.

6. That the death of said assured, Walter Colboch, was immediately reported to the defendant, and all conditions precedent provided for in said policy were and have been complied with, and that said defendant has denied liability under the policy hereinbefore set out and has refused to comply with the terms thereof.

7. That under the terms of said policy there is now due this plaintiff the sum of $1,000 with interest thereon from 20 April, 1932, until paid, all of which has been duly demanded and the payment thereof refused.

Wherefore, this plaintiff prays judgment as follows: (1) For the sum of $1,000, with interest thereon from 20 April, 1932. (2) For the costs of this action to be taxed by the clerk, and for such other and further relief as to the court may seem just and proper."

The material part of the contract of insurance is as follows: "The Independent Life Insurance Company of America, except as is stated in paragraph F of this policy and subject to all the terms and conditions hereof, hereby insures the person named in said schedule against the result of bodily injuries received during the time this policy is in force, and effected solely by external, violent and accidental means strictly in the manner hereafter stated, subject to all the provisions and limitations hereinafter contained, as follows: (a) If the insured shall be struck by a vehicle which is propelled by steam, cable, electricity, naphtha, gasoline, horse, compressed air or liquid power, while insured is walking or standing on a public highway, or be struck by any vehicle named above while riding a bicycle on a public highway, which term, public highway, as here used shall not be construed to include any portion of railroad or interurban yards, station grounds, or right of way except where crossed by a thoroughfare dedicated to and used by the public for automobile or horse vehicle traffic."

The defendant denied the material allegations of the complaint and says: "That it is admitted, as alleged in section 5 of the plaintiff's complaint, the said Walter Colboch met his death on 20 April, 1932, and that his body was found on a public street of the city of Asheville, North Carolina, but how it happened is unknown to this defendant, and all other allegations therein contained are untrue and are denied."

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

"1. Did the insured, Walter Colboch, meet his death as the result of a collision between a gas propelled vehicle and a bicycle which he was riding in a public street or highway? Answer: Yes.

2. What sum, if any, is plaintiff entitled to recover? Answer: $1,000."

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

Zeb. F. Curtis and Weaver & Miller for plaintiff.

Bourne, Parker, Bernard & DuBose for defendant.

CLARKSON, J. The defendant introduced no evidence, and at the close of plaintiff's evidence made a motion for judgment as in case of nonsuit. C. S., 567. The court below overruled the motion and in this we think there is no error.

The only question involved on this appeal is whether or not there was evidence sufficient to go to the jury that defendant's assured met his death by being struck by a vehicle propelled by gasoline while assured was riding a bicycle on a public highway.

We have read the record, heard the arguments of counsel for the litigants and think there was sufficient competent evidence on the part of plaintiff for the jury to answer the issue in favor of plaintiff. We see no good reason to set forth the evidence, and find no prejudicial or reversible error.

No error.

W. G. HARRISON, ADMINISTRATOR, v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 14 June, 1933.)

Railroads D c—Evidence of defendant's negligence and proximate cause held insufficient in this action for wrongful death.

Evidence that plaintiff's intestate was last seen walking down defendant's railroad track a short time before defendant's train passed, that the train did not give warning of its approach, and that soon there-

after the intestate's bruised and cut body was found near the track at a place where the cinders of the track were scuffed as though a body had been shoved along, *is held* insufficient to resist defendant's motion as of nonsuit, negligence not being presumed from the mere fact of an accident on or near a railroad track, and the evidence failing to show the intestate's condition when he was struck, or that the alleged negligence in failing to sound a warning was the proximate cause of the injury.

APPEAL by plaintiff from *Clement, J.*, at November Term, 1932, of BUNCOMBE.

Civil action for alleged wrongful death.

The deceased was last seen by plaintiff's witness, Louis Lythe, walking down defendant's railroad, 7 October, 1931, about the hour of 11:30 a.m., a quarter of a mile from where his body was found two and a half hours later. There was a path about a foot from the end of the railroad ties customarily used as a walk-way. The path does not commence at the end of the ties; the stone ballast extends out about a foot from the end of the ties, and the path begins where the ballast stops. The witness said: "I don't know whether he was walking between the rails or on the path."

Defendant's freight train No. 5067 passed over this track about 12:05 p.m. The witnesses heard no bell or whistle signal. It was apparently coasting, making very little noise.

The body of the deceased was found in Christian Creek, fifteen feet from defendant's track and near the end of the culvert over which the track passes. It was discovered by two small boys who were walking across the highway bridge nearby. The cinders were torn up at a point near the culvert as though a body had been "scooted" or shoved along. Splotches of blood were found on the culvert. There were bruises on the body of the deceased, on his back and forehead; his head was cut. He had some money in his pockets; also a watch. He was wearing a hat when last seen, but this was not found.

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

Little, Smith, Kitchin & Auten for plaintiff.
R. C. Kelly and Jones & Ward for defendants.

STACY, C. J., after stating the case: Conceding the sufficiency of the evidence to permit the inference that plaintiff's intestate was killed by defendant's passing freight train (*Cox v. R. R.*, 123 N. C., 604, 31 S. E., 848), still the record is barren of any evidence of actionable negligence on the part of the defendant. Negligence is not presumed from the mere fact of an injury. *Austin v. R. R.*, 197 N. C., 319, 148 S. E., 446;

Miller v. Holland, 196 N. C., 739, 147 S. E., 8; *Lamb v. Boyles,* 192 N. C., 542, 135 S. E., 464; *Isley v. Bridge Co.,* 141 N. C., 220, 53 S. E., 841.

What was the condition of the deceased when he was struck? Was he in a position of peril when seen by the engineer? or in the apparent possession of his faculties? *Tredwell v. R. R.,* 169 N. C., 694, 86 S. E., 617. What duty did the defendant owe to plaintiff's intestate which it failed to discharge? And was the breach of such duty the proximate cause of his death? *Henry v. R. R.,* 203 N. C., 277, 165 S. E., 698. These are questions which are left in the field of speculation by plaintiff's evidence.

Plaintiff says the failure to give warning of the train's approach was negligence. Even so, but was such negligence the proximate cause of plaintiff's intestate's death? On this point the proof is fatally wanting in sufficiency to establish liability. *Allman v. R. R.,* 203 N. C., 660; *Pharr v. R. R.,* 133 N. C., 610, 45 S. E., 1021; 52 C. J., 730. Negligence is not actionable unless it is the proximate cause of an injury. *Hurt v. Power Co.,* 194 N. C., 696, 140 S. E., 730. Moreover, the evidence tends to show foul play on the part of an assailant, as strongly as it tends to establish death by wrongful act, neglect or default of the defendant. *Davis v. R. R.,* 170 N. C., 582, 87 S. E., 745.

The prevailing rule is, that negligence is not presumed from mere proof of an accident on or near a railroad track. 22 R. C. L., 981. Thus, it was held in *Ward v. So. Pac. Co.,* 25 Ore., 433, 36 Pac., 166, 23 L. R. A., 715 (as stated in the third head-note, which accurately digests the opinion): "The finding of the body of a child on a railroad track, where it had been struck by a train, raises no presumption of negligence on the part of the company, although the track was straight and clear, where there is nothing to show the circumstances of the accident, or how long the child had been on the track when struck."

In a case practically on all-fours with the present one, *Davis v. R. R.,* 187 N. C., 147, 120 S. E., 827, *Hoke, J.,* reviewed the pertinent authorities in a well-considered opinion, and we are content to rest our decision on the *Davis case* without further elaboration. The cases of *Allman v. R. R., supra; Pharr v. R. R., supra,* and *Clegg v. R. R.,* 132 N. C., 292, 43 S. E., 836, are also directly in point; likewise the case of *Elliott v. Ry.,* 130 So. (Ala.), 775. Compare *Hill v. R. R.,* 169 N. C., 740, 86 S. E., 609. The judgment of nonsuit was properly entered.

Affirmed.

FANNIE B. McCOY, TRADING AS McCOY REALTY COMPANY v. WACHOVIA BANK AND TRUST COMPANY.

(Filed 14 June, 1933.)

1. Appeal and Error F a—

Where the only assignment of error is the appellant's exception to the judgment, the correctness of the judgment alone will be considered on appeal.

2. Brokers D a—Broker is not entitled to commissions unless he procures purchaser ready, able and willing to buy upon terms agreed upon.

In order for a broker to be entitled to commissions it is necessary that he secure a purchaser ready, able and willing to complete the purchase on the terms agreed upon between the broker and the vendor, and where the broker and vendor do not agree upon the terms upon which a sale is to be made there is no binding contract, and where the broker has secured only a prospective purchaser, the broker is not entitled to commissions upon the subsequent sale of the property to him upon terms later agreed upon between the vendor and purchaser.

3. Trial D b—

A directed verdict may not be given in favor of a party upon whom rests the burden of proof, nor may the court instruct the jury to answer the issue in his favor if they found the facts to be as all the evidence tended to show if the evidence on a material aspect of the case is uncertain.

4. Bills and Notes C a—

In order for a party to establish his ownership of notes as a *bona fide* purchaser he must not only show that he acquired the notes for value before maturity, but also that he had no notice or knowledge of outstanding equities.

5. Appeal and Error K e—A new trial will be awarded where otherwise party would lose benefit of exceptions taken at trial.

Where in the trial of an action in the county court the jury has answered the issue submitted on defendant's counterclaim adversely to defendant, and on appeal to the Superior Court judgment has been entered remanding the case to the county court with order that a directed verdict be entered in defendant's favor on the counterclaim, and on appeal to the Supreme Court *is held* that defendant was not entitled to a directed verdict, a new trial will be awarded on the issue, the defendant having lost the benefit of exceptions entered to the plaintiff's evidence relating to the counterclaim.

APPEAL by plaintiff from *Clement, J.*, at November Term, 1932, of BUNCOMBE.

The plaintiff sued the defendant for commissions alleged to be due her for procuring a purchaser of real estate to whom the defendant afterwards made a conveyance.

The defendant held notes in the principal sum of $10,000, which with accrued interest and taxes, was secured by two deeds of trust on the Case farm. The plaintiff alleged that the defendant employed her to sell this property at the price of $12,000; that she procured a purchaser; that the defendant sold the farm to the purchaser; and that she is entitled to commissions at 5% on the amount of the sale.

The defendant denied these allegations and set up a counterclaim against the plaintiff. The case was tried in the General County Court and resulted in a verdict and judgment for the plaintiff. On appeal to the Superior Court it was adjudged that the plaintiff's action be dismissed as in case of nonsuit; that the defendant was entitled to a directed verdict on its counterclaim; and that the defendant's cross-action be remanded to the county court. The plaintiff excepted and appealed.

Cathey & McKinney for appellant.
Bourne, Parker, Bernard & DuBose for appellee.

Adams, J. The only assignment of error is the appellant's exception to the judgment of the Superior Court, and on appeal to this Court no other is to be considered. *Smith v. Winston-Salem,* 189 N. C., 178; *Davis v. Wallace,* 190 N. C., 543; *Smith v. Texas Co.,* 200 N. C., 39; *Bakery v. Insurance Co.,* 201 N. C., 816.

We find no error in the judgment of nonsuit. A broker who undertakes to negotiate a sale of property is not entitled to commissions unless he finds a purchaser who is ready, able, and willing to complete the purchase on the terms agreed upon by him and the vendor. The right to commissions depends on the successful performance of the broker's services, and nothing is to be paid unless a bargain is effected. A prospective agreement is not sufficient. *Mallonee v. Young,* 119 N. C., 549; *Trust Co. v. Adams,* 145 N. C., 161; *Crowell v. Parker,* 171 N. C., 392.

The material allegations in the sixth, seventh, and eighth paragraphs of the complaint are that the plaintiff found a purchaser who would pay $12,000 for the property but the defendant would not agree to give terms. This signified that the defendant offered to sell only for cash; and the plaintiff expressly testified that the proposed purchaser "was never ready, willing, and able to pay $12,000 cash; he never was in position to pay all cash."

Other parts of her testimony demonstrate that between her and the defendant there was no definite contract; they never agreed on the terms of the sale. The plaintiff testified: "I saw Mr. Morris and told him that Mr. Wolfe wanted to purchase it and was willing to pay $4,300 down, and would pay the balance in six, twelve, and eighteen months, and would prefer to have eight, sixteen, and twenty-four

months. . . . Mr. Morris said they were willing to accept $4,300 down, but would not state any terms; that they would be willing to give liberal terms, but would not state what the liberal terms were. He didn't know exactly what they would do, but would give terms. He didn't state exactly what they would do then." It is evident that, according to the plaintiff's testimony, she had no definite terms upon which to offer the farm for sale.

As there was no binding contract between the parties the defendant did not become liable to the plaintiff by a subsequent consummation at a sale under the principle stated in *Trust Co. v. Goode,* 164 N. C., 19.

The judgment allowed the defendant's motion for a directed verdict on the counterclaim and remanded the cause for further proceedings. The defendant had the burden of establishing the counterclaim and a verdict may not be directed in favor of the party upon whom rests the burden of proof. *Eller v. Church,* 121 N. C., 269. Assuming, however, that the court intended to say that the jury should be instructed to answer the issues as to the counterclaim in favor of the defendant if the facts were found to be as all the evidence tended to show, we find the evidence uncertain as to whether the defendant had knowledge of such facts as would make its action in taking the notes equivalent to bad faith. C. S., 3037. The burden was on the defendant to show that it was a bona fide purchaser of the notes; it was not sufficient to show that it purchased them for value before maturity; it was required to show that it had no actual notice or knowledge of the plaintiff's equity. *Bank v. Branson,* 165 N. C., 344.

The issue was submitted to the jury in the county court and answered adversely to the defendant, but as the disposition of the case in the Superior Court deprived the defendant of the benefit of its exceptions to the plaintiff's evidence concerning the counterclaim, the appropriate relief can be granted only by a new trial on this issue. The judgment is

Modified and affirmed.

R. L. HUNTER v. HUNTER AUTO COMPANY AND UNITED STATES CASUALTY COMPANY.

(Filed 14 June, 1933.)

Master and Servant F a—Officer of company injured while performing duties of employee is an employee within meaning of Compensation Act.

The secretary and treasurer of an automobile sales company was injured while traveling to collect accounts due the company. *Held,* the officer was performing the ordinary and usual duties of an employee of such a company at the time of the injury, and not duties pertaining

exclusively to an executive function, and such officer was an employee of the company at the time of the injury within the intent and meaning of the Compensation Act.

CIVIL ACTION, before *Cowper, Special Judge,* at January Special Term, 1933, of MECKLENBURG.

The plaintiff was secretary and treasurer of the Hunter Auto Company, and also was a holder of $2,500 of the capital stock of the corporation. When the company was originally incorporated the stockholders were O. F. Hoke, R. B. Oswald and R. L. Hunter. Oswald was the bookkeeper and Hunter was not only secretary and treasurer, but was manager of the business. Hoke furnished the money, and neither Hunter nor Oswald had paid anything for the stock which had been issued to them. The evidence was that Hoke was "the directing head of the corporation," and that the plaintiff worked directly under him and received instructions from him. The plaintiff said: "I was salesman and collector in the stockroom and anything that was to be done around. We had a bookkeeper. He kept the books and everything that was to be done—anything in the world, why it was up to me and the other salesmen. I stayed out three-fourths of the time, . . . working on the outside, whether selling, collecting or any of that kind of stuff. . . . Mr. Hoke did all the firing and everything, changed bookkeeper one or two times. . . . I did whatever was necessary to be done about the place. . . . I received all my orders and directions in regard to the management of the company from Mr. Hoke." The evidence tended to show that on 5 February, 1932, the plaintiff had been out on a collecting trip for the company, and while driving between Blowing Rock and Lenoir plaintiff was injured. He said: "There was a dog that ran across the road and I just jerked the car and lost control of it—you know how those things happen . . . just lost control, . . . the car fell—the papers said it fell 900 feet. . . . It threw me out about half way down and I guess I stayed there for approximately three hours before I came to. The car belonged to the Hunter Auto Company." The evidence further showed that the plaintiff had sustained serious injuries.

The cause was heard by the Industrial Commission, and in an opinion by Commissioner Dorsett it was found that the plaintiff had "suffered an injury by accident arising out of and in the course of his employment, . . . and that at the time of the injury, by accident, the plaintiff was engaged in ordinary labor and was not engaged in work of an executive nature or character." Upon such finding there was an award of $18.00 a week. The defendant appealed to the full Commission, and the finding of fact and award made by Commissioner Dorsett were affirmed and approved. Thereupon the defendant appealed to the Superior Court, and the trial judge, after hearing the cause, decreed "that

the award heretofore signed by the North Carolina Industrial Commission be and the same is hereby in all respects affirmed both as to conclusions of law and findings of fact."

From the foregoing judgment the defendant appealed.

Stancill & Davis for plaintiff.
Ralph V. Kidd for defendant.

BROGDEN, J. Was the claimant an employee of the defendant within the contemplation of the Compensation Act, or was he exclusively an executive?

The boundary line between employee and executive in compensation cases was sketched, by implication at least, in the case of *Hodges v. Mortgage Co.*, 201 N. C., 701. The Court said: "The majority of the decided cases adhere to what may be called the dual capacity doctrine; that is to say, that executive officers of a corporation will not be denied compensation merely because they are executive officers if, as a matter of fact, at the time of the injury they are engaged in performing manual labor or the ordinary duties of a workman. Hence, one of the fundamental tests of the right to compensation is not the title of the injured person, but the nature and quality of the act he is performing at the time of the injury." Applying the test so approved to the facts, it is manifest that the claimant was not discharging an exclusively executive function at the time of the injury. The collection of accounts is well within the ordinary and usual duties of an employee of a motor company of the type described in the evidence in this cause. Indeed, the testimony tends to show that the plaintiff was not an executive at all for the reason that he was subject to the supervision and control of Mr. Hoke, who was apparently both the brain and tongue of the company in so far as the policies of the business were concerned.

There is ample evidence to support the findings of the Industrial Commission and the trial judge ruled correctly in upholding the award.

Affirmed.

LESTER MATTHEWS v. BLACKWOOD LUMBER COMPANY.

(Filed 14 June, 1933.)

Trial E c—Instruction in this case held sufficiently full in view of the simplicity of the case.

The failure of the trial court to define and explain the terms "proximate cause," "burden of proof," "greater weight of the evidence" in his charge to the jury in an action against an employer for negligent injury, will not be held for error where the simplicity of the case renders such explana-

tions unnecessary and it is apparent that the jury could not have misunderstood the meaning of the expressions used when applied to the evidence.

APPEAL by defendant from *Hill, Special Judge,* at February Term, 1933, of JACKSON.

Civil action by servant to recover damages from master for alleged negligent injury, tried upon issues of negligence, contributory negligence, assumption of risk, and damages, which resulted in a verdict and judgment for plaintiff.

Defendant appeals, assigning errors.

W. R. Sherrill and Jones & Ward for plaintiff.
Johnston & Horner for defendant.

STACY, C. J. The validity of the trial is assailed upon the ground that the judge, in charging the jury, used the technical expressions "proximate cause," "burden of proof," "greater weight of the evidence," without explaining their meaning in language which the jury could understand.

The case is a very simple one, both as to the law and the facts. The plaintiff was a woods "swamper," cutting tree laps and brush in the Balsam Mountains. He was given an ax with a defective, switchy handle, which caused him to strike a limb and cut himself. *McKinney v. Adams,* 184 N. C., 562, 114 S. E., 817; *Mercer v. R. R.,* 154 N. C., 399, 70 S. E., 742.

The simplicity of the case rendered the use of the ordinary formula in charging the jury, without further explanation, certainly harmless, if not unnecessary. *Fleming v. Utilities Co.,* 193 N. C., 262, 136 S. E., 723; *S. v. Steadman,* 200 N. C., 768, 158 S. E., 478. The jury could not have misunderstood the meaning of the expressions used, when applied to the evidence.

No error.

J. L. MILLS, JR., v. ROZENA MILLS ET AL.

(Filed 14 June, 1933.)

Appeal and Error K b—Judgment in this case, evidently entered under misapprehension of facts, is vacated and the cause remanded.

In this case the mortgagor sought to enjoin foreclosure under the power of sale contained in the instrument, and to have the land sold, if at all, by decree of the court. The trial court dissolved a temporary order entered in the cause, and decreed foreclosure at instance of mortgagor over

objection of mortgagee without adequate pleading or showing, and later entered supplemental order attempting to correct some of the findings of fact but reaffirming the court's original conclusions. On appeal the judgment and its attempted correction are vacated, and the cause remanded for further proceedings as to justice appertains.

APPEAL by plaintiff from *Grady, J.*, at Chambers, Clinton, N. C., 30 December, 1932. From ONSLOW.

Civil action by mortgagor to restrain sale of land under foreclosure of deed of trust, to declare attempted sale thereunder void, to enjoin delivery of deed, and to have property sold, if sold at all, by order of a court of equity. The mortgagee seeks to proceed under the power of sale contained in the deed of trust.

Temporary restraining order issued 7 December, 1932, by Judge Harris, returnable before Judge Grady, resident judge, at chambers in Clinton, 23 December, 1932.

On 26 December, Judge Grady dissolved the temporary injunction, ordered that deed be tendered purchaser at sale and upon failure of purchaser to comply with bid, a commissioner was appointed to make sale after thirty days notice, etc. The defendant does not ask for foreclosure in equity, but resists it.

On 30 December, 1932, a supplemental order was entered by Judge Grady attempting to correct some of the findings of fact set out in his first judgment, and reaffirming his original conclusions.

Plaintiff appeals, assigning errors.

Ward & Ward for plaintiff.
No counsel appearing for defendants.

STACY, C. J. As the judgment of 26 December, 1932, went beyond the purview of the case, in that, foreclosure was decreed at instance of mortgagor over objection of mortgagee, without adequate pleading or showing, and was evidently entered on a misapprehension of the facts—later attempted to be corrected—it would seem that, in order to preserve the rights of the parties, the judgment ought to be stricken out, as well as its attempted correction.

The judgment, therefore, will be vacated, and the cause remanded for further proceedings as to justice appertains and as the rights of the parties may require.

Error.

CHARLES S. BRYAN AND MRS. ALICE H. BRYAN v. CRAVEN COUNTY AND J. A. PATTERSON, TAX COLLECTOR, B. O. JONES, COUNTY AUDITOR, CITY OF NEW BERN, EDWARD CLARK, TAX COLLECTOR, AND GEORGE C. JONES, CITY AUDITOR.

(Filed 14 June, 1933.)

1. Taxation D c—Owner held entitled to apportionment of taxes to lots comprising property listed as entity.

Where land comprising several city lots is listed for taxation as one lot, and thereafter the owners execute an option on a part of the land: *Held*, under the provisions of C. S., 7987, as amended by chapter 306, Public Laws of 1929 and by chapter 83, Public Laws of 1931, it is lawful for the taxing authorities to apportion the taxes upon application of the owners even though the application is made after the land has been sold for taxes but before foreclosure of the tax certificate, and a judgment ordering that the lot optioned be released from the tax lien upon the payment of the taxes apportioned against it together with the payment of the personal property tax assessed against the owners will be upheld, the statute applying to cases in which a subdivision of property has been made and the land assessed as an entity and it being immaterial whether the subdivision was made before or after the adoption of the amendment.

2. Statutes B a—

A statutory regulation affecting method or procedure may be regarded as merely directory unless the procedure relates to a positive and essential legislative requirement.

3. Taxation D a—

Where an option on certain land is executed to the Government on 20 May of a certain year and is followed by deed delivered to the Government 29 July, the land is subject to the taxes for the year, C. S., 7987, and also is land which the owners contract to dedicate to a city which contract is executed 27 June.

4. Taxation C a—

The valuation of property for taxation as fixed by the county is binding on the city in which the land is situate.

APPEAL by defendants from *Grady, J.*, at April Term, 1933, of CRAVEN.

This is a controversy without action submitted upon the following agreed statement of facts:

1. On 1 January, 1930, Charles S. Bryan and Alice H. Bryan owned lots Nos. 280, 281, 282, and 283, in the plan of New Bern, N. C., Charles S. Bryan being seized of an estate in fee simple, subject to the life estate of Alice H. Bryan, in and to said lands.

2. Said land is bounded on the east by Middle Street, on the north by New Street, on the west by Hancock Street, and on the south by lots Nos. 252, 253, 254, and 255 in the plan of said city.

3. Said land was valued and assessed for taxation by duly appointed list taker and assessors of said county in manner following, viz.: No. 152 Middle Street, at a total valuation for the years 1927 to 1930, inclusive, of $54,000, and at a total valuation for the years 1931 and 1932 of $48,500. Based on the assessors' notations appearing on the original assessment records, the following distribution of the said valuations appears equitable and just:

FOR THE YEAR 1930

214 ft. x 164 ft. on Middle Street at $100	$21,400.00
100 ft. x 214 ft. on New Street at $50	5,000.00
214 ft. x 164 ft. on Hancock Street at $50	10,700.00
Buildings on Middle Street	15,400.00
Buildings on Hancock Street	1,500.00
	$54,000.00

FOR THE YEARS 1931 AND 1932

214 ft. x 164 ft. on Middle Street at $100	$21,400.00
100 ft. x 214 ft. on New Street at $50	5,000,00
214 ft. x 164 ft. on Hancock Street at $50	10,700.00
Buildings on Middle Street	10,400.00
Buildings on Hancock Street	1,000.00
	$48,500.00

For the years 1930, 1931, and 1932, and prior thereto all said lots Nos. 280, 281, 282, and 283 were listed as one lot as follows: 1 lot No. 152 Middle Street; and for the years 1930 and 1931 they were sold for taxes as 1 lot No. 152 Middle Street; and during all said times and for many years prior thereto were used as residence and home of the late James A. Bryan, and since his death to April, 1932, as home and home-site of his widow, Alice H. Bryan.

5. Said Charles S. Bryan and Alice H. Bryan contracted in writing by option 20 May, 1931, to deliver to the United States of America a good and sufficient deed for a lot bounded as follows, . . . ; said lot being a portion of said lands valued and assessed for taxation as aforesaid as Middle Street lot at $100 per front foot on Middle Street; and in addition thereto said Charles S. Bryan and Alice H. Bryan agreed to dedicate and convey to the city of New Bern a strip of land 20 feet in width and extending from said United States lot westwardly along New Street to Hancock Street for the purpose of widening New

Street; said strip of land being portions of said lands valued and assessed as aforesaid as New Street lot and Hancock Street lot at $50 per front foot on New and Hancock streets.

6. By contract in writing dated 4 June, 1932, following said option signed by the United States and executed and delivered by the plaintiffs to the United States on 27 June, 1932, and followed by deeds, possession of which deeds was delivered 29 July, 1932, to United States, the plaintiffs sold to the United States the said lot 200 feet x 164 feet for a post-office site and to the city of New Bern the strip of land 20 feet in width along New Street. There has been no tender or delivery of the deed to the city of New Bern for the 20 foot strip for the street.

7. Neither county nor city taxes have been paid on said lands since the payment of taxes for the year 1929. All said lands listed as "1 lot No. 152 Middle Street valued $54,000, and personalty valued $3,900," was sold 2 November, 1932, to Craven County, for the taxes of 1930, amounting to $1,201.65, as will more fully and at large appear from the certificate issued to said county; and all said land listed as "1 lot No. 152 Middle Street valued $48,500, and personalty valued $5,100," was sold 3 October, 1932, to said county for the taxes of 1931, amounting to $928.75, as will more fully and at large appear from the certificate issued to said county; all said land values, assessed and listed as aforesaid, was sold 2 November, 1931, to said city for the taxes of 1930, amounting to $725.75, and sold 7 November, 1932, to said city for the taxes of 1931, amounting to $672, as will more fully and at large appear by reference to the certificates issued to said city and copies of which are attached hereto; but no foreclosure suit has been begun.

8. If subject to apportionment: Of the whole county tax of $1,201.69 on the whole of said land and all personalty of said Alice H. Bryan, for the year 1930, the sum of $764.31 is fairly chargeable against said post-office site and the strip of land dedicated for street purposes; and of the whole city tax of $725.75 on the whole of said land and all personalty of said Alice H. Bryan for the year 1930, the sum of $458.56 is fairly chargeable against said post-office site and said strip of land.

If subject to apportionment: Of the whole county tax of $928.75 on the whole of said land and all personalty of said Alice H. Bryan for the year 1931, the sum of $580.81 is fairly chargeable against said post-office site and strip of land; and of the whole city tax of $672 on the whole of said land and all personalty of Alice H. Bryan for the year 1931, the sum of $415.81 is fairly chargeable against said post-office site and said strip of land.

If subject to apportionment: Of the whole county tax of $816.00 on the whole of said land and all personalty of said Alice H. Bryan for the

year 1932, the sum of $565.60 is fairly chargeable against said post-office site and strip of land; and of the whole city tax of $586.50 on the whole of said land and all personalty of said Alice H. Bryan for the year 1932, the sum of $395.14 is fairly chargeable against said post-office site and said strip of land, if said post-office site and strip of land is liable for taxes of 1932.

9. On or about 3 April, 1933, Charles S. Bryan and Alice H. Bryan requested said J. A. Patterson, special tax collector, and B. O. Jones, auditor of said county, to investigate and determine the pro rata part of said assessments justly applicable to the lot sold and conveyed as aforesaid to the United States and to the strip of land dedicated and conveyed as aforesaid to the city of New Bern, and they have determined same to be as hereinbefore set out, and plaintiffs have tendered payment of the tax, fairly ascertained to be due against same, together with all tax charged against the personal property of said Alice H. Bryan in whose name said land is charged and assessed for taxes, and have requested said tax collector and auditor to release said lot conveyed as aforesaid to the United States and said strip of land conveyed as aforesaid to the said city, from the tax lien.

10. The plaintiff, Mrs. Alice H. Bryan, tax lister and life tenant of said property and liable for taxes thereon, applied to county auditor of Craven County on ..... February, 1933, for first time to prorate the taxes on lot agreed to be sold to the United States for post-office site.

11. The United States has never paid the plaintiffs the purchase price for said post-office site, but has delayed payment of said purchase price because of the nonpayment of taxes thereon and the transaction has never been closed. Said purchase money has not been listed for taxes. Charles S. Bryan is a nonresident of North Carolina and receives $29,500 of the $35,000.

12. Upon execution of said contract of 4 June, 1932, accepted 27 June, 1932, by plaintiffs, the United States caused its engineers to place concrete markers at each corner of said lot and had its architect to make plans for the public building; had borings made to test foundation on different parts of the site and the contract provided upon 60 days notice from the government the plaintiff, Charles S. Bryan, should remove all buildings from and clear the site to the satisfaction of the custodian of government property. That the servant of Alice H. Bryan has lived on the property not contracted to be sold and looked after all the property up to present date for this plaintiff but the furniture of Charles S. Bryan remained in the mansion until December, 1932, and 18 January, 1933, the government gave notice to Charles S. Bryan to remove all buildings and clear the site, etc., within 60 days from date of such notice and same were removed within said time, the keys of

said mansion were held by the life tenant until December, 1932, and then turned over to Charles S. Bryan in whom the building was reserved.

In the Superior Court it was adjudged that the post-office site and the twenty-foot strip are subject to taxation for 1932; that the defendants have a right to separate said land conveyed to the United States and said strip dedicated to the city from the balance of the Bryan lot for the taxes assessed for the years 1930, 1931 and 1932, and they are hereby separated from the remaining part of the Bryan property for said years, leaving the unpaid part of the taxes for said years due both the county and city in force as against the part of the Bryan property not so being conveyed to the United States and not so being dedicated to the city; that the specific sums set out in the judgment are chargeable against the post-office site and the 20-foot strip for the respective years; and that upon payment of these sums the officers give receipts therefor and the designated site and strip be discharged from the tax liens of the county and city. The judgment contains other provisions which need not be recited.

The defendants excepted to the judgment and appealed.

W. H. Lee and Warren & Warren for appellants.
R. A. Nunn, Ernest M. Green and Ward & Ward for appellees.

ADAMS, J. The lot on which the late James A. Bryan had his residence in the city of New Bern was formerly listed for taxation as "Lot No. 152 Middle Street." Subsequently Charles S. Bryan acquired the title in fee to this property, subject to the life estate of Mrs. Alice H. Bryan. Lot 152 was composed of four city lots numbered 280, 281, 282, 283. On 20 May, 1931, the owners executed and delivered to the United States a written option of purchase, for a post-office site at a fixed price, the lot fronting on Middle and New streets, and at the same time agreed to dedicate and convey to the city of New Bern a strip of land twenty feet in width extending along New Street from the lot described in the option to Hancock Street. The lot on which the option was given and the 20-foot strip are a part of lot 152. The plaintiffs conveyed title to the post-office site on 29 July, 1932, and received the purchase money on 14 April, 1933, but they have not tendered to the city a deed for the 20-foot strip for widening the street.

On 2 November, 1931, the sheriff of Craven County sold lot 152 Middle Street for the delinquent taxes of 1930, and again on 3 October, 1932, for the delinquent taxes of 1931, and on these respective dates issued certificates of sale to the county of Craven. On 2 November, 1931, the same land was sold for the city taxes of 1930, and on 7 November, 1932, for the city taxes of 1931, and certificates of sale were issued

by the municipal tax collector to the city of New Bern. For the taxes of 1932 no sale has been made.

The appellants' assignments of error present the question whether the trial court committed error in holding that the lot sold to the United States for a post-office site and the 20-foot strip dedicated to the city of New Bern can be segregated from the remainder of the property and released from the lien of taxes for the years 1930, 1931, and 1932, upon payment of the respective sums found to be their "equitable and just" burden of taxation under the proposed apportionment.

In reference to real property it is provided that the lien of the State, county, and municipal taxes levied for any and all purposes in each year shall attach to all real estate of the taxpayer situated within the county or other municipality by which the tax list is placed in the sheriff's hands, on the first day of June, annually, and shall continue until such taxes, with any penalty and costs which shall accrue thereon, shall be paid. C. S., 7987.

The General Assembly amended this statute in 1929 by providing that the tax lien should be preferred to any other lien upon the real estate of the taxpayer within the county and to the inchoate right of dower or the curtesy initiate. Public Laws, 1929, chap. 306. In 1931 this was followed by other amendments. Public Laws, 1931, chap. 83. The second proviso of the latter act is in these words: "In all cases where tracts of land have been subdivided into lots, but have been returned, charged, and assessed as a whole tract, the sheriff or other tax collecting officer, together with the auditor, county accountant or other agency performing the duties of such auditor or accountant, shall, upon application of any person interested, make an investigation and determine the pro rata part of said assessment justly applicable to any lot or lots, and shall thereupon, upon payment of the tax fairly ascertained to be due against such lot or lots, together with a ratable share of the tax charged against the personal property of the party in whose name the land is charged and assessed at any time prior to the commencement of the advertisement of such property for sale for taxes prior to the sale of said property for taxes, release the said lot from the tax lien. However, the tax collector or sheriff shall require the owner, upon his application for a release, to pay all of his personal property tax charged on the return."

As the whole amount assessed against the personal property has been paid, the ultimate question is whether the tax can be apportioned as contended by the plaintiffs.

The defendants suggest two obstacles in the way of the apportionment. They say that the land must have been subdivided into lots but returned, charged, and assessed for taxation as "a whole tract." We do not regard

this as a fatal objection. It is admitted in the appellants' brief that lot 152, although listed and assessed as one lot, was composed of the four city lots heretofore described. The statute applies to cases in which the subdivision has been made and the lot has been assessed as an entity; the date of the subdivision, whether before or after the adoption of the amendment, is immaterial.

It is furthermore contended that the apportionment cannot be made after the land has been sold and the certificates of sale have been issued to the purchasers. The statute, though somewhat obscure, seems to indicate that the "application of any person interested" must be made prior to the time the property is advertised for sale. The plaintiffs argue that this clause is directory and that the application may be made at any time before the certificates are foreclosed. A regulation affecting a method is frequently regarded as directory, but a procedure may not be treated as directory when it contravenes a positive and essential legislative requirement. *Land Co. v. Smith,* 151 N. C., 70. According to the appellants' contentions the question is, not whether the plaintiffs can enforce the apportionment, but whether the defendants have a legal right to make it—the two interrogatories submitted to the court being whether the 20-foot strip of land is subject to the taxes of 1932 and whether it is lawful for the defendants to apportion the taxes that are due and uncollected. To each the court gave an affirmative answer, and we concur in the judgment. The valuation fixed by the county authorities is, of course, binding on the city. *R. R. v. Comrs.,* 188 N. C., 265; *Guano Co. v. New Bern,* 172 N. C., 258. Judgment

Affirmed.

FORSYTH COUNTY v. JOHN C. JOYCE AND F. B. FRIES JOYCE, THE CITY OF WINSTON-SALEM, CLISTUS FRIES, AND JOHN C. JOYCE, GUARDIAN AD LITEM FOR CLISTUS FRIES.

(Filed 14 June, 1933.)

1. Taxation H b—Tax certificate on lands of minor may be foreclosed by suit.

Under our present procedure tax sales certificates on the lands of minors may be foreclosed by action in the nature of an action to foreclose a mortgage, the minor being represented by a guardian *ad litem* and his interests being subject to the supervision and protection of the courts, chapter 221, Public Laws of 1927, chapter 334, Public Laws of 1929, C. S., 451, and the provisions of C. S., 7984, and the last clause of C. S., 8038 in so far as they relate to minors are now ineffective.

2. Same—Action to foreclose tax certificate in this case held not barred by statute of limitations.

Where a suit to foreclose a tax certificate is instituted against the person listing the property for taxation and the property is sufficiently described, the action is maintainable although the title to the land is in another, C. S., 8019, and where the owner is a minor and he is made a party and is represented by a guardian *ad litem* the first action is not discharged, and under the provisions of chapter 204, section 4, Public Laws of 1929, which extended the time in which tax foreclosure actions could be instituted on tax certificates issued in 1927 or prior thereto, an action instituted in September, 1929, against the person in whose name the land was listed to foreclose tax certificates for the years of 1924, 1925, 1926, and 1928, in which the minor owner was made a party by summons issued in February, 1932, and in which the minor owner was represented by a guardian *ad litem* who filed answer, is not barred by the statute of limitations.

APPEAL by defendants from *Clement, J.*, at June Term, 1932, of FORSYTH.

This is an action to foreclose a certificate of sale of a minor's real property. A complaint and answer were duly filed and the cause was heard upon the following agreed statement of facts:

1. That the plaintiff is a municipal corporation organized and existing under and by virtue of the laws of the State of North Carolina; that the defendants are residents of Forsyth County, and State aforesaid; and the defendant, city of Winston-Salem, is a municipal corporation organized and existing under and by virtue of the laws of the State of North Carolina.

2. That Clistus Fries, a minor seventeen years of age, inherited from his father, F. B. Fries, in August, 1921, and is now the owner in fee simple of the following described tract of land: (description of lot follows).

3. That the said property was listed for taxes in Forsyth County, North Carolina, in the years 1924, 1925, 1926, 1927, 1928, and 1929, by the defendant, John C. Joyce.

4. That the said listing was copied and used by the city of Winston-Salem in assessing its taxes for the same years.

5. That the taxes of Forsyth County assessed against said property for the said years are as follows:

1924	$28.40
1925	27.98
1927	29.30
1928	30.65
1929	30.20

6. That the taxes assessed by the city of Winston-Salem against the said property for the respective years are as follows:

1924	$57.44
1925	51.61
1926	53.92
1927	60.32
1928	59.05
1929	66.54

7. That the sheriff or tax collector of Forsyth County, pursuant to proper advertisement, sold the said property for the 1924 taxes 3 August, 1925; for the 1925 taxes 7 September, 1926; for the 1927 taxes 4 September, 1928; for the 1928 taxes 5 August, 1929; for the 1929 taxes 2 September, 1930; and at each of the said sales the county of Forsyth became the last and highest bidder and the sheriff or tax collector issued to the said county a tax sales certificate.

8. That the tax collector for the city of Winston-Salem sold the said property for taxes as follows: 1924 taxes 5 October, 1925; 1925 taxes 5 October, 1926; 1926 taxes 4 October, 1927; 1927 taxes 8 October, 1928; 1928 taxes 7 October, 1929; 1929 taxes 13 October, 1930; that at each of the said sales the city of Winston-Salem became the last and highest bidder and the tax collector issued to the said city a tax sales certificate for the said property.

9. That on 30 September, 1929, this action was instituted in Forsyth County, North Carolina, against John C. Joyce and wife, F. B. Fries Joyce and the city of Winston-Salem, and service was had on the said defendants on 2 October, 1929; that a complaint was filed in the said action of 30 September, 1929, against the said defendants to foreclose the tax sale certificate for the years 1924, 1925, 1927, and 1928, under section 8037 of the Consolidated Statutes then in force; that an answer was filed on 7 October, 1929, by the said defendant setting up therein that the minor, Clistus Fries, was the owner in fee simple of the said property described therein.

10. That on 30 September, 1929, an order was signed by the clerk of the Superior Court, directing the plaintiff to advertise that the said action had been brought for taxes for the years 1924 to 1928 inclusive, directing all persons having any interest in the subject-matter to appear in the office of the clerk of the Superior Court of Forsyth County within six months from the date of this notice and present and defend their respective claims upon pain in default thereof of being forever barred; that pursuant to the said order the said advertisement was run in a newspaper in Forsyth County once a week for four consecutive weeks.

11. That on 23 February, 1932, a summons was issued, from this court for Clistus Fries, the said minor, after properly making him a party thereto, and service was had upon the said Clistus Fries on 24 February, 1932, that an amended complaint was filed against Clistus Fries 23 February, 1932; that thereafter John C. Joyce was properly appointed guardian *ad litem* for the said Clistus Fries and the said guardian *ad litem* filed answer for the said minor after an extension of time allowed by the court on 12 April, 1932.

The trial court adjudged that the plaintiff recover the amount of taxes due it with the rate of interest prescribed by the statute and the costs of sale; that the certificate be foreclosed and the land sold by a commissioner after giving notice of the sale as provided by law; and that the taxes be paid out of the proceeds of the sale, including the taxes due the city of Winston-Salem.

The defendants excepted and appealed.

Fred S. Hutchins and H. Bryce Parker for plaintiff.
Elledge & Wells and R. Glenn Key for defendants.

ADAMS, J. The defendants raise the question whether under existing laws the land of a minor is exempt from sale during his minority for the nonpayment of taxes. The question calls for reference to the historical background of the several statutes relating to the subject.

As early as 1873 the General Assembly declared that the land of a minor should in no case be liable to be sold for taxes. Public Laws, 1872-'73, chap. 115, sec. 28(4). The substance of this statute appears in The Code (1883), sec. 3691; in the Revisal of 1905, sec. 2861; and in the Consolidated Statutes (1919), sec. 7984.

In 1885 the Governor of North Carolina, pursuant to legislative authority, appointed a commission to investigate the subject of taxation and to report a bill for listing and assessing property, for equalizing and collecting taxes, and for the sale of real and personal property in case of nonpayment. Public Laws, 1885, chap. 238. The commission made a report which, according to the Governor's Message to the General Assembly, was embodied in the Revenue and Machinery Act of 1887. Executive and Legislative Documents, 1887, p. 7. The act gave the owner or occupant of land (not under disability, evidently) the right to redeem it at any time within one year after the day of sale, and then affixed this proviso: "Infants may redeem any land belonging to them from such sale within one year after the expiration of such disability on like terms as if redemption had been made within one year from the date of said sale and from the date of each subsequent payment of taxes

thereon at the rate of 20 per cent per annum on the several amounts so paid by the purchaser until redemption." Public Laws, 1887, chap. 137, sec. 65.

This provision is inconsistent with the declaration that the real property of a minor shall not be sold for taxes. The right of redemption necessarily implies a previous sale; it is the sale from which the land may be redeemed.

The Machinery Act of 1887 laid down two modes of acquiring a tax title. The first was this: The purchaser could demand a certificate in writing to be signed by the sheriff, describing the land, stating the sum paid, and naming the time when he would be entitled to a deed. At any time within one year after the expiration of one year from the date of sale, the purchaser, upon production of the certificate and compliance with statutes requiring notices to be given and affidavits to be made, had a right to call for his deed. Public Laws, 1887, chap. 137, secs. 62, 69, 70, 71, and 72. In such event no action was necessary.

The other procedure was a foreclosure of the certificate by appropriate suit "in the same manner and with like effect as though the same were a mortgage executed to the owner of such certificate." Secs. 91, 92, 93, 104 *et seq.* Counties, also, were given the right of foreclosure. Sec. 101 *et seq.*

These two modes of acquiring title have been brought forward, with slight modification, in subsequent compilations of the laws, including the Consolidated Statutes, which became effective on 1 August, 1919. The logical and reasonable deduction from these facts is this: the Legislature intended that the clause permitting a minor to redeem his land after attaining his majority should apply only to cases in which the purchaser demanded a deed of the sheriff, and not to those in which the certificate was foreclosed by a formal action in the nature of a suit in equity. The reason is obvious. The purchasers' right to demand a deed was summary and could successfully be resisted only at the active instance of the taxpayer. But in a proceeding to foreclose the certificate the rights and property of the minor were subject to the supervision and protection of the court. As long as the two methods were recognized, it was necessary to preserve the right of redemption, although it appertained to only one of them; and this, we apprehend, explains the retention of the last clause in section 8038 of the Consolidated Statutes.

A radical change, however, was wrought by the act of 1927 and the amendments of 1929. They eliminate the purchaser's right to demand a deed and provide that relief shall be afforded only in an action in the nature of a suit to foreclose a mortgage. Public Laws, 1927, chap. 221, sec. 4; 1929, chap. 334. The delinquent shall be made a defendant,

and if a minor he must defend by a guardian, either general, testamentary, or *ad litem*. C. S., 451.

The amendments referred to resulted in a change of procedure and of substantive rights. The minor's right to redeem his land annulled the inhibition against its sale for taxes, and the protection of his interests by the court in a suit by the purchaser to foreclose his certificate abrogated the minor's right of redemption after final judgment. The result is that section 7984 and the last clause of section 8038 of the Consolidated Statutes, so far as they affect minors, are not now effective.

The changes pointed out are founded on the principle that the State cannot exist without the collection of taxes; that when any taxpayer or any property defaults in contribution to the public burdens, it throws upon those who pay their pro rata the burden of paying the taxes of those who default; that it has never been the policy of the law indefinitely to suspend the payment of taxes; and that the rule of uniformity is not consistent with the exemption of property from taxation, except as the latter is authorized by the Constitution. *McMillan v. Hogan,* 129 N. C., 314; *Southern Assembly v. Palmer,* 166 N. C., 75; *Keith v. Lockhart,* 171 N. C., 451; *Edgecombe County v. Walston,* 174 N. C., 55; *Hines v. Williams,* 198 N. C., 420.

In our opinion the plaintiff's cause of action is not barred by the statute of limitations. The first summons was issued 30 September, 1929, against John C. Joyce and his wife. Clistus Fries was not named as a party defendant; but the land was listed by John C. Joyce in his own name and it is provided that no sale of real estate shall be void because listed in the name of a person other than the real owner if sufficiently described unless the rightful owner has listed it and paid the taxes thereon. C. S., 8019; *Headman v. Commissioners,* 177 N. C., 261. The description is sufficient and the owner did not list the property for taxation. Moreover, the person in whose name the land has been listed, together with the wife or husband if married, shall be made defendant and served with process. Public Laws, 1929, chap. 334, sec. 2; *Orange County v. Wilson,* 202 N. C., 424. The action as at first constituted was maintainable and was not discharged by making the minor a defendant. "Any certificate of sale in the hands of any person, corporation, firm, county or municipality on which an action to foreclose has not been brought, which according to the terms of chapter two hundred and twenty-one of the Public Laws of one thousand nine hundred and twenty-seven should have been brought, shall have until December first, one thousand nine hundred and twenty-nine to institute such action. This action and extension shall and does include all such certificates whether the same were issued for the sale of one thousand nine hundred and

twenty-seven taxes and any and all certificates sold or issued prior thereto." Public Laws, 1929, chap. 204, sec. 4.

Statutes extending the time for the collection of taxes have been upheld with practical uniformity. *Hunt v. Cooper,* 194 N. C., 267. Conceding the rule that a new party may plead the statute of limitations we are confronted with the facts that the minor was made a party defendant within the time authorized by the statute for the prosecution of the action; that he was represented by a guardian appointed by the court, that he filed an answer, and that the law was duly administered. The tax against the lot in controversy has not been paid since 1924. We have given the briefs and the argument due consideration, and we must decline to interfere with the judgment in the absence of prejudicial error. Judgment

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 14 June, 1933.)

Reformation of Instruments C d—Evidence that provision relating to priority was omitted through mutual mistake held sufficient.

Defendant executed a crop lien to a bank to secure a loan. Thereafter he executed another lien on the same crop to secure the payment of fertilizer advanced by plaintiff. The bank's mortgage was first filed for registration, but was not registered until after the registration of plaintiff's mortgage. In an action to determine priority defendant testified that at the time of the negotiation he informed plaintiff's president and agent of the bank's mortgage and that they agreed that plaintiff should take a second lien, and that when plaintiff's mortgage was presented for signature defendant objected because it failed to provide that it should be subject to the bank's mortgage, and that plaintiff's agent assured defendant that the omission made no difference for the reason that registration would take care of the contemplated priority. Thereafter plaintiff learned that the bank's mortgage had not been properly registered. *Held,* the testimony was sufficient to be submitted to the jury on the question of the mutual mistake of the parties in the omission of the provision for the contemplated priority, and upon the rendition of a verdict adverse to plaintiff, judgment that the bank's mortgage had priority was properly entered.

CIVIL ACTION, before *Daniels, J.,* at Spring Term, 1933, of NASH.

This controversy involves the priority of liens. The evidence tended to show that on 6 February, 1930, the defendant, Horne, executed and delivered to F. F. Fagan, trustee for the North Carolina Bank and

Trust Company, to secure notes for $15,000, a chattel mortgage or crop lien upon the crops raised by defendant upon his lands during the year 1930. The plaintiff is engaged in the business of selling fertilizer and in March, 1930, the defendant Horne discussed with the agent of the plaintiff the purchase of fertilizer. The defendant said: "I told him I could give him a second crop lien. I told him that the North Carolina Bank and Trust Company had the first crop lien in the amount of $15,000. After my discussion with Mr. Marshbourn I went with him to Baltimore, the home office of M. P. Hubbard and Company, and discussed the matter further with W. P. Crenshaw, its president. . . . Mr. Marshbourn, Mr. Crenshaw and I were the only ones present at this conversation. As to the security which I was in a position to give the fertilizer company for such advances as they might make to me, I gave Mr. Crenshaw the same information which I had given Mr. Marshbourn. . . . Before we left his home he said he would take up with his board the matter of credit he was going to extend me for fertilizer. I discussed with Mr. Crenshaw the collateral I could give for the amount of fertilizer. I discussed with Mr. Crenshaw the collateral I could give for the amount of fertilizer that I would require. I do not recall anything that Mr. Marshbourn said. . . . I told Mr. Crenshaw that it would be a second mortgage; that the first lien had already been given to the North Carolina Bank and Trust Company for $15,000." Subsequently the plaintiff agreed to furnish fertilizer to the defendant Horne and a chattel mortgage or crop lien upon the crops of the defendant was prepared and presented to the defendant for signature. This chattel mortgage and crop lien was dated April, 1930, and secured an indebtedness of $11,848.12 due the plaintiff for said fertilizer for the year 1930, including a balance past due for fertilizer furnished theretofore. This mortgage covered twenty-one mules and all crops grown by the defendant and his tenants during the year 1930 upon said lands. With respect to the execution of this instrument, the defendant said: "The mortgage was then drawn and signed in Mr. Marshbourn's office. I read the paper and the only objection I raised to it was the guarantee—that I guaranteed it against prior lien. I told him that I had told him there was a first mortgage on it. He said registration—that would not make any difference—registration would take care of that. I then proceeded to sign it. I think this was in April. I later got $750.00 during the summer. When I signed the first mortgage in April I did not know that the paper from me to F. F. Fagan, trustee, which I showed you a moment ago, had not been legally recorded in Edgecombe County. If I had known it, I could not have signed the paper upon the statement made by Mr. Marshbourn. . . . I do not remember just when I found it out, but it was sometime later." The defendant further testified

that he raised an objection to signing the Hubbard mortgage because the mortgage contained a clause warranting the property therein described "to be free and clear from all other liens and encumbrances." Defendant said: "I knew I had given this other paper, and knew Marshbourn knew it, and I called that to his attention. . . . I objected to the provision in the mortgage, and after he told me that was perfectly all right, then I agreed to sign the paper as it was without taking out that provision. . . . If I had struck this out, I would have wanted something else put in. I would have wanted the fact that the bank had a prior lien. I would have wanted something like that put in. I told Marshbourn the bank had a prior lien. I wanted either to strike the objectionable provision out of the paper or put an exception there. He told me it was not necessary to put any provision in this paper that was not there. . . . I told him it was subject to a first lien that had been given the bank. I was doing that for my own protection. . . . Sometime in the fall in a conversation which I had with Marshbourn he told me the bank's paper had not been recorded and that his company had a first lien." The deed of trust of Fagan, securing an indebtedness of $15,000, due the North Carolina Bank and Trust Company, through inadvertence, was filed for registration on 6 February, 1930. The plaintiff's mortgage, dated 17 April, 1930, was duly recorded and properly indexed on or about 17 April, 1930. The plaintiff contended that it had a first lien upon the crops and personal property of defendant for the reason that its paper was properly recorded and indexed in April, 1930, whereas the paper of the North Carolina Bank and Trust Company, although executed in February, 1930, and filed for registration at that time, was not properly registered and indexed until 21 November, 1930. It was alleged that it was understood and agreed that the plaintiff's mortgage should contain a provision subordinating it to the other mortgage or deed of trust of the bank, and that such provision was omitted by the draftsman by mistake of parties.

The following issues were submitted to the jury:

1. "Did plaintiff, in April, 1930, and in July, 1930, agree with defendant Horne to advance him fertilizers for the year 1930 upon crop liens and chattel mortgages to be subject to defendant bank's prior lien of $15,000, as alleged in the answer?"

2. "Was a provision subjecting plaintiff's liens to the lien of defendant bank omitted by the mutual mistake of Horne and the plaintiff's agent as to proper registration of the bank's paper, as alleged in the answer?"

3. "Was a provision subjecting plaintiff's lien to the lien of defendant bank omitted by a mistake on the part of Horne, accompanied by fraudulent concealment on the part of the plaintiff's agent, as alleged in the answer?"

The jury answered the first issue "Yes," the second issue "Yes," and did not answer the third issue.

From judgment upon the verdict decreeing that the lien of the deed of trust to Fagan, trustee for the North Carolina Bank and Trust Company, was a prior lien to the instrument held by the plaintiff, plaintiff appealed.

Cooley & Bone and J. W. Grissom for plaintiffs.
Don Gilliam, G. M. Fountain and Battle & Winslow for defendant.

BROGDEN, J. This cause was considered upon a former appeal, and the opinion of the Court is contained in 203 N. C., at page 205. Upon the former appeal the law of reformation and mutual mistake was fully discussed and applied to the facts then existing, and a new trial was awarded because of error in the instructions given the jury. The jury found that the plaintiff and the defendant, Horne, made an agreement that the bank's lien securing an indebtedness of $15,000, should be a first lien upon the property, and that such agreement was omitted by the mutual mistake of Horne and the plaintiff's agent, Marshbourn. Hence it must be determined whether the testimony of the defendant constituted sufficient evidence of mutual mistake, to warrant a submission of issues to the jury. The following facts must furnish the basis for a proper solution, to wit: (a) Horne informed the president of plaintiff and its agent, Marshbourn, at the time of the negotiation that he had given the bank a first lien on his crop and that plaintiff's paper would therefore be a "second mortgage." (b) When the paper was drawn and presented to Horne for signature he objected to the form of the instrument because it failed to mention or refer to the fact that the bank had a first lien upon the property. (c) Thereupon plaintiff's agent, Marshbourn, assured Horne that the omission of such a provision made no difference for the reason that registration would furnish the contemplated priority.

Obviously both parties contemplated at the time, that the deed of trust given by Horne to the bank should constitute a first lien upon the property. Moreover, the foregoing facts, together with all the surrounding circumstances disclosed by the evidence, are sufficient to warrant submission of the issues to a jury. See *Bank v. Redwine,* 171 N. C., 559, 88 S. E., 878; *Story v. Slade,* 199 N. C., 596, 155 S. E., 256.

There are other exceptions in the record, but they are not deemed of sufficient importance to overthrow the judgment.

Affirmed.

HILDEBRAND MACHINERY COMPANY, INCORPORATED, v. A. L. POST AND W. F. POST, TRADING UNDER THE FIRM NAME OF POST MACHINE COMPANY.

(Filed 14 June, 1933.)

1. Deeds and Conveyances C f—

Where a deed provides that it is subject to a written lease previously executed by the grantor, the grantee takes the premises subject to the lease although the lease is for more than three years and is not recorded, C. S., 3309.

2. Landlord and Tenant B b—Lease in this case held to be for term of four years which could not be shortened at option of lessor.

A lease contract provided in one item that it was to run for a period of four years, and in a subsequent paragraph provided that if the lessee failed to pay the rent "or upon sixty days notice by either party" the lessee would vacate the premises. *Held,* the manifest intention of the parties was that the lease should run for the whole period of four years provided the lessee paid the rent as stipulated, and during the four-year period neither the lessor nor his assignee would be entitled to possession of the premises upon sixty days notice so long as the lessee performed all the conditions imposed upon him, the lease having no provision whereby the term might be shortened at the option of the lessor.

APPEAL by plaintiff from *Alley, J.,* at February Term, 1933, of BUNCOMBE. Affirmed.

Plaintiff, a corporation, is the owner of a certain parcel of land situate in the city of Asheville, N. C., on which are located buildings constructed for use as a machine shop. The land and buildings were conveyed to the plaintiffs, for a valuable consideration, by W. C. Ervin and wife, by deed dated 15 September, 1932. This deed was duly recorded in Buncombe County on 20 October, 1932, and contains a paragraph as follows:

"But this deed is made expressly subject to a lease to the Post Machine Company dated 15 July, 1931, and to all taxes for the year 1932, which taxes the party of the second part assumes and agrees to pay as part of the consideration for this conveyance."

The defendants are in possession of the parcel of land and the buildings located thereon, now owned by the plaintiff under and by virtue of said deed, claiming the right to such possession under a lease executed by C. E. Kistler, agent for W. C. Ervin, which is as follows:

"This contract of lease made and entered into this 15 July, 1931, by and between A. L. Post and W. F. Post, trading and doing business as a partnership under the firm name and style of Post Machine Company, Buncombe County, State of North Carolina, party of the first part, and C. E. Kistler, agent of W. C. Ervin, party of the second part; Witnesseth: For and in consideration of mutual covenants hereinafter

contained and the expected performance of the same, sums of money to be paid, the use of certain properties, tools, and machinery hereinafter designated, and other valuable considerations, the parties hereto for themselves, their successors, heirs and assigns, do mutually agree with each other as follows:

1. (a) Parties of the first part agree to buy certain property, a list of which is hereto attached, marked Exhibit A, and made a part of this contract, at the price stipulated thereon.

(b) Parties of the first part agree to buy all the machinery, tools, etc., marked Exhibit B, and hereto attached and made a part of this contract, at the price stipulated thereon, and at the stipulated time.

2. The parties of the first part agree to rent the following described property, to wit:

The buildings of the old Carolina Machinery Company known as the Machine Shop, the Pattern Shop and the Foundry, together with all real estate upon which they are situate, including sidetrack, machinery and tools, Exhibit B, excepting therefrom the land referred to in paragraph six hereafter. The rent for the aforesaid property is to be $100.00 per month, payable in advance, to wit: on the 25th day of each and every succeeding month.

3. Parties of the first part agree to give a good and sufficient bond in the sum of $1,500 to insure the return of said property, patterns, machinery, tools, etc., as set forth on the inventory marked Exhibits A and B and hereto attached and made a part of this agreement, in as good shape as same were at the date of these presents, ordinary wear and tear excepted.

4. That this contract of lease is to run for a term of four years from date of these presents, with the privilege of the party of the first part renewing said lease at a monthly rental to be agreed between the parties hereto, and by written notice to the party of the second part on or before the first day of April, 1935.

5. Parties of the first part agree to make prompt payment of the rental hereinbefore specified at the time and terms hereinbefore specified, and that if and in the event parties of the first part fail to pay said rent as hereinbefore set forth, or upon sixty days notice by either party, then and in that event parties of the first part agree to vacate said buildings and yield possession of said fixtures, patterns, buildings herein rented, and this contract of lease shall become void and of no effect and said parties of the first part agree to vacate and deliver up possession of said premises in as good and ample manner as same are, ordinary wear and tear excepted.

6. That said property hereby leased does not include that formerly let to the American Scrap Material Company, and party of the second part further agrees not to rent the property rented to the American

Scrap Material Company to any competitor of said parties of the first part, junk and scrap companies excepted.

In testimony whereof the parties hereunto have set their hands and seals the date and year first above written.

W. F. Post. (Seal.)
A. L. Post. (Seal.)
C. E. Kistler. (Seal.)
Agent for W. C. Ervin."

At the date of the deed from W. C. Ervin and wife to the plaintiff, to wit: 15 September, 1932, the lease from W. C. Ervin to the defendants was duly assigned and transferred by C. E. Kistler, agent for W. C. Ervin, to the plaintiff. The lease was thereafter, to wit: 20 September, 1932, duly recorded in Buncombe County.

On 17 September, 1932, by letter addressed to them, the plaintiff gave notice to the defendants that under and pursuant to the provisions of paragraph 5 of the lease, plaintiff would on 19 November, 1932, demand possession of the property described in the lease. The defendants promptly advised plaintiff that they would decline to surrender possession of the property on 19 November, 1932.

At the date of the commencement of this action, to wit: 24 November, 1932, the defendants had paid or tendered to the plaintiff all sums due as rent for the property described in the lease, and had fully performed all the covenants and agreements undertaken by them as lessees of said property.

The court was of opinion that plaintiff was not entitled to recover of the defendants possession of the property described in the lease, and on motion of the defendants at the close of all the evidence, dismissed the action by judgment as of nonsuit. From this judgment, plaintiff appealed to the Supreme Court.

Sanford W. Brown and J. W. Haynes for plaintiff.
Harkins, Van Winkle & Walton and Charles G. Buck for defendant.

CONNOR, J. Under and by virtue of its deed from W. C. Ervin and wife dated 15 September, 1932, the plaintiff is now the owner of the parcel of land and of the buildings described in its complaint, subject, however, to the rights of the defendants under and by virtue of the lease to them executed by C. E. Kistler, agent for W. C. Ervin, and dated 15 July, 1931. The fact that the lease, although for a term of more than three years, was not recorded at the date of the deed to the plaintiff (C. S., 3309) is immaterial. The land and the buildings described in the deed were conveyed to the plaintiff subject to the lease, which was duly assigned to the plaintiff contemporaneously with the execution of the deed to the plaintiff. See *Hardy v. Fryer,* 194 N. C., 420, 139 S. E.,

833, and cases cited in the opinion in that case. The plaintiff concedes that it owns the property conveyed to it by its deed from W. C. Ervin and wife, subject to the rights of the defendants under this lease. At least, the plaintiff does not contend to the contrary on this appeal.

The plaintiff contends, however, that having given sixty days notice to the defendants in accordance with the provisions of paragraph 5 of the lease, that it would demand possession of the property described in the lease on 15 November, 1932, it was entitled to such possession on that date, notwithstanding the payment by the defendants of all sums due as rent under the lease, and notwithstanding full performance by the defendants of all the covenants and agreements undertaken by them as lessees. The language of paragraph 5 construed in connection with the language of the entire lease (*Benton v. Lumber Co.*, 195 N. C., 363, 142 S. E., 229) does not sustain this contention. It is expressly provided in paragraph 4 that the lease should run for four years from its date. There is no provision in this paragraph by which the term might be shortened at the option of the lessor, as was the case in *Texas Co. v. Fuel Co.*, 199 N. C., 492, 154 S. E., 829. It was manifestly the intention of the parties to the lease that the term should be four years, and that the lessees should have the right to hold the property described in the lease for the full term, provided they paid the rent as stipulated in the lease. If they failed to pay the rent monthly as stipulated in the lease, and the lessor demanded possession of the property, after having given sixty days notice of such demand, then and in that event the lessees agreed to vacate the buildings and yield possession of the property to the lessor. In support of this construction see *Trust Co. v. Duffy*, 153 N. C., 62, 68 S. E., 915, and *Robertson v. Robertson*, 190 N. C., 558, 130 S. E., 166.

There was no error in the judgment dismissing the action as of nonsuit, and discharging the receiver, who had been appointed by the court during the pendency of the action. The judgment is

Affirmed.

JOHN D. HAGER v. GROVER WHITENER, ADMINISTRATOR OF THE ESTATE OF JAS. L. HAGER.

(Filed 14 June, 1933.)

1. Wills B b—Evidence held sufficient to show a contract to devise.

Evidence tending to show that deceased was a bachelor and an old man and induced plaintiff to sell his lands and buy other lands as tenant in common with deceased, that plaintiff moved his family to the lands thus bought and lived with deceased as a member of the family, worked the lands and supported and took care of deceased in his old age, with

testimony of declarations by the deceased tending to show that deceased had agreed to devise and bequeath plaintiff all his property in consideration of plaintiff's performance of his agreement, *is held* to show a definite contract by deceased to devise his property to plaintiff, and upon the death of the deceased intestate, is sufficient to be submitted to the jury in plaintiff's action against deceased's administrator for breach of the contract.

2. Evidence H c—Testimony by parties not interested in event as to declarations of deceased against interest held competent.

In an action against the administrator of a deceased person to recover for breach of the deceased's contract to devise, testimony of witnesses not interested in the event as to declarations made by the deceased against his interest was properly admitted, and testimony of defendant's witnesses as to declarations of the deceased not made in the presence of plaintiff and not against the deceased's interest was properly excluded as hearsay. C. S., 1795.

3. Frauds, Statute of, B a—Statute of frauds is not applicable to action to recover for breach of contract to devise.

In this action for breach of a contract to devise there was evidence tending to show that defendant's intestate induced plaintiff to support and take care of him for the remainder of his life under a contract to devise his lands to plaintiff, and that plaintiff fully performed his contract: *Held*, the defendant will not be allowed to set up the statute of frauds as a bar to the action, the plaintiff having rendered services in reliance on the intestate's promise and it being inequitable to permit defendant to take advantage of the bad faith of his intestate.

4. Wills B c—Measure of damages for breach of contract to convey.

In an action against the administrator of a deceased for breach of the intestate's contract to devise and bequeath all of his property to plaintiff, the measure of damages is the fair market value of the intestate's property at the time of his death.

APPEAL by defendant from *Cowper, Special Judge,* and a jury, 17 December, 1932. From MECKLENBURG. No error.

The plaintiff's complaint, in part, is as follows:

"That James L. Hager, of late a citizen and resident of Mecklenburg County, North Carolina, died intestate on or about 23 August, 1930. That Grover Whitener has duly qualified and is now acting as administrator of the estate of said James L. Hager.

That prior to 23 December, 1928, the plaintiff lived with his wife and children on a farm, in Lemley Township, Mecklenburg County, North Carolina, which was then the property of the plaintiff.

That prior to said date, said James L. Hager lived at his own residence which was then located in or near the town of Cornelius, North Carolina.

That on or about 20 December, 1928, said James L. Hager urged and solicited the plaintiff to dispose of his property and to assist said James L. Hager in purchasing another tract of land near Cornelius,

N. C., as tenant in common with said James L. Hager, and to move with his family into a certain house on said other tract of land and to live there with said James L. Hager during the life of said James L. Hager, said James L. Hager offering and proposing to compensate plaintiff therefor by canceling a certain note for $800.00, which had previously been executed by plaintiff to said James L. Hager, and by executing and leaving a will devising all of the property of said James L. Hager to plaintiff.

That in consequence of said solicitation upon the part of said James L. Hager, plaintiff accepted the proposal of said James L. Hager and, thereupon, plaintiff and said James L. Hager entered into a contract containing the following provisions: (a) That plaintiff should immediately sell and dispose of his own farm, in Lemley Township, Mecklenburg County, North Carolina, consisting of approximately 66½ acres, with valuable building thereon; (b) that the plaintiff and said James L. Hager should purchase, as tenants in common, another tract of land in or near Cornelius, N. C., containing about 25 acres, the plaintiff to pay one-half of the purchase price therefor; (c) that plaintiff and his wife and children and said James L. Hager should move into a certain house located on said 25-acre tract; (d) that said James L. Hager should live with plaintiff and plaintiff's family for the rest of his life; that plaintiff should cultivate said 25-acre tract of land and certain other farm lands owned by said James L. Hager; and that plaintiff should help take care of said James L. Hager during the life of said James L. Hager. (e) That said James L. Hager should cancel a certain note, for $800.00 which had previously been executed by plaintiff to said James L. Hager. (f) That said James L. Hager should and would give, bequeath and devise to the plaintiff, by will, all property owned by said James L. Hager."

The plaintiff further alleges, setting forth same in detail, that he complied in all respects with his part of the contract, and that the "said James L. Hager failed to execute any will and died intestate," thus breaching his contract. "Wherefore the plaintiff prays: (1) That the defendant be ordered and required to cancel said $800.00 note, and surrender same to the plaintiff; and, (2) that the plaintiff have and recover of the defendant the sum of $12,800 damages for the breach of said contract, and the costs of the action."

The defendant denied the material allegations of the complaint and set up counterclaim, and pleaded the statute of frauds, C. S., 987, 988.

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

"1. Did the plaintiff, John D. Hager and Jas. L. Hager, during the lifetime of the said Jas. L. Hager, enter into a contract as alleged in the complaint? Answer: Yes.

2. If so, did the plaintiff, John D. Hager, on his part, comply with all of his obligations under said contract? Answer: Yes.

3. Did the said James L. Hager breach said contract as alleged in the complaint? Answer: Yes.

4. What amount, if any, is plaintiff entitled to recover? Answer: $8,500 (eight thousand and five hundred dollars)."

The court below rendered judgment on the verdict. There were certain stipulations between the parties in reference to the $800.00 note, and the judgment conformed to same. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be considered in the opinion.

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

Kemp Battle Nixon, H. A. Jonas, Hiram Whiteacre, J. Laurence Jones and Geo. W. Wilson for defendant.

CLARKSON, J. We think that plaintiff's evidence was sufficient to sustain the allegations in the pleadings. Defendant's intestate, James L. Hager, was a bachelor and an old man when he died. The testimony of J. B. Readling was to the effect that the relationship between plaintiff, Jas. L. Hager and John D. Hager "Was like unto parent and child." F. C. Sherrill testified, in part as to statements made by Jas. L. Hager in reference to John D. Hager: "He has agreed to live with me and take care of me and I am to give him what property I have got." Bob Alley testified, in part: "I am getting old and feeble and not able to work. I am going to give him what I have out there to keep me." Joe Graham testified, in part: "That they went in halves on the Washam place and that he wanted Johnsie to live with him . . . said that he was going to give him the property that he had left to take care of him and wait on him." Anne Bell Hager testified, in part: "We were discussing a neighbor who died and left his property without a will. We were discussing that on the porch with one of the neighbor boys, and after Uncle Jim and I went back in the house Uncle Jim made the remark: 'What a pity this man didn't leave a will'; that that was one thing that he intended to do, and that he intended to will it to Johnnie, because he had agreed to, because Johnnie had helped take care of him and would take care of him the rest of his life. . . . He was just one of the family and very near and dear to all of us."

There was other evidence to like effect and corroborative. We think there is sufficient definite and certain evidence to show a contract.

At the close of plaintiff's evidence and at the close of all the evidence, the defendant made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions and in this we can see no

error. The plaintiff relied on the contract as set forth in his complaint, and the evidence was sufficient to sustain the contract, and the jury so found.

In *Miller v. Lash,* 85 N. C., at p. 54, the principle is thus stated: "The authorities cited in the argument for the plaintiff seem to establish the proposition that where personal services are performed by one person for another during life under a contract or mutual understanding, fairly to be inferred from their conduct and declarations and the attending circumstances, that compensation therefor is to be provided in the will of the party receiving the benefit of them, and the latter dies intestate or fails to make such provision, the subsisting contract is then broken, and not only will the action then lie for the recovery of their reasonable value freed from the operation of the statute, but it could not be maintained before. It is equally plain that if the services were given in the mere expectation of a legacy, without a contract express or implied, and in reliance upon the gratitude and generosity of the deceased, the action cannot be sustained."

In *Brown v. Williams,* 196 N. C., 247, at p. 250, we said: "There is nothing to indicate, in the expressions made by defendant's testator, any certain or definite promise or contract, either express or implied, to make a testamentary provision in his will in favor of plaintiff. The expressions were not even made to plaintiff, but to others. It was an appreciation and intention, but not an obligation."

In the present case, the evidence was sufficient, both direct and circumstantial, to indicate that it was an obligation and a contract. Plaintiff relied on the express and implied agreement and acted under it, which defendant's intestate breached, to his damage. The plaintiff, under the statute, C. S., 1795, could not, and did not, testify.

In *Insurance Co. v. R. R.,* 195 N. C., 693, at p. 695-6, we find: "One of the leading cases in this State, discussing declarations against interest, is *Smith v. Moore,* 142 N. C., 277. In that case *Walker, J.,* writing for the Court, said: 'Declarations of a person, whether verbal or written, as to facts relevant to the matter of inquiry, are admissible in evidence, even as between third parties, where it appears: (1) That the declarant is dead. (2) That the declaration was against his pecuniary or proprietary interest. (3) That he had competent knowledge of the fact declared. (4) That he had no probable motive to falsify the fact declared.' *Roe v. Journegan,* 175 N. C., 261; *Carr v. Bizzell,* 192 N. C., 212."

We think the evidence of the witnesses above mentioned, and as to what they testified, competent. The testimony of certain witnesses as to declarations of defendants' intestate not made in the presence or hearing of plaintiff, were hearsay and incompetent, and were properly ex-

cluded by the court below. *Chandler v. Marshall,* 189 N. C., 301; *Carpenter v. Power Co.,* 191 N. C., 130. The statute of frauds set up by defendant is not applicable to the facts in this case.

In *Redmon v. Roberts,* 198 N. C., 161, at p. 164-5, speaking to the subject, it is written: "This Court and the courts generally have upheld and enforced oral contracts to devise or convey land in consideration of services rendered . . . (citing authorities). The theory upon which the reason is based, is that the party breaching the contract has received the benefit thereof, and that it would be an act of bad faith to plead the statute of frauds as a bar to recovery. This principle was declared in *Deal v. Wilson, supra* (178 N. C., 600), as follows: 'We there said that where the defendant has promised, in consideration of services to be rendered, that he will transfer to the plaintiff certain property, which he afterwards refuses to do, and, instead of fulfilling his contract, sets up the statute of frauds as a bar to any recovery on the same, he acts in bad faith, and his conduct having deceived the plaintiff, who, relying upon the assurance that the contract would faithfully be performed, had been induced to part with his money or to render services of value to the defendant, the latter may recover compensation for the loss he has sustained.' "

We think the charge on the measure of damages, as follows, correct: "The measure of damages, for breach of contract like this to devise, is the value of the property agreed to be devised and this would be as of the date of the death of James L. Hager, in this case. . . . Now, gentlemen of the jury, when the law lays down as measure of damages, in such a case, the value of the property agreed to be devised, as of the date of the death of James L. Hager—by the word 'value' the law means what is called the 'market value' or the fair, open market value of the date of the death of deceased—James L. Hager—in this case, and the fair, open, market value of any piece of property is what it will bring upon the open market for cash paid to one who is not required to sell, or there is no particular reason when he desires or feels he should sell that particular piece of property, and purchased by one who is willing to purchase, but has no particular reason why it is necessary for him to have that particular piece of property."

"The measure of damages for the breach of contract to devise is the value of the property agreed to be devised." *Bowling v. Bowling, Admr.,* 300 S. W., 876 (Ky.); *Redmon v. Roberts, supra.* The amount under conflicting evidence in this case was for the jury to determine.

The plaintiff did not rely on *quantum meruit,* but his contract with defendant's intestate. There was sufficient competent evidence as to the contract and the jury found under proper instructions there was a contract. The exceptions and assignments of error by defendant as to

admissions and exclusion of evidence cannot be sustained. The court below placed the burden of proof properly. What was a contract was defined in conformity with well-settled law of this jurisdiction. The contentions of the parties and the charge was fair and just to the litigants. It appears that the material contentions of defendant have been heretofore passed upon by this Court. We can see no prejudicial or reversible error.

No error.

STATE v. JACK H. AMMONS AND MARION (ALIAS ARTHUR) AMMONS.

(Filed 14 June, 1933.)

1. **Criminal Law I j—On motion to nonsuit all the evidence will be considered in light most favorable to State.**

   Upon a motion as of nonsuit in a criminal action, made at the close of the State's evidence and renewed at the close of all the evidence, all the evidence, whether offered by the State or elicited from defendant's witnesses, will be considered in the light most favorable to the State, and it is entitled to every reasonable intendment thereon and every reasonable inference therefrom, and only evidence favorable to the State will be considered, the weight and credibility of the evidence being for the jury.

2. **Mayhem B c—Evidence of defendant's guilt of malicious castration held sufficient to be submitted to the jury.**

   The direct evidence of the guilt of one of the defendants in this prosecution for malicious castration under the provisions of C. S., 4210, and the circumstantial evidence as to the other's participation and guilt is held sufficient to overrule their motions as of nonsuit.

3. **Criminal Law L e—**

   The granting in the presence of the jury of the solicitor's motion to *nol. pros.* with leave as to some of several defendants will not be held prejudicial to the remaining defendants upon their appeal from a conviction, there being no objection by the defendants against whom the case was *nol. prossed* with leave.

4. **Criminal Law I g—**

   The failure of the trial court to define the meaning of the term "reasonable doubt" in his charge to the jury in a criminal action is not reversible error in the absence of a prayer for special instructions.

5. **Criminal Law L e—Exclusion of testimony in this case held not prejudicial.**

   Where in a prosecution for malicious castration defendant's physician, offered as a witness, has been allowed to testify as to defendant's weak physical condition, the exclusion of his testimony as to the diseases with which defendant was suffering will not be held prejudicial although defendant had testified as to them, the defendant when he became a witness being as other witnesses and subject to the same rules.

STATE *v.* AMMONS.

APPEAL by defendants from *McElroy, J.*, at November Term, 1932, of BUNCOMBE. No error.

The defendants, Jack H. Ammons, Marion (alias Arthur) Ammons, Walter Yarborough, Sam Todd and A. D. Cordell, were indicted in a bill of indictment containing three counts: (1) charging the defendants with castrating the prosecuting witness Johnnie Hart; (2) secret assault; (3) felonious assault. A mistrial was ordered by the court as to the defendants Yarborough, Todd and Cordell, and the solicitor as to them took a *nol. pros.* with leave. The defendants Ammons were convicted under the first count in the bill of indictment and sentenced by the court below.

Johnnie Hart, a witness for the State, testified to the effect that he was 26 years old, lived in Biltmore, N. C., and was married. On Monday, 7 November, 1932, 20 minutes to 12 o'clock he was castrated. "I left and went toward my home, walked up the paved road to the end of a warehouse on a side track. I then went to the woods to get me a load of fire wood. . . . In two or three minutes I was grabbed. *Jack Ammons was on the side of the path along which I was walking in the woods, he grabbed me by the left wrist. Somebody hit me on the head.* I don't know what Jack Ammons had in his hands, *it looked like a knife.* As he grabbed me I was hit in the head. I could not see who hit me. I didn't turn around. They threw something over my head that I couldn't see through. I fell to the ground, and after I fell somebody tore my shirt off and crammed it in my mouth. I could not holler. They were laying on me, kinder, and had my legs tied. They started to work on me. Started to work in my legs. *I felt the knife strike me, it struck me on my private parts.* This lasted just two or three minutes. They then got off of me and left."

Guy Roberts, a deputy sheriff, witness for the State, testified in part: "A call came into the sheriff's office about 12:30 o'clock Monday, 7 November, and in response to this call I went to Taylor's house out in the Oakley section. I must have got there by 1 o'clock, p.m. *I found Johnnie Hart in a chair in a bloody condition.* I found the overalls that he had changed from in a very bloody condition. I then brought Johnnie Hart to the hospital, in a car and after I brought him there I went back out to Taylor's. I talked to Johnnie Hart some, but he seemed to be suffering so that I didn't talk to him much. He went unconscious in the car. *I went back out to Taylor's house, and went to the woods where I understand this happened. I found the testicle lying in the woods, and also found blood on the leaves. It looked like there had been a struggle there.* The solicitor: Mr. Roberts, I hand you this handkerchief and ask you to state what it is, and where you found it? Answer:

I found this in the woods. . . . Johnnie said he went through the woods to pick up some wood to carry home and that Jack Ammons was along the trail and he reached out and grabbed him by the left wrist and he seen a knife in his hand. Jack jerked him down and about that time somebody struck him in the back of the head and threw something over his face and crammed something in his mouth. Then he said there was one on each side laying across him holding him down and somebody held his legs. . . . I arrested the defendant, Jack Ammons. I took a knife from him. Q. What did Arthur or Marion Ammons say about being with Jack on the day of the cutting? Answer: *He said he came to Jack's house that morning about 7 o'clock and he had been with Jack until they came to Jack's house after this happened over there,* and Jack went back, borrowed a shot gun and went back there. When I arrested Marion Ammons at Jack Ammons' house he said that his brother brought him to Jack Ammons' house about 7 o'clock from Woodfin. He is an escaped prisoner and he said he understood the law was looking for him in Woodfin and he decided it was safer there and he had been with Jack ever since. . . . The handkerchief that I identified was not found at the scene of the cutting, but was found in the woods a distance of about one hundred and fifty (150) yards away."

The State then offered in evidence the handkerchief identified by the witness Roberts, and *which contained the initial "A" in the corner,* and which was dirty, but contained no blood. The State then offered in evidence *two knives identified by the witness Roberts as being taken from the person of the defendant, Jack Ammons, at the time of his arrest, one of which contained a dark stain on the blade.*

Zetta Mae Jones, a witness for the State, testified in part: "I know where the woods are that it is said that this cutting took place. I know the time that they say the cutting took place. I was at home at that time. I know Jack Ammons. I saw him that day. Saw him come down the railroad. *Someone that looked like Marion Ammons (pointing him out in the court room) was walking with him. They were walking pretty fast. The man with Jack Ammons had on a brown suit. It was between 12 and one o'clock p.m. that I saw them."*

Ernest Pack, a witness for the State testified, in part: "I saw him go up a bank to leave, going towards the railroad there where he used to live. I know where the old 'Cheesborough Spring' is, *it is up in the woods in the direction towards where Johnnie got cut.* I know Jack Ammons, and have known him for sometime. *I saw Jack Ammons that day and Marion Ammons that man (pointing to Marion Ammons in the court room) was with him.* I was walking along the railroad track, and I saw them coming up a path. *It was about 12:30.* They came up

on the right-hand side of the railroad track in the direction I was going. . . . Jack Ammons asked me if I knew anything about when a freight train would run, and I told him not until later on in the evening about 4 o'clock. . . . When I saw Jack Ammons and Marion Ammons they were coming down a path which is on the right-hand side of the railroad going east. This path runs from up near Jack Ammons' house."

Thurman DeWesse, a deputy sheriff, witness for the State, testified in part: "I went to the place where they said Johnnie Hart got cut. . . . investigated the place and noticed that there had been a scuffle there."

The defendants denied their guilt, and set up an alibi. Both went on the stand as witnesses. Arthur Ammons, one of the defendants, testified, in part, on cross-examination: *"That knife there, that was taken off of Jack Ammons, is one that I gave him.* I got it from a fellow in Dallas, Texas, swapped him a pair of pants for it. Yes, I have been pretty much all over the country. I just set around with Jack Ammons at his house that day and talked. Yes, he knew I was escaped from the chain-gang. No, I didn't hit Johnnie Hart in the head with anything, and didn't help Jack Ammons cut him. *I know that Jack wasn't in these woods over there, because I was with him all that day."*

Defendants made numerous exceptions and assignments of error and appealed to the Supreme Court. The necessary facts and exceptions and assignments of error will be considered in the opinion.

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

Edward H. McMahan for defendants.

CLARKSON, J. The defendants, in the court below, made motions to dismiss the action or for judgment as of nonsuit, at the close of the State's evidence and at the close of all the evidence. C. S., 4643. The court below overruled these motions, and in this we can see no error.

"On motion to dismiss or judgment of nonsuit, the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. 'An exception to a motion to dismiss in a criminal action taken after the close of the State's evidence, and renewed by defendant after the introduction of his own evidence does not confine the appeal to the State's evidence alone, and a conviction will be sustained under the second exception if there is any evidence on the whole record of the defendant's guilt.' *S. v. Earp,* 196

N. C., 164, 166. See *S. v. Carlson,* 171 N. C., 818; *S. v. Sigmon,* 190 N. C., 684. The evidence favorable alone to the State is considered—defendant's evidence is discarded. *S. v. Utley,* 126 N. C., 997. The competency, admissibility, the weight, effect and credibility is for the jury. *S. v. Utley, supra; S. v. Blackwelder,* 182 N. C., 899." *S. v. Lawrence,* 196 N. C., 562, 564.

The first count in the bill charges a violation of C. S., 4210, which is as follows: "If any person, of malice aforethought, shall unlawfully castrate any other person, or cut off, maim or disfigure any of the privy members of any person, with intent to murder, maim, disfigure, disable, or render impotent such person, the person so offending shall suffer imprisonment in the State's prison for not less than five nor more than sixty years."

As to defendant Jack H. Ammons, the evidence of the prosecuting witness, Johnnie Hart, is direct that there were two and that he was one of them that perpetrated the crime.

As to the defendant Marion (alias Arthur) Ammons, he admitted that he "came to Jack Ammons' house that morning about 7:00 o'clock and he had been with Jack until they came to Jack's house after this happened over there." The evidence was also to the effect that Jack Ammons at the time of his arrest had two knives on his person—one of which contained a dark stain on the blade. One of the knives Arthur Ammons had given Jack Ammons. There was other circumstantial evidence. We think the evidence sufficient to be submitted to the jury, the probative force was for them to determine.

The record discloses: "The defendants, Walter Yarborough, Sam Todd and A. D. Cordell, rest and renew their motion for judgment as of nonsuit. The court intimated that it would sustain the said defendants' motion for judgment of nonsuit, whereupon, the solicitor for the State requested the court to declare a mistrial as to the three said defendants. The mistrial was ordered, and the solicitor for the State announced that he would take a *nol. pros.* with leave as to the defendants, Walter Yarborough, Sam Todd and A. D. Cordell. All of this procedure took place in the presence of the jury. The defendants, Jack Ammons and Marion Ammons objected—objection was overruled, and the defendants, each of them, excepted. To the ordering of a mistrial as to the three defendants tried jointly with the two defendants herein appealing, without declaring a mistrial as to all of the defendants, the defendants, Jack Ammons and Marion Ammons, objected—the objection was overruled and the said defendants excepted. The said Jack Ammons and Marion Ammons then moved the court to order a mistrial as to their cases. The motion was overruled and the said defendants

excepted." We think these exceptions and assignments of error cannot be sustained. It will be noted that the defendants Yarborough, Todd and Cordell took no exception to this procedure. The effect of the order made by the judge as to Todd, Cordell and Yarborough was simply that of a *nol. pros.* which could be taken at any time, and the defendants, Jack and Marion Ammons were not prejudiced by it. The record does not disclose that there was any order withdrawing a juror. Nobody could complain of the manner in which this was handled except the defendants, Yarborough, Todd and Cordell, and they acquiesced. So far as these appealing defendants are concerned, the trial was not legally disturbed or interrupted. See *S. v. Ellis,* 200 N. C., 77.

The defendants excepted and assigned error that the court below did not define "reasonable doubt to the jury." This cannot be sustained.

In *S. v. Johnson,* 193 N. C., 701, at p. 704, we find: "The cases last cited are also decisive authority for overruling the prisoner's exception to the instruction on the question of reasonable doubt. The instruction did not attempt a definition of the term, and this the prisoner assigns for error, although he made no request and tendered no prayer for a particular formula or a more comprehensive definition. *S. v. Lane,* 166 N. C., 333."

We see no prejudicial error in the exclusion of the testimony of Dr. Geo. Floyd Ross, as to what disease or illness Jack Ammons was suffering with. The record discloses: "The court: I let him state whether or not he is a strong man or a weak man physically. Witness: Jack Ammons is in a very weakened physical condition." Defendants, when they became witnesses and testified, were as other witnesses, and subject to the same rules.

We have examined the record and charge of the court below with care and we can see no prejudicial or reversible error. The charge of the able and learned judge covered some 14 pages. The crime was defined, the burden of proof as to reasonable doubt was placed on the State, covering every ingredient of the crime and was fully explained to the jury. The definition of "aider and abetter" was properly defined. The jury could find one or both guilty or not guilty. "If you find Jack Ammons not guilty then it follows as a matter of course that you will find the defendant Marion Ammons not guilty." The law applicable to the facts was fully set forth and the contentions of the State and defendants fairly given. In law we find

No error.

E. B. THOMASON AND L. O. LOHMANN, TRUSTEES, AND CHARLES E. MOORE, v. SIMEON SWENSON AND INGA SWENSON.

(Filed 14 June, 1933.)

1. Courts B e—Appeal from County Court's refusal of injunction may be taken to next term of Superior Court without service of case on appeal.

An appeal to the Superior Court from the granting or refusal of a restraining order by the county court may be taken in term time or to the next succeeding term of the Superior Court of the proper county upon exceptions to the judgment of the county court without the necessity of serving statement of case on appeal, countercase or exceptions, etc., the case having been heard on the pleadings and the record in the Superior Court consisting of the summons, complaint, answer, orders, judgment and assignment of errors. N. C. Code of 1931, 1608; Rule of Practice No. 5, 200 N. C., 816.

2. Appeal and Error J a—

On appeal from the refusal of an injunction by the county court the Superior Court will review the evidence with the burden on the appellant to show error.

3. Mortgages H b—Foreclosure may be enjoined in order to ascertain amount of debt where usury is pleaded and accounting demanded.

An order restraining the sale of lands in a suit to foreclose under a mortgage executed thereon is not erroneous where the questions involved include a charge of usurious interest and an accounting between the parties to ascertain the amount due to the mortgagee to be settled at the final hearing of the cause, it being required of the mortgagee seeking the equitable relief of foreclosure to do equity, and the court below having found that irreparable injury would otherwise occur to the mortgagor and that the granting of the injunction would not result in harm to the mortgagee.

APPEAL by plaintiffs from *McElroy, J.*, 8 December, 1932. From BUNCOMBE. Affirmed.

This is an action brought by plaintiffs against defendants for the purpose of securing judgment for a debt and foreclosure of property under a deed of trust to secure payment of same, in which plaintiffs ask for the appointment of a receiver for the rents and profits of the property, *pendente lite*, etc. The defendants raise questions as to the true amount of the indebtedness on account of usurious charges by way of interest and commission collected by the plaintiffs and for other causes, and for an accounting between the parties, and for injunction restraining foreclosure of the property until the final settlement of the issues involved. Defendants also ask for penalty against plaintiffs, contending that the transactions were usurious. A receiver for the

property was appointed, and qualified and took charge of same. The property was advertised for sale under the power of sale in the mortgage, independently of the foreclosure proceeding, when the defendants applied for an injunction. The defendants appealed from the order of the General County Court denying their motion for an injunction restraining sale of the property to the Superior Court on the record, which consisted of the summons and pleadings, used as affidavits. The judgment of the lower court was reversed and the restraining order applied for by defendants was ordered and the cause was remanded to the General County Court "for further proceedings in accordance with this decree."

The following judgment was rendered in the court below: "The above entitled cause, coming on to be heard before the undersigned judge holding the courts of the Nineteenth Judicial District, in the State of North Carolina, on the appeal of the defendants from a judgment of the General County Court of Buncombe County, N. C., dated 25 November, 1932, denying their application and motion for an injunction restraining the sale of the land in controversy pending the hearing of the case on its merits, and, being heard on the record on appeal consisting of the summons, complaint, answer, orders, judgment and assignment of errors, and the undersigned judge, being of the opinion on the facts disclosed in the pleadings in the case, and after argument of counsel that there is a serious controversy existing between plaintiffs and defendants as to the true amount due by the defendants on the notes or bonds sued on in said case, and that to uphold the order of the court below, denying defendants the restraining order applied for, might result in irreparable damage to said defendants if the property in controversy were allowed to be sold at the present time, thus removing same from the jurisdiction of the court and raising complicated questions as to the rights of any purchaser at said sale, and would be tantamount to deciding the case on its merits on the pleadings used as affidavits, and not after trial on the merits of evidence or testimony introduced on such trial in an orderly way, and the court further finding as a fact that the pleadings in said cause do raise serious and material questions of fact, which should be so settled by trial in an orderly way and not on affidavits, and that the entry of an order at the present time restraining said sale, cannot seriously injure the plaintiffs in said cause, nor affect their rights as finally established.

It is now, upon motion of Bourne, Parker, Bernard & Dubose, considered, ordered and decreed that a restraining order issue against the plaintiffs, their agents, representatives, attorneys, servants, and employees, restraining them, and each of them, from taking any further steps looking to the foreclosure of said property or the sale thereof, in

order to satisfy plaintiffs' claim or for any other purpose, or from making any deed therefor to any purchaser at any alleged sale heretofore had, or from taking any other steps which might in anywise affect or change the present title or status of said property, until the further orders of the court, and until the trial of said cause upon its merits, and that said order or judgment heretofore entered by Hon. Guy Weaver, judge of the General County Court of Buncombe County, denying the defendants' application or motion for a restraining order be, and the same is hereby reversed and said cause is hereby remanded to the General County Court of Buncombe County, N. C., for further proceedings in accordance with this decree.

And it is further ordered and adjudged that the plaintiffs pay the costs of this appeal, to be taxed by the clerk of this court, and that the bond heretofore given as security for same by the defendants be, and the same is hereby discharged and the principal and surety are hereby released from any and all liability thereon."

The necessary facts and exceptions and assignments of error of plaintiffs will be stated in the opinion.

John Izard and Harkins, Van Winkle & Walton for plaintiffs.
Bourne, Parker, Bernard & DuBose for defendants.

CLARKSON, J. In the statement of case on appeal to the Superior Court from the General County Court of Buncombe County, is the following: "Being heard in the General County Court of Buncombe County upon the pleadings as shown in the record, which said application and motion was denied by the judge of the General County Court."

The defendants excepted and assigned error to the order of the General County Court of Buncombe County, as follows: "(1) To the action of the court in refusing the defendants' application for an order restraining the sale of the property in controversy in this action, as asked for in defendants' motion upon the pleadings herein. (2) To the action of the court in signing the order formally denying defendants' motion for such restraining order, dated 25 November, 1932, as shown in the record."

The plaintiffs made the following motion in the Superior Court: "The plaintiffs, through their attorneys, made a special appearance in the Superior Court of Buncombe County, N. C., on 8 December, 1932, for the express purpose of opposing the hearing of the above case on appeal from the General County Court, on the ground that the said order, the signing of which is assigned as error in the case on appeal, was entered in the General County Court of 25 November, 1932, and notice of appeal given on 25 November, 1932, and that such appeal has been irregularly,

erroneously and prematurely docketed in the office of the clerk of the Superior Court of Buncombe County, N. C., on 7 December, 1932, and prior to the expiration of time for the filing of countercase or prior to the consideration by the appellees of said statement of case on appeal and without stipulation or consent of appellees or their counsel, all of which is contrary to the statutory laws of North Carolina, and that the Superior Court of Buncombe County is without jurisdiction at this time, for the foregoing reasons, to hear or pass on said assignments of error or review the order of the General County Court relative to such procedure."

The November Term of the General County Court ended 3 December, 1932, and the December Term of the Superior Court following the county court began 5 December, 1932. From the foregoing, the question for decision arises: In an injunctive proceeding, where there is an exception and assignment of error to the order granting an injunction, must defendants make up a "statement of case on appeal?" We think not.

In *Hamilton v. Icard,* 112 N. C., 589, at p. 593, is the following: "But this being an appeal from the granting of an injunction till the hearing, no formal 'case on appeal' is required. The correctness of the ruling in question is tested by the judgment appealed from, which is rendered solely upon the pleadings and affidavits filed in the cause."

In *Parker v. Bank,* 200 N. C., 441, at p. 442, it is said: "From a judgment continuing the temporary restraining order to the final hearing, with leave to the parties to amend their pleadings, the defendants appeal. . . . 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. *Wallace v. Salisbury,* 147 N. C., 58; *R. R. v. Stewart,* 132 N. C., 249; *Clark v. Peebles,* 120 N. C., 31."

In *Seip v. Wright,* 173 N. C., 14, at p. 16, it is written: "On a similar question, in *Hyatt v. DeHart,* 140 N. C., 270, the *Chief Justice* said: "Ordinarily, the findings of fact by the judge below are conclusive on appeal. While this is not true as to injunction cases, in which we look into and review the evidence on appeal, still there is the presumption always that the judgment and proceedings below are correct, and the burden is upon the appellant to assign and show error and looking into the affidavits in this case, we cannot say there was error below," etc.

The statement of case on appeal from the General County Court of Buncombe County to the Superior Court admits that in the General County Court of Buncombe County, the case was heard upon the pleadings as shown in the record. The judgment of the Superior Court says

"being heard on the record on appeal consisting of the summons, complaint, answer, orders, judgment and assignment of errors." From the record they seem to have been the same.

N. C., Code, 1931 (Michie), sec. 1608(jj), in part, is as follows: "Appeals may be taken by either the plaintiff or the defendant from the said county court to the Superior Court of said county in term time for errors assigned in matters of law in the same manner and under the same requirements as are now provided by law for appeals from the Superior Court to the Supreme Court," etc.

The appeal was taken to and during the next term of the Superior Court. Rules of Practice in the Supreme Court, 200 N. C., 816. Part of Rule 5, is as follows: "The transcript of the record on appeal from a court in a county in which the court shall be held during the term of this Court may be filed at such term or at the next succeeding term."

We think that this being an injunctive procedure not requiring a statement of case on appeal, that the motion of plaintiffs to dismiss was properly refused. See *Cook v. Bailey,* 190 N. C., 599; *Davis v. Wallace,* 190 N. C., 543, 546; *Smith v. Texas Co.,* 200 N. C., 39; *Bakery v. Ins. Co.,* 201 N. C., 816.

We see no error in the appeal from the General County Court to the Superior Court. C. S., 643, in reference to making up case on appeal, statement, service and return, is not applicable. As stated heretofore, in an appeal from an order granting or refusing an injunction, an exception and assignments of error to the judgment is sufficient.

As to the relief demanded by defendants, it must be borne in mind that plaintiffs came into a court of equity and prayed for judgment against defendants, etc. One of the rules and maxims of equity, is: "he who seeks equity must do equity." A party cannot claim the interposition of the court for relief unless he will do what it is equitable should be done by him as a condition precedent to that relief.

In *Waters v. Garris,* 188 N. C., 306, at p. 310, we find: "In any action brought by the creditor to recover upon any usurious note or other evidence of debt affected with usury, it is lawful for the party against whom the action is brought to plead as a counterclaim or set off, the penalties provided by the statute, to wit, twice the amount of interest paid, and also the forfeiture of the entire interest charged. But see *Miller v. Dunn, post,* 397."

In *Parker v. Bank, supra,* speaking to the subject, at p. 443, it is said: "It is the general practice of equity courts, upon a showing of a basis for injunctive relief, to continue the restraining order to the final hearing, when it appears that no harm can come to the defendants from such continuance, and great injury might result to the plaintiffs

from a dissolution of the injunction. *Cullins v. State College,* 198 N. C., 337; *Hurwitz v. Sand Co.,* 189 N. C., 1; *Seip v. Wright,* 173 N. C., 14."

We see no error in remanding the case to the General County Court. On appeal from the county court to the Superior Court "error in law" was found. For the reasons given, the judgment of the court below is

Affirmed.

CENTRAL BANK AND TRUST COMPANY, GURNEY P. HOOD, COMMISSIONER OF BANKS FOR THE STATE OF NORTH CAROLINA, G. N. HENSON, LIQUIDATING AGENT FOR CENTRAL BANK AND TRUST COMPANY, AND ASHEVILLE SAFE DEPOSIT COMPANY, v. CAROLINA INSURANCE COMPANY.

(Filed 14 June, 1933.)

1. Trial D a: D b—

A nonsuit may not be entered on conflicting evidence, nor may a directed verdict be given on issues in favor of the party upon whom rests the burden of proof.

2. Insurance P b—Burden of proof on issues involving insured mortgagee's knowledge of further encumbrancing of property is on insurer.

In an action against an insurance company to recover on a policy of fire insurance, contested by the insurer on the ground that the plaintiff mortgagee had knowledge of the placing of a second mortgage on the property and its advertisement for sale under the power of sale contained therein, and that plaintiff mortgagee failed to give defendant notice of these facts: *Held,* the burden of proof on the issues involving plaintiff mortgagee's knowledge is on the defendant insurance company.

3. Insurance J c — Question of imputed knowledge of mortgagee of breach of condition avoiding policy held determined by verdict of jury.

Where a policy of fire insurance contains a standard loss payable clause and provides that the policy should not be canceled as to the mortgagee's or trustee's interest except after ten days notice to the mortgagee or trustee for the mortgagor's further encumbrancing of the property or its advertisement under foreclosure, provided the mortgagee or trustee notifies the insurer of the fact of such further encumbrance or foreclosure if the mortgagee or trustee had knowledge thereof, and there is evidence tending to show that the mortgagee's or trustee's agent solely for the collection of the notes had such knowledge, and the question of agency and imputed knowledge is submitted to the jury under correct instructions from the court, their verdict that the mortgagee or trustee did not have knowledge, and the court's judgment in favor of the mortgagee or trustee will be upheld on appeal.

APPEAL by defendant from *Clement, J.*, at November Term, 1932, of BUNCOMBE, affirming a judgment of the General County Court.

The plaintiffs brought suit against the defendant on two policies of insurance for loss resulting from fire. The two cases were tried together, the matters in controversy being identical and the parties agreeing that the final judgment in one case should determine the judgment in the other except as to the difference in the amount of the recovery.

J. W. Ingle owned a lot containing approximately one acre, on which he built houses. Before building them he borrowed a sum of money from the Federal Mortgage Company and on 8 January, 1926, executed a deed of trust to the Central Bank and Trust Company, trustee, conveying said real estate as security for notes described as "first mortgage notes" and "second lien notes."

The deed of trust provides for the equal and proportionate benefit and security of four negotiable promissory notes referred to as the "first mortgage notes" and six negotiable notes referred to as the "second lien notes" executed by J. W. Ingle and his wife, N. J. Ingle. The first mortgage notes were payable to bearer at the Central Bank and Trust Company and the second lien notes were payable to the Federal Mortgage Company or order at its office in the city of Asheville.

On 8 December, 1928, the defendant issued to J. W. Ingle an insurance policy on the larger house for $1,000 covering a period of three years, and on the smaller house for the sum of $500 covering the same period. Both policies contained the following provisions: "This entire policy shall be void, unless provided by agreement in writing added thereto . . . (c) if, with knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property insured hereunder by reason of any mortgage or trust deed; or (d) if, any change other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard). . . . If loss or damage is made payable in whole or in part, to a mortgagee, this policy may be canceled as to such interest giving to the mortgagee ten days' written notice of cancellation." Both policies contained a Standard Mortgage Clause.

On 19 November, 1929, Ingle and his wife conveyed the property covered by these policies to J. S. Lyda and wife, and Lyda and wife executed a second deed of trust securing Lyda's indebtedness to Ingle. Lyda defaulted in payment and Ingle advertised the property under the second deed of trust and while the advertisement was running and before the sale, both houses were burned. The fire occurred 8 April, 1931.

There is evidence that Ingle at the time of his conveyance notified the Federal Mortgage Company that he had conveyed the property and

that he accompanied Lyda to the office of the Mortgage Company and "showed him where to make his payments." There is evidence, also, that the Mortgage Company had knowledge of the advertisement.

The pertinent provisions of the Standard Mortgage Clause are as follows: "Loss or damage, if any, under this policy, shall be payable to Central Bank and Trust Company, as trustee mortgagee (or trustee), as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; Provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same. Provided, also, that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon, and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void. This company reserves the right to cancel this policy at any time as provided by its terms, but, in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation, and shall then cease, and this company shall have the right, on like notice to cancel this agreement."

In the county court the jury returned the following verdict:

1. Did the defendant execute and deliver the policy of insurance with standard mortgage clause thereunto affixed to the Central Bank and Trust Company, trustee, as alleged in the complaint? Answer: Yes.

2. Was the property insured conveyed by J. W. Ingle and wife to J. S. Lyda and wife before the date of the fire, to the knowledge of the Central Bank and Trust Company, trustee, as alleged in the answer? Answer: No.

3. If said property was so conveyed, did the Federal Mortgage Company have notice of such conveyance, as alleged in the answer? Answer: Yes.

4. If so, was the defendant, Carolina Insurance Company notified of such conveyance and change of ownership? Answer: No.

5. Was the property insured, to the knowledge of the Central Bank and Trust Company, trustee, advertised for sale under foreclosure before the date of the fire, as alleged in the answer? Answer: No.

6. If said property was so advertised, did the Federal Mortgage Company have knowledge thereof, as alleged in the answer? Answer: Yes.

7. If so, was the defendant, Carolina Insurance Company notified of such advertisement? Answer: No.

8. What was the value in cash, of the property destroyed? Answer: $2,000 (large house).

9. What amount is owing on account of the notes and deed of trust referred to in the complaint? Answer: $1,396, plus interest.

10. What amount, if any, is the defendant indebted to the plaintiff? Answer: $1,000 plus 6 per cent interest from date of fire (large house).

The judge of the General County Court gave judgment in favor of the plaintiffs on each policy and the defendant excepted and appealed to the Superior Court upon assigned error.

In the Superior Court all exceptions were overruled and judgment was rendered in favor of the plaintiffs, the court affirming the judgments of the General County Court. The defendant excepted and appealed.

R. R. Williams for appellant.

Heazel, Shuford & Hartshorn and John D. Anderson for appellees.

PER CURIAM. The first four exceptions were taken to the court's refusal to dismiss the action and to direct an answer to the second and fifth issues. Conflicting evidence in support of the contentions of the parties precluded a nonsuit and as to the second and fifth issues the burden of proof was on the defendant. A directed instruction cannot be given in favor of the party upon whom rests the burden of proof. *Bank v. McCullers,* 200 N. C., 591.

The final and determinative question is raised by the provision that the mortgagee (or trustee) should notify the defendant of any change of ownership or occupancy or increase of hazard which should come to the knowledge of the mortgagee (or trustee). Such knowledge, if acquired by the mortgagee or trustee, should have been communicated to the defendant. It was contended by the defendant that the Federal Mortgage Company had notice of the conveyance of the insured property from Ingle to Lyda and of the advertisement of sale under the foreclosure of the second deed of trust; also that this company was the agent of the Central Bank and Trust Company, mortgagee or trustee, and that notice to the agent was notice to the principal. It was further contended that neither the Mortgage Company nor the bank imparted notice to the defendant and that the policy of insurance is consequently void.

There is evidence that Ingle obtained from the Mortgage Company the loan secured by the deed of trust, at least the amount represented

by the "first mortgage notes," and it is argued that this company is in reality the mortgagee; but in our opinion the proper interpretation of the contract leads to the conclusion that the Mortgage Company was the beneficiary or *cestui que trust* and the Central Bank and Trust Company the trustee expressly designated in the deed of trust. The record contains evidence in support of the contentions of the plaintiffs and the defendant, but the question of agency was submitted to the jury under instructions, in which we find no reversible error, and was answered in favor of the plaintiffs. We do not think the court's instruction on this question should be restricted to the limitation by which it is circumscribed in the argument for the defendant. It is a reasonable inference from the evidence that the Mortgage Company was merely an agent for the collection of the notes.

We have considered all the exceptions and find no reason for disturbing the judgment. Judgment

Affirmed.

J. B. RICE v. ASHEVILLE ICE COMPANY AND ELECTRIC ICE COMPANY.

(Filed 14 June, 1933.)

Monopolies B a—C. S., 2563 (3), does not apply where parties are not competitors.

A demurrer is properly sustained in an action by a retailer of ice against wholesalers thereof for damages for their refusal to sell plaintiff ice on the same terms as those offered to other retailers in the city, it not appearing that the defendants were business competitors of plaintiff and C. S., 2563(3) not applying.

APPEAL by plaintiff from *Alley, J.*, at March Term, 1933, of BUNCOMBE. Affirmed.

The plaintiff is engaged in business in the city of Asheville, N. C., as a retail dealer in ice in said city and its vicinity.

The defendants are corporations organized under the laws of this State. Each defendant is engaged in the business of manufacturing and selling ice, at both wholesale and retail, in the said city of Asheville.

It is alleged in the complaint in this action that defendants are the only manufacturers of ice engaged in business in the city of Asheville, and therefore have a monopoly of that business in said city, and its vicinity; that both defendants have refused to sell ice to the plaintiff for resale and distribution to his customers at the price and on the terms established by them for other persons engaged in business as retailers of ice in the city of Asheville; and that by such refusal the defendants

have caused the plaintiff to suffer damages in a large sum. This action was instituted by the plaintiff to recover of the defendants such damages.

The action was heard on the demurrer of the defendant, Asheville Ice Company, to the complaint, on the ground that the facts stated therein are not sufficient to constitute a cause of action. The demurrer was sustained.

Summons has not been served on the defendant, Electric Ice Company nor has said defendant filed an answer to the complaint, or otherwise entered an appearance in the action.

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

Edward H. McMahan and J. W. Pless for plaintiff.
Alfred S. Barnard for defendant.

PER CURIAM. The judgment in this action is affirmed on the authority of *Lewis v. Archbell,* 199 N. C., 205, 154 S. E., 11.

It does not appear from the complaint that plaintiff has suffered damages caused by any unlawful act of either of the defendants. The plaintiff is not a competitor or rival in business of either of the defendants. For this reason subsection 3 of section 2563 of the Consolidated Statutes of North Carolina, is not applicable to the facts alleged in the complaint.

The demurrer was properly sustained. The judgment dismissing the action, is

Affirmed.

L. P. ELLIS MOTOR COMPANY v. R. E. BELCHER ET AL.

(Filed 14 June, 1933.)

Trial F a—

The refusal to submit issues tendered is not error when the issues tendered are not raised by the pleadings, C. S., 582.

APPEAL by defendant from *Moore, Special Judge,* at September Term, 1932, of PITT. No error.

This is an action to recover from the defendant an automobile in his possession, which the plaintiff had sold to Dick Forman, retaining title until the purchase price was paid by an agreement in writing which was duly recorded. The defendant denied the allegations of the complaint. The issues submitted to the jury were answered favorably to the plaintiff.

From judgment that plaintiff recover of the defendant the automobile described in the complaint, the defendant appealed to the Supreme Court.

Arthur B. Corey for plaintiff.
Charles H. Whedbee for defendant.

PER CURIAM. The issue tendered by the defendant at the close of the evidence was not raised by the pleadings. There was, therefore, no error in the refusal of the court to submit this issue to the jury. C. S., 582.

There was no evidence at the trial tending to show that defendant had a lien on the automobile in his possession under C. S., 2435. For this reason, *Johnson v. Yates,* 183 N. C., 24, 110 S. E., 630, is not applicable to the instant case.

There was no error in the trial of this action. The judgment is affirmed.

No error.

W. B. SMITH v. WESTCHESTER FIRE INSURANCE COMPANY, W. B. BARROW AND A. HALL JOHNSTON.

(Filed 14 June, 1933.)

Removal of Causes C b—Cause is removable if separate cause of action is alleged against nonresident.

A nonresident is entitled to the removal of the cause to the Federal Court if the complaint fails to state a cause of action against the resident defendant, or, if from an examination of the complaint, it appears that a separate cause of action is alleged against the nonresident, and the mere allegation of concurrent negligence will not defeat the right of removal.

CIVIL ACTION, before *Moore, J.* From HENDERSON.

The plaintiff instituted an action to recover the proceeds of a fire insurance policy issued by the defendant insurance company, insuring the residence of plaintiff, which was destroyed by fire on or about 1 January, 1929. In apt time a petition for removal was filed by the nonresident defendant praying a removal of the cause to the Federal Court upon the ground of separability. The clerk entered an order of removal and upon appeal to the judge of the Superior Court the order of the clerk was approved and the cause removed to the District Court of the United States for the Western District of North Carolina. From the order of removal plaintiff appealed.

Welch Galloway for plaintiff.
R. R. Williams for defendant, Fire Insurance Company.

PER CURIAM. When a nonresident defendant and a resident of this State are sued in a State court the nonresident is entitled to remove the cause to the Federal Court in the event the complaint fails to state a cause of action against the resident defendant. Even if concurrent negligence is alleged in the complaint, but at the same time it appears from an interpretation and examination of the substance thereof that the charge of concurrent negligence is no more than a hostile gesture or noisy allegation, the right of removal is not thereby defeated or impaired. This Court spoke upon the subject in *Brown v. R. R., ante,* 25. The opinion declares: "But however this may be, in addition to charges of concurrent negligence on the part of both defendants, which the movant says is only a conclusion of the pleader, there is also in the present complaint allegation of negligence on the part of the nonresident defendant alone, sufficient in and of itself to constitute a distinct and independent cause of action, which gives rise to a separable controversy." The *Brown case* rules the case at bar, and the order of removal made by the trial judge is approved.

Affirmed.

HENRY Z. AUDETTE v. SILVER MICA MINING CORPORATION ET AL.

(Filed 8 February, 1933.)

APPEAL by defendants from *Schenck, J.,* at March Term, 1932, of YANCEY.

Civil action for fraud alleged to have been practiced in the sale of stock in the Silver Mica Mining Corporation, Incorporated.

From a verdict and judgment for plaintiff, the defendants appeal, assigning errors.

Edward H. McMahan for plaintiff.
Charles Hutchins for defendants.

PER CURIAM. The controversy on trial narrowed itself to essentially issues of fact, determinable alone by the jury. A careful perusal of the record leaves us with the impression that the case was tried substantially in accord with the decisions and principles applicable. No reversible error has been made to appear. The verdict and judgment will be upheld.

No error.

CLEVELAND MILL AND POWER COMPANY v. A. A. RICHARDS, F. M. NEWTON AND C. A. BRITTAIN ET AL., A PARTNERSHIP, TRADING UNDER THE FIRM NAME AND STYLE OF FARMERS GIN COMPANY, DEFENDANTS.

(Filed 22 February, 1933.)

Trial F a—

Where the issues submitted are sufficient in form and substance to present all phases of the controversy to the jury an exception thereto will not be sustained.

CIVIL ACTION, before *McElroy, J.*, at Spring Term, 1932, of CLEVELAND.

The plaintiff instituted suit against the defendants to recover the sum of $1,442.74, paid through error and mistake, in settlement for sixteen bales of cotton. The defendant denied that any error had occurred in the payment for sixteen bales of cotton. Both parties offered evidence tending to support their respective theories.

The following issues were submitted to the jury:

(1) "Did the defendants on 15 October, 1929, deliver to the plaintiff the sixteen bales of cotton which are in controversy in this action?"

(2) What amount, if any, is the plaintiff entitled to recover of defendants?"

The jury answered the first issue "No," and the second issue "$1,442.74."

From judgment upon the verdict the defendants appealed.

Ryburn & Hoey for plaintiff.

B. T. Falls for defendants.

PER CURIAM. The defendants contended that the controversy should have been solved by an issue of indebtedness, and that the submission of the first issue deprived them of certain elements of defense.

Issues arise upon the pleadings and "it has been held by this Court that where issues submitted by the court to the jury are sufficient in form and substance to present all phases of the controversy between the parties, there is no ground for exception to the same. . . . A new trial will not ordinarily be granted by this Court where it appears that the issues submitted to the jury presented for their determination the essential questions in controversy, although other questions not determinative of liability are also included in the issues." *Bank v. Bank*, 197 N. C., 526, 150 S. E., 34.

An examination of the record and briefs of counsel discloses conflicting evidence upon disputed issues of fact. A verdict for either party

would have been supported by the evidence introduced at the trial. No error of law in the admission of testimony or the instructions of the trial judge is apparent as we interpret the record; hence the verdict and judgment thereon are determinative.

Affirmed.

VARINA D. CHESHIRE v. BEN JACKSON AND MARGARET JACKSON.

(Filed 22 February, 1933.)

Limitation of Actions B b—

A cause of action for the reformation of a deed for mutual mistake does not accrue until the mistake is discovered or should have been discovered in the exercise of ordinary care. C. S., 441(9).

APPEAL by defendants from *Parker, J.*, at December Term, 1932, of CHOWAN. No error.

This is an action to reform a deed by which the plaintiff conveyed the land described therein to the defendants. The deed was executed on 10 November, 1919.

It is alleged in the complaint that by the mutual mistake of the parties the description in the deed includes land which the plaintiff did not sell, and which the defendants did not buy, and that the mistake was not discovered by the plaintiff until some time in August, 1931. The plaintiff prays that the description in the deed be corrected, so that only the land which the plaintiff sold, and which the defendants bought, shall be included therein.

The allegations of the complaint with respect to the mutual mistake of the parties are denied in the answer. The action was begun on 10 October, 1931. The defendants in their answer plead the three-year statute of limitations in bar of plaintiff's recovery.

There was evidence at the trial sufficient to sustain the allegations of the complaint.

The issues submitted to the jury were answered in accordance with the contentions of the plaintiff.

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

R. C. Holland for plaintiff.

P. H. Bell for defendants.

PER CURIAM. The cause of action alleged in the complaint, and supported by the evidence at the trial, did not accrue until the mistake in

the description of the land conveyed by the deed was discovered by the plaintiff, or at least until such mistake should have been discovered by her in the exercise of ordinary care, C. S., 441(9), *Sinclair v. Teal*, 156 N. C., 458, 72 S. E., 487. The statute of limitations did not begin to run against the plaintiff until some time in August, 1931. The action was begun on 10 October, 1931.

There was no error in the refusal of the trial court to dismiss the action by judgment as of nonsuit. The judgment is affirmed.

No error.

S. WALLACE HOWELL v. MUTUAL BUILDING AND LOAN ASSOCIATION.

(Filed 22 February, 1933.)

APPEAL by plaintiff from *MacRae, Special Judge*, at April Special Term, 1932, of MECKLENBURG. Affirmed.

This action was begun on 12 January, 1932. The purpose of the action is to recover of the defendant sums of money due to the plaintiff on account of shares of stock in defendant association, formerly owned by the plaintiff, which have been matured in accordance with the by-laws of the defendant.

In its answer, the defendant alleges that all sums of money due to the plaintiff on account of shares of stock formerly owned by him, were paid to the plaintiff by the defendant promptly as such sums of money became due. The defendant further pleads the three-year statute of limitations in bar of plaintiff's recovery in this action.

The evidence offered by the plaintiff at the trial of the action showed that all the shares of stock in defendant association, which plaintiff had formerly owned were matured prior to February, 1919, and that this action was begun on 12 January, 1932.

At the close of the evidence, the defendant moved for judgment as of nonsuit, on the ground that the action was not begun within three years after the cause of action on which plaintiff seeks to recover accrued, and that for that reason the action is barred by the statute of limitations pleaded in its answer. The motion was allowed, and plaintiff excepted.

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

Thos. W. Alexander and J. L. Delaney for plaintiff.

J. M. Shannonhouse, H. L. Taylor and Chase Brenizer for defendant.

PER CURIAM. There was no error in the trial of this action. *Marks v. McLeod,* 203 N. C., 258, 165 S. E., 693. The judgment dismissing the action as of nonsuit, is

Affirmed.

T. J. BASS v. SELIGMAN, WILLIAMS AND BALL, INCORPORATED.

(Filed 22 February, 1933.)

APPEAL by defendant from *Parker, J.,* at December Term, 1932, of CHOWAN.

Civil action to recover damages for alleged breach of timber and hauling contracts.

Upon denial of liability and counterclaim set up by defendant, there was a verdict and judgment for plaintiff, from which the defendant appeals, assigning errors.

J. Fernando White, C. T. Griffin and J. A. Pritchett for plaintiff.
L. E. Griffin and John H. Hall for defendant.

PER CURIAM. On controverted issues of fact, the jury has responded in favor of the plaintiff. The case seems to have been tried in substantial conformity to the principles of law applicable; and we have discovered no ruling or action of the trial court which we apprehend should be held for reversible error. Even if technical error be conceded, it is regarded as harmless in the light of the whole record. The verdict and judgment will be upheld.

No error.

C. C. HENDERSON v. JENKINS HARDWARE COMPANY, INCORPORATED.

(Filed 8 March, 1933.)

Appeal and Error J c—

Where there is no finding of fact and no request therefor the Supreme Court upon appeal will not attempt to ascertain the truth from conflicting affidavits, and the judgment will be affirmed, it being presumed correct with the burden on appellant to show error.

CIVIL ACTION, before *Moore, J.,* at June Term, 1932, of WILKES.

Buford T. Henderson for plaintiff.
J. H. Whicker for defendant.

PER CURIAM. A justice of the peace rendered judgment for the plaintiff on 25 May, 1931. The defendant appealed and the appeal was docketed in the Superior Court on 12 October, 1931. The return of the justice of the peace was dated 30 May, 1931, and recites that notice of appeal was served on him on 30 May, and docketing fees paid. The cause came on for hearing in the Superior Court at the June Term, 1932, and the plaintiff lodged a motion to dismiss the appeal for the reason that it was not docketed in due time. The trial judge denied the motion and retained the cause for trial, and the plaintiff appealed.

There is no finding of fact and no request therefor. There are two affidavits in the record, but this Court cannot undertake to wrestle out the truth from conflicting affidavits. The burden is on the appellants to show error. In the absence of such showing the judgment of the Superior Court is presumed to be correct.

Affirmed.

BALTIMORE TRUST COMPANY, TRUSTEE, v. GURNEY P. HOOD, COMMISSIONER.

(Filed 15 March, 1933.)

APPEAL by defendants from *Sink, J.*, at June Term, 1932, of BUNCOMBE.

Civil action by plaintiff, as substituted trustee, to establish preference or priority of claim for $52,242.79 against funds in hands of liquidating agent of Central Bank and Trust Company, said amount having been deposited for a specific purpose and misused or misapplied by the bank prior to its insolvency and closing, 19 November, 1930.

From a judgment for plaintiff, the defendants appeal

Alfred S. Barnard for plaintiff.
Johnson, Smathers & Rollins for defendants.

PER CURIAM. Affirmed on authority of *Safe Deposit Co. v. Hood, Comr., ante,* 346, *Flack v. Hood, Comr., ante,* 337, *Post No. 70 of the American Legion v. Trust Co., ante,* 342, and *Trust Co. v. Hood, Comr., post,* 777.

Affirmed.

BALTIMORE TRUST COMPANY, TRUSTEE, v. GURNEY P. HOOD, COMMISSIONER.

(Filed 15 March, 1933.)

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

Civil action to establish preference, or priority of plaintiff's claim against funds in the hands of liquidating agent of insolvent bank.

The case was heard by the court without the intervention of a jury, upon facts agreed or found without objection:

The Federal Mortgage Company and Standard Mortgage Company issued certain bonds with interest coupons attached, secured by indentures duly registered. These bonds and coupons were payable at the Central Bank and Trust Company, named as trustee in each indenture for such purpose. To meet the interest represented by maturing coupons, the Federal Mortgage Company and the Standard Mortgage Company deposited with the Central Bank and Trust Company $7,121.75 and $3,262.35 respectively, and these amounts were entered upon the books of the trust department as having been received for the respective purposes of paying said coupons.

When the Central Bank and Trust Company failed, 19 November, 1930, the above amounts had not been applied to the payment of interest coupons, and according to the records of the trust department of the bank, said amounts are still held for said purposes.

Plaintiff sues as substituted trustee.

The court found that the amounts so deposited with the Central Bank and Trust Company by the Federal Mortgage Company and the Standard Mortgage Company constituted special deposits for specific purposes and adjudged that plaintiff was entitled to a preference of $10,384.10 against the assets in the hands of the liquidating agent, "and to be paid in full, if there is a sufficient amount realized from the liquidation of the said bank to pay the same in full; and, if not, that it share pro rata with the other preferred claims against said trust, as finally determined by the courts."

Defendant appeals, assigning errors.

Alfred S. Barnard for plaintiff.
Johnson, Smathers & Rollins for defendant.

PER CURIAM. Affirmed on authority of *Safe Deposit Co. v. Hood, Comr., ante,* 346, and *Flack v. Hood, Comr., ante,* 337.

Affirmed.

THE REAL ESTATE TRUST COMPANY v. GURNEY P. HOOD, COMMISSIONER.

(Filed 15 March, 1933.)

APPEAL by defendant from *Clement, J.*, at August Term, 1932, of BUNCOMBE.

Civil action to establish preference, or priority of plaintiff's claim, to funds in hands of liquidating agent of insolvent bank.

From a judgment for plaintiff, the defendant appeals.

Harkins, Van Winkle & Walton for plaintiff.
Johnson, Smathers & Rollins and T. A. Uzzell, Jr., for defendant.

PER CURIAM. The facts in the instant case are so nearly identical with those appearing in the case of *Flack v. Hood, Comr., ante,* 337, as to be controlled by the same principles.

Affirmed.

THE REAL ESTATE TRUST COMPANY v. GURNEY P. HOOD, COMMISSIONER.

(Filed 15 March, 1933.)

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

Civil action to establish preference, or priority of plaintiff's claim against funds in hands of liquidating agent of insolvent bank.

The case was heard by the court without the intervention of a jury, upon facts agreed or found without objection:

The Continental Mortgage Company issued certain bonds with interest coupons attached. These bonds and coupons were payable at the Central Bank and Trust Company, named as trustee for such purpose. To meet the interest represented by maturing coupons, the Continental Mortgage Company deposited with the Central Bank and Trust Company $2,001.25, and this amount was entered upon the books of the trust department as having been received for the purpose of paying said interest coupons.

When the Central Bank and Trust Company failed, 19 November, 1930, the above amount had not been applied to the payment of interest

coupons, and according to the records of the trust department of the bank, the amount was still being held for said purpose.

Plaintiff sues as substituted trustee.

The court found that the amount so deposited with the Central Bank and Trust Company by the Continental Mortgage Company constituted a special deposit for a specific purpose and adjudged plaintiff entitled to a preference against the assets in the hands of the liquidating agent.

Defendant appeals, assigning error.

Alfred S. Barnard for plaintiff.
Johnson, Smathers & Rollins for defendant.

PER CURIAM. Affirmed on authority of *Flack v. Hood, Comr., ante,* 337. Plaintiff is entitled to a preference, and to share pro rata with other preferred creditors in the distribution of the funds in the hands of the liquidating agent of the Central Bank and Trust Company.

Affirmed.

POLK COUNTY v. GURNEY P. HOOD, COMMISSIONER.

(Filed 15 March, 1933.)

APPEAL by defendant from *Schenck, J.,* at April Term, 1932, of POLK.

Civil action to establish preference or priority of plaintiff's claim for $847.84 against funds in hands of liquidating agent of First Bank and Trust Company of Tryon, said amount having been deposited for a specific purpose and held by the bank, without application to designated purpose, when it became insolvent, 21 November, 1930.

From a judgment for plaintiff, the defendants appeal.

M. R. McCown for plaintiff.
J. S. Massenburg for defendant.

PER CURIAM. Affirmed on authority of *Parker v. Trust Co.,* 202 N. C., 230, 162 S. E., 564, and *Flack v. Hood, Comr., ante,* 337.

Affirmed.

BANK OF LEICESTER v. GURNEY P. HOOD, COMMISSIONER.

(Filed 15 March, 1933.)

APPEAL by defendant from *Clement, J.*, at July Term, 1932, of BUNCOMBE.

Civil action to establish preference, or alleged priority of plaintiff's claim against funds in hands of liquidating agent of insolvent bank.

The Bank of Leicester had on deposit in the Central Bank and Trust Company the sum of $14,121.75. On 19 October, 1930, about an hour before the depository bank closed for the day, and failed to open again because of insolvency, the president of the plaintiff bank presented a check for the amount of its deposit. The president of plaintiff bank was informed in a private interview that the depository bank was not in condition to pay the check in currency, but that an effort would be made to obtain the money from some other bank in the city. The president of plaintiff bank thereupon waited in the lobby of the depository bank until after two o'clock at which time the depository bank closed for the day without cashing the check, and suspended business thereafter. At the time plaintiff's check was first presented for payment the depository bank had $36,553.00 cash on hand.

From a judgment awarding the plaintiff a preference, the defendant appeals.

C. E. Blackstock for plaintiff.
Johnson, Smathers & Rollins for defendant.

PER CURIAM. Reversed on authority of *Morecock v. Hood, Comr.*, 202 N. C., 321, 162 S. E., 730.

Reversed.

VIRGINIA TRUST COMPANY, E. H. MEADOWS AND MRS. JULIA B. JONES v. E. M. GREEN, RECEIVER OF FORT TOTTEN, INCORPORATED, JOHN A. GUION, TRUSTEE, CRAVEN COUNTY AND NATIONAL HOLDING COMPANY.

(Filed 15 March, 1933.)

APPEAL by plaintiffs from *Harris, J.*, at November Term, 1932, of CRAVEN. Affirmed.

This action was heard on the motion of the defendants other than John A. Guion, trustee, that the action be consolidated for trial with an action entitled "Craven County *v.* National Holding Company and

others," now pending in the Superior Court of Craven County, and that the consolidated action be referred for trial.

From order allowing the motion to consolidate and referring the consolidated action to a referee, for trial, plaintiffs appealed to the Supreme Court.

E. M. Long and W. B. R. Guion for plaintiffs.
Moore & Dunn and Warren & Warren for defendants.

PER CURIAM. There was no error in the order consolidating this action with another action pending in the Superior Court of Craven County. In *Fleming v. Holleman,* 190 N. C., 449, 130 S. E., 171, it is said: "The object of consolidating two or more actions is to avoid a multiplicity of suits, to guard against oppression and abuse, to prevent delay, and especially to save unnecessary cost and expense; in short the attainment of justice with the least expense and vexation to the parties litigant. Consolidation, however, is improper, when the conduct of the cause will be embarrassed, or complications or prejudice will result, which will injuriously affect the rights of the parties." In the instant case, the order of consolidation is supported by this principle.

An examination of the pleadings in this and in the action with which it was consolidated shows that there was no error in the order of reference. C. S., 573, subsection 5. The relief sought in both actions is equitable in its nature.

Affirmed.

JOHN A. BECHTEL v. D. J. WEAVER ET AL.

(Filed 22 March, 1933.)

Appeal and Error J c—

Where there is no request for findings of fact the judgment of the lower court will be upheld, it being presumed that the court found the necessary facts and that the judgment is correct, the burden of showing error being on appellant.

CIVIL ACTION, before *Clement, J.,* at October Term, 1932, of HAYWOOD.

The plaintiff alleged that he had purchased certain lands from one Thomas Byrd, executing a mortgage or deed of trust to the defendant, Bankers Trust and Title Insurance Company, trustee, to secure the balance of purchase money amounting to $200,000, and that thereafter the General Assembly of North Carolina had enacted the Smoky Mountain Park bill and officials of said Park Commission had stated that said land would be included within the park area. Thereupon plaintiff approached Byrd and after some negotiation, it was agreed by Byrd to

extend the time of payment of said notes in order to enable plaintiff to make an advantageous sale of said land. Byrd died in September, 1929, and the defendants, D. J. Weaver and Kittie B. Byrd, were appointed administrators and trustees of his estate. Plaintiff further alleged that in violation of his oral agreement with Byrd, deceased, the defendants proceeded to sell the land to the Park Commission for the sum of $5.50 per acre and delivered a deed therefor, and that by reason of such breach of contract damage had resulted in the sum of $300,000.

The defendant, in answer to the complaint, pleaded as a bar or estoppel former actions instituted by the plaintiff upon the same alleged cause of action. In this connection reference is made to 202 N. C., 855-56, 164 S. E., 338. The trial judge decreed as follows: "After hearing argument of counsel the court doth consider and adjudge that the action as above entitled be dismissed upon the grounds set forth in the pleadings. It is further ordered and decreed by the court, upon the pleadings, that the plaintiff, his agents, servants, attorneys, or any one acting under his authority, shall be, and they hereby are, restrained and enjoined from prosecuting against the defendants, or any of them, any further action upon the grounds set forth in the complaint herein."

From the foregoing judgment the plaintiff appealed.

Jos. W. Little and Geo. H. Ward for plaintiff.
Heazel, Shuford & Hartshorn for defendant.

PER CURIAM. There was no request for findings of fact. Hence it is to be presumed by the Appellate Court that the judge found the necessary facts to support the judgment. It is the duty of appellant to show error, and in the absence of such showing, the judgment is presumed to be correct. *Henderson v. Jenkins Hdw. Co., ante,* 775.

EDNA W. BANKS, EXECUTRIX, ETC., v. NATIONAL ACCIDENT AND HEALTH INSURANCE COMPANY.

(Filed 22 March, 1933.)

APPEAL by defendant from *Frizzelle, J.,* at September Term, 1932, of PITT.

Civil action to recover on contract of insurance.

The execution of the policy was admitted. The defense interposed was, that in the application the assured made false answers to material questions concerning his health and previous medical attention.

Upon conflicting evidence, the issues raised by the pleadings were submitted to the jury and answered in favor of the plaintiff. Judgment on the verdict, from which the defendant appeals, assigning errors.

S. J. Everett for plaintiff.
Prescott, Tyson & Spain for defendant.

PER CURIAM. On controverted issues of fact, the jury has responded in favor of the plaintiff. The case seems to have been tried in substantial conformity to the apposite decisions on the subject and agreeably to the principles of law applicable. We have discovered no ruling or action on the part of the trial court which we apprehend should be held for reversible error. Hence, the verdict and judgment will be upheld.

No error.

DUPLIN COUNTY v. SUDIE TEACHEY ET AL.

(Filed 22 March, 1933.)

APPEAL by heirs at law from *Cranmer, J.*, at December Term, 1932, of DUPLIN.

Civil action to foreclose certain tax certificates, and apparently converted into a special proceeding among the defendants for the sale of lands to make assets.

From a judgment establishing certain claims against the estate of M. C. Teachey, deceased, and ordering a sale of lands to pay same, his heirs at law appeal.

George R. Ward for plaintiff.
A. J. Blanton and John A. Gavin for defendants.

PER CURIAM. The proceeding seems to be somewhat anomalous, but as the pleadings have been omitted from the transcript, and no error is apparent, the appeal will be dismissed on authority of *Riggan v. Harrison*, 203 N. C., 191, 165 S. E., 358, and *Pruitt v. Wood*, 199 N. C., 788, 156 S. E., 126.

Appeal dismissed.

CHAS. KELLY v. CHAS. M. STIEFF, INCORPORATED.

(Filed 29 March, 1933.)

APPEAL by defendant from *Devin, J.*, at December Term, 1932, of NEW HANOVER. No error.

R. B. Shepard and H. Edmund Rodgers for plaintiff.
John D. Bellamy & Son for defendant.

PER CURIAM. The plaintiff brought suit to collect an amount alleged to be due him as commissions for the sale of pianos under a contract he made with the defendant. When the pleadings were filed a compulsory reference was ordered and exceptions were filed to the report. An issue of debt was then submitted to the jury and was answered in favor of the plaintiff.

We have examined all the exceptions in the appellant's brief and find no just cause for disturbing the judgment.

No error.

N. F. TURNER v. J. M. TEMPLETON, JR., AND A. J. TEMPLETON.

(Filed 29 March, 1933.)

Bills and Notes H b—

In an action on a note a demurrer interposed on the ground that defendant was an endorser and the complaint failed to allege that he was given written notice of dishonor is properly overruled where the complaint alleges facts sufficient to show a waiver of notice.

APPEAL by defendant, A. J. Templeton, from *Sinclair, J.*, at November Term, 1932, of WAKE. Affirmed.

This is an action on a note payable to the order of the plaintiff, and executed by the defendant, J. M. Templeton, Jr., as maker, and the defendant, A. J. Templeton, as endorser.

From judgment overruling his demurrer to the complaint, the defendant, A. J. Templeton, appealed to the Supreme Court.

J. Spencer Stell for plaintiff.
R. L. McMillan for defendant.

PER CURIAM. It appears from the complaint that the note sued on was dated 2 April, 1929, and was due ninety days after its date. This action was begun on 16 March, 1931.

The demurrer to the complaint on the ground that it is not alleged therein that notice in writing was given to the defendant of the dishonor of the note by its nonpayment at maturity, was properly overruled. Sufficient facts are alleged in the amended complaint to show that there was a waiver of notice by the defendant both express and implied, if upon all the facts alleged in the complaint defendant was liable only as an endorser, and, therefore, entitled to notice. C. S., 3091.

Affirmed.

AMZI J. ELLINGTON, TRUSTEE, v. D. D. ELLINGTON ET AL.

(Filed 29 March, 1933.)

APPEAL by applicants for allowance from *Sinclair, J.*, at November Term, 1932, of WAKE.

Petition for partition, with prayer on the part of two of the respondents that executor and trustee be required to file true and correct account of his stewardship, as upon application to surcharge and falsify. The matter was referred, as it involved an accounting, and resulted in benefit to the estate; whereupon application was made for allowance out of the estate of counsel fees to attorneys for the two respondents who demanded that the executor and trustee be called to book. Application denied on the ground that the court "is without power to make such allowance." Appeal by applicants.

Pou & Pou and R. L. McMillan for appellants.

Manning & Manning, A. B. Breece and Jones & Brassfield for appellees.

PER CURIAM. Affirmed on authority of *Mordecai v. Devereux*, 74 N. C., 673, and *In re Will of Howell, ante*, 437.

Affirmed.

ALAMANCE HOME BUILDERS ASSOCIATION v. RALPH M. HOLT.

(Filed 5 April, 1933.)

APPEAL by plaintiff from *Barnhill, J.*, at November Term, 1932, of ALAMANCE. Affirmed.

Cooper A. Hall, J. Dolph Long and M. C. Terrell for appellant.

D. J. Walker for appellee.

PER CURIAM. On 2 November, 1926, the defendant executed to the plaintiff his promissory note for $1,750 and secured its payment by a deed of trust on real estate. It is alleged that default was made in payment, that the land was sold, that the proceeds were applied on the note, and that there is a remainder due, to recover which the present action was brought. The defendant denied that he had made default, alleged that he had conveyed the mortgaged land to the plaintiff's agent in payment of the debt, and that as to himself the note had been paid and fully satisfied.

The cause was referred, the referee made his report, and exceptions were filed. The report contains the following findings of fact: "The said Ralph M. Holt accordingly made monthly payments upon said note until 25 February, 1927, whereupon the records introduced in evidence of the plaintiff company disclose that thereupon said indebtedness was transferred to the account of Arnold Holt, a brother of the defendant, Ralph M. Holt; that the said Arnold Holt made payments thereon through August, 1930, and that the balance due on said note in December, 1930, was fourteen hundred twenty-nine dollars thirty-nine cents ($1,429.39); that some years afterwards, the exact date is not in evidence, the said property was foreclosed under said Ralph M. Holt deed of trust and purchased by the Alamance Home Builders Association at the price of one hundred dollars ($100), which has been duly credited upon said indebtedness less cost of said sale, and that the balance due upon said note and indebtedness is thirteen hundred fifty-three dollars and seventy-nine cents ($1,353.79), with interest thereon until paid. From the evidence and the testimony of Ralph M. Holt and his brother, Arnold Holt, it is found as a fact that Ralph M. Holt had a conversation with W. E. Sharpe, who was an officer of said Alamance Home Builders Association, whereby it was understood that the said Ralph M. Holt would deed the said property to the Alamance Home Builders Association in full settlement of said indebtedness; that in accordance with said agreement so testified to by said Ralph M. Holt, he delivered his old deed to Mr. Sharpe and at a later date he signed a paper-writing which purported to be a deed at the instance of George Sharpe, brother of W. E. Sharpe, but it is not in evidence to whom the deed was made, nor anything concerning the contents of the deed, and it is not in evidence that George Sharpe was an agent of the Alamance Home Builders Association."

The trial court concluded as a matter of law that the conduct of the plaintiff in transferring the account to Arnold Holt, and in receiving pay from Arnold Holt, and in failing to make demand upon Ralph M. Holt, and in other conduct disclosed by the evidence constituted a ratification of the agreement between R. M. Holt and the plaintiff and

of the agreement between the plaintiff and Arnold Holt on the other hand, and that said transfer constituted a novation of said debt, making the said Arnold Holt the principal and only debtor of the plaintiff on said note.

If it be granted that there is no sufficient evidence of technical novation, the findings of fact nevertheless support the conclusion of law that Ralph M. Holt was released from his obligation to the plaintiff and to this extent the judgment is affirmed. In this view of the case any alleged failure of proof in the execution of a deed by the defendant would not be controlling. We find no reversible error in the other exceptions.

Affirmed.

METROPOLITAN LIFE INSURANCE COMPANY, A CORPORATION, v. W. O. RASBERRY AND WIFE, ANNIE RASBERRY.

(Filed 5 April, 1933.)

APPEAL by defendant from *Grady, J.* From LENOIR.

The judgment of the court contains the following recital: "And it was there agreed that the court might find the facts and enter judgment out of the county and out of term, to have the same effect as if entered in the county of Lenoir, and at term time." Pursuant to this agreement the court found the following facts and rendered the following judgment.

On 18 September, 1926, the defendants borrowed from the plaintiff the sum of $6,500, and executed their note for the same, and on the same date executed to Raleigh Banking and Trust Company, a deed of trust on lands in Lenoir County, for the purpose of securing said loan, which deed of trust appears on record in Book 91, at page 317, of the register's office of said county. The note was due 1 November, 1926.

Default was made in the payment of said note, and plaintiff caused the lands described therein to be advertised for sale by said trustee on 16 January, 1931, after due notice as required by law. At that time there was due on said bond, as interest, the sum of $367.60, and the plaintiff had paid accrued taxes on the land amounting to $1,400.

The sale was enjoined in an action brought by the present defendants against the trustees, Commercial National Bank of Raleigh and Leon S. Brassfield, who had been regularly substituted in the place of the original trustee.

At the hearing of the restraining order before the undersigned judge of the Superior Court, said judge recited in the judgment then entered, that "the only grounds for injunctive relief set up in the complaint, are that the plaintiffs are unable to pay said debt, that the lands in question

are worth much more than said indebtedness, and that owing to the present financial depression, it is impossible for the plaintiffs to raise sufficient funds to pay said debt." It was further recited in said judgment that "the court has carefully examined the complaint with a view of ascertaining if there is any possible allegation therein upon which equitable relief could or might be demanded, and having failed to find any such allegation," it was thereupon adjudged that the restraining order be dissolved and the action dismissed; and the trustees were permitted to proceed with the sale of said lands in the same manner as if the action had not been commenced.

From said judgment an appeal was noted, but was never prosecuted and the same has been abandoned by the defendants, Rasberry and wife. The trustees proceeded to advertise and sell the lands in question, and at the sale the lands were purchased by the plaintiff for the sum of eight thousand, six hundred, sixty-six and 07/100 dollars, and a deed was made to it by said trustees, after said sale had laid open for the statutory time, and no upset bid was made. The defendants had notice of said sale.

After said sale and the execution and registration of the deed from said trustees to the plaintiff, which sale was on 20 July, 1931, the defendants remained in the possession of the lands in question and refused to surrender the same to the plaintiff, and on 10 March, 1932, the plaintiff instituted the present action in ejectment in which the summons and copies of the complaint were served on the defendants on 11 March, 1932, by the sheriff of Lenoir County. The time for answering expired on 10 April, 1932, which was Sunday, so that, under the law, the defendants had until 12 o'clock midnight on 11 April, 1932, in which to file answer and bond for costs, as required by statute.

On 11 April, 1932, the defendants filed an answer, but did not file any bond for costs.

On 10 March, 1932, the plaintiff applied to the court for a receiver of the lands in controversy, and on 30 March, 1932, S. L. Fordham, of Kinston, was appointed receiver of said lands by consent order, and said receiver, also by consent of the parties, leased the lands in controversy to the defendant, W. O. Rasberry, for the year 1932, at a rental of $300, and the defendants are now in the possession of said premises as tenants of said receiver.

On 2 May, 1932, the plaintiff moved before the clerk of the Superior Court for judgment by default final, and also that the answer filed be stricken out, under C. S., 495, or under C. S., 496. The clerk denied the plaintiff's motion, and to the contrary, entered an order *nunc pro tunc,* permitting the defendants to file a certificate required by C. S., 496, and allowed the answer to remain on file. From this order the

Metropolitan Life Insurance Company appealed to the judge at Chambers, and the cause is now up for hearing upon said appeal.

Practically every question presented by the defendants' answer in the instant case was presented in their complaint in the former action, and the same have been passed upon, and are now not open for a renewed adjudication. The defendants are estopped to again present said contentions to the court.

In the instant case they allege that the substitution of the present trustees was irregular. That question, however, was determined in the first action. They contend that the trustees were not present at the sale. That is immaterial, provided their agent conducted the sale, and that is admitted, at least by inference.

They contend that if given time they can pay the debt secured by the deed of trust, and that the plaintiff is seeking to take an undue advantage of them. These are matters which are purely of humanitarian interest. It is not denied that the plaintiff has paid taxes on the land since the sale; it does not appear from the pleadings in the original action, or in the instant case, that any advantage can be had to the defendants by a postponement of "the day of judgment." The sympathies of the court go out to the defendants, as to all persons who are in distress. The presence in the world at this time of so much distress, the inability of men to pay their taxes, the increasing costs of government, and the improbability of any substantial change in conditions, are matters of the gravest nature. If the defendant had offered, or showed their ability to offer anything at all in the way of payment of taxes and interest on the admitted debt, the court might exercise its discretion, even at this late date, and permit the filing of the certificate and answer; but as nothing has been offered, and it is perfectly apparent that nothing will be offered in the way of taxes or interest, and as the clerk had no authority under the law to enter the order appealed from, it is now considered, ordered and adjudged that the order of the clerk of the Superior Court, permitting the defendants to defend *in forma pauperis*, be, and the same is declared null and void, and is stricken out. It is further adjudged upon the facts as found, that the answer filed by the defendants be stricken out; and it is further ordered, adjudged and decreed that the plaintiff is the owner of the lands and premises described in the complaint, being the lands referred to in the deed of trust executed by the defendants to Raleigh Banking and Trust Company, recorded in Book 91, at page 317, of the register's office of Lenoir County. It is further ordered that a writ of assistance be issued by the clerk of the Superior Court, commanding the sheriff of Lenoir County to put the defendants out of the possession of said lands, and to put the plaintiff into the possession thereof.

It appearing to the court that the defendants are in the present possession of said lands as tenants of the receiver, for the year 1932, it is ordered that said writ of assistance be not issued until on or after 31 December, 1932, at 12 o'clock midnight, at which time the present tenancy will cease and determine.

The costs of this action will be taxed against the defendants by the clerk of the Superior Court.

Rouse & Rouse for appellant.
Winston & Tucker for appellees.

PER CURIAM. Upon the facts as found by the trial court the judgment is

Affirmed.

ETHEL REICH v. HOME MORTGAGE CORPORATION.

(Filed 12 April, 1933.)

APPEAL by defendant from *Stack, J.*, at September Term, 1932, of FORSYTH.

Civil action to recover penalty for usury.

The defendant being a foreign corporation, service of summons was sought to be obtained through the Secretary of State as provided by C. S., 1137.

The defendant entered a special appearance and moved to dismiss the action for want of proper service.

Upon evidence sufficient to support the findings, the court found "that the defendant owned property and was doing business at, before and since the starting of this suit and the service of said process, in the State of North Carolina," and upon such findings overruled the motion to dismiss. Defendant appeals, assigning errors.

Hoyle C. Ripple for plaintiff.
Efird & Liipfert for defendant.

PER CURIAM. Affirmed on authority of *Lunceford v. Association,* 190 N. C., 314, 129 S. E., 805, *R. R. v. Cobb,* 190 N. C., 375, 129 S. E., 828. See note, Yale Law Journal (April, 1927), page 882.

Affirmed.

IN RE GARNER BANKING AND TRUST COMPANY, CHARLES SLOCUMB GAY, LIQUIDATING AGENT.

(Filed 12 April, 1933.)

APPEAL by petitioner from *Sinclair, J.*, at October Term, 1932, of WAKE.

Petition by administrator for preference or priority of claim to funds in hands of liquidating agent of insolvent bank.

The Garner Banking and Trust Company had on deposit with itself to the credit of itself as executor of the estate of E. A. Johnson, deceased, the sum of $4,702.10 at the time it failed, 13 July, 1931, because of insolvency. It had commingled this deposit, as well as others of a similar nature, with the moneys in its common till.

The petitioner's application for a preference to the funds in the hands of the liquidating agent was denied, and he appeals.

T. Lacy Williams for appellant.
Willis Smith and John H. Anderson, Jr., for appellee.

PER CURIAM. Affirmed on authority of *Roebuck v. Surety Co.*, 200 N. C., 196, 156 S. E., 531, *Bank v. Corp. Com.*, 201 N. C., 381, 160 S. E., 360, *Hicks v. Corp. Com.*, 201 N. C., 819, 161 S. E., 545.

THE FEDERAL LAND BANK OF COLUMBIA v. ANNIE A. KORNER ET AL.

(Filed 12 April, 1933.)

APPEAL by certain of the defendants from *Sink, J.*, at February Term, 1933, of FORSYTH. Affirmed.

This is an action for judgment on a note and for the foreclosure of a mortgage executed by the defendants to secure the payment of the note.

After judgment by default on the note rendered by the clerk of the Superior Court, it was ordered and decreed that the land described in the mortgage be sold to satisfy the judgment. The land was sold by a commissioner appointed by the court for that purpose. Upon the report of the sale, the same was confirmed by the clerk of the Superior Court.

The action was thereafter heard by the clerk on the motion of certain defendants that the order of confirmation, the decree of sale, and the

judgment be set aside and vacated upon the grounds stated in the motion which was in writing. The motion was denied, and the defendants appealed to the judge of the Superior Court of Forsyth County.

From judgment affirming the order of the clerk, the defendants appealed to the Supreme Court.

Ingle & Rucker for plaintiff.
Charles T. Ross for defendants.

PER CURIAM. The facts found by the judge and set out in the judgment, are sufficient to support the judgment affirming the order of the clerk. Conceding without deciding that there were irregularities appearing on the record, they are not sufficient to entitle the defendants to the relief sought by their motion as a matter of law. The judgment is

Affirmed.

WESLEY COLLIER v. K. J. HANES.

(Filed 12 April, 1933.)

APPEAL by plaintiff from *Stack, J.*, at September Term, 1932, of FORSYTH. Affirmed.

Williams & Bright for plaintiff.
A. B. Cummings and Efird & Liipfert for defendant.

PER CURIAM. The plaintiff instituted this action to recover an amount alleged to be due for merchandise sold by the plaintiff to the defendant. The defendant denied liability and the jury answered the issue of indebtedness against the plaintiff, who appealed on error assigned in the charge of the court. We do not think the instructions given the jury are subject to the criticism that the plaintiff was denied the right of recovery in a sum less than that prayed for in the complaint. In fact, however, the plaintiff seems to have conducted his case on the theory that the contract was entire. The charge complies with Consolidated Statutes 564.

Affirmed.

SOUTHERN RAILWAY COMPANY v. ROBERT G. LASSITER AND COMPANY.

(Filed 26 April, 1933.)

APPEAL by plaintiff and defendant from *Cowper, J.*, at June Special Term, 1932, of WAKE. Affirmed.

In 1923 the defendant made a contract with the Highway Commission to construct a section of the State Highway in Johnston County, and thereafter entered into two "average agreements" with the plaintiff, marked Exhibits C and D. These agreements are identical in terms, one applying to cars placed by the plaintiff for the defendant's benefit at Clayton, the other to cars placed at Wilson's Mills. The defendant agreed to comply with the terms and conditions of the National Car Demurrage Rules and Charges set forth in Exhibits A and B. In September, October, November, and December, 1923, the plaintiff placed at Clayton and Wilson's Mills a number of cars consigned to the defendant, some of which, the plaintiff contends, were held by the defendant for unloading for a longer time than was allowed by the demurrage rules. Upon failure of the parties to agree upon a settlement the plaintiff brought suit against the defendant to recover $2,442, the amount alleged to be due for demurrage charges. Pleadings were filed and the cause was referred to a referee with instructions to hear the evidence and to report his findings of fact and his conclusions of law. The referee made a report, the court recommitted the cause, the referee heard additional evidence, and submitted his final report. The plaintiff and the defendant filed exceptions.

Smith & Joyner and John H. Anderson, Jr., for plaintiff.
Parham & Lassiter for defendant.

PER CURIAM. The record is voluminous and the briefs are exhaustive. We have given the exceptions filed by both parties due consideration and have discovered no assignment of error which calls for special discussion. The trial court overruled all exceptions and objections to rulings, findings of fact, and conclusions of law except the 17, 25 and 26 findings of fact, and as to these sustained the defendant's exceptions. The pertinent principles of law are familiar and the judgment of the court accords with previous decisions and should be affirmed. Judgment

Affirmed.

OMIA SINGLETON, WIDOW OF WILLIE SINGLETON, DECEASED, EMPLOYEE, v. MODEL STEAM LAUNDRY COMPANY AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY.

(Filed 3 May, 1933.)

APPEAL by plaintiff from *Sink, J.*, at February Special Term, 1933, of MECKLENBURG. Affirmed.

Uhlman S. Alexander and Ralph V. Kidd for plaintiff.
J. Laurence Jones for defendants.

PER CURIAM. Willie Singleton, the deceased, a colored man, was employed by defendant, the Model Steam Laundry Company, and had been working for it 5 or 6 years. He was 35 years old and was earning $12.00 a week at the time of his death. He ran two extractors. They wring the clothes out after being washed. At the time of his death, on 23 July, 1932, about one o'clock p.m., he was unloading some clothes from one of the extractors and putting them in a truck. Plaintiff contends that he was injured by a small lid falling, which struck him, and that Singleton in falling struck his head against the washing machine which made a cut in the back of his head about an inch and a quarter, which bled some. That he died from concussion, cerebral hemorrhage or cardiac failure. On the other hand, defendants contend that he had serious heart trouble and died from that trouble, which was not caused by any injury.

Whatever Willie Singleton died of, it is not disputed that he was a faithful employee and died at his post of duty.

The hearing Commissioner found: "The deceased did not suffer an injury by accident arising out of and in the course of his employment causing his death. The cause of the death was heart trouble."

On appeal of plaintiff to the full Commission, the finding of facts and conclusions of law denying compensation by the hearing Commissioner were sustained.

On appeal to the Superior Court, the following judgment was rendered by the court below:

"Upon the hearing of this cause, it appearing to the court from the record that the physician performing the autopsy did so within a few hours after the death and within the presence of his employer and the representative of the insurance company and without the permission or consent of any member of the family of the deceased or of any one else with power to give such permission:

The court further holds that the practice and manner of making this autopsy was and is unwarranted, unlawful and without justification in

fact; the court is further of the opinion that the testimony upon which the Industrial Commission, of a necessity, relied in forming its conclusion, was incompetent insofar as it arose from the physician making the autopsy, and likewise from his testimony made from a report on X-ray pictures which he had not examined:

The court, however, is of the opinion that inasmuch as this testimony was not objected to in apt time, as shown by the record, the findings and conclusions of the Industrial Commission are binding upon this court, and therefore, this court affirms the rulings and judgment of said Industrial Commission."

The judgment of the court below insofar as it affects the rulings and judgment of the Industrial Commission is sustained. It has been so often held by this Court, that it is not necessary to cite authorities, that if there is sufficient competent evidence to sustain the findings of fact by the Industrial Commission that these findings of fact are conclusive on this Court, and on appeal will not be reviewed by this Court. The judgment of the court below is

Affirmed.

W. K. KANIPE v. R. B. KENDRICK AND J. R. HOOD.

(Filed 3 May, 1933.)

APPEAL by plaintiff from *Cowper, Special Judge,* at September Term, 1932, of MECKLENBURG. Affirmed.

This is an action to recover damages for personal injuries suffered by the plaintiff and alleged to have been caused by the negligence of the defendants in handling a loaded sawed-off shotgun on a street in the town of Shelby, N. C. The action was begun in the Superior Court of Mecklenburg County. The cause of action alleged in the complaint arose in Cleveland County.

The action was heard by the clerk of the Superior Court of Mecklenburg County on the motion of the defendants for the removal of the action from said court to the Superior Court of Cleveland County, on the ground that the defendants are public officers of Cleveland County, to wit, deputy sheriffs, and that the acts complained of by the plaintiff were done by them in the performance of their official duties, and by virtue of their offices.

On the facts found by the clerk, it was ordered that the action be removed from the Superior Court of Mecklenburg County to the Superior Court of Cleveland County, for trial.

From this order the plaintiff appealed to the judge of the Superior Court of Mecklenburg County, who affirmed the order of the clerk. The plaintiff appealed to the Supreme Court.

J. F. Newell and Geo. W. Wilson for plaintiff.

PER CURIAM. On the facts found by the clerk of the Superior Court of Mecklenburg County, and, on plaintiff's appeal, approved by the judge, the defendants were entitled as a matter of right to the removal of the action to the Superior Court of Cleveland County, for trial. C. S., 464(2), *McFadden v. Maxwell,* 198 N. C., 223, 151 S. E., 250, *Shaver v. Huntley,* 107 N. C., 623, 12 S. E., 316. The order of removal is

Affirmed.

NORTH CAROLINA JOINT STOCK LAND BANK ET AL. v. R. L. SHUFORD AND K. J. INGLE.

(Filed 10 May, 1933.)

Appeal and Error J b—

A motion to set aside the verdict as against the weight of the evidence is addressed to the discretion of the trial court, and his action thereon is not reviewable on appeal.

APPEAL by defendant, K. J. Ingle, from *Cowper, Special Judge,* at February Special Term, 1933, of CATAWBA.

Summary proceeding in ejectment, commenced in the court of a justice of the peace, and tried *de novo* on appeal to the Superior Court of Catawba County, where verdict and judgment were rendered for plaintiffs, from which the defendant, K. J. Ingle, appeals.

J. C. Rudisill, Wade H. Lefler and Feimster & Feimster for plaintiffs.
Shuford & Huffman for defendant, Ingle.

PER CURIAM. Error is assigned (1) "to the issues as answered by the jury"; (2) "to the refusal of the court to set aside the verdict as contrary to the weight of the evidence"; and (3) "to the judgment as signed by the court."

The only error suggested in appellant's brief is the refusal of the court to set aside the verdict as contrary to the weight of the evidence. This was a matter addressed to the discretion of the trial court, and is not reviewable on appeal. *Goodman v. Goodman,* 201 N. C., 808, 161 S. E., 686; *Whitted v. Fuquay,* 127 N. C., 68, 37 S. E., 141.

Affirmed.

G. E. ASHLEY v. A. G. MILLER.

(Filed 10 May, 1933.)

APPEAL by defendant from *Sink, J.*, at December Term, 1932, of WATAUGA. No error.

Burke & Burke and T. E. Bingham for plaintiff.
Newland & Townsend and Trivette & Holshouser for defendant.

PER CURIAM. The plaintiff brought suit to recover $1,350 with interest, the aggregate amount of eight notes executed by the defendant to the plaintiff in part payment of a stock of goods. The defendant admitted the execution of the notes and pleaded fraudulent representation as to the quality and quantity of the goods as a defense to the action.

The execution and delivery of the notes made a prima facie case for the plaintiff and barred dismissal of the suit; and the defendant's testimony fails to show any actionable fraud on the part of the plaintiff. The defendant took charge of the goods, employed a "specialty man" to assist in marking and selling them, had opportunity to discover any defects, had been in the business about fifteen years, conducted a ten-day sale, and after the sale was concluded settled with the plaintiff and executed the notes. We find no reversible error in the court's instructions to the jury, in the admission or rejection of evidence, or in permitting the complaint to be verified.

No error.

JOHN C. CROOKS v. DR. J. F. JONAS.

(Filed 10 May, 1933.)

APPEAL by plaintiff from *Sinclair, J.*, at September Term, 1932, of BURKE. Affirmed.

This is an action to recover damages sustained by plaintiff and resulting from the illness and death of his wife, caused, as alleged in the complaint, by the negligence of the defendant, a physician, who attended her, at the request of the plaintiff, at and subsequent to the birth of a child.

From judgment dismissing the action, as of nonsuit, at the close of the evidence, the plaintiff appealed to the Supreme Court.

George W. Phillips and Edward H. McMahan for plaintiff.

J. Laurence Jones, Mull & Patton, S. J. Ervin, W. T. Morgan and S. J. Ervin, Jr., for defendant.

PER CURIAM. Plaintiff's wife, Ethel Crooks, gave birth to a child at his home in Burke County, North Carolina, about nine miles from the town of Marion, N. C., on 20 November, 1930. On 30 November, 1930, she was removed by the plaintiff from his home to a hospital in the town of Morganton, N. C., for medical treatment. She died at the hospital on 8 December, 1930. Her death was caused by an infection following the birth of her child, resulting in a high fever, which was first observed on 29 November, 1930. The defendant, a physician, residing at Marion, at the request of the plaintiff, attended her during her confinement, and visited her, professionally, on or about 29 November, 1930, when he was informed by plaintiff that he had procured another physician to care for his wife. The plaintiff sustained damages resulting from the illness and death of his wife.

It is alleged in the complaint that the defendant was negligent (1) in that he failed to exercise proper care of plaintiff's wife during her confinement; and (2) in that he failed to visit her after her confinement, and to give her proper treatment to prevent infection; and that such negligence was the proximate cause of the damages sustained by the plaintiff.

The facts alleged in the complaint are sufficient to constitute a cause of action (*Bailey v. Long,* 172 N. C., 661, 90 S. E., 809), but in the absence of evidence at the trial tending to sustain these allegations, there was no error in the judgment dismissing the action. *Smith v. McClung,* 201 N. C., 648, 161 S. E., 91; *Smith v. Wharton,* 199 N. C., 246, 154 S. E., 12. For that reason, the judgment is

Affirmed.

J. W. CONNOR v. R. WALTER ROBINSON.

(Filed 10 May, 1933.)

APPEAL by defendant from *Warlick, J.,* at November Term, 1932, of MECKLENBURG. Affirmed.

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

J. D. McCall for defendant.

PER CURIAM. This was a motion to set aside a judgment for excusable neglect. C. S., 600. The trial court found the facts and set them out in the judgment. Among these is the finding that the procedure of the plaintiff was regular and in full compliance with the law and that there was no mistake, surprise, or excusable neglect on the part of the defendant. Judgment

Affirmed.

W. E. GRIGG v. JEFFERSON STANDARD LIFE INSURANCE COMPANY AND JULIAN PRICE, TRUSTEE.

(Filed 10 May, 1933.)

APPEAL by plaintiff from *Schenck, J.*, at October Term, 1932, of LINCOLN. Affirmed.

This is an action to recover of the defendant, Jefferson Standard Life Insurance Company, the sum of $10,000, the proceeds of two checks, each for the sum of $5,000. These checks, both payable to the plaintiff and the Jefferson Standard Life Insurance Company, jointly, were issued by certain fire insurance companies in payment of the loss sustained by the plaintiff resulting from the destruction by fire of a building owned by the plaintiff and others, and conveyed by them to the defendant, Julian Price, trustee, to secure the payment of their note payable to the said Jefferson Life Insurance Company. Both checks, each endorsed by the plaintiff, were delivered to and collected by the defendant, Jefferson Standard Life Insurance Company.

From judgment as of nonsuit, at the close of all the evidence, dismissing the action, the plaintiff appealed to the Supreme Court.

Louis A. Whitener and C. R. Jonas for plaintiff.

Brooks, Parker, Smith & Wharton, Kemp B. Nixon and A. L. Quickel for defendants.

PER CURIAM. Prior to the commencement of this action, the plaintiff, having first endorsed the same, delivered to the defendant, Jefferson Standard Life Insurance Company, two checks, each for the sum of $5,000, both checks being payable to the order of the plaintiff and the said Jefferson Standard Life Insurance Company, jointly. These checks had been issued by certain fire insurance companies in payment of the loss sustained by the plaintiff resulting from the destruction by fire of a building situate in the town of Lincolnton, N. C., and owned by plaintiff and his son. The policies covering said building had been duly assigned by plaintiff to the Jefferson Standard Life Insurance Company, in

compliance with provisions in a deed of trust executed by plaintiff and others to the defendant, Julian Price, trustee, to secure the payment of a note payable to the said Jefferson Standard Life Insurance Company. The Jefferson Standard Life Insurance Company collected both said checks. The proceeds of the checks were applicable, at the option of the Jefferson Standard Life Insurance Company, to the payment of its note. The said proceeds were more than sufficient in amount to pay the said note. The note, however, was not due at the date of the delivery of said checks to the Jefferson Standard Life Insurance Company by the plaintiff.

At the request of the plaintiff and his son, who were the owners of the lot on which the building was situate when it was destroyed by fire, the Jefferson Standard Life Insurance Company agreed to hold the proceeds of said checks, and not apply the same to the payment of its note, until the plaintiff and his son could make arrangements to have the building which had been destroyed by fire replaced by a new building, and upon such arrangement being made, and the new building erected, to apply said proceeds to the payment of the cost of the new building.

All the evidence at the trial showed that plaintiff and his son had made arrangements for the erection of the new building to replace the building which had been destroyed by fire, that the new building had been erected in accordance with such arrangement, and that the Jefferson Standard Life Insurance Company had applied the proceeds of the checks to the payment of the cost of the new building in accordance with its agreement with the plaintiff and his son. The said proceeds did not exceed the cost of the new building, and the Jefferson Standard Life Insurance Company is not now indebted to the plaintiff in any sum.

There was no error in the judgment dismissing the action at the close of all the evidence. The allegations of the complaint were not sustained by the evidence at the trial. The judgment is

Affirmed.

KATHERINE S. BARNES v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Filed 24 May, 1933.)

APPEAL by defendant from *Alley, J.*, at April Term, 1933, of BUNCOMBE.

Civil action to recover on an "Economic Adjustment Policy" of insurance.

It was admitted on the hearing that plaintiff is entitled to recover on the policy in suit unless the answer to question 9 in the application vitiates the contract:

"9. State every physician or practitioner whom you have consulted or who has treated you during the past five years. (If none, so state.) Name and address of each: Dr. H. H. Briggs, Asheville, N. C. Dates and details: November, 1927. Polypi removed from nose. Result: Good.

It is alleged that in addition to consulting Dr. Briggs, the applicant had also received treatment from Dr. O. N. Donnahoe, an osteopath, which she failed to mention, thus rendering the policy void for fraudulent suppression of a material circumstance affecting the risk. *Insurance Co. v. Skurkay, ante,* 227.

Upon this phase of the case, the court of first instance found the following facts:

"And the court further finds as a fact that the plaintiff, Katherine S. Barnes, in executing part two of the application for the policy above referred to, on 7 June, 1931, did not make untruthful answers to any material questions contained in said application; that she did not consult any other physician or practitioner during the past five years preceding said date other than the one given by her in her answer to the question propounded; that the said Katherine S. Barnes, in going to the osteopath, went only for the reason that she was tired from work connected with her duties, and for the purpose of obtaining relaxation, and not for the purpose of receiving treatment from a practitioner within the purview of question 9; that she advised both J. J. Conyers, agent and representative of the company, and Dr. C. C. Orr, defendant's examining physician, of the treatments which she had been receiving, and of her visits to Dr. O. N. Donnahoe, prior to 7 June, 1931, and that the defendant company, through said agent and physician, had full knowledge of the treatments she, the said Katherine S. Barnes, had received and of the visits she had made to Dr. O. N. Donnahoe, and issued the policy in controversy with said knowledge, and it is, therefore, estopped from relying on said treatments or visits to Dr. O. N. Donnahoe or anyone else, as a violation of the terms of the policy."

On appeal from the General County Court to the Superior Court of Buncombe County, the judgment of the county court was affirmed.

Defendant appeals, assigning errors.

Jones & Ward for plaintiff.

Bourne, Parker, Bernard & DuBose for defendant.

PER CURIAM. Upon the findings made by the trial court, supported, as they are, by competent evidence, the judgment is correct under the law as it obtains in this jurisdiction. *Aldridge v. Ins. Co.*, 194 N. C., 683, 140 S. E., 706; *Smith v. Ins. Co.*, 193 N. C., 446, 137 S. E., 310; *Bullard v. Ins. Co.*, 189 N. C., 34, 126 S. E., 179; *Ins. Co. v. Lbr. Co.*, 186 N. C., 269, 119 S. E., 362; *Johnson v. Ins. Co.*, 172 N. C., 142, 90 S. E., 124. Compare *Case v. Ewbanks*, 194 N. C., 775, 140 S. E., 709. It would serve no useful purpose to "thrash over old straw."

Affirmed.

SADIE B. MEYER v. FENNER AND BEANE.

(Filed 24 May, 1933.)

APPEAL by plaintiff from *Alley, J.*, at February Term, 1933, of BUNCOMBE. Affirmed.

Charles B. MacRae for appellant.

A. Hall Johnston and Merrimon, Adams & Adams for appellees.

PER CURIAM. The defendants are stock brokers with whom the plaintiff dealt in the purchase and sale of securities. She brought suit against them and recovered a verdict for $1,205.33. Thereupon the parties settled the controversy between them and at the April-May Term, 1929, of the Superior Court of Buncombe County, Judge Schenck signed a judgment that the plaintiff recover nothing upon the verdict and that the defendants pay the cost. The plaintiff then signed a release in consideration of $1,205.33, the receipt of which she acknowledged, and discharged the defendants "from any and all claims and demands of every kind, nature and character." This was a final settlement.

After the lapse of more than two years the plaintiff again brought suit against the defendants, alleging that she had a further claim of $600 against them. Upon the evidence which she offered her cause was dismissed as in case of nonsuit by the county court, and on appeal to the Superior Court the judgment was affirmed. We find no error and affirm the judgment.

Affirmed.

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

(Filed 14 June, 1933.)

APPEAL by defendant from *Moore, J.*, at September Term, 1932, of HAYWOOD. New trial.

Grover C. Davis for plaintiff.
Jos. E. Johnson and Johnson, Smathers & Rollins for defendant.

PER CURIAM. When the case was here on a former appeal (202 N. C., 12) a new trial was granted for the reason that the judge inadvertently placed the burden of proof on both parties. On the second trial the same error was committed, and we are not satisfied that the attempted correction resulted in a clear explanation of the law, particularly in view of the instructions relating to adverse possession.

New trial.

R. V. BARKLEY AND C. A. MULLIS v. GEORGE W. PATTERSON AND JOSEPH A. ELLIOTT.

(Filed 14 June, 1933.)

APPEAL by plaintiffs from *Warlick, J.*, at November Term, 1932, of MECKLENBURG. Affirmed.

A. A. Tarlton and J. E. Woolard for plaintiffs.
Paul R. Ervin and H. I. McDougle for defendants.

PER CURIAM. In this cause a judgment was rendered by a justice of the peace in favor of the plaintiffs and the defendants appealed. The case was not docketed in the Superior Court, at the term next ensuing the trial and no motion for *a recordari* was made at that time; but the trial court found as a fact that counsel for the defendants had not been negligent and had been induced to believe that the controversy would be settled without appeal. Upon the findings of fact the court permitted the appeal to be docketed. The plaintiffs excepted and appealed. The judgment is

Affirmed.

ROBER M. NOBLE v. J. G. AND L. W. PRITCHETT.

(Filed 14 June, 1933.)

CIVIL ACTION, before *Moore, Special Judge,* at September Term, 1932, of ALAMANCE.

This action was instituted for the recovery of damages for personal injury. The jury answered the issue of negligence "No." From judgment upon the verdict the plaintiff appealed.

Cooper Hall and Carroll & Carroll for plaintiff.
John S. Thomas and Sapp & Sapp for defendant.

PER CURIAM. This is an appeal *in forma pauperis.* There is no affidavit and no certificate of counsel in the record. Hence the Court is without jurisdiction and the appeal is dismissed. C. S., 649; *Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126; *Powell v. Moore, ante,* 654.

Appeal dismissed.

M. F. TEETER v. W. A. NEWELL AND J. B. LINKER.

(Filed 28 June, 1933.)

CIVIL ACTION, before *Finley, J.,* at August Term, 1932, of CABARRUS.

Plaintiff instituted this action against the defendant Newell to recover upon certain notes executed by J. B. Linker. He alleged that Newell was a partner with Linker in the purchase of certain land, and that the notes were given in payment of the purchase price. The defendant Newell denied that he was a partner and offered testimony to the effect that he had loaned Linker money to buy land, but that he was not interested in any of the purchases. The issue of indebtedness was answered by the jury in favor of defendant, and from judgment upon the verdict the plaintiff appealed.

W. S. Bogle for plaintiff.
H. S. Williams for defendant.

PER CURIAM. The evidence discloses a controverted issue of fact, and the verdict is determinative of the controversy. No exception presented in the record warrants the overthrow of the judgment.

No error.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

To the Supreme Court of the United States

Bailey, *In re,* 203 N. C., 362, judgment of the Supreme Court of North Carolina reversed.

APPENDIX.

OPINIONS OF THE JUSTICES IN THE MATTER OF CALLING A CONVENTION.

On 29 March, 1933, the following resolution was received from the President of the Senate and the Speaker of the House of Representatives of the North Carolina General Assembly:

JOINT RESOLUTION No. 31

A JOINT RESOLUTION REQUESTING THE ADVISORY OPINION OF THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT UPON SENATE BILL 320 AND HOUSE BILL 879 PROVIDING FOR THE CALLING OF A CONVENTION OF THE PEOPLE OF THIS STATE TO PASS UPON THE PROPOSED AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REPEALING THE EIGHTEENTH AMENDMENT.

WHEREAS, Senate Bill 320, introduced by Senator A. D. MacLean, to provide for the calling of a convention of the people of this State to consider the proposed amendment to the Constitution of the United States, repealing the Eighteenth Amendment as submitted by the seventy-second Congress, is now pending in the Senate upon a favorable report from the Senate Committee on Constitutional Amendments; and,

WHEREAS, the Senate Committee on Constitutional Amendments is of the opinion that a convention of the people of this State for the purpose of passing on the proposed amendment to the Constitution of the United States repealing the Eighteenth Amendment must be called and held, in accordance with the Constitution of this State, and by the method set up in said Senate Bill 320, and that Article XIII, section one, of the Constitution of this State, sets up and provides the sole and exclusive method by which a convention of the people of this State can be called to pass on said amendment to the Constitution of the United States; and,

WHEREAS, House Bill 879, introduced by Representative Walter Murphy, providing for the calling of a convention of the people of this State, for the purpose of considering and passing on said proposed amendment to the Constitution of the United States, repealing the Eighteenth Amendment, is now pending in the House of Representatives, upon a favorable report of the House Committee on Constitutional Amendments; and,

WHEREAS, it is the opinion of the House Committee on Constitutional Amendments, that a convention of the people of this State, for the purpose of passing on said proposed amendment to the Constitution of the United States, need not, and ought not to be called, in the manner and by the methods as set up in Article XIII, section one, of the Constitution of North Carolina, and that the said House Bill 879, providing

for an election of delegates to said convention at a special election, contains the sole and exclusive method of calling a convention of the people of this State to pass on the proposed amendment to the Constitution of the United States; and,

WHEREAS, much doubt and confusion exists as to which, if either of said bills, sets up and provides the proper method of calling a convention of the people of this State to pass on said proposed amendment to the Constitution of the United States; and,

WHEREAS, it is the purpose of the General Assembly, that is, of the requisite number of the members of the Senate and the House of Representatives each, to pass one of the said proposed bills, as the one or the other may be found to be constitutional; and,

WHEREAS, it is important and necessary that this doubt be resolved, so that such action as may be taken by the General Assembly upon said two bills may be in accordance with the Constitution:

NOW, THEREFORE, Be it resolved by the Senate, the House of Representatives concurring:

SECTION 1. That copies of the said two bills, Senate Bill 320 and House Bill 879, be sent to the *Chief Justice* and the *Associate Justices* of the Supreme Court, together with this resolution, and that the said *Chief Justice* and *Associate Justices* be, and they are hereby, respectfully requested to inspect said bills, and advise the General Assembly, through the presiding officers of the Senate and House of Representatives, whether, in the opinion of the said *Chief Justice* and *Associate Justices,* said bills, either or both of them, set up the constitutional procedure by which a convention of the people of this State may be called for the purpose of passing on the said proposed amendment to the Constitution of the United States.

SEC. 2. That the President of the Senate and Speaker of the House of Representatives be, and they are hereby, instructed to send this resolution, with copies of Senate Bill 320 and House Bill 879, to the *Chief Justice* and the *Associate Justices* of the Supreme Court, upon the ratification of this joint resolution.

SEC. 3. This joint resolution shall be in full force and effect from and after its ratification.

In the General Assembly, read three times, and ratified, this 28 March, 1933.

A. H. GRAHAM,
President of the Senate.
R. L. HARRIS,
Speaker of the House of Representatives.

Compared and found correct. For Committee.

SUBSTANCE OF BILLS.

1. The Senate Bill 320, introduced by Senator MacLean, proposes to submit the question of calling a convention to consider the proposed amendment to the Constitution of the United States as submitted by the Seventy-second Congress, to the qualified voters of the whole State at the next general election in 1934, in accordance with the provisions of section 1, Article XIII of the State Constitution; and provides for the election of delegates at the same time in case a majority of the votes cast be in favor of said convention.

2. The House Bill 879, introduced by Representative Murphy, proposes to call a convention to pass upon the proposed amendment to the Constitution of the United States as submitted by the Seventy-second Congress, without submitting the question of "Convention or No Convention" to a vote of the people; and provides that delegates to said convention shall be elected at a special election to be held on the first Tuesday after the first Monday in November, 1933.

The following response was made by the *Chief Justice* and *Associate Justices* of the Supreme Court on 5 April, 1933:

5 April, 1933.

To the General Assembly of North Carolina,

GENTLEMEN:

In compliance with your request contained in Joint Resolution No. 31, copies of which have been transmitted to each of us by the President of the Senate, and the Speaker of the House of Representatives, as directed by the Resolution, we, the *Chief Justice* and *Associate Justices* of the Supreme Court of North Carolina, have inspected, and carefully considered the provisions of Senate Bill No. 320, introduced by Senator A. D. McLean, and of House Bill No. 879, introduced by Representative Murphy.

You request us further to advise you whether in the opinion of said *Chief Justice* and *Associate Justices,* the said bills, either or both of them, set up the constitutional procedure by which a convention of the people of this State may be called for the purpose of passing on the proposed amendment of the Constitution of the United States, referred to in said resolution. We herewith comply with this request.

It is the opinion of the *Chief Justice* and *Associate Justices* of the Supreme Court of North Carolina, as individuals, that a convention called, organized and held under the provisions of Senate Bill No. 320, introduced by Senator MacLean, and now pending in the Senate, if said bill shall be enacted by the General Assembly of North Carolina would

be valid under the provisions of section 1, Article XIII of the Constitution of North Carolina, and that the action of such convention upon the proposed Amendment to the Constitution of the United States would be valid and effective for all purposes.

There is a difference of opinion, however, among the *Chief Justice* and *Associate Justices* of the Supreme Court of North Carolina, as to the validity of a convention in this State as provided for, organized and held under the provisions of House Bill No. 879, introduced by Representative Murphy, and now pending in the House of Representatives, if said bill shall be enacted by the General Assembly, the majority being of opinion that such convention would not be valid for any purpose, the minority being of a contrary opinion.

It is deemed proper to say that it is the opinion of the *Chief Justice* and *Associate Justices* of the Supreme Court of North Carolina that the question presented by Joint Resolution No. 31, in its final analysis, is a Federal question, and can be answered only by the Supreme Court of the United States, when properly presented to that Court. Whether or not a proposed Amendment to the Constitution of the United States has been submitted by Congress and ratified in accordance with the provisions of Article V of the said Constitution, must necessarily be determined finally by the Supreme Court of the United States.

Notwithstanding this principle, we have deemed it our duty as *Chief Justice* and *Associate Justices* of the Supreme Court of this State to comply with the requests of the General Assembly contained in Joint Resolution No. 31.

No. 31.

Respectfully,

W. P. STACY,
Chief Justice.

W. J. ADAMS,
Associate Justice.

HERIOT CLARKSON,
Associate Justice.

GEO. W. CONNOR,
Associate Justice.

W. J. BROGDEN,
Associate Justice.

Thereafter, on 20 April, 1933, the following resolution was received from the President of the Senate and the Speaker of the House of Representatives of the North Carolina General Assembly:

JOINT RESOLUTION No. 44

A JOINT RESOLUTION REQUESTING THE ADVISORY OPINION OF THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT UPON HOUSE BILL 879, PROVIDING FOR THE CALLING OF A CONVENTION OF THE PEOPLE OF NORTH CAROLINA, FOR THE PURPOSE OF CONSIDERING THE PROPOSED AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, REPEALING THE EIGHTEENTH AMENDMENT.

WHEREAS, House Bill 879, introduced by Representative Walter Murphy, to provide for the calling of a convention of the people of North Carolina for the purpose of considering the proposed amendment to the Constitution of the United States, repealing the Eighteenth Amendment, as submitted by the Seventy-second Congress, is now pending in the House of Representatives, upon a favorable report from the House Committee on Constitutional Amendments; and,

WHEREAS, doubt exists as to whether the said bill sets up and provides the proper methods and processes for a vote upon the calling of a convention of the people of this State to pass on said amendment to the Constitution of the United States, and as to whether said bill is in accordance with the Constitution of this State; and,

WHEREAS, it is the purpose of the General Assembly, that is, of the requisite number of the members of the Senate and House of Representatives each, to pass said proposed bill, if advised and assured that it is constitutional and sets up and provides proper and constitutional methods for the calling of such a convention; and,

WHEREAS, it is important and necessary that this doubt be resolved so that such action as may be taken by the General Assembly may be in accordance with the Constitution:

NOW, THEREFORE, Be it resolved by the House of Representatives, the Senate concurring:

SECTION 1. That copies of the said House Bill 879 be sent to the *Chief Justice* and the *Associate Justices* of the Supreme Court, together with this resolution, and that the said *Chief Justice* and *Associate Justices* be, and they are hereby, respectfully requested to inspect said bill and advise the General Assembly, through the presiding officers of the Senate and House of Representatives, whether, in the opinion of the said *Chief Justice* and *Associate Justices*, the said bill sets up and provides the constitutional procedure by which a convention of the people of this State may be called, for the purpose of passing on the said proposed amendment to the Constitution of the United States.

SEC. 2. That the President of the Senate and Speaker of the House of Representatives be, and they are hereby, instructed to send this reso-

lution, with a copy of the said House Bill 879, to the *Chief Justice* and the *Associate Justices* of the Supreme Court upon the ratification of this resolution.

SEC. 3. This joint resolution shall be in full force and effect from and after its ratification.

In the General Assembly, read three times, and ratified, this 13 April, 1933.

A. H. GRAHAM,
President of the Senate
R. L. HARRIS,
Speaker of the House of Representatives.

Compared and found correct.—For Committee.

SUBSTANCE OF BILL.

The substitution for House Bill No. 879, introduced by Representative Murphy, proposes to submit the question of calling a convention to consider the proposed amendment to the Constitution of the United States as submitted by the Seventy-second Congress, to the qualified voters of the whole State at the next general election to be called and held exclusively for the purpose on Tuesday after the first Monday in November, 1933; and at the same time to elect delegates thereto.

The following responses were made by the *Chief Justice* and *Associate Justices* of the Supreme Court on 26 April, 1933:

To the HONORABLE A. H. GRAHAM, *Lieutenant-Governor, ex officio President of the Senate, and the* HONORABLE R. L. HARRIS, *Speaker of the House of Representatives:*

The opinion requested by Joint Resolution No. 44 of the Senate and House of Representatives relates to the constitutionality of substitute for House Bill No. 879, which provides for the submission of the proposition, "Convention or No Convention," to the qualified voters of the whole State at the next general election to be held on Tuesday after the first Monday in November, 1933, said election to be called exclusively for the purpose of passing upon the question of "Convention or No Convention," and to elect delegates thereto in case a majority of the votes cast be in favor of said convention. The sole purpose of the convention, if and when assembled, is to ratify or reject a proposed amendment to the Constitution of the United States as submitted by the Seventy-second Congress.

It seems to me that this substitute bill meets all the requirements of constitutionality. When the General Assembly has duly adopted an act,

every presumption is indulged in favor of its validity. *Adkins v. Children's Hospital,* 261 U. S., 524.

A convention called pursuant to section 1, Article XIII of the State Constitution, as this bill proposes, would undoubtedly be authorized to act upon the proposed amendment to the Constitution of the United States as submitted by the Seventy-second Congress, for such is its declared purpose. *Koehler v. Hill,* 60 Iowa, 542. Indeed, its only purpose. And while the Constitution apparently contains no specific authority for limiting the powers of a convention called under this section, nevertheless the people themselves in voting upon the proposition, "Convention or No Convention," may perforce, in terms of its submission, limit the authority of the convention, for, in this way, upon such condition of limitation alone will the call of the convention be approved by a majority of the qualified voters of the State. *Green v. Shumway,* 39 N. Y., 418. Of course, it would be subject to any restrictions contained in the Constitution of the United States. *S. v. Keith,* 63 N. C., 140; *Chisholm v. Georgia,* 1 U. S., 440.

In considering, ratifying or rejecting, the proposed amendment to the Constitution of the United States, as submitted by the Seventy-second Congress, the said convention would, *quoad hoc,* be acting as a Federal agency with its authority as such agency grounded in the Constitution and laws of the United States. *Leser v. Garnett,* 258 U. S., 130; *Rhode Island v. Palmer,* 253 U. S., 350; *Hawke v. Smith,* 253 U. S., 221. This is so, because its action in this respect would affect all the people of the United States and not simply those of a single State. It would then be engaged in ratifying or rejecting a proposed amendment to the Constitution of the United States. *Ex parte Dillon,* 262 Fed., 563.

But going farther, I am of the opinion, that in calling a convention for this Federal function alone, section 1, Article XIII of the State Constitution may be put aside as inapplicable, and, therefore, not controlling on the General Assembly. This section has reference to conventions called primarily to consider amendments to the State Constitution or changes in the State's governmental structure. The history of the section, as I understand it, readily lends itself to this interpretation.

It is true, the language of said section, "No convention of the people of this State shall ever be called by the General Assembly, unless by the concurrence of two-thirds of all the members of each house of the General Assembly, and except the proposition, convention or no convention, be first submitted to the qualified voters of the whole State, at the next general election in a manner to be prescribed by law," literally construed, is broad enough to cover a convention called for the purpose of considering a proposed amendment to the Constitution of the United

States. So, too, is the language of section 2, Article XIII ("No part of the Constitution of this State shall be altered, unless a bill to alter the same shall have been agreed to by three-fifths of each house of the General Assembly; and the amendment or amendments so agreed to shall be submitted at the next general election to the qualified voters of the whole State, in such a manner as may be prescribed by law") broad enough to prohibit a convention called under section 1 from altering or amending the Constitution of the State, even though such convention be called for this specific purpose. Yet no one, I take it, would contend for such an interpretation. Language is but a vehicle of thought and may vary in color and content according to the circumstances of its use. *Cole v. Fibre Co.*, 200 N. C., 484.

The title or heading of Article XIII is "Amendments," which, of course, has reference to the manner in which the State Constitution may be amended. But the proposed convention, if and when assembled, is to have no authority to consider amendments to the State Constitution. Then, why the necessity of calling it as if such were its purpose? The meaning of a constitution is to be found, not in a slavish adherence to the letter, which sometimes killeth, but in the discovery of its spirit, which giveth life.

It is also true that the customary manner of calling constitutional conventions in the United States is by resolution of the Legislature followed by a submission of the question to the electorate. *Miller v. Johnson*, 92 Ky., 589; *S. v. Dahl*, 6 N. D., 81, But as the Constitution of the United States is silent on the subject, it would seem that the resolution calling a convention in the State solely for the purpose of ratifying or rejecting a proposed amendment to the Constitution of the United States need not be submitted to the electorate for approval. "It is the accepted position in this State that our Constitution in vesting the General Assembly with legislative authority, conferred and intended to confer upon that body all the 'legislative powers of the English Parliament or other government of a free people,' except where restrained by express constitutional provision or necessary implication therefrom"—*Hoke, J.*, in *S. v. Burnett*, 179 N. C., 735. See, also, *Yarborough v. Park Commission*, 196 N. C., 284. However, as the present bill proposes to submit the proposition, "Convention or No Convention," to the qualified voters of the whole State at a general election to be held for the purpose, the question of a direct call by the General Assembly is no longer presented. The suggestion has even been made that, for this Federal function alone, Congress itself might prescribe the manner and method of calling the conventions in the several States as a necessary incident to its right to select the mode of ratification. But in submitting the pro-

posed Twenty-first Amendment Congress has left the question of the call of the conventions to the states.

We have, then, two widely separated schools of thought on the subject. One which holds that the provisions of the State Constitution are controlling on the General Assembly in calling a convention for any purpose. The other which takes the view that for the Federal function alone the Congress may provide for the call. Fortunately, the problem presently presented may be solved without going with the extremes of either school.

The suggestion that a convention be called comes from the Congress of the United States acting under authority of Article V of the Federal Constitution. This is its right. The purpose of the convention is to consider and to act upon a proposed amendment to the Constitution of the United States. The authority to ratify or to reject the proposal has its sources in the Federal law. "The act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented," says *Mr. Justice Day* in *Hawke v. Smith, supra.* All efforts heretofore made by some of the states, to circumscribe or to limit the exercise of this authority, by provisions inserted in their own constitutions, have been held for naught. *Leser v. Garnett, supra.*

It is my opinion that the General Assembly of North Carolina in calling a convention for the sole purpose of considering a proposed amendment to the Constitution of the United States, may exercise its own judgment and provide for the submission of the question under the provisions of section 1, Article XIII of the State Constitution, or it may call such convention in the exercise of its plenary powers without regard to the provisions of said section. It follows, therefore, from this view of the matter, that it can make no difference, so far as the constitutionality of the present bill is concerned, whether the election be designated a general or a special one.

I have no doubt as to the constitutionality of the bill submitted.

Respectfully,

W. P. STACY,
Chief Justice.

To the HONORABLE A. H. GRAHAM, *Lieutenant-Governor, ex officio President of the Senate, and the* HONORABLE R. L. HARRIS, *Speaker of the House of Representatives:*

Responding to the request embodied in Joint Resolution No. 44 of the Senate and House of Representatives relative to the constitutionality of substitute for House Bill No. 879, I express the opinion that the

substitute bill meets the requirements of the Constitution of North Carolina and when duly enacted by the General Assembly will be valid and effective in law.

Respectfully,

W. J. ADAMS,
Associate Justice of Supreme Court.

To the HONORABLE A. H. GRAHAM, *Lieutenant-Governor, ex officio President of the Senate, and the* HONORABLE R. L. HARRIS, *Speaker of the House of Representatives:*

GENTLEMEN:

Responding to another resolution (Joint Resolution No. 44) requesting the opinion of the several *Justices* of the Supreme Court on the constitutionality of House Bill No. 879, in my opinion it is practically the same as answered before, except calling a special election "for the sole and exclusive purpose," a general election. The Constitution of North Carolina, Article XIII, section 1, requiring "convention or no convention be first submitted to the qualified voters of the whole State at the next general election in a manner to be prescribed by law," clearly means the manner of conducting the election to be prescribed by the General Assembly, the law-making body, but same must be held at the next general election which is well understood to be the general election in November, 1934.

In the former opinion, which was signed by all the *Justices,* it was held that this matter "in its final analysis is a Federal question and can be answered only by the Supreme Court of the United States when properly presented to that Court." I quote the former opinion:

"It is the opinion of the *Chief Justice* and *Associate Justices* of the Supreme Court of North Carolina, as individuals, that a convention called, organized and held under the provisions of Senate Bill No. 320, introduced by Senator MacLean, and now pending in the Senate, if said bill shall be enacted by the General Assembly of North Carolina would be valid under the provisions of section 1, Article XIII, of the Constitution of North Carolina, and that the action of such convention upon the proposed Amendment to the Constitution of the United States would be valid and effective for all purposes.

There is a difference of opinion, however, among the *Chief Justice* and *Associate Justices* of the Supreme Court of North Carolina, as to the validity of a convention in this State as provided for, organized and held under the provisions of House Bill No. 879, introduced by Representative Murphy, and now pending in the House of Representatives, if said bill shall be enacted by the General Assembly, the majority being

of opinion that such convention would not be valid for any purpose, the minority being of a contrary opinion.

It is deemed proper to say that it is the opinion of the *Chief Justice* and *Associate Justices* of the Supreme Court of North Carolina that the question presented by Joint Resolution No. 31, in its final analysis, is a Federal question, and can be answered only by the Supreme Court of the United States, when properly presented to that Court. Whether or not a proposed Amendment to the Constitution of the United States has been submitted by Congress and ratified in accordance with the provisions of Article V of the said Constitution, must necessarily be determined finally by the Supreme Court of the United States.

Notwithstanding this principle, we have deemed it our duty as *Chief Justice* and *Associate Justices* of the Supreme Court of this State to comply with the requests of the General Assembly contained in Joint Resolution No. 31."

Respectfully,

HERIOT CLARKSON,
Associate Justice.

To the HONORABLE A. H. GRAHAM, *Lieutenant-Governor, ex officio President of the Senate, and the* HONORABLE R. L. HARRIS, *Speaker of the House of Representatives:*

GENTLEMEN:

Complying with the request of the General Assembly contained in its Joint Resolution No. 44, a copy of which has been delivered to me as an *Associate Justice* of the Supreme Court of North Carolina, I have given careful consideration to the provisions of the substitute for House Bill No. 879, entitled "An act to provided for the calling of a convention of the people of North Carolina for the purpose of considering the proposed amendment to the Constitution of the United States repealing the Eighteenth Amendment."

I am of the opinion that a convention of the people of this State called, constituted and organized in accordance with the provisions of the substitute for House Bill No. 879, now pending in the House of Representatives, if the said bill shall be duly enacted by the General Assembly, will be valid for the purpose of considering, ratifying or rejecting the proposed Amendment on behalf of the people of this State.

I do not discuss interesting questions of constitutional law suggested by a consideration of the bill, about which there is much conflict of opinion, for the reason that these questions are not now presented.

In my opinion, the substitute for House Bill No. 879 is in strict compliance with the provisions of section 1, of Article XIII of the

Constitution of North Carolina, and for that reason a Convention of the people of this State held under its provisions will be valid for the purpose expressed in the bill.

Respectfully,
GEO. W. CONNOR,
Associate Justice.

Raleigh, N. C., 26 April, 1933.

To the HONORABLE A. H. GRAHAM, *Lieutenant-Governor, ex officio President of the Senate, and the* HONORABLE R. L. HARRIS, *Speaker of the House of Representatives:*

Responding to the resolution requesting the opinion of the several *Justices* of the Supreme Court, you are advised that I hold the view that Article XIII, section 1, of the Constitution of North Carolina, is a piece of political machinery, designed and fashioned for the sole purpose of amending or changing the structure of the organic law of this State, and hence is not set in motion in amending the Federal Constitution.

Nevertheless, assuming that Article XIII, section 1, is applicable, does the proposed House Bill No. 879 contravene either the letter or spirit thereof? Article XIII, section 1, is built upon three pillars, to wit: (1) proper resolution of both houses of the General Assembly; (2) submission of the question to the qualified voters of the State, and (3) at the next general election.

House Bill No. 879 contemplates a proper resolution and a popular vote. Therefore, the only question that could possibly arise would relate to the calling of a general election in November, 1933. The Constitution does not define a general election either in terms or by implication. Hence this field has been left exclusively to legislative judgment and discretion. The term "general election" implies and imports upon its face an election throughout the entire State, called and conducted in accordance with legislative fiat. Time is not of the essence of the power. Consequently, the lawmakers can select any day on the calendar so far as constitutional inhibition or regulation is concerned. The same idea was expressed by the Oregon Court in *Norton v. Coos County,* 233 Pac., 864, in these words: "The principle is that if an election occurs throughout the State uniformly by direct operation of law, it is a general election."

These considerations lead my mind to the definite conclusion that House Bill No. 879, when duly enacted, will be valid and free from maintainable constitutional objection.

Respectfully,
W. J. BROGDEN,
Associate Justice.

ADDRESS

BY JOSEPHUS DANIELS

ON

PRESENTATION OF A PORTRAIT

OF THE LATE

JUDGE ALPHONSO CALHOUN AVERY

ASSOCIATE JUSTICE OF THE SUPREME COURT
OF NORTH CAROLINA

APRIL 11, 1933

I am privileged today to come into this chamber consecrated to Justice to render what to me is a near filial duty. In a very real sense, as to my attitude on some important public questions, I am a son of Alphonso Calhoun Avery. He came into my life in the first years of my editorial work in Raleigh. He honored me with his friendship, counsel and affection which enriched my life until he fell on sleep. In the days when Superior Court judges rode the circuits from Cherokee to Currituck (alas, that statewide rotating was replaced by a hybrid system which denies the most perfect school for training appellate justices) he frequently spent a week-end in Raleigh while holding courts in the counties contiguous to the capital. He was deeply interested in every problem which touched the life of the commonwealth which his forbears had done so much to establish, "some part" of which he could have truly said "I am." Seeing my youthful ambition to be of some service to the State, Judge Avery on those visits and by frequent letters of advice, endowed me with the fruits of a ripe and rare experience born out of a life of dedication to the public weal. Often he guided me in policies for the rebuilding of an ancient commonwealth after the ravages of a war in which he was a true Knight Unafraid, and later a brave member of the Vigilantes in the night of Reconstruction when a price was put upon his head by the minions of Kirk's Army.

Alphonso Calhoun Avery, born on Swan Ponds plantation in Burke County, 11 September, 1835, was the son of Isaac Thomas and Harriet Eloise Erwin Avery.

He graduated at the University of North Carolina in the Class of 1857, standing first in his class. He studied law under *Chief Justice Pearson.*

Reared on Swan Ponds plantation in Burke County by a father who owned a hundred and fifty slaves, he was early inured to labor, for his wise father saw to it that his sons served an apprenticeship between the plow-handles. To the inheritance of robust physical powers, youthful

toil, lightened by the sports and social joys of rural life in the late fifties, he owed the ability to out-work youthful associates during four score years. One secret, in addition to this physical perfection, of his ability to carry on with vigor for so long a period was his vital interest in whatever touched life and his fellow men. "I am a man and whatever concerns man interests me," is the epitome of his life. As a boy, as a college student, as a soldier, as a politician, as a jurist ever and always he touched elbows with his associates, loved fellowship with his kind, and had an absorbing passion for the rights of man. This dominated all his thinking and all his acts. That consecration for equality ran like a thread through his political career as legislator and comaker of the Constitution of 1875 and in his zeal for sound reforms. It is the warp and woof of his more than five hundred opinions filed while he was a member of this Court. Conspicuous evidence of this was seen in his earnest advocacy of the creation of a regulatory Railroad Commission in years when public service corporations were in politics up to their eyes. Belief in State control grew out of no hostility to corporations, but out of belief that they were the servants and the people were the masters. He was always deeply interested in public improvements. Indeed among his earliest contributions in public life was the originating and securing of a law in the General Assembly of 1866-67, in which he served as State Senator from Burke, Caldwell and McDowell counties (this being the last Legislature before the Reconstruction era), which resulted in the extension of the Western North Carolina Railroad to Asheville. In less than six months after the passage of the Avery Act (chap. 106, Laws of 1866-67), grading was let to construct the road from Morganton to Asheville.

Comradship with the men with whom he served in the war was a vital part of Judge Avery's life. Every man who wore the gray was his brother. And to the end of his life this brotherhood persisted. As an illustration of it, his neighbors will recall that when the plan was projected of erecting a monument on the courthouse square in Morganton in memory of the men of Burke County who had followed Lee, Judge Avery insisted that the name of every soldier who went out from that county should be inscribed upon it. Some of his associates held that there were so many volunteers in the county it was impracticable and also unprecedented to erect a shaft containing so many names. No argument dissuaded him. He maintained that every man who responded to the call in the sixties, if a monument was to be erected at all, should have his name recorded so that his children to the remotest generation when they visited the county seat could read there that when the State called upon her sons, their forbears left the plow and the shop and the office and responded to the call of their country. "Equality in honor as equality in sacrifice," was his ultimatum. There may be other

monuments like it, but certainly the descendants of the brave men of Burke from the humblest to the highest are commemorated alike on that monument. This insistence upon having the names inscribed was born solely out of Judge Avery's belief that every man having equally consecrated his all and placed his life in jeopardy, should be equally remembered if any monument was to be erected.

Judge Avery was twice married, his first wife being Miss Susan Washington Morrison, daughter of Rev. R. H. Morrison, a distinguished Presbyterian divine, who was first president of Davidson College, and sister of Mrs. Stonewall Jackson and Mrs. D. H. Hill.

Justice Avery was the father of a large and interesting family. He was survived by two children of his first marriage, A. C. Avery, Jr., a member of the Asheville bar, who, as an officer in the Spanish American War, preserved the Avery patriotic devotion to duty, and the late Mrs. Susan Avery McBee. A son by his first marriage, Isaac Erwin Avery, the brilliant City Editor of the *Charlotte Observer,* the author of "Idle Comments," and an alumnus of Duke University, died in 1904.

His second wife, to whom he was married in December, 1889, honors us by her presence today. She was Miss Sara Love Thomas, daughter of Col. W. H. Thomas, long a leading citizen of Western North Carolina, and Sara Love Thomas, granddaughter of Robert Love, the founder of Waynesville. Three children of the second marriage survived: Lenoir T. Avery, officer and overseas veteran of the World War, Gladys Avery, who is now Mrs. Charles W. Tillett, Jr., and the late Edith Avery Noble, who was the first wife of C. S. Noble.

He is survived by the following grandchildren: Susan Brenizer, who became Mrs. Clarence Naff; Elizabeth McBee, who became Mrs. Capus Waynick; Alphonso Avery McBee; Silas McBee; William Johnston Avery; Arnette Hathaway Avery; Thomas Lenoir Avery; Gladys Avery Tillett; Charles Walter Tillett, III; Sara Avery Tillett; Edith Avery Noble; Margaret Noble; Gertrude Noble.

There is something in a name, even if the great poet held otherwise. This is particularly true of the names given to their children by people with deep religious or political convictions. It was characteristic of the Avery family. The first Avery to hold high place in North Carolina was Col. Waightstill Avery, who, after graduation at Princeton, moved from Connecticut to North Carolina in 1769. He was probably led to make this his adopted State by association at Princeton with classmates from this State. Dr. Ephraim Brevard, Adlai Osborne and Rev. Hezekiah Bach. From his arrival here, in every crisis of the State, in peace and in war, an Avery has always made full proof of patriotism and leadership. Waightstill Avery was one of the great men of his time. More of the State Constitution adopted at Halifax was in his hand-

writing than of any other member of that body. He was a signer of the Mecklenburg Declaration of Independence, was Attorney-General and held many positions of honor and usefulness, and was regarded as one of the ablest lawyers of his day. He owned the most extensive library and was the best classical scholar of his generation in Western North Carolina.

The following incident in Colonel Avery's life is given in "The Averys of Groton" by H. D. L. Sweet and Volume One of "The Groton Avery Clan" by Elroy Avery:

"It is related in Parton's 'Life of Jackson' that when Old Hickory was Young Hickory, just twenty-one years of age, he fought the first duel of his life with Colonel Waitstill Avery, a distinguished member of the bar of North Carolina. Young Jackson had a criminal case before the court at Jonesboro, in which he was deeply interested, Colonel Avery being counsel on the other side. In the course of the trial, Avery was severe in his comments upon some of the legal positions taken by the younger lawyer, and used language which he afterward admitted was too personal and sarcastic.

"On the second morning of the trial, Jackson, acutely mortified by the repetition of the offense, tore a blank leaf from a law book, wrote a challenge upon it, and gave it to his antagonist with his own hands. This challenge, now before us, yellow with its ninety-four years, is the relic to which we refer. We copy from the original:

'August 12, 1788.

SIR When a mans feelings & charector are injured he ought to seek speedy redress: You rec'd a few lines from me yesterday, & undoubtedly you understand me. My charector you have injured; and further you have Insulted me in the presence of a court and a larg audiance I therefore call upon you as a gentleman to giue me satisfaction for the same; and I further call upon you to give me an answer immediately without Equivocation and I hope you can do without dinner untill the business is done; for it is consistant with the charector of a gentleman when he injures a man to make a speedy reparation; therefore I hope you will not fail in meeting me this day from yr. Hbl. st.

Andw. Jackson.'

"Coll. Avery.

"P. S. This Evening after court is adjourned.

"The duel was not fought before dinner, as the impetuous young advocate desired, since Colonel Avery could not immediately 'find a friend.' It occurred just after sunset. Fortunately, neither of the combatants was hit, and they left the ground very good friends."

As evidencing Waightstill Avery's reputation as a leader in the revolution, Cornwallis caused his office and library to be burned when the British occupied Charlotte. He lived up to the Avery tradition, as revealed in a letter written by his brother Solomon from New England in 1783, in which he said, "Eleven Averys were killed in the fort at Groton and seven wounded. Many Averys have been killed in this county, but there have been no Tories named Avery in these parts."

The name of the original Avery who came to this State was derived from an ancestor who was baptized "Wait-Still-on-the Lord Avery." This was in a generation of Ephraims, Hezekiahs, Josiahs, Ruths, Marys, Elizabeths, Naomis and others from Bible characters. In the Avery family the robust and sturdy qualities, which are the ripe fruit of staunch faith in Calvinism, have long remained.

You can understand the political faith inherited by Judge Avery by recalling that his middle name was Calhoun. His father was an ardent disciple of the South Carolina master of logic. I should like to emphasize the part filial devotion played in the making of Judge Avery's life, a pride that stimulated him to high endeavor to worthily bear a distinguished name. The fact that Waightstill Avery signed the Declaration, that his forbears in peace and war were leaders, did not in his opinion give him any distinction unless he tried to carry on in high public service. He was a Democrat and a Democrat who believed in the Jefferson doctrine of equality, and that merit and service alone entitled a man to recognition. He did not take any stock in inherited prerogatives. His sentiment toward his father and grandfather, and other relatives who had done the State some service, could have been expressed in the following poem:

"I follow a famous father,
His honor is mine to wear—
He gave me a name that was free from shame,
A name he was proud to bear.

"He lived in the morning sunlight
And ranked in the ranks of right,
He was always true to the best he knew,
And the shield that he bore was bright."

Col. Isaac Thomas Avery was a State's Rights Democrat "of the most straitest sect." The right of a sovereign state to secede from the compact was his political creed and John C. Calhoun was his political prophet just as belief in Calvinism was his religious creed and John Calvin was his religious prophet. William Waightstill Avery, the elder son of Col. Isaac T. Avery, and brother of Judge Avery, was long the leader of the stalwart Democracy of Western North Carolina. In 1860 he was chair-

man of the North Carolina delegation in the Charleston Convention. He was chairman of the Platform Committee of the convention which nominated Breckinridge for President. Upon Lincoln's election he at once urged the secession of the State and was one of the members of the Provisional Congress.

If you admit the premise of Calvin's and Calhoun's teachings, the man has not been born who can answer the advocates of those two doctrines. Nothing but civil war caused acceptance of the doctrine that this is "an indissoluble union of indestructible states."

The Averys made full profert and sacrifice of their belief in the right of a state to withdraw from the Union in putting their all on the altar of their faith. Too old to be accepted as a soldier, Col. Avery saw all his sons enlist in the Confederate Army, saying to them in spirit: "Return with your shield or on it." He died in 1864 at the age of eighty, heartbroken by the supreme sacrifice of two of his sons, who died valiantly battling to establish a Southern Confederacy, and deeply solicitous for the safety of the other two fighting for the principles they had learned from their father. The oldest brother, Col. Waightstill Avery was mortally wounded in repelling an attack of a detachment of Kirk's Army, who had crossed from Tennessee into the mountains of North Carolina. Willoughby, the youngest, lingered for several years after receiving severe wounds. C. Moulton Avery was the first to die on the field of battle, losing his life in the baptism of blood at Spottsylvania Court House. A brief time after, leading his soldiers in the second day's fighting on the fateful field at Gettysburg, Col. Isaac E. Avery fell in the advance upon Cemetery Heights. He led the brigade on horseback, being the only mounted man of the advancing columns until he fell from his horse mortally wounded by a ball which passed through his neck and shoulder. After falling from his horse he took from his pocket a pencil and piece of paper, on which he wrote in indistinct characters with his left hand (his right being paralyzed) the following message:

"Major, tell my father I died with my face to the enemy.

I. E. Avery."

That immortal scrap of paper with its faded inscription has been preserved in the State Museum. It is worthy to rank with the historic words of Nelson and other renowned heroes. The other son, Alphonso Calhoun Avery, a twin in courage of the gallant casualty at Gettysburg, served with distinction, being first lieutenant of Company E, Sixth N. C. Regiment, of which his brother, Isaac E. was captain. He was in the bloody battle in Manassas, arriving on the field at a crisis and was given credit for being partly instrumental in turning defeat into

victory. Both brothers were complimented for their excellent bearing on the field of battle. When his brother was promoted to the colonelcy of the regiment, Judge Avery was made captain. A short time thereafter he was commissioned a major and adjutant general of Gen. D. H. Hill's Army of West Virginia. Upon Hill's transfer to Chattanooga, his adjutant general went to the West, serving on the staff of Breckinridge, Hindeman and Hood, being with Hood at the retreat from Dalton to the Chattahoochee River. Toward the end of the war, after the death of his brother, he was commissioned as Colonel and given the command of a battalion in Western North Carolina. In April, 1865, shortly before Johnston's surrender, he was captured by Gen. Stoneman and was sent as a prisoner of war to Camp Chase and Johnson Island, being released in August of that year.

Shortly after being released from prison he and his fellow-soldiers were confronted with a situation where neither life nor property was safe. Government was unable to give protection. In North Carolina, as in California in the days of the Vigilantes, it was necessary for patriotic citizens to band themselves together for the protection of womanhood and to prevent the destruction of the civilization which had been builded in the South through the long years. In that crisis—really a revolutionary crisis—new conditions demanded new duties. Led by the late Col. W. L. Sanders, long Secretary of State, Frederick N. Strudwick, Alphonso C. Avery and other kindred spirits, there came into being in this State an organization known as the Ku Klux Klan. Justice Avery was the chief spirit in this organization in Western North Carolina. Like other able men, who were associated with him in the State, he utilized this outside-the-law organization for protection in a day when they could not secure it from government. The excesses committed elsewhere by this organization were contrary to the purpose and spirit of its organizers. When government by the people was restored, these distinguished patriots, recognizing that they had taken the execution of the law into their own hands only as a necessity required in a grave extremity, disbanded the organization. The true story of that period of the Vigilantes in North Carolina and other Southern states, known as members of the Ku Klux Klan, in days when terror stalked abroad is yet to be fully told. That body in the late sixties and early seventies was as unlike the spurious attempt to revive the K. K. K. in other years as real chivalry is unlike pseudo chivalry. When it is written, the courage of brave men in stress will constitute a new chapter of devotion.

The spirit of the men who rode by night and put their lives in jeopardy in that distressful period bound them together with hooks of steel. Many years afterwards in a contest for nomination for high office, I expressed surprise to Judge Avery that he was supporting a

certain man for office. I said to him, "This man is not standing for the policies that we believe in." He took me off to one side and said,

"My young friend, there are some partnerships in life born under conditions worse than war that can never be dissolved. I saw that man in the early seventies venture and dare everything for what was then essential to the preservation of society. I sensed then the stuff of which he is made. He may not agree with us on this policy, but he is a man who would die rather than fail to do his patriotic duty. Moreover, even if I have to risk the loss of this policy, neither height nor depth nor any other creature could separate me from him or him from me. We were bound together in a compact in which we knew it might be sealed with our blood."

The most important decision, so far as placing property which had long enjoyed exemption from taxation on the taxbooks, rendered by the Supreme Court in fifty years was when this Court affirmed the decision of Judge Henry G. Connor, then on the Superior Court bench, in the *Allsbrook case*. By that decision and concurrent legislation the property of the Atlantic Coast Line was valued for taxation at $56,195,691. In addition to paying the ad valorem tax on that large sum to the counties, municipalities and school districts through which that road runs, it has in recent years paid into the State Treasury annually in franchise tax sums averaging a million and a third dollars. When originally chartered, in order to encourage the construction of a railroad through the heart of Eastern North Carolina, the Legislature granted full exemption from taxation. This was in 1833 and it was not until the early nineties and the great decision of this Court rendered by *Associate Justice Clark*—later *Chief Justice*—affirming the decision of Judge Connor that this exemption from taxation came to an end. All victories over privilege have come through long conflict and travail. It was so in this matter. When I had the honor to make the address upon the occasion of the presentation of the portrait of *Justice Connor* to adorn these walls, I undertook to tell the story of the inception and progress of legislation and litigation which reversed the Supreme Court of the United States, culminating in *Justice Connor's* decision in the *Allsbrook case* and its approval by this appellate body.

While credit is due to many patriotic legislators and other officials and jurists for the epoch-making end of the discrimination, the large part played by *Justice Avery* has never been recorded. It should be made a part of the permanent records of the commonwealth and of this Court.

During the days of agitation for a reopening of the question of exemption of taxation upon that railroad, it may be truly said that most lawyers regarded the decision of the Supreme Court of the United States upholding exemption as final. Not so *Justice Avery*. His was the

type of mind that was never closed. *"Stare decisis"* was not ultimate with him. Justice was his passion and hostility to privilege was in the marrow of his faith and practice. The enactment of chapter 544 of the Laws of North Carolina of 1891, which repealed all authority for the connection of the line of the Wilmington and Weldon Railroad with the Virginia line between Black Water and the crossing of the Clarksville road over the State line was essential in the contest to place property of the railroad on the taxbooks. The bill which ordered this property listed for the next and subsequent years and opened the door for the taxation of its franchise was written by *Justice Avery*. It was introduced in the House by the late Alfred D. Jones of Wake County, who was afterwards in the Cleveland administration Consul General at Shanghai. It was enacted after one of the bitterest fights in the annals of the General Assembly.

This was only a part of *Justice Avery's* activity in overturning a precedent of a generation, but his participation was never known to the public or appreciated by it. After the case was argued before the Supreme Court, and ably argued on both sides, the Court held its decision under advisement for a period. As the session drew to its close *Justice Avery* feared that unless the decision was made at that session of the Court, by probable changes in personnel of this body, the fight might be lost. *Justice Davis,* a distinguished member of this Court, was nearing the close of an honorable career. He passed away shortly after he had given the casting vote that upheld the famous *Allsbrook case*. I shall never forget the deep anxiety of *Justice Avery* in those days. The Court was divided, *Chief Justice Merrimon* believing that the decision of the Supreme Court of the United States was final. *Associate Justice Shepherd* wished the case to go over until the next term so he could give it a more thorough consideration. *Justices Avery, Clark* and *Davis* believed that the decision of the lower court should be upheld, but *Justice Davis* was ill and for weeks he could attend no conferences of the Court. His last official act was when *Justice Avery* pointed out to him that unless the decision was made at that term of Court the cause might be lost. *Judge Davis* decided even at the risk of his life to act. Accompanied by *Justice Avery* and a nurse, he came to the last conference of this Court he was permitted to attend. Clear of mind but weak of body, when the roll was called in this tribunal, *Avery, Clark* and *Davis* voted for affirmation and exemption of railroads from taxation came to an end in North Carolina. But for the zeal, persistence and earnestness of *Justice Avery* a different ending might have come of that long litigation.

In his eight years upon the Supreme Court Bench, *Judge Avery* filed more than five hundred opinions. They are found in the Supreme Court

Reports from the 102nd to the 119th. While these opinions run the whole gamut of the law, civil and criminal, he apparently paid particular attention to four subjects: (a) the homestead, (b) ejectment and boundaries, (c) fraud and fraudulent conveyances, (d) insurance.

He brought to the discussion of these four subjects a wealth of legal learning, and all of his opinions have a marked clarity of diction. In all of his opinions he speaks "as one who had authority, and not as the scribes." The value of his legal pronouncements is shown by the number of times that his opinions are cited in subsequent Reports with the approval of his successors on the Supreme Court Bench.

In many of his opinions Justice Avery discussed and decided the quantum of proof necessary to establish various pertinent facts. An instance of this is *Harding v. Long,* 103 N. C., 1, in which he distinguishes between the quantum of proof necessary: (a) to correct a deed on the ground of mistake, (b) to establish the fact that a deed absolute on its face was intended as a mortgage, and (c) to establish a resulting trust arising in a verbal agreement to buy for another; in which three cases he held that the proof offered must be "clear, strong, and convincing," as distinguished from an action to set aside an instrument for fraud in procuring its execution, in which last mentioned case he held that it only required that proof "to the satisfaction of the jury" be adduced. The decision in this case is cited and approved in twenty-two subsequent decisions of our Supreme Court.

His decisions on fraud and fraudulent conveyances were particularly clear and convincing, and are still studied and relied upon both by bench and bar. *Nixon v. McKinney,* 105 N. C., 23; *Bobbitt v. Rodwell,* 105 N. C., 226, and *Goldberg v. Cohen,* 119 N. C., 59, are among the many opinions he filed which illuminate the question of fraud and fraudulent conveyances he therein discussed and decided.

Possibly no judge advanced from the Superior to the Supreme Court Bench was better versed in the law of the "action of ejectment," "color of title," "adverse possession," "boundaries and surveys," and the "construction of deeds and conveyances." He was at home as well in deciding upon riparian rights on the sounds and rivers of the coastal regions as he was on the boundaries and surveys in the mountain coves. *Ruffin v. Overby,* 105 N. C., 78; *Gilchrist v. Midland,* 108 N. C., 705; *Wool v. Edenton,* 115 N. C., 10; and *Stack v. Pepper,* 119 N. C., 434, are cases illustrating the learning and clarity of expression which he showed in his opinions on these subjects.

While not given to any large extent to filing dissenting opinions, he had only been on the Supreme Court Bench a few months before he filed a strong dissenting opinion of about fifteen pages in *Jones v. Britton,* 102 N. C., 166, in which the question at issue was whether the owner of a homestead could be enjoined from selling merchantable

timber from the homestead lands at the instance of a creditor holding a docketed judgment. In this case the majority opinion was that an injunction would lie, while *Justice Avery* held that the homesteader had the right to sell the merchantable timber.

Another very interesting dissenting opinion was filed by *Justice Avery* in *Mattie M. Tate v. City of Greensboro,* 114 N. C., 392, in which the plaintiff sued the city of Greensboro for damages for destroying the three oak trees which stood on the sidewalk in front of her premises and shaded her lawn. The majority opinion filed by *Justice Burwell* held that the city authorities had the right to remove the trees and that the plaintiff could not recover; while *Justice Avery* held that the abutting landowner had property rights in the trees in front of her premises and that the city had no right to remove them unless in fact they obstructed the free use of the street or sidewalk. There runs through his dissenting opinion (in which *Justice McRae* concurs) a sense of outrage that these fine oaks were slaughtered at the whim of a street committee. *Justice Avery* was a great tree lover and would have agreed heartily with Joyce Kilmer's poem:

"I think that I shall never see
A poem as lovely as a tree.
Poems are made by fools like me,
But only God can make a tree."

In *Bresee v. Stanly,* 119 N. C., 278, in which *Judge Avery* held that the promise of one who, while an infant, had contracted a debt, to pay it after reaching his majority, must be unconditional and express, to amount to a binding ratification; he quotes as an illustration the note given by John Huggins to James James in Iredell County, as follows:

> "I, John Huggins, agree to pay James James, one hundred and fifty dollars, *whenever convenient;* but it is understood that *Huggins is not to be pushed."*

Justice Avery loved his work on the Supreme Court Bench. He thoroughly enjoyed the intimate relations he held with his associates and the lawyers appearing before the Court, and for many of them he often spoke in strong terms of affection. He was a loyal friend and was always particularly kind and helpful to the younger members of the bar.

After his retirement from the Bench he taught a law class in Morganton and engaged in a large practice in the courts of Western North Carolina. Age did not dim his remarkable intellect; but the passing years seemed to mellow and sweeten his life, and he passed into

the shadow with the love, admiration, and veneration of all who knew him. He died as he had lived, a devoted member and loyal ruling elder in the Presbyterian church.

The truest summation of the life and character of Alphonso Calhoun Avery is found in his own words depicting the career of another illustrious son of the commonwealth. It is in these words:

> "Brave as a lion in battle, firm as a rock in the councils of the State or on the Supreme Court Bench; to his family he was as gentle, as sympathetic, as tender as a woman. Before his God, he was as humble as a little child."

REMARKS OF CHIEF JUSTICE STACY, UPON ACCEPTING PORTRAIT OF THE LATE ASSOCIATE JUSTICE ALPHONZO C. AVERY, IN THE SUPREME COURT ROOM, 11 APRIL, 1933

The Supreme Court of North Carolina was increased from three to five members by the constitutional amendment of 1888, and Hon. James E. Shepherd from the eastern part of the State and Hon. Alphonso C. Avery from the western section were the first to fill these new positions. It is a matter of common knowledge that two strong and virile personalities were thus added to the Court.

Justice Avery, who was a gallant Confederate soldier, had also served in the State Senate, as a member of the Constitutional Convention of 1875, as a Presidential Elector, and as a judge of the Superior Court, before being elected to the Supreme Court. His term here was for eight years, and his opinions, always pithy and vibrant with the life of his times, are to be found in nineteen volumes of our Reports, beginning with the 102nd and ending with the 119th. Regardless of the subject, whenever and wherever he wrote, the lawyer delights to read.

The Court is pleased to have his portrait look down upon us in this chamber, so that we, and those to come after us, may be inspired by his countenance as well as by his written word.

The Marshal will see that it is hung in its appropriate place, and these proceedings will be published in the forthcoming volume of our Reports.

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B Pending Action.

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h Color of Title

1. In this action in ejectment the charge of the court to the jury in respect to adverse possession, lappage and constructive possession to the outermost boundaries of the deeds of the parties, and the statement of the respective contentions of the parties in respect to the evidence, is held to be free from reversible error. *Shelly v. Grainger*, 488.

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*There have been some changes in the method of indexing with this volume. The subject of liability in automobile collision cases are now indexed under the title "Automobiles" instead of "Highways," and some other minor changes have been made in the hope of improving the system.

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A Nature and Grounds of Appellate Jurisdiction of Supreme Court.

d Judgments and Orders Appealable—Premature Appeals

1. An order striking out defendant's plea of the statute of limitations affects a substantial right and is appealable. *Loan Co. v. Warren*, 50.

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3. Appeals from interlocutory orders entered in this cause which is still pending upon exceptions to commissioners' report of the sale of the lands are dismissed as premature. *Koonce v. Fort*, 430.

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1. Where the questions sought to be presented on appeal have become academic the appeal will be dismissed. *McCleese v. Trust Co.*, 355; *Koonce v. Fort*, 430.

f Parties Who May Appeal

1. The State cannot appeal in either civil or criminal cases except upon statutory authority. *In re Stiers*, 48.

B Theory of Trial in Lower Court and Preservation in Lower Court of Right to Review.

b Theory of Trial in Lower Court

1. The liability of a defendant will be determined in accordance with the theory of liability alleged in the complaint. *Hyde v. Tatham*, 160.

c Waiver of Objections and Exceptions in Lower Court

1. Admission of evidence of like import without objection waives objection to admission of evidence. *Colvard v. Light Co.*, 97; *Bateman v. Brooks*, 176.

2. Where a party objects to the admission of certain evidence on the ground that it is parol evidence in contradiction of the written terms of a contract, and later introduces testimony denying the matters sought to be established by parol, he waives his exception to the admission of the parol evidence. *Smithfield Mills v. Stevens*, 382.

d Appeal

1. Where the U. S. Government, claiming the proceeds of War Risk Insurance under section 514, Title 38, U. S. C. A., does not appeal from a judgment in favor of certain individual claimants, and on appeal it is decided that the funds escheat to the University, the

APPEAL AND ERROR B d—*Continued.*

question of whether the Government is estopped by the judgment is not presented for decision on the record, and the individual claimants may not set up the Government's rights to defeat the University's claim, the Government's rights not being presented for review. *Sharpe v. Carson*, 513.

C Requisites and Proceedings for Appeal.

d Appeals in Forma Pauperis

1. The affidavit required for appeals *in forma pauperis* in civil cases must be filed during the term or within five days thereafter, and the application must be passed upon by the clerk within ten days from the expiration of the term, C. S., 649, and an order allowing an appeal *in forma pauperis* entered by the clerk after the expiration of the statutory time is beyond the clerk's authority and the Supreme Court is without jurisdiction to entertain the appeal and it will be dismissed, the provisions of the statute being mandatory and not directory. *Powell v. Moore*, 654.

2. This appeal *in forma pauperis* is dismissed, there being no affidavit or certificate of counsel in the record. *Noble v. Pritchett*, 804.

E Record Proper.

b Matters Not Set Out in Record Presumed Correct

1. Where the charge of the trial court is not in the record it will be presumed on appeal that the court charged the law applicable to the facts. *Baum v. Ins. Co.*, 57; *Dry v. Bottling Co.*, 222; *Lynch v. Tel. Co.*, 252.

f Certiorari

1. In order to support a motion for *certiorari* it is required that appellant file transcript of the record proper and give appellee notice of the motion, and appellee's transcript of record filed on motion to docket and dismiss cannot avail the appellant on his motion for *certiorari*. Rules 17 and 34. *Hinnant v. Ins. Co.*, 306.

h Questions Presented for Review on Record

1. While a case will be heard on appeal on the theory of trial in the lower court, yet where on appeal from a judgment of a justice of the peace the appellee correctly selects the ground upon which the judgment should be affirmed, and the Superior Court affirms the judgment on a different and insufficient ground, the judgment of the Superior Court, being correct in result, will be affirmed on further appeal. *S. v. Fleming*, 40.

2. Where an action is instituted by a corporation on the theory that it was a duly substituted trustee of an active trust, C. S., 446, 449, and the plaintiff's right to sue is not raised in the lower court, and the lower court finds as a fact under agreement of the parties that plaintiff was duly substituted as trustee, the question of whether the plaintiff is the real party in interest may not be raised by the defendant for the first time in the Supreme Court. *Safe Deposit Co. v. Hood, Comr.*, 346.

3. Where only the record proper is sent up and the verdict is not assailed, the correctness of the instructios and verdict is not presented for review. *Carnes v. Carnes*, 636.

APPEAL AND ERROR—*Continued.*

F Exceptions and Assignments of Error.

a Necessity Therefor

1. Where the only assignment of error is the appellant's exception to the judgment, the correctness of the judgment alone will be considered on appeal. *McCoy v. Trust Co.*, 721.

b Form and Requisites

1. Where the answers which the witness would have made if allowed to testify are not in the record an exception to the exclusion of such testimony will not be considered on appeal. *Chestnut v. Sutton*, 476; *Miller v. Bottling Co.*, 608.

2. Where an appeal is taken from the ruling of the trial judge as to the admission of certain testimony, but the appeal thereon has not been perfected, and no point is made in the brief with respect thereto, this particular aspect of the appeal is eliminated from consideration. *Chemical Co. v. Griffin*, 559.

3. An unpointed exception to the charge will not be considered on appeal. *Miller v. Bottling Co.*, 608.

4. An exception to the admission of incompetent evidence will not ordinarily be considered where evidence of the same import is later admitted without objection. *Bateman v. Brooks*, 176.

J Review.

a Of Injunctions and Restraining Orders

1. On appeal from the refusal of an injunction by the county court the Superior Court will review the evidence with the burden on the appellant to show error. *Thomason v. Swenson*, 759.

b Of Discretionary Matters

1. The discretionary act of the board of county commissioners and the board of education in assuming as a county-wide obligation bonds issued by special charter school districts, N. C. Code (Michie), sec. 5599, will not be interfered with by the courts in the absence of an abuse of such discretion. *Reeves v. Board of Education*, 74.

2. An order denying a petition to require the receiver of an estate being administered under order of the court "to make such steps as may be necessary to complete the administration" of the estate is entered in the sound discretion of the trial court which is not subject to review in the absence of abuse. *In re Estate of Wright*, 494.

3. Although the discretionary ruling of the trial court upon an application for a new trial for newly discovered evidence is not reviewable on appeal, where the applicant fails to make out a showing of "newly discovered evidence" sufficient in law to invoke the discretionary ruling, the granting of the application will be held for error. *Crane v. Caswell*, 571.

4. The amount allowed by the trial court for alimony *pendente lite* is in his sound discretion and is not reviewable. *Tiedemann v. Tiedemann*, 682.

5. A motion to set aside the verdict as against the weight of the evidence is addressed to the discretion of the trial court, and his action thereon is not reviewable on appeal. *Bank v. Shuford*, 796.

APPEAL AND ERROR J—*Continued.*

c Of Findings of Fact

1. Exceptions to the findings of fact will not be sustained where it appears that the evidence and reasonable inferences therefrom support the judgment. *Guaranty Co. v. McGougan*, 13.

2. Where the trial court has found the facts upon a motion to set aside a foreclosure of a tax certificate, and there has been no demand by the parties for a trial by jury, and the appellant has excepted only to the facts so found, he is deemed to have waived his constitutional right to trial by jury, and the facts found by the trial judge are conclusive on appeal when supported by competent evidence. *Madison County v. Coxe*, 58.

3. Where no facts are found by the trial court, and no request is made therefor by the appellant, it will be assumed that the judgment is supported by the essential facts, and it will be affirmed on appeal. *Comr. of Revenue v. Realty Co.*, 123; *Bechtel v. Weaver*, 781.

4. Where the court finds the facts under agreement of the parties, his findings of fact are conclusive when supported by any sufficient evidence, and where the judgment is supported by the findings of fact it also is conclusive. *Fertilizer Co. v. Godley*, 243.

5. The findings of fact of the trial court in respect to service of summons are conclusive when supported by evidence. *Lumber Co. v. Finance Co.*, 285.

6. An order supported by sufficient findings of fact based on the evidence will be sustained. *Tiedemann v. Tiedemann*, 682.

7. Where there is no finding of fact and no request therefor the Supreme Court upon appeal will not attempt to ascertain the truth from conflicting affidavits, and the judgment will be affirmed, it being presumed correct with the burden on appellant to show error. *Henderson v. Hardware Co.*, 775.

d Presumptions and Burden of Showing Error

1. Where the charge of the court is not in the record it is presumed that the court charged the law correctly applicable to the facts. *Baum v. Ins. Co.*, 57; *Dry v. Bottling Co.*, 222; *Lynch v. Tel. Co.*, 252.

2. The burden is on appellant to show prejudicial error, the presumption being against him. *Shelly v. Grainger*, 488.

e Prejudicial and Harmless Error

1. A witness testified as to the amount of damage resulting to the plaintiff's farm from the running of defendant's highly charged transmission line across the land. On cross-examination he testified that his estimate of the damages was based on the fact of danger from the transmission line and that people would not wish to work near it, and on further cross-examination he testified that his testimony as to damages was based on his personal dislike to be near such transmission line. The defendant made a motion to strike out his testimony relative to damages: *Held*, the refusal of the motion to strike out was not prejudicial error, the witness' unobjected

APPEAL AND ERROR J e—*Continued.*

testimony as to general fear of power lines being no more prejudicial than the testimony objected to, and there being testimony of several other witnesses to the effect that the value of the land was decreased by general fear of power lines. *Colvard v. Light Co.*, 97.

2. Where on the question of the measure of damages to plaintiff's farm caused by the running of defendant's transmission line across the land the defendant has elicited evidence from a witness on cross-examination, over plaintiff's objection, that the transmission line also ran near the witness' house and that the line curved, causing the witness to fear that the insulators might break and result in injury to his house, and that the same curve was on plaintiff's land: *Held*, the defendant opened the door for the evidence of the witness in this respect, and its admission was not prejudicial to him. *Ibid.*

3. An exception to the admission of incompetent evidence will not ordinarily be considered where evidence of the same import is later admitted without objection. *Bateman v. Brooks*, 176.

4. In this caveat proceeding the answer of witness on question of mental capacity *is held* not to constitute reversible error in the light of the whole record. *In re Will of Nicholson*, 223.

5. Instruction in this case held not to contain reversible error considered in the light of the evidence upon the trial. *Specs v. Greensboro*, 239.

6. In this action in ejectment there was plenary evidence tending to support the line between the parties as claimed by the plaintiff and the admission in evidence of a deed to defendant's predecessor in title tending to establish the line as claimed by plaintiff is held harmless on the present record. *Shelly v. Grainger*, 488.

g Questions Necessary to Determination of Cause

1. Where an action for libel is tried upon the defendant's theory that the publication was qualifiedly privileged and not upon plaintiff's contention that no privilege attached thereto, and the jury has found that the publication was false and made with actual malice, it is unnecessary to decide upon defendant's appeal whether the publication was qualifiedly privileged, and defendant has no just cause to complain, the case having been tried upon the theory most favorable to him. *Stevenson v. Northington*, 690.

K Determination and Disposition of Cause.

b Remand

1. In this case the mortgagor sought to enjoin foreclosure under the power of sale contained in the instrument, and to have the land sold, if at all, by decree of the court. The trial court dissolved a temporary order entered in the cause, and decreed foreclosure at instance of mortgagor over objection of mortgagee without adequate pleading or showing, and later entered supplemental order attempting to correct some of the findings of fact but reaffirming the court's original conclusions. On appeal the judgment and its attempted correction are vacated, and the cause remanded for further proceedings as to justice appertains. *Mills v. Mills*, 726.

APPEAL AND ERROR K—*Continued.*

c New Trial. (Motion for new trial in trial court see New Trial.)

1. Where in the trial of an action in the county court the jury has answered the issue submitted on defendant's counterclaim adversely to defendant, and on appeal to the Superior Court judgment has been entered remanding the case to the county court with order that a directed verdict be entered in defendant's favor on the counterclaim, and on appeal to the Supreme Court *is held* that defendant was not entitled to a directed verdict, a new trial will be awarded on the issue, the defendant having lost the benefit of exceptions entered to the plaintiff's evidence relating to the counterclaim. *McCoy v. Trust Co.*, 721.

f Rehearing

1. Where it appears from the record that the Court made an error in calculating the amount recoverable by plaintiff a petition to rehear will be granted and the error corrected. *Fidelity Co. v. Board of Education*, 607.

I. Proceedings after Remand.

b Orders and Procedure

1. Trial court may re-refer cause after Supreme Court has remanded appeal with direction that order of confirmation be vacated. *Wilson v. Allsbrook*, 479.

c Subsequent Trial and Review

1. Where on an appeal the question of the sufficiency of the evidence to be submitted to the jury is decided by the Supreme Court according to the contentions of the plaintiff, and no petition for rehearing is filed, the decision of the court constitutes the law of the case both in subsequent proceedings in the trial court and on subsequent appeal to the Supreme Court, and where the evidence on the subsequent trial is practically identical with the evidence on the first trial, the defendant may not again raise the question of its sufficiency. *Masten v. Texas Co.*, 569.

ARBITRATION AND AWARD.

D Award.

c Resubmission

1. Where the court submits a cause to arbitrators with the consent of the parties under an agreement that the award should be final, judgment should be entered upon their award in the absence of exception or objection by either party when the report does not show on its face that the arbitrators exceeded their authority, and it is error for the court of its own motion to remand the same to the arbitrators for the finding of additional facts. *Bowie v. Tucker*, 505.

ATTACHMENT.

J Wrongful Attachment.

b Liability of Attaching Creditor

1. Where a writ of attachment is issued against the property of a nonresident stored in a warehouse, and certain furniture of the nonresident's mother, also stored in the warehouse in his name, is

ATTACHMENT J b—*Continued.*

seized and sold by the officers, the mother may not recover the value of the furniture in an action against the attaching creditor where there is no evidence that the creditor was present or participated in the sale, or that he had knowledge of the mother's claim or received the proceeds of the sale with knowledge of the wrongful act of the officers. *Core v. McCoy and Co.*, 118.

ATTORNEY AND CLIENT. (Same attorney may not represent litigants in adversary action see Judgments K c 1.)

D Compensation

c Lien and Collection

1. Ordinarily attorney's fee may not be allowed as element of damages or costs. *In re Will of Howell*, 437.

E Disbarment of Attorneys.

a Grounds for Disbarment

1. A plea of *nolo contendere* does not amount to a "conviction or confession in open court" sufficient to disbar an attorney under the provisions of C. S., 205, a disbarment proceeding being civil in its nature; and especially is this true where the attorney appears in the disbarment proceeding and denies his guilt and contends that his fault, if any, rested upon a technical violation of a statute. *In re Stiers*, 48.

c Disbarment Proceedings

1. C. S., 205, is complete in itself and, as amended, does not give the State authority to appeal in disbarment proceedings. *In re Stiers*, 48.

AUTOMOBILES.

C Operation and Law of the Road.

b Intersections and Speed at Intersections

1. In an action involving the question of negligence in causing a collision of automobiles 173 feet from an intersection of highways, an instruction defining the legal speed at an obstructed intersection and defining what constitutes an obstructed intersection will be held for reversible error where all the evidence shows that the intersection in question was not an obstructed intersection as defined by law. *Windley v. Brock*, 357.

c Speed on Highways

1. Where there is evidence that defendant was driving his automobile on the highway at a speed of sixty-five miles per hour and that the injury in suit was proximately caused by such excessive speed, it is sufficient to be submitted to the jury on the issue of actionable negligence, since such speed, being in violation of N. C. Code, 2621(46), is negligence *per se*, regardless of the condition of the road, the weather or traffic, and the question of proximate cause is ordinarily for the jury. *Norfleet v. Hall*, 573.

f Ordinary Care in Driving, Attention to Road, Lookout, etc.

1. Where the driver of a car in which the plaintiff was riding as a guest testifies that he could have seen an object twenty feet away under

AUTOMOBILES C f—*Continued.*

the circumstances, and that he could have stopped the car in five or six feet, and all the evidence tends to show that he drove the car into a traffic signal at a street intersection, his testimony establishes negligence on his part as a matter of law. *Speas v. Greensboro*, 239.

2. Where the evidence tends to show that the deceased, a child two years old, had crawled under defendant's standing truck, and was killed when the truck was backed over her, that the driver of the truck and the person riding with him, upon returning to the truck, looked forward and backward and through the rear window of the truck before starting and backing it, and that they could not have seen under the truck without bending over, their failure to look under the truck before starting it cannot be held for actionable negligence, they having observed the ordinary and reasonable elements of a prudent lookout and inspection. *Ham v. Fuel Co.*, 614.

i Proximate Cause

1. The violation of a safety statute is negligence *per se*, but is not actionable unless there is a causal relation between the negligence and the injury in suit, and this causal relation is not presumed from the fact of injury. *Ham v. Fuel Co.*, 614.

2. The fact that a driver of a truck did not have a license and had parked the truck at an angle instead of parallel to the curb, both in violation of municipal ordinance, does not warrant a recovery for an injury caused by the truck in its subsequent movement, there being no evidence of causal relation between the violation of the ordinances and the injury. *Ibid.*

3. The evidence tended to show that the deceased, a child two years old, without being observed, crawled under defendant's truck, that the driver, upon his return to the truck, remounted and looked forward and backward before starting and backing it, and that the front wheel of the truck ran over and killed the deceased before the truck had backed its length. The act of backing the truck was in violation of a municipal ordinance. *Held*, the evidence of causal relation between the violation of the ordinance and the injury was insufficient to be submitted to the jury, the question of whether the injury would not have resulted except for the violation of the ordinance being in the realm of bare conjecture, and the testimony of a person riding with the driver that the injury would not have occurred had the truck moved forward does not alter this result, the testimony being a mere expression of opinion by the witness. *Ibid.*

j Guests and Passengers

1. The plaintiff was riding as a guest in an automobile owned and driven by another. There was evidence that the plaintiff could not have seen through the wind-shield in front of him on account of rain thereon. The car crashed into a municipal traffic signal and the plaintiff brought suit against the city and the driver: *Held*, the plaintiff was not guilty of contributory negligence as a matter of law in failing to keep a look-out for his own safety. *Speas v. Greensboro*, 239.

AUTOMOBILES C j—*Continued.*

2. The fact that plaintiff, who was riding as a guest in defendant's automobile, failed to remonstrate with him as to the excessive speed at which he was driving, is held not to constitute contributory negligence under the evidence in this case, it appearing that defendant increased his speed at the beginning of the journey, and that the car skidded suddenly before plaintiff had an opportunity to remonstrate with him, and since defendant's wilful and intentional violation of the speed law could not have been anticipated by plaintiff when she entered the car. *Norfleet v. Hall*, 573.

m Sufficiency of Evidence and Nonsuit

1. In this action to recover damages resulting from a collision on a highway there was evidence tending to show that plaintiff ran his automobile into defendant's truck which was parked across the hard surface at an angle without lights. Defendant moved for a nonsuit on the ground that plaintiff could have seen the truck and would have avoided the injury had he used due care: *Held*, the motion as of nonsuit was properly refused, since more than one inference could be drawn from the evidence as to whether plaintiff was guilty of contributory negligence. *Johnson v. Transfer Co.*, 420.

BAILMENT.

A Construction and Operation.

a In General

1. A discount corporation obtained possession of and title to certain automobiles by repossessing them under conditional sales contracts which had been assigned for value to the discount corporation by the dealer. The discount corporation delivered the cars to the dealer under a contract providing that the dealer should repurchase such cars from the discount corporation for the amount due under the conditional sales contract, and that until demand by the discount corporation and actual payment of the amount due by the dealer the title to the repossessed cars should remain in the discount corporation and that the dealer's possession should remain that of bailee for storage with duty to redeliver to the discount corporation upon demand. *Held*, the contract under which the cars were delivered to the dealer by the discount corporation was not a conditional sales contract, but created the relation of bailor and bailee, and the contract was not required to be registered, C. S., 3312, and the discount corporation remained the owner thereof and was entitled to possession upon demand as against the receiver of the dealer appointed upon the latter's insolvency. *Realty Co. v. Dunn Moneyhun Co.*, 651.

BANKS AND BANKING.

H Insolvency and Receivership. (Insolvency does not relieve bank of liability for tax on stock see Taxation C c 1. Surety bonds of bank officials see Principal and Surety B e 1.)

d Collection of Debts, Offsets and Counterclaims

1. Upon the insolvency of a bank it has the right to offset an amount due a depositor against the depositor's debt to the bank if the depositor's debt has matured, or, even though the debt has not matured, if the depositor is insolvent. *Lumberton v. Hood, Comr.*, 171.

BANKS AND BANKING H d—*Continued.*

2. A bank executed bonds to secure deposits by an incorporated town. The bank refused to renew the bonds at their expiration, but entered into a written agreement with the town whereby the town was "assigned" certain of its municipal bonds owned by the bank to "protect it against loss on account of deposits." The bank became insolvent. The municipal bonds bore maturity dates of 1935, 1941 and 1942, and at the time of the bank's insolvency were selling below par, although the town was solvent: *Held*, the bank was not entitled to offset the town's deposit against the municipal bonds owned by it, the town being solvent and the bonds not having matured. *Ibid.*

3. A depositor in a bank later becoming insolvent may direct the receiver to apply his deposit to certain of his notes to relieve the endorsers thereon of liability, rather than to his note secured by collateral. *In re Bank*, 472.

e *Claims, Priorities and Distribution*

1. A depositor had funds credited to him in several accounts as guardian, one account as "special account" and one account as "checking account." Thereafter he signed blank checks on these accounts and delivered them to the bank with written instructions that they be filled out in a specified aggregate sum and charged to his accounts, and the proceeds used to purchase Federal and State bonds. The bank, through negotiations by its president, attempted to dissuade the purchase of the bonds, but thereafter agreed to follow the depositor's instructions. The bank became insolvent about two months later without having carried out the instructions: *Held*, the relation of debtor and creditor existed between the bank and the depositor in respect to the deposits, which relation was not altered by the bank's agreement to purchase the bonds, and the depositor was not entitled to a preference in the bank's assets in the absence of a showing that the deposits were special deposits for a special purpose or constituted a trust fund in the bank's hands. *Williams v. Hood, Comr.*, 140.

2. A depositor took a cashier's check for his deposit, and thereafter surrendered the cashier's check to the bank and purchased or exchanged it for the bank's draft for the purchase price of Liberty Bonds, which draft was sent by the bank to a broker with instructions to purchase the bonds for the depositor. The bank became insolvent before the draft was paid: *Held*, the transaction did not entitle the depositor to a preference in the bank's assets, the transaction not constituting a statutory preference under C. S., 218(c) or a preference under the trust found theory. *In re Bank*, 143.

3. A bank executed bonds to secure deposits by an incorporated town. The bank refused to renew the bonds at their expiration, but entered into a written agreement with the town whereby the town was "assigned" certain of its municipal bonds owned by the bank to "protect it against loss on account of deposits." The bank became insolvent, and the town demanded of the liquidating agent the amount of its deposit, and sought to sell the bonds so assigned: *Held*, the purpose of the agreement was to prevent damage to the town by reason of the loss of the deposit or the tying up of its

BANKS AND BANKING H e—*Continued.*

funds, and the town is entitled to have the bonds sold and applied to the payment of its deposit without having to wait until the amount of loss should be determined in the process of liquidation of the bank. *Lumberton v. Hood, Comr.*, 171.

4. A deposit in a bank made with a distinct understanding that it is to be held by the bank for the purpose of furthering a transaction between the depositor and a third person, or a deposit made under circumstances necessarily implying that it is made for such purpose, is impressed with a trust entitling the depositor to a preference over general depositors in case the bank becomes insolvent and is placed in a receiver's hands before discharging the trust. *Flack v. Hood, Comr.*, 337; *Post No. 70 of the American Legion v. Trust Co.*, 342; *Smith v. Hood, Comr.*, 343; *Safe Deposit Co. v. Hood, Comr.*, 346.

5. Where a deposit for a special purpose creating a trust fund in the bank's hands is made in the trust department of the bank, and is in turn deposited with other trust funds by the trust department in a general account carried with the commercial department of the same bank, the depositor is not deprived of his right to preference over general depositors upon the insolvency of the bank by the fact that the account of the trust department with the commercial department of the bank is overdrawn, since the assets in the receiver's hands are increased to the extent of such deposit regardless of the fact that the deposit is commingled with other deposits in the trust department and in turn commingled with the bank's general funds, and the bank will not be allowed to defeat its fiduciary responsibilities by a system of self-dealing. *Ibid.*

6. Where a bank acting as trustee under a trust indenture to hold securities for the protection of a bond issue receives the proceeds of the bond issue and commingles them with its general funds instead of purchasing securities and holding them for the protection of the bond issue as it was bound to do under the trust agreement, the purchaser of the bonds, relying upon the bank's statement that it was holding such securities, is entitled to a preference in the bank's assets in the hands of a receiver. *Trust Co. v. Hood*, 351.

7. A complaint alleging that plaintiff relied on the false and fraudulent statement of a bank's condition published in a newspaper, and in consequence deposited a check in the bank which was collected by the bank and credited to the depositor's account several days before the bank was placed in a receiver's hands, without any allegation that such misrepresentations were made to the plaintiff personally, *is held* insufficient to state a cause of action against the receiver for a preferred claim, and his demurrer thereto was properly sustained. *Mfg. Co. v. Hood, Comr.*, 349.

8. Where a bank debits a depositor's account with the amount of a check drawn by the depositor and issues its cashier's check for the amount, but is placed in a receiver's hands before remitting the proceeds to a third person as instructed to do by the depositor: *Held*, the cashier's check does not constitute a preference either as defined by C. S., 218(c) or under the trust fund theory. *Board of Education v. Hood, Comr.*, 353.

BANKS AND BANKING H e—*Continued.*

9. The U. S. Veterans' Bureau paid the proceeds of certain War Risk Insurance to a bank which had been duly appointed guardian for the deceased soldier's minor children and which had duly executed guardianship bond with sufficient surety. The bank deposited the sums in its savings department and commingled them with its regular deposits, and later was placed in a receiver's hands for liquidation. A substitute guardian was appointed, and the surety on the bank's guardianship bond paid the amount of the deposit to the substituted guardian and was assigned the substituted guardian's rights against the bank. *Held*, the surety was not entitled to a preference for the amount of the guardianship deposit, such sum not being an amount due the U. S. Government (31 U. S. C. A., sec. 191), the Government having discharged its obligation by payment of the sum to the guardian, and the title to the sum having passed to it. C. S., 2169. *In re Bank*, 454.

f Liquidation by Transfer of Assets to Another Bank

1. The transfer of all the assets of a bank, including the statutory liability of its stockholders, may be made to another bank for the purposes of liquidation when two-thirds of the directors of the selling bank and the Corporation Commission approve, sec. 4, chap. 47, Public Laws of 1927, and the approval of the stockholders of the selling bank is not necessary. *Bank v. Earley*, 297.

2. Where a bank has transferred all its assets, including the statutory liability of its stockholders, to another bank for the purpose of liquidation, an action instituted for the purpose of assessing the statutory liability of the stockholders of the insolvent bank involves an accounting and is equitable in its nature, over which the Superior Court has exclusive jurisdiction, and all the stockholders of the insolvent bank are proper, if not necessary, parties, but no judgment can be rendered against them until the amount for which each stockholder is liable has been determined. *Ibid.*

g Liability of Receiver for Personal Injuries Inflicted in Management of Bank's Assets

1. In an action against the Chief State Bank Examiner and the Commissioner of Banks, as his successor, to recover for an injury alleged to have been caused by the negligent condition of an elevator in a building in the hands of the receiver as a part of an insolvent bank's assets, the demurrer of the Chief State Bank Examiner in his individual capacity *is held* properly sustained. *Hood v. Mitchell*, 130.

2. Action against statutory receivers of insolvent bank for injuries received in bank's elevator held not action against the State, and action could be maintained against receivers in their representative capacity. *Ibid.*

BASTARDS. (Right to inherit and heirs of bastards see descent and distribution B c.)

D Bastardy Proceedings.

a Nature of Proceeding

1. Bastardy proceeding is civil proceeding, and appeals from justice's court are controlled by rules applicable to civil cases. *S. v. Fleming*, 40.

BILLS AND NOTES. (Execution of notes by corporation see Corporations G e 2.)

B Negotiability and Transfer.

c Presumption of Negotiation from Possession

1. The possession of a negotiable instrument raises a presumption of ownership, and where a prior party obtains possession of a note for the second time and sells it by reissuance to a purchaser, it will be presumed that the prior party obtained the note by negotiation back to him by endorsement in blank when his name does not appear on the note the second time, and the purchaser from him is charged with notice thereof. *Ray v. Livingston*, 1.

C Rights and Liabilities of Parties.

a Definitions of Various Capacities of Parties on Notes

1. In order to constitute a holder in due course of a note payable to a specified person it is required that the instrument be endorsed. C. S., 3010, 3033. *Keith v. Henderson County*, 21.

2. One who signs a note as an endorser without indicating by proper words his intention to be bound in any other capacity is an endorser, C. S., 3044, and by his unqualified endorsement engages to pay the note to a holder, or any subsequent endorser required to pay it, upon proper notice of dishonor and proceedings thereon. C. S., 3047. *Hyde v. Tatham*, 160.

3. In order for a party to establish his ownership of note as a *bona fide* purchaser he must not only show that he acquired the notes for value before maturity, but also that he had no notice or knowledge of outstanding equities. *McCoy v. Trust Co.*, 721.

c Rights and Liabilities of Endorsers

1. C. S., 3047, providing that an endorser of a negotiable note warrants to all subsequent holders in due course that the instrument is genuine, that he has good title, that all prior parties had capacity to contract, and that the instrument at the time of his endorsement is valid and subsisting, must be construed with the other sections of the Negotiable Instrument Act relating to the liability of endorsers, C. S., 3031, 3039, 3049, and, under the provisions of these sections, where the instrument is negotiated back to the payee the payee cannot hold the intermediate endorsers liable, nor can a purchaser from the payee after reissuance of the note by the payee hold such endorsers liable. *Ray v. Livingston*, 1.

2. By an unqualified endorsement a party warrants to subsequent holders in due course that the note is genuine and what it purports to be, that he has good title, that all prior parties had capacity to contract, that the instrument is valid and subsisting, and he engages to pay it to the holder or any subsequent endorser compelled to pay it if the note is dishonored and the necessary proceedings thereon are taken. C. S., 3044, 3045, 3047. *Kindler v. Trust Co.*, 198.

c Bona Fide Purchasers and Holders in Due Course

1. Where all the names on a negotiable instrument are forged except the endorsement of the payee and the name of an endorser subsequent to the payee's endorsement, and the note is negotiated back

BILLS AND NOTES C e—*Continued.*

to the payee who sells it to a bona fide purchaser for value: *Held*, the bona fide purchaser for value from the payee upon the reissuance of the note may not hold the endorser whose signature was genuine liable, such endorser being an intermediate endorser between the payee's original endorsement and the payee's subsequent possession of the note and transfer to the purchaser. *Ray v. Livingston*, 1.

D Checks and Drafts.

b Rights and Liabilities of Drawer or Payer

1. Construing the Federal Farm Loan Act, it is *held:* the National Farm Loan Associations provided for in the act as intermediaries between the Federal Land Banks and borrowers therefrom is not the agent of the borrowers in transactions necessary to the closing of loans approved by the Land Banks, and where a loan has been approved and in closing the loan the Land Bank's check for the amount thereof has been endorsed by the borrower and by the association's agent and deposited to the association's credit, and only a small part of the proceeds are distributed for the benefit of the borrower because of the later insolvency of the bank of deposit, the borrower is liable on her note and mortgage only for the amount distributed for her benefit, and upon payment of such sum is entitled to have the note and mortgage canceled. *Bank v. Gaines*, 279.

f Criminal Responsibility for Issuing Worthless Checks

1. Where the indictment charges the defendant with issuing a worthless check to a certain person and the evidence at the trial relates only to the issuance of a check to another person, there is a fatal variance between the indictment and proof, and a demurrer to the evidence should be sustained or the action dismissed as in case of nonsuit. C. S., 4643. As to whether a check given under representations that the drawer would have money in the bank to meet payment within ten days comes within the provisions of the "bad-check" law is not presented for decision on the record. *S. v. Franklin*, 157.

2. A post-dated check for a past account does not come within provisions of the "bad-check law." C. S., 4283(a). *S. v. Byrd*, 162.

F Presentment, Demand, Notice and Protest. (Granting of extension of time as consideration for contract see Contracts A d 1.)

b Notice of Dishonor

1. In an action against an endorser on a note the burden of showing that notice of dishonor was given the endorser is on the plaintiff. *Davis v. Royal*, 147.

2. Interest on a note was paid after maturity, the entries thereof on the back of the note being made by an endorser. Thereafter, the endorser severed his business connections with the principal on the note, and the interest was again paid without the knowledge of the endorser. There was no waiver of notice of dishonor on the face of the note, and it did not appear whether the interest was paid in advance. In an action on the note against the endorser: *Held*, it cannot be determined as a matter of law that the endorser was

BILLS AND NOTES F b —*Continued.*

not entitled to notice of dishonor by reason of his consent to an extension of time of payment granted the principal. C. S., 3071, 3085, 3055. *Ibid.*

3. An endorser on commercial paper is entitled to notice of dishonor, and where in an action against an endorser on a note there is testimony that the endorsement was not an accommodation endorsement, C. S., 3061, an instruction that if the jury found that the note had been executed and transferred to plaintiff and had not been paid, that they should allow recovery for the amount of the note with interest is error. *Hyde v. Tatham*, 160.

4. In an action on a note a demurrer interposed on the ground that defendant was an endorser and the complaint failed to allege that he was given written notice of dishonor is properly overruled where the complaint alleges facts sufficient to show a waiver of notice. *Turner v. Templeton*, 784.

G Payment and Discharge.

b Payment Out of Particular Funds

1. Where an unqualified endorsement is supported by a valuable consideration and the maker seeks to enforce the endorser's liability the endorser may introduce parol evidence of an agreement entered into by the parties contemporaneously with the execution of the note that payment was to be made out of a particular fund, but he may not introduce parol evidence in contradiction of the written terms of the note that he was not to be held liable in any event, and under the facts of this case a new trial is awarded for the erroneous admission of such evidence. *Kindler v. Trust Co.*, 198.

BLACKMAIL.

B Prosecution and Punishment.

d Evidence

1. In this prosecution for sending letters through the United States mail demanding that large sums of money be placed in an envelope addressed to a fictitious person and left at a certain filling station in violation of C. S., 4291, the evidence of the guilt of both defendants is held sufficient to be submitted to the jury. *S. v. Moore*, 546.

BOUNDARIES see Deeds and Conveyances D.

BRIBERY.

A Nature and Elements of the Crime.

b Offer to Bribe

1. Acceptance of bribe by offeree is not an ingredient of the crime of offering a bribe. *S. v. Noland*, 329.

B Prosecution and Punishment.

a Indictment

1. In a prosecution under C. S., 4373 for offering a bribe to a juror it is not necessary that the indictment should charge that the juror received any fee or other compensation, the statutes making a distinction between bribery and an offer to bribe and both offenses being included in the common-law definition of bribery. *S. v. Noland*, 329.

BRIBERY B *a—Continued.*

2. An indictment charging that defendant "unlawfully, wilfully, and feloniously offered a bribe to an acting juror with intent to influence the verdict and procure an acquittal" is held to sufficiently charge the corrupt purpose of such offer. *Ibid.*

b Evidence

1. Where there is evidence that the defendant approached the father of a juror relative to offering the juror a bribe, and asked him to talk over the proposition with the juror's wife, testimony of the juror's wife to this effect is competent as tending to corroborate her father-in-law's testimony and as tending to show defendant's indirect communication of the bribe to the juror, and an affidavit made by the witness is also competent for the purpose of corroborating her testimony although made in another proceeding. *S. v. Noland*, 329.

d Instructions

1. An "offer to bribe" is the same as an "attempt to bribe," and in a prosecution for offering a bribe to a juror, C. S., 4373, an instruction directing the jury to reconsider after it had returned an incomplete verdict will not be held for error for failure to instruct the jury as to an attempt to commit the crime charged, especially where the question is not raised until the first verdict had been returned. *S. v. Noland*, 329.

BROKERS.

D Right to Commissions.

a Procuring of Purchaser

1. In order for a broker to be entitled to commissions it is necessary that he secure a purchaser ready, able and willing to complete the purchase on the terms agreed upon between the broker and the vendor, and where the broker and vendor do not agree upon the terms upon which a sale is to be made there is no binding contract, and where the broker has secured only a prospective purchaser, the broker is not entitled to commissions upon the subsequent sale of the property to him upon terms later agreed upon between the vendor and purchaser. *McCoy v. Trust Co.*, 721.

BUILDING AND LOAN ASSOCIATIONS.

D Insolvency and Receivership.

a Rights and Liabilities of Borrowing Stockholders

1. A borrowing stockholder of a building and loan association occupies a dual relationship to the association, and his rights and liabilities in each capacity are independent and must be determined by his contracts with the association. *Lumpkin v. Investment Co.*, 563.

2. Where the deed of trust executed by a borrowing stockholder of a building and loan association provides that the monthly sums paid by the borrower and entered on his pass book should be credited to his indebtedness on the last days of June and December of each year, and the parties have so construed the contract by applying the payments in accordance therewith, and the stock subscribed to by the borrower was its optional payment stock issued under its

BUILDING AND LOAN ASSOCIATIONS D a—*Continued.*

by-laws which imposed no fine for failure to make regular payments thereon, C. S., 5177: *Held*, upon the placing of the association in the hands of a liquidating agent, during the first part of December, 1932, the borrower was entitled to have all monthly payments made by him prior to 1 July, 1932, applied on his loan, and all subsequent payments after 1 July, 1932, should be applied to the payment of the stock subscribed for by him. *Rendleman v. Stoessel*, 195 N. C., 640, distinguished on the basis of the contract between the parties. *Ibid.*

BURDEN OF PROOF See Evidence C, Criminal Law G a.

CASTRATION see Mayhem.

CERTIORARI see Appeal and Error E f.

CHATTEL MORTGAGES see Conditional Sales 1.

CHECKS see Bills and Notes D.

CLERKS OF COURT.

C Jurisdiction and Powers. (Jurisdiction to enter consent judgments see Consent Judgments B b; jurisdiction to appoint guardian see Guardian and Ward B a.)

b Estates of Minors

1. Ward may not maintain action in Superior Court to remove guardian appointed by clerk. *Moses v. Moses*, 657.

2. Clerk appointing guardian has jurisdiction to appoint his successor. *Bank v. Parker*, 54.

c Estates of Decedents

1. Although the clerks of the Superior courts have no equity jurisdiction, they are given probate jurisdiction, C. S., 925, and in the exercise of their probate jurisdiction they may hear and rule on a petition of an executor for authorization to operate the estate's farms to preserve the property pending the determination of caveat proceedings. *Hardy and Co., v. Turnage*, 539.

COMMERCE—Taxation of, see Taxation A h.

COMPENSATION ACT see Master and Servant F.

CONSOLIDATED STATUTES AND N. C. CODE (Michie). (For convenience in annotating, construction and operation of statutes generally see Statutes.)

SEC.

157. Executors and administrators are entitled to lawful commissions and expenses out of assets of estate before payment of creditors or beneficiaries. *Parsons v. Leak*, 86.

160, 415. Provision that action must be brought within one year from death is condition affecting cause of action and is not statute of limitations. *Mathis v. Mfg. Co.*, 434. Action may be maintained within one year from nonsuit in first action brought within time limit. *Swainey v. Tea Co.*, 713. Action will not be considered con-

CONSOLIDATED STATUTES—*Continued.*

SEC.

tinuation of proceedings begun before Industrial Commission, there being distinction between nonsuit and dismissal of proceedings by Industrial Commission. *Mathis v. Mfg. Co.*, 434.

205. Plea of *nolo contendere* is not confession of crime sufficient to sustain disbarment. *In re Stiers*, 48. In disbarment proceedings under this section the State has no right of appeal. *Ibid.*

218(c). Cashier's check does not constitute preference upon bank's insolvency. *In re Bank*, 143; *Board of Education v. Hood, Comr.*, 353.

399. Both legal and equitable rights and remedies may be maintained in one civil action. *Lumberton v. Hood, Comr.*, 171.

415. Nonsuit as affecting limitation of time for bringing action for wrongful death see C. S., 160. Record agreement not to plead statute of limitations held not to apply to second action instituted after nonsuit. *Loan Co. v. Warren*, 50.

416. Writing must acknowledge debt as subsisting obligation and must be written within period of limitation. *Smith v. Gordon*, 695. Provision that new promise must be signed by party to be charged does not apply to payment on debt. *Grocery Co. v. Hoyle*, 109.

441(8). Claim of referee for services held not barred by statute. *Bank v. Bank*, 378.

441(9). Contractual limitation on time for bringing action on bond of bank official is not affected by statute. *Hood, Comr., v. Rhodes*, 158. Cause of action for reformation of deed for mutual mistake does not accrue until mistake is discovered or should have been discovered in exercise of due diligence. *Cheshire v. Jackson*, 773.

442. Action against city for value of sewer system appropriated by city is barred within two years. *Moore v. Charlotte*, 37.

442(2). Where action to recover penalty for usury is barred such penalty may not be set up in counterclaim. *Trust Co. v. Redwine*, 125. Amendment of section by chapter 231, Public Laws of 1931 is prospective in effect, and where action to recover penalty is barred creditor is entitled to recover principal of debt without interest and payments on interest cannot be charged against debt. *Ibid.*

446, 449, 511, 2976, 2982. Trustee may not bring action for reformation of deed of trust without joinder of holders of notes, the notes being negotiable. *Bank v. Thomas*, 599.

466, 1181. Domesticated corporation acquires right to sue and be sued as domestic corporation. *Smith-Douglass Co. v. Honeycutt*, 219. And right to sue applies by analogy to insurance companies complying with provisions of C. S., 6411. *Ins. Co. v. Lawrence*, 707.

469. Where action is instituted by corporation in county of its residence defendant is not entitled to removal as matter of right. *Oil Co. v. Fertilizer Co.*, 362.

483(1). Transient auditor of foreign corporation held not local agent for purpose of service of summons. *Lumber Co. v. Finance Co.*, 285.

CONSOLIDATED STATUTES—*Continued.*

SEC.

511(1), 8081(u). Where it does not appear from face of complaint that defendant employed more than five men in this State a demurrer to action in Superior Court on ground that Industrial Commission had exclusive jurisdiction should be overruled. *Hanks v. Utilities Co.*, 155; *Southerland v. Harrell*, 675.

523. Contributory negligence must be pleaded and proven. *Farrell v. Thomas Co.*, 631.

533. Pleadings and judgment in civil suit are not admissible against defendant in a criminal action against him although the same matters are involved. *S. v. Dula*, 535.

535. Upon demurrer the allegation of the complaint will be deemed admitted, and the pleadings will be liberally construed with a view to substantial justice between the parties. *Farrell v. Thomas Co.*, 631.

547, 551. Trial court has discretionary power to allow amendment. *Speas v. Greensboro*, 239.

564. Although not required by statute, custom of stating contentions of parties to jury has become useful practice. *Trust Co. v. Ins. Co.*, 282. Charge will not be held for error for immaterial matters. *S. v. Noland*, 329.

567. On motion of nonsuit all evidence is to be considered in light most favorable to plaintiff. *Lynch v. Tel. Co.*, 252; *Thigpen v. Ins. Co.*, 551.

569. Decision of court upon issue of fact should be in writing and should contain separate statement of facts and conclusions of law. *Walker v. Walker*, 210.

573(5). Order of reference in this case is upheld. *Trust Co. v. Green*, 780.

582, 584. Refusal to submit issues tendered is not error where they are not raised by pleadings, *Motor Co. v. Belcher*, 769, or where they are not supported by evidence. *Norfleet v. Hall*, 573. Where issues submitted present all phases of controversy to jury an exception thereto will not be sustained. *Power Co. v. Richards*, 772.

593. Clerk has jurisdiction to sign consent judgment in cause pending before referee. *Weaver v. Hampton*, 42.

600. Trial court's refusal to set aside judgment upon finding that there was no mistake, surprise, or excusable neglect on part of defendant is upheld. *Connor v. Robinson*, 798.

601. Judgment stands until reversed or modified according to law. *Myers v. Causeway Co.*, 260.

614. Judgment creditors held entitled to priority of payment in accordance with date of docketing of judgments although execution was restrained and property of judgment debtor was placed in receiver's hands in general creditors' suit. *Dillard v. Walker*, 67.

636. Superior Court has jurisdiction on appeal from clerk's order denying motion to set aside tax foreclosure. *Madison County v. Coxe*, 58.

CONSOLIDATED STATUTES—*Continued.*

SEC.

649. Clerk must pass upon application for appeal *in forma pauperis* within ten days from expiration of the term. *Powell v. Moore*, 654. Appeal *in forma pauperis* is dismissed, there being no affidavit or certificate of counsel. *Noble v. Pritchett*, 804.

653, 654, 655. Where appeal is taken from order of confirmation and appeal bond filed, purchaser is not entitled to immediate possession of property bought at foreclosure sale. *Dixson v. Smith*, 480.

660. Appellee held entitled to dismissal of appeal from justice's court where appeal was not taken to next succeeding term of Superior Court and motion for *certiorari* was not made. *S. v. Fleming*, 40.

722. Appointment of receiver to collect sums due judgment debtor under disability insurance held erroneous. *Comr. of Banks v. Yelverton*, 441.

737. Personal property exemption can be claimed in supplemental proceedings. *Comr. of Banks v. Yelverton*, 441.

768. To the extent that the statute provides for arrest and bail of nonresident defendant in cases where resident defendant would not be subject thereto the statute is void. *Little v. Miles*, 646.

891. Refusal to confine action for waste to issue of title held not error although partition proceedings had been instituted. *Daniel v. Power Co.*, 274.

900. Answers of witness upon examination are competent as evidence on the trial. *Swainey v. Tea Co.*, 713.

925. Clerk has probate jurisdiction to hear and determine petition by executor for power to operate estate. *Hardy and Co. v. Turnage*, 539.

987. Agreement in this case held to constitute an original undertaking not coming within statute of frauds. *Dillard v. Walker*, 16.

997. Where private examination of married woman is not taken to deed of trust executed by her it is void. *Boyett v. Bank*, 639.

1137. Service on foreign corporation through service on Secretary of State upheld. *Reich v. Mortgage Corp.*, 790. Federal Land Bank may not be served with summons by service on Secretary of State. *Leggett v. Bank*, 151.

1226. Held not applicable to referee's claim for services. *Bank v. Bank*, 378.

1291. County commissioners have authority to assent to consent judgment in proper instances. *Weaver v. Hampton*, 42.

1334(53). Liability for taxes arises on 1 July of each year. *S. v. Fibre Co.*, 295.

1608. Appeal from county court's refusal to grant injunction may be taken to next term of Superior Court without service of case on appeal. *Thomason v. Swenson*, 759.

1654. Illegitimate child is entitled to inherit property devised to its mother in fee defeasible upon mother dying without heirs. *Paul v. Willoughby*, 595.

CONSOLIDATED STATUTES—*Continued.*

SEC.

1660, 1661. Only party injured is entitled to divorce *a mensa*, and pleadings must be accompanied by jurisdictional affidavit. *Carnes v. Carnes*, 636.

1664. Homestead exemption may not be claimed against sums ordered to be paid for support of minor child. *Walker v. Walker*, 210.

1667. Amount allowed for alimony *pendente lite* and for counsel fees is in sound discretion of trial court and is not reviewable. *Tiedemann v. Tiedemann*, 682.

1743. Where judgment in tax foreclosure suit has been set aside the owner may bring action to have tax deed canceled. *Galer v. Auburn-Asheville Co.*, 683.

1795. Testimony of parties not interested in event as to declarations by decedent against interest held competent. *Hager v. Whitener*, 748. Payee's agent for collection who had guaranteed note held not party interested in event under facts of this case. *Chemical Co. v. Griffin*, 559.

1801. Refusal to allow cross-examination of witness relative to letter he had written wife held not error. *S. v. Banks*, 233. Where husband assails wife's character in action for criminal conversation the wife is competent to testify in refutation of charges. *Chestnut v. Sutton*, 476.

2165. Guardianship bond is liable for defalcation during any period of the existence of the relationship of guardian and ward. *Thornton v. Barbour*, 583.

2169. Payment of proceeds of War Risk Insurance to guardian of deceased soldier's minor children passes title to guardian, and funds are not entitled to preference upon insolvency of guardian's bank of deposit. *In re Bank*, 454.

2352. Section does not apply where lease fully provides for rights of parties upon destruction of property by fire. *Grant v. Borden*, 415.

2365, 2376. Justice of the peace has jurisdiction of summary ejectment to determine questions of tenancy and holding over, and may consider equitable defenses so far as they relate to issue of tenancy. *Fertilizer Co. v. Bowen*, 375.

2536(3). Section does not apply where parties are not competitors. *Rice v. Ice Co.*, 768.

2591. Requirement of twenty-five per cent cash deposit on bid at sale under power contained in instrument held void. *Alexander v. Boyd*, 103. Under facts of this case order that bidder at foreclosure sale under decree of court make cash deposit held valid. *Koonce v. Fort*, 426. Order of resale releases bidder at prior sale. *Ibid.*

2594(5). Statute relating to conclusive presumption of payment of mortgage after lapse of fifteen years is prospective in effect. *Grocery Co. v. Hoyle*, 169.

2613(15). State gasoline tax is excise and not property tax and applies to gasoline used by municipalities. *Stedman v. Winston-Salem*, 203.

CONSOLIDATED STATUTES—*Continued.*

SEC.

2621(46). Speed in excess of statutory maximum is negligence *per se* and is actionable if the proximate cause of injury. *Norfleet v. Hall*, 573.

2710(1). A petition for street improvements is in the nature of a contract, and the rule that the construction placed upon a contract by the parties thereto will be followed applies to such petitions, and under the petition in this case it is held that abutting owners were liable for entire cost of improvements. *Carpenter v. Maiden*, 114.

3010, 3033. In order to constitute a holder in due course of note payable to specified person it is necessary that instrument be endorsed. *Keith v. Henderson County*, 21.

3044, 3045, 3047. Liability of unqualified endorser on note. *Kindler v. Trust Co.*, 198.

3047. Person signing note as endorser is bound in that capacity in absence of words indicating contrary intent. *Hyde v. Tatham*, 160.

3047, 3031, 3039, 3049. Purchaser from payee after negotiation of instrument back to payee may not hold intermediate endorsers liable. *Ray v. Livingston*, 1.

3061. An endorser on commercial paper is entitled to notice of dishonor. *Hyde v. Tatham*, 160.

3071, 3085, 3055. *Held:* evidence did not show as a matter of law that endorser waived right to notice of dishonor. *Davis v. Royal*, 147.

3091. Demurrer on ground that defendant was endorser and complaint failed to allege that he was given notice of dishonor held properly overruled where complaint alleged facts sufficient to constitute waiver of notice. *Turner v. Templeton*, 784.

3309. Where deed expressly provides that it is subject to four-year lease the grantee takes subject to the lease although lease is not registered. *Machinery Co. v. Post*, 744.

3311, 3312. Unregistered conditional sales contract is good as between the parties. *Realty Co. v. Dunn Moneyhun Co.*, 651.

3312. Where personalty is sold under registered conditional sales contract and the purchase price is not paid in accordance with its terms, the seller is the owner of the property and entitled to possession. *Brunswick Co. v. Bowling Alleys*, 609. Contract in this case held to create relationship of bailor and bailee and was not required to be registered. *Realty Co. v. Dunn Moneyhun Co.*, 651.

3467, 3468, 3470. Evidence of negligence in this action against logging road held sufficient to be submitted to jury. *Bateman v. Brooks*, 176.

3470. Rules of liability of railroad employers applies to logging roads. *Bateman v. Brooks*, 176; *Gurganous v. Mfg. Co.*, 525. Under facts of this case defendant was not a logging road at time of injury. *Gurganous v. Mfg. Co.*, 525.

4161. Pending caveat proceedings executor may operate property, or apply to court or clerk for authority to do so. *Hardy and Co. v. Turnage*, 538.

CONSOLIDATED STATUTES—*Continued.*

SEC.

4162. A devise will be construed to be in fee unless a contrary intention is plainly expressed in the will. *Hambright v. Carroll*, 496; *Jolley v. Humphries*, 672.

4200. Evidence tending to show that defendant killed deceased with deadly weapon in attempt to rob is sufficient to support conviction of first degree murder. *S. v. Langley*, 687.

4210. Evidence of defendant's guilt of malicious castration held sufficient to be submitted to jury. *S. v. Ammons*, 753.

4250. Recent possession of stolen property, without more, is insufficient to raise presumption of receiving the property knowing it to have been stolen. *S. v. Lowe*, 572.

4283(a). Post-dated check for a past-due account does not come within provisions of bad check law. *S. v. Byrd*, 162.

4291. Evidence of guilt of violation of this section held sufficient to be submitted to jury. *S. v. Moore*, 545.

4373. Venue of prosecution for offering bribe to juror in county in which offer was communicated to juror. *S. v. Noland*, 329. Indictment need not allege that jury received any fee or compensation. *Ibid.* Offer to bribe is same as attempt to bribe. *Ibid.*

4428. Competency of evidence of guilt in prosecution for violation of this section. *S. v. Ingram*, 557.

4447. Resumption of marital relationship does not bar State's right to prosecute husband for abandonment. *S. v. Manon*, 52.

4449. Order for support of wife held not conditional, but order for capias to issue on motion of solicitor held void. *S. v. Manon*, 52.

4614. Indictment drawn in accordance with section held sufficient to support charge relative to murder in attempt to rob. *S. v. Fogleman*, 401.

4623. If indictment is sufficient to enable court to proceed to judgment it will not be quashed for informality or refinement. *S. v. Noland*, 329.

4643. Demurrer to evidence should have been sustained, the indictment charging issuance of worthless check to one person and entire proof relating to issuance of another check to another person. *S. v. Franklin*, 157.

4658, 4659. Judgment upon conviction of first degree murder should recite the degree of murder for which sentence is entered. *S. v. Langley*, 687.

5177. Borrowing stockholder held entitled to have payments made prior to specified date applied to loan and not to shares of stock under the contract between parties in this case. *Lumpkin v. Investment Co.*, 563.

5275. Under facts of this case original assessment held not bar to appellant's motion to vacate assessment. *Spence v. Granger*, 247.

5467, 5599. County may assume bonds issued by school district for necessary school term, the duty of providing constitutional term being a county-wide obligation. *Reeves v. Board of Education*, 74.

CONSOLIDATED STATUTES—*Continued.*

SEC.

5608 (Vol. 3). Mandamus held not to lie to compel payment of additional salary to superintendent. *Rollins v. Rogers*, 308.

6411. Insurance company complying with statute acquires right to sue and be sued as domestic corporation. *Ins. Co. v. Lawrence*, 707.

6464(a). Wife made beneficiary of life insurance held entitled to proceeds free from claims of creditors of husband. *Fertilizer Co. v. Godley*, 243. Amendment to section cannot be given retroactive effect. *Comr. of Banks v. Yelverton*, 441.

7977, 7994. Tax lien held discharged by sheriff's settlement, and sheriff's surety who had been assigned note given for taxes by landowner could not claim subrogation to county's lien. *Guaranty Co. v. McGougan*, 13.

7987. Tax on bank stock is payable by the bank and constitutes a lien on bank's realty. *Rockingham v. Hood, Comr.*, 618. As amended entitles owner to apportion taxes to lots comprising property listed as entity and to release of lien upon payment of amount apportioned against lot. *Bryan v. Craven County*, 728.

7984, 8038. Held inapplicable so far as they relate to right to foreclose tax certificate on lands of minor. *Forsyth County v. Joyce*, 734.

8019. Suit to foreclose tax certificate is maintainable if the land is sufficiently described although real owner is not a party. *Forsyth County v. Joyce*, 734.

8028, 8037. County's right to foreclose tax certificate held barred for failure to bring action within eighteen months, and after bar had been completed it should not be repealed by statute. *Wilkes County v. Forester*, 163.

8081(j). (f). Sufficiency of evidence to support finding of Industrial Commission is question of law. *Massey v. Board of Education*, 193.

8081(k). Every employer and employee within purview of Compensation Act is presumed to have accepted its provisions. *Hanks v. Utilities Co.*, 155.

8081(r). Third person may set up negligence of employer in action by employer to recover sum paid as compensation, although action is prosecuted in name of injured employee. *Brown v. R. R.*, 668.

8081(ss). Proceedings under Compensation Act do not abate upon death of claimant. *Butts v. Montague Bros.*, 389.

CONSPIRACY.

B Criminal Conspiracy.

a Elements and Essentials of the Crime

1. One person alone may not be convicted of criminal conspiracy, and where all the defendants charged with conspiracy are acquitted except one, the one convicted is entitled to his discharge. *S. v. Raper*, 503.

2. A conspiracy is an agreement to do an unlawful thing or to do a lawful thing in an unlawful manner or by unlawful means, and the agreement is the crime and not the execution of the agreement. *S. v. Whiteside*, 710.

CONSPIRACY B—*Continued.*

b Evidence. (Competency of acts and declarations of coconspirators see Criminal Law G k.)

1. The manner and time in which the evidence is introduced to prove a conspiracy is in the sound discretion of the trial court. *S. v. Brown*, 392.

2. The criminal offense of conspiracy may be proven by circumstantial evidence, which is usually the only proof obtainable, and the results accomplished, the divergence of these results from the course which would ordinarily be expected, the situation of the parties and their relations to each other, together with the surrounding circumstances and the inferences legitimately deductible therefrom may furnish ample proof of conspiracy even in the teeth of positive testimony to the contrary. *S. v. Whiteside*, 710.

3. In this prosecution for criminal conspiracy there was testimony that the appealing defendant asked the State's witness whether a certain place was a good place to rob several hours before the place was actually robbed by a codefendant, that the appealing defendant and his codefendant were traveling together, with other testimony tending to establish the appealing defendant's guilt of conspiracy to rob, *is held* sufficient to overrule defendant's motion as of nonsuit. *Ibid.*

CONSTITUTION, SECTIONS OF CONSTRUED. (For convenience in annotating.)

ART.

I, sec. 17. Statute providing for sterilization of mental defectives held void, there being no provision for notice and hearing. *Brewer v. Valk*, 186.

II, sec. 14. Amendatory act passed in accordance with constitutional requirements renders former act, not so passed, valid. *Reeves v. Board of Education*, 74.

IV, sec. 1. Both legal and equitable rights and remedies may be maintained in one civil action. *Lumberton v. Hood, Comr.*, 171.

IV, sec. 4. Execution against person of nonresident will not lie where resident would not be subject thereto. *Little v. Miles*, 646.

IV, sec. 8. Supreme Court is limited to matters of law or legal inference on appeal in criminal actions. *S. v. Whiteside*, 710.

V, sec. 3. Rule that property must be taxed in accordance with its true value in money does not apply to income taxes. *Maxwell, Comr., v. Mfg. Co.*, 365. Uniform rule applies to privilege and license taxes. *Roach v. Durham*, 588.

V, sec. 5. Municipalities are not exempt from payment of State gasoline tax. *Stedman v. Winston-Salem*, 203.

IX, sec. 3. County may assume bonds issued by school district for necessary school term, the duty to provide constitutional term being a county-wide obligation. *Reeves v. Board of Education*, 74.

X, sec. 7. Our law favors exemption of proceeds of life insurance from claims of creditors. *Comr. of Banks v. Yelverton*, 441.

X, sec. 1. Judgment debtor is entitled to personal property exemption as often as pressed with execution. *Comr. of Banks v. Yelverton*, 441.

CONSTITUTIONAL LAW. (Constitutional requirements and restrictions on taxation see Taxation A; constitutional requirements in enactment of statutes see Statutes A a, construction of statutes as to constitutionality see Statutes A e; obligations of contract, constitutionality of retroactive statutes see Statutes A c; constitutional exemptions from taxation see Taxation B d; constitutionality of Workmen's Compensation Act see Master and Servant F a 1.)

A Construction of Constitution.

a General Rules

1. The expansion of commercial life and the complexity of social contacts and obligations demand a liberalization of constitutional interpretation. *Stedman v. Winston-Salem*, 203.

C Police Powers.

a Construction and Operation of Statutes Relating Thereto in General

1. Where a statute does not in express words state that it is in the exercise of the police power, but such intention plainly appears from a proper construction, it will be so declared, and the Legislative intent given effect with the least interference with the rights of individuals. *Roach v. Durham*, 587.

b Regulation of Trades and Professions

1. Chapter 52, Public Laws of 1931, which provides that persons desiring to engage in the plumbing and heating business shall apply to a State board therein created for examination and license and that applicants shall pay a certain fee which shall be used to pay the expense of the State Board, and that any surplus remaining shall be paid into the State Treasury, shows the intent of the Legislature to impose a privilege or license tax for the maintenance of the State Board, and the act is not primarily a revenue measure, and it is a valid exercise of the police power of the State for the protection of the health, comfort and safety of the public by regulating this specialized business in the interest of sanitation and proficiency. *Roach v. Durham*, 587.

2. The provisions of chapter 52, Public Laws of 1931, that a firm or corporation may engage in the plumbing and heating business provided one or more persons connected therewith is registered and licensed is valid. *Ibid.*

G Privileges and Immunities and Class Legislation. (Classification of trades and professions for taxation see Taxation A c.)

b Discrimination

1. Under the provisions of Article IV, sec. 2, Amendment XIV, sec. 1, of the Constitution of the United States, a state may not grant to its citizens privileges or immunities not afforded to those of other states, and a nonresident may not be held liable to arrest and bail in a civil action not arising out of contract in cases where a resident of the State would not be subject thereto, and to the extent of the discrimination C. S., 768 is void. *Little v. Miles*, 646.

c Monopolies

1. A statute requiring the examination and licensing of persons engaged in the plumbing and heating business in towns over a certain population does not create a monopoly, all persons being entitled to apply for license and being entitled thereto if they possess the required degree of skill and knowledge. *Roach v. Durham*, 587.

CONSTITUTIONAL LAW—*Continued.*

I Due Process of Law; Law of the Land.

b Notice and Hearing

1. A statute which makes it the duty of the board of county commissioners to have any mental defective sterilized by a qualified, registered surgeon upon a written order signed by the next of kin or legal guardian of such person or by the responsible executive of any State institution of which such person is an inmate, with the special provision that such order shall be approved by four reviewers specified, *i. e.* the Commissioner of Charities and Public Welfare, the Secretary of the Board of Health, and the chief officer of two institutions of the feeble-minded or insane, is unconstitutional, it being in violation of the provisions of the Fourteenth Amendment, sec. 1, of the Constitution of the United States declaring that no State shall deprive any person of his life, liberty or property without due process of law or deny them the equal protection of the laws, and of the State Constitution, Art. I, sec. 17, providing that no person shall be deprived of life, liberty or property but by the law of the land, there being no provision in the statute giving a person ordered to be sterilized notice and a hearing or affording him the right to appeal to the courts. *Brewer v. Valk*, 186.

CONTRACTS. (Contracts to devise see Wills B; contracts to repair see Landlord and Tenant B c; contracts of infants see Infants B.)

A Requisites and Validity.

d Consideration

1. Extension of time for payment of note held sufficient consideration for payer's agreement to assume indebtedness owed payee by third person. *Warren v. Bottling Co.*, 288.

2. Defendant set up a contract under seal, indicating detriment suffered by defendant and benefit accruing to plaintiff, in bar of plaintiff's right to recover: *Held*, the contract is not void for lack of consideration, the seal importing consideration, and detriment suffered by one party or benefit accruing to the other being a valuable consideration. *Basketeria Stores v. Indemnity Co.*, 537.

c Contracts Limiting Liability for Negligence

1. Contract limiting liability for negligence in furnishing electricity held void as against public policy. *Collins v. Electric Co.*, 320.

B Construction and Operation.

a General Rules

1. The terms of a petition of owners of abutting lands for the improvement by the town of its street, C. S., 2710(1), is, when favorably acted upon, in the nature of a contract, and the interpretation placed on the petition by the parties before disagreement thereunder, as evidenced by their acts and conduct, will ordinarily be followed by the courts. *Carpenter v. Maiden*, 114.

2. In interpreting a contract the intention of the parties as gathered from the entire instrument will be given effect, but such intention may be sought from circumstances surrounding its execution, including the subject-matter, the relation of the parties, and the object of the agreement. *Lumberton v. Hood, Comr.*, 171.

CONTRACTS—*Continued.*

D Rescission and Abandonment.

d Abandonment by Conduct

1. Nothing else appearing, a written contract merges all prior negotiations between the parties and the writing abides unless modified, set aside or rescinded according to law, but the written contract may be waived or abandoned by the parties, and while waiver is dependent upon the intent of the parties, such intent may be established as a result of their conduct, and is generally a question for the jury. *Mfg. Co. v. Lefkowitz*, 449.

E Performance or Breach.

d Waiver of Breach

1. The charge of the court in this action for breach of contract in respect to waiver of breach by plaintiffs by placing another shipping order with defendant is held correct, considering the charge as a whole, and the jury's verdict that such action did not constitute a waiver is upheld, there being evidence that the order was placed only for the purpose of obtaining service on defendant by attachment. *Maxwell v. Distributing Co.*, 309.

F Actions for Breach. (Measure of damages see Damages F b.)

b Conditions Precedent to Right to Recovery

1. In an action to recover damages for the breach of an executory contract the plaintiff can recover substantial damages only when he, at the time of defendant's breach, is ready, able and willing to perform the obligations therein imposed upon him, otherwise he may recover only nominal damages. *Baird v. Ball*, 469.

CORPORATIONS. (Service of process on foreign, see Process B d; right of foreign corporation to bring action in county of domestication see Venue A c.)

G Corporate Powers and Liabilities.

c Representation of Corporation by Officers and Agents

1. The president and general manager of a corporation has the power, without authorization of its board of directors, to bind the corporation by a contract incidental to its business which is executed in good faith and which provides for the assumption by the corporation of a debt contracted by others for property necessary to the transaction of the corporate business. *Warren v. Bottling Co.*, 288.

e Contracts and Indebtedness

1. A contract executed by a corporation in the transaction of its business providing for the assumption by the corporation of a debt contracted by others for the purchase of property necessary to the prosecution of the corporation's business is binding on the corporation if authorized and properly executed by it. *Warren v. Bottling Co.*, 288.

2. The corporate seal is not necessary to a contract executed by the president and general manager of a corporation under which the corporation assumed a debt contracted for property necessary to the transaction of the corporation's business. *Ibid.*

CORPORATIONS G c—*Continued.*

3. The extension of time given a corporation for the payment of its notes is a sufficient consideration for the corporation's contract with the payee assuming a debt due the payee which was contracted by its president and others individually for property necessary to the transaction of the corporate business. *Ibid.*

i Torts of Corporations

1. A corporation is civilly liable for torts committed by its servants or agents within the course of their employment precisely as a natural person. *Robertson v. Power Co.*, 359.

COSTS.

C Assessment of Costs. (In reference see Reference E.)

b Elements of Costs

1. Ordinarily, counsel fees may not be allowed as an element of costs. *In re Will of Howell*, 437.

COUNTIES.

B Officers, Agents and Employees.

b County Commissioners

1. Under the statutory authority of the county commissioners to make such contracts as may be necessary to the exercise of its proper powers, C. S., 1291, the commissioners have the authority to assent to the entry of a consent judgment in an action pending against the county, when such judgment is entered in good faith and is free from fraud, etc., a consent judgment being a contract of the parties spread upon the records with the approval and sanction of a court of competent jurisdiction. *Weaver v. Hampton*, 42.

E Fiscal Management, Debt and Securities. (Taxation see Taxation.)

a Validity of Debts and Authorization

1. A person dealing with public officials must take notice of the power and authority conferred on them by statute, and where a note given for county school equipment is signed by the county purchasing agent in the name of the school for whose use the equipment was purchased, a person holding the note is chargeable with notice of his lack of authority to bind the county thereon. *Keith v. Henderson County*, 21.

b Purposes for Which County May Assume Debt of Other Political Agencies

1. A township voted two successive bond issues for the building of highways and bridges in the township. The county levied a tax within the township for the payment of the first bonds, and the income therefrom was more than sufficient to pay same upon maturity, but no sinking fund was created therefor and the bonds were not paid. The county immediately assumed the second bond issue and levied a county-wide tax for its payment, but same were not paid at maturity. The county took over the roads and bridges of the township as a part of the system of county roads, and later the same was taken over by the State Highway Commission: *Held*, under the provisions of chapter 186, Public-Local Laws of 1931, the county had the authority to assume both bond issues, and to make

COUNTIES E b—*Continued.*

provision for their payment by the levy of a county-wide tax, for although one political subdivision may not be taxed for the exclusive benefit of another, the bonds in this case were issued for a county-wide obligation. *Reeves v. Buncombe County*, 45.

2. In pursuance to mandate of our Constitution, Art. IX, sec. 3, it is the duty of the commissioners of the various counties in this State to maintain at least a six months term of public school in their respective counties, subject to indictment for their failure to do so, and in accordance with the provisions of our statute, sec. 5467, Michie's Code of 1931, it is their duty, upon information being furnished by the county boards of education, to provide the funds necessary for suitable buildings and proper equipment, and such expenses are a county-wide charge, and where bonds therefor have been voted by special school districts and by a city constituting a special charter district which has since become a part of the general county schools, the county may assume the payment of such bonds as a county-wide obligation under the provisions of N. C. Code (Michie), sec. 5599, and it is not necessary that payment therefor be made from taxes levied only in such special districts. *Reeves v. Board of Education*, 74.

COURTS. (Supreme Court see Appeal and Error; removal of causes to Federal Courts see Removal of Causes; justices' courts see Justices of the Peace.)

A Superior Courts.

d Jurisdiction on Appeals from Clerk

1. Where a tax certificate has been foreclosed in an action instituted by the county in the Superior Court, and thereafter the owner and mortgagee file a petition in the cause to set aside the decree and judgment of confirmation, which motion is denied by the clerk upon a hearing before him and an appeal taken to the Superior Court: *Held*, the case is properly in the Superior Court, C. S., 636, and it has jurisdiction to hear and determine the motion. *Madison County v. Coxe*, 58.

e Jurisdiction Upon Appeals from Justice of the Peace

1. In appeals from justices of the peace the jurisdiction of the Superior Court is entirely derivative and it must try the case as constituted in the justice's court. *Fertilizer Co. v. Bowen*, 375.

B County and Municipal Courts.

e Appeals

1. An appeal to the Superior Court from the granting or refusal of a restraining order by the county court may be taken in term time or to the next succeeding term of the Superior Court of the proper county upon exceptions to the judgment of the county court without the necessity of serving statement of case on appeal, countercase or exceptions, etc., the case having been heard on the pleadings and the record in the Superior Court consisting of the summons, complaint, answer, orders, judgment and assignment of errors. N. C. Code of 1931, 1608; Rule of Practice No. 5, 200 N. C., 816. *Thomason v. Swenson*, 759.

COVENANTS see Deeds and Conveyances C f.

CRIMINAL CONVERSATION—Competency of wife to testify see Husband and Wife F c 1.

CREDITORS' BILL.

A Nature and Grounds.

c Judgments and Claims Which May Be Made Basis of Participation in Suit

1. A suit in the nature of a general creditors' bill may be instituted under our statutes by creditors before they have reduced their claims to judgment, it being permissible for the creditors to join in one action a proceeding to recover judgment for the amount of their debts and to subject the debtor's property to the payment thereof, the Superior Court having jurisdiction of both legal and equitable matters, and the court may proceed to determine the validity of the debtor's deed to his son, attacked by the creditors as being voluntary, and to determine the rights of the parties and fix the priorities of payment. *Dillard v. Walker*, 67.

D Control and Distribution of Debtor's Property.

c Priorities

1. Where independent actions by creditors have been brought against a debtor who is also a defendant in a suit in the nature of a general creditors' bill, it is not error for the court, upon a proper showing, to permit the plaintiffs in the independent actions to proceed to judgment, restrain the issuance of execution by them, and preserve their rights of priority in the suit in the nature of a general creditors' bill in which they have been made parties, the docketing of their judgments being a lien upon the debtor's lands in accordance with the date of their docketing, C. S., 614, entitling them to priority of payment after the payment of taxes. *Dillard v. Walker*, 67.

CRIMINAL LAW. (Indictment see Indictment; particular crimes see Particular Titles of Crimes.)

D Jurisdiction and Venue.

a Place of Crime

1. Where the husband abandons his wife in this State and thereafter goes to Reno for the purpose of securing a divorce, and the wife follows him there for the purpose of contesting the suit, and the parties there resume the marital relation, and thereafter the husband returns to this State and later the wife also returns here, and the marital relation is not resumed here and he refuses to contribute to her support: *Held*, the resumption of the marital relation in Reno does not affect the State's right to prosecute for the prior abandonment in this State, and our State courts have jurisdiction of the prosecution for such abandonment. *S. v. Manon*, 52.

d Venue

1. The crime of offering a bribe to a juror, C. S., 4373, is committed in the county where the offer is communicated to the juror, and where the defendant is charged with having offered such bribe through the kinsmen and wife of the juror who were residents of a county

CRIMINAL LAW D d—*Continued.*

other than the one in which the juror was serving after being selected from a special venire, the proper venue is the county in which the juror was serving and in which the defendant's offer was communicated to him by his wife, although defendant communicated with the juror's kinsmen and wife in the county of their residence. *S. v. Noland*, 329.

G Evidence. (Presumption from killing with deadly weapon see Homicide G b, from recent possession of stolen property see Receiving Stolen Goods B b; necessity of allegations to support evidence see Indictment E c.)

b Facts in Issue and Relevant to Issues and Order of Introduction of Evidence

1. The order in which the evidence should be introduced is a matter for the trial court. *S. v. Noland*, 329.

2. Order of proof of conspiracy is in sound discretion of trial judge. *S. v. Brown*, 392.

d Materiality and Competency in General

1. In this case it appeared from other evidence introduced, that the witness sufficiently identified the place of the accident in question, and the defendant's exception to his testimony on the ground that he had not done so is not sustained. *S. v. Dills*, 33.

e Hearsay Evidence and Res Gestæ

1. Testimony of a remark of a bystander, addressed to the defendant and his companions and undenied by them, that they were too drunk to drive their automobile, and made a short time before the accident resulting in deceased's death, *is held* competent in a prosecution for homicide resulting from the defendant's culpable negligence in driving his automobile, the remark being unpremeditated and being contemporaneous with and explanatory of the defendant's condition. *S. v. Dills*, 33.

i Expert and Opinion Evidence

1. Testimony relating to the fact that the defendant was drunk, which testimony is based upon observation of the defendant a short time before the accident in question, *is held* competent in a prosecution for manslaughter based upon the defendant's culpable negligence in driving upon the highway. *S. v. Dills*, 33.

2. In a prosecution for homicide, testimony of a witness from his observation of the defendant and deceased while they were conversing that "they were mad" is held competent. *S. v. Brown*, 392.

k Testimony of Acts and Declarations of Coconspirators

1. Where testimony as to acts and declarations of one conspirator in the absence of the other conspirators is properly restricted to the issue of his guilt, the exception of the other conspirators to the admission of the evidence cannot be sustained. *S. v. Brown*, 392.

m Evidence and Record of Former Trial or Proceedings

1. Where a defendant in a criminal action is granted a new trial for newly discovered evidence, and a witness at the former trial has

CRIMINAL LAW G m—*Continued.*

died, the admission of the transcript of his testimony at the former trial will not be held for error where the court stenographer who has transcribed the evidence at the former trial has testified under oath that the transcript was substantially correct and contained all the answers of the witness at the former trial. *S. v. Casey*, 411.

2. The pleadings and judgment in a civil suit are not admissible in evidence in a criminal prosecution against the same defendant although the same transaction is involved, and their admission constitutes reversible error. C. S., 533. *S. v. Dula*, 535.

3. A defendant is presumed to understand the significance of his plea of guilty entered in a prosecution in the municipal court in the absence of explanatory evidence, and his plea is admissible against him in his trial in the Superior Court. *S. v. Ingram*, 557.

p Evidence of Identity

1. Where in a prosecution for homicide the deceased's wife testifies that upon hearing shots she rushed from a back room into the storeroom where her husband had been shot, that two lights were burning in the room, and that she saw the defendant over a curtain between the two rooms before entering the storeroom, and saw him after entering the storeroom while he was standing with a pistol in his hand about seven feet from her, that the defendant left the store and got into an automobile waiting with the motor running and driven by another, and minutely describes the automobile owned by defendant, and positively identifies the defendant as the man who had committed the crime: *Held*, the evidence of the defendant's identity as the perpetrator of the crime is sufficient to be submitted to the jury, the weight and credibility of the wife's identification of the defendant being for their determination, and defendant's motion as of nonsuit on the ground that her testimony was based upon imagination and auto-suggestion was properly refused. *S. v. Fogleman*, 401.

g Privileged Communications

1. In this prosecution for a homicide the defendant offered in evidence a letter written by one of the State's witnesses to his wife, which had been given defendant's counsel by the witness's wife. The defendant proposed to cross-examine the witness in respect to the letter for the purpose of showing bias: *Held*, the trial court's refusal to allow the cross-examination was not error, it appearing that the wife had given the letter to a third person and that it had not been acquired by a third person without the consent or privity of the wife, C. S., 1801, and it further appearing that the letter contained no expression of bias of the witness which was not elicited on his cross-examination. *S. v. Banks*, 233.

r Impeaching, Contradicting or Corroborating Witness

1. Refusal to allow cross-examination of witness relative to letter witness had written wife for the purpose of showing witness's bias held not error it being privileged communication and containing no expression of bias not brought out on cross-examination of witness. *S. v. Banks*, 233.

CRIMINAL LAW G r—*Continued.*

2. Where a witness has made an affidavit concerning certain facts, and on the trial his answers in respect to such facts are evasive and hesitant an exception to the court's action in allowing the solicitor to call the witness's attention to the affidavit for the purpose of refreshing his memory will not be sustained. *S. v. Noland*, 329.

3. Testimony of witness in reference to the receipt of a letter written him by juror's wife held competent as corroborative of her testimony in prosecution of defendant for offering bribe to the juror. *Ibid.*

4. Testimony held competent to show indirect communication of offer to bribe and as corroborating evidence. *Ibid.*

5. The credibility of a witness whose character has been impeached is a matter for the jury. *S. v. Whiteside*, 710.

t Best and Secondary Evidence

1. Where in a criminal prosecution the fact that one corporation had bought out another corporation becomes relevant and material, there being evidence that defendant had made threats against the employees of one of them as a class, it is not required that such connection be shown by the written instrument, but parol evidence thereof is competent, the matter being collateral. *S. v. Casey*, 411.

H Time of Trial.

c Continuance

1. In this case the defendant requested a continuance for the purpose of taking depositions as to the character of the State's witnesses who were nonresidents, without giving names, etc., as required by C. S., 560, Rule of Practice in Superior Courts No. 5. The defendant was allowed to cross-examine the witnesses before trial, and the witnesses admitted upon the trial that they had been prosecuted for various criminal offenses. The witnesses obviously could not give bond for their appearance at a subsequent term: *Held*, the trial court's refusal of the motion for a continuance was in the exercise of a discretion free from abuse. *S. v. Banks*, 233.

I Trial. (Of particular crimes see Particular Titles of Crimes.)

e Reception and Withdrawal of Evidence

1. In a criminal prosecution, as well as in a civil action, the court may withdraw incompetent evidence and instruct the jury not to consider it. *S. v. Dills*, 33.

g Instructions

1. Where the charge to the jury presents the vital issue in the case in substantial compliance with C. S., 564, it will not be held for reversible error on exception to immaterial matters. *S. v. Noland*, 329.

2. The failure of the trial court to define the meaning of the term "reasonable doubt" in his charge to the jury in a criminal action is not reversible error in the absence of a prayer for special instructions. *S. v. Ammons*, 753.

CRIMINAL LAW I—*Continued.*

h Arguments and Conduct of Counsel

1. Where counsel for the private prosecution, in his argument to the jury, comments upon the defendant's failure to testify in his own behalf and intimates that defendant's wife had also failed to testify in his behalf, and the court immediately upon each improper remark stops the argument, directs the counsel to desist, and instructs the jury not to be influenced by the improper remarks, and in his charge specifically and emphatically instructs the jury not to allow defendant's failure to testify to prejudice them and instructs them to exclude from their minds everything except the evidence and the law as declared by the court, the defendant's exceptions to the remarks of counsel will not be sustained. *S. v. Fogleman*, 401.

2. In this prosecution for murder committed in an attempt to rob, the solicitor in his argument to the jury referred to another case where a merchant in the same neighborhood was held up, robbed and murdered, and the perpetrators convicted. The trial court, upon objection by defendant, instructed the jury that counsel had a right to argue the law, but that the jury should take the law from the court and that they should not consider the facts in the case referred to by the solicitor. *Held*, the instruction was sufficient to meet defendant's objection, and his exception to the solicitor's argument is overruled. *S. v. McNair*, 606.

i Province of Court and Jury in General

1. Conflicting evidence is for the determination of the jury. *S. v. Brown*, 392.

2. The functions of the court and jury are separate and distinct, and neither may invade the province of the other, it being the exclusive province of the court to explain the law and the exclusive province of the jury to determine the facts and apply the law as explained by the court to the facts as found. *S. v. Fogleman*, 401.

j Nonsuit

1. Upon a motion as of nonsuit in a criminal action, made at the close of the State's evidence and renewed at the close of all the evidence, all the evidence, whether offered by the State or elicited from defendant's witnesses, will be considered in the light most favorable to the State, and it is entitled to every reasonable intendment thereon and every reasonable inference therefrom, and only evidence favorable to the State will be considered, the weight and credibility of the evidence being for the jury. *S. v. Ammons*, 753.

k Verdict

1. Where the verdict of the jury is incomplete, insensible or repugnant the trial court may, before the verdict has been accepted by him, instruct the jury to reconsider, and where in a prosecution for offering a bribe to a juror the jury returns a verdict of "guilty of attempt," and the trial court gives additional instructions and the jury then brings in a verdict of "guilty of offering a bribe" to a juror, an exception to the trial court's refusal to accept the first verdict will not be sustained, and sentence on the second verdict will be upheld. *S. v. Noland*, 329.

CRIMINAL LAW—*Continued.*

K Judgment and Sentence.

f Capias

1. Judgment in this prosecution for abandonment of wife held not conditional, C. S., 4449, but order that *capias* issue at any time on motion of solicitor is void and not a part of judgment, and *capias* may issue only upon order of the court. *S. v. Manon*, 52.

L Appeals in Criminal Cases.

a Prosecution of Appeals Under Rules of Court

1. Where nothing is done to perfect the appeal of a defendant, although he was allowed to appeal *in forma pauperis*, and the appeal is not ready for argument at the call of the district to which it belongs, the appeal will be dismissed on motion of the State. *S. v. Hines*, 507.

d Record and Exceptions

1. A broadside exception to the charge as given will not be considered. *S. v. Brown*, 392.

2. Under the facts and circumstances of this case the trial court's finding upon the order of the Supreme Court for a correction of the minutes, that the record as formerly certified spoke the truth as the records then existed, *is held* within his discretion. *Ibid.*

3. Where defendant does not object to the admission of certain evidence upon the trial he may not complain for the first time in the Supreme Court on appeal, and *held further* the evidence complained of was favorable to defendant. *S. v. Stone*, 666.

e Review

1. A motion for a continuance is addressed to the discretion of the trial court, and in the absence of abuse, his ruling thereon is not reviewable. *S. v. Banks*, 233.

2. The admission of testimony of a witness that the deceased was "captain" of a group of bonus marchers, and testimony of another witness in explanation of his previous testimony on private examination *is held* not to constitute reversible error in this prosecution for homicide. *Ibid.*

3. Exclusion of evidence relative to defendant's kinship to deceased and of deceased's financial condition as tending to support theory of suicide is held not prejudicial on the whole record in this prosecution for homicide. *S. v. Brown*, 392.

4. Acceptance of verdict of "guilty of manslaughter" after poll of jury held not prejudicial under facts of this case. *Ibid.*

5. Where the allegations in defendant's motion for a new trial for misconduct affecting the jury and the solicitor's affidavit filed in response thereto are conflicting as to whether the jury knew of the alleged misconduct, and the trial court overrules the motion without finding the facts, there being no request therefor, the Supreme Court will not attempt to find the facts from the conflicting averments, but it will presume that the trial court found facts supporting his action, and his judgment refusing the motion for a new

CRIMINAL LAW L e—*Continued.*

trial will be upheld, the regularity of the trial being presumed with the burden on appellant to show prejudicial error. *S. v. Harris*, 422.

6. The verdict of the jury, based upon correct and full instructions from the court, must stand as returned by the jury and recorded in the minutes of the court, and it may not be disturbed or set aside by the Supreme Court on appeal. *S. v. Langley*, 687.

7. On appeal in a criminal case the Supreme Court is confined to matters of law or legal inference. Art. IV, sec. 8. *S. v. Whiteside*, 710.

8. The granting in the presence of the jury of the solicitor's motion to *nol. pros.* with leave as to some of several defendants will not be held prejudicial to the remaining defendants upon their appeal from a conviction, there being no objection by the defendants against whom the case was *nol. prossed* with leave. *S. v. Ammons*, 753.

9. Where in a prosecution for malicious castration defendant's physician, offered as a witness, has been allowed to testify as to defendant's weak physical condition, the exclusion of his testimony as to the diseases with which defendant was suffering will not be held prejudicial although defendant had testified as to them, the defendant when he became a witness being as other witnesses and subject to the same rules. *Ibid.*

DAMAGES.

C Grounds for Recovery of Damages.

d Costs and Expenses of Collection or Litigation

1. Ordinarily, counsel fees may not be included as an element of damages, nor allowed as a part of the costs in a civil action or special proceeding, although the court may under statutory or chancery powers allow attorney fees in certain instances where the attorney is appointed by the court. *In re Will of Howell*, 437.

F Measure of Damages.

b Breach of Contract. (For breach of contract to devise see Wills B c.)

1. The measure of damages for the breach of a contract is the loss suffered by plaintiff at the time of the breach which was within the reasonable contemplation of the parties, and not the loss as of the time for performance under its terms. *Maxwell v. Distributing Co.*, 309.

2. Substantial damages for breach of contract may be recovered only if plaintiff is ready, able and willing to perform his obligations at the time of the breach, otherwise plaintiff may recover only nominal damages. *Baird v. Ball*, 469.

DEATH.

B Actions for Wrongful Death.

a Time Within Which Action Must be Brought

1. An action for wrongful death must be brought within one year of the accrual of the cause of action, and plaintiff must prove that the action was brought within the prescribed time, and this provision is not a statute of limitation but a condition affecting the cause of action. C. S., 160. *Mathis v. Mfg. Co.*, 434.

DEATH B a—*Continued.*

2. Where a proceeding for compensation is instituted before the Industrial Commission by the dependent widow of a deceased employee against the employer and its insurance carrier, and the proceeding is dismissed, an action thereafter begun in the Superior Court by the widow as administratrix against the employer to recover for the employee's wrongful death will not be considered a continuation of the proceedings before the Industrial Commission so as to relate back to the time of the institution of such proceedings, and the action instituted in the Superior Court is barred if not brought within one year from the employee's death. C. S., 160, there being a distinction between dismissal of proceedings under the Compensation Act and a nonsuit entered in an action instituted in the Superior Court entitling plaintiff to institute a new action within one year, C. S., 415. *Ibid.*

3. Where an action for wrongful death has been instituted within one year from the accrual of the cause of action, and a nonsuit has been entered therein, and plaintiff has paid all costs charged against her in the action, the plaintiff may maintain another action commenced within one year from the date of the nonsuit, C. S., 415, although more than a year has elapsed since the accrual of the cause of action, C. S., 160, and the fact that the plaintiff has been assessed with additional costs upon motion for reassessment made in the second action and has not paid the cost so reassessed is immaterial. *Swainey v. Tea Co.*, 713.

DEEDS AND CONVEYANCES. (Contracts to purchase see Vendor and Purchaser.)

C Construction and Operation.

f Conditions and Covenants

1. Where certain property not owned by the grantor is included in the description in the deed through the mutual mistake of the parties, the grantee may not recover therefor on the deed's covenant of seisin. *Plotkin v. Bond Co.*, 508.

2. Where a deed provides that it is subject to a written lease previously executed by the grantor, the grantee takes the premises subject to the lease although the lease is for more than three years and is not recorded, C. S., 3309. *Machinery Co. v. Post*, 744.

D Boundaries.

c Definiteness of Description and Admissibility of Parol Evidence

1. In an action involving the boundaries to lands the plaintiff introduced evidence of a parol agreement between plaintiff and contiguous owners fixing the boundaries. The description in the deed introduced by plaintiff was unambiguous and was at variance with the boundaries agreed upon by parol: *Held*, the evidence of the parol agreement respecting the boundaries was incompetent, the parol agreement not being contemporaneous with the execution of the deed, and being in contradiction of the unambiguous description therein. *Daniel v. Power Co.*, 274.

DEMURRER see Pleadings D.

DESCENT AND DISTRIBUTION.

B Persons Entitled and Their Respective Shares.

c Bastards and Their Heirs

1. Under statutory modification of the common law, the mother and brothers and sisters of a bastard may inherit from him, but the rule extends no further, and the brothers and sisters of the bastard's mother may not inherit from him. *Sharpe v. Carson*, 513.

2. Illegitimate child is entitled to inherit property devised to its mother in fee defeasible upon mother dying without heirs. *Paul v. Willoughby*, 595.

DIVORCE.

A Grounds for Divorce.

c Grounds for Divorce a mensa et thoro

1. Only the party injured is entitled to divorce *a mensa et thoro*, C. S., 1660. *Carnes v. Carnes*, 636.

D Jurisdiction and Proceedings.

b Pleadings

1. The pleadings in an action for divorce must be accompanied by the jurisdictional affidavit. *Carnes v. Carnes*, 636.

E Alimony.

a Alimony Pendente Lite

1. The amounts allowed for reasonable subsistence and counsel fees upon application for alimony *pendente lite* are determined by the trial court in his discretion and are not reviewable, although either party may apply for a modification before trial. C. S., 1667. *Tiedemann v. Tiedemann*, 682.

b Alimony Upon Divorce A Mensa

1. In order for the wife to be entitled to alimony in her action for divorce from bed and board she must allege and prove her grounds for such divorce and that the acts complained of were without provocation on her part, and where the verdict of the jury establishes that both parties had offered such indignities to the person of the other as to render his or her condition intolerable and life burdensome, and judgment is entered granting each a divorce *a mensa et thoro*, the wife is not entitled to alimony as long as the verdict stands undisturbed, and the granting of alimony and counsel fees to her is error. *Carnes v. Carnes*, 636.

F Custody and Support of Children.

d Enforcing Payment Ordered for Support of Children

1. In a decree of absolute divorce the wife was given the custody of a minor daughter and the husband was ordered to pay a certain sum monthly for the child's support, and to execute a bond securing such payments, the case being retained with leave to the parties to apply for a modification of the order. Upon a motion in the original cause for a renewal of the bond after the husband had been placed in a receiver's hands and had defaulted in the payments, an order was issued that the husband should pay the amount delinquent, that it should be a charge on his homestead and personal property

DIVORCE F d—*Continued.*

exemption when allotted, and that the receiver pay the sums out of assets in his hands: *Held*, the order that the sums assessed should be a charge on the husband's homestead and personal property exemptions was authorized by the original order and by statute, C. S., 1664, and the receiver having filed an answer to the motion, he admitted that the assets were in excess of the husband's liabilities, rendering it unnecessary to decide whether the husband's exemptions should be first exhausted before resort to the assets in the receiver's hands. *Walker v. Walker*, 210.

2. Where a decree for absolute divorce is entered which provides that the husband should pay to his wife certain sums monthly for the support of his minor child left in the mother's custody, and that he should give bond securing the payments, and the cause is retained with leave to the parties to apply for a modification of the order: *Held*, the mother was an interested party, and the liability of the sureties of the bond is properly determined by a motion in the original cause, the action not being finally disposed of by the original decree for absolute divorce. *Ibid.*

3. Where in a divorce decree the court orders that the husband pay certain sums for the support of his minor child, and the cause is retained, and upon motion in the cause it is determined that the husband was in default in the payments and he is ordered to pay the amount delinquent within a certain time: *Held*, execution against his person may not be entered without a hearing, and upon a judgment of the Supreme Court sustaining the order, the husband should be granted a reasonable extension of time for making the past-due payments. *Ibid.*

DOWER.

C Dower Consummate.

a Rights of Widow and Creditors

1. The deceased left an estate consisting of lands and interest in a number of various businesses and named trustees in his will to carry on the businesses for a period after his death, clothing them with full power to do so. The wife dissented from the will and claimed dower. Some of the lands were unencumbered but some had been mortgaged by the deceased in his lifetime and some by the trustees in carrying out the provisions of the will, the widow having joined in all the instruments: *Held*, the widow was entitled to actual allotment of dower in the unencumbered lands and to the money value of her dower in the encumbered lands, payable out of the proceeds of the sale of the remaining assets of the estate under the order of court, after deducting commissions due the trustees, reasonable attorney's fees and charges of administration. *Parsons v. Leak*, 86.

DRAINAGE DISTRICTS.

B Liens and Assessments.

d Vacating and Reassessment

1. Under the facts of this case original assessment was not bar to appellants' motion to vacate assessment. *Spence v. Granger*, 247.

DYING DECLARATIONS see Homicide G c.

EJECTMENT.

B Summary Ejectment.

a jurisdiction

1. A justice of the peace has jurisdiction of a summary action in ejectment, C. S., 2365, 2376, and may determine the questions of tenancy and holding over, and while he has no equitable jurisdiction, he may consider equitable defenses set up in summary ejectment in so far as they relate to the issue of tenancy. *Fertilizer Co. v. Bowen*, 375.

c Appeal

1. In appeals from the justice of the peace in summary ejectment the Superior Court's jurisdiction is exclusively derivative and it may not consider equities between the parties except in so far as they relate to the issue of tenancy, and where in the justice's court the defendant denies the tenancy and alleges that she was in possession under a contract of purchase made by plaintiff when it purchased the property at foreclosure sale, and on appeal the one issue as to tenancy is submitted to the jury and answered in defendant's favor, the issue determines the controversy, leaving the rights of the parties in respect to the equitable matters set up as a defense to be determined by a court of competent jurisdiction. *Fertilizer Co. v. Bowen*, 375.

C Pleadings and Evidence.

b Evidence and Burden of Proof

1. Plaintiff in ejectment has the burden of proving by the greater weight of evidence his good title against the world or against the defendant by estoppel. *Shelly v. Grainger*, 488.

2. Where in an action in ejectment involving a dispute in the boundary between the parties as called for in their deeds, the plaintiff introduces evidence tending to establish the line claimed by him by agreement, acquiescence and adverse user, and the defendant introduces evidence tending to establish the line as claimed by him, the conflicting evidence is properly submitted to the jury under correct instructions from the court as to burden of proof. *Ibid.*

ELECTRICITY.

A Duties and Liabilities in Transmission of Electricity.

a Care Required in Respect to Installation, Inspection and Maintenance of Wires and Equipment

1. Evidence that plaintiff was injured by being struck by a bolt of lightning as she passed within two feet of the telephone installed in her home, that her father had seen the bolt of lightning on the telephone wires coming into the house, that the wires of the phone were "swealed" and the telephone instrument damaged, that bits of wood were knocked off the telephone poles for some distance from the house is held sufficient to be submitted to the jury on the issue of causal relation between the telephone company's negligence in failing to properly maintain a ground wire used to prevent lightning from entering the house over the wires, and the injury in suit. *Lynch v. Tel. Co.*, 252.

ELECTRICITY A a—*Continued.*

2. A public-service corporation maintained a primary wire charged with a deadly current of electricity along a highway from which secondary wires led across plaintiff's premises to his warehouse, all of which electrical equipment was furnished and installed by and was under the sole control and inspection of the electric company: *Held*, the electric company's written contract with the owner of the warehouse that it would not be liable for damages which might occur on his property from electricity is void, such contract being against public policy as relieving the electric company of negligence in respect to its duties to properly install, maintain and inspect its equipment. *Collins v. Electric Co.*, 320.

3. In an action for damages against an electric power company, evidence tending to show that plaintiff's warehouse caught fire at the point where defendant's wire was attached to the warehouse by a bracket, and that the wires, poles, bracket and other electrical equipment were installed and maintained by the power company and were under its exclusive control and inspection is sufficient to be submitted to the jury under the doctrine of *res ipsa loquitur*. *Ibid.*

4. The charge in this case, when construed as a whole, correctly instructed the jury that they must find that the fire originated at defendant's electrical fixture before they could apply the doctrine of *res ipsa loquitur*. *Ibid.*

EMINENT DOMAIN.

C Compensation.

c Compensation for Injury to Contiguous Land

1. On the question of the measure of damages to plaintiff's farm caused by the running of defendant's transmission line across it, evidence of the danger from the line and the fear of people of injury therefrom as affecting the decrease in value of the land is properly submitted to the jury, and it is not objectionable as being contingent, remote, or a matter of speculation, and an instruction based thereon is not erroneous. *Colvard v. Light Co.*, 97.

e Measure and Elements of Damage

1. Lands of the defendant public-service corporations were condemned by the State for the purpose of transferring same to the Federal Government for an inland waterway. Defendants maintained a bridge and trestle over the waters where the canal was to be constructed, and it was necessary to destroy them, necessitating the construction of a temporary bridge for the maintenance of defendants' franchises. A permanent draw-bridge was thereafter constructed by defendants in accordance with specifications and requirements of the United States Government in its jurisdiction over navigable waters. The trial court allowed compensation and damages for the lands actually taken, for the easement acquired over the other lands of defendants, the amount reasonably expended for the construction of the temporary bridge and the rebuilding of mains and electric lines: *Held*, the amount reasonably expended by defendants for the construction of the draw-bridge

EMINENT DOMAIN C e—*Continued.*

in accordance with the specifications of the United States Government should have been included as an element of damages, the construction of such draw-bridge being necessary for the preservation of defendants' franchises as public-service corporations, and for the preservation of the value of their property not included in the right of way condemned. *Myers v. Causeway Co.*, 260.

E Title and Rights Acquired.

b Time of Transfer of Title

1. Where condemnation proceedings are instituted by the State and are prosecuted to a final determination the State is deemed the owner of the land from the commencement of the proceedings. *S. v. Floyd*, 293.

EQUITY—Joinder of equitable and legal remedies see Actions B a; particular equitable remedies see Injunction, Money Received, etc., equitable mortgage see Mortgages B c.)

ESTATES—Created by will see Wills E b; dower see Dower, tenancy in common see Tenants in Common.

ESTOPPEL.

B By Record.

a Creation and Operation in General

1. A verdict in plaintiff's favor was set aside by consent of the parties upon condition that the defendant would withdraw his plea of the statute of limitations. Upon the second trial a nonsuit was entered. Within a year the present suit was instituted under the provisions of C. S., 415, and the defendant set up the plea of the statute of limitations: *Held*, the agreement not to plead the statute of limitations does not apply to the present suit, the bringing of a suit after nonsuit constituting a different action though the causes of action are the same, and an order striking out the plea of the statute of limitations is error. *Loan Co. v. Warren*, 50.

2. Where parties are permitted by a referee to intervene in a pending cause involving the question of priorities of claim of dower and other claims against the estate of a decedent, and the order of the referee allowing them to intervene specifies that the claims of the interveners shall be heard without affecting the right of priority of the original parties whose claims had already been heard by him: *Held*, the interveners are bound by the limitations in the order and may not claim priority over the original parties to the action. *Parsons v. Leak*, 92.

C Equitable Estoppel.

a Grounds and Essentials

1. In an action involving plaintiff's liability to a bank on his unqualified endorsement of a note, plaintiff sought to set up a parol agreement that the note should be paid out of collateral given by the maker to the bank and that in no event was the plaintiff to be held liable thereon. The plaintiff accepted the proceeds of the note in payment of material furnished the maker. The plaintiff contended

ESTOPPEL C a—*Continued.*

that he had lost his right to a materialman's lien by reason of the transaction: *Held*, the contention respecting the loss of the lien is unavailing, the plaintiff having had ample opportunity of protecting himself by a qualified endorsement. *Kindler v. Trust Co.*, 198.

EVIDENCE. (In criminal cases see Criminal Law G and Titles of Particular Crimes; in particular actions see Particular Titles of Actions.)

A Judicial Notice.

c Facts Within Common Knowledge

1. The courts will take judicial notice of the fact that the season for producers' sales of tobacco in North Carolina begins about 1 September and closes about 1 February, and that the crop is chiefly sold during September, October and November, and that only a small portion is sold during December and January. *Grant v. Borden*, 415.

C Burden of Proof. (Burden of proof in particular actions see Particular Titles of Actions, in criminal cases see Criminal Law G a.)

a General Rules

1. The terms "greater weight of the evidence" and "preponderance of the evidence" are synonymous, and the charge of the court that the burden was on defendant to prove by the greater weight of the evidence his defense of fraud set up in an action to recover the balance due on the purchase price of an article, will not be held for error on the plaintiff's exception on the ground that the court should have charged that the burden of proving the defense was by the preponderance of the evidence. *Supply Co. v. Conoly*, 677.

2. Burden of proof is a substantial right. *Furst v. Taylor*, 603.

D Relevancy and Materiality in General.

b Transactions with Decedent

1. A father endorsed his son's note as guarantor and was sued thereon by the payee. Upon the trial the father was allowed to testify as to transactions with the payee's agent, who had died prior to the trial, that the note was for fertilizer sold the son the previous year and that his guarantee was solely in consideration of the payee's agreement to furnish the son fertilizer on open account the ensuing year, and that the payee had wrongfully refused to so furnish the fertilizer under the agreement. It appeared that the agent guaranteed all notes to the payee. *Held*, the father's testimony was not incompetent under C. S., 1795, the payee's agent not being a party interested in the event within the meaning of the statute, since the father would have no right of action against the agent had he lost the suit, and the release of the father upon the ground that the payee had wrongfully breached the contract would also release the agent on his guarantee to the payee, his principal. *Chemical Co. v. Griffin*, 559.

f Impeaching, Corroborating and Credibility of Witnesses

1. The fact that witnesses made inconsistent statements does not render their testimony incompetent, but affects only their credibility, which is for the determination of the jury. *Maxwell v. Distributing Co.*, 309.

EVIDENCE D—*Continued.*

k Record at Former Trial or Proceedings

1. Where a defendant has been examined after the filing of the complaint in the action, but before trial in accordance with C. S., 900, his answers to the questions propounded on the examination are competent as evidence at the trial. *Sweaney v. Tea Co.*, 713.

H Hearsay Evidence.

c *Declarations by Decedent Against Interest.* (Transactions or communications with decedent see hereunder D b.)

1. In an action against the administrator of a deceased person to recover for breach of the deceased's contract to devise, testimony of witnesses not interested in the event as to declarations made by the deceased against his interest was properly admitted, and testimony of defendant's witnesses as to declarations of the deceased not made in the presence of plaintiff and not against the deceased's interest was properly excluded as hearsay. C. S., 1795. *Hager v. Whitener*, 747.

J Parol Evidence Affecting Writings. (Admissibility to establish boundaries see Deeds and Conveyances D c.)

a General Rules of Admissibility

1. Although parol evidence is not admissible to contradict, vary, or add to a written instrument, where the contract is not required to be in writing and part is written and part unwritten, the unwritten part may be established by parol if it does not contradict the writing, and in proper cases it may be shown by parol that an obligation was to be assumed only upon a certain contingency or that payment was to be made out of a particular fund or that specified credits should be allowed. *Kindler v. Trust Co.*, 198.

2. Parol evidence is admissible to establish the unwritten part of a contract when such evidence does not contradict the written terms, and the contract is not required by law to be in writing, and in this case parol evidence is held competent to establish an agreement that defendant would put up margin to protect plaintiff from a drop in the price of cotton although each purchasing order was in writing and made no reference to the agreement to put up margin. *Smithfield Mills, Inc., v. Stevens*, 382.

3. Written terms of contract may be waived by conduct clearly showing an intent to waive its provisions. *Mfg. Co. v. Lefkowitz*, 449.

K Expert and Opinion Evidence. (In criminal cases see Criminal Law G i.)

b Subjects of Expert or Opinion Evidence

1. In an action by an employee against a logging or tram road to recover for injuries received by the employee while attempting to apply a hand brake on the cars, the air brakes thereon having become in such state of disrepair as to render them useless, the admission of testimony of witnesses of years of experience and with personal knowledge of the facts as to the operation of hand and air brakes and as to whether the injury could have been avoided had the air brakes been repaired and used, *is held* not to constitute reversible error. *Bateman v. Brooks*, 176.

EXECUTION.

B Property Subject to Execution.

c Personal Property Exemptions. (May be charged for support of child upon divorce of parents see Divorce F d 1.)

1. The five-hundred-dollar personal property exemption prescribed by Art. X, sec. 1, of our Constitution entitles a judgment debtor to the amount of the exemption at all times, and such sum may be set apart for the comfort and support of the judgment debtor as often as the judgment debtor may be pressed with executions. *Comr. of Banks v. Yelverton*, 441.

2. Where supplemental proceedings are instituted upon return of execution unsatisfied on a judgment against a husband and wife, C. S., 721, and it appears that the husband is totally and permanently disabled and has no property upon which execution could be levied, but is receiving the sum of three hundred dollars a month under disability insurance: *Held*, the judgment debtor is entitled, under his personal property exemption, to the three hundred dollars each month if such amount is necessary for the support of himself and wife, and an order appointing a receiver to collect the sum each month and apply it to the judgment after setting apart the personal property exemption, C. S., 722, is erroneous, it not being permissible for the monthly payments to be thus pyramided. *Ibid.*

J Supplementary Proceedings.

c Funds Subject to Attachment

1. While the statute prescribes the manner in which a judgment debtor's personal property exemption must be set aside, C. S., 737, the exemption exists by virtue of the Constitution, and where the judgment debtor has not waived his exemption he is entitled to claim it in supplemental proceedings instituted by the judgment creditor. *Comr. of Banks v. Yelverton*, 441.

2. Execution on a judgment against defendants was returned unsatisfied and plaintiff instituted supplemental proceedings. Plaintiff levied on certain funds in the hands of the liquidator of an insolvent bank and obtained an order restraining the liquidator from disposing of the funds. The trial court found that the funds levied upon were paid into the hands of the liquidator by persons other than the defendants and were paid to him for distribution to the depositors and creditors of the bank pursuant to the terms and conditions suggested by the court for the disposition of criminal actions against defendants for violation of the banking laws. Upon the facts found the trial court adjudged that the funds were not subject to any lien by reason of the levy and that the restraining order be dissolved. *Held*, the facts found support the order, it appearing that the liquidator had no funds in his hands belonging to defendants and was not indebted to them, and an exception to the order cannot be sustained, there being no exception to the findings of fact. *Higgins v. Chimney Rock Corp.*, 633.

K Execution Against the Person.

a Grounds Therefor

1. Execution against the person of a nonresident defendant may not issue in an action for damages resulting from an automobile col-

EXECUTION K a—*Continued.*

lision in this State where the jury does not find that the injury was wilful or wanton, since a resident defendant would not be subject thereto. *Little v. Miles*, 646.

EXECUTORS AND ADMINISTRATORS. (Rules of descent see Descent and Distribution, construction of wills see Wills E.)

B Assets, Appraisal and Inventory.

c Insurance Funds

1. Under our Constitution and statutes the law favors exemption of the proceeds of life insurance from the claims of creditors of the insured as against the interests of the insured's wife and children. Art. X, sec. 7, N. C. Code, sec. 6464. *Comr. of Banks v. Yelverton*, 441.

C Control and Management of Estate.

c Operation and Management by Executor or Administrator in General

1. Where a caveat is filed to a will the executor is required by statute to suspend all operations relating to the settlement of the estate and to preserve the property until a decision of the issue is had, C. S., 4161, and in the observance of the mandate to preserve the property the executor may operate and manage the property in the exercise of that degree of care, diligence and honesty which he would exercise in the management of his own property, or he may institute a civil action in which all persons having an interest are made parties and request the court in its equity jurisdiction to authorize such operation, or he may apply to the clerk in his probate jurisdiction for such authorization. *Hardy and Co. v. Turnage*, 538.

d Personal Liability of Executor in Management of Estate

1. Where an executor of an estate consisting mainly of farm lands has applied to the clerk for authority to operate the farms pending the determination of caveat proceedings filed in the cause, and has obtained an order therefor approved by the judge of the Superior Court, and has operated the farms through tenants as was the testator's custom, making the necessary advancements to them, and has exercised due diligence and good faith therein, neither the executor nor his bondsman may be held liable to the estate or its creditors for loss occasioned in such operation, such loss being paid out of the cash assets of the estate, nor can they be held liable for expenses incurred in marketing the crop or the purchase of equipment used in the cultivation of the farms, or for personal property of the estate used therefor, and all such items having been paid out of the assets of the estate, the principle that an executor has no authority to create a posthumous debt has no application. *Hardy and Co. v. Turnage*, 538.

D Allowance and Payment of Claims. (Liability of estate on intestate's contract to devise see Wills B.)

d Determination of Whether Items are Chargeable Against Estate or Beneficiaries

1. The insured and the beneficiaries in a policy of life insurance executed a note to the insurer for borrowed money and assigned the

EXECUTORS AND ADMINISTRATORS D d—*Continued.*

policy to the insurer as security therefor. The insured received the proceeds of the note and used same for his exclusive benefit, carried the note on his books as a personal liability, and paid the interest thereon during his lifetime. Upon his death, the beneficiaries, as his executors named in his will, paid the note out of the general assets of the estate and received from the insurer the full amount of the policy. *Held*, the executors could not be made to account to the estate for the amount of the note, the note being a personal liability of the testator, and there being no provision in the policy that upon the maturity of the policy any sum due on account of a loan on the policy should be deducted in the settlement with the beneficiaries, and the fact that the executors and the beneficiaries were the same is immaterial. *In re Estate of Wright*, 500.

e Priorities

1. The widow's dower right in the lands of her deceased husband is an interest in his estate, and his executors are entitled to payment of commissions due them, together with reasonable attorney's fees, cost and charges of administration before the payment to the widow of the money value of her dower right in lands sold under mortgages executed by her husband and his executors in which she joined. *Parsons v. Leak*, 86.

F Distribution of Estate.

c By Agreement of Interested Parties

1. Under the facts and circumstances of this case it is held that an agreement entered into by the heirs at law of the testator providing for the distribution "of the remainder of the estate" of the testator, applied to both the real and personal estate, and under its terms the respondents were entitled to the proportion designated in the agreement of the rents and profits from the testator's lands as against the life tenant under the will. *In re Estate of Wright*, 465.

G Personal Rights and Liabilities of Executors and Administrators. (Personal liability in management of estate see hereunder C d.)

a Right to Commissions

1. The commissions allowed executors and administrators are in reasonable payment for services rendered by them in the performance of their duties, and in proper instances include reasonable costs, charges and attorneys' fees necessary to the performance of their duties, and under the provisions of the statute, C. S., 157, such sums may be retained by them out of the assets of the estate against the rights of creditors and all persons claiming an interest in the estate. *Parsons v. Leak*, 86.

c Liabilities on Bonds

1. The bond of an administrator covers "all moneys received under color of official authority," and where the administrator is paid the proceeds of an insurance policy on the life of his intestate, and it is later determined by judgment of the Superior Court affirmed by the Supreme Court that the proceeds of the policy were the property of the estate of the intestate's wife, and the administrator fails to account therefor to her estate, his bond as administrator is

EXECUTORS AND ADMINISTRATORS G e—*Continued.*

liable therefor, although the funds were improperly paid into his hands as administrator, and the liability of the surety on his administration bond may be determined in the original action to which the surety has later been made a party defendant. *Parker v. Potter*, 407.

EXEMPTIONS see Execution B e; personal property exemption may be charged for support of child upon divorce see Divorce F d 1; property exempt from taxation see Taxation B d.

FALSE PRETENSE—Issuing worthless check see Bills and Notes D f.

FIXTURES.

B Right to Removal.

b Where Premises Can Be Restored to Original Condition

1. Where the lessee of real property purchases certain personal property under a registered conditional sales contract and installs same in the leased premises, the lessee being under contract with the lessor to make all alterations in the building necessary for the purpose to which the lessee was to use the property and to pay for all equipment required therefor, and the lessee fails to pay for the personal property installed in the building, and it appears that the personal property cannot be removed without substantial damage to the building, but that such damage can be fully and adequately compensated in money: *Held*, in the suit of the seller of the personal property to have same sold for the payment of the balance due thereon he is entitled to have an issue as to the amount of money necessary to restore the premises to their original condition submitted to the jury, and the rights of the lessor may be protected by judgment of the court requiring the seller to reimburse him for the damage to the building, since the proceeds of the sale of the personal property will be distributed under the orders of the court. *Brunswick Co. v. Bowling Alleys*, 609.

FOOD.

A Liability of Manufacturer for Injury to Consumer.

a Deleterious and Foreign Substances

1. In this action to recover damages alleged to have been caused by foreign and deleterious substances in a bottled drink it *is held* that the facts bring the case within the rule of liability declared in *Perry v. Bottling Co.*, 196 N. C., 175, and *Broom v. Bottling Co.*, 200 N. C., 55, *Dry v. Bottling Co.*, 222.

2. The manufacturer or bottler of drinks owes the duty of using due care to see that the bottled beverage contains no noxious substance, and where foreign and deleterious substances are negligently mixed with the drink which is bottled in opaque glass which would prevent the discovery of the noxious substance upon reasonable inspection by the consumer, the manufacturer may be held liable to the ultimate consumer who purchased it from an intermediate dealer for the injury caused thereby although there is no contractual relation between the manufacturer and the ultimate consumer. *Broadway v. Grimes*, 623.

FOOD A a—*Continued.*

3. The mere fact of injury from the drinking of a bottled beverage is not proof of negligence on the part of the manufacturer or of proximate cause, but the evidence in this case is held sufficient to justify the verdict of the jury establishing negligent failure of inspection, injury, proximate cause and damage. *Ibid.*

4. In an action by the ultimate consumer of a bottled drink to recover for injuries caused by a noxious substance contained therein, evidence that other drinks bottled by the defendant contained foreign substance is held competent when properly confined by the court. *Ibid.*

FRAUD.

A Deception Constituting Fraud.

a In General

1. The essential elements of actionable fraud are a representation, its falsity, knowledge and fraudulent intent on the part of the person making it, deception and injury. *Plotkin v. Bond Co.*, 508; *Dallas v. Wagner*, 517.

2. Fraud may not be specifically defined by the courts, and in this action to recover the purchase price of an article it is held the purchaser sufficiently alleged and proved fraud in misrepresentation of article inducing its purchase. *Supply Co. v. Conoly*, 677.

b Misrepresentation of Past or Subsisting Fact

1. Where in an action for fraud the evidence is to the effect that plaintiff purchased a diamond pin and ring which defendant guaranteed in writing were genuine, and that the written guarantee also contained a stipulation that defendant would loan thereon a certain sum at any time within twelve months, and that defendant refused to loan the amount stipulated within the specified time upon demand, but there is no evidence that the diamonds were not genuine: *Held*, the plaintiff's action for fraud should have been nonsuited, the plaintiff's remedy, if any he has, being for breach of the contract to loan the amount stipulated. *Dallas v. Wagner*, 517.

d Knowledge and Intent to Deceive

1. A. conveyed certain land to B. B. conveyed the northern corner thereof to the city, and then conveyed the remainder to defendant by deed describing the whole tract and including in the description the part previously conveyed to the city. The defendant conveyed the land to plaintiff by deed erroneously containing the description in the original deed to B. Defendant's agent pointed out the land to plaintiff and represented that certain land adjoining the property on the west was included therein. All the deeds were recorded, and plaintiff given opportunity to investigate the title. The description in the deed would have disclosed that the land to the west was not included therein. There was no evidence that defendant's agents knew that a part of the property had been conveyed to the city, or that they knew the boundaries of the property. *Held*, the grantor's action to recover damages for fraud should have been nonsuited, there being evidence that the grantee should have discovered the error through proper diligence, and there being no evidence of knowledge or fraudulent intent on the part of the grantee's agents. *Plotkin v. Bond Co.*, 508.

FRAUD A—*Continued.*

c Deception and Plaintiff's Duty to Ascertain Facts

1. It is the duty of the grantee in a deed to read the instrument unless prevented from so doing by fraud or misrepresentation on the part of the grantor, and where he fails to read the instrument after full opportunity he may not recover on the ground of fraud for the failure of the deed to convey certain adjoining land represented by the grantor to be included therein. *Plotkin v. Board Co.*, 508.

2. Where in an action for fraud there is no evidence that plaintiff was illiterate or that he was prevented from reading the agreement by any trick, artifice, scheme or device, and no evidence of any misrepresentation on the part of defendant's agent, and it appears that the agreement signed by plaintiff clearly and in detail set forth the elements of the transaction, the defendant's motion as of nonsuit is properly allowed, the evidence failing to bring the case within any of the exceptions to the rule that the failure to read an instrument constitutes negligence barring a recovery for the failure of the instrument to contain the agreement as understood by plaintiff. *Dorrity v. Building and Loan Asso.*, 698.

FRAUDS, STATUTE OF.

A Promise to Answer for Debt or Default of Another.

a Scope and Applicability

1. The petitioner owned a certificate of time deposit in a certain bank. Upon demand on the bank for payment thereof a clause in the certificate requiring thirty days notice of withdrawal was invoked. There was evidence that thereafter the president of the bank persuaded the petitioner to leave the money on deposit and promised to become personally liable therefor, and to execute a mortgage on certain of his real property as security. There was evidence, also, that the president was an endorser on large numbers of notes, etc., held by the bank and that he owned a large number of shares of its capital stock, and that the withdrawal by the petitioner would have caused the bank to close its doors, resulting in the president's immediate liability to the bank. Thereafter the bank became insolvent. The president of the bank was placed in receivership, and the receiver denied the petitioner's claim against his estate, and the petitioner appealed to the Superior Court: *Held*, the evidence tended to establish that the promise by the president of the bank to become personally liable for the deposit was supported by a new and independent consideration, and constituted an original undertaking by him, and the agreement does not come within the provisions of the statute of fraud, C. S., 987, and parol evidence thereof was competent. *Dillard v. Walker*, 16.

E Application of Statute in General.

c Executed Contracts

1. In this action for breach of a contract to devise there was evidence tending to show that defendant's intestate induced plaintiff to support and take care of him for the remainder of his life under a contract to devise his lands to plaintiff, and that plaintiff fully performed his contract: *Held*, the defendant will not be allowed to set up the statute of frauds as a bar to the action, the plaintiff

FRAUDS, STATUTE OF E c—*Continued.*

having rendered services in reliance on the intestate's promise and it being inequitable to permit defendant to take advantage of the bad faith of his intestate. *Hager v. Whitener*, 747.

FRAUDULENT CONVEYANCES.

A Transfers and Transactions Invalid.

a Nature and Form of Transfer

1. Where the complaint alleges that the plaintiff was a creditor of the defendant under a docketed judgment and seeks to set aside on the ground of fraud and conspiracy a subsequent, registered deed executed by the defendant to his wife, and the answer alleges that the deed was made upon adequate consideration, and also alleges that the defendant owed a large sum of money to his wife and had promised to convey the land to her as security: *Held*, a judgment on the pleadings setting aside the deed as against the issuance of execution is erroneous, for, although the answer is ambiguous, the question of whether the conveyance was a deed as imported on its face or in effect a mortgage to secure a debt, is a question for the determination of the jury; and should the jury answer the issue adversely to the plaintiff, the validity of the instrument must be determined by the principles announced in *Aman v. Walker*, 165 N. C., 224. *Foster v. Moore*, 9.

GAMBLING.

B Prosecution and Punishment.

d Evidence

1. In establishing by circumstantial evidence the promotion of a lottery in violation of C. S., 4428, it is permissible for the State to show the association between the defendants and their financial relation to the transactions, and to this end testimony of declarations of one of them made in the presence of the other tending to establish such association and the participation of the defendants in the transactions is competent, and testimony of defendants' possession of certain slips of paper with numbers on them is competent where the evidence shows that they were essential to the consummation of the lottery, and testimony of the receipt and disbursement of money by one of them is also competent. *S. v. Ingram*, 577.

GUARDIAN AND WARD.

B Appointment, Qualification and Tenure.

a Jurisdiction to Appoint

1. The court originally appointing a guardian ordinarily has jurisdiction to appoint his successor though the residence of the ward may have been changed in the meantime, and this is especially true where suit against the original guardian is necessary to obtain a settlement. *Bank v. Parker*, 54.

2. A ward may not bring an action in the Superior Court by her next friend to remove her guardian appointed by the clerk, appoint another, compel an accounting, and to recover damages against the guardian and the bondsman for breach of the official bond, the Superior Court in such instances being without jurisdiction, the ward's remedy being to ask for an accounting before the clerk,

GUARDIAN AND WARD B a—*Continued.*

and then for cause to ask the clerk to remove the guardian appointed by him and to appoint another, which guardian could maintain an action against the former guardian and the bondsman. *Moses v. Moses*, 657.

H Liabilities on Bonds.

a In General

1. The office of the ordinary guardian is not for a definite term although his bond is required to be renewed every three years, C. S., 2165, but is usually for the nonage of the ward, and where successive bonds have been given with different sureties, the sureties among themselves become additional sureties, and upon default of the guardian they are liable to contribution among themselves proportionate to the amount of their respective bonds, though the default may have occurred prior to the time any particular bond may have been executed. Cases of liability upon the bonds of clerks of the Superior Court, cited and distinguished. *Thornton v. Barbour*, 583.

2. There is no statutory power given a clerk of the Superior Court to release the liability of sureties on a guardianship bond, and such an order made by the clerk, especially after default of the guardian, is beyond his authority and of no effect. *Ibid.*

HIGHWAYS—Authority of county to assume township road bonds see Counties E b; negligent driving of automobiles on highways see Automobiles C.

HOMESTEAD—May be charged for support of child upon divorce of parents see Divorce F d 1.

HOMICIDE.

B Murder.

a Murder in the First Degree

1. Evidence tending to show that defendant killed the deceased with a deadly weapon while attempting to perpetrate a robbery is sufficient to be submitted to the jury on the issue of first degree murder, C. S., 4200, the credibility and probative force of the evidence being for the jury. *S. v. Langley*, 687.

C Manslaughter.

a Negligence or Culpability of Defendant

1. In a prosecution for the felonious slaying of a pedestrian upon the highway, alleged to have been caused by the defendant's culpable negligence in driving his car, an instruction that if the defendant was guilty of violating a statute enacted for the safety of persons upon the highway, and that such violation proximately resulted in death, that the defendant would be guilty of manslaughter at least, *is held* erroneous as giving the test of civil liability rather than that of criminal responsibility. *S. v. Cope*, 28.

2. Evidence tending to show that all of the defendants were drunk and riding in the front seat of a car driven by one of them in a manner contrary to statute, and that the appealing defendant, being mad because not permitted to drive, grabbed the steering wheel, causing

HOMICIDE C a—*Continued.*

the car to run into a filling station in a reckless manner, resulting in the death of the deceased, is held sufficient to overrule a demurrer to the evidence in a prosecution for felonious slaying. *S. v. Harvell*, 32.

3. In this prosecution for a felonious slaying resulting from the negligent operation of an automobile, the instruction relating to culpable negligence, though inexact, *is held* not to contain reversible error, there being no evidence that the violation of the traffic regulation was unintentional or inadvertent. *Ibid.*

4. Evidence that the defendant, while intoxicated, drove an automobile on a public highway from one side of the road to the other in a reckless manner, resulting in the car overturning and the death of a person riding in the car, *is held* sufficient to be submitted to the jury in a prosecution for manslaughter. *S. v. Dills*, 33.

5. In this prosecution for manslaughter, based on the defendant's culpable negligence, the charge of the court in the statement of the abstract principles of law involved was not strictly correct, but in its application of the law to the facts of the case it correctly charged that the accident and death in question must have been proximately caused by defendant's culpable negligence, and the defendant admitted that the death of the deceased was caused by the accident: *Held*, the charge does not contain reversible error. *Ibid.*

b Negligence of the Deceased

1. Criminal liability for culpable negligence is unaffected by contributory negligence, as such, of the person killed. *S. v. Cope*, 28.

G Evidence.

b Presumptions and Burden of Proof

1. Where the State establishes a killing with a deadly weapon the burden is on the State to prove beyond a reasonable doubt that the defendant perpetrated the crime, and the burden is on the defendant to rebut the presumption of malice, or prove matters rendering the killing justifiable or excusable. *S. v. Banks*, 233.

c Dying Declarations

1. Testimony that deceased declared she was going to die, and that at the time of the declaration she was desperately sick and that death ensued within two days, constitutes a proper foundation for the admissibility of her dying declaration, and since a dying declaration is judged by the same standards as other evidence and is not admissible unless the declarant could testify to the same facts if he were a witness, the testimony of declarant's attending physician as to whether declarant thought she was going to die at the time of the declaration is immaterial. *S. v. Layton*, 704.

2. The fact that a dying declaration does not identify defendant does not render it incompetent where there is other sufficient evidence of defendant's identity as the perpetrator of the crime, the dying declaration being of a material fact connected with the crime. *Ibid.*

HOMICIDE G—*Continued.*

d Competency and Admissibility in General

1. Testimony that defendant's car contained, among other implements, tools adapted to robbery and burglary is held competent in this prosecution for homicide where the evidence tended to show that defendant killed deceased at deceased's store while attempting to rob him, and that after the crime defendant escaped in the car, the testimony being of a circumstance tending to show a design or plan on the part of the defendant, and the fact that several days elapsed between the date of the killing and the seizure of defendant's car is not sufficient to render the testimony incompetent, the probative force thereof being for the jury. *S. v. Fogleman*, 401.

2. In a prosecution for homicide, evidence that defendant had made threats against a class of persons generally, in which class the deceased was included, in this case the employees of a certain corporation, is held competent to show malice, motive, premeditation and deliberation. *S. v. Casey*, 411.

e Weight and Sufficiency of Evidence

1. Evidence tending to show that deceased was in an advanced stage of pregnancy and was found dead lying on her bed where she had evidently been placed, it being impossible that she could have died in such position, that she was purging some at the nose and mouth and a small quantity of bloody fluid was oozing from her vagina, but that she was not in labor when she died, with medical opinion testimony that she died from a blow on the stomach, but that no bruises were found inside her body upon an autopsy, that the defendant, the deceased's husband, had been indicted for assaulting the deceased on previous occasions, but that he did not return home on the night of her death until eleven o'clock, when according to his testimony, he found the door latched and went to his father's house for the night and did not see his wife until the next morning when he found her dead, and that defendant did not view his wife's body after it had been removed to the undertaker's establishment *is held* insufficient to be submitted to the jury, and a nonsuit is entered by the Supreme Court on appeal. C. S., 4643. *S. v. Carter*, 304.

2. The direct and circumstantial evidence in this case tended to show that defendant had quarreled with deceased and had entered into a conspiracy to kill him, that deceased was murdered and that all the conspirators, including the appealing defendant, were present, aiding and abetting in the commission of the crime: *Held*, the evidence was sufficient to be submitted to the jury and the appealing defendant's exception to the refusal of her motion as of nonsuit cannot be sustained. C. S., 4643. *S. v. Brown*, 392.

3. Evidence of identity of defendant as perpetrator of crime of murder in first degree held sufficient. *S. v. Fogleman*, 401.

4. Testimony tending to show that defendant shot and killed deceased, together with testimony of the dying declaration of the deceased identifying defendant as his assailant, and other evidence of identity, motive, etc., is held sufficient to have been submitted to the jury, and their verdict of guilty of first degree murder is upheld. *S. v. Stone*, 666.

HOMICIDE G e—*Continued.*

5. Testimony of a witness, corroborated by other testimony, that defendant told him while both were in the county jail that defendant had killed the deceased and had prepared an alibi, with testimony of the witness's good character for truth and honesty, and testimony of the dying declaration of the deceased that he was killed by persons attempting to rob him, *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of first degree murder, although defendant introduced testimony of himself and several witnesses that he was in another city the night the crime was committed, the conflicting testimony being for the determination of the jury. *S. v. Langley*, 687.

6. In this prosecution for performing an abortion resulting in death there was evidence that defendant had agreed to perform an abortion upon deceased for a stated sum, that defendant visited deceased's room at a hotel and stated that she left an instrument with deceased which deceased could use if she desired, that defendant was seen leaving the elevator in deceased's hotel and that the witness immediately went to deceased's room and that deceased immediately said that a lady had performed the operation, and that defendant received a sum of money from deceased's associate, *is held* sufficient to be submitted to the jury on the question of defendant's identity as the person who had committed the abortion. *S. v. Layton*, 704.

H Prosecution and Punishment.

a Indictment

1. An indictment charging the essential facts of murder as required by C. S., 4614, is sufficient to sustain the court's charge based upon the evidence in the case relative to murder committed in the perpetration of robbery or other felony. *S. v. Foglcman*, 401.

c Instructions

1. In this prosecution for murder the trial court's charge as to justifiable and excusable homicide *is held* not to contain reversible error, the charge correctly stating that an accidental killing committed unintentionally and without negligence was excusable, and there being no evidence of self-defense. *S. v. Banks*, 233.

2. Remark of the court in its charge that there was no evidence that killing was "done in any other way" *is held* to relate solely to fact that killing was done with pistol, construing charge as a whole, and the instruction was in accordance with the evidence and was not erroneous. *Ibid.*

e Verdict

1. Where upon the return of the jury in a prosecution for homicide one of the jurors answers "guilty of murder in the third degree," and, upon the jury being polled gives the same answer, but later explains that he intended to say "guilty of manslaughter," and all the other jurors properly return a verdict of "guilty of manslaughter" both in their general verdict and upon being polled: *Held*, an exception to the court's acceptance of the verdict of "guilty of manslaughter" will not be sustained, the record failing to disclose any prejudicial or reversible error. *S. v. Brown*, 392.

HOMICIDE H—*Continued.*

f Judgment and Sentence

1. Where in a prosecution for murder the jury returns a verdict of guilty of murder in the first degree, the judgment of the court, which alone is certified to the warden of the State prison, C. S., 4658, 4659, 4660, must recite that the defendant had been convicted of murder in the first degree, and where it recites that the prisoner had been convicted of murder, and sentences the prisoner to death by electrocution, the case will be remanded for the rendition of a proper judgment upon the verdict. *S. v. Langley*, 687.

HUSBAND AND WIFE. (Divorce and alimony see Divorce; dower see Dower; wife's acknowledgment see Mortgages A c; unacknowledged mortgage constituting equitable mortgage see Mortgages B c; wife's liability on husband's mortgage see Mortgages C b.)

G Abandonment.

c Defenses

1. Abandonment of the wife by the husband is a statutory offense, and it is not condoned, so far as the State's right to prosecute is concerned, by a subsequent resumption of the marital relation. C. S., 4447. *S. v. Manon*, 52.

H Actions.

c Competency of Wife to Testify in Action to Which Husband is a Party. (Testimony relating to communications between husband and wife see Criminal Law G q.)

1. In an action for criminal conversation wherein the husband has testified to immoral relations between his wife and the defendant, the wife is a competent witness for the defendant for the purpose of refuting the charges made against her character. C. S., 1801. *Chestnut v. Sutton*, 476.

INDEMNITY.

A Contracts to Indemnify.

b Matters Secured

1. Where a contract for the retail distribution of gasoline bought by the dealer from a refining company provides that the refining company should furnish certain pumps and equipment for such retail distribution, and stipulates that the dealer should exonerate the refining company and hold it harmless from all claims, suits and liabilities arising from the existence of such equipment: *Held*, by the terms of the agreement the dealer was barred from bringing action against the refining company for loss alleged to have been caused by a defect in the pumps which caused them to deliver more gasoline than was indicated on the dial thereon. *Burnett v. Texas Co.*, 460.

B Rights and Liabilities of Parties.

a Incurring of Loss by Those Indemnified as Prerequisite of Right of Action

1. An action on an "indemnity" contract in its technical sense could not be instituted at law until damages had been suffered, but a suit in equity could be maintained to enforce rights arising therefrom. *Lumberton v. Hood, Comr.*, 171.

INDICTMENT. (For bribery see Bribery B a, for murder see Homicide H a.)

B Form and Sufficiency.

a In General

1. If a bill of indictment is sufficient to enable the court to proceed to judgment, the prosecution should not be stayed for any informality or refinement. C. S., 4623. *S. v. Noland*, 329.

C Motions to Quash or Dismiss.

c For Incompetent or Illegal Evidence

1. Where it appears that some of the witnesses before the grand jury were qualified and some disqualified, or some of the testimony was competent and some incompetent, the courts will not go into the barren inquiry of how far evidence which was incompetent or witnesses who were disqualified contributed to the findings of a true bill, and defendant's motion to quash will not be allowed unless all the witnesses were disqualified or all the evidence was incompetent. *S. v. Moore*, 545.

E Issues, Proof and Variance.

c Necessity of Allegations to Support Evidence

1. In this case *held:* there was fatal variance between indictment and proof. *S. v. Franklin*, 157.

2. Where the indictment charges the defendant with breaking and entering a certain store in a specified county and stealing certain property therefrom and with receiving stolen property, evidence of breaking and entering another store in another county is incompetent even upon the charge of receiving, since the receiving count applied to property alleged to have been stolen from the store specified in the indictment, the testimony not coming within any of the exceptions to the rule that evidence of guilt of a distinct and substantive offense is inadmissible to prove another and independent crime. *S. v. Smith*, 638.

INDUSTRIAL COMMISSION see Master and Servant F.

INFANTS. (Foreclosure of tax certificate on lands of minor see Taxation H *b* 4.)

B Contracts and Conveyances of Infants.

b Affirmance, Disaffirmance, and Ratification

1. Certain minors were sued to have a deed executed to them by their father set aside. The mother of the minors, who was also a grantee in the deed and a party defendant in the suit, was appointed guardian *ad litem* for the minors, and she accepted service and filed answer. A consent judgment was entered that all the parties plaintiff and defendant were tenants in common in the land, and part of the land was sold under order of court for division. The minors' share in the proceeds of the sale was paid to their guardian appointed by the court. The guardian paid certain of the money to the minors during their minority, and upon their coming of age, paid the balance to them, and they accepted payment with full knowledge of all the vital facts. A number of years later they brought suit attacking the consent judgment: *Held*, by accepting the benefits derived from the sale under the consent judgment after

INFANTS B b—*Continued.*

their majority the plaintiffs ratified the same and may not now upset the consent judgment in an action instituted more than eight years after accepting such benefits. *Watson v. Watson*, 5.

G Actions.

a Right of Infant to Maintain Action

1. The plaintiff, a minor living with and supported by her father, without objection by her father, prepared herself for the teaching profession, and, after consulting her father, accepted by wire a wired offer of a teaching position. Her wired acceptance was not delivered by the telegraph company and she brought action, by her father as next friend, to recover damages sustained: *Held*, the plaintiff could maintain the action in her own right to recover the loss of salary sustained as a result of the defendant's negligence, the doctrine of implied emancipation applying to the facts of the case. *Jolley v. Tel. Co.*, 136.

INSTRUCTIONS see Trial E, Criminal Law I g.

INSURANCE. (Surety bonds see Principal and Surety.)

D Insurable Interest.

b In Life of Another

1. Evidence tending to show that the beneficiary to whom the policy of insurance was issued and who paid the premiums thereon was the half-sister of the insured, the insured being the illegitimate daughter of the beneficiary's father, is held insufficient, standing alone, to establish the beneficiary's insurable interest in the life of the insured, and the policy is void. *Crump v. Ins. Co.*, 439.

E The Contract in General.

b Construction and Operation

1. In an action on a policy of life insurance executed in Pennsylvania the laws of that State in respect to the insurer's right to cancellation, involved in the action, determine the controversy. *Ins. Co. v. Skurkay*, 227.

2. Where an insurance policy is reasonably susceptible of two interpretations, the one more favorable to the insured will be adopted. *Conyard v. Ins. Co.*, 506.

c Contracts to Insure

1. Where a mortgagee has agreed with the mortgagor to advance the premium for a fire insurance policy on the premises, and thus lulls the mortgagor into a sense of security, and thereafter the mortgagor pays a certain sum to the mortgagee or his accredited agent, and directs by an itemized statement that a part of the sum should be used to pay the fire insurance premium, the mortgagee may be held liable to the mortgagor for the loss occasioned by the failure to pay the premium and the consequent lapse of the policy prior to a fire destroying the property. *Dixon v. Osborne*, 480.

F Group Insurance Contracts.

b Determination of Whether Insured Was Employee at Time of Injury

1. Where there is evidence that one of the employees insured under a policy of group insurance was an employee of the company taking

INSURANCE F b—*Continued.*

out the insurance at the time of the execution of the policy, that thereafter the employer was placed in the hands of a receiver, but that the employee continued to do the same work at the same place until his death, and that his pro rata share of the premium on the policy owed by the company which had taken out the insurance was taken out of his wages after the receivership, and there is no evidence that the employee consented to or had knowledge of the fact that after the receivership he was carried on the payroll of another company or that he had been discharged or had left the employment of the first company, *is held* insufficient to show as a matter of law that he had ceased to be an employee of the first company, and the evidence was properly submitted to the jury in an action on the policy by his beneficiary. *Deese v. Ins. Co.*, 214.

d Expiration, Cancellation and Renewal

1. A policy of group insurance issued by the defendant provided that upon expiration of its term it might be renewed from year to year, and gave a grace period of thirty days during which it should remain in force and might be renewed. Under the terms of an agreement with the employer, of which the insurer had knowledge, the premium was deducted pro rata from the wages of the employees. The employer failed to exercise its option to renew the policy. Suit was entered on the policy by the named beneficiary of one of the employees who died within the thirty days grace period, and evidence was introduced showing that the employee had not been given notice that the policy had been canceled, and that his pro rata part of the premium had been deducted from his wages after the expiration date of the policy but during the thirty days grace period: *Held*, the insurer's contention that the policy was not in force at the date of the employee's death cannot be maintained, at least as to the employee paying his pro rata part of the premium during the thirty days grace period and relying on the terms of the policy. *Deese v. Ins. Co.*, 214.

H Cancellation, Rescission and Reinstatement of Policies.

c Reinstatement of Policies

1. Where, after the forfeiture of a policy of life insurance for nonpayment of premiums, the insured makes application with the company for reinstatement according to the terms of the policy contract, and remits his check in the amount necessary therefor, and the insurer accepts the check, but requires a physical examination of the insured before reinstating the policy, but notice of such requirement is not given the insured although twenty-one days elapse between the time the insured's agent received the information from the company and the time the insured was seized with fatal sickness: *Held*, the evidence is sufficient to be submitted to the jury on the issue of whether the insurer waived its right to reject the application by failing to act thereon within a reasonable time. *Trust Co. v. Ins. Co.*, 282.

I Avoidance of Policy for Misrepresentation or Fraud.

b Matters Relating to Insured

1. In this action by the insurer to cancel a policy of health and accident insurance with disability benefits, there was uncontroverted evidence

INSURANCE I b—*Continued.*

that the insured had other policies of insurance carrying a large aggregate amount of disability benefits, and that the insured, an intelligent man, in his application for the policy in suit, stated that he had no disability benefits under other policies. The insurance contract was executed in Pennsylvania. Applying the law of that State it *is held*, the misrepresentation related to a material risk as a matter of law, and the insured having written the answers to the questions in the application himself, the doctrine of estoppel does not apply although the insurer's agent was present, knew the facts and saw the insured write the answers, and the insurer was entitled to a directed verdict. *Ins. Co. v. Skurkay*, 227.

J Forfeiture of Policy for Breach of Covenants or Conditions.

b Nonpayment of Premiums

1. Evidence tending to show that a person other than the insured placed in an envelope, addressed to the insurer and bearing the sender's return address, cash equal to the semiannual premium on insured's policy of life insurance, without more, is held insufficient to be submitted to the jury on the question of payment of the premium. *McGee v. Ins. Co.*, 424.

c Encumbrancing Property

1. A clause in a policy of fire and theft insurance requiring that the insured disclose any encumbrance or lien against the automobile insured is not a valid defense to an action on the policy where an encumbrance on the car in violation of the terms of the policy is paid off and discharged prior to the occurrence of loss covered by the policy. *Barefoot v. Ins. Co.*, 301.

2. Where a policy of fire insurance contains a standard loss payable clause and provides that the policy should not be canceled as to the mortgagee's or trustee's interest except after ten days notice to the mortgagee or trustee for the mortgagor's further encumbrancing of the property or its advertisement under foreclosure, provided the mortgagee or trustee notifies the insurer of the fact of such further encumbrance or foreclosure if the mortgagee or trustee had knowledge thereof, and there is evidence tending to show that the mortgagee's or trustee's agent solely for the collection of the notes had such knowledge, and the question of agency and imputed knowledge is submitted to the jury under correct instructions from the court, their verdict that the mortgagee or trustee did not have knowledge, and the court's judgment in favor of the mortgagee or trustee will be upheld on appeal. *Trust Co. v. Ins. Co.*, 764.

N Persons Entitled to Proceeds.

a Life Insurance

1. Where a policy of life insurance reserves the right in the insured to change the beneficiary therein named, the named beneficiary has only a contingent interest therein, and the insured may change the beneficiary in accordance with the terms of the policy at any time, and where the insured has done all that is possible under the circumstances to change the beneficiary in accordance with the terms of the policy, such change of beneficiary will be given effect under the principle that equity regards as done that which ought

INSURANCE N a—*Continued.*

to have been done, and where the insured's wife is thus made the beneficiary the proceeds inure to her sole benefit free from the claims of his creditors. N. C. Code, 6464(a). *Fertilizer Co. v. Godley*, 243.

2. Where under an agreement that the court should find the facts the court finds that the deceased had expressed an intention to change the beneficiary in a policy of insurance on his life, but had done no affirmative act to effect such change, the court's judgment that no change of beneficiary had been effected will be affirmed on appeal. *Ibid.*

3. In an action to determine conflicting claims to the proceeds of War Risk Insurance in the hands of the deceased soldier's administrator it appeared that the soldier was a bastard, and that the funds were claimed by the brothers and sisters of the soldier's mother, the U. S. Government, and the University of North Carolina, the deceased soldier's wife being incapable of claiming the funds because of marital misconduct. Judgment was entered in the lower court in favor of the soldier's uncles and aunts, and the Government did not appeal. Upon the University's appeal it *is held:* the uncles and aunts of the deceased soldier are incapable of inheriting from him, and the funds escheat to the University, and the rights of the Government under Title 38, U. S. C. A. need not be determined, the Government not having appealed, nor can the Government's rights be set up by the uncles and aunts to defeat the University's claim. *Sharpe v. Carson*, 513.

4. A "facility of payment" clause in a policy of life insurance which provides for discharge of the insurer by payment to the executor or administrator of the insured, any relative by blood or marriage, or to any other person appearing to the company to be equitably entitled thereto by reason of having incurred expense on account of illness or death of the insured, is valid. *Mitchell v. Ins. Co.*, 593.

P Actions on Policies. (Insurer's right to bring action in county of its domestication see Venue A c 3.)

b Evidence and Burden of Proof

1. In this action on a policy of group insurance the judgment as of nonsuit is affirmed, the plaintiff having failed to offer satisfactory proof that the premiums were paid in accordance with the terms of the policy, that the policy was ever delivered, that insured had completed three months service required by the policy, or that the death of insured occurred while the policy was in force. *Carson v. Henrietta Mills*, 667.

2. In an action against an insurance company to recover on a policy of fire insurance, contested by the insurer on the ground that the plaintiff mortgagee had knowledge of the placing of a second mortgage on the property and its advertisement for sale under the power of sale contained therein, and that plaintiff mortgagee failed to give defendant notice of these facts: *Held*, the burden of proof on the issues involving plaintiff mortgagee's knowledge is on the defendant insurance company. *Trust Co. v. Ins. Co.*, 764.

INSURANCE P—*Continued.*

g Judgment and Recovery

1. In this action to recover on a policy of fire insurance on a boat, contested by the insurer on the ground that gasoline was kept on the boat in violation of the terms of the policy, the verdict of the jury that an auxiliary gasoline engine was necessary to the proper use of the boat is held sufficient to support a judgment in insured's favor, the Supreme Court having decided on a former appeal that a small quantity of gasoline kept on the boat would not avoid the policy if such gasoline was necessary to the proper operation of the boat, and the insurer knew of such necessity. *Baum v. Ins. Co.*, 57.

R Accident and Health Insurance.

a Construction of Policy as to Accidental Injury or Death and Risks Covered

1. Where the insured, voluntarily engaging in a basketball game, is hit in the chest when he and one of his opponents collide, and the blow causes traumatic pneumonia resulting in the death of the insured in a few days, the death is caused by accidental means within the terms of a life insurance policy providing for double indemnity if the insured should die of bodily injury inflicted solely through external, violent, and accidental means or from bodily poisoning or infection occurring simultaneously with and in consequence of such bodily injury, for although collisions with opponents could have been foreseen and the game was voluntarily engaged in, no such injury as suffered by the insured was probable or foreseeable, and, since the death was through accidental means, the distinction noted by some jurisdictions between accidental death and death by accidental means is inapplicable. *Harris v. Ins. Co.*, 385.

2. A private one and one-half ton motor driven truck is a "private motor driven car" within the meaning of that term as used in a policy of accident insurance. *Conyard v. Ins. Co.*, 506.

3. A policy providing for liability if the insured is injured "by collision or accident to . . . any motor driven truck" in which insured was riding, and requiring that there should be some external or visible injury to the vehicle, will not warrant a recovery where plaintiff's evidence tends only to show that his hand was crushed between the side of a truck and a frigidaire loaded therein when the frigidaire slid across the truck body when the truck was driven rapidly around a curve. *Kelly v. Ins. Co.*, 594.

4. The assured was found dead on the streets of a city. The plaintiff brought suit on a policy of accident insurance in which she was named beneficiary, and which provided for the payment of a certain sum if the assured was killed by being struck by a gasoline propelled vehicle: *Held*, the evidence that the assured met his death by being struck by a vehicle propelled by gasoline was sufficient to be submitted to the jury and uphold their verdict in plaintiff's favor. *Colbock v. Ins. Co.*, 716.

c Construction of Policy as to Total, Permanent Disability

1. Whether an insured has suffered disability within the meaning of a disability clause in a life insurance policy is ordinarily a question

INSURANCE R c—*Continued.*

for the jury, but where facts are admitted which establish that the insured had not suffered disability as defined by the policy the question is for the court. *Thigpen v. Ins. Co.*, 551.

2. In order for an insurer to be liable on a clause in a life insurance policy providing for the payment of a certain sum monthly in case the insured should become "wholly and continuously disabled . . . and wholly prevented thereby from pursuing any occupation whatsoever for remuneration or profit" the insured must suffer a disability preventing him not only from pursuing his usual employment but any other regular employment, and where in an action on the disability clause the plaintiff admits that the insured received $40.00 a month as court crier during the term of the alleged disability, the defendant's motion as of nonsuit is properly allowed. *Ibid.*

JUDGMENTS.

B By Consent.

a Parties Who May Enter Consent Judgment

1. County commissioners have authority to assent to consent judgment in proper instances. *Weaver v. Hampton*, 42.

b Jurisdiction of Clerk to Enter Consent Judgments

1. The clerk of the Superior Court has jurisdiction to sign a consent judgment in an action even while the action is pending before a referee. C. S., 593. *Weaver v. Hampton*, 42.

F On Trial of Issues.

b Form and Requisites

1. Where a judgment is ambiguous resort may be had to the pleadings and record to ascertain its meaning, but when it remains ambiguous and not supported by the record when thus considered a new trial will be awarded. *Tucker v. Bank*, 120.

2. Order in this case held not to require duplicate payment by principal and sureties on bond securing payment of monthly sums for support of minor child. *Walker v. Walker*, 210.

G Entry, Recording and Docketing.

a Lien and Priority—judgment creditors' right to priority in creditors' bill see Creditors' Bill D c.

K Attack and Setting Aside. (Granting of new trial see New Trial.)

c For Fraud or Conspiracy

1. While the courts will not permit the same attorney to represent both parties to an action, even colorably, in this action to set aside a judgment on the ground of conspiracy of the parties in procuring the judgment in order to defeat the plaintiff's recovery in an action pending against the defendant at the time of the rendition of the judgment sought to be set aside, the jury found upon conflicting evidence that the attorney in the action attacked did not act for both parties and did not enter into a conspiracy to procure a fraudulent judgment, and the verdict of the jury determines the rights of the parties. *Gilliam v. Saunders*, 206.

JUDGMENTS K—*Continued.*

f Procedure

1. An independent action to set aside a judgment may not be treated as a motion in the original cause where all parties to the prior action are not parties to the action to set aside the judgment. *Davis v. Brigman*, 680.

2. Remedy to set aside deed for failure to serve summons in tax foreclosure suit is by motion in the cause. *Davis v. Brigman*, 680; *Galer v. Auburn-Asheville Co.*, 683.

L Operation of Judgments as Bar to Subsequent Action. (Estoppel by record see Estoppel B.)

a Judgments of Nonsuit

1. A judgment as of nonsuit will not bar a subsequent action on the same cause of action where the evidence in the second action is not identical with the evidence in the first action. *Swaincy v. Tea Co.*, 713.

b Matters Concluded or Embraced in Pleadings

1. Where in an action against the receiver of a bank the main question decided is that the plaintiff individually owned a deposit in the bank, and an order is entered to that effect and directing the receiver to apply the deposit to certain notes of the depositor, upon the receiver's refusal to apply the deposit as directed, the order in the action will not bar the depositor from bringing a subsequent action to compel the application of the deposit to the notes as directed. *In re Bank*, 472.

2. A consent judgment entered by the parties in a suit to restrain the foreclosure of a mortgage, which judgment stipulates the amount the defendant should recover on the mortgage note and gives the plaintiff a certain length of time for its payment, is a waiver by the mortgagor of his right to set up the plea of usury, and his subsequent action for usury is properly nonsuited. *Dixon v. Osborne*, 480.

M Conclusiveness of Adjudication.

a Matters Concluded

1. Where in a proceeding for the condemnation of land by the State for the purpose of transferring same to the Federal Government for an inland waterway, chapter 266, Public Laws of 1925, chapter 44, Public Laws of 1927, chapters 4 and 7, Public Laws of 1929, the State denies the title of the defendants to the lands in question, and judgment is entered by the court upon its findings of fact that defendants were the owners in fee of the lands and were entitled to just compensation and damages resulting from such taking, and it is ordered that the cause be retained for trial upon the issue of the amount of compensation and damages, and no appeal is taken from the judgment and the judgment is not reversed or modified according to law, it is conclusive in all respects upon the parties upon the issue of title. C. S., 601. *Myers v. Causeway Co.*, 260.

N Actions on Judgments.

b Foreign Judgments

1. A distress judgment of another state in a proceeding *in rem* in the nature of an attachment, obtained without personal service, is con-

JUDGMENTS N b—*Continued.*

clusive only to the amount of the value of the property seized and sold, and an action on the judgment may not be maintained in this State to recover the balance due on the judgment after deducting the amount brought by the sale of the property. *Smith v. Gordon*, 695.

Q Suspension and Enforcement.

d Proceedings Against Sureties on Bonds Executed to Insure Performance of Provisions of Judgment

1. Motion in original cause held proper remedy against sureties on bond given by order of court, the cause having been retained. *Walker v. Walker*, 210.

JUDICIAL NOTICE see Evidence A.

JURY. (Bribery of, see Bribery.)

A Competency of Jurors, Challenges and Objections.

d Partiality and Bias

1. In an action involving negligence in causing an automobile collision, counsel for plaintiff is entitled to ask the jurors whether they are connected with any liability insurance companies when such questions are asked in good faith and solely for the purpose of ascertaining whether the jurors are affected by partiality or bias, and whether good faith is exercised must ordinarily be left to the sound discretion of the trial court, and in this case defendant's objections to the questions are not sustained, there being nothing in the record to show bad faith. *Johnson v. Transfer Co.*, 420.

C Right to Trial by Jury.

a Preservation and Waiver of Right

1. Where the parties do not demand a trial by jury upon motion to set aside a tax foreclosure, and the court finds the facts, the parties are deemed to have waived a jury trial. *Madison County v. Coxe*, 58.

2. Where the judgment of the court states that the parties stipulated that the court should find the facts upon exceptions to the referee's report, objections that the issues were not submitted to the jury are untenable. *Smithfield Mills v. Stevens*, 382.

JUSTICES OF THE PEACE. (Justices' jurisdiction of summary ejectment see Ejectment B a.)

E Review of Proceedings. (Jurisdiction of Superior Court Upon Appeal see Courts A e.)

a Appeals from Magistrate's Court

1. It is required by statute that appeals from a judgment of the justice of the peace be taken to the next succeeding term of the Superior Court, with the right of appellant to ask for a *recordari* in proper cases, and where an appeal is not taken as prescribed, the appellee may ask that the appeal be docketed and dismissed and the judgment affirmed. C. S., 660. *S. v. Fleming*, 40.

2. Order allowing defendants to docket appeal from justice's judgment after expiration of time, although no motion for *recordari* was

JUSTICES OF THE PEACE E a—*Continued.*

made, is affirmed upon Superior Court's finding that defendants were not guilty of negligence and were induced to believe the case would be settled without appeal. *Barkley v. Patterson*, 803.

b Recordari

1. While an appellant has the right to a writ of *recordari* to bring up an appeal from the justice's court to the Superior Court where the appeal is not docketed in time through fault of the court or its officers, where the trial court finds upon conflicting evidence upon a motion for *recordari* that the appellant had been guilty of inexcusable neglect and laches in failing to perfect and docket his appeal, and that the petition for *recordari* was not applied for until execution had been issued and the judgment docketed more than sixteen months, the finding of the court upon the conflicting evidence is conclusive, and his order refusing to grant the writ of *recordari* will be affirmed. *Trust Co. v. Cooke*, 566.

LANDLORD AND TENANT. (Issue of tenancy in summary ejectment see Ejectment B.)

B Leases in General.

a Requisites and Validity

1. A lease for four years is binding upon the lessor's grantee although the lease is not registered where the deed expressly provides that it was subject to the lease. *Machinery Co. v. Post*, 744.

c Repairs. (Liability of owner of filling station for loss occasioned lessee from leak in pipes see Money Received A a 1.)

1. Plaintiff and defendant entered into a contract whereby plaintiff was to sell at retail gasoline bought from defendant at wholesale, and defendant was to furnish and install certain pumps and equipment necessary to such retail distribution, and plaintiff was to keep such equipment in repair. Plaintiff brought suit for loss occasioned by a defect in the pumps which caused them to deliver more gasoline than was indicated on the dial thereof. *Held*, defendant would be liable only for such loss as was occasioned by a defect in the pumps at the time of their installation, it being plaintiff's duty under the contract to keep the equipment in repair. *Burnett v. Texas Co.*, 460.

D Terms for Years.

c Termination by Destruction of Premises

1. Where the terms of a lease fully provide for the rights of the parties upon destruction of the property by fire such rights will be determined in accordance with the written agreement, without reference to C. S., 2352 or the common law. *Grant v. Borden*, 415.

d Termination or Cancellation Under Terms of Lease

1. A lease contract provided in one item that it was to run for a period of four years, and in a subsequent paragraph provided that if the lessee failed to pay the rent "or upon sixty days notice by either party" the lessee would vacate the premises. *Held*, the manifest intention of the parties was that the lease should run for the whole period of four years provided the lessee paid the rent as stipulated, and during the four-year period neither the lessor nor his assignee

LANDLORD AND TENANT D d—*Continued.*

would be entitled to possession of the premises upon sixty days notice so long as the lessee performed all the conditions imposed upon him, the lease having no provision whereby the term might be shortened at the option of the lessor. *Machinery Co. v. Post*, 744.

g Rights of Parties Upon Termination of Lease Before Expiration of Term

1. Where the lease of a tobacco warehouse for a term of years is executed in May and provides for the payment of the yearly rental in four equal installments on 15 September, 1 October, 15 October, and 1 November, and provides that if the premises are destroyed by fire a just proportion of the rent should be paid and the lease terminated, provided that if the fire occurs after the close of the season then the lessor shall not be called upon to refund any part of the rents paid, in an action between the parties to determine their rights upon destruction of the premises by fire on 30 December: *Held*, the contract did not contemplate a rental by the month, and the lessee is not entitled to recover any part of the rent paid, since the provision for the adjustment of the rent upon destruction of the property by fire did not require the lessor to refund any part of the rent paid during the tobacco season. *Grant v. Borden*, 415.

LARCENY—Receiving stolen goods see Receiving Stolen Goods.

LIBEL AND SLANDER.

A Requisites and Essentials.

b Defamation and Damage

1. Where in an action for libel the plaintiff not only proves losses of a financial nature, but also proves injury to her reputation and standing in the community tending to injure her in her calling or profession, defendant's contention that the action should be dismissed for failure to prove damages cannot be sustained. *Stevenson v. Northington*, 690.

B Privileged Communications.

b Qualified Privilege

1. Although falsity and actual or expressed malice must be shown to establish liability for an alleged libel where the defendant is under a qualified privilege, such malice need not be directed against the plaintiff personally, it being sufficient if the defendant was governed by a bad motive and did not act in good faith, and the instruction in this case that defendant would not be liable "unless it was done with some malice, not necessarily ill-will; but without just cause or excuse, why then that would end the case—that is to say, if it was done in good faith, why then that would end the case" when taken in connection with other portions of the charge is held not erroneous as failing to draw the distinction between actual and implied malice. *Stevenson v. Northington*, 690.

D Actions.

d Evidence

1. Evidence in this action for libel is held sufficient to be submitted to jury and overrule defendant's motion as of nonsuit. *Stevenson v. Northington*, 690.

LICENSES see Taxation B c.

LIMITATION OF ACTIONS. (For wrongful death see Death B a, for foreclosure of tax certificate see Taxation H b 1, 5.)

A Statutes of Limitations in General.

a Construction and Operation in General

1. C. S., 442, subsection 2 bars an action to recover the penalty for usury after the expiration of two years, and where more than two years has elapsed from the payment of alleged usury until the institution of an action on the debt alleged to have been tainted with usury, the defendant's counterclaim for twice the amount of usury charged is barred. *Trust Co. v. Redwine*, 125.

2. The amendment to C. S., 442 by chapter 231, Public Laws of 1931, barring the forfeiture of all interest for usury after the lapse of two years, is prospective in effect, and does not apply to a forfeiture of interest for usury when such forfeiture occurred prior to the enactment of the amendment. If the statute did affect forfeitures incurred prior to its enactment the defendant would have a reasonable time in which to maintain such forfeitures. *Ibid.*

3. Where the bar of the statute of limitations has been completed the Legislature may not repeal the bar by statute, since such action would affect a vested right. *Wilkes County v. Forester*, 163.

4. The general rule that the sovereign is not barred by the statute of limitations does not apply where the statute providing the remedy also prescribes a limitation. *Ibid.*

d Actions Barred in Ten Years

1. The assessment against abutting lands for street improvements is made a lien on the land superior to all other liens and encumbrances, chapter 56, Public Laws, 1915, and the ten-year statute of limitation is applicable thereto and not the three-year statute. *High Point v. Clinard*, 149.

e Claims Against Municipalities

1. Under the provisions of Michie's N. C. Code of 1931, 442, an action against a city to recover the value of a sewer system installed by the plaintiff and taken over by the city upon extension of its limits is barred after the lapse of two years from the accrual of the cause of action, and the bar is not affected by the payment by the city for certain pipe taken up and salvaged by the city when no claim therefor had been filed by plaintiff as the statute requires. *Moore v. Charlotte*, 37.

B Computation of Period of Limitation.

b Notice, Fraud and Ignorance of Cause of Action. (Contractual limitation in surety bond is unaffected by statute see Principal and Surety B e 1.)

1. A cause of action for the reformation of a deed for mutual mistake does not accrue until the mistake is discovered or should have been discovered in the exercise of ordinary care. C. S., 441(9). *Cheshire v. Jackson*, 773.

g Institution of Action

1. Parol evidence is not competent to show the identity of a "new action" commenced after nonsuit and the original action, and where

LIMITATION OF ACTIONS B g—*Continued.*

no complaint is filed in the original action, and the statute of limitations is properly pleaded in the "new action" the "new action" will be held barred when it is not commenced within the time allowed. *Drinkwater v. Tel. Co.*, 224.

C Matters Barring Plea or Constituting Waiver Thereof.

a Payment

1. The provisions of C. S., 416, that no acknowledgment or promise for the payment of a note will prevent the running of the statute of limitations unless the agreement be in writing and signed by the party to be charged, expressly exempts from its operation the effect of the payment of principal or interest on the note, and where the record shows that the interest on a mortgage note has been paid to within ten years of the institution of an action to restrain the foreclosure of the mortgage, the plea of the ten-year statute of limitations is bad, and the mortgagee is entitled to foreclosure, nothing else appearing. C. S., 437(3). *Grocery Co. v. Hoyle*, 109.

b New Promise

1. The three-year statute of limitations bars a simple action for debt, and where a letter relied on as arresting the running of the statute is written more than three years before the commencement of the action it is ineffective. C. S., 416. *Smith v. Gordon*, 695.

2. In order for a letter signed by the debtor to remove the bar of the statute of limitations it must contain an express, unconditional promise to pay or a definite, unqualified acknowledgment of the debt as a subsisting obligation, and a letter acknowledging the debt at the time defendant left plaintiff's city but claiming that it had been canceled by the creditor's action in selling the debtor's goods of a value greatly in excess of the debt, is not such an acknowledgment of a subsisting obligation as will repeal the statutory bar. *Ibid.*

E Pleading, Evidence and Trial.

c Evidence and Burden of Proof

1. Where the applicable statute of limitation is properly pleaded the burden is on plaintiff to show that the action is not barred thereby. *Wilkes County v. Forester*, 163; *Drinkwater v. Tel. Co.*, 224.

2. In an action on a note under seal a mere allegation that defendant was a surety on her husband's note, without supporting evidence, will not support her plea of three-year statute of limitations. *Hood, Comr., v. Boney*, 364.

LOTTERIES see Gambling.

MAGISTRATES see Justices of the Peace.

MALICIOUS CASTRATION see Mayhem.

MANDAMUS.

A Nature and Grounds of Remedy.

b Performance of Legal Duty

1. Mandamus will lie only to compel performance of a legal duty by a party having a clear legal right to demand performance, and the writ is erroneously granted on petition of a county superintendent

MANDAMUS A b—*Continued.*

to compel the levy of taxes for the payment of an additional salary to him as superintendent of a special-charter school district where the matter is in dispute between the board of county commissioners and the county board of education, and the boards have not had a joint meeting nor the clerk of the Superior Court called upon to arbitrate the matter. 3 C. S., 5608. *Rollins v. Rogers*, 308.

MANSLAUGHTER see Homicide C.

MASTER AND SERVANT.

A The Relationship.

b Distinction Between This and Other Relationships

1. One who represents another only as to the results of a piece of work, and not as to the means of accomplishing it, is an independent contractor and not a servant or employee. *Bryson v. Lumber Co.*, 664.

D Master's Liability for Injuries to Third Persons.

b Scope of Employment

1. The modern tendency is to give the rule defining "course of employment" a liberal and practical application, especially where the business of the master involves a duty to the public or to third persons. *Robertson v. Power Co.*, 359.

2. The evidence tended to show that defendant's employees were digging holes for telephone poles along defendant's right of way, that they were molested by yellow jackets, and in order to get rid of them set fire to a tree above their nest, that the fire was allowed to burn and spread until a large part of plaintiff's woods were destroyed: *Held*, the evidence was sufficient to be submitted to the jury on the issue of whether the damage was caused by defendant's employees while acting within the scope of their employment. *Ibid.*

F Workmen's Compensation Act.

a Validity, Construction and Application

1. The North Carolina Workmen's Compensation Law is constitutional. *Hanks v. Utilities Co.*, 155.

2. Under the provisions of section 8081(k) every employer and employee within the purview of the Compensation Act is presumed to have accepted its provisions. *Ibid.*

3. Where a demurrer is interposed in an action by the administrator of a deceased employee on the ground that the action is cognizable only by the Industrial Commission, and it does not appear from the face of the complaint that the defendant employed more than five men in this State, section 8081(u), the demurrer is properly overruled, it being necessary that the vitiating defect appear on the face of the complaint in order to be available on demurrer. *Hanks v. Utilities Co.*, 155; *Southerland v. Harrell*, 675.

4. Where a person duly appointed a deputy game warden is injured while engaged in assisting the county game warden, but at the time of his injury the appointment had neither been communicated to him nor accepted by him, the injury is not sustained while perform-

MASTER AND SERVANT F a—*Continued.*

ing service by virtue or color of the appointment, and the injury is not compensable under the Workmen's Compensation Act. *Birchfield v. Department of Conservation*, 217.

5. Under the facts of this case a newsboy engaged in selling papers is held not to be an employee of the newspaper within the meaning of that term as used in the Workmen's Compensation Act, the newsboy not being on the newspaper's payroll and being without authority to solicit subscriptions and being free to select his own methods of effecting sales, although some degree of supervision was exercised by the newspaper. *Creswell v. Publishing Co.*, 380.

6. An award inadvertently entered by the Industrial Commission after the death of the claimant is irregular, but not void, and the proceedings do not abate, the Compensation Act providing that upon the death of an employee from any cause other than the injury for which he was entitled to compensation, payment of the unpaid balance should be made to his next of kin dependent upon him at the time of his death. N. C. Code, 8081(ss). *Butts v. Montague Bros.*, 389.

7. Evidence tending to show that the deceased was engaged in hauling logs to a pond for the defendant, and that deceased was at liberty to haul the logs in his own way, employed his own assistants and owned the truck and trailer used by him in the work, and was paid a certain sum per thousand feet for the logs hauled, and that he was killed when his truck overturned in the performance of the work, *is held* to show that deceased was an independent contractor and not an employee, and the claim of his dependents for compensation should have been denied. *Bryson v. Lumber Co.*, 664.

8. In an action for wrongful death brought by the administrator of a deceased employee against a third person *tort-feasor*, and prosecuted for the benefit of the employer and his insurance carrier to recover the sum paid by them as compensation for the employee's death under the Compensation Act, N. C. Code, 8081(r), such third person may set up the employer's negligence in bar of recovery, since the employer will not be allowed to profit by his own wrong in causing the employee's death, and an order striking out the allegations in the answer setting up the employer's negligence is reversible error. *Brown v. R. R.*, 668.

9. The secretary and treasurer of an automobile sales company was injured while traveling to collect accounts due the company. *Held*, the officer was performing the ordinary and usual duties of an employee of such a company at the time of the injury, and not duties pertaining exclusively to an executive function, and such officer was an employee of the company at the time of the injury within the intent and meaning of the Compensation Act. *Hunter v. Auto Co.*, 723.

b Injuries Compensable

1. Where in a hearing under the Workmen's Compensation Act there is evidence that it was the employee's duty to collect accounts of his employer for goods sold upon the installment plan and that the employee endeavored to collect an account from a debtor and was

MASTER AND SERVANT F b—*Continued.*

struck by another also owing an account to the employer, the injury resulting in death, *is held* sufficient to sustain a finding by the Industrial Commission that the injury was the result of an accident arising out of and in the course of the employment, and was not the result of the employee's own wilful intent to injure or kill himself or another. *Winberry v. Farley Stores*, 79.

2. Evidence at a hearing before the Industrial Commission that the applicant for compensation was employed as a janitor at a public school, and that it was part of the services required of him to clean the building and to purchase cleaning material necessary therefor with money furnished him by teachers, and that it was customary for him to buy such material at a certain store while on his way to work, and that on his way to work he was struck and injured by an automobile while attempting to cross the street to the store to buy cleaning material according to his custom *is held* sufficient to show that the injury was from an accident arising out of and in the course of his employment, and the evidence not being conflicting, the question is one of fact, and the Industrial Commission's finding to the contrary is erroneous. *Massey v. Board of Education*, 193.

3. Where in a hearing before the Industrial Commission there is evidence that the claimant injured her back in an accident arising out of and in the course of her employment, that the insurer paid two weeks disability, and that thereafter claimant returned to her work, but collapsed after a period of almost twelve months after the injury, and became wholly disabled, that she complained of pain in her back throughout the period, together with medical expert opinion evidence that the claimant was suffering with myelitis and that it was the result of the injury to her back which arose out of and in the course of her employment, *is held* sufficient to sustain the award of compensation by the Industrial Commission, although there was conflicting expert testimony that the myelitis was not the result of the injury. *Clark v. Woolen Mills*, 529.

d Hearings by Industrial Commission

1. All the evidence which makes for the claim of an injured employee in a hearing before the Industrial Commission will be considered in the light most favorable to the claimant and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. *Massey v. Board of Education*, 193.

i Appeal and Review of Award

1. Where there is sufficient competent evidence to support the finding of the Industrial Commission that the accident resulting in the death of an employee arose out of and in the course of the employment and was not a result of the employee's own wilful intent to injure or kill himself or another, the finding is conclusive on the courts upon appeal. *Winberry v. Farley Stores*, 79.

2. Although the findings of fact of the Industrial Commission on conflicting evidence are final and not reviewable by the courts, the question of the sufficiency of the evidence to support its findings is a question of law and is reviewable, and where the evidence before the Industrial Commission in a hearing before it is not conflicting and the only question is whether it is sufficient to sup-

MASTER AND SERVANT F i—*Continued.*

port its finding relative to whether the injury arose out of and in the course of the injured employee's employment, the question is one of law and is reviewable by the court upon appeal. N. C. Code of 1931 (Michie), sec. 8081(j) (f). *Massey v. Board of Education*, 193.

3. Whether a person was an employee at the time of his injury is a question of law and reviewable where the facts are not in dispute. *Birchfield v. Department of Conservation*, 217.

4. An appeal from an award under the Workmen's Compensation Act operates as a supersedeas, and the award is not enforceable until the questions of law involved have been determined by the courts. *Butts v. Montague Bros.*, 389.

5. The findings of fact of the Industrial Commission are conclusive when based on any competent evidence. *Clark v. Woolen Mills*, 529.

6. The admission of incompetent evidence in a hearing before the Industrial Commission will not be held prejudicial where there is sufficient competent evidence to support the Commission's findings of fact. *Ibid.*

7. The finding of the Industrial Commission that the deceased was an employee is binding if supported by any competent evidence. *Bryson v. Lumber Co.*, 664.

8. The findings of fact of the Industrial Commission in a hearing before it that the claimant was not an employee within the meaning of the act at the time of the injury is a jurisdictional finding and is not binding on the Superior Court on appeal, and the Superior Court's finding from conflicting evidence that the claimant was an employee will be upheld upon further appeal to the Supreme Court. *Francis v. Wood Turning Co.*, 701.

9. Where upon appeal the Superior Court reverses the judgment of the Industrial Commission dismissing a proceeding under the Compensation Act on the ground that it was without jurisdiction for that the claimant was not an employee within the meaning of the act, the Superior Court should remand the case to the Industrial Commission for a finding as to whether the injury resulted from an accident arising out of and in the course of the employment, and judgment entered in the Superior Court ordering an award of compensation is erroneous. *Ibid.*

j Determination and Disposition of Cause in Superior Court

1. In a proceeding under the Compensation Act an award in favor of the claimant was entered and the employer and his insurance carrier appealed to the Superior Court. It appeared on appeal that the award was inadvertently entered after the death of the claimant. The Superior Court remanded the proceedings with direction that the Industrial Commission ascertain the next of kin dependent upon the employee at the time of his death. The Commission refused to hear the matter on the ground that it was deprived of jurisdiction by the appeal. Thereafter the employee's widow was made a party by order of the clerk of the Superior Court. The appeal was then heard in the Superior Court and dismissed on

MASTER AND SERVANT F j—*Continued.*

the ground that the proceeding abated upon the death of the employee, and the widow appealed. *Held*, the order dismissing the appeal was erroneous, and the Industrial Commission should have heard the matter as directed, and the cause is remanded to the Superior Court with direction that the Industrial Commission, after notice to the parties, find who was the next of kin of the deceased employee at the time of his death to the end that they may be made parties to the proceedings in the Superior Court and the appeal determined on its merits by judgment binding upon all parties. *Butts v. Montague Bros.*, 389.

G State Regulations as to Railroads' Liability for Injury to Employees.

a Applicability of State Regulations

1. The provisions of C. S., 3467, that in actions against a railroad company by an employee thereof contributory negligence shall not bar recovery but shall be considered only in diminution of damages and that no employee shall be held to have been guilty of contributory negligence where the violation of a statute enacted for the safety of employees contributed to the injury or the injury was caused by negligence, and the provisions of C. S., 3468 that no employee shall be held to have assumed risks resulting from the violation of such safety statutes by the employer or from its negligence, apply to an action by an employee of a logging or tram road to recover damages for an injury suffered by him in the performance of his duties. C. S., 3470. *Bateman v. Brooks*, 176.

2. In recognition of the imminently dangerous and hazardous character of railroad operations the General Assembly has provided by statute that in actions by employees of railroads to recover for injuries the fellow-servant rule shall not apply thereto, C. S., 3465, that contributory negligence shall not be a complete bar, C. S., 3467, and that the statutes should apply to logging roads and tramroads, C. S., 3470, but the acts apply only to employees who are engaged in duties connected with or incidental to the operation of such roads. *Gurganous v. Mfg. Co.*, 525.

3. Where the uncontradicted evidence discloses that defendant had operated a logging road, but that the tracks had been taken up at the time of plaintiff's injury, and all locomotives removed, and that plaintiff was injured while operating a motor engine on defendant's spur track around its manufacturing plant, and that plaintiff was engaged in dismantling defendant's lumber plant and machinery preparatory to transporting it to another point: *Held*, the defendant was not engaged in the business of a logging road at the time of the injury, and plaintiff may not recover for the injury so sustained when the jury has found that he was guilty of contributory negligence; spur tracks maintained in a mill yard for shipping, loading and unloading, being essentially plant facilities and not railroad. *Ibid.*

b Nature and Extent of Liability Under State Statutes

1. In an action to recover damages of a steam logging or tramroad and its foreman, evidence tending to show that the defendant company failed to repair or use air brakes on its cars and that the plaintiff was injured by slipping and falling between the moving cars while

MASTER AND SERVANT G b—*Continued.*

attempting to apply the hand brakes thereon by walking or running between them and using a brake wrench, and that the defendant's foreman and *alter ego* had directed the plaintiff to apply the brakes in this dangerous manner, *is held* sufficient to be submitted to the jury on the issue of the defendant's actionable negligence, the rules as to contributory negligence and assumption of risk prescribed by C. S., 3467, 3468 applying to the action. C. S., 3470. *Bateman v. Brooks*, 176.

c Assumption of Risks and Contributory Negligence

1. Where a rule promulgated by an employer for the safety of employees is constantly and habitually violated by the employees for a long period of time to the knowledge of the employer or his *alter ego* the rule becomes a dead rule and its violation by an employee may not be set up as contributory negligence in an action by the employee to recover damages for a negligent personal injury. *Bateman v. Brooks*, 176.

MAYHEM.

B Prosecution and Punishment.

c Sufficiency of Evidence and Nonsuit

1. The direct evidence of the guilt of one of the defendants in this prosecution for malicious castration under the provisions of C. S., 4210, and the circumstantial evidence as to the other's participation and guilt is held sufficient to overrule their motions as of nonsuit. *S. v. Ammons*, 753.

MENTAL DEFECTIVES—Sterilization of, see Constitutional Law I b 1.

MONEY RECEIVED.

A Right of Action and Defenses.

a Nature and Essentials of Right of Action

1. The complaint in this action alleged in substance that plaintiff ran a gasoline filling station leased by the defendant under an agreement that plaintiff would buy gasoline from defendant at one cent per gallon over the wholesale price and retail it for the retail market price, that the pumps were owned and controlled by defendant, that plaintiff discovered that he was losing money and repeatedly complained to defendant and suggested that the pumps were leaking, that defendant, with a reckless disregard for the truth of its statements, falsely represented that the pumps were in good condition and suggested that the loss was due to plaintiff's bookkeeping, that sometime thereafter plaintiff tested the pumps and found a shortage and that defendant then also tested them with the same result, that defendant tore up the concrete and discovered a leak in the pipes as big as a man's finger. Plaintiff prayed judgment for the amount he had paid defendant for gasoline which had leaked from the pumps as money had and received by defendant to the use of plaintiff: *Held*, the exact relationship between the parties is immaterial, and the complaint sufficiently states a cause of action for money had and received, and a demurrer thereto was properly overruled. *Andrews v. Oil Co.*, 268.

MONOPOLIES. (Creation of, by statute see Constitutional Law G c.)

B Combinations in Restraint of Trade.

a Applicability of Statutory Provisions

1. A demurrer is properly sustained in an action by a retailer of ice against wholesalers thereof for damages for their refusal to sell plaintiff ice on the same terms as those offered to other retailers in the city, it not appearing that the defendant were business competitors of plaintiff and C. S., 2563(3) not applying. *Rice v. Ice Co.*, 768.

MORTGAGES.

A Requisites and Validity.

c Acknowledgment

1. A notary public who owns a life estate in lands has no interest therein which would render his taking the acknowledgment of a deed of trust on the remainder in fee void. *Armstrong v. Jonas*, 153.

2. Where the private examination of a married woman is not taken to a deed of trust executed by her it is void. C. S., 997. *Boyett v. Bank*, 639.

B Instruments Constituting Mortgages.

c Equitable Mortgages

1. The plaintiff and her husband executed a note and signed a receipt in the amount thereof and used the proceeds of the note as a part of the purchase price of land, and executed a mortgage on the land to secure its payment. Plaintiff and her husband also signed an estoppel certificate stating that it was to be exhibited to prospective purchasers of the note and certifying that there were no defenses available to the payees against the payment of the note. The mortgage, although registered and regular on its face, was void because not properly acknowledged: *Held*, since a married woman has the power to contract under our present law, she can be held liable in equity for the return of the loan, and although equity will not compel the acknowledgment of the mortgage, it will declare the amount paid to her and used by her in the payment of the purchase price an equitable lien on the land prior to a valid but subsequently executed mortgage. *Boyett v. Bank*, 639.

C Construction and Operation.

a In General

1. The statutory provisions relating to foreclosure of mortgages and deeds of trust in force at the time of the execution of such instruments become a part thereof as much as though written therein. *Alexander v. Boyd*, 103.

b Parties and Debts Secured and Parties Liable

1. The wife joined with her husband in executing a note and duly registered mortgage on his lands for money borrowed by him. After his death, while this mortgage was outstanding and unpaid, the husband's executors and trustees conveyed the land to her for the purpose of having her mortgage the same in order to realize funds necessary for their use in carrying out the provisions of a

MORTGAGES C b—*Continued.*

trust imposed upon them by the husband's will. In accordance with this agreement she executed a deed of trust on the land with warranty of an unencumbered title, the *cestui que trust* having knowledge of the fact and purpose of the transfer of the land to her. The deed of trust was foreclosed and the property bought in by the *cestui que trust* for an amount more than sufficient to discharge the original mortgage: *Held*, the wife was but a surety on the original mortgage note and was discharged of personal liability thereon, the amount realized from the foreclosure of the subsequent deed of trust being more than sufficient to discharge the debt under the original mortgage. *Parsons v. Leak*, 92.

2. The grantee in a deed executed a contract-mortgage back to his grantor which provided that the grantee should support the grantor's mother, the grantee's mother-in-law, during her lifetime, pay all doctors' bills and provide her body a decent burial at her death, and the contract was made a charge upon the land and the instrument was duly registered. The mother died in Florida and the grantee borrowed a certain sum for the purpose of transporting her body back to North Carolina for burial in the family cemetery. After the burial the grantee obtained from the grantor the exact sum borrowed for the transportation, and repaid the lender, both parties construing the contract to include such transportation. *Held*, the sum was advanced in good faith by the grantor under the contract-mortgage, and the question of the reasonableness of the expenditure and whether the obligation to provide a decent burial reasonably included such transportation should have been submitted to the jury under instructions from the court. *Brady v. Presnell*, 659.

c Lien and Priority: Registration and Indexing. (Where provision for priority of first encumbrance is omitted from second encumbrance through mutual mistake, second encumbrance is subject to first although second encumbrance was first registered see Reformation of Instruments C d 1.)

1. Although the name of the wife should be shown on the index and cross-index of a deed or mortgage, where the records in the office of the register of deeds are sufficient to put a reasonable man upon inquiry which would have disclosed the name of the wife, a mortgage indexed and cross-indexed in such manner will not lose its priority over a later registered encumbrance on the same property. *Bank v. Cox*, 335.

d Property Mortgaged and Estates and Rights of Parties Therein

1. Ordinarily a mortgagee is not entitled to the rents and profits from the mortgaged premises even after default. *Parker Co. v. Bank*, 432.

G Satisfaction and Cancellation.

a Payment

1. Our statute prescribing that mortgages and deeds of trust on lands securing the payment of money shall be conclusively presumed to have been paid as against creditors or purchasers for value after fifteen years from the date on which the last installment of the debt was due unless an affidavit is filed with the register of deeds show-

MORTGAGES G a—*Continued.*

ing the unpaid balance, etc., is prospective in effect, and the act, being passed in 1923, does not affect a mortgage securing a note dated 6 September, 1911, and maturing 8 September, 1911. Michie's N. C. Code of 1931, 2594(5). *Grocery Co. v. Hoyle*, 109.

H Foreclosure.

b Right to Foreclose and Enjoining Foreclosure

1. An order restraining the sale of lands in a suit to foreclose under a mortgage executed thereon is not erroneous where the questions involved include a charge of usurious interest and an accounting between the parties to ascertain the amount due to the mortgagee to be settled at the final hearing of the cause, it being required of the mortgagee seeking the equitable relief of foreclosure to do equity, and the court below having found that irreparable injury would otherwise occur to the mortgagor and that the granting of the injunction would not result in harm to the mortgagee. *Thomason v. Swenson*, 759.

c Injunction and Receiver. (Grounds for injunction see hereunder H b.)

1. While ordinarily a mortgagee is not entitled to the rents and profits from the mortgaged lands even after default, where the foreclosure of the land has been restrained, and a commissioner to sell the land has been appointed by the court, and the land, pending the sale, has been placed in the hands of a receiver, the rents and profits from the land collected by the receiver pending the action should be applied to the payment of the mortgage debt as against the other creditors of the mortgagor where the sale by the commissioner brings an amount insufficient to discharge the mortgage indebtedness. *Parker Co. v. Bank*, 432.

g Foreclosure by Decree

1. Where under decree of foreclosure the lands have been repeatedly resold under the provisions of N. C. Code, 2591, and the commissioners in their report of the sixth resale call the court's attention to the number of resales and suggest that the demands for resale had not been made in good faith but to hinder and delay the plaintiff: *Held*, the court has the power in its discretion to order upon the hearing of the report that the last and highest bidder at future sales be required to deposit twenty-five per cent of the amount of his bid in cash or secured by bond to show his good faith. *Alexander v. Boyd, ante*, 103, cited and distinguished. *Koonce v. Fort*, 426.

h Requirements and Validity of Sale Under Power Contained in Instrument

1. Under the provisions of our statute, C. S., 2591, the last and highest bidder at a foreclosure sale obtains no interest in the land until the elapse of the ten-day period for the filing of an increased bid, and although the mortgagee or trustee may, in fixing the terms of the sale, require a reasonable cash deposit to cover the cost of the sale and insure completion of the sale by the purchaser if no upset bid is made, the reasonableness of such deposit may be determined by analogy to the deposit required for an upset bid, and where a deed of trust provides that the sale should be for cash,

MORTGAGES H h—*Continued.*

and the trustee, after notice, demands a cash deposit at the sale amounting to twenty-five per cent of the bid: *Held*, the amount demanded as a cash deposit is unreasonable, and where the last and highest bid of a proposed purchaser at the sale is refused because of his failure to make the required deposit, and the land is again exposed to sale and bid in by another who makes the deposit, an order restraining the executor of a deed to the second purchaser is properly continued to the final hearing. *Alexander v. Boyd*, 103.

2. The courts look with jealousy on the power of sale contained in mortgages and deeds of trust and the provisions are strictly construed. *Ibid.*

m Title and Rights of Purchaser

1. The last and highest bidder at a sale under decree of foreclosure of a deed of trust is but a proposed purchaser until the sale is confirmed by the judge, and upon confirmation the purchaser's title relates back to the date of sale, but where an appeal is taken from the order of confirmation and an appeal bond is filed to stay execution, C. S., 653, 654, 655, and the judgment of the lower court is reversed on appeal, the purchaser at the sale may be held liable to the mortgagor for the former's taking of immediate possession of the property after the confirmation appealed from. *Dixon v. Osborne*, 480.

n Resales

1. Where the last and highest bidder at a sale of lands under decree of foreclosure has been required under order of court to deposit a certain per cent of his bid in cash to show his good faith, he is entitled to receive his deposit back upon the entering of an order of resale by the clerk under the provisions of N. C. Code, 2591, upon the placing of an advanced bid and cash deposit by another. *Koonce v. Fort*, 426.

p Attack of Foreclosure

1. Where a mortgagee has received the surplus after foreclosure and has rented the land from the purchaser, any rights he may have on account of alleged wrongful foreclosure are waived by ratification. *Flake v. Building and Loan Asso.*, 650.

MUNICIPAL CORPORATIONS.

E Torts of Municipal Corporations.

c Defects or Obstructions in Streets

1. It is a positive duty of a city to keep its streets in a reasonably safe and suitable condition, and it may not escape liability for its negligent failure to do so on the ground that such duty is a governmental function. *Speas v. Greensboro*, 239.

2. In this action to recover for personal injuries sustained in a collision of an automobile with a traffic signal maintained by a city at a street intersection there was evidence that the lights of the signal were not burning at the time of the accident, and that the lights had not been properly lighted for a long period of time: *Held*, notice

MUNICIPAL CORPORATIONS E c—*Continued.*

of such defects may be implied, and the evidence was sufficient to be submitted to the jury on the question of whether the city had used due care to provide adequate lights. *Ibid.*

3. There was evidence that the driver of the car in which the plaintiff was riding as a guest was negligent in driving into a traffic signal at a street intersection, and that the city was negligent in failing to use due care in respect to the lighting of the traffic signal: *Held*, the negligence of the driver was not intervening negligence as a matter of law, since the probability of such injury should have been within the reasonable contemplation of the city. *Ibid.*

G Public Improvements. (Limitation of actions on assessments see Limitation of Actions A d 1.)

c Apportionment of Assessments and Persons Liable

1. Where the owners of land abutting upon a certain street in an incorporated town petition the town to improve the street under the provisions of C. S., 2710(1), and set forth in the petition that the owners on each side of the street be assessed one-half of the cost of the improvements, and the assessment roll is accordingly made up and the full amount of the cost of the improvement assessed against the abutting owners, one-half upon the lots on each side of the street in accordance with the front footage, and no objection is made thereto by the abutting owners after notice until the town threatens sale of the lots for the assessment liens: *Held*, under the terms of the petition, recognized and acquiesced in by the parties, the abutting owners were liable for the full amount of the cost of the improvements and they cannot successfully claim that the town was liable for a proportionate part of the cost. *Carpenter v. Maiden*, 114.

MURDER see Homicide.

NEGLIGENCE. (Of persons in particular relationships see Banks and Banking H g (liability of bank's receiver for negligent injury caused by defective elevator in building) Electricity A, Telegraph Companies A d, Food A, Municipal Corporations F, Master and Servant D, F, G; negligence in driving see Automobiles C.)

A Acts and Omissions Constituting Negligence.

c Condition and Use of Lands or Buildings

1. Neither the owner nor the manager of a store is an insurer of the safety of its customers, and in order for a customer to recover for injuries resulting from slipping and falling on a banana peeling on the floor of the store he must establish negligence. *Cooke v. Tea Co.*, 495.

2. Plaintiff entered defendant's drug store and asked to use a telephone. Defendant's clerk showed her into a rear room of the store where there was a phone, turned on a small light and left her. There were two doors leading from the rear room, one to the front of the store and the other to the basement, and there was sufficient light for both to be visible, and plaintiff, after using the phone, sought to go back to the front of the store, opened one of the doors, and

NEGLIGENCE A c—*Continued.*

without stopping to look, fell through to the basement, sustaining serious personal injury. *Held*, plaintiff was guilty of contributory negligence as a matter of law rendering it immaterial whether she was an invitee or licensee or whether defendant was negligent in failing to instruct her as to the basement door, and defendant's motion as of nonsuit was properly allowed. *Clark v. Drug Co.*, 628.

3. A complaint alleging in substance that plaintiff was an invitee on defendant's premises, that the steps leading from defendant's office were in an unsafe condition to defendant's knowledge, and that defendant knowingly failed to use due care to provide reasonably safe steps, and that plaintiff was injured as a proximate result thereof when she fell while attempting to leave defendant's office where she had gone on business as an invitee, is held to sufficiently allege a cause of action, and defendant's demurrer thereto was properly overruled. *Farrell v. Thomas Co.*, 631.

d Anticipation of Injury

1. A father and son each brought action to recover damages sustained by them by reason of injury to the minor son. The evidence tended to show that defendants were attempting to repair a wheel on a truck which the driver had parked on the highway because, due to the defective wheel, he was unable to move it, and while one of the defendants held an iron or steel bar against the wheel the other hit it with a sledge hammer in order to take the wheel off for repairs, that the son approached the truck and was hit in the eye by a particle which flew off the iron or steel bar, *Held*, judgment as of nonsuit was properly entered in each action, the evidence showing that the injury was caused by an accident which could not have been anticipated in the exercise of due care. *Hager v. Reed Band Co.*, 568.

e Res Ipsa Loquitur

1. Doctrine of *res ipsa loquitur* held to apply to fire originating at electric fixture. *Collins v. Electric Co.*, 320.

D Actions.

a Parties and Pleadings

1. A complaint alleging that the plaintiff had been informed by the manager of a building in which he rented offices as to a safety device on the elevator therein which would prevent the opening of the elevator door if the elevator was not in place at that floor, that the plaintiff was given a key to unlock the elevator doors so that he could use same in the operator's absence, that the plaintiff, at night, unlocked the door of the elevator shaft on the ground floor, and, relying on the safety device and being unable to see into the shaft because of defective lighting, stepped into the empty shaft to his injury *is held* not to show contributory negligence of the plaintiff as a matter of law, and the defendant's demurrer thereto was properly overruled. *Hood v. Mitchell*, 130.

2. Complaint held to sufficiently allege cause of action for negligent injury from unsafe condition of building. *Farrell v. Thomas Co.*, 631.

NEGLIGENCE D a—*Continued.*

3. Contributory negligence is a matter of defense and must be alleged and proven, C. S., 523, and it may not be taken advantage of by demurrer, and defendant's remedy to confine plaintiff to one of several acts of negligence is by application for a bill of particulars and not by demurrer. *Ibid.*

b Evidence and Burden of Proof

1. The burden is on the plaintiff to establish a causal relation between the alleged negligence and the injury in suit. *Lynch v. Tel. Co.*, 252.

2. All the elements of actionable negligence, including the element of causal relationship, may be proven by circumstantial evidence. *Ibid.*

c Nonsuit

1. Where the evidence on the question of contributory negligence is conflicting a motion as of nonsuit is improvidently granted. *Eversole v. Sprinkle*, 122.

2. Where the evidence is sufficient to support the allegations in the complaint alleging a cause of action for negligent injury, defendant's motion for judgment as of nonsuit is properly refused. *Swaincy v. Tea Co.*, 713.

E Culpable Negligence. (See, also, Homicide C, Assault and Battery.)

a Negligence of Defendant

1. Culpable negligence imports something more than actionable negligence in the law of torts, and is such recklessness or carelessness, proximately resulting in injury or death, as is incompatible with a proper regard for the safety or rights of others; and the violation of a safety statute regulating the use of highways does not constitute culpable negligence unless such violation is intentional, wilful or wanton, or unless the violation, though unintentional, is accompanied by recklessness or is under circumstances from which probable death or injury to others might have been reasonably anticipated. *S. v. Cope*, 28.

b Negligence of Deceased

1. Criminal liability for culpable negligence is unaffected by contributory negligence, as such, of the person injured or killed. *S. v. Cope*, 28.

NEGOTIABLE INSTRUMENTS see Bills and Notes.

NEW TRIAL.

B Grounds.

g Newly Discovered Evidence

1. Movant held to have failed to make out showing of newly discovered evidence sufficient in law to invoke discretionary ruling, and granting of new trial is reversed. *Crane v. Carswell*, 571.

C Motions for New Trial and Hearings.

c Right to Hear Motion or Grant New Trial After Term

1. The trial court is without authority to vacate a judgment of nonsuit and grant a new trial after adjournment of the term at which the

NEW TRIAL C c—*Continued.*

case was tried except by consent. In this case such order was entered by the trial court when called upon to settle the case on appeal. *Hinnant v. Ins. Co.*, 307.

NONSUIT see Trial D a, Criminal Law I j.

PARENT AND CHILD—Order for support of child upon divorce of parents see Divorce F; infant's right to maintain action for negligent injury see Infants G a.

PARTIES.

A Parties Plaintiff.

a Persons Who May or Must Bring Suit

1. An action for the reformation of a deed of trust for mutual mistake of the parties in the stipulation of the amount of the indebtedness may not be maintained by the trustee without the joinder of the holders of the mortgage notes, the notes being made payable to bearer and being negotiable, C. S., 2976, 2982, and in an action brought by the trustee alone the defendant's demurrer *ore tenus* on the ground that plaintiff was not the real party in interest, C. S., 446, 511, should have been sustained, and the provisions of C. S., 449, do not alter this result, the statute not being applicable to the facts of the case. *Bank v. Thomas*, 599.

PARTITION—As defense to action for waste see Tenants in Common B c.

PAYMENT. (Operation of check as payment upon insolvency of bank of deposit see Bills and Notes D b; presumption of payment of mortgage after lapse of time see Mortgages G a.)

B Application of Payment.

a Payer's Right to Direct Application of Payment

1. Where a debt consists of more than one item the debtor has the right to direct the application of moneys paid his creditor to a specific item thereof. *Dixon v. Osborn*, 480.

PENDING ACTION see Abatement and Revival B.

PLEADINGS. (In particular actions see Particular Titles of Actions.)

D Demurrer.

c "Speaking Demurrers"

1. Jurisdiction of Industrial Commission must appear from face of complaint to be available on demurrer. *Hanks v. Utilities Co.*, 155; *Southerland v. Harrell*, 675.

e Effect of Demurrer and Construction of Pleadings Upon Demurrer

1. Upon demurrer the allegations of the complaint are to be taken as true, and a demurrer to the sufficiency of the complaint will not be sustained if the complaint in any of its parts sufficiently alleges a cause of action. *Andrews v. Oil Co.*, 268.

2. Upon a demurrer the allegations of the complaint and the reasonable inferences therefrom are deemed admitted, and the demurrer will be overruled if any part of the complaint presents facts sufficient

PLEADINGS D c—*Continued.*

to constitute a cause of action or such facts can be reasonably inferred therefrom by a liberal construction with a view to substantial justice between the parties. C. S., 535. *Ibid.*

E Amendment of Pleadings.

a Power to Allow Amendment

1. It is within the discretionary power of the trial court to allow the filing of amended or supplemental complaints, and an amendment of a pleading may be allowed after verdict to conform the allegations to the proof. C. S., 547, 551. *Speas v. Greensboro*, 239.

J Defects, Objections and Waiver.

a Procedure to Raise Objection to Pleadings or to Take Effect of Defect

1. The remedy to confine plaintiff to one of several acts of negligence alleged is by motion for bill of particulars and not by demurrer. *Farrell v. Thomas Co.*, 631.

PLUMBERS—Licensing of, see Constitutional Law C b.

POLICE POWER see Constitutional Law C.

PRINCIPAL AND AGENT. (Brokers see Brokers.)

A The Relation.

a Creation and Proof of the Relationship

1. Evidence that defendant transacted business with plaintiffs for a long period of time in accordance with the terms of a contract alleged by plaintiffs to have been executed for defendant by its duly authorized agents, is sufficient to show ratification by plaintiff and constitute evidence of agency *aliunde* the acts and declarations of the alleged agents sufficient to render evidence of their acts and declarations competent, and the direct and circumstantial evidence of agency in this case together with the fact that the alleged agents were present in court and did not deny plaintiffs' testimony as to their acts and declarations is held sufficient to be submitted to the jury. *Maxwell v. Distributing Co.*, 309.

2. The manner and time in which the evidence *aliunde* as to agency may be introduced is largely in the discretion of the trial court. *Ibid.*

C Rights and Liabilities of Principal to Third Persons.

b Powers and Authority of Agent

1. An agent authorized to compromise a debt has the power to accept payment from the debtor in accordance with the debtor's directions as to the application of the payment to the items of the debt. *Dixon v. Osborne*, 480.

2. Under the evidence in this case the question of whether defendant's agent had authority to agree to a modification of the contract between the parties is held a question of fact for the determination of the jury. *Dirson v. Realty Co.*, 521.

f Ratification

1. The unauthorized acts of an agent must be ratified in whole or rejected in whole. *Maxwell v. Distributing Co.*, 309.

PRINCIPAL AND SURETY. (Guardianship bonds see Guardian and Ward H.)

B Nature and Extent of Liability on Surety Bonds.

c Actions on Bonds

1. Where the bond covering defalcation of a bank official provides that no action thereon should be maintained after six months from the termination of the bond, the contractual limitation is valid and bars an action on the bond after the expiration of the prescribed period although the defalcation was not sooner discovered because of the concealment of the official, nor is this result affected by the provisions of C. S., 441 that action against the official is not deemed to have accrued until the discovery of the facts constituting the fraud. *Hood, Comr., v. Rhodes*, 158.

PROCESS.

B Service of Process.

d Service on Foreign Corporations

1. A Federal Land Bank created by act of Congress and deriving its right to own property and to do business in this State solely through a Federal statute is not a foreign corporation exercising such functions under express or implied authority of this State, and C. S., 1137, relating to service of process on foreign corporations by service upon the Secretary of State is not applicable to such corporation, and our courts acquire no jurisdiction over it by such service. *Leggett v. Bank*, 151.

2. A traveling auditor for a foreign corporation who is a nonresident and who covers several states in the performance of his duties, and who is in this State intermittently and for short periods, is not a local agent for the purpose of service of process, the term local agent meaning an agent residing in this State permanently or temporarily for the purpose of his agency, and the fact that such agent received money for the corporation on a single instance does not alter this result, and service of process on such agent is not valid service on the corporation when such corporation has no property or place of business in this State. C. S., 483(1). *Lumber Co. v. Finance Co.*, 285.

3. Service of summons on Secretary of State in action against foreign corporation is upheld in this case, C. S., 1137. *Reich v. Mortgage Corp.*, 790.

RAILROADS. (As carriers see Carriers; liability for injuries to employees see Master and Servant G.)

D Operation.

b Accidents at Crossings

1. Evidence tending to show that defendant's train approached a crossing within a city's limits at an excessive rate of speed through a heavy fog without giving warning by bell or whistle, and struck plaintiff's truck, that plaintiff stopped his truck before attempting to cross, but failed to see or hear the approach of the train, *is held* sufficient to overrule defendant's motion as of nonsuit, there being no evidence that plaintiff could not have heard warning signals by bell or whistle had such been given. *Dancy v. R. R.*, 303.

RAILROADS D—*Continued.*

c Injuries to Persons on or Near Track

1. Evidence that plaintiff's intestate was last seen walking down defendant's railroad track a short time before defendant's train passed, that the train did not give warning of its approach, and that soon thereafter the intestate's bruised and cut body was found near the track at a place where the cinders of the track were scuffed as though a body had been shoved along, *is held* insufficient to resist defendant's motion as of nonsuit, negligence not being presumed from the mere fact of an accident on or near a railroad track, and the evidence failing to show the intestate's condition when he was struck, or that the alleged negligence in failing to sound a warning was the proximate cause of the injury. *Harrison v. R. R.*, 718.

RECEIVERS. (Creditors' bill see Creditors' Bill; receivers of banks see Banks and Banking H.)

A Nature and Grounds for Receivership.

a In General

1. While ordinarily a receiver will not be appointed for a debtor where insolvency is not shown, the appointment of a receiver in a general creditors' bill will not be held for error when the debtor joins in the request for the receivership and none of the creditors object to the appointment of the receiver, and the receiver is appointed for the benefit of all creditors and their rights are protected in accordance with their claims for priority, and the cause is retained by the court. *Dillard v. Walker*, 67.

C Title and Right to Possession of Property.

b Title and Liens of Third Persons

1. *Held:* contract was one of bailment, and bailor was entitled to possession as against bailee's receiver. *Realty Co. v. Dunn Moneyhun Co.*, 651.

RECEIVING STOLEN GOODS.

B Prosecution and Punishment.

b Evidence, Burden of Proof and Presumptions

1. Recent possession of stolen property, without more, is insufficient to raise a presumption of guilt of the statutory charge of receiving said property knowing it to have been stolen. C. S., 4250. *S. v. Lowe*, 572.

RECORDARI see Justices of the Peace E b.

REFERENCE.

A Proceedings.

a Order of Reference and Power to Refer

1. Order of reference in this case is affirmed, C. S., 573(5). *Trust Co. v. Green*, 780.

c Effect of Reference

1. An order of reference does not take the case from the jurisdiction of the court, the referee being merely an instrumentality of the

REFERENCE A e—*Continued.*

court, and the court has jurisdiction to hear and determine all proper motions in the cause pending the reference which are not in conflict with the order of reference, including the signing of a consent judgment by the parties. *Weaver v. Hampton*, 42.

C Report and Findings.

a Power of Court to Affirm, Modify, Set Aside, Re-refer, etc.

1. Where the Supreme Court has remanded a cause with direction that the order of the trial court in confirming the report of the referee be vacated and that further proceedings be had according to law, the trial judge has the power, the original reference having been by consent, to again refer the cause to the referee for additional findings in accordance with the opinion of the Supreme Court, such order being tantamount to vacating the order of confirmation, and the appellants being entitled to notice and a hearing before the referee with right of appeal. *Wilson v. Allsbrook*, 479.

E COSTS.

b Referee's Claim for Services

1. The claim of a referee for payment of services rendered in the cause which is still pending in the courts upon exceptions to his report is not barred by C. S., 441(8), nor is C. S., 1226, applicable thereto. *Bank v. Bank*, 378.

REFORMATION OF INSTRUMENTS.

C Actions for Reformation. (Trustee may not bring suit for reformation of deed of trust without joinder of holders of bonds see Parties A a 1.)

d Evidence and Burden of Proof

1. Defendant executed a crop lien to a bank to secure a loan. Thereafter he executed another lien on the same crop to secure the payment of fertilizer advanced by plaintiff. The bank's mortgage was first filed for registration, but was not registered until after the registration of plaintiff's mortgage. In an action to determine priority defendant testified that at the time of the negotiation he informed plaintiff's president and agent of the bank's mortgage and that they agreed that plaintiff should take a second lien, and that when plaintiff's mortgage was presented for signature defendant objected because it failed to provide that it should be subject to the bank's mortgage, and that plaintiff's agent assured defendant that the omission made no difference for the reason that registration would take care of the contemplated priority. Thereafter plaintiff learned that the bank's mortgage had not been properly registered. *Held*, the testimony was sufficient to be submitted to the jury on the question of the mutual mistake of the parties in the omission of the provision for the contemplated priority, and upon the rendition of a verdict adverse to plaintiff, judgment that the bank's mortgage had priority was properly entered. *Hubbard and Co. v. Horne*, 740.

REHEARING see Appeal and Error K f.

REMOVAL OF CAUSES.

C Citizenship of Parties.

b Separable Controversy and Fraudulent Joinder

1. Where the complaint in a suit against two defendants fails to allege a cause of action against the resident defendant the cause is removable to the Federal Courts upon motion of the nonresident defendant, the jurisdictional amount being established. *Brown v. R. R.*, 25.

2. The question of whether a cause of action is joint or separable is to be determined by the manner in which the plaintiff has elected to state his cause of action, the allegations of the complaint being controlling in this respect, but where in addition to alleging a joint action against both the resident and nonresident defendants the complaint also alleges facts sufficient to constitute an independent action against the nonresident defendant, a separable controversy arises and the cause is removable to the Federal Court upon motion of the nonresident defendant, the effect being to carry the entire cause to the Federal Court. *Ibid.*

3. Where the complaint in an action against a resident defendant and a nonresident railroad company alleges that the plaintiff was injured by the joint negligence of both defendants and also alleges that the nonresident defendant allowed its train to coast down hill while approaching a crossing, that the tracks were hidden by an embankment in a deep cut on a curve, that the driver of the wagon in which the plaintiff was riding as a guest could not have seen or heard the approach of the train, and that the engineer, upon seeing the heads of the horses pulling the wagon, gave an untimely signal which caused the horses to rear up and stop on the track, resulting in the injury: *Held*, the complaint states an independent cause of action against the nonresident defendant in addition to the joint cause alleged against both defendants, and the cause is removable to the Federal Court upon motion of the nonresident. *Ibid.*

4. A nonresident is entitled to the removal of the cause to the Federal Court if the complaint fails to state a cause of action against the resident defendant, or, if from an examination of the complaint, it appears that a separate cause of action is alleged against the nonresident, and the mere allegation of concurrent negligence will not defeat the right of removal. *Smith v. Ins. Co.*, 770.

RES IPSA LOQUITUR see Negligence A e.

RESTRAINT OF TRADE see Monopolies.

ROBBERY.

B Prosecution and Punishment.

c Evidence

1. The State's evidence tended to show that defendants went to the home of the prosecuting witness in the daytime, and robbed him of money at the point of a pistol. Defendants denied the robbery and offered testimony that they went to the home of the prosecuting witness for the purpose of buying whiskey. The trial court excluded

ROBBERY B c—*Continued.*

the testimony and defendants excepted: *Held*, the exclusion of the testimony constituted prejudicial error, the testimony being in explanation of defendants' presence in the home of the prosecuting witness. *S. v. Gillespie*, 533.

SALES.

F Warranties.

d Stipulations in Contract as to Manner and Time of Making Claim for Breach of Warranty

1. The parties entered into a written contract whereby plaintiff agreed to sell and defendant to buy certain store fixtures. The contract provided for partial down payment and the execution of notes for the balance of the purchase price, and that the use of the fixtures for a period of five days should constitute an acceptance thereof as being in conformity with the specifications of the contract, and that all complaint as to quality should be made in writing within ten days from delivery. Defendant's evidence tended to show that upon delivery of the goods he entered complaint that they were not up to the specified quality and were not made in a good and workmanlike manner, that plaintiff's secretary, treasurer and general manager made repeated visits to defendant's store and repeatedly promised to remedy the defects to defendant's satisfaction, and that no reference was made in such conferences to the stipulations in the contract relative to complaints. In an action to recover the balance of the purchase price: *Held*, the evidence viewed in the light most favorable to defendant was sufficient to be submitted to the jury on the question of whether plaintiff had waived the provisions of the contract prescribing that complaints as to quality should be made in writing and that use of the property for five days should constitute acceptance thereof. *Mfg. Co. v. Lefkowitz*, 449.

H Remedies of Buyer.

c Actions and Counterclaims for Breach of Warranty

1. In an action to recover the purchase price for goods sold and delivered the burden is on defendants to prove their defenses of breach of warranty and payment, and plaintiff is entitled to a new trial for the trial court's failure to so instruct the jury, although no request for such instructions was submitted, since the matter affects a substantial right of plaintiff. *Furst v. Taylor*, 603.

f Misrepresentation of Article and Fraud as Defense to Action for Purchase Price

1. In this action to recover the balance due on notes given by defendant for the purchase price of a case for the preservation and display of meats, defendant contended that the case was not as represented to him, and set up a counterclaim for loss sustained by reason of defects therein. *Held*, fraud may not be definitely defined by the courts, and defendant sufficiently alleged all the elements of fraud and deceit, and offered evidence sufficient to be submitted to the jury on the issue of whether defendant was induced to sign the notes by the false and fraudulent representations of plaintiff. *Supply Co. v. Conoly*, 677.

SALES—*Continued.*

I Conditional Sales. (Contract held not conditional sales contract but contract of bailment see Bailment A a.)

b Registration and Priority

1. Registered contract is good as against purchaser and parties claiming under him. *Brunswick Co. v. Bowling Alleys*, 609.

2. Unregistered conditional sales contract is valid as between the parties, including assignee of seller. *Realty Co. v. Dunn Moneyhun Co.*, 651.

d Rights and Remedies of Seller. (Right to remove chattels after they have been affixed see Fixtures.)

1. Where personal property is sold under a registered conditional sales contract and the purchase price is not paid in accordance with the agreement, the seller is the owner thereof and is entitled to possession as against the purchaser and all persons claiming under him. C. S., 3312. *Brunswick Co. v. Bowling Alleys*, 609.

2. An unregistered conditional sales contract is valid as between the parties. C. S., 3311, 3312, and where an automobile dealer sells cars under conditional sales contracts and assigns the contracts to a discount corporation for value, and the discount corporation repossesses the cars from the purchasers upon default in the payment of the purchase price, the discount corporation is the owner of the cars as against the purchasers and the dealer although the conditional sales contracts were not registered. *Realty Co. v. Dunn Moneyhun Co.*, 651.

SCHOOLS AND SCHOOL DISTRICTS. (Assumption of bonds of special tax district by county see Counties E b 2.)

D Government and Officers.

c Purchase of School Property and Equipment

1. The board of education of a county is required to provide suitable supplies for the public schools of the county and to pay for them by vouchers drawn by it within its appropriation on funds provided therefor by the board of county commissioners in the manner prescribed by statute, and where the county board of education has refused to purchase certain equipment because of lack of funds, and the county purchasing agent and chairman of the board of county commissioners purchases the same and gives a note for the purchase price signed by him in the name of the school for whose use the equipment was purchased: *Held*, the county is not liable on the note, the county purchasing agent having no connection with the county board of education. *Keith v. Henderson County*, 21.

f Compensation of Officers

1. Mandamus to compel payment of additional salary to county school superintendent held error in this case. *Rollins v. Rogers*, 308.

SEDUCTION.

B Prosecution and Punishment.

d Evidence

1. In a prosecution for seduction under promise of marriage the character evidence of the prosecutrix relied on as supporting evidence

SEDUCTION B d—*Continued.*

must tend to establish her good character at the time of the alleged seduction, and where the only "supporting testimony" relied on is testimony of the prosecutrix's good character two years prior to the alleged seduction, with no testimony as to her character subsequent to that time, the evidence is insufficient to be submitted to the jury and defendant's motion as of nonsuit should have been granted. *S. v. Patrick*, 299.

SERVICE see Process B.

STATES. (Application of statute of limitations to sovereign see Limitation of Actions A a 4.)

A Relation Between the States. (Action on foreign judgment see Judgments N b.)

a Conflict of Laws and Law of the Forum

1. Law of State in which insurance policy is executed control in the interpretation of the contract. *Ins. Co. v. Skurkay*, 227.

2. In an action on a debt contracted in another state in which the statute of limitations is pleaded the statute of limitations of the forum must govern. *Smith v. Gordon*, 695.

E Claims Against the State.

c Claims Against Agencies of State

1. An action against the Chief State Bank Examiner and the Commissioner of Banks, as his successor, to recover for an injury alleged to have been caused by the negligent condition of an elevator in a building under defendants' control as a part of the assets of an insolvent bank is held not an action against the State of North Carolina nor against the successive statutory receivers as agencies of the State, and the State has no interest in the action, the recovery being payable solely out of the assets of the insolvent bank. *Hood v. Mitchell*, 130.

STATUTE OF FRAUDS see Frauds, Statute of.

STATUTE OF LIMITATIONS see Limitation of Actions.

STATUTES.

A Requisites and Validity.

a Constitutional Requirements in Enactment

1. Where a statute required by the Constitution to be passed by the Legislature upon separate readings upon separate days with the aye and no vote recorded, Art. II, sec. 14, is not so passed and is therefore invalid, and a later act, amending to and referring to the former act, is passed in accordance with the constitutional provisions, the two acts will be construed together as one act, and the later act ratifies the former and renders it valid. *Reeves v. Board of Education*, 74.

c Retroactive, Curative and Ex Post Facto Statutes

1. The provisions of chapter 260, section 3, Public Laws of 1931, in so far as they attempt to revive the right to foreclose a tax certificate after such right had been barred under the provisions of N. C. Code

STATUTES A c—*Continued.*

(Michie), sec. 8037, is unconstitutional and void, but under the proviso in the act it would seem that it was not intended to so apply. *Wilkes County v. Forester*, 163.

2. N. C. Code of 1931, sec. 6464(a), providing that the beneficiary named in a policy of life insurance, or an assignee of such policy if the transfer is not made with intent to defraud creditors, shall be entitled to the proceeds of the insurance free from the claims of creditors of the insured cannot affect policies written before the effective date of the statute. *Comr. of Banks v. Yelverton*, 441.

e Rules of Construction in Relation to Constitutionality and Validity

1. An act will not be held unconstitutional unless its invalidity appears beyond a reasonable doubt, and where two reasonable interpretations are possible that one will be adopted which sustains the statute. *Stedman v. Winston-Salem*, 203.

2. Ordinarily, the constitutionality of a taxing statute is to be determined upon its inspection, and those matters of which the court may take judicial notice, with the burden on the taxpayer to show that it is unconstitutional in its application to him, the presumption being in favor of constitutionality. *Maxwell, Comr., v. Mfg. Co.*, 365.

B Construction and Operation.

a General Rules of Construction

1. A statutory regulation affecting method or procedure may be regarded as merely directory unless the procedure relates to a positive and essential legislative requirement. *Bryan v. Craven County*, 728.

STERILIZATION see Constitutional Law I b 1.

SUBROGATION.

B Operation and Effect of Subrogation.

b Right of Party Subrogated

1. Where a title guaranty company insures the title of certain lands for the benefit of the mortgagee, and is forced to pay the amount of a prior mortgage on the lands, the title company is subrogated to the rights of the mortgagee against the mortgagors, but can have no better right in this respect than the mortgagee. *Parsons v. Leak*, 92.

SUMMONS see Process.

TAXATION.

A Validity and Constitutional Requirements and Restrictions. (Assumption by county of debt of political agency see Counties E b.)

c Uniform Rule and Ad Valorem

1. The provision of Art. V, sec. 3, of our State Constitution that property shall be taxed according to its true value in money does not apply to income taxes. *Maxwell, Comr., v. Mfg. Co.*, 365.

2. While the Constitution, Art. V, sec. 3, does not expressly apply to trades and professions, it is held that the rule of uniformity in taxation also applies to them, but the rule does not prohibit the

TAXATION A c—*Continued.*

classification of trades and professions for taxation when the classification applies uniformly to all of a class and the classification is not arbitrary or unjust. *Roach v. Durham*, 587.

3. A statute imposing a license or privilege tax on persons engaged in the plumbing and heating business, but exempting from its operation persons engaged in the business in towns under a certain population is held not to be unconstitutional as creating an unjust, unreasonable or arbitrary classification, the classification by population not being of itself unjust, unreasonable or arbitrary, and the tax being levied equally and uniformly on all persons of the same class. *Ibid.*

d License and Franchise Taxes

1. Statute requiring licensing of plumbers and heaters held constitutional. *Roach v. Durham*, 587.

h Interstate Commerce

1. An income tax on a corporation doing an interstate business is not a burden on interstate commerce, such tax being a tax on net income allocated to the State in accordance with a proper apportionment of the corporation's operations and business in this State, and the State may set up the formula for determining the allocation of income. *Maxwell, Comr., v. Mfg. Co.*, 365.

B Kinds of Taxation and Liability of Persons and Property.

c Excise and License Taxes

1. Our State gasoline tax is an excise and not a property tax. C. S., 2613(i5). *Stedman v. Winston-Salem*, 203.

d Property Exempt from Taxation

1. Under the provisions of our Constitution, Art. V, sec. 5, the General Assembly is prohibited from levying a property tax on property owned by municipal corporations, but the prohibition does not extend to excise taxes, and under the provisions of C. S., 2613(i5), a municipality is liable for the gasoline tax on gasoline bought by it in bulk and distributed by it to its various departments for use in its governmental functions. *Stedman v. Winston-Salem*, 203.

2. Exemptions from taxation must be strictly construed in favor of the taxing power. *Ibid.*

e Corporate Stock and Excess

1. The tax on shares of stock of a bank is payable by the bank under the provisions of statute, it being required that the cashier or other proper officer of the bank pay the tax to the municipality levying it when the corporate excess is certified to the municipality by the State Board of Assessment, the tax being in the nature of a statutory garnishment against the bank, and the tax is a lien upon the land. N. C. Code, 7987. Public Laws of 1929, chap. 344. *Rockingham v. Hood, Comr.*, 618.

C Levy and Assessment.

a Listing and Assessment of Real Property

1. The question as to whether certain lands were validly listed for taxes for a certain year must be determined by the law in force at the time relating to the listing of property for taxes. *Madison County v. Coxe*, 58.

TAXATION C a—*Continued.*

2. Chapter 71, Public Laws of 1927, must be construed as a whole, and section 73 thereof requires that the chairman of the board of county commissioners shall examine the tax list and insert therein all property not given in, and shall charge the owner with the statutory penalty, and where the county list taker has inserted on the tax list certain property not given in by the owner for that year instead of calling the matter to the attention of the chairman, the listing of the property by the list taker is void, the duty of the chairman of the board of county commissioners in this respect being nondelegable. *Ibid.*

3. The valuation of property for taxation as fixed by the county is binding on the city in which the land is situate. *Bryan v. Craven County*, 728.

c *Levy and Assessment of Corporate Stock and Excess*

1. Where a bank does not appeal from the amount of the assessment on its stock as certified by the State Board of Assessment, the bank may not thereafter show that the amount of the assessment was erroneous because of the insolvency of the bank at the time of the assessment, and the tax duly levied prior to the closing of the bank may be collected from the bank's statutory receiver. *Rockingham v. Hood, Comr.*, 618.

2. Where the State Board of Assessment has certified the excess value of bank stock to the municipality in which the bank conducted its business, the Commissioner of Revenue has no authority to direct the tax accountant of the town to strike from his records the amount so certified because the bank stock was worthless by reason of the insolvency of the bank when the bank has not appealed from the assessment in the manner provided by the statute. *Ibid.*

f *Levy and Assessment of Income Taxes*

1. The income of a corporation from a unitary business may be allocated for the purpose of assessing income taxes against it to different states in which its activities are carried on, but such allocation must be based upon apportionment of productive capital, investment or employment, or some logical reference to the production of income, and the locus of its sales may not alone be made the basis of such distinction, the income from its sales being determined in relation to its capital, organization or efforts producing the sales, and where our State statute prescribes allocation in accordance with the corporation's capital outlay the statutory method will be deemed constitutional, with the burden on the corporation to show by evidence any outside factors rendering the application of the statutory method unconstitutional. *Maxwell, Comr., v. Mfg. Co.*, 365.

2. An income tax assessed against a corporation is not a tax upon its capital stock or franchise, and may be imposed in addition to a property tax, and in the allocation of its taxable income the locus of its capital stock need not be considered. *Ibid.*

3. Where the Commissioner of Revenue has assessed an income tax against a foreign corporation operating a manufacturing plant in this State in accordance with the provisions of secs. 311(a), (c), of

TAXATION C f—*Continued.*

the Revenue Act of 1929, allocating its income taxable by the State in accordance with the ratio between its tangible property within the State and its total tangible property without regard to its intangible property, consisting of capital stock, cash, accounts receivable, etc., the Commissioner's assessment will be upheld by the courts upon appeal where the corporation has failed to show that such method of allocation is unconstitutional in its application to the corporation, and the corporation's showing that its intangible property was not included in determining the ratio between its property within and without the State is not sufficient for this purpose, such intangible property being considered as the result and profits of its manufacturing operations in this State in the absence of proof that it resulted from operations without the State. *Maxwell, Comr., v. Mfg. Co.*, 365.

D Lien and Liability of Vendor and Purchaser.

a Date of Attachment of Lien on Realty and Liability of Successive Owners

1. Where condemnation proceedings are instituted by the State against certain property for the purpose of incorporating it as a part of the Great Smoky Mountain National Park, chapter 48, Public Laws of 1927, and the report of the appraisers is affirmed by the clerk upon appeal to him upon exceptions duly filed, and the owners do not remain in possession after the decree of confirmation: *Held*, the land is withdrawn from taxation by the sovereign as of the date of the decree of confirmation, and where such decree is entered in January the land is not subject to taxes listed against it the following April although the condemnation proceedings were not determined until a subsequent date, and this result is not altered by the provision of the statute that the fee could not pass to the State until the payment of the award, nor the provision permitting the commission to elect not to acquire the lands even after final judgment when such right is not exercised. *S. v. Floyd*, 292.

2. Where an option on certain land is executed to the Government on 20 May of a certain year and is followed by deed delivered to the Government 29 July, the land is subject to the taxes for the year, C. S., 7987, and also is land which the owners contract to dedicate to a city which contract is executed 27 June. *Bryan v. Craven County*, 729.

d Subrogation to Lien by Person Paying Taxes

1. Under facts of this case *held:* tax lien against land was discharged and plaintiff obtained no right of subrogation thereunder. *Guaranty Co. v. McGougan*, 13.

E Collection and Remedies for Wrongful Collection or Levy. (Collection by enforcement of lien see hereunder H.)

a Funds Subject to Payment

1. Where in proceedings for the condemnation of land by the State under chapter 48, Public Laws of 1927 for incorporation into the Great Smoky Mountain National Park the clerk confirms the report of the appraisers and retains the cause for adjudication of claims against the sum paid into the clerk's hands by the State as com-

TAXATION E a—*Continued.*

pensation: *Held*, the county wherein the land lies is not entitled to the payment of taxes out of such fund where the decree of confirmation was entered prior to date of the listing of the taxes and the compensation is paid subsequent to the listing date. *S. v. Floyd*, 293.

2. Construing chapters 427 and 428, Public Laws of 1931, and C. S., 1334(53), it *is held*, the liability of a landowner for taxes arises on July first of each year, and where land has been conveyed to the State for public park purposes (chapter 48, Public Laws of 1927) by deed executed in April the land is not subject to taxes for the fiscal year beginning the following July, it having been withdrawn from taxation by act of the State. *S. v. Fibre Co.*, 295.

F Payment and Discharge.

a Sheriff's Authority in Making Settlement

1. A sheriff has no authority to accept anything but money in payment of taxes. *Guaranty Co. v. McGougan*, 13.

b Transactions Operating as Discharge of Lien

1. The sheriff of a county advertised certain lands for sale for delinquent taxes. The owner executed a note for the amount of the taxes to the sheriff individually, the sheriff accepted the note in payment and discontinued the advertisement of the property, marked the taxes paid upon the proper record, detached the original receipt and attached it to the note. The sheriff accounted to the county for all taxes, including the tax in question, and upon discovery of a shortage, the surety on the sheriff's bond paid the amount of the shortage. The land in question was thereafter foreclosed under deed of trust executed prior to the year for which the taxes were due, which deed of trust provided for foreclosure for nonpayment of taxes. The sheriff assigned the note to his surety, who brought action seeking to enforce the county's lien against the land for the taxes: *Held*, the tax lien was discharged and neither the sheriff nor his surety may assert a claim thereunder. C. S., 7977, 7994. *Guaranty Co. v. McGougan*, 13.

c Apportionment of Taxes and Discharge of Lien by Part Payment of Total Taxes Due

1. Where land comprising several city lots is listed for taxation as one lot, and thereafter the owners execute an option on a part of the land: *Held*, under the provisions of C. S., 7987, as amended by chapter 306, Public Laws of 1929 and by chapter 83, Public Laws of 1931, it is lawful for the taxing authorities to apportion the taxes upon application of the owners even though the application is made after the land has been sold for taxes but before foreclosure of the tax certificate, and a judgment ordering that the lot optioned be released from the tax lien upon the payment of the taxes apportioned against it together with the payment of the personal tax assessed against the owners will be upheld, the statute applying to cases in which a subdivision of property has been made and the land assessed as an entity and it being immaterial whether the subdivision was made before or after the adoption of the amendment. *Bryan v. Craven County*, 728.

TAXATION—*Continued.*

H Tax Sales and Foreclosures.

b Foreclosure of Tax Certificates

1. Where a county has purchased certain land at a tax sale and elects to proceed to foreclose its tax certificate under the provisions of N. C. Code (Michie), 8028, the county is bound by the limitation prescribed by section 8037, and its action to foreclose such certificate is barred after the elapse of eighteen months from the date of the purchase of the certificate when the limitation prescribed by the statute is properly pleaded. *Wilkes County v. Forester*, 163.

2. After right to foreclose tax certificate is barred statute may not revive right by changing limitation. *Ibid.*

3. Where land owned by minors subject to their mother's dower right therein is sold for taxes and bought in by an individual, and foreclosure proceedings are instituted in which only the mother and her second husband are made parties: *Held*, the interest in the land of the mother and her second husband are divested by the proceedings, but the rights of the minors therein are not affected, they not having been made parties to the suit. *Guy v. Harmon*, 226.

4. Under our present procedure tax sales certificates on the lands of minors may be foreclosed by action in the nature of an action to foreclose a mortgage, the minor being represented by a guardian *ad litem* and his interests being subject to the supervision and protection of the courts, chapter 221, Public Laws of 1927, chapter 334, Public Laws of 1929, C. S., 451, and the provisions of C. S., 7984, and the last clause of C. S., 8038 in so far as they relate to minors are now ineffective. *Forsyth County v. Joyce*, 734.

5. Where a suit to foreclose a tax certificate is instituted against the person listing the property for taxation and the property is sufficiently described, the action is maintainable although the title to the land is in another, C. S., 8019, and where the owner is a minor and he is made a party and is represented by a guardian *ad litem* the first action is not discharged, and under the provisions of chapter 204, section 4, Public Laws of 1929, which extended the time in which tax foreclosure actions could be instituted on tax certificates issued in 1927 or prior thereto, an action instituted in September, 1929, against the person in whose name the land was listed to foreclose tax certificates for the years of 1924, 1925, 1926, and 1928, in which the minor owner was made a party by summons issued in February, 1932, and in which the minor owner was represented by a guardian *ad litem* who filed answer, is not barred by the statute of limitations. *Ibid.*

c Validity of Foreclosure and Attack

1. The owner of certain land failed to list same for taxes. The land was listed on the tax books in the name of a person other than the owner and was sold for delinquent taxes and bought in by the county and the tax certificate foreclosed: *Held*, the county could not convey a good title to the purchaser at the foreclosure sale it being necessary that the method for the listing and collection of taxes provided by statute should be followed. *Wake County v. Faison*, 55.

TAXATION H c—*Continued.*

2. Where upon petition and motion in the cause by the owners of land and the trustee and *cestui que trust* in a trust deed thereon to set aside a foreclosure of a tax certificate on the land it appears that the owners of the land and the trustee and *cestui que trust* lived in the adjoining county and were not personally served with summons or given notice of the proceedings and that the owners' residence was disclosed by his listing of the property for taxes for the previous year, and that the land was not lawfully listed for taxes for the year for which it was sold, and that the petitioners upon notice of the foreclosure filed their petition and tendered the amount of the taxes: *Held*, the foreclosure proceeding of the tax certificate is in a court of equity, and the trial court's decree setting aside the tax foreclosure will be sustained on appeal, the taxes remaining a lien on the land until they are paid, and the county being under duty to make restitution to the purchasers at the foreclosure sale. *Madison County v. Coxe*, 58.

3. Where a tax certificate has been foreclosed and deed made to the purchaser's assignee, the remedy of the former owner to set aside the deed on the grounds that summons in the foreclosure action was not in fact served and that the land was not properly listed for taxation and was insufficiently described, is by motion in the original cause and not by independent action, there being no allegation of fraud or any other ground of equitable relief, since, if the cause be treated as a suit to remove cloud upon title, it would be necessary to vacate the judgment in the foreclosure proceedings, and plaintiff's contention that he could not proceed by motion in the original cause because the grantee in the foreclosure deed was not a party to the original suit cannot be sustained, since the grantee is in privity with the foreclosure judgment and its validity could be attacked by motion in the cause after notice to the parties and their privies. *Davis v. Brigman*, 680.

4. The proper procedure to set aside a judgment entered in favor of the county in an action against the owner for taxes is by motion in the original cause, and where such judgment has been set aside upon motion after notice to the parties, the owner, in an action to remove cloud upon title, is entitled to judgment canceling the tax deed, C. S., 1743, the judgment for the taxes having been set aside and the owner having paid into court the amount of the taxes plus interest. *Galer v. Auburn-Asheville Co.*, 683.

5. Where a county has bid in certain property at a tax foreclosure sale and has assigned its bid to a third party, the assignee may be made a party to the action upon a motion in the cause by the owner to set aside the judgment for the taxes. *Ibid.*

TELEGRAPH COMPANIES.

A Liability for Negligence in Transmitting or Delivery of Telegrams.

d Measure of Damages

1. Plaintiff brought action against the defendant telegraph company to recover damages for its negligent failure to deliver plaintiff's telegram accepting an offer of a teaching position. The defendant contended that the plaintiff was entitled to nominal damages at most on the ground that there was no valid contract in that the

TELEGRAPH COMPANIES A d—*Continued.*

acceptance was not in the exact terms of the offer, and that the county school superintendent had not approved the officer's appointment. The jury answered the issue as to damage in the plaintiff's favor: *Held*, the issue, unobjected to, embraced the question of whether there was a valid contract, and the evidence cannot be held insufficient as a matter of law to support an inference that the discrepancy between the offer and acceptance was of an immaterial matter; and it appearing that the offerer had authority to employ teachers subject to the approval of the county superintendent, and had conferred with the superintendent regarding the offer in question, the jury could infer that the offerer had at least implied authority to make the contract. *Jolley v. Telegraph Co.*, 136.

TELEPHONE COMPANIES—Liability to customer injured by lightning coming over wires see Electricity A a 1.

TENANTS IN COMMON.

B Actions for Waste.

c Allotment and Partition as a Defense

1. One tenant in common may sue another for waste, and while a tenant in common is usually entitled to an allotment of that part of the common property on which in good faith he has made improvements and to have its value assessed as if no improvements had been made, where suit has been entered against one tenant in common by his cotenants to recover damages for the ponding of water upon the land and for waste in cutting trees thereon, and pending the action the defendant institutes proceedings in partition, and the action for waste is first upon the calendar: *Held*, the trial court's refusal to limit the action for waste to the issue of title and upon determination of the issue to have the land partitioned is not error, and the fact that the proceedings for partition is pleaded as a further defense does not affect the allegation in the complaint. C. S., 891. *Daniel v. Power Co.*, 274.

THREATS see Blackmail.

TRIAL. (Of criminal cases see Criminal Law I, of particular actions see Particular Titles of Actions.)

C Conduct and Course of Trial.

a Arguments and Conduct of Counsel

1. Plaintiff is entitled to question jurors in good faith relative to their connections with liability insurance companies. *Johnson v. Transfer Co.*, 420.

D Taking Case or Question from Jury.

a Nonsuit. (Operation as bar to subsequent action see Judgments L a, as affecting limitations see Limitation of Actions B g, Death B a 3; in negligence cases see Negligence D c.)

1. 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. *Lynch v. Tel. Co.*, 252.

TRIAL D a—*Continued.*

2. On a motion as of nonsuit the evidence is to be considered in the light most favorable to the plaintiff. C. S., 567. *Thigpen v. Ins. Co.*, 551.

b Directed Verdict

1. A directed verdict may not be given in favor of a party upon whom rests the burden of proof, nor may the court instruct the jury to answer the issue in his favor if they found the facts to be as all the evidence tended to show if the evidence on a material aspect of the case is uncertain. *McCoy v. Trust Co.*, 721; *Trust Co. v. Ins. Co.*, 764.

E Instructions.

c Form, Requisites and Sufficiency of Instructions

1. Although it is not required by law that the trial judge should state the contentions of the parties to the jury, C. S., 564, the practice has grown up in our courts as a helpful and accepted procedure, and a fair statement of the contentions of a party will not be held for error upon exception. *Trust Co. v. Ins. Co.*, 282.

2. Where in an action for breach of contract the defendant desires more specific instructions as to the measure of damages he should aptly tender a request therefor. *Maxwell v. Distributing Co.*, 309.

3. Failure to instruct the jury as to the burden of proof affects a substantial right and will be held for error even in the absence of a request for instructions. *Furst v. Taylor*, 603.

4. The failure of the trial court to define and explain the terms "proximate cause," "burden of proof," "greater weight of the evidence" in his charge to the jury in an action against an employer for negligent injury, will not be held for error where the simplicity of the case renders such explanations unnecessary and it is apparent that the jury could not have misunderstood the meaning of the expressions used when applied to the evidence. *Matthews v. Lumber Co.*, 725.

g Construction of Instructions

1. The charge to the jury will be construed as a whole, and where it is free from error upon such construction an exception thereto will not be sustained. *Collins v. Electric Co.*, 320.

h Additional Instructions and Redeliberation by Jury

1. In this case the jury was excused from Thursday until the following Tuesday while having the case under consideration. Upon resuming deliberations, the foreman inquired of the attending officer whether the judge would not again read his charge. The court was not informed of the request and did not reread his charge, but gave additional instruction upon request of defendant's counsel in the absence of plaintiff's counsel: *Held*, the plaintiff is entitled to a new trial upon his appeal from an adverse verdict, it being apparent that the minds of the jury needed refreshing in regard to the evidence and law under the facts disclosed by the record. *Burns v. Laundry*, 145.

2. All parties properly in court are charged with notice of proceedings while the action is pending and the court in session, and the court while in regular session may, except in certain cases, give additional instructions in the absence of counsel. *Ibid.*

TRIAL—*Continued.*

F Issues.

a Form and Sufficiency

1. Where the issues submitted are sufficient in form and substance to present all phases of the controversy to the jury an exception thereto will not be sustained. *Power Co. v. Richards*, 772.

c Tender of Issues

1. The trial court's refusal to submit issues tendered will not be held for error where there is no supporting evidence and the issues are not material to the trial. C. S., 584. *Norfleet v. Hall*, 573.

2. The refusal to submit issues tendered is not error when the issues tendered are not raised by the pleadings, C. S., 582. *Motor Co. v. Belcher*, 769.

G Verdict.

c Acceptance of Verdict by Court

1. Before a verdict is complete it must be accepted by the court, and where the verdict is inconsistent or conflicting the court may give additional instructions and direct the jury to again retire and bring in a proper verdict, and the court's action in so doing will not be held for error where such additional instructions do not contain any expression as to how the issues should be answered, but only explain the inconsistency and direct its correction. *Baird v. Ball*, 469.

H Trial by Court.

b Findings of Fact. (Review of findings of fact see Appeal and Error J c.)

1. The decision of the court upon an issue of fact should be in writing and should contain a separate statement of the facts and the conclusions of law. C. S., 569. *Walker v. Walker*, 210.

USURY.

A Usurious Contracts and Transactions.

b Effect and Liabilities for Usury

1. Defendant executed a note to the plaintiff, which note was renewed from time to time, usurious interest being charged and voluntarily paid upon the renewals. The plaintiff brought suit on the last renewal note more than two years after the charge of usurious interest: *Held*, although the defendant's counterclaim for the penalty for usury was barred by C. S., 442, subsection 2, the defendant was entitled to a forfeiture of the interest under C. S., 2306, but was not entitled to have the amount of interest paid applied on the principal of the note, and the plaintiff was entitled to recover the amount of the note sued on without interest. *Trust Co. v. Redwine*, 125.

C Actions. (Limitations of actions to recover for usury see Limitation of Actions A a 1, 2.)

a Pleadings

1. Our usury statute will be strictly construed, and usury must be pleaded. *Dixon v. Osborne*, 480.

VENDOR AND PURCHASER.

C Modification or Rescission of Contract.

a By Acts or Agreement of Parties

1. Defendant was under obligation to purchase certain lands at plaintiff's option at any time within one year. At defendant's request the agreement was extended for a year in order to give defendant time to dispose of the lot, and a memorandum of the extension was made on the bottom of the agreement: *Held*, the defendant was not relieved of his obligation under the agreement by plaintiff's failure to insist on performance within the time stipulated in the original agreement, the modification of the agreement being at defendant's request and by agreement with him. *Dixson v. Realty Co.*, 521.

F Remedies of Vendor.

c Action for Damages

1. Defendant gave plaintiff a written agreement to repurchase certain land at the contract price within a year if the plaintiff should be dissatisfied with the lot. In the plaintiff's action to recover for defendant's refusal to repurchase the land in accordance with the agreement there was evidence that plaintiff demanded that defendant repurchase the land, and that plaintiff was ready, able and willing to execute a deed therefor: *Held*, the evidence was sufficient to be submitted to the jury. *Dixson v. Realty Co.*, 521.

VENUE. (In criminal cases see Criminal Law D d.)

A Nature and Subject of Action.

b Actions Against Public Officers

1. Upon findings of clerk, approved by the court, that defendants were deputy sheriffs and that the action was to recover for alleged negligence in the performance of their duties, the clerk's order removing the action to the county of defendants' residence is affirmed. *Kanipe v. Kendrick*, 795.

c Transitory Actions and Residence of Parties

1. Where a foreign corporation has submitted to domestication in this State by filing its certificate of incorporation with the Secretary of State and by otherwise complying with the provisions of C. S., 1181, and has designated a certain county in this State as the location of its principal office and has filed a certified copy of its certificate of incorporation in the office of the clerk of the Superior Court of such county: *Held*, it thereby acquires the right to sue and be sued in the courts of this State as a domestic corporation, C. S., 466, and where it brings action on a note in the county of its designated residence the defendants are not entitled to removal to the county of their residence as a matter of right. C. S., 469, 463, 464. *Smith-Douglass Co. v. Honeycutt*, 219; *Smith-Douglass Co. v. Bailey and Co.*, 221.

2. Where a corporation institutes an action for damages in the county in which it maintains its principal place of business the denial of defendant's motion for removal to the county of its residence is properly denied. C. S., 469. *Oil Co. v. Fertilizer Co.*, 362.

VENUE A *c—Continued.*

3. Where a foreign insurance corporation has fully complied with the provisions of C. S., 6411, and has moved its head office to this State and has domesticated here, it acquires the right to sue and be sued in the courts of this State as a domestic corporation, C. S., 466, 467, 468, 469, and where it brings a transitory action in the county of its residence the defendants are not entitled to removal to the county of their residence as a matter of right, for although C. S., 1181, excludes insurance companies from its operation, the statutes will be construed in relation to their subject-matter, and the exception in C. S., 1181, being because insurance companies are exclusively dealt with elsewhere. *Ins. Co. v. Lawrence*, 707.

WAR RISK INSURANCE—Right to proceeds of, see Insurance N a 3.

WILLS.

B Contracts to Devise.

b Actions to Recover for Breach of Contract to Devise

1. Evidence tending to show that deceased was a bachelor and an old man and induced plaintiff to sell his lands and buy other lands as tenant in common with deceased, that plaintiff moved his family to the lands thus bought and lived with deceased as a member of the family, worked the lands and supported and took care of deceased in his old age, with testimony of declarations by the deceased tending to show that deceased had agreed to devise and bequeath plaintiff all his property in consideration of plaintiff's performance of his agreement, *is held* to show a definite contract by deceased to devise his property to plaintiff, and upon the death of the deceased intestate, is sufficient to be submitted to the jury in plaintiff's action against deceased's administrator for breach of the contract. *Hager v. Whitener*, 747.

2. Statute of frauds is not applicable to action to recover for breach of contract to devise. *Ibid.*

c Measure of Damages

1. In an action against the administrator of a deceased for breach of the intestate's contract to devise and bequeath all of his property to plaintiff, the measure of damages is the fair market value of the intestate's property at the time of his death. *Hager v. Whitener*, 747.

D Probate and Caveat. (Probate jurisdiction of clerk see Clerks of Court C c.)

m Costs and Attorneys Fees

1. An order allowing fees for attorneys for caveators out of the estate pending further proceedings after a mistrial in the caveat proceedings is erroneous. *In re Will of Howell*, 437.

E Construction and Operation.

a General Rules of Construction

1. A devise will be construed to be in fee unless a contrary intention is plainly expressed in the will, C. S., 4162, and the fee generally passes upon a devise of the proceeds of land when an intention to separate the income from the principal is not expressed, or

WILLS E a—*Continued.*

where the devise is general and the devisee is given the power of disposition, or a limitation over is made of such part as may not be disposed of by the first taker. *Hambright v. Carroll*, 496.

2. Although the intent of the testator as gathered from the whole instrument is controlling in the interpretation of a will, where there is no ambiguity in the language of the will it must be given effect. *Paul v. Willoughby*, 595.

3. A devise will be construed to be in fee simple unless an intention to convey an estate of less dignity is apparent from the will, C. S., 4162, and regard will be had to the natural objects of the testator's bounty, and the testator's intention as gathered from the whole instrument will be given effect unless it is contrary to some rule of law or public policy. *Jolley v. Humphries*, 672.

b Estates and Interests Created

1. The testator devised the remainder of his property to his three children and one grandchild, to be equally divided among them, with a later clause directing the executors to hold the share of the grandchild in trust and give her the proceeds from the estate until in their judgment she is able to manage it wisely herself, "but should she die without children, then what remains of her share becomes a part of my estate and is to be divided equally among my children." *Held*, the grandchild takes a fee in the property upon the termination of the trust, the first clause devising the land to the children and grandchild in fee, and the second clause not being inconsistent with the fee to the grandchild, there being no certain and express terms limiting it to a life estate, and the phrase "what remains of her share" connotating that nothing may remain and implying unrestricted power of disposition. *Hambright v. Carroll*, 496.

2. A fee may be limited after a fee by executory devise, but no remainder may be limited after a grant of an estate in fee simple, and where a devisee is devised certain lands in fee with power of disposition, and not merely a life estate with a naked power of disposition, with a limitation over of what remains of the estate to others if she should die without children, the devise conveys the absolute fee simple to the first taker, and the purported limitation over is void, there being no estate which the testator could limit over as a remainder. *Ibid.*

3. A devise to the testator's daughter "for her sole and separate use and benefit during the period of her natural life, and at her death to descend to the legal heirs of her body, if any, and if she should leave no legal heirs of her body surviving her" then to the other children of the testator, is held to convey the defeasible fee to the testator's daughter, and where the daughter leaves her surviving an illegitimate child such child is her legal heir, N. C. Code, 1654, and is entitled to the property as against the other children of the testator claiming under the will, although the child was born prior to the execution of the will. *Paul v. Willoughby*, 595.

4. The testator devised three tracts of land to his wife, each tract being described separately and the words of disposition being pre-

WILLS E b—*Continued.*

fixed to each description, and after the description of the third tract the will contained the following words: "to have and to hold the afore described real estate during the term of her natural life and at her death" to the testator's daughter. A later item devised the third tract to the daughter subject to the wife's life estate. *Held*, the words "afore described real estate" applied only to the tract immediately preceding, and the limitation over to the daughter applied only to the third tract, and the wife took the first two tracts in fee simple. *Jolley v. Humphries*, 672.

WITNESSES—Impeaching, corroborating, etc., see Evidence D f, Criminal Law G r; Competency of wife to testify in action in which husband is a party see Husband and Wife F c, testimony of communications between husband and wife see Criminal Law G p; testimony of transactions with decedent see Evidence D b.

WORKMEN'S COMPENSATION ACT see Master and Servant F.