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VOLUME 206

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NORTH CAROLINA REPORTS
VOL. 206

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1934

REPORTED BY
ROBERT C. STRONG

RALEIGH
BYNUM PRINTING COMPANY
STATE PRINTERS
1934

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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1934.

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,
T. W. BRUTON.

SUPREME COURT REPORTER:

ROBERT C. STRONG.

CLERK OF THE SUPREME COURT:

EDWARD MURRAY.

LIBRARIAN:

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*Died—May 20, 1934. Succeeded by Michael Schenck.

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.

*Appointed Justice of the Supreme Court 23 May, 1934, succeeded as Superior Court Judge by J. Will Pless, Jr.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
HEBBERT 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.
F. D. PHILLIPS	Thirteenth	Rockingham.
JOHN G. CARPENTER	Fourteenth	Gastonia.
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L. SPURGEON SPURLING	Sixteenth	Lenoir.
JNO. R. JONES	Seventeenth	N. Wilkesboro.
J. WILL PLESS, JR.*	Eighteenth	Marion.
Z. V. NETTLES	Nineteenth	Asheville.
JOHN M. QUEEN	Twentieth	Waynesville.

*Appointed Superior Court Judge 25 May, 1934, succeeded as solicitor by C. O. Ridings.

LICENSED ATTORNEYS

SPRING TERM, 1934.

List of applicants granted law license by the North Carolina Board of Law Examiners at Raleigh, N. C., 29 January, 1934.

ANGLIN, WILLIAM ENGLISH.....Burnsville.
BEAM, HUGH FERNLEY.....Marion.
BRASWELL, JAMES MILTON.....Elm City.
CLARK, WILLIAM NICHOLSON.....Rocky Mount.
COTTON, ALBERT HENRY.....Durham.
EAGLES, JOSEPH COLIN, JR.....Wilson.
ELAM, REUBEN LEE.....Shelby.
FAIRCLOTH, CROOM MAURICE.....Clinton.
GARRISON, FLOYD BRICE.....Concord.
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JONES, DAN HOLDEN.....Asheville.
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MONTFORT-BEBB, ALFRED LLEWELLYN.....Arden.
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POPE, JOHN HARBISON.....Durham.
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WALKER, ARCHIE COLIN.....Maxton.
WILCOX, TAYLOR WESTBROOK.....Winston-Salem.

COMITY LICENSEES.

COHEN, I. T.....Charlotte.
JAMISON, RALPH C.....Salisbury.
KEIGHLEY, WILLIAM.....Gastonia.

SUPERIOR COURTS, FALL TERM, 1934

The numerals in parenthesis 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, 1934—Judge Sinclair.

Beaufort—July 23‡; Oct. 1†; (2); Nov. 5* (A); Dec. 3†.
Camden—Sept. 24.
Chowan—Sept. 10; Dec. 17.
Currituck—Sept. 3.
Dare—Oct. 22.
Gates—July 30; Dec. 10.
Hyde—Oct. 15.
Pasquotank—Sept. 17†; Oct. 8† (A) (2); Nov. 5†; Nov. 12*.
Perquimans—Oct. 29.
Tyrrell—Oct. 1 (A).

SECOND JUDICIAL DISTRICT

Fall Term, 1934—Judge Devin.

Edgecombe—Sept. 10; Oct. 15†; Nov. 12† (2).
Martin—Sept. 17 (2); Nov. 19† (A) (2); Dec. 10.
Nash—Aug. 27; Oct. 8; Nov. 26 (2).
Washington—July 9; Oct. 22†.
Wilson—Sept. 3; Oct. 1†; Oct. 29† (2); Dec. 17.

THIRD JUDICIAL DISTRICT

Fall Term, 1934—Judge Small.

Bertie—Aug. 27; Nov. 12 (2).
Halifax—Aug. 13 (2); Oct. 1† (A) (2); Oct. 22* (A); Nov. 26 (2).
Hertford—July 30*; Oct. 15*; Oct. 22†; Nov. 26† (A).
Northampton—Aug. 6; Sept. 3; Oct. 29 (2); Dec. 10†.
Vance—Oct. 1*; Oct. 8†.
Warren—Sept. 17 (2).

FOURTH JUDICIAL DISTRICT

Fall Term, 1934—Judge Barnhill.

Chatham—July 30† (2); Oct. 22.
Harnett—Sept. 3*; Sept. 17†; Oct. 1† (A) (2); Nov. 12* (2).
Johnston—Aug. 13*; Sept. 24† (2); Oct. 15 (A); Nov. 5† (A) (2); Dec. 10 (2).
Lee—July 16 (2); Oct. 29† (2).
Wayne—Aug. 20; Aug. 27†; Oct. 8† (2); Nov. 26 (2).

FIFTH JUDICIAL DISTRICT

Fall Term, 1934—Judge Parker.

Carteret—Oct. 15; Dec. 3†.
Craven—Sept. 3*; Oct. 1† (2); Nov. 19† (2).
Greene—Dec. 10 (2).
Jones—Sept. 17.
Pamlico—Nov. 5 (2).
Pitt—Aug. 20†; Aug. 27; Sept. 10†; Sept. 24†; Oct. 22†; Oct. 29; Nov. 19† (A).

SIXTH JUDICIAL DISTRICT

Fall Term, 1934—Judge Daniels.

Duplin—July 23*; Aug. 27† (2); Oct. 1*; Dec. 3† (2).
Lenoir—Aug. 20; Sept. 24†; Oct. 15; Nov. 5† (2); Dec. 10 (A).
Onslow—July 16‡; Oct. 8; Nov. 19† (2).
Sampson—Aug. 6† (2); Sept. 10† (2); Oct. 22† (2).

SEVENTH JUDICIAL DISTRICT

Fall Term, 1934—Judge Frizzelle.

Franklin—Aug. 27† (2); Oct. 15*; Nov. 12† (2).
Wake—July 9*; Sept. 10*; Sept. 17 (2); Oct. 1†; Oct. 8*; Oct. 22† (2); Nov. 5*; Nov. 26† (2); Dec. 10* (2).

EIGHTH JUDICIAL DISTRICT

Fall Term, 1934—Judge Grady.

Brunswick—Sept. 3†; Oct. 1.
Columbus—Aug. 20 (2); Nov. 19† (2).
New Hanover—July 23*; Sept. 10*; Sept. 17†; Oct. 15† (2); Nov. 12*; Dec. 3† (2).
Pender—July 16; Oct. 29 (2).

NINTH JUDICIAL DISTRICT

Fall Term, 1934—Judge Harris.

Bladen—Aug. 6†; Sept. 17*.
Cumberland—Aug. 27*; Sept. 24† (2); Oct. 22† (2); Nov. 19*.
Hoke—Aug. 20; Nov. 12.
Robeson—July 9†; Aug. 13*; Sept. 3† (2); Oct. 8*; Oct. 15†; Nov. 5*; Dec. 3† (2); Dec. 17*.

TENTH JUDICIAL DISTRICT

Fall Term, 1934—Judge Cranmer.

Alamance—July 30†; Aug. 13*; Sept. 3† (2); Nov. 12† (A) (2); Nov. 26*.
Durham—July 16*; Sept. 3* (A) (2); Sept. 17† (2); Oct. 8*; Oct. 22† (A); Oct. 29† (2); Dec. 3*.
Granville—July 23; Oct. 22†; Nov. 12 (2).
Orange—Aug. 20 (2); Oct. 1†; Dec. 10.
Person—Aug. 6; Oct. 15.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Fall Term, 1934—Judge McElroy.

Alleghany—Sept. 24.
Ashe—July 9† (2); Oct. 15*.
Caswell—Oct. 15† (A); Dec. 3.
Forsyth—July 9 (A) (2); Aug. 27 (2); Sept. 24† (A) (2); Oct. 8 (A) (2); Oct. 22†; Nov. 5 (2); Nov. 19† (A) (2); Dec. 3 (A); Dec. 10.
Rockingham—Aug. 6*; (2); Sept. 10† (2); Nov. 19† (2).
Surry—July 9† (A); Oct. 1 (2).

TWELFTH JUDICIAL DISTRICT

Fall Term, 1934—Judge Alley.

Davidson—Aug. 20*; Sept. 10†; Sept. 17† (A); Oct. 1† (A) (2); Nov. 19 (2).
Guilford—July 9* (A); July 30*; Aug. 6† (2); Aug. 27† (2); Sept. 17* (2); Oct. 1† (2); Oct. 22* (A); Oct. 29† (2); Nov. 12*; Nov. 19† (A) (2); Dec. 3† (2); Dec. 17*.
Stokes—July 2*; July 9†; Oct. 15*; Oct. 22†.

THIRTEENTH JUDICIAL DISTRICT

Fall Term, 1934—Judge Clement.

Anson—Sept. 10†; Sept. 24*; Nov. 12†.
Moore—Aug. 13*; Sept. 17†; Sept. 24† (A); Dec. 10†.
Richmond—July 16†; July 23*; Sept. 3†; Oct. 1*; Nov. 19† (A).
Scotland—Oct. 29†; Nov. 26 (2).
Stanly—July 9; Sept. 3† (A) (2); Oct. 8†; Nov. 19.
Union—July 30*; Aug. 20† (2); Oct. 15; Oct. 22†.

FOURTEENTH JUDICIAL DISTRICT

Fall Term, 1934—Judge Sink.

Gaston—July 23*; July 30† (2); Sept. 10* (A); Sept. 17† (2); Oct. 22*; Nov. 26* (A); Dec. 3† (2).
Mecklenburg—July 9* (2); Aug. 27*; Sept. 3† (2); Oct. 1*; Oct. 8† (2); Oct. 29† (2), Nov. 12*; Nov. 19† (2).

FIFTEENTH JUDICIAL DISTRICT

Fall Term, 1934—Judge Stack.

Cabarrus—Aug 13 (3); Oct. 15 (2).
Iredell—July 30 (2); Nov. 5 (2).
Montgomery—July 9; Sept. 24†; Oct. 1; Oct. 29†.
Randolph—July 16† (2); Sept 3*; Dec. 3 (2).
Rowan—Sept. 10 (2); Oct. 8†; Oct. 15† (A); Nov. 19 (2).

SIXTEENTH JUDICIAL DISTRICT

Fall Term, 1934—Judge Harding.

Burke—Aug. 6 (2); Sept. 24† (3); Dec. 10 (2).
Caldwell—Aug. 20 (2); Nov. 26 (2).
Catawba—July 2 (2); Sept. 3† (2); Nov. 12*; Nov. 19†; Dec. 3† (A).
Cleveland—July 23 (2); Sept. 17† (A); Oct. 29 (2).
Lincoln—July 16; Oct. 15; Oct. 22†.
Watauga—Sept. 17.

SEVENTEENTH JUDICIAL DISTRICT

Fall Term, 1934—Judge Oglesby.

Alexander—Sept. 3 (2).
Avery—July 2*; July 9† (2); Oct. 15*; Oct. 27†.
Davie—Aug. 27; Dec. 3†.
Mitchell—July 23† (2); Oct. 29 (2).
Wilkes—Aug. 6 (2); Oct. 1† (2).
Yadkin—Aug. 20*; Dec. 10† (2).

EIGHTEENTH JUDICIAL DISTRICT

Fall Term, 1934—Judge Warlick.

Henderson—Oct. 8 (2); Nov. 19† (2).
McDowell—July 9† (3); Sept. 10 (2).
Polk—Aug. 27 (2).
Rutherford—Sept. 24† (2); Nov. 5 (2).
Transylvania—July 30 (2); Dec. 3 (2).
Yancey—Aug. 13† (2); Oct. 22† (2).

NINETEENTH JUDICIAL DISTRICT

Fall Term, 1934—Judge Finley.

Buncombe—July 9† (2); July 23 (2); Aug. 6† (2); Aug. 20; Sept. 3† (2); Sept. 17; Oct. 1† (2); Oct. 15; Oct. 29; Nov. 5† (2); Nov. 19; Dec. 3† (2); Dec. 17.
Madison—Aug. 27; Sept. 24; Oct. 22; Nov. 26.

TWENTIETH JUDICIAL DISTRICT

Fall Term, 1934—Judge Pless.

Cherokee—Aug. 6 (2); Nov. 5 (2).
Clay—Sept. 24 (A); Oct. 1.
Graham—Sept. 3 (2).
Haywood—July 9 (2); Sept. 17† (2); Nov. 26 (2).
Jackson—Oct. 8 (2).
Macon—Aug. 20 (2); Nov. 19; Nov. 26 (A).
Swain—July 23 (2); Oct. 22 (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. S. H. BUCK, 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

J. O. CARR, United States District Attorney, Wilmington.
JAMES H. MANNING, Assistant United States District Attorney, Raleigh.
D. M. STRINGFIELD, Assistant United States District Attorney, Fayetteville.
F. S. WORTHY, 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. HENRY REYNOLDS, Clerk; MYRTLE COBB, Chief Deputy; LILLIAN HARKRADER, Deputy Clerk; B. FRANK MILLIKAN, Deputy.

Rockingham, first Monday in March and second Monday in September. HENRY REYNOLDS, Clerk, Greensboro.

Salisbury, third Monday in April and October. HENRY REYNOLDS, Clerk, Greensboro: ELIZABETH HENNESSEE, Deputy.

Winston-Salem, first Monday in May and November. HENRY REYNOLDS, Clerk, Greensboro; ELLA SHORE, Deputy.

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

OFFICERS

CARLISLE HIGGINS, United States District Attorney, Greensboro.
ROBT. S. MCNEILL, Assistant United States Attorney, Greensboro.
MISS EDITH HAWORTH, Assistant United States Attorney, Greensboro.
BRYCE R. HOLT, Assistant United States Attorney, Greensboro.
WM. T. DOWD, United States Marshal, Greensboro.
HENRY REYNOLDS, 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

MARCUS ERWIN, United States Attorney, Asheville.
W. R. FRANCIS, Assistant United States Attorney, Asheville.
W. M. NICHOLSON, Assistant United States Attorney, Charlotte.
CHARLES R. PRICE, United States Marshal, Asheville.
J. Y. JORDAN, Clerk United States District Court, Asheville.

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ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1934

WALTER H. REID AND WIFE, GRACE REID; McKINLEY REID AND WIFE, EMMA REID; DORA P. REID (WIDOW); GENEVA WEAVIL AND HUSBAND, R. L. WEAVIL; SALLIE MOTSINGER AND HUSBAND, F. L. MOTSINGER; ALVERTA YOKELEY AND HUSBAND, J. R. YOKELEY; AND CONRAD REID AND CLARICE REID, BY THEIR NEXT FRIEND, H. O. SAPP, v. WESLEY REID AND WIFE, DAISY REID; P. C. REID AND WIFE, ADDIE REID; AND ROBAH R. REID AND WIFE, ETHEL REID.

(Filed 28 February, 1934.)

1. Appeal and Error J g—

Where the answer to one of the issues determines the rights of the parties the Supreme Court will not consider exceptions and assignments of error relating to other issues.

2. Adverse Possession C b—Evidence of adverse possession held sufficient.

Evidence of plaintiffs' testator's actual, open and notorious adverse possession of the land in question under known and visible metes and bounds, in the character of owner and adverse to the claims of all other persons held sufficient to be submitted to the jury. C. S., 430.

3. Adverse Possession A e—Possession of trustee under constructive trust held adverse to cestuis que trustents under facts of this case.

Plaintiffs' testator went into possession of land devised the testator's first wife. Testator married again prior to the death of his wife's testator, and left him surviving children by both the first and second marriages. Subsequent to the death of his wife's testator the land was advertised and sold at public auction to ascertain its market value to make settlement between the parties, and plaintiffs' testator bid in the property, and went into possession. The children by his first marriage left home

upon their coming of age, and plaintiff's testator, for over twenty years after the majority of the youngest child by the first marriage, possessed the land under known and visible metes and bounds, exercised such sole and adverse dominion over the property as its nature afforded, cultivated crops, made repairs, etc., paid taxes, and devised the property to be equally divided between all his children. Upon the children of the second marriage filing a petition in partition, the children of the first marriage filed answer pleading sole seizin, although they had not objected to their father's sole possession of the land for the many years previous, and one of them had returned and purchased part of the land from his father. There was also evidence that the father had settled with the children of the first marriage for their inheritance from their mother. *Held*, the children of the first marriage were barred by twenty years adverse possession, C. S., 430, from setting up their claim of sole seizin.

APPEAL by the defendants from *Sink, J.*, and a jury, at 5 June Term, 1933, of FORSYTH. No error.

This was an action brought by plaintiffs against defendants to partition certain land containing about 130 acres known as the "Wesley Fry Tract." John A. Reid died in December, 1928, leaving a last will and testament, dated 2 February, 1926, which was duly probated, in which he left "one share to be divided equal between all of my other children and my wife, Dora, her receive a child's part all of my property," *et cetera*. John A. Reid had nine children—three by his first wife, the defendants being his heirs at law by his first wife and six by his second wife, the plaintiffs being his heirs at law by his second wife. The defendants in their answer succinctly plead sole seizin.

The judgment of the court below is as follows: "This cause coming on to be heard and being heard before his Honor, H. Hoyle Sink, judge presiding, and a jury, and issues being submitted to the jury and answered by the jury as follows: (1) Was the land described in the petition purchased by John A. Reid, as alleged in the petition and the amendments to the petition? Answer: Yes. (2) Did John A. Reid enter into the possession of and hold said land as trustee for defendants, J. C. Wesley Reid, R. R. Reid and P. C. Reid, as alleged in the answer? Answer: Yes. (3) Did the defendants assert any claim to the title and ownership of the property described in the petition within ten years after their right of action accrued? Answer: No. (4) Did the said John A. Reid hold undisputed possession of the lands described in the petition under known and visible lines and boundaries adverse to all other persons, for 20 years prior to the time of his death? Answer: Yes. (5) Are the plaintiffs tenants in common with the defendants, Wesley Reid, P. C. Reid and R. R. Reid, of the lands described in paragraph 1 of the petition, as alleged in the petition and amendments to the petition? Answer: Yes. It further appearing to the court that subsequent to the bringing of this action and prior to the trial of this

action Dora Reid, the widow of John A. Reid, died, but no administrator was appointed or has been appointed, and as this action was determined in her favor and not against her interest, it is agreed by the parties hereto, without prejudice to the rights of the defendants to appeal, that the interest of the said Dora Reid might be awarded to her administrator hereafter to be appointed by the clerk of the court in the same manner and with the same force and effect as if the said administrator had been a party to this action.

It further appearing to the court that the plaintiffs in this action are all of the lawful heirs of Dora Reid; that all necessary parties save and except the administrator of Dora Reid are parties to this action. It is therefore, ordered, adjudged and decreed that the plaintiffs, Walter H. Reid, McKinley Reid, Geneva Weavil, Sallie Motsinger, Alverta Yokeley, Conrad Reid and Clarice Reid, and the defendants, Wesley Reid, P. C. Reid and Robah Reid, are tenants in common of the lands described in the petition.

It is further ordered, adjudged and decreed that the plaintiffs hereinbefore named are tenants in common to the extent of their pro rata interest in the one-eighth interest of Dora Reid, deceased, subject, however to the said interest being divested by the rights of the creditors of Dora Reid, deceased.

It is further ordered, adjudged and decreed that this case is remanded to the clerk of the Superior Court of Forsyth County to be partitioned under the partition petition according to the terms of the will of John A. Reid and according to law.

It is further ordered, adjudged and decreed that the costs of this action from the time of the filing of the answer by the defendants and transfer of the same to the civil issue docket to determine the ownership of the said property to this time be taxed against the defendants; all other costs of the partition proceedings to be taxed by the clerk according to law.

This 16 June, 1933. H. HOYLE SINK, *Judge Presiding.*"

Numerous exceptions and assignments of error were made by the defendants, who appealed to the Supreme Court. The material ones and the necessary facts will be considered in the opinion.

S. E. Hall, J. F. Motsinger and E. M. Whitman for plaintiffs.
Elledge and Wells for defendants.

CLARKSON, J. At the close of plaintiffs' evidence and at the close of all the evidence, defendants made motions in the court below for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions and in this we can see no error. For a determination of this controversy, we do not think it necessary to consider any except the fourth

issue: "Did the said John A. Reid hold undisputed possession of the lands described in the petition under known and visible lines and boundaries, adverse to all other persons, for 20 years prior to the time of his death? Answer: Yes."

It is well settled in this jurisdiction, that this Court will not consider exceptions and assignments of error arising upon the trial of other issues when one issue decisive of the appellant's right to recover has been found against him by the jury. *Ginsberg v. Leach,* 111 N. C., 15; *Sams v. Cochran,* 188 N. C., 731 (734); *Lilley v. Cooperage Co.,* 194 N. C., 250 (254).

We think there was sufficient evidence to be submitted to the jury on this issue. C. S., 430, is as follows: "No action for the recovery or possession of real property, or the issues and profits thereof, shall be maintained when the person in possession thereof, or defendant in the action, or those under whom he claims, has possessed the property under known and visible lines and boundaries adversely to all other persons for twenty years; and such possession so held gives a title in fee to the possessor, in such property, against all persons not under disability." C. S., 429.

In *Locklear v. Savage,* 159 N. C., 236 (237-8), speaking to the subject: "What is adverse possession within the meaning of the law has been well settled by our decisions. It 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." Citing numerous authorities.

Johnson v. Fry, 195 N. C., 832; *Gault v. Lake Waccamaw,* 200 N. C., 593 (602). On this aspect the court below charged the jury: "The law says that where one holds undisputed possession of any lands under known and visible boundaries, adversely to all other parties and claimants, that his title is ripened, whether he has a deed or whether he has not. In the instant case the petitioners contend and insist that John A. Reid held for twenty years openly and notoriously and in such manner as to put the world on notice that he contended that the land was his, and that for a period of twenty years prior to his death this dominion was exercised in such a manner as to put these defendants, who were his wards and for whom he had been guardian, upon notice, and that for twenty years prior to his death they did not assert any claim to

said land, that you should so find by the greater weight of the evidence; and if you shall so find you shall answer the fourth issue, Yes. If you shall not so find, you will answer it, No.

That twenty years would be after the youngest child became 21 years of age, because before they, or either of them, became 21 years of age, such a person under 21 years of age is under a disability and such disability as referred to in the statute read you by the court. The defendants, and each of them, contend that such period has not elapsed.

Gentlemen, with respect to what adverse possession is, the court has said, and I charge you, that it must be actual, one must be in the actual possession of the property; that it must be under known and visible boundaries; that it must be exclusive and hostile; and that it must be for the continuous period of twenty years.

If you are satisfied by the greater weight of the evidence, as the petitioners contend you should be, that John A. Reid, although he went in there as trustee, held in that manner for a period of twenty successive and continuous years prior to his death, then you should answer, if you shall so find by the greater weight of the evidence, the issue, Yes."

The exceptions and assignments of error to the above charge made by defendants cannot be sustained. The court below had theretofore charged the jury: "The second issue is: 'Did John A. Reid enter into the possession of and hold said land as trustee for the defendants, J. C. Wesley Reid, R. R. Reid and P. C. Reid, as alleged in the answer?" The court instructs you to answer that issue, Yes. The law made him a trustee for the defendants, and the court charges you to answer that issue, Yes."

This was a correct charge under all the evidence and a safe, salutary principle of law. The question for us to consider, although Jno. A. Reid went into possession of the land as trustee for defendants, were they barred under C. S., 430? We think so. The land in controversy originally belonged to Wesley Fry who died in 1892. He willed same to his wife, Emily Fry, and after her death (she died prior to her husband), to their two children, Malisa Reid—wife of John A. Reid—and Sarah Smith "each daughter or her heirs to receive one-half of the whole estate. I do hereby appoint, constitute and ordain John A. Reid and Riley Smith to be my executors," *et cetera.* John A. Reid had married a second time before the death of Wesley Fry. Sometime after Wesley Fry died, before 1897, the tract of land in controversy was sold—after advertisement—at public auction to ascertain its value to make settlement between the two interests, and was bid in by John A. Reid for about $1,105. He went into possession of same about 1897 and lived on it until he died in 1928—"called it his home. He farmed the land and had some wood cut from it and hauled to town, and did some repairing and building. He rented out a portion of the land."

"John A. Reid farmed the Wesley Fry tract just like all farmers, tended crops, tobacco and corn and wheat, cut wood, worked about away from home some. He was a carpenter and worked in the Union Cross wagon shops about one year, I believe. He built an addition to the house and remodeled the barn and built a tenant house. He built the tenant house some ten years before he died."

"He farmed like all of us try to do, raised all kinds of grain and stuff, and I think he cut wood and hauled, maybe cut some timber for the wagon shop, just working like a farmer would. He repaired the house and I think he built an automobile shed, and maybe repaired the barn some and built a tenant house. He made the repairs along at different times."

The defendants, P. C. Reid, became of age about 1897, J. C. Wesley Reid, about 1901, and Robah R. Reid, 1905. As each of them reached his majority he left home. P. C. Reid and Wesley Reid never did return except on visits, and Robah Reid returned and rented land from his father, John A. Reid. Robah continued to rent land from his father until about 1912 or 1913. During the 31 or 32 years that John A. Reid lived on the "Wesley Fry tract" of land, he treated it in every respect as other farmers treated their land in that community. He cut wood off the place and sold it, he remodeled and repaired buildings; he constructed new buildings and raised corn, wheat, tobacco and other crops on the farm. He listed the property for taxes and paid taxes on it. No one ever disputed his ownership of the property. He left a will, in which he provided for the disposition of his land, as well as his personalty, and he owned no other land at the time of the execution of his will and at his death. He provided for his widow and all of his children by both wives in his will, and named the defendant, Wesley Reid, as his executor and the defendants accepted their share of said John A. Reid's personalty under his will.

The present action was commenced 18 June, 1930. There was also evidence to the effect to indicate estoppel, that John A. Reid, the father of defendants, paid defendants their full interest in the estate of their grandfather, Wesley Fry. That defendant, J. C. Wesley Reid, purchased in 1922 about 20 acres of the Wesley Fry land from his father, John A. Reid. All of the defendants when John A. Reid died in 1928, were over 21 years of age and *sui juris*. This was a contest between two sets of children by the first and second wife of John A. Reid. In N. C. Practice and Procedure in Civil Cases (McIntosh), pp. 103-4, it is said: "Laches, or unreasonable delay, independently of any statute of limitation, will prevent relief in equity, upon the principle that equity aids the diligent and not the slothful. When a claimant has slept on his rights until the rights of innocent third persons have intervened, or it

would be otherwise inequitable to change the existing conditions, equitable relief may be denied, although the statute of limitation has not barred the claim. Conscience, good faith, and reasonable diligence are necessary to call forth the exercise of the peculiar powers of a court of equity. No particular rule can be given as to what will constitute laches; it must depend upon the circumstances of each case."

We think that defendants are barred by the statute C. S., 436, under the facts and circumstances of this case. Under the view we take of this case that the evidence on the 4th issue was sufficient to be submitted to the jury, and found in favor of plaintiffs. The many exceptions and assignments of error, as to the admission and exclusion of evidence, issues tendered, *et cetera,* made by the defendants become immaterial on this record. The court below gave the contentions fully for both plaintiffs and defendants and charged the law applicable to the facts. It may be said that the whole record of exceptions and assignments of error made by defendants are carefully and accurately set forth in accordance with the rules of this Court, but become immaterial except to those bearing on the 4th issue which cannot be sustained. In the record, we find in law

No error.

MAUDE PATTON ANTHONY v. TEACHERS PROTECTIVE UNION.

(Filed 28 February, 1934.)

1. Insurance I b—Misrepresentation in this case held not material and was not adequate cause for cancellation of policy.

Plaintiff, in her application for the policy in suit, failed to disclose in her written answer to a written question, that she had been treated within five years prior to the application by a physician, and the policy provided that insurer might cancel same for misleading statements in the application. The verdict of the jury, supported by evidence, established that the treatment which plaintiff did not reveal in her application was for an illness other than the cholecystitis causing the disability sued on, that prior to the application for the policy plaintiff had not suffered from cholecystitis, and that for five years prior to the application for the policy plaintiff had had no departure from good health other than that disclosed on the application. *Held,* the failure of plaintiff to disclose the treatment by the physician on the application was not a suppression of a material fact and was not adequate cause for cancellation of the policy. C. S., 6289.

2. Trespass A d—Definition of forceable trespass.

Forceable trespass is a high-handed invasion of the actual possession of another, he being present and forbidding, and although actual force need not be used, it is necessary that the trespasser by acts or threats

plainly imply the purpose to use force against resistance and create the reasonable apprehension that the party in possession must yield to avoid a breach of the peace, and even if the party's entry is peaceable he may become guilty of forceable trespass if he thereafter puts himself in open opposition to the occupant.

3. Trespass B c—Evidence of forceable trespass held insufficient.

Evidence tending merely to show that plaintiff was nervous and that defendant talked to her in a loud voice and accused her of having made false statements in her application to defendant's insurance company and that both parties became angry, and that thereafter plaintiff's brother put defendant out without the slightest opposition on his part *is held* insufficient to be submitted to the jury on the issue of forceable trespass, the evidence failing to disclose any offer of violence or the use of profane or indecent language, or threats, or any force or assault.

APPEAL by defendant from *Finley, J.*, at March Term, 1933, of BURKE.

The complaint states two causes of action. The first is for loss founded upon disability under a health and accident policy issued to the plaintiff by the defendant.

The plaintiff made application in writing for membership in the Teachers Protective Union, on 1 October, 1931. A certificate of membership, containing the following clause, was issued to her on 8 October, 1931: "In consideration of the statements, conditions and provisions of the application for membership, . . . the articles of incorporation and the constitution and general laws of the union, and all amendments thereto, which are on file in the office of the supreme secretary and are now hereby made a part of this certificate of membership." The certificate provides that "Benefits for sickness shall not be paid for any illness contracted prior to or within thirty (30) days after the date of the certificate of membership." The same provision is in the constitution and general laws. The certificate also provides that "The supreme officer shall have power to cancel a certificate of membership when it becomes evident that false or misleading statements were made in the application for membership or in application for benefits; or when it shall have been established that disability, for which claim is made, had its inception prior to membership in the union under this certificate." The same provision is in the constitution and general laws.

The plaintiff became sick on 7 January, 1932, and remained incapacitated and confined to her home during the time for which she makes claim. She filed proof of claim for benefits and a representative of the defendant notified her that on account of cholecystitis with which she was suffering and her failure to inform the defendant that she had been treated for this disorder she was not entitled to benefits under her policy.

The second cause of action is assault and forceable trespass committed by E. L. Cunningham, agent of the defendant, when he called at her home to settle the controversy between the defendant and herself growing out of her claim of loss.

The jury answered the issues as follows:

1. Did the plaintiff, prior to 1 October, 1931, have chronic cholecystitis or chronic inflammation of the gall bladder? Answer: No.

2. Had the plaintiff, prior to 1 October, 1931, been treated by Dr. J. J. Kirksey for chronic cholecystitis or chronic inflammation of the gall bladder? Answer: No.

3. At the time of applying for membership in the Teachers Protective Union did the plaintiff fail to inform the defendant or did she withhold information from the defendant that she had been treated by Dr. J. J. Kirksey in the spring of 1931 for chronic cholecystitis or chronic inflammation of the gall bladder? Answer: No.

4. If so, was the failure to so inform the defendant material to the risk applied for to be assumed? Answer: .....

5. Did the plaintiff at any time during the five years immediately before 1 October, 1931, have any medical or surgical advice or treatment or any departures from good health, other than the operation by Dr. J. B. Riddle in September, 1930, and if so, when and by what physician was she treated? Answer: No.

6. If so, did the plaintiff at the time of applying for membership in the Teachers Protective Union, fail to inform the defendant, or did she withhold information from the defendant that she had been so treated? Answer: No.

7. If so, was the failure to so inform the defendant material to the risk applied for to be assumed? Answer: .....

8. Did the plaintiff become disabled of sickness on or about 7 January, 1932, and if so, was chronic cholecystitis or chronic inflammation of the gall bladder the cause or one of the causes contributing to such sickness and disability? Answer: No.

9. Was the plaintiff on account of sickness from and after 7 January, 1932, totally disabled and necessarily and continuously confined to her house and regularly attended therein by a registered physician at least once a week solely by reason of such sickness? Answer: Yes.

10. If so, for what period of time and between what dates was she so confined? Answer: 7 January-20 April, 1932.

11. Did the defendant unlawfully enter upon the premises of the plaintiff and unlawfully and wilfully commit forceable trespass upon the person of the plaintiff, as alleged in the complaint? Answer: Yes.

12. If so, what damage, if any, is the plaintiff entitled to recover of the defendant? Answer: $1,000.

The plaintiff was given judgment on the first cause of action for $350 and on the second for $1,000.

The defendant excepted and appealed upon assigned error.

C. E. Cowan and Winborne & Proctor for appellant.

Mull & Patton, S. J. Ervin and S. J. Ervin, Jr., for appellee.

ADAMS, J. The defendant moved to dismiss both causes of action as in case of nonsuit and tendered prayers for directed instructions on all the contested issues that were answered. The court denied the motion and declined to give the requested instructions, and the defendant excepted.

The ground of all the exceptions addressed to these questions, as set out in the appellant's brief, is the asserted failure of the plaintiff to state in her application for membership that she had previously suffered illness and received medical treatment. This contention is based upon her answer to each of the following questions: Q. 5: "Are you now suffering from, or have you ever had any . . . gall or kidney stones . . . or any chronic or periodical mental or physical ailment or disease . . . or have you ever had or been advised to have a surgical operation?" A. "Yes." Q. 6: "Have you during the past five years had any medical or surgical advice or treatment or any departure from good health? If so, state when and what the duration." A. "Operation; 3 months; September, 1930. My physician at that time was Dr. J. B. Riddle. Address: Morganton, N. C."

These questions and the answers appear in the plaintiff's application for membership in the defending corporation and were subscribed on 1 October, 1931. At the trial the plaintiff testified that in the spring of 1931 Dr. Kirksey had treated her and that she had not given his name to the defendant's agent at the time she made her application. The defendant says that the statements contained in her application were representations (C. S., 6289) which, being in the form of written answers to written questions, are deemed to be material (*Insurance Co. v. Woolen Mills,* 172 N. C., 534), and that the withholding of information in regard to Dr. Kirksey's treatment was in effect the suppression of a material fact by reason of which the policy may be avoided at the election of the defendant.

In view of facts revealed by the record this position cannot be maintained. The verdict, supported by competent evidence, establishes these facts: Anterior to 1 October, 1931, the plaintiff had not suffered from chronic cholecystitis; Dr. Kirksey had not treated her for this infirmity; during the five years preceding this date she had had no departure from good health other than that which was attendant upon the operation

performed by Dr. Riddle. It is therefore evident that her failure to inform the defendant's representative that in the spring of 1931 Dr. Kirksey had treated her for a temporary indisposition is of negligible significance and in no event is adequate cause for canceling the policy.

The second cause of action consists of alleged forceable trespass on the premises of the plaintiff and alleged assault upon her person by the defendant's agent when he went to her home and undertook to settle a controversy between the plaintiff and the defendant founded upon the policy of insurance. The allegations directed to the second cause are specifically denied, and the immediate question is whether the evidence considered most favorably for the plaintiff is enough to warrant a recovery upon these allegations, or, indeed upon the answers returned to the eleventh and twelfth issues.

Forceable trespass is the high-handed invasion of the actual possession of another, he being present and forbidding. When a person enters upon the actual possession of another and by his language or conduct gives the occupant cause to fear that he will inflict bodily harm if the person in possession does not yield, his entry is forceable in contemplation of law, whether he causes such fear by a demonstration of force such as to indicate his purpose to execute his pretensions, or by actual threats to do bodily harm, or by the use of language which plainly implies a purpose to use force against any who may make resistance.

Even if the entry is peaceable, or by the express or implied invitation of the occupant, still if after coming upon the premises the defendant uses violent and abusive language and does acts which are calculated to produce a breach of the peace and is forbidden, he is guilty of forceable trespass, because although not a trespasser in the beginning, he becomes a trespasser as soon as he puts himself in open opposition to the occupant of the premises. It is not necessary that the occupant actually be put in fear, if the conduct or language of the trespasser be calculated to intimidate, alarm, put in fear or to create a breach of the peace—if there be such demonstration of force as to create a reasonable apprehension that the party in possession must yield to avoid a breach of the peace. The act complained of must have been with a strong hand, '*manu forti*," and this implies the exercise of greater force than is expressed by the words *"vi et armis."* Rudeness of language, mere words, or even a slight demonstration of force against which ordinary firmness is a sufficient protection will not constitute the offense. *S. v. Ray,* 32 N. C., 39; *S. v. Pearman,* 61 N. C., 371; *S. v. King,* 74 N. C., 177; *S. v. Gray,* 109 N. C., 791; *S. v. Davenport,* 156 N. C., 596; *S. v. Tyndall,* 192 N. C., 559.

Examined in the light of these principles the evidence does not justify the answers to the eleventh and twelfth issues. The testimony is concise.

The plaintiff was nervous; the defendant's agent talked to her in a loud tone and said that she had made false statements in her application for membership; both the plaintiff and the agent were angry; and the agent tried to persuade her to accept a check for $30.00 and to cancel the policy, and she declined the offer. The plaintiff's daughter requested the agent to leave the house, but she immediately asked "if he wanted to stay" until Dr. Kirksey came. He waited and a few minutes later, when they arrived, he had an interview with the physician and the plaintiff's brother, who, after the conversation had become electric, "got up" and without the slightest resistance "put the agent out." This incident, however, the plaintiff neither instigated nor encouraged.

The foregoing circumstances, appearing in the evidence for the plaintiff, may be conceded. Still, according to her evidence the agent made no threats, offered no violence, used no profane or indecent language, committed no assault, exerted no force, but was only insistent that the plaintiff's statements had misled the defendant and that she was entitled only to the sum he tendered. Indeed, the plaintiff testified, "My complaint is that he (the agent) accused me of making false statements." We find nothing in the agent's conduct that was calculated to result in a breach of the peace—nothing to make a case of forceable trespass; bare words, however violent, cannot of themselves constitute the force necessary to complete the offense. *S. v. Covington,* 70 N. C., 71.

The exceptions relating to the admission of evidence and the charge of the court are not of sufficient gravity to require a new trial.

We find no error as to the first cause of action but the defendant's motion to dismiss the second should have been allowed.

As to the first cause no error, and as to the second the judgment is Reversed.

IN THE MATTER OF THE INDEPENDENCE TRUST COMPANY AND GURNEY P. HOOD, COMMISSIONER OF BANKS, v. E. Y. KEESLER ET AL.

(Filed 28 February, 1934.)

1. Appeal and Error A e—The Supreme Court will not consider the constitutionality of a statute where it has become academic in the case.

In this case the proposed consolidation or reorganization of a bank with other banks was sought to be enjoined on the grounds that the statute under which such consolidation or reorganization was planned was unconstitutional, Public Laws of 1933, chap. 271. Subsequent to the institution of the action the Commissioner of Banks, upon the request of the board of directors of the bank, issued an order revoking all action taken in regard to such reorganization, and the trial court refused to find

that the parties proposed to consummate the merger or reorganization. *Held*, the finding was equivalent to a finding that no such purpose was contemplated, and the constitutionality of the statute need not be considered.

2. Banks and Banking B c: Corporations K a—Stockholders held estopped to deny existence of corporation as banking institution.

Stockholders of a bank making no challenge of its charter as a banking corporation for the many years during which it carried on a general banking business are estopped from denying its existence as a banking corporation upon a levy of the statutory assessment against their stock upon its later insolvency.

3. Banks and Banking H a—Statute providing procedure for levy of statutory liability on bank stock is constitutional.

The statute giving the Commissioner of Banks control of the assets of an insolvent banking corporation and providing the procedure for the levy of the statutory liability on its stock, C. S., 218(c) (13), is constitutional, the act not depriving the Superior Court of its constitutional jurisdiction in such matters.

4. Same—Levy of statutory liability on bank stock may be made prior to showing of necessity therefor to pay creditors.

The obligations of a contract are not impaired by chap. 113, sec. 13, Public Laws of 1927, which provides for the levy of the statutory liability on bank stock prior to a showing of necessity for such levy to pay the claims of depositors and creditors of the bank.

CLARKSON, J., not sitting.

APPEAL by defendants from *Harding, J.*, at Chambers, 17 July, 1933. From MECKLENBURG.

The appellants filed objections and exceptions to an assessment of stock held by them in the Independence Trust Company on the grounds stated in a written instrument entitled "Objections, exceptions and appeal to the Superior Court," among which are the following:

1. The appellants are advised and believe that the proceedings relating to such assessments and such alleged assessments are null and void, for that:

(a) The acts of the General Assembly of North Carolina, under which said Commissioner of Banks purports to act, are unconstitutional, null and void;

(b) The acts of said Commissioner of Banks and said Independence Trust Company in regard thereto are contrary to law, unconstitutional, null and void;

(c) The Independence Trust Company, at the time of said alleged proceedings, as appellants are informed and believe, was and is solvent and the purported levy of such assessment is contrary to the provisions of law and null and void;

(d) The appellants are advised and believe that the Commissioner of Banks and the Independence Trust Company have entered into an unlawful agreement or scheme under the provisions of which it is proposed to collect from the stockholders of the Independence Trust Company and particularly these appellants the par value of said stock for the purpose of organizing and promotion of a new banking corporation, and divert such proceeds so that the same shall not be for the protection of the depositors and creditors of said Independence Trust Company, all contrary to law;

(e) The appellants are informed and believe that it is the purpose upon the consummation of the organization of said new banking corporation, that the said new banking corporation will thereupon enter into a combine or consolidation with a new corporation to be organized in a similar manner by a corporation known as Page Trust Company, and a new banking corporation to be organized in a similar manner by a corporation known as North Carolina Bank and Trust Company, and the attempt of said banking commissioner to levy and collect any assessment against these appellants, as these appellants are advised and believe, is not necessary and not for the purpose of protecting depositors and creditors of said Independence Trust Company, but in furtherance of said agreement or scheme.

The plaintiffs moved to dismiss the "objections, exceptions, and appeal," denominated a cross-action, and the motion was denied. They filed a demurrer which was overruled, and then answered putting in issue the material allegations of the cross-action.

The record contains several exceptions and documents appertaining to the organization of the bank, amendments of its charter, stock assessments, balance sheets, etc., from which the appellants requested the court to find certain facts. The court adopted several of the facts as requested but declined to find the following:

9. That the said Independence Trust Company was solvent at the time when it was taken in charge by Gurney P. Hood, Commissioner of Banks, on or about 29 May, 1933.

15. That plaintiffs entered into an unlawful agreement to divert the funds of the Independence Trust Company to buy stock in a new banking corporation.

16. That it is the purpose of plaintiffs to merge or consolidate such new bank when organized, with two other proposed new banks when organized, one by the Page Trust Company, and one by the North Carolina Bank and Trust Company.

17. That the last examination of the Independence Trust Company by Gurney P. Hood, Commissioner of Banks, showed that said Independence Trust Company was solvent.

19. That the best interests of the creditors and stockholders of the Independence Trust Company will be conserved by the appointment of a receiver by the presiding judge of the Mecklenburg Superior Court.

20. That the Independence Trust Company is in imminent danger of insolvency.

The court further found as facts:

1. That the Independence Trust Company was properly chartered and organized as a banking corporation under the laws of North Carolina; that commencing in 1912 and continuously up until possession was taken by Gurney P. Hood, Commissioner of Banks of North Carolina, the Independence Trust Company operated and conducted a general banking business in the city of Charlotte; that each of the appellants was a stockholder in the Independence Trust Company when possession was taken by Gurney P. Hood, Commissioner of Banks of North Carolina; and that for many years prior to the taking of possession by Gurney P. Hood, Commissioner of Banks of North Carolina, each of the appellants and/or his predecessor owner of such stock dealt with said Independence Trust Company as a bank in the ordinary course of business.

2. That on 20 May, 1933, when Gurney P. Hood, Commissioner of Banks of North Carolina, took possession of the assets and business of Independence Trust Company, the Independence Trust Company was unable to meet its deposit liabilities as they became due in the regular course of business, and was insolvent.

It was thereupon adjudged:

1. That the Independence Trust Company is, and since 1912 has been, a banking corporation under the laws of North Carolina; and that its stockholders are subject to an assessment on account of their stock to the extent of the amount of the par value thereof in accordance with the provisions of chapter 5 of the Consolidated Statutes of North Carolina.

2. That Gurney P. Hood, Commissioner of Banks of North Carolina, since taking possession of Independence Trust Company on 20 May, 1933, is lawfully in control of the assets and business of the Independence Trust Company for liquidation in accordance with the provisions of chapter 5 of the Consolidated Statutes of North Carolina and in accordance with the provisions of chapter 271 (House Bill No. 1154) of the Public Laws of 1933, and the plan of reorganization filed and approved pursuant thereto.

3. That appellants' motion for the appointment of a receiver for the Independence Trust Company be and is denied.

4. That appellants' motion for an injunction to restrain the Independence Trust Company and Gurney P. Hood, Commissioner of Banks, from proceeding under and in accordance with the plan of reorganization be and is denied.

5. That appellants' motion to have the respective stock assessments levied against them declared null and void be and is denied; and each appeal from stock assessment is continued to be heard in regular course in the Superior Court in the manner provided by law.

The defendants excepted and appealed.

H. L. Taylor for appellants.
Stewart & Bobbitt for appellees.

ADAMS, J. In 1933 the General Assembly enacted laws for the reorganization of banks in North Carolina. Public Laws, 1933, chap. 271. Pursuant to authority thus conferred the board of directors of the Independence Trust Company proposed a plan for its reorganization and the appellants objected for the assigned reason that the act was passed in disregard of the organic law and is therefore null and void. The plan was approved; but on 6 October, 1933, the board of directors of the Independence Trust Company rescinded the resolution previously adopted, abandoned the reorganization, and requested the Commissioner of Banks to revoke such action as he had taken. With this request the commissioner complied by a formal order filed in the clerk's office on 28 October, 1933, a copy of which was duly certified to this Court. Indeed, the judge refused to find as a fact that the plaintiffs proposed to consummate a merger or consolidation of the Independence Trust Company with other banks. This we interpret as equivalent to a finding that no such purpose was contemplated. Whether the act of 1933 is constitutional is therefore a moot or academic question which requires no further consideration.

The appellants next insist that the stock assessments are invalid because the Independence Trust Company was not lawfully engaged in the business of banking. This position calls for reference to the act under which the company was organized and to subsequent acts by which its powers were enlarged.

The Charlotte Realty Company, incorporated on 26 July, 1905, was authorized to deal in and dispose of real and personal property, to lend money on bonds secured by mortgages, etc., and to transact on commission the general business of a real estate agent. Public Laws, 1901, chap. 2; 1 Pell's Revisal, chap. 21. In 1908 its charter was amended by increasing the authorized capital stock from $100,000 to $300,000; and afterwards by changing the corporate name to Charlotte Trust and Realty Company and by conferring upon it authority to act as guardian, trustee, etc., and to negotiate loans and to guarantee the payment of collections. On 19 February, 1912, the charter was again amended by changing the name to Independence Trust Company and

authorizing the corporation to "do the business of a commercial bank and of a savings bank" in addition to other enumerated powers.

It is contended by the appellants that corporations organized under the act of 1901 were not permitted to engage in the business of banking (Public Laws, 1901, chap. 2; sec. 5, 8; Pell's Revisal, chap. 21, sec. 1134, 1137), and by the appellees it is contended that this prohibition was remedied by a subsequent act which provided that all the provisions of law relating to private corporations not inconsistent with the business of banking should be applicable to banks. Public Laws, 1903, chap. 275, sec. 4; Revisal of 1905, sec. 234. It seems that the last amendment of the charter was made by virtue of this provision; but in any event the Independence Trust Company conducted a general banking business for a period of more than twenty years, during which its charter was never challenged by the State or the shareholders, and the appellants are now estopped to assail its corporate existence as a banking institution. Holding certificates of its stock under a claim of corporate capacity they cannot set up "either for themselves or on behalf of the corporation any irregularity in the organization for the purpose of shielding the corporation or freeing themselves from personal liability." 1 Thompson on Corporations, sec. 255.

Exception was taken to the adjudication that the Commissioner of Banks is in lawful control of the assets and business of the Independence Trust Company. It is argued that the General Assembly cannot transfer to the Commissioner of Banks the constitutional jurisdiction of the Superior Court and that section 218(c) (13) of the Consolidated Statutes, under which the assessments of stock were levied, is void. The argument is founded on a misapprehension. The Superior Court is not deprived of its constitutional jurisdiction. The act under consideration is procedural, and all the questions presented by this exception have been considered by the court and decided adversely to the contention of the appellants. *Corporation Commission v. Murphey,* 197 N. C., 42; *Murphey v. Corporation Commission,* 280 U. S., 534, 74 L. Ed., 598; *In re Trust Co.,* 197 N. C., 613; *Corporation Commission v. Stockholders,* 199 N. C., 586; *Corporation Commission v. Bank,* 200 N. C., 422; *Corporation Commission v. McLean,* 202 N. C., 77; *Hood, Comr. of Banks v. Martin,* 203 N. C., 620; *Hood, Comr. of Banks v. Holding,* 205 N. C., 451.

It is further contended that the obligation of the stockholders' contract is impaired by the levy of the assessments without a showing of its necessity; but this question, also, was exhaustively considered in the case of *Corporation Commission v. Murphey, supra.* Referring to chapter 113, section 13, of the Public Laws of 1927, *Connor, J.,* observed: "The contention that the foregoing statute is in violation of provisions

of the Constitution of this State, in that stockholders of insolvent banking corporations, under the procedure prescribed therein, may be deprived of their property without due process of law, or contrary to the law of the land, cannot be sustained." The reasoning upon which this conclusion was reached was clearly set forth in the opinion and was approved on appeal to the Supreme Court of the United States. *Murphey v. Corporation Commission, supra.*

We have examined the record in its relation to all the exceptions noted in the brief of the appellants and find no adequate cause for reversing or modifying the judgment of the trial court. The statutory provisions for the liquidation of insolvent banks by the Corporation Commission under the former law and by the Commissioner of Banks under the existing law do not purport to interfere in any manner with the equitable jurisdiction of the Superior Court. These statutes, as pointed out in the cases herein cited, do not deprive the holders of stock of any constitutional rights, since they have reasonable opportunity to be heard on all material questions before judgment is finally rendered. No merger is planned; no diversion of assets is contemplated or menaced; and as to the procedure we regard the verification of the answer as sufficient and the denial of the appellants' motion for judgment on the pleadings as free from error. Judgment

Affirmed.

CLARKSON, J., not sitting.

FIRST CAROLINAS JOINT STOCK LAND BANK v. H. A. PAGE, JR., FRANK PAGE, J. R. PAGE, THE SALVATION ARMY AND BROAD-ACRES ORCHARD COMPANY.

(Filed 28 February, 1934.)

1. Mortgages F b—Where mortgagee relies on assumption of debt by mortgagor's grantee, the grantee becomes principal debtor as between parties.

Where a mortgagor personally liable for the mortgage debt transfers his equity of redemption by deed in which the grantee by valid contract assumes the payment of the debt, and the mortgagee accepts or relies upon the debt assumption contract, as between the parties the grantee becomes the principal debtor and the mortgagor a surety, and the mortgagee may enforce the grantee's liability by suit in equity under the doctrine of subrogation, or by action at law as upon a contract made for the benefit of a third party. Whether the mortgagee may enforce such liability where the grantee's transferror is not personally liable for the mortgage debt, *quære?*

2. Same—Mortgagee's rights under debt assumption contract of mortgagor's grantee are subject to defenses existing between original parties.

While a grantee's contract assuming the mortgage debt upon the land may not be rescinded without the consent of the mortgagee after his acceptance of same, the contract inures to the benefit of the mortgagee as it exists, and, in the mortgagee's action thereon against the grantee, the grantee may set up the defense that the assumption contract was conditional, voidable or unenforceable at the time of its execution, or that the mortgagor had breached a condition subsequent, and although the mortgage notes may be negotiable, the law governing negotiable instruments does not extend to the assumption contract.

3. Same—Breach of condition subsequent by grantor held valid defense to mortgagee's action against grantee on debt assumption contract.

The respective owners of two tracts of land executed a contract, in consideration of mutual promises, etc., to convey each to the other their respective lands, the contract stipulating that each was to assume and pay the mortgage debt on the land to be transferred to him, and in accordance with the contract deeds were executed in which each grantee assumed and agreed to pay the mortgage debt on the land conveyed. Thereafter the mortgagee of one of the tracts of land sued the grantee thereof on the debt assumption contract in his deed, and the grantee set up the defense that his grantor had abandoned the contract and failed to pay the mortgage debt assumed by him in the exchange of deeds. *Held*, the defense was valid, and upon its establishment, the mortgagee was not entitled to recover.

APPEAL by Salvation Army from *Harding, J.*, at May Term, 1933, of RICHMOND.

Civil action to recover balance due on three promissory notes executed by H. A. Page, Jr., Frank Page and J. R. Page, payable to plaintiff, and secured by deeds of trust on three separate tracts of land, immediately thereafter conveyed to Broadacres Orchard Company, Incorporated, and subsequently conveyed to the Salvation Army, a Georgia corporation, with assumption of liability and agreement to pay said outstanding indebtedness on the part of the said last named grantee.

The facts upon which the case turns are as follows:

1. On 14 April, 1927, in consideration of three several loans, H. A. Page, Jr., executed and delivered to the plaintiff his note in the sum of $45,000, with J. R. Page and Frank Page sureties thereon, and secured by deed of trust on 1,906 acres of land; Frank Page executed and delivered to plaintiff his note in the sum of $47,000, with H. A. Page, Jr., and J. R. Page sureties thereon, and secured by deed of trust on 1,500 acres of land; and J. R. Page executed and delivered to plaintiff his note in the sum of $33,000, with H. A. Page, Jr., and Frank Page sureties thereon, and secured by deed of trust on 1,564 acres of land. These three tracts of land adjoin and make a total of 5,030 acres, more or less, known as "Broadacres," and are situate in Richmond and Scotland counties, North Carolina.

2. The said loans were negotiated pursuant to agreement and on behalf of Broadacres Orchard Company, a corporation owned principally by the Pages and controlled by H. A. Page, Jr.; and immediately thereafter, 28 April, 1927, the said three tracts of land were conveyed to said corporation, subject to the several deeds of trust above mentioned, but without agreement on the part of said grantee to assume and pay the mortgage debts. The aggregate balance of these loans was approximately $114,000 at the beginning of the year 1931.

3. At the same time the Salvation Army was the owner of a business piece of property situate in Norfolk, Va., and subject to a deed of trust securing a note in the sum of $125,000 held by the Massachusetts Mutual Life Insurance Company. It is suggested that neither Broadacres nor the Norfolk property was worth the indebtedness outstanding against it.

4. On 7 March, 1931, H. A. Page, Jr., and the Salvation Army, "for and in consideration of the mutual promises, agreements and benefits hereinafter mentioned," entered into a written contract by the terms of which:

(A) Page agreed to convey or cause to be conveyed to the Salvation Army "Broadacres" subject only to the indebtedness held by the plaintiff and secured by the three deeds of trust above mentioned, "which said three deeds of trust the party of the second part (Salvation Army) obligates and agrees to assume and discharge in accordance with the terms and maturity dates set forth and provided in said amortization notes thereby secured, and save the party of the first part harmless from any claim or demand by reason thereof."

(B) The Salvation Army agreed to convey the Norfolk property to Page subject only to the indebtedness held by the Massachusetts Mutual Life Insurance Company, "which said encumbrance the said H. A. Page, Jr., agrees to take and hereby assumes the full payment and discharge of the indebtedness thereby secured . . . further agrees to save harmless the said the Salvation Army from any and all further claims or demands which may be made thereunder."

5. The agreement of the Salvation Army to assume and to pay the indebtedness held by the plaintiff on Broadacres was dependent upon the agreement of H. A. Page, Jr., to assume and to pay the indebtedness held by the Insurance Company on the Norfolk property.

6. Pursuant to the agreement of 7 March, between H. A. Page, Jr., and the Salvation Army, an exchange of the properties was effected by the simultaneous execution and delivery of deeds dated 14 March, 1931, the Army conveying its Norfolk property to H. A. Page, Jr., with assumption clause inserted therein, and Page causing the Broadacres Orchard Company to execute and deliver to the Army deed for Broadacres in which it is stipulated that "the party of the second part by the accept-

ance of this deed hereby obligates and agrees to pay off and discharge in accordance with the terms, tenor, and conditions of the said three deeds of trust, and the three amortization notes thereby respectively secured, and thereby save the party of the first part, its successors, or the grantors of said deeds of trust and the makers of said amortization notes, or the endorsers thereon, their executors, administrators or representatives, harmless, released and fully discharged from any claim or demand of any kind or nature, by reason of said deeds of trust or notes, the same having been assumed and taken over by the party of the second part as a part of the consideration for the execution and delivery of this deed."

7. On 14 March, 1931, pursuant to contract between H. A. Page, Jr., and J. Rush Shull *et ux.*, Eula Haynes Shull, the Army conveyed Broadacres to the Shulls, with assumption agreement on their part to assume and pay plaintiff's debt, but the Shulls were later adjudged bankrupts and their obligation thus discharged.

8. Soon thereafter, H. A. Page, Jr., at the instance of the plaintiff, sent to the Army three assumption-agreement forms, in accordance with the practice of plaintiff bank, which were returned unexecuted, counsel for the Army stating: "This document appears to be an original undertaking or agreement with the First Carolinas Joint Stock Land Bank of Columbia, S. C., with whom the Salvation Army has no contract. . . . It is my view that each contracting party is bound to the other only if the other duly performs the conditions of his contract."

9. At no time, when performance was due on his part, has H. A. Page, Jr., been able and willing to discharge his obligations to the Army, but on the contrary, he has abandoned the same and treated them as terminated.

10. Nothing has been paid to the plaintiff by the Army, nor has it recognized any direct obligation to the plaintiff, but on the contrary, it has insisted that the failure and wrongful refusal of H. A. Page, Jr., to carry out his dependent promises released the Army from any liability to the plaintiff, if any ever vested or attached.

11. There are many other adminicular facts appearing of record, but the foregoing will suffice for a proper understanding and disposition of the case.

Upon the issues joined between plaintiff and the Army—the other defendants conceding their liability but contending that it is now only secondary—there was a verdict for the Army, but judgment was entered for the plaintiff, notwithstanding the answers of the jury to a number of issues, on the ground that the Army had rendered itself primarily liable to the plaintiff by reason of the assumption clause inserted in the deed from Broadacres Orchard Company, mentioned in paragraph 6 above.

The Army tendered judgment on the verdict, which the court refused to sign. From this refusal, the Army appeals, assigning errors.

Melton & Belser and Cansler & Cansler for plaintiff.

L. R. Varser for defendants, Pages and Broadacres Orchard Company.

John M. Robinson and Hunter M. Jones for defendant, Salvation Army.

STACY, C. J., after stating the facts: The plaintiff, a donee beneficiary, and the mortgagors, the Pages, and the grantor, Broadacres Orchard Company, are seeking to hold the grantee, Salvation Army, primarily liable for the mortgage debt on the assumption clause contained in the deed conveying to the Army the equity of redemption in 5,030 acres of land. The briefs are replete with learning on the subject, but the case, in reality, falls within a comparatively narrow compass.

The law undoubtedly is, that when a purchaser of mortgaged lands, by a valid and sufficient contract of assumption, agrees with the mortgagor, who is personally liable therefor, to assume and to pay off the mortgage debt, such agreement inures to the benefit of the holder of the mortgage, and upon its acceptance by him, or reliance thereon by the mortgagee, thenceforth as between themselves, the grantee occupies the position of principal debtor and the mortgagor that of surety, and the liability thus arising from said assumption agreement may be enforced by suit in equity, under the doctrine of subrogation, *Baber v. Hanie,* 163 N. C., 588, 80 S. E., 57, or by action at law, as upon a contract made for the benefit of a third person, *Rector v. Lyda,* 180 N. C., 577, 105 S. E., 170, *Gorrell v. Water Co.,* 124 N. C., 328, 32 S. E., 720, 70 Am. St., 598, 46 L. R. A., 513. See full annotation on the subject, 21 A. L. R., 439; 78 Am. Dec., 72; 19 R. C. L., 373. The mortgagee is entitled to appropriate for his debt any security acquired or held by his debtor for its payment. *Brown v. Turner,* 202 N. C., 227, 162 S. E., 608; *Voorhees v. Porter,* 134 N. C., 591, 47 S. E., 31; *Woodcock v. Bostic,* 118 N. C., 822, 24 S. E., 362.

Nor is the mortgagor and the grantee at liberty thereafter to rescind said agreement without the consent of the mortgagee. *Keller v. Parrish,* 196 N. C., 733, 147 S. E., 9; *Parlier v. Miller,* 186 N. C., 501, 119 S. E., 898; 41 C. J., 749. Especially is this so where indulgence has been granted upon reliance of the solvency of the grantee. *Keller v. Parrish, supra.*

In each of the cases above cited, the Court was dealing with a contract of assumption, the validity and binding effect of which was not questioned; but, here, the sufficiency and enforceability of the assumption agreement is assailed. The question then arises: What defenses may the grantee interpose in an action by the mortgagee on the assumption clause?

It will not be controverted, we apprehend, that one who claims the benefit of a contract which he fortuitously discovers, or picks up in the

road as it were, must take it as he finds it. *Glass Co. v. Fidelity Co.*, 193 N. C., 769, 138 S. E., 143. As said by the Supreme Court of Iowa in *Shult v. Doyle*, 200 Ia., 1, 201 N. W., 787, speaking of the right of a mortgagee to sue on an assumption agreement: "The cause of action thus created in his favor is a bit of legal grace; it cost him nothing; it simply fell upon him, without effort or knowledge on his part. He is entitled to it, such as it is. He has no ground of appeal to equity either to expand it or to prevent its shrinkage. Nor is his plea of estoppel available to him as against the very truth. *Peters v. Goodrich*, 192 Iowa, 790, 185 N. W., 903."

Indeed, it is not perceived upon what theory the rights of a donee beneficiary may be said to be greater than is provided by the contract out of which they spring. *Bank v. Assurance Co.*, 188 N. C., 747. The fact that an assumption agreement, after acceptance by the mortgagee, is not thereafter subject to rescission without his consent, adds nothing to the original agreement; it simply preserves the contract as it is, and as accepted. So, if the original agreement be conditional, voidable, or unenforceable at the time of its making, or is subsequently breached by the mortgagor, the rights of the mortgagee are necessarily limited and affected thereby. And although the mortgage indebtedness may be evidenced by negotiable notes, the law governing negotiable instruments does not extend to the assumption agreement. *Gray v. Bricker*, 182 Iowa, 816, 166 N. W., 284. The mortgagee is in no position to claim any rights as an innocent purchaser. *Bank v. Kirby*, 191 Iowa, 786, 183 N. W., 478.

In 41 C. J., 754, the authorities on the subject are epitomized as follows:

"In the case of a contract by the grantee of mortgaged premises to assume the payment of the mortgage thereon, where the mortgagee is not a party to such contract and has paid no part of the consideration, he acquires no greater rights than the covenantee or promisee, and takes the covenant subject to all legal and equitable defenses which would have been available against him."

And in the Restatement of the Law of Contracts by the American Law Institute, the heading of section 140 is as follows:

"There can be no donee beneficiary or creditor beneficiary unless a contract has been formed between a promisor and promisee; and if a contract is conditional, voidable, or unenforceable at the time of its formation, or subsequently ceases to be binding in whole or in part because of impossibility, illegality or the present or prospective failure of the promisee to perform a return promise which was the consideration for the promisor's promise, the right of a donee beneficiary or creditor beneficiary under the contract is subject to the same limitation."

But without going as far as the above statements, we think the present case is controlled by the terms of the contract of 7 March, 1931, between H. A. Page, Jr., and the Salvation Army.

It is true, the plaintiff contends that the assumption clause appearing in the deed from the Orchard Company to the Army alone determines the rights of the parties, but this is not the whole of the contract. Indeed, it may be observed that the grantor in this deed, Broadacres Orchard Company, never assumed the payment of plaintiff's debt, and at no time became liable therefor. There is authority for the position, with decisions to the contrary, that the mortgagee acquires no right to enforce the assumption agreement unless the grantor in the deed is personally liable for the mortgage debt. Annotation, 12 A. L. R., 1528. But we pass by this suggestion, and proceed to a consideration of the terms of the contract of 7 March, 1931. At the very beginning of this agreement it is recited that "for and in consideration of the mutual promises, agreements and benefits hereinafter mentioned," thus making the promises of the parties dependent one upon the other. 13 C. J., 567, *et seq.*

The heart of a contract is the intention of the parties. *Cole v. Fibre Co.*, 200 N. C., 484, 157 S. E., 857.

That Page has failed to carry out his part of the agreement is conceded and established by the verdict. He has not only breached it, but also abandoned it. This precludes any recovery by the plaintiff against the Army. Judgment to this effect should have been entered on the verdict.

Error and remanded.

CHARLES H. LIPE *v.* CITIZENS BANK AND TRUST COMPANY AND SAM SUBER, EXECUTORS OF THE WILL OF ALICE J. BOST, DECEASED.

(Filed 28 February, 1934.)

1. Wills F d—Under facts of this case legatee was not put to his election between legacy and claim for services rendered testatrix.

Plaintiff claimed an unliquidated amount for services rendered testatrix, and in her will testatrix bequeathed plaintiff a certain sum. The will directed the executor to pay all testatrix's just debts. *Held*, under the facts of this case plaintiff was not required to elect between the legacy and his claim for services rendered.

2. Wills B b—Instruction in this case on issue of express contract to devise held prejudicial.

In this action to recover for services rendered testatrix issues were submitted both as to an express contract to devise and an implied contract for *quantum meruit*. The testatrix bequeathed a certain sum to

plaintiff, and on the issue of an express contract the court charged the jury that if plaintiff should be allowed a recovery by the jury the court would subtract such recovery from the specific bequest to plaintiff. *Held*, the charge was prejudicial to plaintiff and a new trial is awarded on appeal.

3. Same: Pleadings A f—Plaintiff's prayer for relief does not determine his right to relief.

The prayer for relief does not determine the scope of plaintiff's right to relief, and where the plaintiff prays for recovery only on the alleged contract to devise, and the allegations and evidence are sufficient to warrant a recovery on *quantum meruit* for services rendered testatrix, it is not error for the court to submit issues as to both the alleged express contract and the implied contract to pay for the services.

4. Trial G b — Defendant held entitled to new trial for inconsistent answers to issues submitted.

In this action to recover for services rendered testatrix issues were submitted to the jury as to both an alleged contract to devise and plaintiff's right to recover upon *quantum meruit*, the jury found that there was an express contract to devise in consideration of personal services to be rendered and that plaintiff breached the contract. *Held*, the jury's finding on a subsequent issue that plaintiff rendered personal services upon an implied agreement to pay for same is rendered inoperative, and on appeal from judgment thereon defendant is held entitled to a new trial.

APPEAL by plaintiff and defendants from *Hill, Special Judge*, at June Term, 1933, of CABARRUS. On both appeals, new trial.

The complaint of the plaintiff against defendants is as follows: "That Alice J. Bost, late of Concord, said county and State, died in Concord, N. C., on 6 August, 1929, leaving a last will and testament in which the defendants are named as executors. That said will was admitted to probate, on application of the defendants, in the county of Cabarrus, and the said defendants qualified and are now acting in the capacity of executors of said will. That said Alice J. Bost never had any child or children, and at the time of her death she had no living brother or sister. That the plaintiff is a farmer, and at the time hereinafter mentioned, he resided on his farm in No. 11 Township, about three miles from Concord. The said Alice J. Bost then lived in her new home on South Union Street, Concord, N. C. That during the month of August, 1910, the said Alice J. Bost, then living alone in her home in Concord, N. C., and then advanced in years and frail in body, and physically unable to get around and look after her affairs, she asked the plaintiff to look after and manage her affairs in general and render such other service and to do other work for her as she, from time to time, might request, and told him if he would do so, that she would make her will leaving all her property to him, the said Chas. H. Lipe. That plaintiff, believing in her sincerity and relying on her promise, accepted her offer,

and in good faith from that date until her death, covering a period of about twenty years, did look after and attend to her and manage her affairs in general, and complied with his part of said agreement at a great sacrifice and neglect of his own outside other interests, fully expecting her to comply with her part of the agreement made with him, that she would leave all her estate to him in her will at her death. That said Alice J. Bost did not comply with her agreement with the plaintiff in that she did not leave a will giving the plaintiff all her estate as she had agreed and contracted with the plaintiff she would do, but did leave a will in which the defendants are named executors, providing among other things that there be spent on her burial $4,500, at least, together with the payment of her funeral expenses and the payment of her just debts. That the services rendered by the plaintiff to and for said Alice J. Bost, under said agreement and which services she accepted, and had the benefit of, for said period of about 20 years, and the value of her estate at the time of her death was $10,000, and are reasonably worth the sum of $10,000, no part of which has been paid.

Wherefore the plaintiff demands judgment in his favor and against said estate for the breach of said contract, in the sum of ten thousand dollars ($10,000), and his costs of action, and for such other and further relief as he may be entitled in law or equity."

The defendants denied the material allegations of the complaint. The issues submitted to the jury and their answers thereto were as follows: "(1) Did the testatrix, Alice Bost, deceased, contract and agree with the plaintiff that she would devise and bequeath to him all of her property in consideration of services to be rendered, as alleged in the complaint? Answer: Yes. (2) If so, did the plaintiff perform his part of said agreement? Answer: No. (3) What sum, if any, is the plaintiff entitled to recover of the defendants? Answer: ..... (4) Is the plaintiff's cause of action barred by the three years statute of limitations, as alleged in the answer? Answer: ..... (5) If there was no express contract or agreement as alleged, did the plaintiff render to said Alice Bost, deceased, services upon an implied agreement that she would pay therefor their reasonable worth? Answer: Yes. (6) What sum, if any, is the plaintiff entitled to recover of the defendants for services rendered under said implied agreement? Answer: $3,000. (7) What sum, if any, is the plaintiff indebted to the defendants by reason of the note set up in the counterclaim? Answer: $250.00 and interest from 26 March, 1928."

The judgment of the court below was as follows: "At a Superior Court, held at the courthouse in Concord, N. C., on 12 June, 1933, present his Honor, Frank S. Hill, judge presiding and holding said court by and under a commission from the Governor of the State of North Carolina. This action having been calendared, called and tried before his Honor

and a jury upon the following issues, to wit: (the issues are referred to as above set forth). It is now on motion adjudged that the plaintiff recover of the defendants the sum of $3,000; which said amount, however, when and if paid by defendants, to the plaintiff, Charles H. Lipe, shall be a credit upon and deducted from the amount that said Charles H. Lipe is entitled to receive under and by virtue of the will of the said Alice Bost, deceased.

It is further adjudged that the defendants recover of the plaintiff the sum of $250.00 and interest on said amount from 26 March, 1928, on and by reason of their counterclaim. And that the defendants be taxed with the costs of this action."

The plaintiff and defendants made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

Hartsell & Hartsell, J. Lee Crowell and J. Lee Crowell, Jr., for plaintiff.

Z. A. Morris, Jr., and H. S. Williams for defendants.

CLARKSON, J. *Plaintiff's appeal.* This kind of action has been recently discussed by this Court in *Hager v. Whitener,* 204 N. C., 747, and *Grantham v. Grantham,* 205 N. C., 363. It is unnecessary to repeat, but refer to those cases. On the question of damage in the *Hager case* following *Redmon v. Roberts,* 198 N. C., 161, we affirmed the charge of the learned judge who tried the case below that "the measure of damages for the breach of contract to devise is the value of the property agreed to be devised." It is said in the *Grantham case, supra,* it is evidence on the question, which is technically and strictly speaking, and said to be the better rule. The Grantham action was one for specific performance. One of the questions as set forth by plaintiff on this appeal is as follows: "Is a pecuniary legacy to a creditor who has an unliquidated account for services rendered to testatrix, a payment of the creditor's debt, undetermined in amount, when the testatrix directs in her will the sale of all her property and out of the proceeds directs: (1) The payment of funeral expenses. (2) The payment of all her just debts, out of the first moneys coming into the hands of her executors; and, (3) Gives pecuniary legacies to several persons, aggregating about $12,000, in which is included a legacy of $3,000 to such creditor, her nephew, the plaintiff in this case?"

We think the question must be answered in the negative under the facts and circumstances of this case. The principle of law is thus stated in Pomeroy's Equity Jurisprudence, 4th ed., sec. 527, and part of sec. 528, pp. 998, 999 and 1000: "The general rule as stated by *Sir J.*

Trevor, M. R., in the leading case of *Talbot v. Duke of Shrewsbury*, is as follows: 'If one, being indebted to another in a sum of money, does by his will give him a sum of money as great as or greater than the debt, without taking any notice at all of the debt, so that he shall not have both the debt and the legacy.' Wherever this rule operates, and the presumption of satisfaction arises, the creditor-legatee is of course put to his election: if he claims the legacy, he cannot enforce the debt; if he enforces the debt, he cannot obtain the legacy. It is also proper to remark that a debtor-testator can always thus put his creditor to an election, by accompanying his testamentary gift, whatever be its nature or amount, with words sufficiently indicating his intention that it is made and must be received in lieu and satisfaction of the debt. This general rule, being based upon artificial reasoning, has been distinctly condemned by able judges. It is not favored by courts of equity; on the contrary, they lean strongly against the presumption, will apply it only in cases which fall exactly within the rule, and will never enlarge its operation."

Bispham's Principles of Equity, 10th ed., pp. 822 and 823: "*Chancey's case* and *Strong v. Williams* may be cited as authorities in which the general doctrine is admitted, and at the same time several of its qualifications illustrated. In the former case a person indebted to his servant for wages, in the sum of £100, gave her a bond for that sum, and afterwards by will gave her £500 for her long and faithful services, and directed that all his debts and legacies should be paid; in the latter, the testator gave a bond to his housekeeper conditioned for the payment of $333.00 within six months after his decease, and also written promise to pay her $20.00 annually; and he afterwards in his will bequeathed her a pecuniary legacy of $300.00, together with furniture and other chattels valued at $745.00; and he devised the residue of his estate subject to the payment of debts and legacies. In both of these cases the general doctrine of satisfaction was recognized; but in both its application was refused; in *Chancey's case*, because the intention to satisfy the debt by the legacy was supposed to be rebutted by the express direction that debts and legacies should be paid; and in *Strong v. Williams*, not only for the reason in *Chancey's case*, but also because the pecuniary legacy was less than the amount of the debt, and the specific legacy was of a different nature."

Perry v. Maxwell, 17 N. C., 488, *Baptist Female University v. Borden*, 132 N. C., 476. In the will in controversy, the testatrix says: "Said executors are to pay all my said funeral expenses, together with all my just debts, out of the first moneys which may come into their hands out of and belonging to my estate."

The court below charged the jury as follows: "Now the defendants' counsel are correct in that the law would not permit the plaintiff to

recover damages upon an alleged breach of an express contract to devise and bequeath to him certain property, to recover the full value of that property and at the same time also recover or take under the will whatever the testatrix gave to him in consideration of services rendered; but you are not to be concerned with that question, gentlemen, because it appears that the plaintiff has never received anything under the will, and if he recovers anything under this contract and its alleged breach, then in the judgment the court will provide that whatever amount he takes under this action is to be deducted from any amount that he might be entitled to under the will of the testatrix, Alice J. Bost, deceased. In that way he would not be permitted to collect twice—once under an alleged express contract and the other for services under the will of the testatrix."

The plaintiff's exception and assignment of error to the above charge for the reasons given, must be sustained. It will be noted that this charge was confined to the "alleged express contract," which was found by the jury for plaintiff and on the 2nd issue it was breached by plaintiff. We think the charge prejudicial.

Defendants' Appeal. At the close of plaintiff's evidence and at the close of all the evidence, defendants made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions and in this we can see no error. We think the evidence was sufficient to be submitted to the jury. *Hager v. Whitener,* 204 N. C., 747. We do not think it necessary to consider the controversy over the first and second issues as the case goes back for a new trial. The question involved on this appeal: "Whether or not the plaintiff sufficiently states and alleges a cause of action on an implied contract to pay for services alleged to have been rendered by plaintiff to the deceased, or an action on a *quantum meruit,* and or to raise issues based thereon." We think so. The prayer for relief does not determine the scope of the plaintiff's right to relief. *Dunn v. Moore,* 38 N. C., 364; *Capps v. Holt,* 58 N. C., 153; *Pitt v. Moore,* 99 N. C., 85; *Kelly v. Johnson,* 135 N. C., 647; *Deal v. Wilson,* 178 N. C., 600; *Scott v. Ins. Co.,* 205 N. C., 38 (40).

In *Sams v. Cochran,* 188 N. C., 731 (733): "Under our liberal practice, the court below, in its sound discretion, in furtherance of justice, can amend the pleading, before and after judgment, to conform to the facts proved, keeping in mind always that an amendment cannot change substantially the nature of the action or defense, without consent. Our system is broadening and expanding more and more, with the view at all times that a trial should be had on the merits and to prevent injustice." C. S., 535, 545, 547, 548, 549.

The amendment can be made in the Supreme Court "in form or substance for the purpose of furthering justice," C. S., 1414. On the facts

in the present controversy there was sufficient evidence to be submitted to the jury on the 5th issue, as to *quantum meruit*. *Brown v. Williams*, 196 N. C., 247. In *Dorsey v. Corbett*, 190 N. C., 783, speaking to the subject, at page 788: "Mordecai's Law Lectures, Vol. 1 (2d ed.), page 127, says: 'Under the old practice the plaintiff generally declared upon the special contract and added also what were called the common counts, so that if he failed on the special contract he could have relief in assumpsit; and now under The Code a party may recover on a *quantum meruit*, although the complaint is on the special contract; or the plaintiff may so frame his complaint as to declare both on the special contract and in *quantum meruit;* or the complaint may state the cause of action so broadly as to authorize a recovery of either on a *quantum meruit* or on the special contract. This, however, is a slovenly mode of pleading, tolerated, but not approved, as the cases cited will show.' There are cases where this principle would not apply. When the recovery is restricted by the special contract, and the price agreed upon in the special contract is the standard, the special contract 'must of necessity guide the jury.' Mordecai's Law Lectures, *supra*, page 128; *Markham v. Markham*, 110 N. C., page 362; *Reams v. Wilson*, 147 N. C., 304." *Stokes v. Taylor*, 104 N. C., 394 (397).

In the present case the jury found on the first issue that there was a "special contract," and on the 2nd issue it was "breached." The finding on these two issues, the 5th issue *quantum meruit*, became inoperative. On defendants' appeal, there must be a new trial.

There was error both in plaintiff's and defendants' appeal. On the whole record there must be a new trial. There are many exceptions and assignments of error on both appeals that we do not think it now necessary to consider. For the reason given, there must be a

New trial.

J. W. WINBORNE v. EVA H. McMAHAN, ADMINISTRATRIX OF W. H. McMAHAN, DECEASED.

(Filed 28 February, 1934.)

1. Sales A a—Where parties agree upon sale, and nothing remains to be done but payment of agreed price, sale is consummated.

Evidence that a party agreed to purchase certain specific stock at a designated price and that the seller agreed to sell at the price named, and that the parties agreed that the purchase price should be paid to a bank in which the seller had hypothecated the stock as security for a loan, and that the seller had directed the bank to release the stock upon the payment of the purchase price *is held* sufficient to establish a contract of sale.

2. Evidence D b—Disinterestedness of witness held established and his testimony of transaction with decedent was competent.

Defendant's intestate made two separate contracts with the holders of stock in a corporation to purchase their respective holdings. In an action by one of the stockholders to recover on the contract of sale the other testified that he had no claim against the estate on his contract. *Held*, the witness was not interested in the event, and his testimony as to transaction between decedent and plaintiff as to the contract of sale of plaintiff's stock was competent. C. S., 1795.

3. Evidence E c—

Defendant's admission of truth of material allegation in original complaint held competent in evidence although amendment to complaint was subsequently filed making immaterial change in paragraph admitted.

4. Evidence E d—Attorney's admissions in scope of authority in management of estate held competent in action against the estate.

The admissions in the pleadings and the evidence established that declarant was attorney for the estate and acted for it in certain matters, that he attended a conference with bank officials to obtain extensions of certain notes executed and indebtedness incurred by his intestate, and to this end furnished the bank officials with statement of liabilities of the estate, and that he told them the estate owed plaintiff the item sued on. *Held*, testimony of the admission of the attorney was competent in plaintiff's action against the estate on the item as an admission of an authorized agent acting within the scope of his authority.

5. Same—

A witness not a party to the action and having no pecuniary interest therein may testify as to admissions of defendant's authorized agent made in the scope of his authority.

6. Trial E f—

Where error in statement of contentions of party is not brought to the court's attention at the time, an exception to the charge on this point will not be sustained on appeal.

CIVIL ACTION, before *Schenck, J.*, at February Term, 1933, of MCDOWELL.

W. H. McMahan died intestate on 9 January, 1931, and his wife, Mrs. Eva H. McMahan, was duly appointed and qualified as administratrix of his estate. The plaintiff alleged that on 20 February, 1929, he was the owner of twelve shares of the common capital stock of the Blanton Feed Company, a corporation doing business in McDowell County, and that on said date he sold said stock to the deceased, W. H. McMahan, for the sum of $1,200; that said deceased failed and neglected to pay for said stock prior to his death, and that in due time the plaintiff filed a claim with the defendant for said sum. Upon denial of liability this suit was instituted against the estate. The defendant filed an answer denying the vital allegations in the complaint.

At the trial of the action J. W. Pless testified that he was a former law partner of the plaintiff and that there had been certain preliminary negotiations between the deceased McMahan and the plaintiff and the witness with respect to the sale of said stock. The witness said that the deceased "told me he wanted to be the owner of the business so that he could take such course with it as he desired. He talked with me about being desirous of making whatever changes, the sale of the property, the changing of the business, that occurred to him. He said that in making these changes he did not wish to be responsible to any one and therefore he wished to own all this stock. . . . When I was in court here he got Mr. Winborne and me together, at his instance, and said he desired to take this stock and he wished us to have par for it and six per cent interest or that which would amount to six per cent interest. Par was $100.00 per share. He was to pay us as was agreed then, the $3,000 for this stock, that is to Mr. Winborne, Mrs. Winborne and me for the whole of this stock. It was held, as I explained, in this manner and he was to take over the stock. . . . Mr. Winborne stated that he would accept that for that which he represented. Mr. McMahan had been informed by me before and knew that my stock was up at the First National Bank as collateral security to a note which the bank held against me, and in this conversation when the transaction was being closed it was stated that all the stock, as I recall, was in the bank and he was to take the stock out of the bank. He said he would take the stock out of the bank. . . . No time was fixed that I know of. It was an agreement that went into effect then. . . . He was to pay the bank for this stock and take it up. I went and arranged with the bank so that I could take my stock and credit my note for the amount he was to pay for it. Mr. McMahan agreed to pay this price for the stock to the bank to obtain our stock. We agreed that we would have nothing further to do with the business and that he could do as he pleased with it. Absolutely, we agreed to accept the amount to be paid by Mr. McMahan to the bank as payment for that stock. No other conditions at all were mentioned." The vice-president and cashier of the bank testified that in February, 1929, the bank held twelve shares of the capital stock of the Blanton Feed Company issued to J. W. Winborne, and that the stock was held as collateral for indebtedness to the bank. All said certificates were signed in blank by the stockholders. The witness further testified that after 20 February, 1929, that he had a conversation with the deceased Mr. McMahan and that "he told me he had bought the stock of Mr. Pless and Mr. Winborne, all of it, . . . and that he would take it up as soon as he had funds available." Mr. Winborne came in and told me he had sold his stock to Mr. McMahan; . . . that Mr. McMahan was to pay him $100.00 per share, and when

paid the certificate was to be delivered to him and his note credited with the amount received. The bank agreed to do that. The stock was to have been taken up by Mr. McMahan. The stock certificate is still at the bank. Since that time . . . the bank would have transferred that stock and delivered it to Mr. McMahan upon the completion of the arrangement Mr. Winborne described to me." This witness further testified that after the death of Mr. McMahan that there was a directors meeting at the bank and that Mr. E. H. McMahan came to the meeting and in going over the affairs of the estate said "that the estate owed Mr. Pless and Mr. Winborne $3,000 . . . for a contract entered into between W. H. McMahan and Mr. Pless and Mr. Winborne." This witness further testified that the deceased prior to his death in discussing his business affairs referring to the stock of the Blanton Feed Company, "told me he had contracted to acquire it all. He told me he had entered into a contract, whether it was written or verbal I don't know, with Mr. Pless and Mr. Winborne to buy their stock and when he acquired that stock then he would own the whole of it."

The president of the bank testified that Mr. E. H. McMahan "came in there to see about some notes which the estate owed there and he gave an account of the liabilities and assets and in it he said they owed Mr. Pless and Mr. Winborne $3,000. . . . That was after the death of his father."

The plaintiff testified that in February, 1929, following the conference between the witness and Mr. Pless and the deceased that he went to the bank and told the vice-president and cashier that he had sold the stock and instructed him "to deliver the stock on the payment of the purchase price." Witness further testified that he had filed a claim for $1,200 against the estate, and that Mr. E. H. McMahan had written a letter to the effect that the estate would not pay the claim.

Mr. E. H. McMahan, attorney at law, and son of deceased, testified that he had never acknowledged the validity of the claim of the plaintiff against the estate, and that he had never stated to the plaintiff that the estate would vote the stock issued to the plaintiff in a stockholders' or directors' meeting. The testimony of defendant tended to show that the deceased had never purchased the stock but was merely negotiating with the plaintiff and that no stock had ever been delivered to the deceased in his lifetime by the plaintiff, and that consequently the estate was not liable.

Two issues were submitted by the court, as follows:

(1) "Did the defendant's intestate, W. H. McMahan, contract with the plaintiff, J. W. Winborne, to purchase the twelve shares of stock of Blanton Feed Company owned by him (Winborne), as alleged in the complaint?"

(2) "What amount, if anything, is the defendant indebted to the plaintiff?"

The jury answered the first issue "Yes," and the second issue "$1,200 with interest."

From judgment upon the verdict the defendant appealed.

Robt. W. Proctor and J. W. Pless, Jr., for plaintiff.
Guy Weaver and Edward H. McMahan for defendant.

BROGDEN, J. The exceptions and assignments of error present four primary questions of law, as follows:

1. Was there sufficient evidence of a sale of the stock to be submitted to the jury?

2. Was the testimony of J. W. Pless incompetent by virtue of the application of C. S., 1795?

3. Were the admissions of E. H. McMahan to the plaintiff and to the officials of the bank competent against the estate?

4. Was the testimony of Neal with respect to admissions made by the alleged attorney of the estate competent?

The jury found that the deceased had contracted with the plaintiff to purchase twelve shares of the capital stock of Blanton Feed Company. The evidence of Mr. Pless was to the effect that the deceased had agreed to purchase the stock and to pay therefor the sum of $1,200. The twelve shares of stock owned by the plaintiff were held by the bank as collateral for an indebtedness due the bank by the plaintiff. There was evidence from the plaintiff and from Mr. Pless and officials of the bank that the deceased was to take up this stock at the bank, paying the bank therefor and receiving the stock which had already been signed in blank by the owner. There was evidence that the deceased had stated to the officials of the bank that he had purchased the stock and "would take it up as soon as he had funds available." This evidence, if competent, tended to establish a sale. Quoting from Tiffany on sales, this Court in *Teague v. Grocery Co.*, 175 N. C., 195, 95 S. E., 173, said: "When there is a contract of sale of specific goods, the property in them is transferred at such time as the parties to the contract intended it to be transferred. When there is a contract for the sale of specific goods, unless a different intention appears, the property in the goods passes to the buyer when the contract is made." The Court further said: "On the present record, there are facts in evidence tending to show that this transaction was an executed contract of sale, having reference to designated and specific pieces of property, and if these facts should be accepted by the jury, it is well understood that present physical delivery of the property is not necessary to the transfer of the title but that the same passes ac-

cording to the intent of the parties as expressed in the contract between them, and further, that, in the absence of specific agreement on the question, the presumption is that the title passed at the time of the purchase and without such delivery." See, also, *Cohen v. Stewart,* 98 N. C., 97.

The evidence discloses that no further act was to be performed by the seller, and the only act to be performed by the purchaser was to step into the bank, pay the purchase money and put the stock in his pocket. Such evidence therefore established a contract of sale.

The defendant, however, asserts that the evidence of J. W. Pless tending to establish the sale was not competent by reason of the inhibition of C. S., 1795. The evidence discloses that Mr. Pless had contracted to sell his stock to the deceased at the same time the Winborne sale was effected. Consequently, the pertinent question is: Did Pless have a pecuniary interest in the sale of the stock to Winborne, or would he get anything of financial value out of the lawsuit if it terminated favorably for his former law partner, the plaintiff? See *Chemical Co. v. Griffin,* 204 N. C., 559; *Hager v. Whitener,* 204 N. C., 748; *Vannoy v. Green, post,* 80. The record discloses that Mr. Pless was asked that if he should make a claim for anything on the stock he agreed to sell, would not the same evidence applicable to the Winborne case be applicable to his case? The witness said: "My evidence relates to one transaction. I have no claim and I suppose I am not capable of making a claim now. If the statute were not pleaded, I don't know that I could bring a suit against the estate." The foregoing answer of the witness was elicited by counsel for the defendant and plainly discloses that the witness had no pecuniary interest in the outcome of the trial. He declared unequivocally, "I have no claim." Consequently the evidence was properly admitted.

The third question of law involves the competency of alleged statements made by Mr. E. H. McMahan to the plaintiff and to the officials of the bank to the effect that the estate owed the plaintiff for the stock. The defendant earnestly contends that declarations made by a lawyer in a conference and not during the progress of the trial impose no liability upon an estate and cannot be used as a means of establishing the validity of a claim against a dead man. In arriving at the proper conclusion upon the question, it is necessary to observe the relationship of the parties and other pertinent facts and circumstances. It was alleged in the complaint "that E. H. McMahan, as the son and attorney for the defendant, Mrs. Eva McMahan, administratrix, actively managed and directed the administration of the estate of W. H. McMahan and was authorized and empowered by said administratrix to act for her in the administration of said estate, for, and in her place and stead, as plaintiff is informed and believes and so alleges." The original pleading filed by

the defendant, answering paragraph 8 of the complaint, declares: "That it is admitted that he has acted as attorney for her in matters pertaining to the administration of the said estate." Thereafter the complaint was amended by inserting the word "certain" in paragraph 8 between the word "in" and the word "matters." The plaintiff offered the said admission in the original answer and the defendant objected. This objection, however, is not sustained upon authority of *Morris v. Development Co.*, 194 N. C., 279, 139 S. E., 433.

E. H. McMahan signed the answer as attorney for the defendant. He attended a directors meeting of the bank and gave an account of the assets and liabilities of the estate. He was present at the meeting in response to a letter from the cashier of the bank to discuss "the line of credit extended the Blanton Feed Company and to W. H. McMahan." He testified: "I was then asked to look into the assets and liabilities of the estate and a few things of that nature and attend another meeting. . . . Our purpose in attending the meeting was to try to persuade the bank to carry on outstanding notes my father owed and notes the company owed and prevent a closing out of the company's business and also to prevent a foreclosure of certain valuable property that my father had as security at the bank. All the directors were there. . . . As I recall I read this report filed by me in behalf of the administrator of the estate in which I referred under an exhibit to the amount of claims which had been filed against the estate." Consequently it is manifest that the attorney was present representing the estate and undertaking to secure indulgence upon the basis of assets and liabilities. Thus, the amount and validity of claims filed against the estate was a vital factor in the conference. Under such circumstances it was competent to show an admission of liability made by counsel. This conclusion is supported by the principles announced and applied in *Richardson v. Satterwhite*, 203 N. C., 113, 164 S. E., 825. Such admission of course "does not conclusively bind the defendant or give it the effect of a solemn admission *in judicio*. It would merely stand upon the same footing as the declaration of any other authorized agent."

The testimony of Neal, presenting the fourth question of law, was competent. He was not a party to the suit and had no pecuniary interest in the outcome thereof.

The point is made that the trial judge did not correctly state the contentions of the parties. However, this matter was not called to the attention of the court at the time, and in such event the exceptions must fail. *S. v. Sinodis*, 189 N. C., 565, 127 S. E., 601.

There are other exceptions in the record, but none of them warrant the overthrow of the judgment.

Affirmed.

GEORGE FERGUSON, CLINT FERGUSON, CARRIE FERGUSON BRYANT, ALICE FERGUSON BERRY, MAE SUE FERGUSON WOODY, ANNIE BETHEL JACKSON, WALTER BETHEL, ULYSEES G. BETHEL AND WILLIE HENDERSON BETHEL, BY HIS MOTHER AND NEXT FRIEND, ANNIE BELLE BETHEL McDANIEL, *v.* DAVID PRICE, ADMINISTRATOR OF ALBERT BETHEL, DECEASED, AND NATIONAL SURETY COMPANY OF NEW YORK.

(Filed 28 February, 1934.)

1. Executors and Administrators F d: Judgments A b—Action held one in rem, and judgment based upon service by publication was not void.

A judgment entered in an action to determine the heirs at law of intestate for the purpose of distributing funds in the hands of his administrator, in which the court has jurisdiction of the administrator and the funds in his hands, and some of the heirs appear in court and the other heirs are duly served by publication, is not void, the judgment being one *in rem*. C. S., 484.

2. Same—Judgments M b—Heirs served by publication held barred from bringing subsequent action against administrator for share in estate.

An action to determine the heirs at law of an intestate for the purpose of distributing funds in the hands of his administrator, the court having jurisdiction of the administrator and the funds in his hands and the heirs appearing in court, is an action *in rem*, and where service by publication is duly ordered on those heirs that cannot be found or are unknown, C. S., 484, and judgment entered directing the distribution of the fund, and the administrator has disbursed the fund in accordance with the judgment and filed his final account, the judgment will bar an action against the administrator by those heirs unknown at the time of the institution of the action and who did not see the notice by publication and did not appear in the action. C. S., 492.

CIVIL ACTION, before *Clement, J.*, at September Term, 1933, of ROCKINGHAM.

A. L. Bethel, a colored man, died, and the defendant, David Price, was duly appointed administrator of his estate on 26 November, 1926. At the time of his death the deceased had in bank and due him in money the sum of $8,736.54. He had no wife or children, and after the payment of funeral expenses and the costs of administration there was left on hand in money the sum of $6,627.58. The question arose as to who were the next of kin of intestate and in order to settle this question a suit was instituted in the Superior Court of Rockingham County, entitled "John Daniels, Jim Bethel, Harriet Slade, Mary Hairston, Willie Daniels, Willie Ann Adams, Green Bethel, Nat Bethel and Annie Bethel, *v.* David Price, administrator of the estate of A. L. Bethel, deceased, Harriet Thomas, Nannie L. Henderson, Ollie Pittrell, Willie

Bethel, Nat Bethel and Green Bethel." Summons was duly issued and served on the defendant administrator. On 12 March, 1927, J. H. Daniels made an affidavit that the sheriff had returned the summons in said action endorsed: "Harriet Thomas, Nannie L. Henderson and Ollie Pittrell not to be found in Rockingham County." It further appeared from the affidavit "that the defendants therein cannot after due diligence be found within the State but a cause of action exists against the defendants in favor of plaintiff to determine the next of kin of A. L. Bethel, deceased, and to determine to whom the said estate belongs." Whereupon, the said plaintiff prayed that summons be served on said defendants by publication. Pursuant to said affidavit the clerk of the Superior Court on 12 March, 1927, entered an order setting forth, that Harriet Thomas, Nannie L. Henderson and Ollie Pittrell were not to be found in Rockingham County, and after due diligence could not be found in the State, and that notice of the action be published as required by law. Thereupon a notice of publication was duly published as required by statute. The notice of publication stated: "The defendants, Harriet Thomas, Nannie L. Henderson, Ollie Pittrell, Nat Bethel, Green Bethel and Willie Bethel, and all other persons who claim any right, title or interest in and to the estate of A. L. Bethel, will take notice that an action entitled as above has been commenced in the Superior Court of Rockingham County to determine the heirs of the A. L. Bethel estate, and said defendants and all others interested will further take notice that they are required to appear before the clerk of the Superior Court in his office in Wentworth on or before 11 May, 1927, and answer or demur to the petition filed in this cause," etc. The notice was dated 9 April, 1927. The plaintiffs filed a petition alleging the death of A. L. Bethel, intestate; that he left certain sums of money, and that the defendant, David Price, was duly appointed administrator. The petitioners further alleged that they were first cousins and next of kin of said A. L. Bethel and entitled to a one-ninth interest in said estate. The petition further prayed the court for an order of publication and that after such publication had been duly run "that they be declared to be the next of kin of said A. L. Bethel, deceased," and that the administrator, after all debts of decedent, expenses of administration and costs of the action had been paid, to turn over to each of the above petitioners a one-ninth interest in said estate. Harriet Thomas, Nannie L. Henderson, Ollie Pittrell and Willie Bethel filed an answer denying that the petitioners were the next of kin and alleging that they were the next of kin and entitled to a one-fourth each of said estate. The petitioners filed a reply and the defendant administrator filed an answer denying all the allegations of the complaint, except that he was administrator

and had in his hands the sum of $8,010.64. Thereafter at the November Term, 1927, the cause came on for trial in the Superior Court, and the following issue was submitted to the jury: "Are John Daniels, Jim Bethel, Harriet Slade, Mary Hairston, Willie Daniels, Willie Ann Adams, Green Bethel, Nat Bethel, Annie Bethel, Alice Price, Harriet Thomas, Nannie L. Henderson, Ollie Pittrell and Willie Bethel the next of kin and heirs at law, and entitled to the proceeds of the estate of A. L. Bethel, share and share alike, wherever situated?" The jury answered the issue "Yes," and thereupon A. M. Stack, judge presiding, signed a judgment in accordance with the verdict and directed the defendant administrator to distribute the proceeds of said estate, less costs of administration, to the parties specified in the verdict. The judgment further declared: "And when said checks are delivered and paid to their attorneys of record, it shall be binding upon the heirs at law as completely as if paid direct to them." Thereafter on 8 December, 1927, the administrator filed his final account, showing all receipts and disbursements, and further disclosing that he had paid the entire sum of money in his hands, to wit, $6,627.58, to the distributees specified in the verdict and judgment, each distributee receiving the sum of $473.40. The clerk audited the final account, approved the same and ordered it filed.

Thereafter on 29 September, 1930, George Ferguson, Clint Ferguson Woody and Annie Bethel Jackson brought a suit in the Superior Court of Rockingham County *v.* David Price, administrator of Albert Bethel, and the National Surety Company of New York, alleging the death of A. L. Bethel, the appointment of defendant, David Price, as administrator of his estate, the execution and delivery of a bond by the defendant Surety Company, and that said administrator, after paying debts and charges of administration, had in his hands for distribution the sum of $6,627.58, and that said plaintiffs were first cousins of deceased, and each entitled to the sum of $368.19 or a total of $2,209.14. The administrator filed an answer denying the allegations of the complaint and alleging that he had fully administered said estate according to law and had disbursed all funds in his hands "under order of the Superior Court of Rockingham County and filed a final account showing all such receipts and disbursements which was duly ordered and approved by the clerk of the Superior Court of Rockingham County on 8 December, 1927." The cause came on for trial and evidence was introduced tending to show that the plaintiffs in the present action were kin to the deceased and entitled to a distributive share in his estate. The testimony further showed that Mae Sue Woody lived in Tennessee, and that Clint Ferguson and Carrie Ferguson Bryant lived in West Virginia. The

defendant introduced the Stack judgment rendered at the November Term, 1927, and also certain testimony from the administrator to the effect that he had made a final settlement of the estate and disbursed the money in accordance with the judgment of the Superior Court aforesaid.

At the conclusion of all the evidence the trial judge duly entered a judgment of nonsuit and the plaintiffs appealed.

Brown & Trotter and William R. Dalton for plaintiffs.
Hunter K. Penn and Kenneth M. Brim for defendants.

BROGDEN, J. (1) Was the judgment signed by Judge Stack, at the November Term, 1927, in the proceeding entitled: John Daniels *et al. v.* David Price, administrator, *et al.*, void?

(2) Does such judgment constitute a bar to the right of plaintiffs to recover against the administrator?

In determining whether the judgment of the Superior Court entered by Judge Stack, at the November Term, 1927, was void, it is necessary to keep certain facts clearly in mind. In the first place, the *res* or subject-matter of the action was subject to the jurisdiction of the Superior Court; that is to say, the money was within the jurisdiction of the court and the administrator holding the money was likewise subject to the jurisdiction of the court, and at all times under the control, direction and supervision of the court. Consequently, the suit was an action *in rem*. The judgment roll discloses that the purpose of the action was to discover the next of kin of A. L. Bethel, who were apparently widely scattered and to distribute the entire fund to such persons as the court might determine entitled thereto after due investigation and inquiry in accordance with law.

The plaintiffs in the present suit were not parties to the former action in the Superior Court and their testimony is to the effect that they knew nothing of the proceeding. However, an attempt was made by publication to give notice to all parties who claimed an interest in the estate of deceased. Indeed, no other method was available. An affidavit was filed in the cause setting forth that the summons had been returned and that certain defendants were not to be found in Rockingham County, or, after due diligence, within the State of North Carolina. An order of publication was duly made and in the notice of publication duly signed by the clerk of the Superior Court on 9 April, 1927, certain defendants therein specified "and all other persons who claim any right, title or interest in and to the estate of A. L. Bethel were notified that an action entitled as above has been commenced in the Superior Court of Rockingham County to determine the heirs of the A. L. Bethel estate."

Said notice of publication further required all such persons to appear at the office of the clerk of the Superior Court at Wentworth on or before 11 May, 1927, "and answer or demur to the petition filed in this cause," etc. This notice was duly published.

C. S., 484, authorizes the service of summons in certain instances therein specified "where the subject of the action is real or personal property in this State, and the defendant has, or claims, or the relief demanded consists wholly or partly in excluding him from any actual or contingent lien or interest therein." Obviously, the subject of the action was money in the hands of an administrator, and the plaintiffs in the present action had or claimed an interest therein. While it is unfortunate that the plaintiffs in the present suit did not see the notice or assert their rights, it cannot be held that the Stack judgment of November, 1927, was void. Moreover, the plaintiffs in the present suit do not mention the judgment in their complaint, and, therefore, neither attempt to set it aside so far as they are concerned by an independent action nor motion in the cause. McIntosh in North Carolina Practice and Procedure, page 317, section 321, says: "The owner of property, whether resident or nonresident, who cannot be reached personally by the process of court, is presumed to look after his interest, and when notice is given in a proper proceeding affecting his property and in a manner provided by law, he is bound by it." This declaration of the author is fully supported by *Foster v. Allison Corporation*, 191 N. C., 166, 131 S. E., 648. Indeed, C. S., 492, referring to judgments on substituted service or service by publication, declares: "No fiduciary officer or trustee who has made distribution of a fund under such judgment in good faith, is personally liable," etc. See *Lawrence v. Hardy*, 151 N. C., 123, 65 S. E., 766; *Stevenson v. Trust Co.*, 202 N. C., 92, 161 S. E., 728. See, also, *Harris v. Starkey*, 57 N. E., 698; *O'Neill v. Cunningham*, 244 Pac., 444.

It necessarily follows from the conclusion upon the first question of law that said judgment constitutes an estoppel so far as the administrator is concerned, as it stands admitted upon the record that he has disbursed the entire fund in his hands in accordance with the judgment of a court of competent jurisdiction.

As no relief is asked except as against the administrator, the ruling of the trial judge was correct.

Affirmed.

J. W. ANDERSON COMPANY, INCORPORATED, v. TOMLINSON CHAIR MANUFACTURING COMPANY, INCORPORATED.

(Filed 28 February, 1934.)

Sales F e—Goods must be of same kind, quality, condition and color as sample where these elements are of essence of contract.

In the sale of goods by sample the seller must deliver goods of the same kind, condition, quality, design and color as the sample where any or all of these elements are of the essence of the contract, and an instruction by the court that the goods must be "reasonably similar," "substantial duplication," etc., is too broad, and upon exception thereto the purchaser will be awarded a new trial.

CIVIL ACTION, before *Sink, J.*, at October Term, 1933, of GUILFORD.

The plaintiff is a corporation with its principal office in Rock Hill, South Carolina, and is engaged in the business of manufacturing tapestries. The defendant is a North Carolina Corporation with its principal place of business at High Point and is engaged in the business of manufacturing and selling furniture.

On 21 November, 1931, the defendant gave an order to the plaintiff for the manufacture and shipment of certain tapestries to be used in manufacturing furniture. The contract specified "100 pieces No. 334 tapestry. . . . Ship 1 January, five pieces, each of colors 334, 3343, 3342, 3344, then follow with 10 pieces each of colors 334, 3343, 3342, 3344," etc. The price specified in the contract was 70 cents per yard. The evidence tended to show that the order was solicited by an agent of plaintiff who said: "No. 334 was the fabric in question. It was a tapestry weave and designates to me Tomlinson Chair Manufacturing Company's number of the fabric. They gave me this sample. In the general work of my solicitation, I came and asked them to show me some samples of their tapestry, and asked them to let me duplicate some of them. They gave me eight or ten different samples to analyze for prices. This particular pattern No. 334, I gave to J. W. Anderson Company, and accepted the order subject to the approval of J. W. Anderson Company. The sample showed a floral design made up in colors. The samples were in rust, taupe, green, and possibly brown. . . . The samples have the same pattern and same warp, with filling being the predominating color. Sample No. 334 given me by Tomlinson Chair Manufacturing Company is predominating green. . . . I knew we had to furnish this green in a commercial match. . . . When I took the order, I took an order to make a piece of tapestry with the same green color in it. It was to be like the sample. . . . You can't get a perfect match. . . . They could use what they had with this as

it was a commercial match, and it should be all right, but not side by side on the same piece of furniture. . . . There is a difference between it and the sample given by Tomlinson Chair Manufacturing Company. In the sample given me it looks like a green and rust together. The leaf immediately above the tulip in the sample furnished by Tomlinson Chair Manufacturing Company looks like green and rust. The green leaf above the tulip in the manufactured product is more of a green tint than green color. It is different. The same thread that goes through the leaf immediately above the tulip goes through the tulip. I would say the tulip is a good match. This leaf is different. That can be readily seen. . . . The tulip on the rust sample measures two and five-eights inches and the tulip on the manfactured product measures 2½ inches. . . . You could not match these two stems on the same piece of furniture any more than you could match the coloring. . . . There is a difference in the color of the green leaves on this manufactured product and on the sample. The stem of the flowers and the tendrils are not matched with the sample. They are a little bit smaller. . . . This gold flower on the manufactured product is smaller than on the sample. The sample is three inches. The manufactured product is two and seven-eights inches. . . . The order was taken on 21 November, and five pieces shipped 1 January. I do not know when the samples were finished. The next time I heard from it was when Joe Howerton phoned me to hold up all contracts. He said he had gotten word from Chicago and that Mr. Tomlinson was there. The next I recall when Mr. Anderson came to High Point to inspect the goods and made some complaint on account of shades. They found it was off-color and they did not take it. . . . Mr. Tomlinson rejected the goods that were here because he said they did not match."

J. W. Anderson, president of plaintiff company, testified: "We shipped five pieces of each color, and maybe a little more." The defendant wrote a letter to the plaintiff stating that "we are obliged to decline to accept goods shipped on our order 21 November, owing to your failure to match colors properly." A witness offered by plaintiff, who had been a dyer for twenty-three years, testified that "the match between the Tomlinson and Anderson is a good one. In 14 there is a little difference. . . . Exhibit 7 and 12 is a good match, and thirteen is away off. Exhibit 6 and 11 is a good match, and also 15. Exhibit 5 and 9 is off a little bit and 16 is off a little bit. The green thread out of the manufactured product and the green thread out of the sample are not the same. Those two threads out of that sample and the manufactured piece are not the same color but a good match. This one is a little off. I am an expert of many years experience and that manufactured product and the sample are not the same. There is a difference, but I will not call it extreme."

Another expert witness for plaintiff, who was a textile designer, said: "I think Exhibit 6 and 11 are a very good match. All three pieces are a good match in the design. It is bound to be alike because it came from the same set of cards. No. 8, No. 10, and No. 14 are good matches as to designs. It is expensive to pick out the thread and get a perfect match. It is never done. It is not generally done in tapestry of this grade."

The evidence for the defendant tended to show that the tapestry in controversy was intended for upholstering furniture, to cover back, seat, cushion and sides of chairs. A witness for defendant said: "I was in Chicago when I saw the sample that came from J. W. Anderson Company. That was during the first two weeks in January. I examined this sample to see if it was a duplicate of the tapestry we ordered. The color was off between the manufactured product and sample and we turned it down in Chicago. . . . We could not use it on the same suite of furniture or piece of furniture. We could not use a piece that did not match in color and size of design. The customer would not accept it. . . . It was turned down at the market because of the color. The green is a pretty good match, but is off-color." Another witness for defendant said: "I find there is quite a bit of difference in the color of those two pieces. One is more of an orange rust and the other more of a henna rust. One cannot be used as a duplicate of the other. . . . There is a difference in the color of all three pieces handed to me."

There was evidence that after the defendant refused to take the product that the plaintiff sold the material on the open market for 45 cents per yard, thereby sustaining an alleged loss of $1,250.

The cause was tried in the municipal court of High Point upon the following issue: "What damages, if any, is plaintiff entitled to recover of the defendant?" The jury answered the issue $750.00. There was an appeal to the Superior Court upon exceptions and the judgment of the municipal court was affirmed. From such judgment the defendant appealed to the Supreme Court of North Carolina.

Thomas Turner, Jr., and G. G. Dickson for plaintiff.
Roberson, Haworth & Reese for defendant.

BROGDEN, J. What duty is imposed upon the manufacturer of an article for sale by sample?

The judge of the municipal court charged the jury as follows:

(1) "Now, the court charges you in a case of this nature where a contract is entered into between a buyer and a seller, where the goods must be manufactured, and where there is a sample presented for the

manufacture of the goods, that the manufacturer of the goods who contracts to manufacture the goods in accordance with the sample presented, warrants that the goods that he manufactures will be in a reasonable compliance or will be reasonably similar to the sample that is presented to him, that there will be a substantial duplication of the sample."

(2) "Now, the burden of proof in this case is upon the plaintiff to satisfy you by the greater weight of the evidence that it manufactured the goods which came up to the sample to a substantial and reasonable degree, to a degree that the goods made as a result of its receiving the sample could be used in the place of the goods in the sample; that there was a reasonable and substantial similarity in the goods manufactured and the sample that was presented to it at the time the contract was entered into."

(3) "That there was a duty on the plaintiff company to manufacture a fair specimen; that is, that it was a substantial duplication, a reasonable duplication in design, color and quality of the sample furnished to it."

(4) "And if you find that the goods were capable of being used as a substantial duplicate of the goods from which the samples came, and that there was not a material difference or variation in the goods made and shipped by the plaintiff and that represented by the samples, then the court charges you that would be a compliance with the contract and a refusal on the part of the defendant to accept the goods would be a breach of the contract."

A discussion of the various aspects of the law of sales by sample, together with the application of accepted principles to given facts, may be found in *Jorgensen v. Gessell Pressed Brick Co.*, 141 Pac., 460; *Greenwood Cotton Mill v. Tolbert*, 89 S. E., 653; *Perine Machinery Co. v. Buck*, 156 Pac., 20. All the foregoing cases are reported in Ann. Cas., 1917C, 309 to 343.

The Supreme Court of North Carolina has spoken upon the subject in *Main v. Griffin*, 141 N. C., 43, 53 S. E., 727, and *Pickrell v. Wholesale Co.*, 169 N. C., 381, 86 S. E., 187. Quoting with approval from another jurisdiction, this Court said in the *Pickrell case, supra:* "Strictly speaking, a contract of sale by sample is not a warranty of quality, but an agreement of the seller to deliver, and of the buyer to accept, goods of the same kind and quality as the sample. The identity of the goods sold in kind, condition, and quality with that of the sample is of the essence of the contract; and where the goods sold do not correspond with the sample, there would seem to be no performance of the contract. The rule recognized in the cases as governing sales by sample seems to be founded on or to be a simple application of the principle that, to

fulfill a contract of sale, the seller must deliver that which he has agreed to sell, and that if he does not, the purchaser may rescind the contract, or receive the goods and claim a deduction for their relative inferiority in value." Consequently the standard prescribed in this jurisdiction in sales by sample is that the seller must furnish "goods of the same kind and quality as the sample. The identity of the goods sold in kind, condition and quality with that of the sample is of the essence of the contract." Obviously, if color was of the essence of the contract, the same rule would require that articles of the same kind, quality, condition and color should be furnished in order to discharge the obligation of the contract.

The municipal judge used the expression "reasonable compliance," or "reasonably similar," "reasonable and substantial similarity," "a fair specimen," "substantial duplication," or "reasonable duplication in design, color and quality." These instructions, tested by the standard prescribed in our decisions, are too broad. It is apprehended that the correct rule as pronounced by this Court is that in sales by sample the seller must deliver goods of the same kind, condition, quality, design and color where any or all of these elements are of the essence of the contract.

In view of the conclusion reached, it is not deemed necessary to discuss other exceptions in the record.

New trial.

L. R. POWELL, JR., AND E. W. SMITH, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY, v. BLADEN COUNTY AND NASH L. TATUM, SHERIFF AND TAX COLLECTOR FOR BLADEN COUNTY.

(Filed 28 February, 1934.)

1. Taxation A b—County tax rate for State six months school term in this case held valid.

A county tax rate of 16½ cents for the support of the constitutional six months school term for the tax year of 1931, chap. 427, Public Laws of 1931, is held valid, a levy of 16 cents on the valuations of 1931 being equal to a levy of 15 cents on the valuations of the county for the year 1930, and the taxable values being uncertain at the time of its levy, and it appearing that the tax rate was reasonably accurate and that the surplus collected therefrom for the purpose was carried over to the next year and the tax rate reduced accordingly.

2. Same—County tax rate to supplement State school fund held valid.

A county tax rate of 8 cents for the year 1931, in addition to a levy equal to a 15-cent rate on the valuations of 1930, to supplement the State

fund in order to provide for a higher standard of public schools, and to provide for a deficiency in the maintenance fund and fixed charges for the prior year, no State funds being available for such deficiency and it not being possible to otherwise comply with the constitutional mandate for the six months school term, *is held* valid, such additional tax rate being permissible when the relative statutes are construed together, chap. 427, Public Laws of 1931, chap. 430, secs. 6 (4 and 5), 7, 15, Public Laws of 1931, and the county board of education being given authority to supplement items of the budget with the approval of the board of commissioners and the State Board of Equalization for the purpose of providing a higher standard of schools than that provided by State support, and the record showing that this levy was made for the purpose of instructional service and auxiliary agencies is sufficient to support a finding that the items were to provide such higher standard of public schools.

3. Appeal and Error J c—

Where the trial court makes no specific findings in regard to a material fact in issue it will be presumed on appeal that the judgment is supported by findings of the essential facts.

APPEAL by plaintiffs from *Devin, J.,* 10 February, 1933. From BLADEN.

Action to recover $1,193.92, the amount of taxes alleged to have been unlawfully levied and paid by plaintiffs under protest. The appropriation of funds for the expenses of county government and the levying of taxes for such appropriations are the only questions to be considered.

For 1931 the board of commissioners levied the following taxes:

On each $100.00 worth of property, real and personal:

County General Fund Tax:	
For general purposes	$0.15
For outside poor, hospital expense, medicine and burial	.03½
For health	.01½
Total	$0.20
County General School Fund Tax:	
State 6 months term	$0.16½
Current expenses, supplement	.08
Capital outlay	.01½
Debt service	.37½
Total	$0.63

Under a resolution adopted on 7 September, 1931, the board appropriated funds for current expenses "State six months school term" as follows:

	State	*County*
General Control	$ 4,770.00	
Instructional service	80,695.00	$ 3,372.13
Operation of plant	5,245.00	
Maintenance of plant		5,057.00
Fixed charges		2,542.53
Auxiliary agencies	15,918.28	1,525.00
Capital Outlay:		
New buildings and grounds		
Old buildings and grounds		$ 390.00
Trucks		1,429.50
Equipment, superintendent's office		297.50
Debt Service:		
State loans		$ 21,649.25
County bonds		21,127.88
District bonds		588.50
Interest temporary loans		660.00

To meet the appropriations for "current expense" the county commissioners levied a tax of 16½ cents on the hundred-dollar valuation of property, and to meet appropriations to supplement the current expense for the objects enumerated as instructional service, $3,372.13; maintenance of plant, $5,057; fixed charges, $2,542.53; and auxiliary agencies, $1,525, the commissioners levied a tax of 8 cents on the hundred-dollar valuation.

For the fiscal year ending 30 June, 1932, the schools of Bladen County were maintained according to State standards as provided in chapter 430, section 15, Public Laws, 1931.

The county tax rate appearing in the tax receipt for 1931 was as follows:

County	$0.15
Outside poor	0.03½
Health	0.01½
School	0.46½
State six months	0.16½
Road debt	0.36
Total	$1.19

At the close of the evidence, trial by jury being waived, the court adjudged that the plaintiffs take nothing by their action and that they pay the costs. The plaintiffs excepted and appealed.

Varser, Lawrence, McIntyre & Henry for appellants.
H. H. Clark for appellees.

ADAMS, J. The Revenue Act applicable to the present appeal went into effect on 27 May, 1931. Public Laws, 1931, chap. 427. One of its purposes was to provide for the expense of operating all the public schools of the State for the constitutional term of six months within the standards of cost prescribed in the public school law. The total cost of operating all the public schools of the State for a term of six months was not to exceed a fixed sum, and the boards of commissioners of the several counties were authorized and directed to levy in each of the years of the next biennium a tax upon all the taxable property in each county that would be equal to a levy of fifteen cents on each hundred-dollar valuation on the total value of real and personal property listed and assessed in each county in the year 1930, as shown in the county's official report to the State.

The total valuation of all real and personal property listed and assessed for taxation in Bladen County for the year 1930, as shown in the official report, was $13,440,002, and for the year 1931 it was $12,602,463. A levy of fifteen cents on each hundred dollars in value of all property assessed in 1930 would amount to $20,160, and substantially the same amount would be raised by a levy of sixteen cents on $12,602,463, the value of property assessed for taxation in 1931. The levy actually made in 1931 was 16½ cents, and this, the appellants contend, was excessive and invalid, at least to the extent of one-half a cent.

This levy raised $20,794.06, which is in excess of the sum that would have been realized if calculated on the basis of 1930, but the commissioners had to make the appropriations and fix the levy before the amount of taxable values was definitely known and this fact necessarily involved estimates which could not be accurately predetermined. Public Laws, 1923, chap. 136, sec. 172. Indeed, the act of 1931 (chap. 427, sec. 492), provides that the tax levy therein authorized shall be subject to the same discounts and penalties as are allowed for other county taxes and the same percentage for collection, in view of which the levy seems to have been reasonably accurate. Moreover, the surplus created by the levy was carried forward and the levy of the following year was one-half a cent less than it would otherwise have been. We do not perceive that the plaintiffs have suffered any substantial loss in this respect.

In addition to the amounts levied for instructional service, maintenance of plant, fixed charges, and auxiliary agencies, there was an appropriation for a deficit in 1930 of $4,572.08. These several amounts aggregated $17,068.74. After deducting from this amount an estimated

revenue of $9,640.37 there was a remainder of $7,428.37, to which were added uncollectible taxes and collectors' commissions, making a total of $8,065.39, for the payment of which the board of commissioners levied the tax of eight cents.

Objecting to the levy of this tax, the plaintiffs contend, as with respect to the levy of sixteen and a half cents, that the maximum amount to be levied by the commissioners was a sum equal to a levy of fifteen cents on each hundred-dollar valuation.

The Constitution provides that one or more public schools shall be maintained at least six months in each school district in every county in the State and subjects the county commissioners to indictment if they fail to comply with this requirement. Article IX, sec. 3. The section is mandatory, and to provide the means of complying with it is a legislative function which the General Assembly has undertaken to exercise. *Wilkinson v. Board of Education,* 199 N. C., 669; *Lacy v. Bank,* 183 N. C., 373. It is the declared intent and purpose of the Revenue Act of 1931, to provide revenue to defray the expense of operating all the public schools of the State for six months (Public Laws, 1931, chap. 427, sec. 492), and it is made the duty of the board of county commissioners to provide by taxation the funds necessary to maintain the schools for the constitutional term. Public Laws, 1923, chap. 136, secs. 182, 183; Public Laws, 1927, chap. 239, sec. 9. It is true that in the Public Laws of 1931, chap. 430, sec. 15, it is said that no county shall levy an *ad valorem* tax for the operation of the current expense budget for schools operated according to the State standard therein set out except as provided in the Revenue Act of 1931, but this clause must not be construed as an isolated and unqualified inhibition.

One of the objects for which the tax was levied was a deficit for the preceding year. The objects designated "maintenance of plant" and "fixed charges" were to be supplied *as far as possible* out of the funds required by law to be placed to the credit of the public school fund of the county and derived from fines, forfeitures, penalties, dog taxes, and all other sources except State funds, contributions and *ad valorem* taxes; but if the estimated amount of these funds, based upon the average amount received from the specified sources for the three years next preceding was deemed insufficient, the State Board of Equalization had authority to allocate the necessary amount out of the State six-month school fund. Public Laws, 1931, chap. 430, sec. 7.

The clause requiring these two objects of expenditure to be supplied "as far as possible" out of the designated funds must be considered in connection with the preceding section (section 6, subsections 4 and 5), in which it is directed that 'maintenance of the plant" and "fixed charges" were to be paid for by the local unit out of the funds mentioned in

section seven so far as they were sufficient, and, if not sufficient, that the deficiency should be paid out of the State funds "if available."

Construed together the several sections with respect to the two objects now under consideration seem to authorize the board of county commissioners to levy a tax to supply the deficiency when the necessary State funds are not available and it is not possible otherwise to comply with the imperative requirement to maintain the schools for a term of six months.

It is contended by the appellants that the tax levied for instructional service and auxiliary agencies was unauthorized and illegal. They concede that section fifteen, *supra* (Laws, 1931, chap. 430), provides that the county board of education, with the approval of the board of county commissioners and the State Board of Equalization, in order to operate the schools of higher standard than those provided for by State support may supplement any object of expenditure specified in the budget. They insist, however, that it affirmatively appears from the record that the schools were not maintained on any standard higher than that prescribed for State support.

It is true that the plaintiffs offered evidence to this effect; but the defendants say that this testimony is inconsistent with the record which shows that the sum of $3,372.13 was levied for instructional service and $1,525 for auxiliary agencies, both of which were so levied as a supplement to the support of the six months school term at State standards. The record shows that the levy was made for "current expenses, supplement" and we think this a sufficient showing in support of such levy as a supplement for these two items. The tax if otherwise valid would not be ineffective merely for the reason all the details are not shown upon the minutes of the board of commissioners or that the specific purposes for which the levy of eight cents was made do not appear upon the tax receipt.

The allegations contained in the twelfth article of the complaint to the effect that the board of commissioners made no provision for maintaining schools on a basis higher than that of State standards and that the approval of the State Board of Equalization had not been obtained as required by law are denied in the answer. In reference to the allegations thus put in issue the trial court made no specific finding and it is presumed that the judgment is supported by the essential facts. *Comr. of Revenue v. Realty Co.*, 204 N. C., 123; *S. v. Harris, ibid.*, 422; *Rutledge v. Fitzgerald*, 197 N. C., 163. Judgment

Affirmed.

W. B. WRIGHT, MRS. ELIZABETH HICKS JOHNSON, MRS. ELLEN D. SHORE, AND J. WILBUR BUNN, CONSTITUTING THE MAJORITY OF THE TRUSTEES OF REX HOSPITAL, *v.* J. W. MCGEE, ONE OF THE TRUSTEES OF REX HOSPITAL.

(Filed 28 February, 1934.)

1. Actions B g—Action held not to involve rights, status or legal relations of parties and not to come within Declaratory Judgment Act.

An action by the majority of the trustees of a charitable corporation against a minority of the trustees to determine a controversy between them as to the power of the corporation to mortgage its property for the purpose of obtaining funds necessary to the furtherance of the charity for which it was created, in which action the corporation is not made a party, *is held* not to come within the provisions of the Declaratory Judgment Act, chap. 102, Public Laws of 1931, it not appearing that any controversy exists between plaintiffs and defendants as to their respective rights, status, or legal relations with respect to the property of the corporation, and the action is dimissed on appeal to the Supreme Court.

2. Pleadings D d—Failure to demur cannot confer jurisdiction on courts.

The failure of defendant to demur to the complaint in an action does not confer jurisdiction on the trial court or upon the Supreme Court and where the courts have no jurisdiction of the action it will be dismissed in the Supreme Court on appeal from judgment rendered therein.

APPEAL by defendant from *Harris, J.*, at Chambers in the city of Raleigh, on 5 February, 1934. From WAKE. Action dismissed.

This action was begun in the Superior Court of Wake County under the authority, and pursuant to the provisions of chapter 102, Public Laws of North Carolina, 1931, which is entitled "An act to authorize declaratory judgments."

The plaintiffs and the defendant constitute the trustees of Rex Hospital, a corporation created by the General Assembly of North Carolina. Chapter 6, Private Laws of North Carolina, 1840-41. The said corporation is now the owner of certain property, real and personal, situate in the city of Raleigh, and known as Rex Hospital. The said hospital is operated primarily as a public charity, and is maintained and supported by said corporation with funds derived from certain endowments and donations which have been made to it to enable the said corporation to provide hospital facilities for poor and afflicted persons who reside in the city of Raleigh. These funds are insufficient in amount for the adequate support and maintenance of said hospital, and for this reason are supplemented by funds derived from patrons of said hospital, who are able to pay and who do pay for the services rendered to them by said corporation.

The buildings and equipment of Rex Hospital are now inadequate for the purposes of a modern hospital, and certain repairs and improvements

are necessary in order that the corporation may continue to receive patronage which will enable it to provide hospital facilities for poor and afflicted persons residing in the city of Raleigh. The corporation is without funds to pay for such repairs and improvements and for that reason has applied to the Public Works Administration, an agency of the government of the United States, for a loan of $250,000, to be expended by the said corporation in making said repairs and improvements, and in enlarging the facilities of Rex Hospital. If the application is approved, and if the loan is made, the corporation will be required by said Public Works Administration to secure the same by a mortgage or deed of trust on all its property, both real and personal, situate in the city of Raleigh, and known as Rex Hospital.

The plaintiffs, who constitute a majority of the trustees of Rex Hospital, contend that the corporation has the power to borrow money for the purpose of repairing and improving its property, and of enlarging the facilities of Rex Hospital, and to secure the payment of money loaned for such purposes by a mortgage or deed of trust on its property. The defendant, who is one of the trustees of Rex Hospital, contends to the contrary. The sole question presented for determination is whether the trustees of Rex Hospital, as a corporate body, have the power to borrow money for the purpose of repairing and improving said hospital, and of enlarging its facilities, and to secure the payment of the same by a mortgage or deed of trust on said hospital.

On the facts alleged in the complaint and admitted in the answer, the court concluded:

"1. That all persons interested in this controversy have been duly served with summons and are now before the court. That the defendant J. W. McGee has duly filed an answer by his counsel admitting the facts as alleged in the petition, but seriously controverting the right of the trustees of Rex Hospital to borrow money under said state of facts, and as a matter of law.

2. That the court has jurisdiction of this action and of all parties concerned, by reason of the power conferred upon it by chapter 102, Public Laws of North Carolina, 1931, known as 'The Uniform Declaratory Judgment Act.'

3. That the court is of the opinion and so holds upon the foregoing findings of fact that the trustees of Rex Hospital have full power to accept the loan offered by the Public Works Administration, to borrow money and to pledge therefor the physical property now in the hands of said trustees known as Rex Hospital, as security therefor, by way of mortgage, deed of trust, or other legal instrument, and to do any and all things necessary and proper to the completion of said loan, the proceeds of which shall be used for the purpose of either improving the present

hospital building or building a new hospital and providing equipment for the same."

It was thereupon ordered, considered, adjudged, and decreed by the court:

"1. That the trustees of Rex Hospital and their successors have and are hereby fully clothed with the power to borrow money for the purpose of improving the present hospital and its equipment and/or of erecting a new hospital and providing such equipment; to pledge the physical property of the institution known as Rex Hospital as security for said loan and to execute a mortgage, a deed of trust, or any other legal instrument pledging said property; to execute notes or bonds representing the indebtedness involved and to do any and all things necessary to a proper and legal conclusion of said loan; and said trustees of Rex Hospital or their successors are hereby adjudged to have full power to accept the loan from the Public Works Administration, or any other corporation making a loan to said trustees for the purposes above expressed; and to do any and all things necessary for the acceptance and conclusion of the same, including the power to alienate as above provided.

2. It is further ordered that the costs of this action be taxed against the defendant by the clerk."

The defendant excepted to the judgment and appealed to the Supreme Court.

Thomas W. Ruffin for plaintiffs.
Banks Arendell for defendant.

CONNOR, J. The plaintiffs and the defendant in this action, as was said of the parties in *Poore v. Poore,* 201 N. C., 791, 161 S. E., 532, have misconceived both the purpose and the scope of chapter 102, Public Laws of North Carolina, 1931, which is entitled "An act to authorize declaratory judgments." The bill which was enacted by the General Assembly of this State, was approved by the National Conference of Commissioners on Uniform State Laws, in 1922, and has been adopted and is now in force in at least twenty states. See Uniform Laws Annotated, Vol. 9, page 120. The act has been in full force and effect in this State since its ratification on 12 March, 1931.

Prior to its enactment, the courts of this State had no jurisdiction to render advisory opinions with respect to, or judgments declaring the rights and liabilities of parties to actions or proceedings on an agreed statement of facts. *Hicks v. Greene Co.,* 200 N. C., 73, 156 S. E., 164. Such jurisdiction was not conferred by C. S., 626, *Burton v. Realty Co.,* 188 N. C., 473, 125 S. E., 3. Actions or proceedings in which on the facts agreed there was no real controversy as to questions of law arising

on such facts, which might be the subject of a civil action, were dismissed, for the reason that the Court was without jurisdiction to determine such questions. *Hicks v. Greene Co., supra. Burton v. Realty Co., supra.* The distinction between C. S., 626, and chapter 120, Public Laws of North Carolina, 1931, is obvious. In *Light Co. v. Iseley,* 203 N. C., 811, 167 S. E., 256, it is said: "It need not be alleged in the complaint or shown at the trial, in order that the Court shall have jurisdiction of an action instituted under the authority and pursuant to the provisions of chapter 120, Public Laws of North Carolina, 1931, that the question in difference between the parties is one which might be the subject of a civil action at the time the action was instituted. It is not required for purposes of jurisdiction that the plaintiff shall allege or show that his rights have been invaded, or violated by the defendants, or that the defendants have incurred liability to him, prior to the commencement of the action. It is required only that the plaintiff shall allege in the complaint and show at the trial, that a real controversy, arising out of their opposing contentions as to their respective legal rights and liabilities under a deed, will or contract in writing, or under a statute, municipal ordinance, contract or franchise, exists between or among the parties, and that the relief prayed for will make certain that which is uncertain, and secure that which is insecure. See *Walker v. Phelps,* 202 N. C., 344, 163 S. E., 727."

In the instant case, it does not appear from the facts alleged in the complaint that the plaintiffs or the defendant, who is each a party to the action in his or her individual capacity, have any rights, status or legal relations which are involved in the question of law which it is sought to have determined by a declaratory judgment. There is no controversy between the plaintiffs and the defendant as to their respective rights, status, or legal relations, with respect to the property now held by the corporation and subject to a charitable trust. The corporation created by the General Assembly of this State, and existing under the name of the trustees of Rex Hospital, is not a party to the action, although the question submitted to the court for the determination involves the powers of the corporation, and not the powers of the individuals who constitute the corporation.

We are of opinion that on the facts alleged in the complaint, admitted in the answer, and found by the court, the court had no jurisdiction of the action, and for that reason the action should have been dismissed.

The failure of the defendant to demur to the complaint did not confer jurisdiction of this action on the Superior Court, nor does such failure confer jurisdiction on this Court of defendant's appeal from the judgment which was adverse to his contention. In *Heller v. Shapiro,* 208 Wis., 310, 242 N. W., 174, 87 A. L. R., 1201, dismissing the action, the

Court said: "While the point was nowhere raised by the appellant in the course of the litigation, we consider the case is not one for declaratory relief, and that the trial court should not have entertained jurisdiction of it. We construe the declaratory relief statute as only justifying a declaration of rights upon an existing state of facts, not upon a state of facts that may or may not exist."

We refrain from discussing the question which the parties to this action have sought to present for determination by a declaratory judgment. In *Shannonhouse v. Wolfe*, 191 N. C., 769, 133 S. E., 93, it was held that where trustees who held property impressed with a charitable trust had mortgaged the same to secure money which had been expended by the trustees in improving the property, the mortgage was void, for the reason that the trustees were without power to borrow the money and to secure the same by the mortgage. Whether in an action or proceeding to which the trustee of a charitable trust, corporate or otherwise, is a party, a court of equity has the power to authorize the trustee to borrow money to preserve the trust and to secure the same by a mortgage or deed of trust on the property, is too serious a question to be discussed or decided, until it shall be clearly presented to this Court. If the power exists, it is manifest, it should be exercised with great care, and only when it clearly appears that the preservation of the trust requires the trustees to borrow money which they can do only by securing its payment by a mortgage or deed of trust on property conveyed, devised, bequeathed or donated to the trustees in trust for a charitable use. We have been unable to find any case in which a court with equity jurisdiction has exercised such power. The power to authorize the sale of property impressed with a trust for charity, and the investment of the proceeds of the sale in other property to be held under the same, or like a trust, does not necessarily include the power to authorize a mortgage or deed of trust on the property, which may result in the loss of the property upon the foreclosure of the mortgage or deed of trust.

Action dismissed.

T. C. BOWIE v. H. C. TUCKER AND MARTHA TUCKER.

(*Filed 28 February, 1934.*)

Judgments D b—Upon judgment by default and inquiry only question of damages is open for determination.

In an action to recover for one-half the value of a wall built by plaintiff on his property and used by defendant by connecting the fence on his property thereto, a judgment by default and inquiry was entered for defendant's failure to answer plaintiff's amended complaint, filed by leave

of court after demurrer filed by defendant to the original complaint had been sustained. *Held*, the only question open for determination upon the hearing was what was one-half the value of the wall at the time of the rendition of the judgment by default and inquiry, and an issue and instruction confining the jury to this point will not be held for error, and the jury's verdict after hearing the evidence and defendant's testimony in mitigation of damages that he had disconnected his gate from the wall, is upheld on appeal. C. S., 593, 596.

APPEAL by defendants from *Clement, J.*, and a jury, at July Term, 1933, of ASHE. No error.

The amended complaint of plaintiff and judgment by default and inquiry is as follows: "By leave of court the plaintiff files the following amended complaint: (1) That the defendants are the owners of lots Nos. 6, 7, 8, 9, and 10, in block No. 43, of the first addition to the town of West Jefferson, North Carolina, north of which there is a ten-foot public alley, which was dedicated to the town of West Jefferson by the West Jefferson Land Company by plat of 19 May, 1915, which is duly recorded in the office of the register of deeds of Ashe County, in Book S-1, pages 600 and 601, and that said alley at the time the plaintiff purchased his property from the West Jefferson Land Company was open and remained open until the defendants closed the same, as will hereinafter appear. That the plaintiff is the owner of the property north of said alley and the northern portion of blocks Nos. 43, 42 and 41 of said addition. (2) That the plaintiff has erected a brick and concrete wall on the north side of said alley and along the plaintiff's property line and entirely on the plaintiff's property, and that the defendants, without the knowledge or consent of this plaintiff, have closed up said alley and have joined their fence to plaintiff's brick and concrete wall and are using the same for the northern boundary of their lots and thus closing up and are attempting to appropriate to their own use said alley and have refused to remove said fence and connection of their fence to the plaintiff's wall and have refused to open said alley, although they have been duly notified to do so; that the defendants have run their fence across said alley and joined it to the plaintiff's wall at three points, two points on block No. 43 and one on blocks Nos. 42 and 41; that a reasonable cost of the wall along the plaintiff's property line is $3,000, and the plaintiff prays that the defendants be required to pay the sum of $1,500 as a reasonable sum for the use of said wall, which is now being used and appropriated by the defendants as the northern boundary of their property.

That the defendants, without the knowledge or consent of this plaintiff, used and appropriated the woven wire and stakes that the plaintiff removed from along the boundary line between himself and said alley north of block No. 43, which is reasonably worth $50.00.

Wherefore, plaintiff prays that the defendants be required to remove their fence and connection from plaintiff's wall and open said alley, and that they be permanently restrained from the connecting of their fence to plaintiff's wall and from obstructing said alley, or that they be required to pay the plaintiff the sum of $1,500 damages, and the cost of this action, and that the plaintiff have such other and further relief as he is entitled under the pleadings in this cause.—C. W. Higgins, attorney for plaintiff. (Verified 7/21/28.)"

"*Judgment of C. S. C. by Default and Inquiry.* This cause coming on to be heard before the undersigned clerk of Superior Court of Ashe County on this Monday the 4th day of March, 1929, and it appearing to the court that summons was issued in the above entitled cause on 24 April, 1928, and personally served on each of the defendants by leaving a copy of summons and copy of complaint with each of the defendants; and it also appearing to the court that the plaintiff filed a duly verified complaint in said cause on 24 April, 1928, and that on 26 April, 1928, the defendant filed a demurrer to said complaint, and that at the July Term of Superior Court of Ashe County, 1928, said demurrer was heard by his Honor, John H. Clement, judge presiding, and a judgment was signed sustaining the demurrer of the defendants and giving the plaintiff forty days to file an answer to said amended complaint; it also appearing to the court that the plaintiff filed an amended complaint on 21 July, 1928, and a copy of same was mailed to the defendants' counsel on said date; it further appearing to the court that the defendants have never answered said amended complaint:

It is, therefore, upon motion of plaintiff in this action, considered and adjudged that the plaintiff is entitled to a judgment by default and inquiry for the value of one-half of the brick wall erected by the plaintiff on his premises as described in the complaint to which the defendants have joined their fence and are utilizing; which one-half value shall be determined by a jury upon proper issues submitted to them as provided by sections 595-6-7 of the Consolidated Statutes of North Carolina. This Monday, 4 March, 1929.—J. D. Stansberry, clerk of Superior Court."

The issue submitted to the jury and their answer thereto is as follows: "What is the value of one-half of the brick wall which the defendants attached their fence, without the plaintiff's permission? Answer: $1,000."

The court below rendered judgment on the verdict. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The other facts necessary will be set forth in the opinion.

C. W. Higgins and R. A. Doughton for plaintiff.
W. B. Austin for defendants.

CLARKSON, J. In *Bowie v. Tucker*, 197 N. C., 671, the judge of the Superior Court found that in not answering plaintiff's complaint that the defendants were entitled to have the judgment by default and inquiry set aside on the ground of excusable neglect and reversed the judgment of the clerk. Plaintiff appealed to this Court and this Court reversed the judgment of the court below. The decision in part is as follows at p. 672: "The clerk gave judgment by default and inquiry and the defendants made a motion before him to set aside the judgment on the ground of excusable neglect. The motion was denied, and upon appeal the clerk's judgment was reversed. C. S., 600. An applicant for relief under this section must show a meritorious defense, as well as excusable neglect. *Dunn v. Jones*, 195 N. C., 354; *Crye v. Stoltz*, 193 N. C., 802; *Helderman v. Mills Co.*, 192 N. C., 626. Conceding that there is sufficient evidence of excusable neglect to support the finding to this effect, we have discovered no evidence whatever, and of course there is no finding, of a meritorious defense. . . . This is the substance of the amended complaint, which the plaintiff is entitled to establish by competent evidence, unless the defendants disconnect their fence from the plaintiff's wall and reopen the alley, the plaintiff alternately asking either this relief or damages for the alleged wrong."

At the close of plaintiff's evidence and at the close of all the evidence, the defendants made motions in the court below for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions and in this we can see no error. The plaintiff's evidence was sufficient to be submitted to a jury, the question was solely one of damage under the default and inquiry judgment. N. C. Code of 1931 (Michie), sections 593-596. "A judgment by default is one thing; a judgment by default and inquiry consists of two things. There are two kinds of judgments by default—one final, the other interlocutory. In actions sounding in damages the interlocutory judgment, which is rendered for want of an answer, is an admission or confession of the cause of action; and there follows a writ of inquiry by means of which the damages are to be assessed." *Junge v. MacKnight*, 137 N. C., 285, 288.

A judgment by default and inquiry for the want of an answer establishes the cause of action and leaves the question of the amount of damages open to the inquiry. *Plumbing Co. v. Hotel Co.*, 168 N. C., 577. *Armstrong v. Asbury*, 170 N. C., 160, but the burden of proving any damages beyond such as are nominal still rests upon the plaintiff. *Hill v. Hotel Co.*, 188 N. C., 586.

A judgment by default and inquiry is conclusive that the plaintiff has a cause of action and entitles him to nominal damages without further proof. *Foster v. Hyman*, 197 N. C., 189.

The exception and assignment of error made by defendants as to the issue submitted by the court below cannot be sustained. The issue and verdict is as follows: "What is the value of one-half of the brick wall which the defendants attached their fence, without the plaintiff's permission? Answer: $1,000."

The issue submitted arises on the pleadings and present to the jury the inquiry as to the essential matter or determinative fact in dispute. *Grier v. Weldon*, 205 N. C., 575.

The judgment by default and inquiry on the allegations in the complaint settles this matter and we are confined to what it clearly states: "Considered and adjudged that the plaintiff is entitled to a judgment by default and inquiry for the value of one-half of the brick wall erected by the plaintiff on his premises as described in the complaint to which the defendants have joined their fence and are utilizing; which one-half value shall be determined by a jury upon proper issues submitted to them, as provided by sections 595-6-7 of the Consolidated Statutes of North Carolina."

Where no answer is filed then the relief shall not exceed that demanded in the complaint. *Jones v. Mial*, 82 N. C., 252; C. S., 606. The court below charged the jury as follows: "Now the clerk has found, in this judgment rendered here, that the defendant was entitled to pay for one-half of the wall built by the plaintiff. Then it is your duty, your mission, to find out what a fair value of one-half of that wall built by the plaintiff as described in the complaint, was or is, or was of 4 March, 1929, when the judgment was rendered.

You are not required to find out in this case or to decide whether the plaintiff built a wall or not. Neither are you required to find out whether the defendant built his fence or attached his fence to the wall built by the plaintiff, that has already been decided and a judgment has been rendered setting that out and the judgment providing that a case should be submitted to a jury to decide what was a fair market value of one-half of this wall."

We do not think this exception and assignment of error made by defendants to the charge of the court below above set forth, can be sustained. The plaintiff was the owner of blocks 43, 42 and 41 and had built the wall for the distance of about 530 feet. Defendants owned lots 6, 7, 9, 8 and 10 in block 43 and the lots of defendants extended for a distance of about 250 feet along said wall and defendants joined their fence to the plaintiff's wall at only two points in block 43. The defendants also own block No. 40, as appears on the map, and closed the alley

between the north and south portions of block No. 40, and extended a fence along the south side of the alley through block 40 and across Fourth Street, and erected a gate across said alley about the north end, between the line of lots 6 and 7 on block 41 and there again joined their fence to the plaintiff's brick wall, utilizing this end of the brick wall as a part of their enclosure around their property in the northern portion of block 40. Any contention in reference to this matter is concluded in the judgment by default and inquiry. The record discloses that the following was sent: "To H. C. Tucker: You are hereby notified to remove the gate and fence that you have joined to my brick wall on the south side of my premises in the town of West Jefferson, N. C., and put your fence back on the line on the south side of the alley between my property and your property, and do so within five days from the date of this notice, or I will sue you for one-half of the value of said wall and also apply to the court for a restraining order, restraining you from joining this fence to my wall. This 11 April, 1928. T. C. Bowie."

The defendant went into all these matters that are disputed, in his testimony. He even testified: "I will state that there is no alley between my property and Mr. Bowie's and never has been. There is a driveway that I use to get into my wood shed, going in and out, but no one else has ever used it."

A deed was introduced by plaintiff from E. A. McNeill, to defendants after describing the land purchased. "And known as lots Nos. 6, 7, 8, 9, and 10, block 43 (No. 43) situated on First Street and Church Avenue; for specific description and location of said lots, reference is hereby made to the plan and blueprint of said town of West Jefferson, which is registered in the office of the register of deeds of Ashe County, North Carolina, in Book R-1, page 600, to which reference is hereby made."

The blueprint as part of the record in this Court shows the alley. The defendant, H. C. Tucker, testified on cross-examination: "I disconnected my gate from the wall, it has been open for a year or more." This matter, if one of partial defense, we do not think it material on this record. The defendants contended there was no alley to open. The jury heard this contention and we do not see that it is prejudicial or reversible error. As to the value, defendant Tucker, said: "I could place no value on the wall as there would be no value so far as I am concerned, and no particular value to any individual that I could see."

J. A. Weaver, a witness for defendant, testified: "I am familiar with H. C. Tucker's property, and the wall built by Mr. Bowie between Mr. Bowie and Mr. Tucker. I was in West Jefferson at the time the wall was built. I have an opinion satisfactory to myself as to value of the wall on 4 March, 1929. In making up the value of this wall for the

purpose of this fence it would not be more than $1.00 per foot. 250 feet of this wall is along Mr. Tucker's property."

The exceptions and assignments of error made by defendants cannot be sustained. The jury, the triers of the facts, heard all the evidence and rendered their verdict. The plaintiff contended that the wall cost about $4,000. The verdict was for $1,000. The court below in a careful charge applied the law applicable to the facts. We find in law

No error.

MARY SILER HIGDON v. W. L. HIGDON, BANK OF FRANKLIN, BANK OF WEST JEFFERSON, A. B. SLAGLE, SHERIFF OF MACON COUNTY, R. S. JONES, TRUSTEE FOR GEORGE R. McPHERSON AND GEORGE R. McPHERSON.

(Filed 28 February, 1934.)

Dower B a—Under facts of this case wife held not entitled to have value of inchoate dower computed and paid to her in cash.

Plaintiff, alleging that she had been abandoned by her husband, brought suit to enjoin the sale of her husband's lands under a deed of trust and executions on judgments against him until her rights to inchoate dower in the lands could be determined, and to have the present value of her inchoate dower in the lands of her living husband fixed and paid to her in cash. *Held*, although inchoate dower has a present value, the enjoyment of the estate is expressly postponed by statute until after the husband's death, and is contingent upon the wife surviving her husband, and other provisos of the statute, C. S., 4099, 4100, and defendant's demurrer to the complaint was properly sustained, *Blower Co. v. MacKenzie*, 197 N. C., 152, not being applicable to the facts of the present case.

APPEAL by plaintiff from *Alley, J.*, at November Term, 1933, of MACON. Affirmed.

For the determination of this action, the only allegation in plaintiff's complaint necessary to be considered is as follows: "That the plaintiff is a citizen and resident of Macon County, North Carolina, where she has resided continuously for the last past nine years and more.

That the defendant, W. L. Higdon, is also a citizen and resident of Macon County, North Carolina, but is at this time temporarily residing in the city of Sacramento, in the State of California.

That the plaintiff and defendant, W. L. Higdon, were married to each other on 28 February, 1928, in the city of Atlanta, Fulton County, Georgia, and thereafter lived together as husband and wife up until about 17 June, 1933, at which time the said W. L. Higdon, without any just cause or excuse, or any fault on the part of the plaintiff, wrongfully and unlawfully abandoned the plaintiff, and since said time the

said W. L. Higdon has resided in the city of Sacramento, in the State of California.

That the plaintiff is advised and believes that she occupies the status of a preferred creditor of her husband, W. L. Higdon, on account of her inchoate right of dower in the real estate owned by him, as aforesaid, and of the value of $102,000, as aforesaid, and that, as she is advised and believes, the present value of her contingent right of dower during the life of her said husband can be computed and that the correct rule or computation is to ascertain the present value of an annuity for her life, according to the interest in the third of the proceeds of the estate to which her contingent right of dower attaches, and then to deduct from the present value of the annuity for her life, the value of a similar annuity, depending upon the joint lives of herself and her husband, and that the difference between these two sums will be the present value of her contingent right of dower; and in this connection the plaintiff avers that the annual net income from her husband's said real estate, and in which she is entitled to share, as aforesaid, is the sum of $7,000.

Wherefore, plaintiff prays the court: (1) That the sale of the property of W. L. Higdon under the aforesaid deed in trust by R. S. Jones, trustee for George R. McPherson, be restrained until the further order of the court. (2) That the defendants, the Bank of Franklin and the Bank of West Jefferson, and A. B. Slagle, sheriff of Macon County, be restrained from selling, or attempting to sell any of the lands of the defendant, W. L. Higdon, in satisfaction of the judgments obtained by the defendant banks against W. L. Higdon until the further orders of this court. (3) That the plaintiff's inchoate right of dower in the lands of the said W. L. Higdon be protected and preserved by a proper order of the court. (4) For the costs of this action to be taxed by the clerk, and for such other and further relief as the plaintiff may be entitled to in the premises."

The defendants demurred. The demurrer and judgment of the court below is as follows: "This cause coming on to be heard before the undersigned judge at the November Term, 1933, of the Superior Court of Macon County, upon the demurrer *ore tenus* of the defendants entered therein, for that: (1) It appears upon the face of the complaint from the allegations and prayer therein contained that the relief sought by the plaintiff's inchoate right of dower in the lands of her husband, who is now living, and the fixing of the present value thereof, to the end that the plaintiff may receive the same in cash. (2) It appears from the face of the complaint that the property of the defendant which the Bank of Franklin is undertaking to advertise and sell, is the property of the defendant, W. L. Higdon, and that the sale of said property would

not in any way involve or affect the rights of the plaintiff in said property if the plaintiff's inchoate right of dower therein should at some later date become consummate. (3) For that it appears upon the face of the complaint that the action was instituted originally in the Superior Court of Macon County, whereas, if maintainable at all, it should have been brought as a special proceeding before the clerk of Superior Court of Macon County.

Whereupon, upon due consideration of the record and the arguments of counsel, the court being of opinion that the action cannot be maintained by the plaintiff in this court at this time, for the objects and purposes sought in said complaint:

It is, therefore, considered and adjudged by the court that the demurrer *ore tenus* be and the same is hereby sustained and allowed."

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

W. L. McCoy for plaintiff.

Jones & Ward and Jones & Jones for defendant, the Bank of Franklin.

T. B. Higdon, Atlanta, Ga., R. J. Sisk, Geo. B. Patton and J. H. Stockton for defendant, W. L. Higdon.

CLARKSON, J. The question to be decided in this case, is the plaintiff, Mary Siler Higdon, wife of W. L. Higdon, under the facts and circumstances of this case entitled to have her inchoate right of dower assigned and laid off to her, or the cash value thereof ascertained and it be paid to her during the lifetime of her husband? We think not.

C. S., 4099, is as follows: "Widows shall be endowed as at common law as in this chapter defined: *Provided,* if any married woman shall commit adultery, and shall not be living with her husband at his death, or shall be convicted of the felonious slaying of her husband, or being accessory before the fact to the felonious slaying of her husband, she shall thereby lose all right to dower in the lands and tenements of her husband; and any such adultery or conviction may be pleaded in bar of any action or proceeding for the recovery of dower."

C. S., 4100, in part is as follows: "Subject to the provision in the preceding section, every married woman, upon the death of her husband intestate, or in case she shall dissent from his will, shall be entitled to an estate for her life in one-third in value of all the lands, tenements and hereditaments whereof her husband was seized and possessed at any time during the coverture, in which third part shall be included the dwelling-house in which her husband usually resided, together with offices, out-houses, buildings and improvements thereunto belonging or appertaining; she shall in like manner be entitled to such an estate in

all legal rights of redemption and equities of redemption or other equitable estates in lands, tenements and hereditaments whereof her husband was seized in fee at any time during the coverture, subject to all valid encumbrances existing before the coverture or made during it with her free consent lawfully appearing thereto." *et cetera.*

In *Gatewood v. Tomlinson*, 113 N. C., 312 (313), it is said: "By the express words of the statute, her enjoyment of the possession of one-third of the land is postponed until the death of her husband. The defendants have acquired the husband's rights. They stand in his place as to this land. She has, it is true, a right, an inchoate right or estate in the land, but its enjoyment is postponed by the law until the death of her husband, and is contingent upon her surviving him. The case of *Felton v. Elliott*, 66 N. C., 195, is directly in point, we think."

In *Rodman v. Robinson*, 134 N. C., 503 (504): "The wife has an inchoate right of dower, but she has no present right to the property nor to its possession, nor any dominion over it, she has only a right therein contingent upon surviving her husband, which may not happen. *Gatewood v. Tomlinson*, 113 N. C., 312."

In *Rook v. Horton*, 190 N. C., 180 (183): "On account of the nature of the wife's interest in an inchoate right of dower, she cannot set up her claim to dower during her husband's lifetime. *Hughes v. Merritt*, 67 N. C., 386; *Felton v. Elliott*, 66 N. C., 195; *O'Kelly v. Williams*, 84 N. C., 283; *Gatewood v. Tomlinson*, 113 N. C., 312; *Rodman v. Robinson*, 134 N. C., 503. This rule does not affect her rights in equity for the protection of her inchoate right, as discussed in *Deans v. Pate*, 114 N. C., 194; *Gore v. Townsend*, 105 N. C., 228, and cases therein cited."

We think the case of *Griffin v. Griffin*, 191 N. C., 227 (229), is decisive of this controversy. The facts are similar: "Upon the death of the husband the dower becomes consummate. During the lifetime of the husband, it is inchoate. The wife, during the lifetime of her husband, by proper conveyance, can alienate her inchoate right of dower. The wife joining with her husband in deed of conveyance and privy examination. C. S., 4102."

We have read the brief and supplemental brief of plaintiff carefully prepared, but we do not think the authorities mainly relied on, *Gore v. Townsend*, 105 N. C., 228, and *Blower Co. v. MacKenzie*, 197 N. C., 152, applicable on the facts and pleading in this action. The cases of *Chemical Co. v. Walston*, 187 N. C., 817, and *Holt v. Lynch*, 201 N. C., 404, were actions where the dower had become consummate. Nor do we think the other authorities cited by the plaintiff applicable. For the reasons given, the judgment of the court below is

Affirmed.

POLY FOX, JR., BY HIS NEXT FRIEND, POLY FOX, SR., v. RUFUS L. BARLOW.

(Filed 28 February, 1934.)

1. Automobiles C f—

A driver of an automobile is required to observe a greater degree of care when approaching small children on the shoulders on a highway.

2. Same—Evidence held insufficient to be submitted to jury in action to recover for injuries to child struck by car on highway.

Evidence tending to show that plaintiff, a five-year-old child, was walking on the shoulders on a highway with his mother and that she was holding his hand, and that he was under her immediate control, when suddenly the child broke away and ran across the road immediately in front of defendant's car, without evidence as to defendant's speed immediately prior to the accident or that he was driving at excessive speed upon approaching the scene of the accident, and that upon the child's running in front of the car, defendant swerved the car to the left in an attempt to avoid the injury and struck and injured the child on the left-hand side of the highway, *is held* insufficient to be submitted to the jury on the issue of negligence.

3. Negligence A e—

Actionable negligence is not presumed from the mere fact of injury, however unfortunate or severe the injury may be.

4. Automobiles C b—Evidence held insufficient to be submitted to jury on question of excessive speed in residential district.

Where there is no definite evidence as to the number of residences at the scene of the accident so as to bring the place within the statutory definition of "residential section," C. S., 2618-A, or "residential district," C. S., 2621(43), and no evidence that the speed of the car was a proximate cause of the accident in suit, the evidence is insufficient to be submitted to the jury on the question of defendant's negligence in exceeding the speed limit prescribed in residential districts, there being no evidence that defendant exceeded the speed limit prescribed for highway travel generally.

CIVIL ACTION, before *Warlick, J.*, at July Term, 1933, of CATAWBA.

On 7 January, 1932, in the afternoon about three-thirty or four o'clock, the mother of plaintiff and the plaintiff were walking on Highway No. 10 between Newton and Conover and traveling in the direction of Conover. The defendant, driving a one-seated Ford cabriolet, was traveling from Newton to Conover in the same direction. At that time the plaintiff was five and a half years old. The mother of plaintiff said: "We were on the right-hand side going toward Conover. . . . The school bus and some other cars were passing. They were going in the direction of Newton. . . . After all those cars got by—bus and all—I stopped and looked around and saw this car coming and I waited or was going to wait until this car got by. It was the only car

that was coming or going, and my little boy jerked loose and he saw his little sister Louise and ran across the highway to her. When I saw the car that struck my boy I was up the highway a piece. We were walking on the shoulder of the highway. . . . My daughter's name is Louise. She came out toward the road and started down the highway, coming to meet us. I know that he started across the highway and got hit, and after that I cannot tell you any more. . . . After those cars passed, my boy jerked loose from me and ran across the road. It was my intention to keep him from running across the highway, but he had never done such a thing before and I didn't think he would do it. He started across the street to see his sister on the other side. His sister had just come from school. . . . He was stricken on the left-hand side of the highway. I don't know how fast Mr. Barlow was going. . . . The child started to cross the highway. The little fellow ran just as hard as he could run. He did not run right in front of Mr. Barlow's car. . . . He was not going straight across. . . . I told Mr. Barlow at the time that no matter whether the child lived or died that he was in no way to blame and I didn't blame him at the time, but I found out later that he was on the wrong side of the road when he hit the child. . . . I changed my mind about what I told him after I found out he was on the wrong side of the road. It just came to me how it was. I didn't know it when I was talking to Mr. Barlow. It never came to my mind which side of the road that car should have been on until after I got to the hospital. . . . I saw Mr. Barlow pick up the child on the left-hand side of the road."

The evidence tended to show that the plaintiff sustained a broken leg, a fractured skull and numerous bruises, and remained in the hospital about two weeks, when he was returned to his home.

Witness for plaintiff said that he was standing inside a filling station and noticed "the car that struck the child coming up the road. . . . When I first saw the car in my opinion it was moving between 35 and 40 miles per hour. . . . Mr. Barlow was about 150 feet from the place of the accident when I first saw him. . . . I don't know what rate of speed it was going at the time of the impact." There was evidence that a dirt road intersected Highway No. 10 near the scene of the accident. The said witness continued "when I saw the man going toward Conover he was about 150 feet from the crossing. It is 35 or 40 feet from the crossing to where the accident occurred. . . . That crossing is used right smart. It is a regular street. It is not in the corporate limits of Newton or Conover."

Another witness for plaintiff, a civil engineer, testified that "beginning about the Log Cabin Service Station I measured down the highway a thousand feet. I found eight residences within that distance. . . .

I did not count how many houses are within 1,000 feet north of the intersection toward Conover. . . . If you were a stranger and not acquainted with that country and got in your car and started toward Conover, you would have to get rather close up to that intersection before you would know there was one there. I don't remember seeing any sign or signal to show there is an intersection. . . . I can't say that for a distance of 300 feet either way from the intersection it is mainly unoccupied. . . . For a distance of 300 feet north and 300 feet south on either side there may be a good deal more land unoccupied by houses than there is occupied."

There was testimony tending to show that the collision occurred about 100 feet from the intersection and that certain skid marks on the pavement began about the center of the road going toward Conover and extended toward the left-hand side of the road. Describing the marks, witness said: "I don't mean skidded. You could see where he started to stop. I would not be right positive how far he skidded, but around 25 or 30 feet. The skidding was from the direction of left from the right."

The defendant testified that he was driving his car in a careful manner and saw the plaintiff and his mother walking in the same direction in which he was traveling; that they stopped and were standing on the shoulder of the road, "and just as he got within a little way of them, those two cars passed, and the child pulled loose from its mother and jumped suddenly in front of me, some six or eight feet in front of me. I cut to the left as soon as I could in order to miss the child and its mother. I did not go straight because the mother was there. She was reaching out like she was going to catch the child, and I thought I could turn to the left and miss them. When I hit him I was running across the road. I picked him up and took him in the house and put him on the bed. . . . Just before I passed the intersection I cut my speed to about 20 miles. Before that I was running 25 or 30, and I didn't gather any more speed until the child jumped in front of me."

Issues of negligence and damages were submitted to the jury and answered in favor of the plaintiff.

From judgment upon the verdict assessing damages in the sum of $1,250, defendant appealed.

Jos. A. Taylor and Self, Bagby, Aiken & Patrick for plaintiff.
Warren & Crisp and Newland & Townsend for defendants.

BROGDEN, J. Experience demonstrates that children of tender years in or about streets and highways are likely in obedience to impulse to run into or across such streets and highways suddenly and without

warning. Motorists must know and recognize this fact and govern themselves accordingly else the criminal and civil laws must be called upon to turn professor.

However, in the case at bar, the child was standing on the shoulder of the highway, under the immediate control of the mother. She held him by the hand. She saw the approach of defendant's car and stopped to wait for it to pass. Obviously it was near at hand. Suddenly the child jerked loose from the mother and started to run across the highway to meet his sister on the opposite side of the road. The defendant turned to the left and struck the child on the left hand side of the road, inflicting serious and permanent injuries. There was no evidence of the speed of the car immediately preceding the act of the child in running across the road. The road was straight for 600 or 800 feet. There is no evidence as to how close the car was when the child started across the highway except the evidence of defendant, who testified that the child jerked loose and started across the road when his car was not more than six or eight feet away.

Such is the story told by the testimony.

Actionable negligence is not presumed from the mere fact of injury, however unfortunate or severe the injury may be. So, in order to show an excessive speed the plaintiff invoked the principle that the accident occurred in a residential district. C. S., 2618(a) prescribes a speed of twenty miles per hour in a residential section and undertakes to define the residential section on highways by providing that "residential sections shall be construed to begin at the first point between which point and a point 1,000 feet away on said road or highway there are as many as eight residences." C. S. section 2621(43) (t), defines residential district as "the territory contiguous to a highway not comprising a business district when the frontage on such highway for a distance of 300 feet or more is mainly occupied by dwellings or by dwellings and buildings in use for business." The trial judge expressed doubt as to which of these antagonistic definitions should be adopted, but regardless of the conflict or of how much the statutes swear at each other, they have no bearing on this case. As we interpret the record, there is no definite evidence of the number of residences measured from the point of the collision or as to whether in a space of 300 feet the surface of the earth "is mainly occupied by dwellings or by dwellings and buildings in use for business." While various measurements were submitted by several witnesses, the vital point is covered with fog and uncertainty. Moreover, there is no evidence that the speed of the car was the proximate cause of the injury. Consequently the motion for nonsuit should have been allowed.

Reversed.

CLYDE F. WOOD v. SHENANDOAH LIFE INSURANCE COMPANY.

(Filed 28 February, 1934.)

Insurance C c—Held: under terms of special agent's contract with general agent, special agent could not hold insurer liable for commissions.

Plaintiff was appointed a special agent by a general insurance agent by contract specifying plaintiff's authority in regard to procuring applications for insurance in defendant company, collecting the first annual premiums on applications obtained by him, and commissions to be allowed him by the general agent on renewal premiums paid on policies obtained by him, and expressly specifying that plaintiff was to hold the general agent and not the insurance company liable for any commissions due. All commissions due by insurer on renewals of policies coming through the general agency for the years in question were offset by insurer against indebtedness due the insurer by the agency. The special agent brought action against the insurer to recover the amount of commissions due him on renewal policies by the general agent on the theory of money had and received to his use by the insurer. *Held*, the contracts between the general agent and the insurer and the special agent and the general agent are separate and independent, and no part of the commissions on renewals due by the general agent to the special agent was to be set apart or held in trust for the special agent, and insurer had the right to offset the commissions on renwals against the debt due it by the general agent, and insurer's motion of nonsuit in the special agent's action against it was properly allowed.

APPEAL by plaintiff from *McElroy, J.*, at July Term, 1933, of BUNCOMBE.

The M. P. Coley Agency, of Shelby, North Carolina, was the general agent of the Shenandoah Life Insurance Company and on 22 October, 1926, made a written contract with the plaintiff, material parts of which are as follows:

Whereas the said M. P. Coley Agency, party of the first part, has a general agency contract with the Shenandoah Life Insurance Company, Incorporated, and desires to secure the services of the said Clyde F. Wood, party of the second part, in order to aid him in carrying out his general agency contract with the Shenandoah Life Insurance Company, Incorporated. Now therefore, the said M. P. Coley Agency, party of the first part, does hereby appoint the said party of the second part as his special agent, for the purpose of procuring applications for insurance in the Shenandoah Life Insurance Company, Incorporated, of Roanoke, Virginia, on the lives of individuals residing in Buncombe County and vicinity (nonexclusive) and to collect thereon the first annual premium, and no more, and as the agent of the said first party,

to transmit such written applications to the home office of the Shenandoah Life Insurance Company, at Roanoke, Va., for approval or rejection. . . .

(8) It is further agreed that any sum that may be advanced or loaned the party of the second part by reason of the provisions hereof, or otherwise, shall be and become a debt of the party of the second part to the party of the first part, due and payable immediately on demand. . . .

(9) If in any case the said Shenandoah Life Insurance Company shall deem it necessary to cancel any policy and return the premium paid thereon, then said party of the second part shall be bound to repay to said party of the first part, on demand, the amount of commissions received on premiums so returned. . . .

(21) This contract is between the general agent and the party of the second part and said party of the second part agrees to hold the general agent and not the Shenandoah Life Insurance Company, Incorporated, responsible for any commissions due or promises made by said general agent hereunder.

The plaintiff continued in service under this contract until April, 1933, and did not renew his license after that date. He brought suit for $529 which he said was 5 per cent claimed by him as commissions on renewal premiums paid in 1930, 1931, 1932 for policies written in 1926, 1927, 1928, 1929.

The Coley Agency became indebted to the defendant and released or assigned to the defendant the renewals which might have been due from the defendant to the Coley Agency. On account of this indebtedness the defendant had not paid the Coley Agency any renewals since 1929.

At the close of the plaintiff's evidence the court dismissed the action as in case of nonsuit. The plaintiff excepted and appealed.

J. W. Haynes for appellant.
R. R. Williams for appellee.

ADAMS, J. The plaintiff brought suit for $529 alleged to be due him as commissions at the rate of 5 per cent on renewal premiums paid the defendant in 1930-'31-'32 for policies written in the latter part of 1926 and in 1927-'28-'29. The defendant denied liability. The question is whether the judgment of nonsuit was erroneous.

It will be noted that the contracts introduced by the plaintiff were executed by himself and the M. P. Coley Agency. These two are the only parties. Their respective obligations are minutely set forth, and the terms, limitations, and conditions of the first contract are included in the supplementary agreement. Section 21 of the original contract is in these words: "This contract is between the general agent (M. P.

Coley Agency) and the party of the second part (plaintiff) and said party of the second part agrees to hold the general agent and not the Shenandoah Life Insurance Company, Incorporated, responsible for any commissions due or promises made by said general agent hereunder."

According to the appellant's brief the action is based upon the theory of money had and received by the defendant to the use of the plaintiff, a form of declaration in assumpsit which the defendant says is in direct repudiation of the plaintiff's express agreement. The solution of this position is dependent upon the terms of the contract.

In 2 Joyce on the Law of Insurance (2 ed.), sec. 695, it is said: "It may be stated at the outset as a primary and general rule that an agent's right to commissions or compensation of whatever nature, or by whatever name designated, must, where the contract entered into by and between such agent and his principal is in writing, necessarily depend upon the terms thereof, having in view the intent of the parties, the rules of construction applicable in arriving at that intent, and the evidential circumstances under which the right to said compensation is claimed or denied, as such contract constitutes the guide for ascertaining, determining, and measuring the rights, duties and obligations of the parties."

The plaintiff contracted to serve, not as an agent of the defendant, but as the special agent of the Coley Agency—a special agent being "one who is authorized to do one or more specific acts in pursuance of particular instructions, or within restrictions necessarily implied from the act to be done." 2 Couch, Ency. Ins. Law, sec. 507. He was forbidden, except as specifically authorized, to make, alter, or discharge contracts for the Coley Agency, to assign his agency or commissions, to allow any concession or rebate from the regular premium rates, or to modify his contract by any verbal promise or statement. He was to receive as a special trust and promptly to remit the net initial premium due the agency; to pay it any sum advanced him by reason of the contract; to repay it the amount of commissions received as premiums on canceled policies; and to segregate and make no other use of funds belonging to the agency.

Contracts having similar provisions have repeatedly been construed. In *State v. Topeka Nat. Live Stock Ins. Co. et al.,* 169 Pac. (Kan.), 1149, Burns, the appellant, alleged that $1,725 was due him for services rendered for one of the defendant companies under a contract between himself and J. H. White, who was doing business under the name of the White Agency. The services, however, were not rendered under a contract with the insurance company, but under a contract with the agency, as in the case before us. Burns attempted to apply the principle that a contract executed by an authorized agent in his own name, but in fact

on behalf of his principal, is the contract of the principal, in reference to which the Court observed: "The difficulty with the position taken by Mr. Burns is that in the *Edwards case* the contract was made in behalf of the principal, while in the present case the contract was made, not in behalf of the insurance company, but with the White Agency in its own behalf, and the services rendered by Burns were rendered for the agency. The findings conclude the argument. They leave nothing further to be said. Under them the judgment that was rendered was the only one that could be rendered. Burns must look to his employer for compensation."

Substantially the same agreement was construed in *Lester v. New York Life Ins. Company,* 19 S. W. (Tex.), 356. There the claimant had agreed that he should have "no claims whatever for commissions or other services against the New York Life Insurance Company and that the general agent may offset against any claims under this contract any debt or debts due by said district agent to said general agent." Sustaining a demurrer to the action the Court said: "The contract itself, being made a part of the petition as an exhibit, controlled the averment. It shows affirmatively that the company was not to be bound by the contract. It stipulates that plaintiff shall have no claims whatever for commissions or services against the company. No other claim could grow out of the contract, and a breach of it would not give plaintiff a right of action against the company, the suit being against the company for a breach of its own contract."

The principle is approved in other cases. *Moore v. New York Life Ins. Co.,* 51 S. W. (Tenn.), 1021; *Stearns v. Hazen,* 101 Pac. (Col.), 339; *United States Life Ins. Co. v. Hessberg,* 27 Ohio State, 393; *United Casualty & Surety Co. v. Gray,* 114 Fed., 422.

The contractual relation between the Coley Agency and the plaintiff was that of debtor and creditor; the relation between the agency and the defendant rested upon their mutual indebtedness and was altogether independent of the former. No part of the renewals due by the agency to the defendant was to be segregated or set apart to the use of the plaintff or to be held by the agency in trust for him—the right to offset or balance the mutual indebtedness between the agency and the defendant being exclusively a matter of adjustment between themselves. The two exceptions to the exclusion of evidence are plainly untenable.

The result is that the plaintiff has no cause of action against the defendant. Judgment

Affirmed.

J. S. BRASWELL v. RICHMOND COUNTY.

(Filed 28 February, 1934.)

Sheriffs B c—Sheriff holding sales held entitled to commissions on cash received by county on tax certificates purchased by it.

Construing chapter 107, Public-Local Laws of 1924, relating to the compensation of the sheriff of Richmond County for the collection of taxes, *in pari materia* with N. C., Code of 1931, secs. 7992, 8010, 8014, 8024, 8026, 8037, 8038, relating to tax sale certificates, *it is held*, the sheriff selling lands for delinquent taxes is entitled to his commissions on money thereafter actually paid the county on tax sale certificates purchased by the county although such cash was not paid to the sheriff, and the county's demurrer to an action by the sheriff to recover such commissions was properly overruled although the complaint also demanded commissions on tax certificates on which the county had received no actual cash, to which commissions the sheriff is not entitled.

APPEAL by defendant from *Stack, J.*, at September Civil Term, 1933, of RICHMOND. Affirmed.

The plaintiff, J. S. Braswell, was sheriff of Richmond County for four years beginning December, 1926. By virtue of his office the tax books were delivered to him as tax collector for the tax years 1927, 1928, 1929, and 1930. He made due accounting with the commissioners each and every year, and in all respects complied with the law as to his settlements.

After the annual sale of the land for taxes and the yearly settlement the county commissioners refused to pay the commissions to the plaintiff on taxes thereafterwards collected from taxpayers on the tax sale certificates.

The *first cause* of action was for the commission of 2 per cent on $8,124.90 tax sale certificates for real estate which had been sold by the plaintiff as sheriff for nonpayment of taxes as provided by law for 1927 and which had been purchased by defendant county. *Second cause* of action was 2 per cent on $49,082.15, the sale for 1928. *Third cause* of action was 2 per cent on $62,604.30 the sale for 1929. *Fourth cause* of action was 2 per cent on $73,612.79 the sale for 1930. The plaintiff further alleges that the county could realize the full amount of taxes, penalty, etc., as such sales certificates were secured by sufficient real estate for that purpose. The plaintiff also demanded an accounting on all his causes of action "as to the amount actually paid to the defendant county by the taxpayers, etc."

The prayer of plaintiff is as follows:

"Wherefore, plaintiff prays the court that he recover of the defendant on the first cause of action the sum of $162.50 with interest thereon at

the rate of 6 per cent per annum from 15 March, 1930; that he recover of the defendant on the second cause of action the sum of $981.64, with interest thereon at the rate of 6 per cent per annum from 15 May, 1930; that he recover of the defendant on the third cause of action the sum of $1,252, with interest thereon at the rate of 6 per cent per annum from 15 November, 1930, and that he recover of the defendant upon the fourth cause of action the sum of $1,452.25, with interest thereon at the rate of 6 per cent per annum from 15 January, 1932; that he recover his costs expended herein, and be granted such further or different relief as he may be entitled to upon his stated causes of action."

The defendant demurred to the complaint on the ground that it did not contain facts sufficient to constitute a cause of action against defendant in that *succinctly* the statute did not allow him commission on land sold by him for taxes and not actually collected by him when sheriff.

The judgment of the court below is as follows:

"This cause having been placed upon the calendar for hearing at this the September Term, 1933, of the Superior Court of Richmond County, and being heard upon the demurrer filed to the complaint of the plaintiff by the defendant, and after hearing the contentions of the parties thereon the court hereby overrules the demurrer and the defendant is allowed until 10 October, 1933, in which to file answer.

A. M. STACK, *Judge Presiding.*"

The defendant excepted and assigned error to the judgment overruling the demurrer in the court below and appealed to the Supreme Court.

W. R. Jones for plaintiff.
Fred W. Bynum for defendant.

CLARKSON, J. The question involved: Is the plaintiff when sheriff of Richmond County, under the local statute applicable and other general statutes, entitled to commissions on land sold by him as sheriff for taxes, and the land purchased by the county, but the purchase price not actually paid to him? We think he is entitled to the money, actually paid the county thereafter on the tax sale certificates.

The statutes the Court is called upon to construe are as follows:

"An act providing for the compensation of the sheriff of Richmond County for collecting taxes: (Public-Local Laws, chap. 107, Extra Session, 1924).

The General Assembly of North Carolina do enact:

Section 1. That the sheriff of Richmond County shall receive as full compensation for collecting the taxes of said county four-fifths of one

per cent of the first hundred thousand dollars ($100,000) collected; one per cent of the second hundred thousand dollars ($100,000) collected and one and one-fifth per cent of the third one hundred thousand dollars ($100,000) collected; and two per cent of the fourth one hundred thousand dollars ($100,000) collected and two per cent of the excess over four hundred thousand dollars ($400,000) collected.

Section 2. That this act shall apply to Richmond County only.

Section 3. That all laws and clauses of laws in conflict with the provisions of this act are hereby repealed.

Section 4. That this act shall be in force from and after the beginning, of the next term of office of the sheriff of Richmond County.

Ratified 21 August, A.D. 1924."

Section 7992 (N. C. Code, 1931, Michie), in part is as follows: "Whenever any taxes shall be due and unpaid, the sheriff, who by law is required to collect the same, shall, immediately proceed to collect them as prescribed by this chapter."

Section 8010, in part is as follows: "If personal property of any taxpayer, sufficient for the satisfaction of his taxes and subject to levy, is not to be found in the county of the sheriff having the tax list in hand for collection, it shall be the duty of such sheriff to sell the real estate of such taxpayer, if delinquent in the payment of his taxes, under the directions set forth in this chapter."

Section 8014, in part is as follows: "Before any real estate shall be sold for taxes the sheriff shall give public notice of the time, place, and cause of such sale by advertisement at the courthouse door and in some newspaper published in the county."

Section 8024, in part is as follows: "The sheriff shall give to the purchaser of real estate sold for taxes a written certificate, under his official signature, to the effect and in the form following," etc.

Section 8026, in part is as follows: "When the county or other municipal corporation becomes the purchaser, under the provisions of this chapter, of any real estate sold for taxes, the sheriff shall issue a certificate of purchase in the name of such corporation substantially in the form provided by the two preceding sections. Such certificates shall remain in the custody of the sheriff, and at any time the county commissioners may assign such certificates to any person wishing to buy, for the amount expressed in the face of the certificate and interest thereon at the rate per centum which the taxes were drawing at the time of the purchase, or for the total amount of all tax on such real estate."

Section 8037, in part is as follows: "All certificates of sale evidencing purchases by counties shall immediately, upon being allowed as a credit in the settlement with the sheriff of the county, be delivered to the county accountant, county auditor, or other officer, specifically desig-

nated by the board of county commissioners, or other governing board of the county, except sheriff or tax collecting officer, and it shall be the duty of the officer, or such officer designated, to collect the same."

Section 8038, in part is as follows: "The owner or occupant of any land sold for taxes, or any person having a lien thereon or any interest or estate therein, may redeem the same, at any time within one year after the day of such sale, by paying the sheriff for the use of such purchaser, his heirs or assigns, the sum mentioned in his certificate."

We must construe the local act and other acts *supra in pari materia* and in so doing, we think that the plaintiff would be entitled to the 2 per cent on all the taxes paid on the tax certificates when they are actually paid. We do not think the plaintiff would be entitled to the per cent on the tax sale certificates until paid. The complaint of the plaintiff is not sufficient to allow the full amount claimed, yet it is sufficient to allow the 2 per cent on so much of the tax sales actually paid, therefore, the court below was correct in overruling the demurrer.

The plaintiff also demanded an accounting on all his causes of action "as to the amount actually paid to the defendant county by the taxpayers" etc. The plaintiff also prayed "and be granted such further or different relief as he may be entitled to upon his stated causes of action." The statutes are not entirely clear in their meaning, but we think the just intent is borne out by the position here taken and no time limit is fixed in the local statute before or after sale as to the "full compensation for collecting the taxes." There are no officials in the State that have more responsibility for the peace and good order of a county than the sheriffs and "the labourer is worthy of his hire." For the reasons given, the judgment of the court below is

Affirmed.

MABEL GREEN VANNOY v. JOSIE GREEN, WIDOW, G. C. GREEN, JR., HAZEL AUSTIN, GLENN AUSTIN, MARY AUSTIN, ALICE LEE AUSTIN, AND C. S. NEAL, GUARDIAN AD LITEM.

(Filed 28 February, 1934.)

1. Dower C b: Partition A a—

Dower may be allotted the widow and lands partitioned among the heirs in one proceeding. C. S., 3226, 4105.

2. Dower C b—Widow does not have the right to select land to be allotted for her dower.

The widow has no right to select the lands to constitute her dower, the commissioners being required by statute to equally protect the interest of the heirs and widow, and the right of dower being statutory,

and there being no statutory provision conferring such right on the widow, C. S., 4100, providing that the commissioners need not select the dwelling-house if the widow requests otherwise, being merely to afford relief from the otherwise mandatory duty of the commissioners to select the dwelling-house, and not conferring the right of selection on the widow. C. S., 4104, 4105.

APPEAL by Josie Green from *Clement, J.*, at September Term, 1933, of ASHE. Affirmed.

On 16 April, 1931, G. C. Green died intestate seized and possessed of real estate in Ashe County. He owned valuable personal property. In September, 1931, the petitioner instituted a special proceeding before the clerk for allotment of the widow's dower and partition of the real property. Pleadings were filed and the clerk found that the personal property was sufficient to pay the debts of the intestate, advancements that might be recovered, and the costs of administration, and appointed three men to serve as jurors and commissioners in allotting dower and partitioning the land. The commissioners complied with the order of the court and made their report.

Josie Green excepted to the report on the ground that she was not permitted by the commissioners to select the real property which was to be allotted as her dower; that the valuation of the property allotted to her was too high; and that she was not allotted one-third in value of the lands of her deceased husband.

The clerk heard and considered affidavits filed by the parties and confirmed the report. On appeal to the Superior Court Judge Clement, after finding as a fact that the widow requested the jurors to give her an opportunity to point out property for the allotment of her dower and that they ignored her request and allotted dower in property she did not want, affirmed the order of the clerk. From this judgment the widow, Josie Green, appealed.

T. C. Bowie for appellant.

Ira T. Johnston and C. W. Higgins for petitioner.

W. B. Austin for Hazel Austin, Glenn Austin, Mary Austin and Alice Lee Austin.

ADAMS, J. The only appellant is Josie Green, widow of G. C. Green, who died intestate on 16 April, 1931. The procedure is not questioned; in the allotment of dower and the partition of land only one proceeding is necessary. C. S., 3226, 4105; *Baggett v. Jackson*, 160 N. C., 26. The appeal presents the question whether a widow has a legal right to select the land upon which her dower shall be allotted—*i. e.*, whether she has a legal right to determine the location of her dower.

At common law a widow had no estate in her husband's land until her dower was assigned. *Spencer v. Weston,* 18 N. C., 213; *Harrison v. Wood,* 21 N. C., 437. She was permitted to remain in his mansion for forty days after his death, the period known as "the widow's quarantine," during which her dower was to be allotted. The particular lands to be held in dower were assigned by the heir of the husband or by his guardian, and if neither the heir nor his guardian assigned her dower within the term of quarantine the sheriff was appointed to make the allotment.

Under the old English law there were five species of dower, in only one of which the widow "endowed herself"—a species which was found necessary to the release of lands held under a particular tenure and which was abolished along with military tenures and is now of interest chiefly as an incident in the evolution of the law. 2 Bl., 135; 2 Scribner on Dower, 65 *et seq.* In the common law we find no basis for the appellant's argument. The old method of the heir's assigning dower, at one time recognized in this State (*Williamson v. Cox,* 3 N. C., 4; *Sutton v. Burrows,* 6 N. C., 79), has been superseded by various statutes, the last of which are contained in chapter 80, of the Consolidated Statutes, some of which, however, have been amended. In section 4104 it is provided that if the personal property of a decedent be insufficient to pay his debts and the charges of administration the heir and the widow may agree to an assignment of dower by deed, and in section 4105 that if no such agreement be made the widow, and, if she fail, the heir may apply for the assignment by petition filed in the Superior Court.

We find nothing in these statutes to indicate that the widow may select her dower or "endow herself." In section 4100 it is said that the jury summoned to assign dower shall not be restricted to an assignment in every separate and distinct tract of land, but may allot dower in one or more tracts. This clause was inserted for the reason that at common law the widow was entitled to be endowed of all lands and tenements of which her husband was seized in fee at any time during the coverture, and this implied that she was entitled to one-third out of each parcel of land. "The assignment of dower required by the common law is of one-third part of the lands and tenements of which the widow is dowable . . . . The endowment, therefore, must be of parcels of the lands and tenements themselves." 2 Scribner, 74; 19 C. J., 544, sec. 237.

It is further provided that section 4100 shall not be construed to compel the jury to allot the dwelling-house in which the husband usually resided, when the widow shall request that her dower be allotted in other property. This clause was intended to afford release from the preceding requirement that the dwelling-house be included in the allotment, as it must be if such request is not made; but release from this requirement

was not intended to confer upon the widow the compulsory power of selection. Inclusion of the dwelling-house in the assignment is not mandatory when the widow requests that it be omitted, but this provision does not exempt the jury from the duty of "having a due regard to the interest of the heirs as well as to the right of the widow." Sec. 4100; *Askew v. Bynum*, 81 N. C., 350; *Caudle v. Caudle*, 176 N. C., 537. The statute enjoins the protection of these conflicting interests. The power to choose her dower would be equivalent to the widow's power to deprive the heir of any part of the inheritance that would yield profit or income.

It is argued that her dower should be selected by the widow as the homestead is selected by the owner, but the interests are not identical. "Dower is entirely statutory, and the language of the statute, and of the decisions construing it as well, are so explicit and peremptory that any relief must be sought in a modification of the statute." *Howell v. Parker*, 136 N. C., 373. The owner's right to select his homestead is conferred by the Constitution: "Every homestead and the dwellings and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof . . . shall be exempt from sale under execution." Constitution, Art. X, sec. 2. No constitutional or statutory provision confers upon a widow the right to select her dower. Judgment

Affirmed.

MABEL GREEN VANNOY v. JOSIE GREEN, WIDOW OF G. C. GREEN, DECEASED, ET AL.

(Filed 28 February, 1934.)

1. Evidence D b—Husband held competent to testify as to transaction between his wife and his wife's deceased father.

The issue involved in this action was whether intestate had made advancements to his daughters during his lifetime. A check made payable to one of the daughters and signed by intestate was introduced in evidence. The daughter's husband was permitted to testify over objection that the check was given his wife as a wedding present. The clerk had found that the personalty was sufficient to cover all alleged advancements. There was no evidence that there were any children of the marriage of intestate's daughter and the witness. *Held*, the husband's testimony was competent, he having no interest in the event of the action. C. S., 1795.

2. Same—Party to action held competent to testify to transaction between party's sister and deceased father relating solely to sister's interest.

The issue involved in this action was whether intestate had made advancements during his lifetime to his daughters. A check made payable

to one of the daughters and signed by intestate was introduced in evidence, and the other daughter was permitted to testify over objection that the check in question was given her sister as a wedding present. *Held*, the evidence was competent, the transaction testified to not being between the witness and the deceased, but between the witness's sister and deceased father. C. S., 1795.

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

G. C. Green died intestate in Ashe County on 16 April, 1931, owning real and personal property described in the petition. The defendant, Josie Green, is the widow of the deceased and entitled to a dower interest in the property. The defendants, the Austin children, are the children and heirs at law of Ola Green Austin, daughter of the intestate, and the defendant, G. C. Green, Jr., is the son of the intestate by a subsequent marriage. The plaintiff is the daughter of the intestate by the first marriage and instituted a special proceeding praying that dower in said land be allotted to the widow and that the real estate be divided according to the respective interests of the several heirs at law. The widow filed an answer alleging that certain advancements had been made by the intestate to the plaintiff, Mabel Green Vannoy, and her deceased sister, Ola Green Austin, which should be accounted for in the settlement of the estate.

The clerk entered a judgment reciting that the "personal property is sufficient to pay all debts, charges of administration and any alleged advancements which might be recovered by any of said parties against any other of said parties, it is, therefore, considered and adjudged that said issue as to the alleged advancements be and it is hereby certified and transferred to the civil issue docket of the Superior Court for trial according to law."

At the trial two issues were submitted to ascertain what advancements, if any, had been made by G. C. Green, deceased, to his daughter, the plaintiff, Mabel Green Vannoy, and also to his deceased daughter, Ola Green Austin. The jury answered that neither of said parties had received any advancement from the father.

The defendants offered in evidence certain checks found among the papers of the deceased, which had been made payable to the plaintiff, Mabel Green Vannoy, by the deceased, and other checks payable to Ola Green Austin. Among the checks so found there was one in the sum of $500.00 signed by G. C. Green, payable to Mabel Green Vannoy, the plaintiff, dated 1 January, 1926. There was another for $500.00 signed by G. C. Green and payable to Ola Green Austin, dated 30 April, 1919. The checks offered in evidence were drawn in various amounts from the year 1919 to the year 1928 or 1929.

The evidence for Mabel Green Vannoy tended to show that her mother, the first wife of deceased, G. C. Green, died in 1921, and that he married a second time on 22 September, 1926. Mabel Green Vannoy was married in December, 1925, and her sister, Ola Austin, was married on 30 April, 1919. Mabel Green Vannoy offered evidence tending to show that she had been postmistress from April, 1921, to November, 1925, and received a salary of $500.00 per year, and that she taught school prior to her marriage and owned and sold certain cattle. There was also evidence that Ola Green Austin had a chestnut orchard and that her father paid her for certain chestnuts.

W. E. Vannoy, the husband of Mabel Green Vannoy, testified that he was married on 22 December, 1925, and returned from his wedding trip on 1 January, 1926, to the home of his wife's father, the intestate, and that the check for $500.00, dated 1 January, 1926, and signed by G. C. Green and payable to Mabel Green Vannoy, was a wedding present given his wife by her father. The defendant objected to the testimony, asserting that it transgressed C. S., 1795. Mabel Green Vannoy testified that her deceased sister, Ola Green Austin, was married on 30 April, 1919, and that the check for $500.00 signed by her father, G. C. Green, deceased, and dated 30 April, 1919, was a wedding present for her sister. The defendant objected to this testimony for the same reason heretofore mentioned.

From judgment upon the verdict defendant appealed.

Ira T. Johnston for Mabel G. Vannoy.

W. B. Austin for Hazel Austin, Glenn Austin, Mary Austin and Alice Lee Austin.

Bowie & Bowie for defendants, Josie Green, widow of G. C. Green, deceased, and G. C. Green, Jr.

BROGDEN, J. Two questions of law are presented by the record.

1. Does the application of C. S., 1795, render incompetent the testimony of Wade Vannoy that his father-in-law, the deceased G. C. Green, gave a five-hundred-dollar wedding present to his wife, the plaintiff, Mabel Green Vannoy?

2. Does the application of said statute render incompetent the testimony of Mabel Green Vannoy that her father, G. C. Green, deceased, gave her sister, Ola Green Austin, deceased, a check for $500.00 as a wedding present?

Both questions must be answered in the negative. In considering the answer to the first question, it must be noted that Wade Vannoy had no interest in the event of the lawsuit; that is to say, he would get nothing of pecuniary value out of the lawsuit, however terminated. There is no evidence that Wade Vannoy and the plaintiff, Mabel Green

Vannoy, have children, and the testimony of Wade Vannoy tended to show a transaction between the deceased G. C. Green and the wife of the witness. Moreover, the clerk found as a fact that the personal property of decedent was sufficient "to pay all debts, charges of administration and any alleged advancements which might be recovered by any of said parties against any other of said parties." Consequently, the evidence of the husband was competent by virtue of the application of the principles applied in *Hall v. Holloman,* 136 N. C., 34, 48 S. E., 515; and *Helsabeck v. Doub,* 167 N. C., 205, 83 S. E., 241.

The testimony of Mabel Green Vannoy that her father, the deceased, gave $500.00 to her deceased sister, Ola Green Austin, as a wedding present was competent. This conclusion is established by various pronouncements of this Court, notably: *Johnson v. Cameron,* 136 N. C., 243, 48 S. E., 640; *In re Mann,* 192 N. C., 248, 134 S. E., 649; *Barton v. Barton,* 192 N. C., 453, 135 S. E., 296. The applicable principle was stated in the *Johnson case, supra,* as follows: "But here the witness testified as to no transaction or communication between herself and W. M. Cameron. It was a transaction between W. M. Cameron and her husband, and as to that she is a competent witness notwithstanding her interest. . . . This case does not turn upon the witness being a party or interested in the event—she is both. But the transaction with the deceased here testified to by a party to the action was not *between the witness and the deceased,* and hence by the terms of the statute and by the decisions . . . the witness was properly admitted to testify in regard thereto."

There are certain exceptions to the charge of the trial judge, but an interpretation of the charge as a unit fails to disclose reversible error.

Affirmed.

GURNEY P. HOOD, COMMISSIONER OF BANKS OF NORTH CAROLINA, EX REL. PLANTERS BANK AND TRUST COMPANY, A CORPORATION, AND R. C. COPPEDGE, LIQUIDATING AGENT, PLANTERS BANK AND TRUST COMPANY, V. VANCE MCGILL, TAX COLLECTOR OF THE TOWN OF LUMBERTON, P. S. KORNEGAY, SHERIFF OF ROBESON COUNTY, AND THE FIDELITY MUTUAL LIFE INSURANCE COMPANY, A CORPORATION.

(Filed 28 February, 1934.)

Mortgages D b: Banks and Banking H c—Insolvent bank mortgagor held liable for taxes as preferred claim, although mortgagee collected rents.

The mortgagor, the owner of the equitable title to the mortgaged property, is the real owner of the land and is liable for taxes thereon, which liability is unaffected by the mortgagee's taking peaceable posses-

sion after default and collecting the rents and profits therefrom, and where the mortgagor is a bank, and upon its insolvency, the Commissioner of Banks taking over its assets lists the property for taxes, and the mortgagee takes possession of the mortgaged building and collects the rents therefrom, and thereafter forecloses its mortgage and bids in the property at the sale, it may hold the bank liable for the taxes unpaid at the time of the sale, which is made a preferred claim in the bank's assets. C. S., 218(c).

CIVIL ACTION, before *Devin, J.*, at May Term, 1933, of ROBESON.

The agreed facts are substantially as follows:

1. The Planters Bank and Trust Company, a banking corporation in the town of Lumberton, closed its doors on 19 December, 1931, and Gurney P. Hood, Commissioner of Banks of North Carolina, by virtue of his office and the statutes in such cases made and provided, immediately took into his possession all the property and assets of said bank. At the time of the closing the bank owned its banking house by deed registered in Book 7-a, page 176, in the office of the register of deeds for Robeson County. The bank had previously executed a deed of trust to the Fidelity Mutual Life Insurance Company to secure an indebtedness of $25,000 and such was outstanding, due and unpaid on the day of its insolvency as aforesaid.

2. Thereafter, on 1 April, 1932, the liquidating agent of the bank duly listed said real estate for taxation for the year 1932 for the following values: lot and building, $55,000; furniture and fixtures, $4,000. Taxes were duly levied upon said values, as follows: Town of Lumberton taxes, $885.00; county of Robeson taxes, $436.00.

3. On 1 February, 1932, prior to listing the land for taxes as aforesaid, the defendant, insurance company, "took over the possession and operation of the building . . . and collected the rent thereon through the plaintiff, R. C. Coppedge, and applied the same on its mortgage debt," and Gurney P. Hood, commissioner of banks, and Coppedge, liquidating agent, assumed no responsibility whatsoever with respect to said building and the possession thereof. Thereafter the plaintiff, Hood, Commissioner, rented one of the rooms in the building from the mortgagee and paid rent therefor.

4. On 5 December, 1932, default having been made in the payment of the indebtedness described in the deed of trust, the insurance company sold the land at public auction in accordance with the terms of the deed of trust, and at said sale became the purchaser of the premises for the sum of $27,000, which said purchase price was duly confirmed and a deed duly executed and delivered. At the sale the trustee announced that the 1932 town taxes and county taxes had not been paid, and that, while the trustee contended that such taxes constituted a preferred claim upon the assets of the bank, he made no warranty or

assurance of any kind that such taxes would be paid by the liquidating agent, and that the purchaser at the sale must take the risk of paying the taxes.

Thereafter, on 7 December, the insurance company served a notice on the sheriff of Robeson County under C. S., 8006, demanding that the personal property of the bank be applied to the payment of taxes, "calling attention to the said sheriff to all the notes, mortgages, negotiable instruments and choses in action then in possession of the liquidating agent." On the same day the insurance company also served a like notice upon the defendant, James McGill, tax collector for the town of Lumberton. The tax collector for the county and town of Lumberton contend that they have authority to levy and sell personal property belonging to the bank and now in the hands of the liquidating agent to pay said taxes by virtue of C. S., 8003 and C. S., 7985.

The Commissioner of Banks contends that when the insurance company, after default, took over the property and received the rents and thereafter became the purchaser at the sale, it should be charged with the payment of taxes, "and is estopped to claim the amount thereof from plaintiffs or their trust."

At the hearing the trial judge was of the opinion that the taxes constituted "a preferred claim against the assets of said bank," etc.

From the foregoing judgment plaintiff appealed.

McNeill & McKinnon for plaintiff.

F. E. Carlyle for Robeson County.

Johnson & Floyd and John G. Proctor for tax collector of town of Lumberton.

McLean & Stacy for Fidelity Mutual Life Insurance Company.

BROGDEN, J. A bank, owning the land upon which the bank building was situate, closed its doors and the Commissioner of Banks took possession for purposes of liquidation by virtue of the statute. At the time of closing there was an outstanding mortgage securing an indebtedness of $25,000, all of which was unpaid and in default. The mortgagee took possession of the real estate and collected the rents and thereafter the liquidating agent of the bank listed the real property for taxation. County and town taxes were duly assessed and subsequently the mortgagee duly exercised the power of sale and became the purchaser of the property.

The respective tax collectors of the county and town upon notice from the purchaser of the property, contend that they have the right to levy upon the personal property in the hands of the liquidator for the payment of taxes.

The foregoing facts produce two questions of law, to wit:

1. Who is liable for the taxes?

2. Do such taxes constitute a preferred claim against the assets of the insolvent bank?

The rights and remedies of mortgagors and mortgagees pronounced in the decisions of this State, are assembled and discussed in Mordecai's Law Lectures, Vol. I, page 579, *et seq.* Mordecai says: "If the mortgagee take possession he must account for rents and all manner of profits; not only those actually received, but also for what he might have received from any reasonable and prudent use of the property without detriment thereto. He is not entitled to betterments put upon the land, but is entitled to credit for money expended for necessary repairs, and under some circumstances, for money expended in payment of liens. He may off-set against rents and profits the increased value of land caused by his improvements when he has been long in peaceful possession." A recent utterance is found in *Bank v. Lumber Co.*, 193 N. C., page 759, as follows: "The legal title to property, whether real or personal, conveyed by a mortgage deed, passes to and vests in the mortgagee, who holds the same, however, only for purposes of security. . . . The equitable or beneficial title remains in the mortgagor, who, as to all persons except the mortgagee, is considered the true owner of the property."

Property must be listed for taxation by the owner or his agent except in special instances prescribed by statute. Consequently, the owner is primarily the taxpayer. *Stone v. Phillips*, 176 N. C., 457, 97 S. E., 375. The mortgagor is the real owner of his land and liability for taxes thereon is not shifted to the mortgagee merely by reason of possession of the premises after default; nor is liability for taxes duly levied against real estate, affected by the receipt of rents and profits. *Harper v. Battle*, 180 N. C., 375, 104 S. E., 658. See *Chowan County v. Comr. of Banks*, 202 N. C., 672, 160 S. E., 808; *Rockingham v. Hood, Comr.*, 204 N. C., 618.

The land was duly listed for taxation by the Commissioner of Banks or his agent and the taxes were duly assessed. C. S., 218c (14) provides a statutory order of preference in the distribution of assets of an insolvent bank. Taxes are specifically included as a preferred item therein. Therefore, the trial judge ruled correctly.

Affirmed.

STATE v. JOHN H. HARWOOD.

(Filed 28 February, 1934.)

1. Attorney and Client E a—

All prior statutes relating to the disbarment of attorneys were repealed and superseded by chap. 64, Public Laws of 1929.

2. Criminal Law C d—Punishment determines the grade or class of a crime.

The grade or class of a crime is determined by the punishment prescribed therefor and not the nomenclature of the statute, a felony being a crime punishable by death or imprisonment in the State prison, and while all misdemeanors for which no punishment is prescribed are punishable as misdemeanors at common law, where the offense is infamous, or done in secrecy or malice, or with deceit and intent to defraud, it is punishable by imprisonment in the county jail or State prison, C. S., 4173, and is a felony.

3. Same: Attorney and Client E b—Plea of guilty to indictment charging wilful and secret destruction of public records is confession of felony.

A plea of guilty to an indictment charging defendant with wilfully, feloniously, secretly, and maliciously giving aid and assistance to his codefendant by manufacturing evidence, altering and destroying original records in the office of the Commissioner of Revenue, etc., C. S., 4255, is a confession of a felony, C. S., 4173, and is ground for disbarment if defendant is a practicing attorney. Chapter 64, Public Laws of 1929.

4. Attorney and Client E b—

Whether an offense confessed by an attorney shows him "unfit to be trusted in the duties of his profession" is not a fact to be found by the court, but is a conclusion of law to be deduced from the facts revealed to the court, and defendant's motive in the commission of the crime is not determinative.

5. Same—Judgment upon conviction of attorney of felony must include order of disbarment, and no notice of such order is necessary.

Where an attorney has confessed to the commission of a felony showing him to be unfit to be trusted in the duties of his profession, it is the imperative duty of the trial court to include in the judgment an order of disbarment, and no previous notice to defendant of such order is necessary, and a motion thereafter made to vacate the order on the ground that it was made without notice and was void and was entered through mistake and contrary to the course and practice of the court is properly refused.

APPEAL by defendant from *Harris, J.*, at October Term, 1933, of WAKE. Affirmed.

Lola G. Harwood, daughter of the defendant, was indicted for the embezzlement of various sums of money, the property of A. J. Maxwell, Commissioner of Revenue for the State of North Carolina (C. S., 4268),

and the defendant was indicted for the mutilation and destruction of public records and the fabrication of false and spurious evidence in violation of section 4255 of the Consolidated Statutes. The cases against these two defendants were called for trial at the April Term, 1932, of the Superior Court of Wake County, and after the jury had been empaneled Lola G. Harwood pleaded guilty of a breach of section 4268 and the defendant pleaded guilty of a breach of section 4255. The court then sentenced John H. Harwood to imprisonment in jail for a term of twelve months to be assigned to work on the public roads, but during the term on motion of counsel and by consent of the defendant the court changed the sentence to imprisonment for one year in the State prison. At the same term the court made the following order: "It appearing . . . that the defendant . . . is a duly licensed attorney at law and that he has pleaded guilty to a felony as charged in the bill of indictment . . . : It is the judgment of the court that said John H. Harwood be disbarred from practicing as an attorney at law, and the clerk is directed to transmit a certified copy of this judgment to the Supreme Court."

The defendant served his term and in October, 1933, he made a motion in the Superior Court of Wake County to vacate the order of disbarment, alleging that it had been made without notice to him, that the order and the record upon which it had been made were void, and that it had been entered through a mistake of fact and contrary to the course and practice of the court. The motion was denied and the defendant excepted and appealed.

Ball & Ball for appellant.

Attorney-General Brummitt and Assistant Attorney-General Seawell, contra.

ADAMS, J. It is needless to call attention to the several amendments of the statute that was first enacted in this State for the disbarment of attorneys. Public Laws, 1870-1, chap. 216, sec. 4. They were all repealed and superseded by the act of 1929 (Pub. Laws, chap. 64), which was in effect at the time the orders complained of were made respectively by Judge Devin and Judge Harris, who presided in the Superior Court. The following are the material and pertinent clauses of the statute: "No attorney at law shall be disbarred for crime unless after conviction or confession in open court, State or Federal, of a criminal offense showing him to be unfit to be trusted in the duties of his profession. After conviction of a felony showing him to be unfit to be trusted in the duties of his profession he must be disbarred by the court; and if any attorney be convicted of or confess to the commission of a felony of such nature in a State court, the presiding judge of such court . . . shall cause

a judgment to be entered and docketed in the office of the clerk of the Superior Court in which such attorney is convicted, or in which such attorney is practicing, disbarring said attorney, and the clerk of the Superior Court in which the same is docketed shall forthwith transmit a certified copy of said judgment to the clerk of the Supreme Court; whereupon the Supreme Court shall revoke the license and the right of such attorney to practice law in this State."

If, therefore, the defendant pleaded guilty to the commission of a felony "showing him to be unfit to be trusted in the duties of his profession" he subjected himself to the imperative duty of the court to debar his further practice of the law.

Did the defendant "confess to the commission of a felony?" He was indicted and prosecuted for violation of section 4255 of the Consolidated Statutes, and each of the several offenses therein mentioned is denominated a misdemeanor. Nomenclature, however, does not always determine the grade or class of a crime: a felony is a crime which is or may be punishable either by death or by imprisonment in the State prison and any other crime is a misdemeanor. Calling an offense a misdemeanor does not make it so when the punishment imposed makes it a felony. *S. v. Newell,* 172 N. C., 933; *S. v. Hyman,* 164 N. C., 411.

All misdemeanors for which a specific punishment is not prescribed shall be punished as misdemeanors at common law; but if the offense be infamous, or done in secrecy or malice, or with deceit and intent to defraud, the offender shall be punished by imprisonment in the county jail or in the State prison. C. S., 4173. The indictment charges the defendant with wilfully, feloniously, secretly, and maliciously giving aid and assistance to his codefendant by "manufacturing false and spurious evidence," by erasing, mutilating, altering, and destroying original records in the office of the Commissioner of Revenue, and composing and forging letters and carbon copies purporting to have been written by the Commissioner of Revenue—all with intent thereby to prevent the conviction of his codefendant. This offense is punishable by imprisonment in the penitentiary, and by admitting his guilt the defendant confessed that he had committed a felony. *S. v. Ritter,* 199 N. C., 116, 120.

Whether the offense committed by the defendant shows him unfit to be trusted in the duties of his profession is not a fact to be found by the Court; it is a conclusion of law to be deduced from facts which are revealed to the court. *McLean v. Johnson,* 174 N. C., 345. The case is that of a licensed attorney who, after appointment to the bench, turned from the exercise of judicial functions to the private inspection and the secret and deceptive mutilation and destruction of momentous public records. That the court thought him unfit to be further "trusted

in the duties of his profession" is implicit in Judge Devin's judgment. The motive actuating the defendant, the impelling thought, is not decisive of the question.

Sitting as a Court with jurisdiction only to review upon appeal decisions "upon any matter of law or legal inference" we can reach only one conclusion: in the light of unquestioned facts Judge Devin by the terms of the statute was charged with the performance of an imperative duty, and with his judgment Judge Harris rightly declined to interfere. Disbarment necessarily followed the defendant's conviction; it was an essential part of the judgment, and no previous notice to the defendant was required. In *McLean v. Johnson, supra,* disbarment was enforced upon conviction of a misdemeanor. Other questions suggested in the briefs need not be considered. Judgment

Affirmed.

JAMES L. BALL v. THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD.

(Filed 28 February, 1934.)

Insurance J d: S c—Whether notice of accident covered by liability insurance was given insured within reasonable time held for jury.

Plaintiff brought action on a policy of automobile liability insurance which provided that insured should give immediate written notice of the occurrence of an accident covered by the policy. A guest riding in insured's car was injured in an accident but the injuries seemed slight and insured had no reasonable apprehension of a claim for damages therefor until approximately four months thereafter when it was discovered that the injuries were more serious than at first thought and the guest claimed damages of insured. Insured then immediately gave written notice of the accident to insurer. *Held,* whether the notice was given insured within a reasonable time under the facts and circumstances was properly submitted to the jury.

APPEAL by defendant from *Small, J.,* at November Term, 1933, of PASQUOTANK.

Civil action to recover on policy of automobile liability insurance.

On 8 March, 1931, the defendant issued to plaintiff a policy of insurance protecting him against claims for damages arising from operation of Dodge sedan automobile.

On 12 June, 1931, plaintiff's son, Luther Ball, was driving the sedan in question, with his father's permission, and had as his guest Miss Margaret Adelaide Hobbs. An accident occurred in which Miss Hobbs

received a cut on her left arm, not regarded at the time as serious, and, several months thereafter, it developed that her shoulder had been dislocated.

No report was made to the Assurance Corporation until sometime in October, 1931, immediately after Miss Hobbs notified plaintiff of a claim for damages.

The defendant denies liability solely upon the ground that "immediate written notice" of the accident was not furnished the defendant, or its duly authorized agent, in accordance with the terms of the policy.

On the night of the accident and for sometime thereafter Miss Hobbs told Luther Ball that "she was getting along all right and didn't think it amounted to anything." She frequently visited in plaintiff's home, following the accident, and assured plaintiff that "she was getting along fine, and that her arm was giving her no trouble at all."

Miss Hobbs went to Norfolk in the fall to attend a business college, and discovered for the first time, in her effort to use a typewriter, that her shoulder pained her. An examination by defendant's physician disclosed that it had been dislocated in the accident of 12 June.

Miss Hobbs, through her next friend, brought suit against plaintiff and recovered judgment in the sum of $2,500. The Assurance Corporation declined to defend in said suit.

The present action is for indemnification against said judgment and costs, according to the provisions of the policy in suit.

Whether the notice given by plaintiff was sufficient to meet the terms of the policy was submitted to the jury and answered in the affirmative.

Judgment on the verdict, from which the defendant appeals, assigning errors.

M. B. Simpson and John H. Hall for plaintiff.
L. T. Seawell and Worth & Horner for defendant.

STACY, C. J. The accident occurred 12 June, 1931; the injuries appeared slight, and plaintiff had no reasonable ground to apprehend any claim for damages until approximately four months thereafter, when it was discovered, for the first time, that the injuries were more serious than originally thought; immediately thereafter notice was given to defendant's agent. Was this sufficient under the terms of the policy which provides: "Upon the occurrence of an accident covered by this policy, the assured shall give immediate written notice thereof to the corporation, or its duly authorized agent?"

The action of the trial court in submitting the question to the jury finds support in the following cases: *Hunt v. Fidelity Co.*, 174 N. C., 397, 93 S. E., 900, *Mewborn v. Assurance Corp.*, 198 N. C., 156, 150

S. E., 887, *McKenna v. Indemnity Co.*, 125 Wash., 28, 215 Pac., 66, *Southern Surety Co. v. Heyburn*, 234 Ky., 739, 29 S. W. (2d), 6.

The defendant relies upon the decision in *Peeler v. Casualty Co.*, 197 N. C., 286, 148 S. E., 261.

The *Peeler case* was distinguished in *Mewborn v. Assurance Corp.*, and we think the court properly submitted the question to the jury under the *Hunt* and *Mewborn cases*. The matter is fully discussed in these cases, and it would serve no useful purpose to "thrash over old straw."

In the note to *Hatch v. Casualty Co.*, 197 Mass., 101, as reported in 14 Ann. Cas., 290, the annotator makes the following pertinent observations:

"In many accident insurance policies it is provided that immediate notice of the accident shall be given to the company. And it has been generally held that the word 'immediate' means that notice must be given within a reasonable time according to the circumstances of the particular case. (Citing authorities.) The words 'immediate notice' must have a common-sense interpretation and cannot be held to require of the insured anything that is impossible or unreasonable. Whether the stipulation has been complied with must depend upon the facts and circumstances of the particular case. (Citing authorities.) Where there is any doubt as to whether the notice required by the accident insurance policy was given within a reasonable time, the question should be submitted to the jury." (Citing authorities.)

There was nothing said in *Ins. Co. v. Bonding Co.*, 162 N. C., 384, 78 S. E., 430, cited and relied upon by appellant, which militates against our present position.

A careful perusal of the record leaves us with the impression that the result of the trial is accordant with our previous decisions on the subject. Hence, the verdict and judgment will be upheld.

No error.

STATE v. A. B. BREECE.

(Filed 28 February, 1934.)

Criminal Law G s: Constitutional Law F a—Admission of testimony as to unidentified books and records held reversible error.

In a prosecution for embezzlement, testimony of the prosecuting witness that he had examined account books in a foreign state and that the books showed that defendant was not entitled to the credits claimed, without identification of the books or the person making the entries thereon by the witness or the introduction of the books in evidence, or

evidence that the entries had been made in due course of business, *is held* incompetent and its admission constituted reversible error and was in violation of defendant's constitutional right to confront his accusers, which includes the right of cross-examination. Art. I, sec. 11.

CRIMINAL ACTION, before *Cranmer, J.*, at May Term, 1933, of WAKE.

The defendant was indicted for embezzlement in several bills of indictment which alleged that he had embezzled money amounting to approximately $1,100 from G. Sorenson, trading as Federal Adjustment Company, Spier and Company, Studebaker Watch Company and Spiegel May Stern and Company. The causes were consolidated for trial. The evidence tended to show that G. Sorenson, the prosecuting witness, using several trade names, had employed the defendant, a practicing attorney, to collect certain claims upon an agreement that the defendant should report all claims collected with authority to deduct 35 per cent of such collections for his services. The evidence further tended to show that the defendant had not accounted for all claims collected. The defendant admitted that he had received through Sorenson hundreds of claims for collection in various parts of the State; that he was required to do much traveling, and that he was authorized to retain traveling expenses from the proceeds of collections. The defendant testified that he had embezzled nothing, and that in fact the prosecuting witness or the firms he represented owed the defendant approximately $3,000.

The cause was submitted to a jury and a verdict of guilty returned. Thereupon the defendant was sentenced to serve a term of approximately five years in the State's prison. From judgment pronounced the defendant appealed.

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

Jones & Brassfield and Dye & Clark for defendant.

BROGDEN, J. The evidence for the State tended to show that approximately two thousand accounts had been sent to the defendant for collection. The defendant contended that he had made many remittances direct to the concerns forwarding claims for which no credit had been given. The State's witness Sorenson testified: "I have been back there and checked the books on him myself in Pittsburgh, Pennsylvania. I did not keep the books but checked the records. I don't know which ones of those have been paid direct and which have not been paid direct." The defendant in apt time objected to the testimony of the witness with respect to entries in the books in the State of Pennsylvania. The objection was overruled and the witness was permitted to testify

that such books showed that the defendant was entitled to only $31.03 as commissions on direct remittances.

The objection should have been sustained. The books of account referred to were in a foreign state. The witness did not make the entries in the books, nor were they made under his control or supervision. Indeed, the witness declared that he did not know which claims had been paid direct or which had not been paid direct. So that it appears that a witness undertook to testify concerning entries made in a book in the State of Pennsylvania by somebody not even identified by the witness or that the entries had even been made in the due course of business. The Constitution and laws of this State have always guaranteed to every person charged with a felony the right to be confronted in open court by his accusers in order that they may be subjected to cross-examination and the truth or falsity of the accusation probed and sifted in the presence of the trial jury. This salutary principle is fundamental. Thus, *Stacy, J.*, in *S. v. Hightower*, 187 N. C., 300 wrote: "In all criminal prosecutions the defendant is clothed with a constitutional right of confrontation, and this may not be taken away any more by denying him the right to cross-examine the State's witnesses than by refusing him the right to confront his accusers and witnesses with other testimony. Constitution, Art. I, sec. 11. "We take it that the word confront does not simply secure to the accused the privilege of examining witnesses in his behalf, but is an affirmance of the rule of the common law that in trials by jury the witness must be present before the jury and accused, so that he may be confronted; that is, put face to face. . . . And this, of course, includes the right of cross-examination." See, also, *King v. Bynum*, 137 N. C., 491, 49 S. E., 955; *R. R. v. Hegwood*, 198 N. C., 309, 151 S. E., 641; *Supply Co. v. McCurry*, 199 N. C., 799, 156 S. E., 91. The books referred to by the witness were neither identified nor offered in evidence. The practical effect of the testimony was to allow the witness to declare in substance: "The books in Pittsburgh say that the defendant is not entitled to any such credit as he contends."

The incompetency of such evidence is established by correct application of the principles announced in *Flowers v. Spears*, 190 N. C., 747, 130 S. E., 710, and *R. R. v. Hegwood, supra*.

There are many exceptions in the record, but as a new trial must be awarded for the error specified, it is deemed unnecessary to discuss them.

New trial.

NEW HAMPSHIRE FIRE INSURANCE COMPANY v. THE FARMERS MUTUAL FIRE INSURANCE ASSOCIATION OF NORTH CAROLINA.

(Filed 28 February, 1934.)

1. **Insurance E b: J c—Provision against other insurance is valid but will be construed with loss payable clause.**

   A clause in a policy of fire insurance providing that insurer should not be liable if other insurance is taken out on the property without notice is valid, but will be construed in connection with a New York Standard Mortgagee Clause attached to the policy.

2. **Insurance N c—**

   A New York Standard Mortgagee Clause attached to a policy of fire insurance constitutes a separate contract between the insurer and the trustee, mortgagee or beneficiary.

3. **Insurance J c—Insurer held relieved of liability to insured and mortgagee by violation of provision against additional insurance.**

   The beneficiary named in a New York Standard Mortgagee Clause attached to a policy of fire insurance returned the policy to the insured on the ground the insurer was not acceptable to the beneficiary, and the insured in compliance with the request of the beneficiary obtained insurance in another company with similar loss payable clause, but gave no notice to the first insurer of the second policy. The first policy contained a provision that it should be void if other insurance was taken out on the property without notice to insured. *Held*, neither the beneficiary repudiating the first policy nor the insured taking out other insurance in violation of its provisions can assert any right against the first insurer for loss by fire, nor may their assignee, the insurer in the second policy, acquire any right by subrogation.

CIVIL ACTION, before *Moore, Special Judge,* at June Term, 1933, of ORANGE.

It was agreed that the judge should find the facts and render judgment thereon. Such facts as are pertinent to the question involved, may be stated as follows: J. A. Simmons, a resident of Orange County, owned the land and the building thereon near Chapel Hill. In 1926, the defendant issued a policy of fire insurance No. 94930 insuring the dwelling-house against loss or damage by fire in the sum of $1,000. Simmons secured a loan from the North Carolina Joint Stock Land Bank of Durham and had a New York standard insurance clause attached to said policy, payable to the First National Bank of Durham, trustee for the North Carolina Joint Stock Land Bank of Durham. This policy was delivered to the North Carolina Joint Stock Land Bank and held by it until the fall of 1930 "when same was returned to J. A. Simmons with notice that the insurance in the defendant company was not satisfactory and requiring him to take out a policy

in the sum of $1,000 on said dwelling-house in a standard company satisfactory to the North Carolina Joint Stock Land Bank." After receiving notice and the policy on or about 5 November, 1930, Simmons took out a policy of fire insurance in the plaintiff New Hampshire Fire Insurance Company and had attached thereto a New York Standard insurance clause with loss payable to the First National Bank of Durham, trustee for North Carolina Joint Stock Land Bank.

Neither Simmons, the owner of the property, nor the bank, trustee, nor the Joint Stock Land Bank, beneficiary, gave any notice to the defendant that Simmons was acquiring additional insurance or that its policy was unsatisfactory, nor did the defendant acquire notice in any way of such additional insurance. Both policies were of standard form and the policy of the defendant contained a clause excluding liability for loss occurring "while the insured shall have any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy," etc. On 26 February, 1931, the dwelling of the insured, J. A. Simmons, was totally destroyed by fire, and the amount recoverable was $1,125. The indebtedness to the land bank, beneficiary, was in excess of the insurance.

The plaintiff, New Hampshire Fire Insurance Company, paid to the beneficiary Land Bank the sum of $1,000 in October, 1931, but before making the payment demanded that the defendant pay one-half of the insurance to wit, the sum of $500.00. When the payment was made the plaintiff took an assignment from the Land Bank and the trustee of "their right of subrogation *pro tanto* to the New Hampshire Fire Insurance Company against the said J. A. Simmons and against the said Farmers Mutual Fire Insurance Association . . . to enforce in proper action or suit the same subrogation," etc.

The defendant declined to pay and thereupon the present suit was instituted. The policy of plaintiff contained a clause as follows: "This company shall not be liable for a greater proportion of any loss or damage than the amount hereby insured shall bear to the whole insurance covering the property, whether valid or not and whether collectible or not."

From the foregoing facts the trial judge was of the opinion that the plaintiff was not entitled to recover against the defendant, and the plaintiff appealed.

Manning & Manning for plaintiff.
Graham & Sawyer for defendant.

BROGDEN, J. The clause in the policy of the defendant excluding liability in the event of other insurance is valid. *Johnson v. Ins. Co.,*

201 N. C., 362; *Flemming v. Ins. Co.*, 201 N. C., 846. However, the effect of such a clause in a standard fire insurance policy must be considered in connection with the New York standard mortgagee clause, which was attached to both policies. The New York standard mortgagee clause is a separate and independent contract between the company and the trustee, mortgagee or beneficiary in a deed of trust upon the property at the time the insurance is procured. *Bank v. Assurance Co.*, 188 N. C., 747, 125 S. E., 631.

In the case at bar the beneficiary who held the policy of defendant, repudiated the same and returned it to the insured. The insured kept the policy in his possession and gave no notice to the defendant but procured a new policy in the plaintiff company, and forwarded the same to the beneficiary who retained it until the time of the fire and made claim thereunder. Consequently, the trustee or beneficiary in the deed of trust cannot assert any right against the defendant by virtue of the repudiated policy. The insured can assert no right thereunder for the reason that he abandoned the policy and procured other insurance contrary to a valid clause therein contained. It follows, therefore, that the plaintiff cannot acquire by assignment or subrogation a right from a party who had no enforceable right. Indeed, the case of *Johnson v. Ins. Co., supra,* while not directly in point, is determinative of the controversy in principle.

Affirmed.

MRS. AILEEN B. SMITH, WIDOW OF HERMAN E. SMITH, v. NEWMAN MACHINE COMPANY AND GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION.

(Filed 28 February, 1934.)

Master and Servant F b—Finding that death of night watchman did not result from accident arising out of employment held conclusive.

Although the courts adopt a liberal interpretation of the law in awarding compensation to night watchmen because of the special hazards attached to their work, evidence tending to show that a night watchman went to a store on the premises leased by the employer and run by the lessee, and that he was killed in a fight precipitated when strangers entered the store and attempted to rob the owner of the store after he had waited on them, and that the night watchman often went to the store to procure matches or drinks for himself, and was not required to go to the store in the performance of his duties, *is held* sufficient to sustain a finding by the Industrial Commission that the accident did not arise out of and in the course of the employment.

CIVIL ACTION, before *Sink, J.*, at July Term, 1933, of GUILFORD.

SMITH *v.* MACHINE CO.

H. E. Smith, a night watchman, was killed by robbers on the night of 1 October, 1932. A claim was filed with the Industrial Commission and the hearing Commissioner denied an award. Upon appeal to the full Commission the award of the hearing Commissioner was approved, and thereupon there was an appeal to the Superior Court.

The hearing Commissioner set out the facts which are substantially as follows: "There is a small store building on the premises of the Machine Company's property. Mr. J. S. Walters operated a store. It appears that the Newman Machine Company had rented a vacant lot to Mr. Clegg, who constructed a store and then leased the store to Mr. Walters. The deceased Smith was a night watchman for the Machine Company and it was his duty to patrol the premises. At about 9:30 on the night of 1 October, the deceased for some purpose went into the store of Mr. Walters. While in the store two men came in and called for a cold drink. The operator of the store waited on the two men and as he was making change . . . he was asked by the men to 'put 'em up.' The owner of the store fell down behind the counter When the smoke of the battle had cleared away the owner came out from behind the counter and found the night watchman, H. E. Smith, fatally wounded." Walters, the storekeeper, said: "I saw Mr. Smith on the night of 1 October, 1932. He was down at the store. Mr. Smith never loafed in my store. He went there for his purchases. Sometimes he would come and get something to eat, and sometimes a coca cola and matches. Every Saturday night he would come and get a box of matches mostly. On the night of 1 October, 1932, at approximately 9:30, Herman E. Smith entered my store. . . . He had just walked in the store and walked to the back and turned around, . . . and as he turned around . . . two boys came in. They called for a drink. I got the drink in the ice box. When I gave those boys coca cola the tallest gave me a dollar bill and I went to get his change. . . . The tall one was at the counter and he gave me the money. When I walked behind the counter I passed Mr. Smith. . . . This tall boy faced me when I gave him the change. I laid it on the counter in front of him. I stepped in front of the cash drawer and he said: 'Put 'em up.' He had a pistol in his hand. . . . When he said: 'Put 'em up' I fell on the floor. I heard a fuss, the fuss of a pistol, and Mr. Smith falling on a can of black eyed peas. . . . I came out from under the counter as soon as the fuss was over. I heard the boys run and the screen door close. . . . When I came around to the end I saw Mr. Smith lying on a can of peas. . . . Mr. Smith did not speak. I picked up his pistol. It was lying right beside him on the floor. The pistol was lying about his hip on the floor. I picked it up and laid it on the counter."

. . .

An empty match box was found in the pockets of the deceased after his death. The hearing Commissioner in his opinion declared: "There is no evidence in the record that the job the deceased was employed to perform in any way contributed to this accident. There is no evidence to show that he was called upon at any time to go to the store where he met his fatal accident. Under the circumstances the commissioner is of the opinion that compensation must be denied and it is so ordered."

The judge of the Superior Court affirmed the award of the Industrial Commission, denying compensation, and the plaintiff appealed.

Sapp & Sapp for plaintiff.
Don A. Walser for defendant.

BROGDEN, J. There was competent evidence to support the finding by the Industrial Commission that, while the accident occurred during the period of employment, it did not arise out of and in the course thereof, and consequently compensation should have been denied. The decided cases disclose a disposition upon the part of the courts to adopt a liberal interpretation of the law in awarding compensation to night watchmen. This view has sometimes found utterance in the phrase "zone of special danger," due to the fact that the night and darkness and the loneliness of the watchmen create certain practical hazards which must be deemed to be a risk of the business in proper cases. Notwithstanding, the facts in the case at bar disclose that the watchman was not making his rounds at the time of his injury or performing any service for his employers.

The plaintiff insists that the deceased had gone to the store for the purpose of securing oil for his lantern or matches for his own use. However, this conclusion rests upon surmise and speculation and not upon evidence in the record. Therefore, the findings of facts by the Industrial Commission is determinative.

Affirmed.

ALMA PEACE BURTON v. JOHN PEACE AND WIFE, MINNIE PEACE, AND J. A. PEACE.

(Filed 28 February, 1934.)

1. Deeds and Conveyances A e—

Delivery of a deed is essential to its validity, it being necessary that the grantor should part with possession and control of the instrument with the intent of giving effect to it.

2. Same—Presumption of delivery from registration held not to apply under facts of this case.

Where in an action to set aside a deed registered after the grantor's death, the grantee introduces no evidence that it had ever been delivered to anyone by the grantor, and plaintiff seeking to set the deed aside, introduces same in evidence for the purpose of attacking its validity, the presumption of delivery from registration does not apply, the presumption being rebuttable as between the parties, and a directed verdict in plaintiff's favor is not error.

CIVIL ACTION, before *Stack, J.*, at April Term, 1933, of GUILFORD. Mary Elizabeth Peace, mother of plaintiff, was the owner of certain land in High Point Township for many years prior to 13 November, 1929. She lived at her home place and on said date it was alleged that "she was removed from her home place by her son, the defendant, John Peace," and lived in his home until her death, intestate, on 27 December, 1931. She left surviving the following children and only heirs at law: J. A. Peace, C. L. Peace, Alma Peace Burton and John Peace. She had no other property except the real estate in controversy. At the time of her death the deceased was 79 years of age. On 26 November, 1930, Mary Elizabeth Peace signed a paper-writing purporting to be a deed for said land, in which Minnie Peace, the wife of the defendant, J. A. Peace, was named grantee.

The plaintiff instituted this action to recover a one-fourth undivided interest in the land and to set aside the deed. She offered evidence that her mother had been totally blind for ten years, previous to her death, and that she was weak, nervous, and not capable of taking care of herself. "She didn't know what she was doing. After she went to John's she could go around in the room but not out."

The deed was recorded on 31 December, 1931, after the death of the grantor. The plaintiff offered the deed for the purpose of attack. There was evidence offered by the defendant tending to show that the deceased, although blind and old, was intelligent and of sound mind and memory until shortly before her death.

The only evidence with respect to the execution and delivery of the deed is contained in the testimony of J. M. Davis, a notary public, who took the acknowledgment of Mary Elizabeth Peace. He said: "I wrote her name there. She made this mark. She told me to write her name. . . . I was in the home ten or fifteen minutes. I didn't altogether read that deed to her. I asked her if she understood what it was. I went into the room where she was lying on the bed, apparently blind. I told her my business. I told her that I had come there to get her signature to a deed to a house and lot. She said she couldn't see how to write and I took it to her in bed and held it up to her and she touched the pen and she made her mark. I had not known her prior to this time.

John Peace came by and got me and took me over there. She said she knew me. . . . I went with John and came back with John Peace. I took the deed to her to her bed on a book or something, and held it up to her and she touched the pen. I wrote the name. I do not recollect there was anybody else in the room, but Mr. and Mrs. Peace were in the house. There were two rooms. The door was open. We went first into this room. She was lying in there on the bed and I went in there to the bed to her. I do not recollect that he (Mr. Peace) went out. The rooms, if I recollect right, could open together."

The trial judge inquired of attorneys for the defendant if they had any more evidence about the execution of the deed, and upon receiving a negative reply, stated to counsel that he would charge the jury that the deed had never been executed and delivered, and that the plaintiff was entitled to recover her one-fourth interest in the land. Thereupon the judge charged the jury to answer the issue as to the ownership of one-fourth of the property "Yes."

From judgment upon the verdict the defendant appealed.

S. G. Daniel, Garland B. Daniel and King & King for plaintiff.
T. W. Albertson and Frazier & Frazier for defendants.

BROGDEN, J. Was there any evidence of the execution and delivery of the deed?

The delivery of a deed is essential to its validity and is said to be "its tradition from the maker to the person to whom it is made or to some person for his use." That is to say, the maker of the deed must part with the possession and control of the instrument with the intention of giving effect to it. *Kirk v. Turner,* 16 N. C., 14; *Robbins v. Roscoe,* 120 N. C., 79, 26 S. E., 807; Mordecai Law Lectures, Vol. II, page 28, *et seq.*

This Court has consistently held that registration of a deed is prima facie evidence of delivery, but that such is not conclusive between the parties and that an injured party may attack the execution and delivery of the deed and show, if possible, that in fact there was no delivery. In the case at bar the deed was offered by the plaintiff for the purpose of attack, and hence the presumption arising from registration thereof, does not arise. See *Fortune v. Hunt,* 149 N. C., 358, 63 S. E., 82; *Linker v. Linker,* 167 N. C., 651, 83 S. E., 736.

There was no evidence of a delivery of the deed during the lifetime of the grantor, and as there is no presumption arising from registration upon the facts disclosed by the record, the trial judge ruled correctly, and the judgment rendered is

Affirmed.

IN THE MATTER OF THE ESTATE OF MOSES REID, DECEASED.

(Filed 28 February, 1934.)

Insurance X a—Where installments to beneficiaries of War Risk Insurance are not paid the whole sum is to be distributed to soldier's heirs.

A soldier, having a policy of War Risk Insurance in which his mother and father were jointly named beneficiaries, died intestate leaving his mother and father him surviving as his sole heirs at law. No installments were paid either the mother or father prior to their respective deaths. *Held*, the whole sum is now assets of the estate of the deceased soldier and should be paid equally to the respective administrators of his father's and mother's estates, and the fact that one parent lived longer than the other and was therefore entitled to receive more money in installments does not affect their rights as distributees. C. S., 137(6).

CIVIL ACTION, before *Cowper, Special Judge,* at November Special Term, of MECKLENBURG.

Moses Reid, a soldier in the United States Army during the World War, died intestate on 23 August, 1920, without leaving a wife or child or issue of such. He left him surviving his father, Adolphus Reid, and his mother, Ida Reid. Adolphus Reid, the father, died on 22 November, 1926, and his mother, Ida, died 22 February, 1932. The deceased soldier had a policy of war risk insurance in the sum of $10,000. In said policy his father and mother were both named beneficiaries. W. M. Smith is the administrator of the estate of the soldier, Moses Reid. Elijah Reid is the administrator of the estate of Adolphus Reid, the father, and Lizzie May McCulloch is the executrix named in the will of the mother, Ida Reid. The father and mother after the death of the soldier were entitled to receive a monthly installment of $28.75 each for a total of 240 months. However, neither of said beneficiaries received any installment prior to death. The Bureau of War Risk Insurance paid to the administrator of the father the aggregate monthly installments which he would have received up to the time of his death, amounting to $2,127.50. The installments the mother would have received amounting to $3,938.75, were paid to her executrix. The sum of $6,630.50 was paid to W. M. Smith, the administrator of the estate of the soldier. The children of the mother, Ida Reid, have filed a caveat to her will. The validity of the will has not yet been determined.

This proceeding was brought to determine the rights of the parties in and to the estate of the soldier. It was admitted that the only property of said estate consisted of war risk insurance and disability insurance paid by the government.

The pertinent portion of the judgment rendered was as follows: "That at the date of the death of Moses Reid his distributees were

Adolphus Reid, his father, and Ida Reid, his mother, and as such distributees they became entitled upon his death to his personal estate. That the money now in the hands of W. M. Smith, administrator of the estate of Moses Reid, consisting entirely of insurance money from war risk insurance, is not subject to claims of creditors of the insured. That as to the $862.50, which was due the insured prior to his death, it belongs to the estate of the father and the estate of the mother equally. That as to the $5,768 received by him as the commuted value of the unpaid portion of the policy after the death of the beneficiaries, it should be paid to the estate of the father and the estate of the mother respectively in such sums as are required to bring the said estates to an equal sum after the sums paid into each by the Bureau of War Risk Insurance, and the half of the $862.50 have been added to make the estate of the father and the estate of the mother exactly equal finally. . . . The court in its discretion declines to rule on the question raised in the petition as to the right of Ida Reid to devise any part of the funds held by the petitioner."

From the foregoing judgment the executrix of the estate of Ida Reid, deceased, appealed.

J. H. McLain for Executrix of the Estate of Ida Reid, Deceased.

Wade H. Williams for the Administrator of the Estate of Moses Reid, Deceased.

BROGDEN, J. When Moses Reid died his distributees were his father, Adolphus Reid, and his mother, Ida Reid. Both were living. The statute cast upon each one-half of the personal property of deceased. Thereupon the right of property to such one-half immediately vested. C. S., 137, subsection 6.

Neither received as beneficiary in the war risk insurance policy any installment from the government during his or her life. Therefore, the whole fund in contemplation of law is now assets of the estate of the dead soldier, to be distributed immediately to the estates of his father and mother. The fact that one beneficiary lived longer than the other and hence entitled to receive more money in installments from the government, has nothing to do with the right of property as distributee. The intestate law of this State pegged that right at the death of the soldier. *In re Estate of Pruden,* 199 N. C., 256, 154 S. E., 7; *Grady v. Holl,* 199 N. C., 666, 155 S. E., 565; *Mixon v. Mixon,* 203 N. C., 566, 166 S. E., 516; *In re Saunders,* 205 N. C., 241; *Singleton v. Cheek,* 284 U. S., 493, 76 L. Ed., 419. See, also, *Stacy v. Culbertson et al.,* 160 S. E., 50.

Affirmed.

MADELINE S. WHITE v. R. G. RANKIN AND A. E. WOLTZ.

(Filed 28 February, 1934.)

Venue A a—Action held not to involve interest in realty, and motion for removal as a matter of right was properly refused.

An action against the endorser of a negotiable note secured by a deed of trust and against the transferee of the equity of redemption on his debt assumption contract in his deed, to recover from each of the parties on their liability on the note is not an action involving an interest in real estate, plaintiff not being entitled to a decree of foreclosure on the facts alleged, neither the trustee nor the trustor being parties to the action, and defendants' motion aptly made, C. S., 913(a), for removal of the action as a matter of right to the county in which the land is situate was properly refused. C. S., 463(1).

APPEAL by defendants from *Shaw, Emergency Judge,* at April Term, 1933, of GUILFORD. Affirmed.

From an order denying their motion for the removal of this action from the Superior Court of Guilford County to the Superior Court of Gaston County for trial, the defendants appealed to the Supreme Court.

York & Boyd for plaintiff.
Geo. B. Mason for defendants.

CONNOR, J. This action was begun and is now pending in the Superior Court of Guilford County. After the complaint was filed, and before the time for answering had expired, the defendants moved before the clerk of the Superior Court of Guilford County, in writing (C. S., 913(a), that the action be removed from said court to the Superior Court of Gaston County for trial on the ground that it appears from the allegations of the complaint that the action is for the determination of an estate or interest in land situate in Gaston County. C. S., 463(1). The motion was denied by the clerk, and the defendants appealed to the judge of the Superior Court of Guilford County, who heard the motion *de novo,* as provided by statute. C. S., 913(a). The judge was of opinion that the action, as appears from the allegations of the complaint, is *in personam,* and does not involve the title to land situate in Gaston County, nor any interest therein, and accordingly denied the motion.

The only question presented by this appeal is whether there was error in the order of the judge denying defendants' motion, which was made in apt time, and as a matter of right. The answer to this question must be determined by a consideration of the allegations of the complaint.

The facts alleged in the complaint as constituting the cause of action on which plaintiff seeks to recover of the defendants are as follows:

The plaintiff is a resident of Guilford County. The defendants are residents of Gaston County. On 2 January, 1928, the Rankin-Lineberger Realty Company, a corporation, executed a note for $5,000, payable to the order of Leonard White, and due five years after its date. At the date of its execution, and prior to its delivery, the defendant, R. G. Rankin, endorsed the note by writing his name across its back. Thereafter, on 7 February, 1929, the payee of the note, Leonard White, endorsed and transferred the note to the plaintiff. She is now the holder and owner of the note.

The debt sued on was secured by a deed of trust on land situate in Gaston County. This deed of trust was executed by the Rankin-Lineberger Realty Company, the maker of the note, and conveyed the land described therein to R. G. Cherry, trustee. The deed of trust was duly recorded in Gaston County on 24 January, 1928. Thereafter by deed dated 20 November, 1928, the Rankin-Lineberger Realty Company conveyed the land described in the deed of trust to the defendant, A. E. Woltz, who expressly assumed the payment of the note secured by the deed of trust, by a covenant contained in the deed by which the land was conveyed to him.

The note sued on is now due and unpaid.

The plaintiff demands judgment that she recover of the defendant, R. G. Rankin, by reason of his liability as endorser, and of the defendant, A. E. Woltz, by reason of his covenant to pay said note, the sum of $5,000 with interest and costs.

This action does not involve any estate or interest in the land situate in Gaston County and described in the deed of trust referred to in the complaint. On the facts alleged in the complaint, plaintiff is entitled to recover a personal judgment against each of the defendants for the amount due on the note. *Rouse v. Wooten,* 140 N. C., 557, 53 S. E., 430; *Brown v. Turner,* 202 N. C., 227, 162 S. E., 608. She is not entitled on these facts to a foreclosure of the deed of trust by judgment or decree in this action. Neither the grantor nor the trustee is a party to the action. For this reason, *Mortgage Co. v. Long,* 205 N. C., 533, is not applicable to this case.

There is no error in the order denying defendants' motion for removal of the action. The order is

Affirmed.

JOHN RICHARD BAKER v. THE ÆTNA LIFE INSURANCE COMPANY.

(Filed 28 February, 1934.)

1. Insurance R c—Recovery may be had on total, permanent disability clause where suit is brought during disability presumed permanent under the policy.

Insured brought suit on a policy providing for certain benefits if insured should become permanently and totally disabled. The policy provided that in the event total disability existed for a period of ninety days it should be presumed permanent. Insured furnished insurer proof of disability signed by a physician stating that insured had been disabled for a period of over 71 days, and that such disability would probably last for two or three weeks longer. On the trial insured offered evidence from which the jury found that he was totally and permanently disabled. *Held*, insured furnished evidence of total and presumably permanent disability, which the jury later found to be total and permanent, and such evidence was sufficient for a recovery under the terms of the policy.

2. Insurance P b—

Evidence of totality and permanency of disability held sufficient to be submitted to jury in this case.

APPEAL by defendant from *Barnhill, J.*, at November Term, 1933, of NASH.

Civil action to recover on a total and permanent disability clause in a policy of life insurance.

On 1 November, 1923, the defendant issued to plaintiff a $2,500 life insurance policy, containing, among other things, the following provisions:

"If the insured becomes totally and permanently disabled and is thereby prevented from performing any work or conducting any business for compensation or profit, . . . and satisfactory evidence of such disability is received at the home office of the company, the company will, if there has been no default in the payment of premiums, waive the payment of all premiums falling due during such disability after the receipt of such proof: . . .

"If before attaining the age of sixty years the insured becomes totally disabled by bodily injuries or disease and is thereby prevented from performing any work or conducting any business for compensation or profit for a period of ninety consecutive days, then if satisfactory evidence has not been previously furnished that such disability is permanent, such disability shall be presumed to be permanent within the meaning of this provision."

Plaintiff is a farmer, 43 years of age, and has been disabled by disease and thereby prevented from performing any work or conducting any business for compensation or profit since 1 August, 1931.

On 20 October, 1931, plaintiff mailed the defendant, on blank form furnished by it, proof of disability, signed by Dr. J. H. Martin, containing, among others, the following answers to questions:

"9. Date total disability began—1 August, 1931.

14. Does total disability now exist? Yes.

15. Does the doctor believe that the total disability will be permanent and that the insured will for life be unable to engage in any gainful occupation? (If not, how long does he believe that the total disability will exist?) Total disability for his work will probably last 2 or 3 weeks."

Upon the answer to the last question (15th), the defendant denied liability and declined to pay any disability benefits under the policy.

Suit was thereafter brought, and upon issues joined, the jury returned the following verdict:

"1. Did the plaintiff become totally and permanently disabled and was he thereby prevented from performing any work or conducting any business for compensation or profit? Answer: Yes.

"2. If so, on what date did such disability commence? Answer: 1 August, 1931.

"3. Was satisfactory evidence submitted to the defendant company at its home office that the plaintiff had become totally and permanently disabled, and was thereby prevented from performing any work or conducting any business for compensation or profit? Answer: Yes.

"4. If so, on what date was such evidence received? Answer: 21 October."

Judgment on the verdict, from which the defendant appeals, assigning errors.

Cooley & Bone for plaintiff.

Murray Allen and R. Pearson Upchurch for defendant.

STACY, C. J. Defendant contends that no satisfactory evidence of total and permanent disability was ever furnished by plaintiff; that Dr. Martin's report, instead of showing a permanent disability, disclosed a temporary disability; and that no liability has attached under the total and permanent disability clause contained in the policy in suit.

The doctor's report did show, however, that total disability began 1 August, 1931; that it still existed on 20 October, and that it would probably continue for two or three weeks longer. This was evidence of total disability for more than ninety consecutive days, which, under the terms of the policy, is presumed to be permanent: "If . . . the assured becomes totally disabled . . . for a period of ninety con-

secutive days, then if satisfactory evidence has not been previously furnished that such disability is permanent, such disability shall be presumed to be permanent within the meaning of this provision."

We then have evidence furnished the defendant of a total and presumably permanent disability, which the jury later found to be total and permanent. *Fields v. Assurance Co.,* 195 N. C., 262, 141 S. E., 743. This is sufficient to entitle the plaintiff to recover under the terms of the policy. *Mitchell v. Assurance Society,* 205 N. C., 721. The case of *Ammons v. Assurance Society,* 205 N. C., 23, 169 S. E., 807, cited and relied upon by plaintiff as authority to the contrary, is easily distinguishable.

The evidence was amply sufficient to carry the case to the jury on the totality and permanency of plaintiff's disability. *Bulluck v. Ins. Co.,* 200 N. C., 642, 158 S. E., 185; *Misskelley v. Ins. Co.,* 205 N. C., 496, 171 S. E., 862. It differs materially from that appearing in *Thigpen v. Ins. Co.,* 204 N. C., 551, 168 S. E., 845, and *Buckner v. Ins. Co.,* 172 N. C., 762, 90 S. E., 897.

The verdict and judgment will not be disturbed on any of the exceptions presented by defendant's appeal.

No error.

GRACE HALL STOKES v. M. J. STOKES ET AL.

(Filed 28 February, 1934.)

1. Dower C a—Right of dower is superior to creditor's equity of marshaling.

A widow's right of dower is superior to a junior lienor's equity to force a creditor having a first lien on several parcels of land belonging to the estate to first exhaust the security upon property against which the junior lienor has no claim, the widow's dower having been allotted in the lands having a single encumbrance and she having enjoined the senior lienor from selling the property in which her dower was allotted except as a dernier ressort.

2. Marshaling A a—

The doctrine of marshaling rests on equitable principles only, and will not be invoked against a superior equity, or to the injury of the creditor having the double security.

APPEAL by Citizens Bank and Trust Company from *Harris, J.,* at September Term, 1933, of FRANKLIN.

Civil actions (1) for the allotment of dower, (2) to restrain foreclosure and (3) to have securities marshaled, consolidated by consent and heard together as all three of the cases are interrelated.

The facts are these:

1. On 1 January, 1928, C. W. Stokes, a bachelor, executed a deed of trust to the Virginia Trust Company, trustee, on three lots or parcels of land situate in Louisburg, N. C., to secure an indebtedness of $12,000.

(a) The first lot is situate on Main Street, known as the Strother home place, and embraces the Stokes residence, the Albert Wheless residence, the Nobe Medlin residence, and two metal garages.

(b) The second lot is situate on Main Street and known as the Farmers National Bank Building.

(c) The third lot is situate near the railroad track with three houses erected thereon.

2. On 29 May, 1931, C. W. Stokes, while still a bachelor, borrowed $5,000 from the Citizens Bank and Trust Company and secured the same by deed of trust to W. L. Lumpkin, trustee, on a storage warehouse (alone insufficient to secure the debt), and the Farmers National Bank Building, the second lot above mentioned.

3. On 1 November, 1931, the said C. W. Stokes and Miss Grace Hall were married.

4. On 24 December, 1932, C. W. Stokes died intestate and insolvent, owing a balance of approximately $6,485 on the first indebtedness above mentioned, and $4,780 plus accrued interest on the second.

5. There is no personal property of the estate available for payment of these debts. The deceased left other lands in addition to those covered by the above deeds of trust.

6. On 7 July, 1933, the widow was allotted the Strother home place as dower. The Citizens Bank and Trust Company later intervened and filed exceptions.

7. On 17 July, 1933, the Virginia Trust Company, trustee, started foreclosure under the power of sale contained in its deed of trust. The widow secured a restraining order as against the sale of her dower, except as a *dernier ressort*. The Citizens Bank and Trust Company secured a restraining order until its right to have the securities marshaled could be determined.

8. The Farmers National Bank Building is the doubly encumbered property. The junior lienor seeks to compel the senior lienor to exhaust its remaining security in exoneration of this property under the doctrine of marshaling. The widow has been allotted the Strother home place as her dower. She seeks to compel the trustee in the deed of trust to exhaust its remaining security before resorting to a sale of her dower.

From a judgment overruling the Citizens Bank and Trust Company's exceptions to the allotment of the widow's dower in the first case, and holding that the widow's right of dower is superior to the right of marshaling in the second and third cases, the Citizens Bank and Trust Company, appeals, assigning errors.

Scott B. Berkeley and Wyatt E. Blake for plaintiff, Grace Hall Stokes.

W. L. Lumpkin and Perry & Kittrell for Citizens Bank and Trust Company, intervener.

STACY, C. J., after stating the case: Is the equity of marshaling superior to the right of dower? The answer is, No.

In the first place, it should be observed that the right of a junior creditor to have the common debtor's assets marshaled is not a lien, or a vested interest, but only an equity to be administered as such. It does not fasten itself upon the situation when the successive securities are taken, but is to be determined at the time the marshaling is invoked. *Harrington v. Furr,* 172 N. C., 610, 90 S. E., 775; 18 R. C. L., 456. It is true, equity pursues the right until it meets another of equal or superior rank. 38 C. J., 1367. But, here, the widow's superior right of dower is met at the threshhold of the administration of appellant's claim. *Holt v. Lynch,* 201 N. C., 404, 160 S. E., 469; *Blower Co. v. MacKenzie,* 197 N. C., 152, 147 S. E., 829. "Dower has long been the favorite of the law"—*Varser, J.,* in *Pridgen v. Pridgen,* 190 N. C., 102, 129 S. E., 419.

While the doctrine of marshaling is well established, it is not founded on contract, but rests upon equitable principles only, and the benevolence of the court; and it is never extended so as to affect injuriously the creditor who has the double security, or to trench upon the rights of the common debtor or of third persons.

Thus, in *Butler v. Stainback,* 87 N. C., 216, it was held that the debtor's right of homestead was superior to the creditor's right of marshaling, the Court saying: "To apply the principle of marshaling assets in such a case would be an indirect way of subjecting a homestead to the payment of debts, when the very object of the law is to confer a homestead exemption superior to all creditors, and ever consecrated, except so far as it may be impaired by the voluntary act of the claimant himself." And this was quoted with approval in *Harris v. Allen,* 104 N. C., 86, 10 S. E., 127.

Again, in *Watts v. Leggett,* 66 N. C., 197, it was held that the widow's right of dower is paramount to the right of the children to enjoy the homestead during the minority of any one of them. "Dower is paramount to homestead, and the children of a deceased husband must

enjoy their homestead subject to the dower rights of the widow"—Mordecai's Law Lectures, 2 ed., Vol. I, 380.

A fortiori, therefore, if homestead is superior to marshaling, and dower is paramount to homestead, the right of dower must be higher in rank than the equity of marshaling.

The remaining exceptions call for no elaboration. The cases were properly decided in the court below.

Affirmed.

WILLIAM LAMONT v. HIGHSMITH HOSPITAL ET AL.

(Filed 28 February, 1934.)

1. Appeal and Error J g—

Where a new trial must be awarded on appeal on one of appellant's exceptions and assignments of error, other exceptions and assignments of error need not be considered.

2. Damages F a—Instruction failing to limit future damages to their present cash value is held for reversible error.

An instruction on the question of future damages which plaintiff might recover for personal injury which fails to limit the recovery to the present cash value of such future losses *is held* for reversible error, a sum in cash being of greater value than the same sum payable in the future, and the instruction complained of being calculated to appreciably augment the recovery.

APPEAL by defendants from *Sinclair, J.,* at April Term, 1933, of HOKE.

Civil action to recover damages for defendants' alleged negligent failure properly to care for plaintiff after an operation for fistula, in which the "sacral nerve block" was used, temporarily deadening the nerves in the lower part of the body, and hot water bottles applied to plaintiff's feet following said operation, resulting in a third degree burn on plaintiff's left foot near the base of his little toe from said hot water bottles. The burn reached the bone, necrosis set in, and affected the whole system.

The case was nonsuited as to the corporate defendant (hospital), and upon denial of liability by the individual defendants, and issues joined, the jury returned the following verdict:

"1. Was the plaintiff injured by the negligence of the defendants, Drs. J. F. Highsmith and J. D. Highsmith, as alleged in the complaint? Answer: Yes.

"2. If so, what damage did plaintiff sustain? Answer: $20,000."

Judgment on the verdict, from which defendants appeal, assigning errors.

Robert A. Collier, L. R. Varser, O. L. Henry and R. A. McIntyre for plaintiff.

Oates & Herring and Dye & Clark (on appeal) for defendants.

STACY, C. J. The validity of the trial is called in question by a number of exceptions and assignments of error, but consideration of them *seriatim* is omitted, as it is necessary to award a new trial for error in the following instruction on the issue of damages:

"If you come to pass upon the question of damages, gentlemen, for his physical injury, physical pain and suffering, his mental pain and suffering or by the diminishment of his capacity to work, his ability to make money, you consider all past damages, all future damages and make it all in one sum, all past and prospective damage, if you find there will be any prospective injury."

This charge is defective in that it fails to limit plaintiff's recovery for future losses to the present cash value or present worth of such losses. *Taylor v. Const. Co.*, 193 N. C., 775, 138 S. E., 129.

Speaking to a similar instruction in *Murphy v. Lumber Co.*, 186 N. C., 746, 120 S. E., 342, it was said: "Defendant's position in regard to limiting the damages, if any, which may accrue in the future to the present cash value or present worth of such damages is undoubtedly the correct one, for if the jury assess any prospective damages, the plaintiff is to be paid now, in advance, for future losses. The sum fixed by the jury should be such as fairly compensates the plaintiff for injuries suffered in the past and those likely to occur in the future. The verdict should be rendered on the basis of a cash settlement of the plaintiff's injuries, past, present and prospective."

The pertinent decisions on the subject are assembled in *Shipp v. Stage Lines*, 192 N. C., 475, 135 S. E., 339.

To like effect is the Federal rule in actions to recover under the Federal Employers' Liability Act, as stated in *C. & O. R. Co. v. Kelly, Admr.*, 241 U. S., 485:

"So far as a verdict is based upon the deprivation of future benefits, it will afford more than compensation if it be made up by aggregating the benefits without taking account of the earning power of the money that is presently to be awarded. It is self-evident that a given sum of money in hand is worth more than the like sum of money payable in the future. . . . In computing the damages recoverable for the deprivation of future benefits, the principle of limiting the recovery to compensation requires that adequate allowance be made, according to

circumstances, for the earning power of money; in short, that when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only."

The Federal rule was further elaborated in *Gulf C. & S. F. Ry. Co. v. Moser,* 275 U. S., 133.

The instruction of which the defendants complain was calculated appreciably to augment the recovery, which it undoubtedly did, and must be held for reversible error; otherwise the ruling would be discordant with the current of authority on the subject.

New trial.

STATE v. JESSE BROOKS, ALIAS PETE BROOKS.

(Filed 28 February, 1934.)

1. **Homicide G e—**

Where in a prosecution for homicide there is sufficient evidence of defendant's guilt of murder in one of the degrees of the crime defendant's motion as of nonsuit is properly refused.

2. **Homicide B a: G e—Evidence of defendant's guilt of murder in the first degree held sufficient to support instruction on that question.**

Evidence that defendant, while in the custody of officers of the law who had arrested him when they apprehended him in the commission of a robbery, drew his pistol in an attempt to escape, and with premeditation and deliberation shot one of the officers in his attempt to escape, *is held* sufficient to support an instruction to the jury on the question of murder in the first degree.

APPEAL by defendant from *Devin, J.,* at July Term, 1933, of DURHAM. No error.

At the trial of this action, the defendant was convicted of murder in the first degree. C. S., 4200.

From judgment that he suffer death by means of electrocution as prescribed by statute (C. S., 4658), the defendant appealed to the Supreme Court.

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

E. C. Brooks, Jr., for defendant.

CONNOR, J. The Attorney-General has waived consideration by this Court of his motion in behalf of the State that this appeal be dismissed because of manifest defects and irregularities in the record, to the end

that defendant's contention that there was no evidence at the trial of the action tending to show that he is guilty of murder in the first degree, may be considered and determined by this Court. This contention is presented by defendant's assignments of error based on his exception (1) to the refusal of the trial court to allow his motion for judgment as of nonsuit, at the close of all the evidence, and (2) to the instruction of the court to the jury that if the jury should find from the evidence, beyond a reasonable doubt that the defendant, on or about 10 June, 1933, intentionally shot and killed the deceased, Ronald A. Gill, and that his act in so doing was wilful, deliberate and premeditated, under the definition and rules given in the charge, it would be the duty of the jury to return a verdict of guilty of murder in the first degree.

There was manifestly no error in the refusal of the court to allow the motion for judgment of nonsuit. It is conceded that there was evidence tending to show that defendant is guilty of murder in the second degree. For this reason, the evidence was properly submitted to the jury under instructions as to the verdict, which are free from error, unless, as contended by the defendant, there was no evidence sufficient to support a verdict of guilty of murder in the first degree.

There was evidence tending to show that the defendant was discovered by the deceased and other police officers of the city of Durham in a store in said city, at about 1:00 o'clock a.m., on 10 June, 1933; that defendant had broken and entered said store for the purpose of stealing therefrom merchandise and money; and that when discovered by the officers he was engaged in the perpetration of a felony. The defendant was arrested by the officers, and after his arrest, and while in the lawful custody of said officers, he attempted to escape, and for that purpose drew a pistol from his pocket and fired at least twice at the officers. The deceased, Ronald A. Gill, one of the officers, was shot by the defendant, and died as the result of his wounds. There was evidence not only of deliberation but also of premeditation, on the part of the defendant, before he shot and killed the deceased. There was no error in the instruction of the court to which the defendant excepted. *S. v. Evans,* 198 N. C., 82, 150 S. E., 678; *S. v. Miller,* 197 N. C., 445, 149 S. E., 590; *S. v. Rodman,* 188 N. C., 720, 125 S. E., 486. The learned judge who presided at the trial was careful to submit to the jury every contention in behalf of the defendant which was or could have been made in his behalf. His charge was clear and full, and correctly applied the law to the facts as the jury might find them from the evidence. The judgment is affirmed.

No error.

J. S. EVERTON, Y. T. EVERTON, C. F. EVERTON, E. T. EVERTON, R. M. EVERTON, MELISSA TWIFORD AND HUSBAND, JOHN W. T. TWIFORD, PETITIONERS, v. LEON RODGERS, DESMOND RODGERS, ERNEST RODGERS, WILLIE RODGERS, TINE RODGERS, B. B. BASNIGHT, AND LEON BASNIGHT, RESPONDENTS.

(Filed 28 February, 1934.)

1. **Executors and Administrators D g—**

A claim for services rendered a deceased widow may not be set up in a proceeding for sale of land for partition which was owned by the deceased husband of the widow and devised by him to the widow for life and then to the petitioners in fee.

2. **Same—Judgment that claim for payment of estate's debt should not attach to funds from partition unless personalty is insufficient is affirmed.**

Where in a proceeding for sale of land for partition the judgment provides that the claim of one of the parties for sums paid on indebtedness of the estate should not be paid out of the proceeds of sale unless the personal property of deceased devisor should be insufficient, an exception by petitioners on the ground that there had been no adjudication of the sufficiency of the personal property will not be sustained.

3. **Same—Petitioners held not entitled to appeal from judgment allowing party to recover taxes paid out of funds from partition.**

Petitioners in a proceeding for sale of land for partition may not object to the allowance of a sum advanced by one of the parties to pay taxes on the property, C. S., 7983, when there is no exception or appeal entered of record by the testator's administrator.

APPEAL by plaintiffs and by B. B. Basnight and L. B. Basnight, defendants, from *Small, J.*, at Fall Term, 1933, of DARE. Affirmed.

The plaintiffs filed a petition for the sale of land for partition. The clerk adjudged that the petitioners (except John W. Twiford) and the respondents (except Tine Rodgers) were tenants in common; that J. S. Everton, Y. T. Everton, C. F. Everton, E. T. Everton, R. M. Everton, and Melissa Twiford were the owners each of an undivided one-twenty-fourth interest; Leonard Rodgers, Desmond Rodgers, Ernest Rodgers, and Willie Rodgers each of an undivided one-sixteenth interest; and B. B. Basnight and Leon Basnight each of an undivided one-fourth interest. The land was sold by commissioners at the price of $7,000, the sale was confirmed, and the deed was executed. The controversy involves the application of the funds.

Claims against the funds were filed by V. S. Rodgers for the children of Rennie Basnight Rodgers and by B. B. Basnight and Leon B. Bas-

night, and were contested. Judge Moore referred the cause and the referee made a report, to which there were exceptions. Judge Small heard the exceptions and rendered judgment, from which the appeal was taken.

Thompson & Wilson for plaintiffs.
Worth & Horner for B. B. Basnight and L. B. Basnight.

ADAMS, J. On 22 October, W. H. Basnight died leaving a will in which he devised his real property to his wife, Nancy J. Basnight, for the term of her natural life or so long as she remained unmarried, with remainder to devisees named in the will, who are parties to this action. The fund out of which the payment of the contested claims is sought is the proceeds of the land described in the will and sold for partition after the death of life tenant. The title to the land was derived from W. H. Basnight, not from his wife.

B. B. Basnight and the heirs and distributees of Rennie Basnight Rodgers filed claims for services rendered the widow, not the testator, and asked that their claims be paid out of the fund in the hands of the court. We have given due consideration to the argument of the appellants and find no sufficient cause for interfering with the judgment as to these claims.

L. B. Basnight filed a claim composed of several items, all of which were disallowed except $149.32, which he advanced to pay indebtedness against the estate of W. H. Basnight, the testator, and $401.50 which was the aggregate amount of taxes due by the testator and paid by the claimant. C. S., 7983.

The plaintiffs suggest that there has been no judicial determination of the sufficiency of the testator's personal estate, and that they were not called upon to contest the claims which were allowed until the administrator was made a party, which was done during trial.

By the terms of the judgment the sum advanced by L. B. Basnight in payment of indebtedness against the testator's estate is to be paid out of the fund received by the commissioners only in the event that the administrator has not sufficient funds for this purpose; and as to the other position we find no exception and no appeal entered of record by the administrator. Judgment

Affirmed.

W. J. CARLTON ET AL. v. CENTRAL OIL COMPANY.

(Filed 28 February, 1934.)

1. Evidence J a—

As a general rule all prior and contemporaneous negotiations of the parties are deemed to be merged in their written contract, and parol evidence of such negotiations is inadmissible to vary the terms of or contradict the written instrument.

2. Appeal and Error J d: J e—Burden is on appellant to show prejudicial error.

The burden is on appellant to show error on his exception to the admission of parol evidence, and where he has failed to show that such evidence came within the general rule excluding such evidence, and it appears that the error, if any, was cured by an instruction to the jury not to consider the evidence, the judgment will not be disturbed.

APPEAL by defendant from *Devin, J.*, at October Term, 1933, of DURHAM.

Civil action to recover for alleged breach of exclusive right, or franchise granted plaintiffs by defendant to market certain petroleum products controlled by the defendant in Durham County and certain surrounding territory.

Upon denial of liability and counterclaim set up by defendant, there was a verdict and judgment for plaintiffs, from which the defendant appeals, assigning errors.

J. Elmer Long and Victor V. Young for plaintiff.
Brawley & Gantt for defendant.

STACY, C. J. The appeal presents the single question whether reversible error was committed in allowing plaintiffs to state in their oral testimony, over objection, the substance of the negotiations had between the parties prior to the execution of the written contract, relative to buying or erecting a number of filling stations and furnishing certain equipment, upon the theory that all such preliminary negotiations were merged in the written agreement, and that thereafter parol evidence was inadmissible to vary its terms or to contradict its provisions.

The general rule undoubtedly is, that no verbal agreement between the parties to a written contract, made before or at the time of the execution of such contract, is admissible to vary its terms or to contradict its provisions. All such agreements are considered as varied by

and merged in the written contract. "It is a rule too firmly established in the law of evidence to need a reference to authority in its support, that parol evidence will not be heard to contradict, add to, take from or in any way vary the terms of a contract put in writing, and all contemporary declarations and understandings are incompetent for such purpose, for the reason that the parties, when they reduce their contract to writing, are presumed to have inserted in it all the provisions by which they intended to be bound."—*Smith, C. J.,* in *Ray v. Blackwell,* 94 N. C., 10. *Overall Co. v. Hollister Co.,* 186 N. C., 208, 119 S. E., 1; *Exum v. Lynch,* 188 N. C., 392, 125 S. E., 15.

But it is nowhere pointed out, with specific definiteness, wherein the testimony of the plaintiffs runs counter to the terms of the written contract or contradicts its provisions or offends against the general rule just stated.

The appellees say in their brief "this testimony did not contradict, vary or add to the terms of a valid written instrument, for the simple reason that there was not any valid written instrument at that time in existence between the parties." But the problem is not quite so simple. Indeed, if this were a valid reason, the rule would be practically meaningless.

We do find, however, in an excursion through the record, that the jury was instructed to disregard the items mentioned by the plaintiffs which were not covered by the written agreement. This would seem to cure any previous error in the admission of testimony. At any rate, no harmful ruling has been made to appear, and on appeal the burden is on appellant to show error, which has not been done in the instant case.

No error.

ADDISON B. GUY v. ÆTNA LIFE INSURANCE COMPANY.

(Filed 28 February, 1934.)

1. Insurance R c—Evidence held sufficient to be submitted to jury in action on total and permanent disability clause in insurance policy.

Where plaintiff's examination in chief and the testimony of other witnesses is sufficient to be submitted to the jury on the question of plaintiff's total and permanent disability under the provisions of the policy in suit, testimony elicited from plaintiff on cross-examination that he was able to direct his business for compensation and profit during the alleged disability does not justify a judgment as of nonsuit.

2. Appeal and Error A f—

On plaintiff's appeal from a judgment as of nonsuit defendant, asking no affirmative relief, may not test the competency of a witness's testimony should the nonsuit be reversed, by also appealing from the judgment, defendant not being the "party aggrieved." C. S., 632.

APPEALS by plaintiff and defendant from *Frizzelle, J.*, at February Term, 1933, of HARNETT.

Civil action to recover on a total and permanent disability clause in a policy of life insurance.

On 1 November, 1919, the defendant issued to the plaintiff a life insurance policy containing, *inter alia,* the following provisions:

"Six months after proof is received at the home office of the company, that from causes originating after the delivery of this policy the insured has become wholly, continuously and permanently disabled and will for life be unable to perform any work or conduct any business for compensation or profit, if all premiums previously due hereon have been paid, the company will waive the payment of all premiums falling due thereafter under this policy during such disability.

"Also six months after such proof of disability occurring before the insured reaches the age of sixty is received, the company will pay to the insured a sum equal to the monthly installment provided on the first page hereof to be paid at the death of the insured and will pay the same amount on the same day of every month thereafter during the lifetime and during the permanent total disability of the insured."

Defendant admits that all premiums have been paid on said policy, and that the same was in full force and effect at the time total and permanent disability is alleged to have occurred.

Plaintiff's evidence tends to show that he is 59 years of age, a farmer by occupation, and has not been able to perform any of his duties as a farmer since September, 1931; that on 30 January, 1932, he furnished the defendant with proof of his disability, and that payment under the policy was declined.

Dr. A. T. Wyatt testified that he examined the plaintiff in May, 1932, and discovered that he had arthritis of the spine, from which he suffered great pain; that in his opinion the plaintiff will never get any better, but continue to grow worse, and that he will be totally and permanently disabled for life; that this condition existed at the date of his examination, and had existed for a year or two, or probably longer.

The defendant elicited on cross-examination of the plaintiff, and some of his witnesses, evidence to the effect that the plaintiff was able to direct his business of farming for compensation or profit during the year 1932, and upon this testimony, judgment of nonsuit was entered.

Both plaintiff and defendant appeal, assigning errors.

Neill McK. Salmon and Dupree & Strickland for plaintiff.
Murray Allen for defendant.

STACY, C. J. The evidence adduced on the plaintiff's examination in chief, and the testimony of his other witnesses, was sufficient to carry the case to the jury on the issue of plaintiff's alleged total and permanent disability within the meaning of the policy in suit. *Mitchell v. Assurance Society,* 205 N. C., 721; *Misskelley v. Ins. Co.,* 205 N. C., 496, 171 S. E., 862; *Green v. Casualty Co.,* 203 N. C., 767, 167 S. E., 38; *Bulluck v. Ins. Co.,* 200 N. C., 642, 158 S. E., 185. Compare *Thigpen v. Ins. Co.,* 204 N. C., 551, 168 S. E., 837; *Buckner v. Ins. Co.,* 172 N. C., 762.

The defendant, realizing the force and effect of Dr. Wyatt's testimony, also appeals and in this way seeks to test the competency of his evidence, should the judgment of nonsuit be reversed, citing as authority for the position *Hunt v. R. R.,* 203 N. C., 106, 164 S. E., 626. But a defendant, who asks for no affirmative relief, is not the "party aggrieved" by a judgment of nonsuit within the meaning of C. S., 632. *McCullock v. R. R.,* 146 N. C., 316, 59 S. E., 882. Nor does *Hunt's case* decide otherwise.

Plaintiff's appeal, reversed.

Defendant's appeal, dismissed.

STATE v. HARRY ANTHONY.

(Filed 28 February, 1934.)

Receiving Stolen Goods B b—Evidence of guilt of receiving stolen goods knowing them to have been stolen held insufficient to overrule nonsuit.

Evidence from which the jury might infer that stolen goods were thereafter in the constructive possession of defendant will not justify an inference that at such time defendant knew the goods to have been stolen, and where the evidence is sufficient to support only the first inference the defendant's motion as of nonsuit should be allowed.

APPEAL by defendant from *Small, J.,* at January Term, 1934, of WASHINGTON. Reversed.

The defendant was tried on an indictment in which Robert Lee Hill and defendant were charged (1) with unlawfully and feloniously breaking and entering into the warehouse of the Norfolk Southern Railroad

Company at Roper, N. C.; (2) with the larceny of four bags of peas, the property of the said Norfolk Southern Railroad Company; and (3) with unlawfully and feloniously receiving four bags of peas knowing them to have been stolen.

Robert Lee Hill entered a plea of guilty, as charged in the indictment. The defendant was convicted of receiving stolen goods, knowing them to have been stolen.

From judgment that he be confined in the common jail of Washington County for a term of not more than twenty-four or less than fifteen months, the defendant appealed to the Supreme Court.

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

P. H. Bell for defendant.

CONNOR, J. At the close of the evidence for the State, the defendant moved for judgment as of nonsuit. C. S., 4643. The motion was allowed as to the first count in the indictment, and denied as to the second and third counts. The defendant excepted to the refusal of his motion as to the second and third counts in the indictment, and offered evidence in support of his plea of not guilty. At the close of all the evidence the defendant again moved for judgment as of nonsuit. The motion was denied, and defendant excepted. On his appeal to this Court, defendant contends that there was no evidence at the trial tending to show that he is guilty either of larceny or of receiving stolen goods knowing them to have been stolen. After a careful examination of the evidence appearing in the case on appeal, we are of the opinion that defendant's contention must be sustained. For that reason the judgment is reversed.

There was no evidence tending to show that the goods which were stolen by Robert Lee Hill were at any time thereafter in the possession, actual or constructive of the defendant, or that defendant, when he was in the company of Robert Lee Hill on Sunday night, knew that the goods which were then in the possession of Robert Lee Hill had been stolen by him on Saturday night, when he broke and entered into the warehouse at Roper. But conceding that the jury could infer from all the evidence that the goods were in the constructive possession of the defendant, this fact alone could not justify the inference that defendant knew that the goods had been stolen by Robert Lee Hill. *S. v. Lowe*, 204 N. C., 572, 169 S. E., 180.

There was error in the refusal of defendant's motion for judgment as of nonsuit at the close of all the evidence. The judgment is

Reversed.

NOAH PERRY v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Filed 28 February, 1934.)

Appeal and Error J g: Question debated in briefs held immaterial in view of allegations, evidence and verdict.

Where the allegations, evidence and verdict establishes the fact that insured under a group policy became totally and permenantly disabled while the policy was in force and prior to the modification of the master policy by striking out the disability provisions therein, the question of whether insurer and employer had the right to change the master policy and the certificates issued thereunder by striking out the disability provisions becomes immaterial, and the jury's verdict in insured's favor on the controverted issues of fact will be upheld.

APPEAL by defendant from *Hill, Special Judge,* at July Term, 1933, of AVERY.

Civil action to recover on a certificate of insurance.

The record discloses that on 1 June, 1929, the defendant issued to the Consolidated Coal Company and its subsidiary companies a policy of group life, accident and health insurance, containing total and permanent disability provisions, under which individual certificates were issued to the plaintiff as an employee of said coal company, the first on 28 April, 1930, and the second on 1 August, 1932.

The second certificate was issued in substitution of the first, because on 29 June, 1932, by agreement between the defendant and the "Group Patron or Employer," the Consolidated Coal Company and its subsidiaries, the master policy was amended by rider attached thereto, effective 1 August, 1932, whereby the total and permanent disability provisions contained in said policy, and the individual certificates issued thereunder, were stricken out, and provided for payment of insurance only in the event of the death of an employee occurring while insured under said policy.

Plaintiff, however, seeks to recover on the first certificate, and the evidence tends to show that his disability began in June, 1932, while the first certificate was outstanding and in force.

The disability clause contained in this certificate, and the master policy as originally written, is as follows:

"In the event that any employee while insured under the aforesaid policy and before attaining age 60 becomes totally and permanently disabled by bodily injury or disease and will thereby presumably be continuously prevented for life from engaging in any occupation or performing any work for compensation of financial value, upon receipt

of due proof of such disability before the expiration of one year from the date of its commencement, the society will, in termination of all insurance of such employee under the policy, pay equal monthly disability installments, the number and amount of which shall be determined by the table of installments below. The amount of insurance herein referred to shall be that in force upon the date on which said total and permanent disability commenced."

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

"Did the plaintiff, while an employee of the Consolidated Coal Company, and while the insurance referred to in the complaint was in full force and effect, and more than six months after the effective date of such insurance become totally and permanently so disabled as presumably to be continuously prevented for life from engaging in any occupation or performing any work for compensation of financial value, as alleged in the complaint and amendment thereto? Answer: Yes."

Judgment on the verdict for plaintiff, from which the defendant appeals, assigning errors.

J. V. Bowers for plaintiff.

Bourne, Parker, Bernard & DuBose for defendant.

STACY, C. J. In view of the allegations of the complaint, the evidence, and the verdict establishing plaintiff's right to recover on the original certificate, the principal questions debated on brief, to wit, the right of the defendant and the group patron or employer, to change the provisions of the master policy and the individual certificates by striking out the total and permanent disability clauses and substituting in lieu thereof new and different individual certificates, goes out of the case.

Thus, the whole matter reduces itself to controverted issues of fact, which have been determined in favor of plaintiff.

Similar policies and certificates were before the Court in *Whitmire v. Ins. Co.*, 205 N. C., 101, 170 S. E., 118, and *Deese v. Ins. Co.*, 204 N. C., 214, 167 S. E., 797.

The verdict and judgment will not be disturbed on the exceptions and assignments of error appearing of record.

No error.

WILMINGTON SAVINGS AND TRUST COMPANY, TRUSTEE, v. H. F. WILDER AND WIFE, JENNIE B. WILDER.

(Filed 28 February, 1934.)

Bills and Notes H a—Plaintiffs held not entitled to judgment on pleadings in action on note, defendant's answer alleging a valid defense.

In an action between the original parties on a negotiable note allegations that the payees, prior to the execution of the note sued on, held a note of third parties secured by deed of trust and upon default had the land conveyed to defendants as trustees for plaintiffs and that defendants executed the note sued on in like sum under an agreement that the payees would not enforce payment of the note but would look solely to the proceeds from the sale of the land when it could be sold, and that the makers received no consideration for the note, states a valid defense and judgment on the pleadings in favor of the payees is error.

CIVIL ACTION, before *Sinclair, J.*, at May Term, 1933, of NEW HANOVER.

On 7 May, 1930, the defendants executed and delivered to the plaintiff as trustee of the Perpetual Agreement Fund of the Oakdale Cemetery Company two promissory notes in the sum of $2,000 each. These notes were secured by a deed of trust on certain property in Wilmington. The payees in the notes were the trustees of the Perpetual Agreement Fund of Oakdale Cemetery Company, and the plaintiff is the successor of said trustees by virtue of chapter 69 of the Private Laws of 1931. The trustee, in the deed of trust securing the notes, upon default, advertised and sold the property on 30 August, 1932, and the plaintiff became the last and highest bidder for said property. After crediting the proceeds of the sale upon the loan there was a deficiency of $2,668.28, and this action was instituted for the recovery of said amount.

The defendants alleged "that sometime ago the trustees of the Perpetual Agreement Fund of Oakdale Cemetery Company held notes signed by W. D. Colwell and wife, and to secure the payment of said notes had a deed of trust . . . on the same real estate described in the complaint; that the said W. D. Colwell and wife defaulted in the payment of said indebtedness and under the terms of the deed of trust, a representative and agent of the Perpetual Agreement Fund of Oakdale Cemetery Company arranged with these defendants, through H. F. Wilder, to take over said property as trustee for the Oakdale Cemetery Company . . . with the understanding and agreement that they would never be pushed or called upon to pay said notes or any part of same, but would handle same as trustee for plaintiffs, and when said property could be sold that the proceeds derived from the sale of said property was to be applied on the notes. These defendants were not to be called upon to pay any part of said notes out of their own funds, but these

defendants would handle said property as trustee and endeavor to get a sale for same as agents of the plaintiff. In consequence of said agreement, these answering defendants executed the notes and deed of trust as an accommodation to plaintiff, and these defendants have never received any value for same or any benefit whatever, but were only acting as agents and trustees for plaintiffs, and these defendants are in no way liable to plaintiffs in any sum whatever."

After the pleadings were read the plaintiff moved for judgment, and the trial judge being of the opinion that the plaintiff was entitled to judgment upon the pleadings, adjudged accordingly, and the defendant appealed.

K. O. Burgwin for plaintiff.
John A. Stevens for defendants.

BROGDEN, J. This controversy is between the original parties to the notes described in the complaint. The only question of law is whether the defense pleaded in the answer classifies the case in the line represented by *Hilliard v. Newberry,* 153 N. C., 104, 68 S. E., 1056; *Boushall v. Stronach,* 172 N. C., 273, 90 S. E., 198; *Mfg. Co. v. McCormick,* 175 N. C., 277, 95 S. E., 555; *Bank v. Andrews,* 179 N. C., 341, 102 S. E., 414, or the line represented by *Evans v. Freeman,* 142 N. C., 61, 54 S. E., 847; *Bank v. Winslow,* 193 N. C., 470, 137 S. E., 320; *Justice v. Coxe,* 198 N. C., 263, 151 S. E., 252; *Stack v. Stack,* 202 N. C., 461, 163 S. E., 589.

Liberally construed, the defendants allege that they executed the notes as trustees for the plaintiff, receiving no consideration, and with the agreement that the notes were to be paid out of the proceeds of the sale of land. These allegations invoke the principles applied in the second line of cases, *supra,* and therefore it necessarily follows that the judgment upon the pleadings was inadvertently entered.

Reversed.

JAMES W. BEAN v. HOME DETECTIVE COMPANY ET AL.

(Filed 28 February, 1934.)

Actions A c—Courts will not entertain action where both parties are in pari delicto.

Where the allegations of the complaint reveal that both parties were *in pari delicto* in respect to the matters out of which the cause of action arose, defendant's demurrer to the complaint is properly sustained, it being the policy of the law in such instances to remit the parties to their own folly.

BEAN *v.* DETECTIVE CO.

APPEAL by plaintiff from *Sink, J.*, at August-September Term, 1933, of GUILFORD.

Civil action for alleged fraud and deceit.

The complaint alleges:

1. That plaintiff was employed by the defendant company through its agents, the individual defendants, in September, 1929, to aid in promoting its business in High Point, assuring the plaintiff that the work was entirely legitimate and lawful.

2. That the operations of the defendant were unlawful and fraudulent, in that, it was promoting thefts and robberies and ostensibly recovering the stolen goods as a means of creating business and enhancing its reputation as a private detective agency.

3. That on or about 4 November, 1929, upon instructions from the defendant and in the course of his employment, the plaintiff received certain hosiery from a party who had stolen the same from the Royal Hosiery Mill; that the stolen hosiery was turned over to the defendant; and that in consequence of such activities on the part of the plaintiff he was indicted and convicted at the September Term, 1931, Guilford Superior Court, of receiving stolen goods, knowing them to have been feloniously taken or stolen, and sentenced to six months on the roads.

4. That plaintiff has been greatly damaged in the sum of $10,000.

Demurrer interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action; sustained; exception; appeal.

Garland B. Daniel, Younce & Younce and Brawley & Gantt for plaintiff.

Allen Adams for defendants.

STACY, C. J. The allegations of the complaint are discreditable to both parties. They blacken the character of the plaintiff as well as soil the reputation of the defendant. As between them, the law refuses to lend a helping hand. The policy of the civil courts is not to paddle in muddy water, but to remit the parties, when *in pari delicto*, to their own folly. So, in the instant case, the plaintiff must fail in his suit. *Miller v. Howell*, 184 N. C., 119, 113 S. E., 621.

"It is very generally held—universally, so far as we are aware—that an action never lies when a plaintiff must base his claim, in whole or in part, on a violation by himself of the criminal or penal laws of the State"—*Hoke, J.*, in *Lloyd v. R. R.*, 151 N. C., 536, 66 S. E., 604.

The decisions of other jurisdictions, cited and relied upon by plaintiff, are easily distinguishable, and are not controlling on the allegations of the present complaint. The demurrer was properly sustained.

Affirmed.

BRUNSWICK COUNTY, THE BOARD OF COUNTY COMMISSIONERS OF BRUNSWICK COUNTY, THE COUNTY BOARD OF EDUCATION OF BRUNSWICK COUNTY, PEOPLES UNITED BANK OF SOUTHPORT, J. W. RUARK, E. K. BRYAN AND W. B. CAMPBELL, PARTNERS, DOING BUSINESS AS BRYAN AND CAMPBELL, C. ED TAYLOR AND I. C. WRIGHT, PLAINTIFFS, v. NORTH CAROLINA BANK AND TRUST COMPANY AND GURNEY P. HOOD, COMMISSIONER OF BANKS.

(Filed 28 February, 1934.)

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

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

2. Evidence E d—Evidence in this case held pars res gestæ and competent as admission of agent acting within scope of authority.

In an action to have plaintiffs' claim against a closed bank declared a preference, plaintiffs introduced a letter written at the request of the bank's vice-president by the cashier of the bank several weeks after the bank had been closed under the general bank moratorium: *Held*, the letter containing the admission was competent in evidence as constituting an admission by an agent acting within the scope of his authority, and though not made at the precise time of the act to which it referred, was made at a time at which it had present interest and weight and a subsisting importance, and was at least corroborative of other testimony adduced at the trial.

3. Banks and Banking H e—Evidence held to show without material conflict that deposit was special deposit entitling plaintiffs to preference.

The evidence in this case tended to show that a bank was given certain drafts for collection under an agreement made at the time that when collected the funds were to be held by the bank separate and apart from other funds on deposit in the depositor's name, and that the funds were to be distributed among the interested parties in accordance with an agreement to be made by them as to the amount of their respective interests therein. *Held*, the evidence was sufficient to be submitted to the jury on the issue of whether the deposit was a special deposit in the nature of a trust fund, entitling plaintiffs to a preferred claim in the bank's assets upon its insolvency, and there being no material conflict in the evidence as to the facts and circumstances upon which the deposit was made, an instruction by the court that the jury should answer the issue in plaintiff's favor if they believed the evidence was not error.

4. Trial D b—

Where the only inference that can be drawn from the evidence is in plaintiffs' favor, the court may instruct the jury to answer the issue accordingly if they believe the evidence.

5. Banks and Banking H e—Bank official's opinion testimony as to nature of deposit is not controlling.

The testimony of the vice-president of a bank that the deposit in question was a special account and not a special deposit does not create a conflict in the evidence as to whether it was a special deposit when the testimony of the vice-president as to the facts and circumstances under which the deposit was made is in accord with the other testimony, and such facts and circumstances are sufficient to constitute the deposit a special deposit and trust fund.

APPEAL by defendants from *Grady, J.*, and a jury, at October Term, 1933, of BRUNSWICK. No error.

This is an action brought by plaintiffs against defendants to recover $57,035 as a special deposit and trust fund. The action was originally brought against the North Carolina Bank and Trust Company subsequently Gurney P. Hood, Commissioner of Banks, was made a defendant. The defendants deny that the fund was a special deposit and trust fund, but the transaction was one of debtor and creditor.

It was admitted by the defendants that their only purpose was to have the court determine whether the plaintiffs had a priority over the general depositors of the bank to the extent of $57,035.00, and it was agreed that demand was made by the plaintiffs upon Gurney P. Hood, Commissioner of Banks, for the preferential payment of the sum of $57,035, and that the payment was refused by the said Commissioner of Banks.

On motion of plaintiffs, an order to show cause and restraining order was made on 25 April, 1933, by Judge Devin, to segregate and to hold separate and apart from its other assets, the sum of $57,035 in cash. This matter was heard by Judge Sinclair, 17 May, 1933, who found certain facts and ordered that the $57,035 be segregated to wit: "$57,035, be and the same is hereby ordered by the court to be by the defendant placed in a safety-deposit box in the North Carolina Bank and Trust Company, at Wilmington, N. C., and there held, intact, until the final determination of this action or some other order is made relative to its safe-keeping, and when so deposited in such safety-deposit box, the defendant North Carolina Bank and Trust Company shall lock said box and furnish a key thereto to E. K. Bryan, of counsel for the plaintiffs, and the bank shall keep one key, and neither the bank nor its officers, nor the said Bryan, shall open said box where the

money is so deposited except in the presence of a representative of said bank and a representative of the plaintiffs."

I. C. Wright, one of plaintiff's witnesses testified on direct examination as follows "I am a practicing lawyer in the city of Wilmington, N. C., and was one of the attorneys who brought suit against the American Surety Company attempting to recover $135,000. We sued for more than that, but only recovered $57,035. This amount was paid by Mr. John D. Bellamy, of counsel for the American Surety Company, who brought to me as one of the counsel for the plaintiffs, two drafts drawn by the American Surety Company, payable at the Chase National Bank, New York, aggregating that sum. One of them was payable to the board of county commissioners of Brunswick and one to the board of education of Brunswick. These drafts were delivered to me in the courthouse in Wilmington.

The first thing that I did was to have Mr. Bellamy correct the checks by making it appear thereon that these payments did not include the costs of the action. I then notified Bryan and Campbell and we called Mr. Ruark, county attorney, at Southport, and other counsel for the plaintiffs and told them that we had the checks and requested that he have some one come up and endorse the checks to send them on for payment. In consequence of that conversation, Mr. Joe Ruark and R. I. Mintz, clerk to the board of county commissioners, and Mr. Sentelle, clerk to the board of education, came to Wilmington and met with me and Mr. Campbell in Bryan and Campbell's office. In the office of Bryan and Campbell we had a discussion as to how the checks would be handled and after we had the discussion we called Mr. Yates, vice-president of the North Carolina Bank and Trust Company, and he came up to the office and we told him the conversation and the discussion we had just had. I told him most of it and Mr. W. B. Campbell told him the balance. These gentlemen said that they did not feel that they had the power and authority to endorse those checks to us lawyers."

Mr. Royall: "Was Mr. Yates present?" A. "We told Mr. Yates of this conversation. We told Mr. Yates that we had these drafts for collection and that we had had a discussion with these gentlemen, and these two clerks to the respective boards did not feel that they could endorse the checks except to the Peoples United Bank, which was the county depository, and we lawyers did not want to turn the drafts over until our fees were paid out of the money and that we had agreed among ourselves, that the Peoples United Bank was willing for the drafts to be sent on through the North Carolina Bank and Trust Company and that the North Carolina Bank and Trust Company would hold that just like Mr. Campbell and I had sent it on for collection ourselves and we told

him that we did not want to mix it with our funds but to keep it apart from other funds and send them for collection and when collected we were going to take the money and meet with the commissioners and agree on our fees and for the board of education and board of commissioners to be paid the balance due them.

Some of us asked if we could take that $57,000 down to Southport and deliver it and we said we would if they didn't come to get it or agree for some other way. I asked Mr. Yates the question if he or the North Carolina Bank and Trust Company would be willing to handle these drafts for collection under that agreement and he said that it could be done with the permission of the Peoples United Bank and he pointed to Mr. Joe Ruark and said 'there sits the president, and if he agrees to it we will.' Mr. Ruark said he agreed to it and that was what he wanted done, and I said I don't like the proposition of the money going in some one else's name until it is paid in and until it is distributed, and Mr. Yates said he would send it for collection and hold it in a separate account until we agreed and notified them and thereupon the checks were signed and endorsed by Mr. Mintz for the board of commissioners and Mr. Sentelle for the board of education and Mr. Ruark for the Peoples United Bank, and they were turned over to Mr. Yates. The checks never went to Southport except for endorsement in that office. It was agreed that it should not be done, but be held by this bank.

It was agreed that the bank would distribute the funds if the drafts were collected according to the agreement. This was done on 20 February of this year. The checks were delivered to Mr. Yates in Bryan and Campbell's office in the North Carolina Bank Building and the meeting broke up. Mr. Yates did not give me any paper-writing about the two checks.

Mr. Mintz and Mr. Sentelle stated that they would go down stairs to the bank afterwards as they wanted a memorandum of the checks they had endorsed to carry back with them. I had a further conversation or agreement with Mr. Yates about these checks. I wanted to know whether the checks had been paid or not and he advised me that the drafts had been collected. This was a verbal communication. I was in and out of the bank every day. On the first Monday of March, following that meeting, my recollection is that it was 6 March, Mr. Campbell and I went to Southport and had a meeting with the board of commissioners and board of education in an effort to agree about our fees. We did not agree at that time on the fees or how this money should be distributed, so on the next day, 7 March, when we came back, we wrote a letter to the bank. I have not got it here. They notified them to produce it."

Mr. Royall: "We make no point of using the copy. This is a copy of the letter. Mr. Campbell and I went down and put it on Mr. Yates' desk. He was not there at the time. This was 7 March, 1933."

Plaintiffs offer in evidence letter dated 7 March, 1933, as follows:

"7 March, 1933.

North Carolina Bank and Trust Company,
Wilmington, North Carolina.
Gentlemen:

You will recall that on 20 February, 1933, we and the representatives of the Brunswick County commissioners and board of education delivered to you checks on New York totaling $57,035 to be collected and held on special deposit, in trust, until we could settle with the board of county commissioners and the board of education and receive our shares of that money.

When the items were so handled it was anticipated that the settlement of the interested parties would be completed by this time. Such settlement not having been made, you are hereby so advised and notified to continue to hold separate, on special deposit, in trust, those funds until we get our part of them and so advise you. Yours very truly, Bryan & Campbell, J. W. Ruark, C. Ed. Taylor, I. C. Wright."

"I had a further conversation with Mr. Yates, in which I asked him whether the money had been segregated and was held separate and apart from other funds, and he told me that it was not; I told him that we wanted that done. Mr. Yates said that the checks had been collected and deposited to the credit of the bank by its New York correspondent, the Chase National Bank; that it had transferred the money to another bank, which he told me at the time. I told him to write that bank to have the money as a special fund until this matter was determined. He did not say that he would or would not. In the meantime Mr. Bellamy had paid the costs. Mr. Yates mentioned that he got a check for $1.00 as a witness fee in the same case and he hoped that we would get the money because he said it was a special fund set apart for a specific purpose. I did not have any further conversation with Mr. Yates, except I asked him whether he wrote the bank to have the money set apart and he said he did not. There is another thing in the pleadings, if you want to ask about it.

I had a note at the bank that I owed them for a balance of $1,100 with Dr. Murphy as a signer with me. It was a collateral note and Dr. Murphy had died and before that first Monday, Mr. J. V. Grainger, vice-chairman of the board of directors of the bank, asked me if that

was my note or if it was Dr. Murphy's note. This was before we had agreed on our settlement with the commissioners and between 20th of February and the 13th of March. I told him it was my note, that Dr. Murphy was endorsing it and that I owed the note. The bank was executor of Dr. Murphy's estate and the family had requested and the bank acquiesced that I be attorney for the estate. Mr. Grainger said: 'I am glad it is yours.' I told him I was going to pay the note out of my fee in this matter.

Two or three days before the note came up for payment or renewal I said I did not know how I was going to arrange about this note. I intended to pay it out of this fee. Mr. Grainger said that Mr. Strange had been handling the matter as trust officer and he could sign the note as executor of the estate and just renew it. On the 13th, I got a renewal note, collateral note, and signed it and wrote my check for the interest and wrote the assignment for this fund. I have that assignment, I think. The assignment was delivered to Mr. Strange, trust officer of the North Carolina Bank and Trust Company, at the time I carried the renewal in. I told him that I intended to pay it out of this fund and we had not agreed on our fees and he could take it if he wanted it and he took my new note and this assignment, with the statement, 'I will see about it. Usually they want all the security and collateral they can get.' I gave my check for the interest and my old note came back marked 'renewed.'"

Plaintiff offers in evidence assignment dated 19 March, 1933, amount $1,100, signed I. C. Wright, produced by defendants under notice, marked Exhibit B, reading as follows:

"$1,100.

I hereby transfer and assign to the North Carolina Bank and Trust Company, as collateral security to my note of this date for that amount, eleven hundred dollars ($1,100) of the special deposit held in trust by the North Carolina Bank and Trust Company in the name of the Peoples United Bank of Southport, for $57,035, more than that part of the fund belonging to me.

This 13 March, 1933. I. C. Wright."

Defendants object to the introduction of the foregoing document; objection overruled; defendants except.

"I know M. F. Allen, who was cashier for the North Carolina Bank and Trust Company, at Wilmington."

Plaintiffs offer in evidence letter from M. F. Allen to Peoples United Bank, dated 21 March, 1933, marked Exhibit C, as follows:

"North Carolina Bank and Trust Company
Wilmington, N. C., 21 March, 1933.

Peoples United Bank,
Southport, N. C.
Gentlemen:

We don't think we had the right to charge against special account set up in your name a part of the currency we shipped you on 3 March, amounting to $3,802.40. We are, therefore, charging your regular account with this amount and crediting the same to its original figures.

Trusting this meets with your approval, we are

Yours truly, M. F. Allen, cashier."

To the introduction of the foregoing letter, the defendants object, but not to the genuineness of the signature. Objection overruled and defendants except.

"I told Mr. Yates that Mr. Ruark had stated that the North Carolina Bank and Trust Company was correspondent bank in Wilmington for the Peoples United Bank, and so it could be handled by the North Carolina Bank, and that was why we sent for him. Mr. Ruark was president of the Peoples United Bank."

The affidavit of I. C. Wright, corroborative, was in part: "and turned over to Mr. Yates for collection, and he was to hold the money in a special deposit and for this specific purpose of being apportioned out as we agreed with the commissioners and board of education. I left and came back to my office."

On cross-examination: "Q. Don't you know that those funds, as soon as collected, on 23 September, were deposited the next day in the Peoples United Bank and credited to them by the North Carolina Bank and Trust Company? A. As a special account, or special deposit, which was to be done, and he agreed that it was to be held, subject to our agreement as to how it was to be distributed. That was by special agreement with Mr. Ruark, president, that they should be under that agreement. . . . Banking holidays were being declared in Michigan and a great many states and that was one reason that we were so particular about wanting these things collected and wanted the actual cash held separate and I was not willing for that money to be deposited in the North Carolina Bank and Trust Company and wanted to send these checks for collection, as I always do for clients. . . . I had a conversation with Mr. Yates, in which he said: 'I want the Brunswick folks to have that money, and hope that they will get it, for it certainly was a special account for a specific purpose.' This conversation took place when I went down to see if that money had been put in a special fund, if the cash had been segregated in the bank records."

The testimony of I. C. Wright was in all material aspects corroborated by W. B. Campbell, R. I. Mintz, J. W. Ruark.

W. B. Campbell testified in part: "After we conferred among ourselves I telephoned Mr. Yates requesting him to come to my office if he could, that I wanted to take up with him the matter of handling the vouchers. In a few minutes he came and I stated to him that we had these two drafts, drawn by the American Surety Company on itself and payable through the Chase National Bank. That we wanted the drafts collected and that we would have to settle with clients and that our compensation had not been fixed and that division would have to be determined by agreement between counsel and clients and we wanted them put in a special deposit for collection and when collected held until an agreement could be reached, for distribution, according to the interests then ascertained, and that no one interested would be permitted in the meantime to check on this fund, which was an aggregate of the two drafts.

We explained in detail to Mr. Yates that as attorneys we had nothing but two drafts and no fees and we would not release control of the money when collected until settlement of respective interests had been ascertained and it was then to be distributed as reported to the bank. We also stated to him that when these collections were made it was to be held separate and apart from any of the funds of any of the parties, and that we were expecting to reach an agreement fixing the interest of clients. . . . The vouchers were then endorsed and delivered to Mr. Yates in my office under that agreement. That was about 1:30 in the day and we were all anxious to get them started on that course during that banking day. The drafts were delivered under these agreements to Mr. Yates in person."

L. T. Yaskell, chairman of board of commissioners of Brunswick County testified in part: "This transaction took place in February, 1933. I know Mr. M. F. Allen when I see him; I saw him in the court room this morning; he was an officer and employee of the North Carolina Bank and Trust Company. Q. After this controversy arose did you have any conversation with Mr. Allen, and if so, detail it to the court and jury, in reference to this fund? (Defendants object.) Q. (By court): Before the suit was brought? A. Yes, sir. My conversation was before the suit was brought. Objection overruled; defendants except. I called Mr. Allen over the telephone and asked Mr. Allen the status of the funds, the $57,000 belonging to the funds of Brunswick County. (Defendants object; objection overruled; defendants except.) I spoke to Mr. Allen in reference to the 5 per cent they were going to pay out and Mr. Allen said he did not know the status of that fund, for the reason that the fund was placed there for a special

fund and I would have to talk to Mr. Yates. His understanding was that this fund was not to be disturbed, was placed there for a special purpose. I told him that I was chairman of the board, and he said it would be necessary to get a resolution of the board of commissioners and board of education in order to disturb the fund. (Defendants object to answer and move that it be stricken from the record; objection overruled; defendants except.) Q. State whether or not the attorneys were to be paid out of that fund? (Defendants object.) Q. Do you know? A. Yes, sir; I know. (Objection overruled; defendants except.) It was understood that the funds were not to be disturbed until the attorneys were paid out of it. (Defendants object to the foregoing answer and move that the answer be stricken out; objection overruled; defendants except.) The board of county commissioners were insisting that the attorneys were to be paid out of this fund and it was not to be disturbed until they were. (Defendants object to answer and move to strike out; objection overruled; defendants except.) Cross-examination (by Mr. Royall). This conversation was on the morning that the bank went on the moratorium, or the day afterwards."

J. W. Yates, vice-president, North Carolina Bank and Trust Company (Wilmington unit) witness for defendants testified in part: "Q. State to his Honor and the jury the transaction, as you recall it, which took place, in reference to these drafts involved in this controversy? Mr. Royall: We are reserving our objection in regard to the competency in respect to the board of commissioners and board of education of Brunswick County. On 20 February, I received a telephone message from the office of Bryan and Campbell, asking me to come up and I did so and found in the office Mr. Campbell, Mr. I. C. Wright, Mr. J. W. Ruark, Mr. Mintz and Mr. Sentelle. They explained that they had two checks sent in settlement of some suit that the board of education and board of commissioners of Brunswick County had against the American Surety Company or somebody the American Surety Company had bonded, Mr. Inman. That they wanted to get money for these checks and send forward for collection.

I told them that we could not pay any money on the checks until they had been collected. They stated that the Peoples United Bank of Southport was county depository and for that reason it would be necessary for the checks to be sent through the Peoples United Bank but that they desired to avoid the loss of time of about two days for the checks to go to Southport and back. Mr. Ruark in addition to being attorney was also president of the Peoples United Bank. I suggested that in my opinion Mr. Ruark could endorse these checks in behalf of the bank and that they could be turned over to the North Carolina Bank and Trust Company for collection. It was only necessary for the chairman

of the board of commissioners or clerk to the board of education to endorse them and turn them over to me as representative of the North Carolina Bank and Trust Company. They stated further that the lawyers present had an interest in the amount, in the way of fees, the amount of which had not been decided, but which would be decided in a short time, and they wanted the proceeds of these checks to be kept and credited in a separate and distinct account from the regular and general account of the Peoples United Bank. The Peoples United Bank was carrying at that time a general account with us. It was their wish that these funds be kept and credited in a separate account from the regular account. I suggested that the checks be forwarded for collection and when they had been collected and the bank had been so advised the amount be credited to the Peoples Bank of Southport, special account, and they all agreed that was satisfactory, and upon that basis, I took these checks. We were in the office probably a half hour and that was the substance of the conversation.

We started downstairs and I am under the impression that we all started downstairs, and I said going downstairs: 'I will give you receipts for these checks.' I think they were all present at this time. They did not suggest that I give them receipts but I thought it was proper. I came downstairs and drew two receipts which were offered in evidence, delivered one to Mr. Mintz and one to Mr. Sentelle. It was my impression that Mr. Ruark was standing in the middle of the lobby at that time, if not at that moment, he had been a moment or so before. I was also under the impression that Mr. Campbell was there. We all came down together and I am not sure who came into the lobby of the bank and who passed on through and did not stop. I do know that Mr. Sentelle and Mr. Mintz were present. (Counsel hands witness paper-writing.) This is one of the receipts, check for $25,925. (Defendants offer receipt in evidence reading as follows): '20 February, 1933. Received from Peoples United Bank, Southport, North Carolina, depository of Brunswick County, North Carolina, a check for $25,925, drawn to the order of the board of commissioners, Brunswick County, North Carolina, on the Chase National Bank of New York, by the American Surety Company of New York.

When collected, the proceeds of this check are to be credited to the Peoples United Bank of Southport in a special account. N. C. Bank and Trust Company, J. W. Yates, vice-president.'

(Counsel hands witness another paper-writing.) This is the other receipt. Defendants offer same in evidence reading as follows: '20 February, 1933. Received from the Peoples United Bank, Southport, North Carolina, a check for $31,110, drawn to the order of the board of education, Brunswick County, North Carolina, on the Chase National Bank of New York, by the American Surety Company of New York.

When collected, the proceeds of this check are to be credited to the Peoples United Bank of Southport in a special account. N. C. Bank and Trust Company, J. W. Yates, vice-president.'

"Q. Did you have any conversation with Mr. Wright? A. I have had conversations with one or two of the attorneys since that, but I don't recall any specific conversations I had with any of them. I never made the statement to Mr. Wright that this was a special deposit but stated that it was a special account. I have the distinct desire that Brunswick County would get the money and also these attorneys, if you want to know my sympathies in the matter. That is where they lie. I would like to see all of the depositors get their money, the unsecured as well as the secured. I think there is a difference between sympathy and interest.

Cross-examination (by Mr. E. K. Bryan): I came up to the office of Bryan and Campbell and stated to Messrs. Bryan and Campbell that it was my understanding that the money was to be divided between the parties in interest when their respective interests were decided between them. I understood this at the time the checks were turned over. Q. (by E. K. Bryan): It was one of the reasons they were putting it there, was to keep it away from Brunswick County and other people until that was decided, and that was the reason it was done in that way? A. I heard them discussing it. I was informed that the attorneys had an interest in the funds which was to be paid out of the particular fund. The Peoples Bank had a general deposit account in the North Carolina Bank and Trust Company. We didn't distinguish in that account belonging to Brunswick County. It was stipulated that the $57,035 was not to go in the general account. It was understood that the funds in the special account would be disbursed by the Peoples United Bank of Southport and in accordance with an agreement to be reached at a later date by the parties in interest, to the lawyers and the board of education and the board of county commissioners and that it was not to be checked upon until that time and that the checks were to be drawn to settle these specific accounts in accordance with the agreements. This was understood at the time the checks were taken. . . . Recross-examination (by E. K. Bryan): I know that Mr. Allen had written a letter when he charged five per cent to this special account. At the time he wrote that letter he had probably talked to some of us in the bank about it and that was probably the reason he wrote it. I don't think the letter of Mr. Wright and others of 7 March was replied to. A copy was sent the Peoples United Bank. I suggested that as long as Mr. Ruark was president of the Peoples United Bank he could act in that capacity in endorsing the checks. This he did. I knew he was president of the bank and accepted his endorsement as such."

M. F. Allen testified in part: "(Counsel shows witness letter from M. F. Allen to Peoples United Bank, Exhibit C, of plaintiffs' exhibits.) On the date this letter was written, 21 March, 1933, the other superior officers of the bank, such as Mr. Grainger and Mr. Yates, spoke to me in reference to this charge that had been made against the special account. They all decided that I had better write this letter and I did so and made entries reversing the charges. I do not know whether before that time the bank had received a letter from Messrs. Bryan and Campbell and Ruark and Taylor, because it did not come to my desk.

I did know the contents of the letter in a general way. I do not recall any conversation with Mr. Yaskell. I don't remember that I ever made the statement to Mr. Yaskell that these funds involved in these drafts were to be distributed by the bank or to be held intact or were to be segregated. The shipment I sent the Peoples United Bank at Southport was a shipment of currency."

The court below charged the jury as follows: "Gentlemen of the jury, if you find the facts to be as testified to by all of the witnesses, it would be your duty to answer the issue Yes. Otherwise, you would answer it No." Thereafter the jury returned verdict answering the said issue Yes.

Upon the incoming of the verdict the defendants moved that the same be set aside and for a new trial for errors occurring during the trial and appearing in the record. Motion denied. Defendants except. Thereupon defendants moved for a judgment *non obstante vere dicto*. Motion overruled. Defendants except. Whereupon his Honor signed the judgment as set out in the record, to which judgment defendants except.

This cause coming on to be heard before his Honor, Henry A. Grady, judge presiding, and a jury, at the October Term, 1933, of the Superior Court of Onslow County, and being heard, and the following issue having been submitted to the jury, to wit: (see issue above).

And the jury having answered the said issue Yes, and it further appearing to the court that the $57,035 is now held in a safety-deposit box in said bank subject to the orders of the court in this cause.

It is now on motion of counsel for plaintiffs ordered, considered and adjudged, that the plaintiffs are entitled to a preferred claim against the assets of the North Carolina Bank and Trust Company in the sum of $57,035, to be paid in full and that same was held in trust for the plaintiffs by said bank and that the said $57,035 now in the safety-deposit box be delivered to plaintiffs in satisfaction of this judgment, and that the plaintiffs recover their costs. The defendant Gurney P. Hood, North Carolina Commissioner of Banks, will pay the costs of this action."

The defendants assigned errors to the exceptions before set forth and made other exceptions and assignments of error and appealed to the Supreme Court. The other necessary facts will be set forth in the opinion.

Bryan & Campbell, I. C. Wright, C. Ed. Taylor and J. W. Ruark for plaintiffs.

Brooks, McLendon & Holderness, Cyrus D. Hogue and Kenneth C. Royall for defendants.

CLARKSON, J. The defendants made motions in the court below for judgment as of nonsuit at the close of plaintiffs' evidence and at the close of all the evidence. C. S., 567. The motions were overruled and in this we can see no error.

The settled rule in this jurisdiction is that upon a motion as of nonsuit, the evidence, whether offered by the plaintiff or elicited from defendants' 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. We think the evidence sufficient to show that the fund was a special deposit and trust fund.

The evidence is set forth above rather lengthy, but the amount involved is large and the controversy important. The testimony of I. C. Wright, that was in all material aspects, corroborated by W. B. Campbell and other witnesses and plaintiffs' evidence was to the effect that: there were two drafts aggregating $57,035. "Check No. 40916 of Am. Surety Com. to Bd. of Com. of Bru. Co. N. C., $25,924. Check No. 40917 of same Co. & date to Bd. of Ed. $31,110. Both signed by E. P. Watson, vice-pres. Chase National Bank, New York. 15 February, '33."

On 7 March, 1933, the following letter was written to North Carolina Bank and Trust Company at Wilmington, N. C., by Bryan and Campbell, J. W. Ruark, C. Ed. Taylor and I. C. Wright: "Gentlemen: You will recall that on 20 February, 1933, we and the representatives of the Brunswick County commissioners and board of education delivered to you checks on New York totaling $57,035 to be collected and held on special deposit, in trust, until we could settle with the board of county commissioners and the board of education and receive our shares of that money.

When the items were so handled it was anticipated that the settlement of the interested parties would be completed by this time. Such settlement not having been made, you are hereby so advised and notified to continue to hold separate, on special deposit, in trust, those funds until we get our part of them and so advise you."

Plaintiffs offer in evidence assignment, dated 19 March, 1933, amount $1,100, signed I. C. Wright, produced by defendants under notice, reading as follows: "$1,100. I hereby transfer and assign to the North Carolina Bank and Trust Company, as collateral security to my note of this date for that amount, eleven hundred dollars ($1,100) of the special deposit held in trust by the North Carolina Bank and Trust Company in the name of the Peoples United Bank of Southport, for $57,035, more than that part of the fund belonging to me. This 13 March, 1933. I. C. Wright."

Plaintiffs offer in evidence letter from M. F. Allen to Peoples United Bank, dated 21 March, 1933, as follows:

"North Carolina Bank and Trust Company
Wilmington, N. C., 21 March, 1933.

Peoples United Bank,
Southport, N. C.
Gentlemen:

We don't think we had the right to charge against special account set up in your name a part of the currency we shipped you on 3 March, amounting to $3,802.40. We are, therefore, charging your regular account with this amount and crediting the same back to the special account, restoring same to its original figures.

Trusting this meets with your approval, we are

Yours truly, M. F. Allen, cashier."

I. C. Wright testified: "I had a conversation with Mr. Yates, in which he said: 'I want the Brunswick folks to have that money, and hope that they will get it, for it certainly was a special account for a specific purpose.' This conversation took place when I went down to see if that money had been put in a special fund, if the cash had been segregated in the bank records."

The affidavit of I. C. Wright as corroborative of his testimony on the trial, was in part: "And on that arrangement the checks were endorsed and turned over to Mr. Yates for collection, and he was to hold the money in a special deposit and for this specific purpose of being apportioned out as we agreed with the commissioners and board of education. I left and came back to my office."

The defendants contend: "The principal questions in this case concern: (a) The refusal of the court to grant the defendant's motion of nonsuit and (b) the action of the court in peremptorily instructing the jury to answer the issue in favor of the plaintiffs. Therefore, the exceptions relating to the admission of evidence are principally material as they reflect upon these two principal questions."

As to the admission of the letter and the declarations of M. F. Allen, cashier of the North Carolina Bank and Trust Company (Wilmington unit) to witness L. T. Yaskell we think competent.

In *Pangle v. Appalachian Hall,* 190 N. C., 833 (834): "The authorities in this State are all to the effect that what an agent says, relative to an act then being done by him within the scope of his agency, is admissible as a part of the *res gestæ,* and may be offered in evidence, either for or against the principal; but what the agent says afterwards, and merely narrative of a past occurrence, though his agency may continue as to other matters, or generally, is only hearsay and not competent as against the principal. *Johnson v. Ins. Co.,* 172 N. C., 142; *Southerland v. R. R.,* 106 N. C., 100." We think that this evidence is *dum fervet opus.*

"So too, if the declaration or admissions, though relating to something that is in mere point of time passed, yet have for any reason a present interest and weight, or from any combination of circumstances assume a still subsisting importance, they will then be admissible as constituting a part of the *res gestæ,* without regard to the fact that the precise act itself to which they relate was strictly speaking, concluded some time before." Morse on Banks and Banking, 6th ed., Vol. 1, pp. 286-287.

It is at least corroborative. The letter M. F. Allen testified to was written at Yates' request. Under the facts and circumstances of this case, we think the evidence admissible.

The real controversy in this case: was the charge of the court below correct? "Gentlemen of the jury, if you find the facts to be as testified to by all of the witnesses it would be your duty to answer the issue Yes." We think so.

In McIntosh, N. C. Practice and Procedure on page 632, we find: "If the evidence is all one way, and there is no conflict, the judge may say to the jury that, if they believe the evidence, they may find a certain verdict, but he cannot direct them that they must so find from the evidence. If the facts are admitted or established, and only one inference can be drawn from them, the judge may draw the inference and so direct the jury; but when the facts are not admitted, or more than one inference may be drawn, the case must be left to the jury to determine, with proper instructions from the judge as to the law. 'A verdict can never be directed in favor of a plaintiff when there is any evidence from which the jury may find contrary to the plaintiff's contention, or where there is evidence which will justify an inference contrary to such contention.'" *Bank v. Noble,* 203 N. C., 300 (302).

The well established principle in this jurisdiction is thus stated in *Corporation Commission v. Trust Co.,* 193 N. C., 696 (699): "A deposit for a specific purpose is made when money or property is delivered

to a bank to be applied to a designated object, or for a purpose which is particularly defined, as, for example, the payment by the bank of a specified debt. It is neither general nor wholly special. It partakes of the nature of a special deposit to the extent that the title remains in the depositor, and does not pass to the bank. The consequence is that the money, if not applied, or if misapplied, may be recovered as a trust deposit. 7 C. J., 631; 1 Morse, Banks and Banking, sec. 185. In *Morton v. Woolery,* 24 A. L. R., 1107, it is said: 'Where money is deposited for a special purpose as, for instance, in this case, where it was deposited for the stated purpose of meeting certain checks to be thereafter drawn against such deposit, the deposit does not become a general one, but the bank, upon accepting the deposit, becomes bound by the conditions imposed, and, if it fails to apply the money at all, or misapplies it, it can be recovered as a trust deposit.'" Citing a wealth of authorities. *Corporation Commission v. Trust Co.,* 194 N. C., 125. In *Flack v. Hood, Comr.,* 204 N. C., 337 (340), speaking to the subject: "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." *Lawrence v. Hood, Comr.,* 205 N. C., 268.

We do not think that there was such a material conflict in the testimony of plaintiffs' witnesses and defendants that would impinge the charge of the court below. The letter of 7 March, 1933, by Bryan and Campbell and others "to be collected and held on special deposit in trust," *et cetera.* No answer was made to this letter. Mr. Grainger, vice-chairman of the board of North Carolina Bank and Trust Company testified: "I have not copy of any answer in the file of the North Carolina Bank. It is the usual custom to make duplicate copies of letters. I did not tell any of the plaintiffs that I thought they ought to have this money. I told Mr. Wright on yesterday that the only interest we had was to find out legally to whom it belonged."

The assignment of I. C. Wright to secure a loan in which it was stated "to be collected and held on special deposit in trust" was a circumstance and competent. The testimony of J. W. Yates, vice-president of North Carolina Bank and Trust Company (Wilmington unit) in part was as follows: "They stated further that this money was to settle these suits and that the lawyers present had an interest in the amount,

in the way of fees, the amount of which had not been decided, but which would be decided in a short time, and they wanted the proceeds of these checks to be kept and credited in a separate and distinct account from the regular and general account of the Peoples United Bank. The Peoples United Bank was carrying at that time a general account with us. It was their wish that these funds be kept and credited in a separate account from the regular account. I suggested that the checks be forwarded for collection and when they had been collected and the bank had been so advised, the amount be credited to the Peoples Bank of Southport, special account, and they all agreed that was satisfactory, and upon that basis, I took these checks."

The receipts given afterward to Mintz and Sentelle read in part: "When collected, the proceeds of this check are to be credited to the Peoples United Bank of Southport in a special account." This read in connection with Mr. Yates' agreement, indicated that the special account was for a specific purpose.

The evidence instead of contradicting can be construed as corroborating plaintiffs' evidence. The checks were to be collected, the proceeds were not to be put in the "regular and general account," but a "special account," in other words, intact, indicating a "trust quality" and more correctly stated in plaintiffs' evidence "special deposit in trust." The evidence on the entire record was sufficient to show that the checks were put in the bank to be collected and held as "special deposit in trust." The testimony of I. C. Wright was that Mr. Yates said: "I want the Brunswick folks to have that money and hope that they will get it, for it certainly was a special account for a specific purpose." Mr. Yates in his testimony said: "I never made the statement to Mr. Wright that this was a special deposit, but stated that it was a special account."

The evidence, termed conflicting by defendants, we think it can be said on this record, is a distinction without a difference. All the facts and circumstances show that the drafts were to be collected and to be held as a special deposit and trust fund and the conclusion of Mr. Yates that it was a special account did not make it so, as the facts of the agreement—as stated by other witnesses and Mr. Yates himself, showed to the contrary. If a conflict, it is not a material one. The evidence all was to the effect that plaintiffs, knowing the shaky condition of banks at that period, took every precaution to protect their clients and themselves in insisting that when the bank collected the drafts they were impressed with a "trust quality." We do not think there is prejudicial or reversible error on the record. The exceptions and assignments of error made by defendants cannot be sustained. For the reasons given, in the judgment of the court below we find

No error.

J. A. BOLICH, JR., AND WIFE, ROSALIE F. BOLICH, *v.* PRUDENTIAL INSURANCE COMPANY OF AMERICA, WACHOVIA BANK AND TRUST COMPANY, TRUSTEE, AND MRS. NONA S. HANES.

(Filed 28 February, 1934.)

1. Trial D a—Where a party is entitled to affirmative relief on the pleadings adverse parties may not take voluntary nonsuit.

In an action by a mortgagor to prevent foreclosure and to obtain judgment on a contract of a third person to pay principal and interest on the debt satisfactorily to the mortgagee, the allegations and evidence of such third person that the alleged contract was obtained by fraud and misrepresentations entitles her to the affirmative relief of having the contract canceled upon a favorable verdict of the jury, and the mortgagor and mortgagee may not take a voluntary nonsuit against her, the contract entailing liability on her part in the event of deficiency after foreclosure.

2. Pleadings A f—

The prayer for relief does not determine the scope of a party's right to relief, the scope of the relief being determined by the allegations in the pleadings.

3. Cancellation and Rescission of Instruments B d—

In an action to set aside an instrument for fraud plaintiff must show by the greater weight of the evidence affirmative facts entitling him to the relief.

4. Same—Evidence of fraud in procurement of contract held sufficient to be submitted to jury.

Evidence that plaintiff was a close business associate of defendant's husband, that defendant's husband became seriously ill and in a greatly weakened condition, that defendant herself prior to the execution of the contract had been ill, and that she was extremely worried over her husband's illness, and that while defendant's husband was in such weakened condition and while plaintiff was attending to business for him, plaintiff got him to sign a contract obligating himself on a large part of plaintiff's indebtedness, and that defendant signed the contract under direction of her husband because of his precarious health, and that the consideration for the contract was worthless, *is held* competent and sufficient to be submitted to the jury on defendant's cross-action to have the contract canceled for fraud.

5. Cancellation and Rescission of Instruments A b—Whether misrepresentations were of fact or merely promissory representations held for jury.

Representations by the owner of property that it was leased under long term leases and that the income therefrom was more than sufficient to pay taxes and interest on the debt, and that the value of the property for lease purposes was greatly increasing *is held* to amount to more than mere promissory representations under the facts and circumstances of this case, and raised a question for the jury as to whether they were intended and received as statements of material fact, and testimony of an auditor as to the actual income from the property was competent.

6. Same—

In an action to cancel an instrument for fraud the usual elements of fraud must be established.

7. Fraud A a—Elements of fraud.

The essential elements of fraud are a misrepresentation or concealment, intent to deceive or negligence in uttering falsehoods with intent to influence the action of others, actual deception, and reliance upon the misrepresentations by the complaining party.

8. Cancellation and Rescission of Instruments B c—

A party seeking cancellation of an instrument for fraud must act within a reasonable time after the discovery of the fraud or after it should have been discovered by due diligence, and must seek to rescind the whole transaction, and must not have ratified the transaction by any voluntary act in recognition of its validity.

APPEAL by defendant, Nona S. Hanes, from *Sink, J.*, at 13 March Term, 1933, of FORSYTH. Reversed.

This action was originally for injunctive relief. The plaintiffs on 11 March, 1930, made and executed a note to the defendant, Prudential Life Insurance Company, in the sum of $160,000 and secured same by a deed of trust to the defendant, Wachovia Bank and Trust Company, trustee, on certain lands on West Fourth Street, in the city of Winston-Salem, N. C. The deed of trust is recorded in the register of deeds office in Forsyth County, North Carolina, in Book 270, at page 301. $8,000 of the principal together with $4,800 was due and payable, which under the terms of the deed of trust rendered the entire sum due and gave power of sale. Pursuant to the provisions of the deed of trust, the land was advertised for sale on 20 November, 1931. The plaintiffs further alleged: "That this mortgage will not be foreclosed if the defendant, Nona S. Hanes, will pay or otherwise arrange interest and taxes amounting to around $7,000, and that the plaintiffs are unable to raise said sum. That on 20 November, 1930, the plaintiffs entered into a contract with the defendant, Nona S. Hanes, and her husband, W. M. Hanes, a copy of which is attached hereto, marked Exhibit A, and asked to be made a part of this complaint. That Nona S. Hanes is solvent in an amount in excess of the mortgage indebtedness," *et cetera.*

The contract of 20 November, 1930, provides among other things, that W. M. Hanes and Nona S. Hanes "contracts, covenants and agrees to pay, renew or handle in a manner satisfactory to both parties, each and every encumbrance against said properties as the same become due," *et cetera.*

"That Nona S. Hanes in consideration of the conveyance by the plaintiffs for her benefit has become primarily liable for the pay-

ment of the debt of the defendant, Prudential Insurance Company of America." The depression is set forth and a lengthy complaint unnecessary to detail.

The prayer of plaintiffs: "Wherefore, the plaintiffs pray that the defendants Prudential Insurance Company of America and the Wachovia Bank and Trust Company, as trustee, be restrained from foreclosing the deed of trust heretofore mentioned; that a mandatory injunction issue against the defendant, Nona S. Hanes, commanding and directing her to pay the encumbrances which she agreed to pay under the contract hereto attached, or submit to judgment in the sum of said indebtedness; and for such other and further relief as the court may deem just and proper."

The defendants, Prudential Insurance Company of America and Wachovia Bank and Trust Company, trustee, answer and admit certain facts and deny others and the prayer is as follows: "Wherefore, the defendants pray that the action be dismissed, that they go without day and recover their costs in this behalf expended, and, should the court continue the restraining order to the hearing, they pray that a receiver of the premises be appointed whose duty it shall be, among other things, to collect the rents thereof and apply the same towards the discharge of the obligations secured by the mortgage referred to in the complaint; and in the alternative that the court decree forthwith foreclosure of the deed of trust by a commissioner appointed by it."

Later they amended their answer to read as follows: "By leave of the court, the defendants, the Prudential Insurance Company of America and Wachovia Bank and Trust Company, trustee, amend the answer heretofore filed by adding to the prayer thereof that they have and recover judgment against J. A. Bolich, Jr., Rosalie F. Bolich, and Nona S. Hanes in the sum of $160,000 with interest on $160,000 from 11 March, 1931; upon $1,249.50 from 10 November, 1931; upon $2,731.25 from 30 November, 1931; and upon $870.00 from 11 November, 1931; and that said sums be declared to be a lien upon the property described in the mortgage or deed of trust referred to in second paragraph of the complaint, as of and from 11 March, 1930."

The defendant, Nona S. Hanes, set up a lengthy answer contending that the contract relied on by plaintiffs dated 20 November, 1930, entered into by and between the plaintiffs and herself and husband, W. M. Hanes, was induced by fraud on the part of plaintiffs. Among other allegations were that during the period of negotiations her husband was suffering from pulmonary tuberculosis and that during his illness he was "in almost constant communication with the said J. A. Bolich, Jr., who was handling numerous business transactions for him

and on whom he had come to rely; that their relationship was particularly close and friendly and he was constantly advised on business matters by the said J. A. Bolich, Jr., and on account of this relationship between them it was comparatively easy for the said J. A. Bolich, Jr., to influence the said W. M. Hanes, on whom he had so intimately relied."

The said Nona S. Hanes, further alleged in substance, certain material representations as to the rental value of the properties were made to induce the signing of the contract which were fraudulently made and relied on and calculated to deceive. Other allegations of fraud were alleged.

"That said J. A. Bolich, Jr., had been an officer of the Bolich Holding Corporation since its organization and knew the condition of its finances and the value of the properties, that the plaintiffs knew that the rents from said property were not and would not be sufficient to pay taxes and other charges hereinbefore set out, and that unless outside financial assistance were given that said properties would be lost by foreclosure sales held under mortgages or deeds of trust on said properties; that the said J. A. Bolich, Jr., advised the said W. M. Hanes and this defendant to sign said paper-writings aforesaid knowing that the said Hanes and this defendant relied on his advice and that this defendant would not refuse to sign said instruments if her husband so desired, on account of the condition of his health, that said advice was not given in good faith and constituted a fraud upon this defendant and the said W. M. Hanes; that all of said transactions were induced by the conspiracy and fraud of the plaintiffs for the purpose of taking advantage of the concentration of title of certain properties of the said Hanes in himself and this defendant free from the claims of his creditors other than joint creditors and passing to this defendant at his death so that said property would stand as additional security for the protection of the endangered properties of the Bolich Holding Corporation, and that by means thereof the said Bolich might be relieved of all risk of loss by reason of said transactions.

That no consideration or property right or anything of value whatsoever passed to the said W. M. Hanes and or this defendant, Nona S. Hanes, by reason of any or all of the transactions heretofore referred to, and the paper-writings setting forth the terms thereof; and that this fact was known to the plaintiffs; that they falsely and fraudulently represented that there was consideration and caused to be prepared for the signature of the said W. M. Hanes and this defendant, and obtained their signatures on the instruments heretofore referred to, which said instruments falsely purported to set forth consideration which was worthless and illegal and was known by the plaintiffs to be totally worthless and illegal; that said instruments and their recital of the purported

but worthless consideration set forth therein were fraudulent and constituted a part of the conspiracy and fraud by which the plaintiffs contrived to get indemnity from the said W. M. Hanes and this defendant.

That during all of the said transactions, the said J. A. Bolich, Jr., acted as the agent of Rosalie F. Bolich, and as such agent had full knowledge of all of the transactions and facts alleged in this answer; that all of the representations and acts done by him as alleged in this answer were done by him both in his own behalf and as agent of the said Rosalie F. Bolich, and she is bound thereby.

That the stock certificates for the common stock of the Bolich Holding Corporation are now in the possession of the receiver of the Bolich Holding Corporation heretofore appointed in a civil action in the Superior Court of Forsyth County entitled 'J. A. Bolich, Jr., *et al. v.* Prudential Insurance Company of America *et al.*'; that this defendant has repudiated all of said transactions and surrendered any and all right and claim to said stock by virtue of the instruments heretofore referred to.

Wherefore, the defendant, Nona S. Hanes, prays judgment that these plaintiffs take nothing by their action against her; that their action be dismissed; that she go without day; and that the costs of this action be taxed against the plaintiffs."

The plaintiffs in a lengthy reply set forth certain facts and denied the allegations of fraud, *et cetera*. On 28 December, 1931, Judge Clement appointed a receiver for the property of the Bolich Holding Corporation which had been made a party and continued the case for hearing to the next regular term of the Superior Court of Forsyth County. At the regular term, Judge Harding on 14 January, 1932, made an order in part: "That the court forthwith enter a decree of foreclosure and appoint a commissioner to advertise and conduct a sale of the premises described in the pleadings and in said deed of trust, the court is of the opinion that the parties opposed to said motion and sale have not alleged any equity or reason why said motion should not be allowed, and said motion is, therefore, allowed, and W. F. Shaffner, Esq., is hereby appointed commissioner by this court to sell the lands described in the pleadings herein and in said deed of trust. . . . Receiver, is ordered and directed to pay to the Prudential Insurance Company of America, or its nominee, the net amount of rents then in his hands derived from the mortgaged premises to be applied in accordance with the terms and provisions of said deed of trust." An appeal was taken to the Supreme Court of North Carolina. See *Bolich v. Ins. Co.*, 202 N. C., 789, when the judgment was affirmed.

The judgment at March Term, 1933, in part: "This cause coming on to be heard, and being heard, before his Honor, H. Hoyle Sink, judge presiding, and a jury, at the 13th March Term, 1933, of the Superior Court of Forsyth County, when upon the calling of the said action, J. A. Bolich, Jr., and wife, Rosalie F. Bolich, took a voluntary nonsuit on the cause of action alleged by them against Nona S. Hanes, and the Prudential Insurance Company of America took a voluntary nonsuit on its cause of action alleged against the said Nona S. Hanes, whereupon the case proceeded to trial upon the cross-action of Nona S. Hanes and the amended reply of the plaintiffs, which was adopted by the Prudential Insurance Company of America; and, at the conclusion of the evidence of the defendant, Nona S. Hanes, upon motion of counsel for the plaintiffs and the Prudential Insurance Company of America for judgment as of nonsuit, the court being of the opinion that the said motion should be allowed; it is therefore, ordered, adjudged and decreed that the motion for nonsuit by the plaintiffs and the defendant, Prudential Insurance Company of America, be allowed, and the action by the defendant, Nona S. Hanes, against J. A. Bolich, Jr., and wife, Rosalie F. Bolich and the Prudential Insurance Company of America be, and the same is hereby dismissed," *et cetera.*

An order was made by Judge Sink confirming the sale of the property in controversy, by the commissioner, W. F. Shaffner. Under the foreclosure proceeding, the property brought about $40,000 less than the debt secured by deed of trust. "The plaintiffs, J. A. Bolich, Jr., and Rosalie F. Bolich, made a motion to be permitted to take a voluntary nonsuit in their cause of action alleged against Nona S. Hanes. Motion allowed."

"The defendant, Prudential Insurance Company of America, made a motion to be permitted to take a voluntary nonsuit upon its cause of action alleged against Nona S. Hanes. Motion allowed. The defendant, Nona S. Hanes, excepted."

"The court then permitted the case to go to trial upon the further defense in the answer of the defendant, Nona S. Hanes and the replies of the other defendants."

"At the close of the evidence of Nona S. Hanes, the plaintiffs, J. A. Bolich, Jr., and wife, Rosalie F. Bolich, and the defendant, Prudential Insurance Company of America, moved for judgment as of nonsuit. Motion allowed. To the allowance of the motion for nonsuit the defendant, Nona S. Hanes, excepted and gave notice of appeal to the Supreme Court of North Carolina."

The defendant, Nona S. Hanes, made numerous exceptions and assignments of error. The material ones and necessary facts will be set forth in the opinion.

Fred S. Hutchins and Ratcliff, Hudson & Ferrell for defendant. Nona S. Hanes.

Elledge & Wells and Parrish & Deal for plaintiffs.

Manly, Hendren & Womble for the Prudential Insurance Company of America and Wachovia Bank and Trust Company, trustee.

CLARKSON, J. In the decision of this controversy, it must be borne in mind that we do not pass on the truthfulness of the facts alleged by Nona S. Hanes, we merely pass on the sufficiency of the evidence viewed in the light most favorable to her to be submitted to the jury, it is for them to ultimately pass on the facts. The first question involved on this appeal is whether the court below erred in permitting the plaintiffs and the defendants, Prudential Insurance Company and the Wachovia Bank and Trust Company, trustee, to submit to voluntary nonsuits when defendant, Nona S. Hanes, set up as a defense, an affirmative plea of fraud in the procurement of the contract of 20 November, 1930, which is the main subject of the controversy? We think so. On the present record, this may not be material to the controversy as it discloses that the learned judge in the court below "permitted the case to go to trial upon the further defense in the answer of the defendant, Nona S. Hanes, and the replies of the plaintiffs and the other defendants." We think the parties under the facts and circumstances of this case could not submit to a voluntary nonsuit. It is contended by the parties other than Nona S. Hanes that, in her prayer, she did not ask for affirmative relief.

The prayer for relief does not determine the scope of a party's right to relief. In *Herring v. Lumber Co.*, 159 N. C., 382 (388), speaking to the subject: "The form of the prayer for judgment is not material. It is the facts alleged that determine the nature of the relief to be granted." *Baber v. Hanie*, 163 N. C., 588 (590); *Lipe v. Trust Co., ante*, 24; N. C. Practice and Procedure in Civil Cases (McIntosh), sec. 489, p. 517; C. S., 549.

The affirmative facts set up by Nona S. Hanes—direct and circumstantial—indicate fraud as the relief sought. It is not an action for reformation, where it must be alleged and shown by evidence clear, strong and convincing. The purpose is not to reform, but to set aside the instrument for fraud and the affirmative facts must be shown by the greater weight of the evidence. *Ricks v. Brooks*, 179 N. C., 204 (207); 32 C. J. (Injunctions), p. 357, part sec. 594.

In N. C. Practice and Procedure in Civil Cases (McIntosh), *supra*, at pp. 701, 702, part sec. 629, is the following: "While the plaintiff may generally elect to enter a nonsuit, 'to pay the costs and walk out of court,' in any case in which only his cause of action is to be determined, although it might be an advantage to the defendant to have the action

proceed and have the controversy finally settled, he is not allowed to do so when the defendant has set up some ground for affirmative relief, or some right or advantage of the defendant has supervened, which he has the right to have settled and concluded in the action. . . . If the defendant has some equitable right involved in the controversy which he has a right to have determined, the plaintiff will not be allowed to defeat it by nonsuit." *Shearer v. Herring,* 189 N. C., 460; *Ins. Co. v. Griffin,* 200 N. C., 251.

The next and material question is: Whether the court below erred in holding that there was not sufficient evidence of fraud to be submitted to the jury on the affirmative facts alleged by Nona S. Hanes? We think there was sufficient evidence.

The main controversy in this case is whether the contract of 20 November, 1930, was procured by fraud. The defendant, Nona S. Hanes, alleged in her answer that it was fraudulently made. The plaintiffs denied this. If it was not fraudulently made, the defendants, Prudential Insurance Company and Wachovia Bank and Trust Company, trustee, were vitally interested as the contract signed by W. M. Hanes and Nona S. Hanes, which provides on their part: "contracts, covenants and agrees to pay, renew or handle in a manner satisfactory to both parties each and every encumbrance against said properties as the same become due," *et cetera.*

W. M. Hanes and Nona S. Hanes, under this contract—if the same was valid—became the "principal debtor" to the Prudential Insurance Company. *Baber v. Hanie, supra:* "Nor is the mortgagor and the grantee at liberty thereafter to rescind said agreement without the consent of the mortgagee." *Bank v. Page, ante,* 18.

The defendant, Nona S. Hanes, set up the facts to show fraud in the procurement of the contract made with plaintiffs, the Prudential Insurance Company and the Wachovia Bank and Trust Company, trustee, by amendment to its answer "got in the boat" with plaintiffs. If the boat is sound, then the parties can recover on the deficiency some $40,000 from Nona S. Hanes, as the property did not bring at the sale by the commissioner, the debt, by $40,000. If the boat is rotten and leaky—in other words, procured by fraud—and so found by a jury, these parties get nothing. Neither they nor plaintiffs could take a voluntary nonsuit.

As to the sufficiency of fraud, on the allegations of Nona S. Hanes in her answer and the evidence on the trial, we will not go into same at great length as the case goes back for a new trial when all the evidence by the parties to this controversy will be submitted to a jury. In *Hodges v. Wilson,* 165 N. C., 323 (328 and 329), it is said: "*Lord Hardwicke* has, perhaps, given us the best classification of fraud such as will invalidate a deed or contract, in *Chesterfield v. Janssen,* 1 Atk., 301, 1 Lead. Cases

in Equity, star page 341 (4 Am. Ed., 773): (1) Fraud arising from the facts and circumstances of imposition; (2) Fraud arising from the intrinsic matter of the bargain itself; (3) Fraud presumed from the circumstances and condition of the parties contracting; (4) Fraud affecting third persons not parties to the transaction. Bispham on Equity (5 ed.), sec. 24. . . . Whatever be the cause of the mental weakness—whether it arises from permanent injury to the mind, or temporary illness, or excessive old age—it will be enough to make the court scrutinize the contract with a jealous eye; and any unfairness or overreaching will be promptly redressed."

On the issue of fraud, a latitude is permitted and every material circumstance is a link in the chain of evidence. The evidence tended to show that plaintiff, J. A. Bolich, Jr., was a business associate and deeply interested since 1925 in properties, with W. M. Hanes—and a friend. In *Abbitt v. Gregory,* 201 N. C., 577 (598), is the following: "In Pomeroy's Equity Jurisprudence, Vol. 2, sec. 956 (3d ed.), it is said: 'Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded. It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side, and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal; it may be moral, social, domestic or merely personal.'"

The evidence on the part of Nona S. Hanes was further to the effect that in 1915, W. M. Hanes contracted pulmonary tuberculosis. From that time until he died in April, 1931, he had this malady. He stayed for long periods of the year, at Saranac Lake, N. Y., on account of the disease and was there for many years. In June, 1930, he was in Winston-Salem and had a hemorrhage and was confined to his bed under the care of nurses and doctors and in July was getting around at his home in a rolling chair. On 2 August, he had another hemorrhage and was confined to his bed until about 18 August, he then had a doctor and two nurses. In October, he was getting along fairly well, but had breakfast in bed and did not get up until about noon, was able to sit up on his sun porch in a rolling chair and able to ride in his car—someone driving him. The contract signed and alleged by Nona S. Hanes, to be fraudulent was on 20 November, 1930.

Dr. S. F. Pfohl, the family physician of W. M. Hanes, testified in part: "Had occasion to treat him from time to time between the years 1925 and his death, in 1931. He suffered from pulmonary tuberculosis. His condition from 1926, until his death was progressively getting worse all of the time. I saw him off and on from June, 1930, until his death.

I think he was very weak during the summer from June, 1930. I know that he had hemorrhages during that time, but I don't recall the dates. I don't remember how many, but quite a number. . . . I have an opinion satisfactory to myself as to the fact of Mr. Hanes' physical condition between 1 July and 31 December, 1930, upon his business judgment and capacity to weigh and determine business matters. I think he was not capable of exercising good judgment on account of his physical condition. In my opinion, this condition continued from 31 December until the date of Mr. Hanes' death. . . . After he came back in 1928, I don't think he would have had good sound judgment in transacting business. A general weakness can affect your mind. Tuberculosis is an affection of the lungs."

Dr. S. D. Craig testified, in part: "I saw him during the summer and fall of 1930, and up until his death, in 1931. I don't recall how frequently. I saw him rather frequently. He was very ill."

When the contract of 20 November, 1930, was signed, the evidence was to the effect that plaintiffs and others were in the home of W. M. Hanes. A notary public was taken with them. The testimony of Nona S. Hanes as to her physical and mental condition in August, September and October, 1930, coupled with the extreme illness of her husband, W. M. Hanes, was competent. This prior illness of hers and burdened, no doubt, by long years of physical stress and mental anxiety, was a circumstance to be considered by the jury on the question of fraud in her signing the contract. She spoke of getting her lawyers—"they answered me that it was nothing more than showing Mr. Hanes' legal interest in all of this property." Yet, the contract was to the effect that the Haneses assumed some $357,000 of indebtedness on the properties. Nona S. Hanes' testimony, in part: "Mr. Hanes was too tired to sit up much longer after it was over with, and they left. . . . Mr. Bolich and Mr. Edwards both pictured it in what they said—I don't know how else to express it—as being a very prosperous piece of property and that it had good lessees and in the years to come Mr. Bolich said it would have a great rental. Mr. Edwards and Mr. Bolich both told me that the leases, which were in the future, so many years leases on them which would be in the future, would be, but it was more than they represented on the paper to me, because they would increase. They looked very good. Mr. Edwards said that he was very pleased with Mr. Blick, that he knew of his financial standing as the largest bowling alley man in the United States. He said that the bowling alley lease was for twenty years; that the first ten years was for $10,000 and the second ten years for $13,000 a year. Mr. Edwards and Mr. Bolich both told me all that. Mr. Bolich laughingly made the remark that in five years it would be worth millions on Fourth Street. . . . They said that the rents were

taking care of all of the expenses of that property and there was still a profit of around four or five thousand dollars, after all expenses were taken out; that the leases were taking care of it all; I mean the rents taking care of the leases."

Nona S. Hanes contends that these representations were untrue: "Yesterday I said that Mr. Edwards agreed with what Mr. Bolich told me and he told me about the renters. I didn't testify yesterday that I relied on Mr. McKeithan, but that I did rely on you, Mr. Bolich and Mr. Edwards, on the statements that you all made to me. I did swear on 23 February 'I signed that because my desperately sick husband asked me to sign and not because I knew exactly what was in it.' I was taking Mr. Bolich's and yours and Mr. Edward's words and statements you made to Mr. Hanes and me, and I never would question a thing my husband asked me to do. I said that because I did not want to sign it. I said I would sign it under protest, didn't want to get involved in business, and then Mr. Bolich and they said I wouldn't get involved in business; that he expected to carry on just as he had been carrying on. May I add something to my last sentence? He asked me why I said I would sign it because my desperately sick husband asked me to. I said I had signed it because my desperately sick husband had asked me to."

During the period Hanes and Bolich were business associates, Bolich on 4 April, 1926, wrote Hanes when at Saranac Lake, N. Y., and signed "Sincerely your friend, Lon Bolich. . . . I have never seen things look as good here as they do now and particularly Fourth Street. . . . I want you to remember and see if it comes true. It is this; that before 1935 our Englewood property will be worth two million dollars. Now watch what I tell you and see if I am not right."

C. R. Wharton, was one of W. M. Hanes' attorneys. He testified, in part: "I had some conversation with Mr. Bolich and Mr. Hanes during the year 1928, or 1929. In consequence of a message I received from Mr. Hanes, I came over from Greensboro to Mr. Hanes' home and met with him and Mr. Bolich. The matter that was under discussion at that conference was the Fourth Street property. I only know it by that designation, the Fourth Street property. In that conference both Mr. Hanes and Mr. Bolich told me that the property in question was in the name of Mr. Bolich and that they each had a half interest in it. Mr. Bolich said that he had some sort of claim, arising out of a real estate transaction, as I recall it, in Florida, against him and that he was afraid he was going to have a judgment taken against him and he thought that it was necessary and advisable for the property to be conveyed to Mr. Hanes. Then there was a discussion as to the terms upon which the property should be conveyed, if it were conveyed."

In handling all of the properties by Bolich before the contract was signed, the record seems to disclose that no itemized statement was given the Haneses although hundreds of thousands of dollars were involved—except the memoranda on the *"Hanes Poultry Farm"* stationery, which showed a $290.00 loss. "That paper, they assured me the rents were taking care of the property. Mr. Edwards said they were all good lessees. Mr. Bolich told me they were good lessees and these were the rents, and Mr. Edwards said yes, they would increase."

She contends that these representations were untrue. We think the testimony of the auditor competent under the facts and circumstances of this case. *Helms v. Green,* 105 N. C., 251 (265). In *Unitype Co. v. Ashcraft,* 155 N. C., 63, it is said at page 66: "There have recently been several cases of this kind before the Court, and we have held that while expressions of opinion by a seller, amounting to nothing more than mere commendation of his goods—puffing his wares, as it is sometimes called—or extravagant statements as to value or quality or prospects, are not, as a rule, to be regarded as fraudulent in law, yet 'when assurances of value are seriously made, and are intended and accepted and reasonably relied upon as statements of fact, inducing a contract, they may be so considered in determining whether there has been a fraud perpetrated; and though the declarations may be clothed in the form of opinions or estimates, when there is doubt as to whether they were intended and received as mere expressions of opinion or as statements of facts to be regarded as material, the question must be submitted to the jury.' 14 A. & E., 35; 20 Cyc., 124; *Morse v. Shaw,* 124 Mass., 59; *Whitehurst v. Ins. Co.,* 149 N. C., 273; *Register Co. v. Townsend,* 137 N. C., 652."

In *Pritchard v. Dailey,* 168 N. C., 330, the representations were termed "promissory representations." On this record we think the evidence direct, circumstantial and by inference shows that they were more than promissory under the facts and circumstances of this case. *McNair v. Finance Co.,* 191 N. C., 710; *Clark v. Laurel Park Estates,* 196 N. C., 624. Of course the usual elements of fraud govern the case. First, there must be a misrepresentation or concealment; second, an intention to deceive, or negligence in uttering falsehoods with the intent to influence the action of others; third, the misrepresentations must be calculated to deceive and must actually deceive; and fourth, the party complaining must have actually relied upon the representations.

Of course, Nona S. Hanes is bound by the well settled rule that is laid down in *May v. Loomis,* 140 N. C., 350 (359): "In order to rescind, however, the party injured must act promptly and within a reasonable time after the discovery of the fraud, or after he should have discovered it by due diligence; and he is not allowed to rescind in part and affirm

in part; he must do one or the other. And as a general rule, a party is not allowed to rescind where he is not in a position to put the other in *statu quo* by restoring the consideration passed. Furthermore, if, after discovering the fraud, the injured party voluntarily does some act in recognition of the contract, his power to rescind is then at an end." *McNair, supra.* We think on the whole record, the evidence indicates that the plaintiff Bolich, in the transactions, was the agent of his wife. For the reasons given, the judgment of the court below is

Reversed.

J. SIDNEY HOOD v. JOHN MITCHELL, INDIVIDUALLY; JOHN MITCHELL, CHIEF STATE BANK EXAMINER, TRUSTEE FOR THE LIQUIDATING AGENT OF THE COMMERCIAL BANK AND TRUST COMPANY, GASTONIA, NORTH CAROLINA, ITS STOCKHOLDERS AND DEPOSITORS, AND GURNEY P. HOOD, COMMISSIONER OF BANKS, TRUSTEE, FOR THE LIQUIDATING AGENT, STOCKHOLDERS AND DEPOSITORS OF THE COMMERCIAL BANK AND TRUST COMPANY, GASTONIA, NORTH CAROLINA.

(Filed 28 February, 1934.)

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

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

2. Negligence D b—Evidence held sufficient to be submitted to jury in tenant's action to recover for injuries from fall in elevator shaft.

Evidence that 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 plaintiff was given a key to unlock the elevator doors so that he could use the elevator at night when no one was on duty, that 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 whether the elevator cage was in place at the floor because of poor lighting, stepped into the empty shaft to his injury *is held* not to show contributory negligence as a matter of law, and defendant's motion for nonsuit on the grounds of contributory negligence was properly refused.

3. Judgments L b—Adjudication is not *res judicata* against those not parties to the action.

An unappealed from judgment sustaining a demurrer of the chief State bank examiner for failure of the complaint to state a cause of action against him for an injury received by a tenant when the tenant fell down an elevator shaft in a building operated by the bank examiner in

the interest of the creditors of the bank will not support a plea of *res judicata* as to the Commissioner of Banks in a subsequent action brought by the same plaintiff against the former defendant and the Commissioner of Banks later succeeding the bank examiner in the liquidation of the bank, the recovery being payable out of assets in the hands of the Commissioner of Banks, the bank examiner being an unnecessary party, and his joinder resulting in no injustice, and the Commissioner of Banks being the real party in interest, and *res judicata* applying only to parties to the action.

APPEAL by defendants from *Oglesby, J.*, and a jury, at March Civil Term, 1933, of GASTON. No error.

This is an action for actionable negligence brought by plaintiff against defendants. The defendants deny negligence and set up the plea of contributory negligence and *res judicata*. "That prior to the institution of this action, to wit: on 9 October, 1931, this plaintiff had about June, 1930, instituted another action in the Superior Court of Gaston County, against the said John Mitchell, chief State bank examiner, and that his complaint set forth as his cause of action the exact statement of facts as set forth in the complaint filed in this cause, and the issues to be decided were exactly the same as in this action, that within the time allowed by law, the defendant, John Mitchell, chief State bank examiner, filed a demurrer on the grounds that the complaint did not state a cause of action, which demurrer was subsequently sustained by the judge of the Superior Court at the August Term, 1930, and judgment was entered thereon, from which judgment the plaintiff did not take an appeal. That thereafter, to wit, on or about the ..... day of ....., 1930, the plaintiff took a voluntary nonsuit in said action, and about ..... months thereafter instituted this action against the above named defendants. That as these defendants are informed and believe, this cause of action is against the same parties against whom the former action was instituted with the exception of the defendant, Gurney P. Hood, Commissioner of Banks, who was added as a party by virtue of an act of the General Assembly of 1931, which transferred the duties of the liquidation of banks from the State Corporation Commission and John Mitchell, chief State bank examiner, to Gurney P. Hood, Commissioner of Banks. That by reason of the facts that the plaintiff did not appeal from the judgment sustaining the defendants' demurrer filed in the former cause of action above referred to, these defendants are informed and believe that matters alleged in the plaintiff's complaint in this cause of action have become *res judicata* and judgment in the former action is hereby pleaded in bar of any recovery in this action."

The issues submitted to the jury and their answers thereto, were as follows: "Was the plaintiff injured by the negligence of the defendants,

as alleged in the complaint?" Answer: "Yes." "Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer?" Answer: "No." "What damage, if any, is plaintiff entitled to recover of the defendants?" Answer: "$3,000 (three thousand dollars)."

The court below rendered judgment on the verdict. The defendants made exceptions and assignments of error which will be considered in the opinion and appealed to the Supreme Court. The necessary facts will be set forth in the opinion.

Emery B. Denny, E. R. Warren and A. C. Jones for plaintiff.
O. F. Mason, Jr., George B. Mason and P. W. Garland for defendants.

CLARKSON, J. This action was before this Court before. We find (*Hood v. Mitchell,* 204 N. C., 130), at page 135, the following: "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, Comr.,* 203 N. C., 56; *In re Trust Co.,* 198 N. C., 783. 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, was made on a fact situation altogether different from that in the instant case."

The complaint in the appeal *supra* is fully set forth. The demurrer of defendants in that appeal which was overruled in part is as follows: "(1) 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. (2) 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."

It will be noted that defendants did not demur on the ground as to the charge in the complaint, of negligence. "That complaint does not state facts sufficient to constitute a cause of action," C. S., 511(6), but demurred on the ground that defendants (1) "Are agencies of the State of North Carolina and for that reason 'the action for damages for injuries could not be sustained.'" (2) "That the allegations of the complaint show that plaintiff by his own negligence contributed to his injuries." May it not be inferred that the learned counsel for defendants, considered that the complainant's allegation of negligence was sufficient to take the case to the jury? This Court sustained the court below in overruling the demurrer. The decision of this Court is *stare decisis*. This Court's decision is sustained elsewhere: Where injury to a tenant occurs the tenant has an action against the receiver and an application by the tenant for leave to sue the receiver will be granted where the negligence occurred through the affirmative act of a servant employed by a receiver of the rents and profits, appointed in an action in foreclosure. *T. G. & T. Co. v. Ukiah Realty Corporation*, 90 L. J., 1925, *Wenzel, J.*

After overruling the demurrer, the defendants answered, denied negligence and pleaded contributory negligence and *res judicata*. The exception and assignments of error on this appeal: (1) At the close of plaintiff's evidence and at the close of all the evidence, the defendants made motions as in case of nonsuit, C. S., 567. The court below overruled these motions and in this we can see no error.

The settled rule in this jurisdiction is that upon a motion as of nonsuit, the evidence, whether offered by the plaintiff or elicited from defendants' 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.

The evidence of plaintiff was to the effect: That he was 48 years of age, a physician and specialist in eye, ear, nose and throat work. In 1924 he became a tenant, occupied four offices and was located on the 5th floor of the building in controversy, now owned, purchased by Gurney P. Hood, Commissioner of Banks, to protect the stockholders and depositors of the Commercial Bank and Trust Company of Gastonia, N. C., and in responding to an emergency call, he went into the building to go to his offices to get some needed instruments, and was injured 6 April, 1930. He paid his rent until he moved out in 1932. He testified in part:

"There were two Otis elevators which I employed going to and from my offices. The elevators were equipped with a safety device which would not allow the door to be opened from the outside unless the elevator was at that particular door unless you inserted the key or instrument which he furnished me in using the elevator. The building had a lobby through which you passed from the street to the elevator, passing through the front door of the building. I got through the front door with a key which was furnished me by the superintendent of the building, which I had continuously until I moved out of the building in 1932. I got it when I first became a tenant in the building. Purpose of having the key was in case of night work as a physician. I have had to visit my offices to treat patients at night and I would have access to the building and could get in through the front door which was generally locked by the night superintendent when he left and I could not enter the door unless I had a night-latch key. It was furnished by the superintendent. Mr. Faucette, superintendent of the building, furnished me with a straight piece of iron about the size of a lead pencil that *I would push into the opening of the elevator and trip the latch and the elevator would open if the elevator was there at the landing at the time, but if the elevator was not at the landing at the time, I could not open the door to the elevator, if it was in proper working order.* I have been there many nights and tried to open the door of the elevator after inserting the key but the elevator door would not open. The elevator would be at some other floor. I would go to the other elevator door and find that it would if the elevator was there. During the course of my tenancy there I would use the elevator after the night superintendent had locked up and gone, from two to five nights a week. Some weeks more than that. There was no means of lighting the lobby and the elevator cage at night after the night superintendent was gone, except a light overhead in the lobby, but it could only be turned on with a special key which was inserted in a switch to turn the light on, and I was never provided with a key. The other light was in the elevator cage and you could enter the elevator and step to the right and push a button and light up. The button was on the right side as you entered. The front door of the elevator faces west and has four sides. The button was on the south side and about four feet from the front door of the elevator. To get to it, I would step inside of the elevator, take about two steps and reach the button where the light could be turned on. There was no other light. When the front door key and the elevator key were given to me, I was instructed by the superintendent of the building in the use of the elevator. Keys were given me just after my tenancy in 1924 by Mr. Faucette, the day superintendent; *Mr. White was night superintendent at that time.* Mr. Faucette knew I was using that key at night

thereafter, as I have stated. *Night superintendent knew that I was using the front door key and the elevator key, as I have stated.* R. B. Wilson is still day superintendent and has been, but during the time he has been there I think Mr. White was day superintendent for a while succeeding Mr. Faucette. *White has been continuously connected with the building as superintendent either day or night since I was tenant there. White had knowledge that I had a key to the front door and a key or instrument to the elevator and knew that I went in there at night after the building had been closed.* White has been there in the building at night when I was in the office at work and before leaving he would bring the elevator up to me and tell me that if I were going to be there longer, he would leave the elevator there for my use and he would go home. When Mr. White was talking to me, the means I had of getting in the elevator was the elevator key. If he stopped the elevator at my floor he propped the door open. *At times I have lost the straight piece of iron or screwdriver and Mr. White would furnish me with another for opening the elevator door at night when no one was on duty to operate the elevator. There was a key or long screwdriver that was generally found on top of the mail box in the lobby, left there for a long time for use of myself and others for the purpose of opening the elevator door. It was placed there by Mr. White.* He told me that people had been using the elevator at night when he was off duty and he said that any time you could come in and don't have your key, I am not going to leave that key on the mail box any more, but you can find it behind the wastebasket, or behind that drumhead. *The State Corporation Commission, through its liquidating agent, purchased the building in which my offices were located about 1929.* I was injured when I went through the elevator shaft on Sunday night, 6 April, 1930, I received a call from Claude Craig to come to his home to take care of an accident to his grandmother. I left home to come to my offices to get some instruments needed to take care of the injury. The front door of the building was not locked yet and I walked in and found the lobby dark, as I generally found it, and I inserted my key to open the elevator door and it opened very readily. Of course I had never known it to do otherwise, and being in a hurry, *I opened the elevator and saw what I presumed was the elevator cage and stepped in, then after feeling the sensation of nothing under me and the precipitation of the fall I remember nothing more until three or four days after, when I regained consciousness and found myself in the City Hospital. I was stepping across to undertake to turn on the light in the elevator cage. Always when I have gone there, I found that if the door would open, the elevator was there.*"

On cross-examination: "If the lights had been on, when I opened the door, I would have seen that there was no elevator there, I could

have seen positively that none was there, as it was I saw shadows that I presumed to be the elevator cage. In answer to your question "If lights had been on when you opened the door you would have looked to see if the elevator was there?' *I would say 'I looked anyway.'* Q. *'Why did you?* A. *'Just for safety sake. I saw some forms or shadows that I presumed to be the elevator, looked like it.'* If the lights had been on I would have looked to see if the elevator was there. I would have done the same thing. The light would have brought the cage out more distinctly. There would have been no mistake about it then. I don't recall ever going in there at night when the lights were on after the operator was off duty. . . . I could have gone up the stairway and I used the elevator for my individual convenience. The reason I stepped in I looked to see if the elevator was there and I saw some shadows that I thought was the elevator cage and stepped in. . . . *The reason I say the elevator was defective is because the door opened when the elevator was not there, and I knew that the door cannot be opened unless the elevator was there even with the floor on account of the safety device on it.*"

Dr. S. E. Moser, a witness, testified in part: "I am a dentist and have my office on the fifth floor of the Commercial Bank Building and have had since 1924. I had a key to the elevator furnished by Mr. Faucette. I have lost about five or six, maybe a dozen. Mr. Wilson furnished me with a key. I frequently went to my offices at night and used this key. After the lights were off, I frequently went to my offices three to a dozen times a week, and then sometimes it would be several weeks before I went at night. *On 4 April, I went to my office after the lights were off and found that the safety device on the elevator door was broken and I told Mr. White and Mr. Wilson. Told Mr. White that night and Mr. Wilson the next morning.* Had a call and went up to get my instruments and I inserted the key in the door and it went back just as it had been doing and I saw that the elevator was not there and liked to have walked in there myself, but I caught hold of the door. *The elevator was not fixed for two or three days after that. Mr. Wilson said he would fix it or have it fixed.* Two days afterwards two mechanics came and fixed the elevator. I fixed Dr. Hood's teeth after the accident. His mouth was badly lacerated and bruised and he had lost four teeth on one side. They were not completely out, but the crown of the teeth were broken even with the gum line and the roots had to be extracted and he had a fracture of one front tooth. Just a part of the enamel knocked off. It is not possible to make a mechanical device with which he can satisfactorily chew. Dr. Hood does not have any jaw teeth to meet. Mr. Wilson and Mr. White knew I had a key after February, 1930."

Plaintiff testified: "I had no trouble with my knee and thigh prior to my accident on 6 April, 1930, and my health was good. Since then my health has been impaired by the atrophy and worry."

R. F. Faucette testified in part: "I live at Charlotte and am in the termites business. Have had experience in elevator business. Had charge of Third Trust Building which is a seven-story building and has a basement. Basement floor is ten feet and the elevator shaft is fourteen to sixteen feet from the main floor. Was superintendent of the building from January, 1924, until last of December, 1927. Have had experience with other buildings before that where they had elevators. The elevator at the bank building had two safety devices. One, a travel safety device which caught the elevator in case of a fall, and the other a safety device on the door called an interlock that was on the elevator. If the elevator was functioning properly it could not be opened unless the elevator was even with the floor unless extreme force was used. It would take a crowbar or something like that to open the door, something like a leverage to break the safety lock. At the landing of the elevator on each floor there is one of these safety devices and as the elevator comes to within three inches of the landing that lock works or rather it functions in connection with certain apparatus on the elevator and when the elevator is not at the door the safety lock holds the door in place so that it can't be opened except by force until that elevator is back in place. When the elevator was in place on the main floor it could be opened with a key from the outside. When I was superintendent Dr. Hood had a key to the front lobby door and I gave it to him to gain entrance to the building to his offices at night. I instructed him that he could use the building at night to get to his offices. I gave him the instrument to open the door of the elevator and fully instructed him and showed him how to use it and how to gain entrance to the elevator. I assured him that the elevator would be there if the door was opened and if the elevator was not there then, of course, the door would not open. I went over that with him and inserted the key and showed him how he should work it and saw he worked it properly. I have seen him use the elevator at night. R. B. Wilson succeeded me in December, 1927, as superintendent of the building. He came on the job about a week before I left. I told him who had keys at that time, and what they were for. I told him the purpose of Dr. Hood having a key. I told him that Dr. Hood had been furnished with a key to the front door as well as the elevator door."

Plaintiff's evidence was corroborated by other witnesses. The evidence was plenary to have been submitted to the jury. In *Jacobi et al. v. Builder's Realty Co.* (Cal.), 164 Pacific Reporter (69 Lawyer's Reports Ann., 1917-E, p. 696) 394. The facts were similar as in the present

action. The Court said (page 395): "It opened to her touch, and assuming, by virtue of this fact, that the cage was there, she stepped forward and met her death. Since knowledge of the defects in construction or in operation, or both, was not only chargeable against this defendant, but was actually possessed by it, it is too plain for discussion that in inviting tenants and their guests to use such a contrivance it was sheer negligence not at the same time to have adequately warned and protected them against dangers necessarily attendant upon the use of the elevator under this defective faulty construction or lack of repair. *Treadwell v. Whittier,* 80 Cal., 574, 22 Pac., 266, 5 L. R. A., 498, 13 Am. St. Rep., 175. Under its second proposition appellant contends that the negligence of the deceased is established by virtue of the fact that if in opening the door she had used her eyesight, as she was in duty bound to do, she would have perceived that the cage was not there, and that it was therefore contributory negligence upon her part to have made the fatal step. We have hereinbefore sufficiently outlined the course of conduct which the deceased doubtless pursued, and also the conditions which prompted her to that course of conduct. It has thus been made to appear, and indeed the positive evidence is to that effect, that people, using such an elevator and finding that in general practice when such an elevator was operating properly a door could not be opened unless the cage was at that floor, had come to rely, in determining the presence or absence of the cage, upon their ability or inability to open the door. The deceased unquestionably opened this door or found it open. In either case (there being no attendant to warn or any other kind of warning given) it was not at least unnatural that she should have placed reliance upon the conditions which she found. Whether under these circumstances she should also have looked or be convicted of negligence, presents a question of reasonable argument before a jury, but one which cannot be resolved against plaintiffs as matter of law: 'An elevator for the carriage of persons is not, like a railroad crossing at a highway, supposed to be a place of danger to be approached with great caution; but, on the contrary, it may be assumed, when the door is thrown open by an attendant, to be a place which may be safely entered without stopping to look, listen, or make a special examination.' *Tousey v. Roberts,* 114 N. Y., 312, 21 N. E., 399, 11 Am. St. Rep., 656."

The case of *Scott v. Telegraph Co.,* 198 N. C., 795, cited by defendants is not applicable; in the former appeal *supra,* it was cited and this Court said "It was made on a fact situation altogether different from that in the instant case," nor are the other cases cited by defendants. All the evidence was to the effect that plaintiff was a tenant not a licensee.

The second contention of defendants "Is the plaintiff barred by judgment in the former action?" We think not.

Under section 218(c), subsection (1), N. C. Anno. Code (1927 Michie), the Corporation Commission is the body authorized to take possession of the banks designated and this was done through an agent of the Commission acting for it—either the chief State bank examiner or other duly authorized agent. Under subsection (6) the remedy for one aggrieved where the Commission had taken possession of the bank was by service of notice on the Commission, not the agent acting for the Commission. Again, under subsection (11) upon rejection of the claim filed with the agent in charge "any action or suit upon such claim so rejected must be brought by the claimant against the Corporation Commission."

It is contended that the agent has only statutory powers, and the capacity to be sued in the instant case is not given. Subsection (7) designated the duties and powers of the agent in collecting and conserving assets. If the plaintiff in the exercise of his right to sue proper party, did so, but has, also, joined an unnecessary party no injustice has been done in the premises as the payment of the judgment is restricted by its very terms to the assets in the hands of Gurney P. Hood, as statutory receiver of the Commercial Bank and Trust Company.

We think the real party in interest was the Corporation Commission, now Gurney P. Hood, Commissioner of Banks. C. S., 446, in part: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided," *et cetera.*

In re Trust Co., 198 N. C., 783; *Blades v. Hood, Comr.*, 203 N. C., 56. N. C. Practice and Procedure in Civil Cases (McIntosh), at page 186: "That the action must be in the name of the real party in interest, is the pervading feature in The Code system; that is, it must be by the person who is entitled to receive the fruits of the litigation."

We do not think the plea of *res judicata* set up by defendants can be sustained. Adjudication is not *res judicata* against those not parties to action. *Meadows Co. v. Bryan*, 195 N. C., 398. In the judgment, we find

No error.

CITY OF HICKORY v. CATAWBA COUNTY AND BOARD OF EDUCATION OF CATAWBA COUNTY AND NEWTON GRADED SCHOOL DISTRICT v. CATAWBA COUNTY AND BOARD OF EDUCATION OF CATAWBA COUNTY.

(Filed 28 February, 1934.)

1. Appeal and Error F b—

A general exception to the judgment will not be sustained when no irregularity appears upon the face of the record.

2. Same—

An exception to the findings of fact of the trial court will not be sustained when the exception is too indefinite to bring up for review the court's findings.

3. Trial H b—

An exception to the court's refusal to find certain additional facts will not be sustained where the requested findings embody conclusions of law or are adopted in substance by the court.

4. State B b—Exceptions to rule that new governmental agency takes exclusive control of matters within its jurisdiction.

The doctrine that where a new governmental instrumentality is established it takes control of the territory and affairs over which it is given authority to the exclusion of other governmental instrumentalities does not prevail where it is inconsistent with the organic law or with statutes subsequently enacted.

5. Trial H b: Appeal and Error J c—

The refusal of the trial court to find additional facts is equivalent to holding that such requested facts are not supported by the evidence, and the Supreme Court will be concluded by the facts found where the refusal to find the additional facts is correct.

6. Schools and School Districts D a—

The mode by which the counties of the State shall effectuate the constitutional mandate to provide for the constitutional six months term of school, Art. IX, sec. 3, is prescribed by statute.

7. Same: Counties E b—County may assume debt of special charter districts incurred for necessary buildings without transfer of school property.

Under the provisions of C. S., 5599, a county may include in its debt service fund in its budget the indebtedness lawfully incurred by any of its school districts, including special charter districts, in the erection and equipment of necessary school buildings, and it is not prerequisite to the assumption of such debt of special charter districts that the districts should release their charters or that the trustees of such districts should convey the school property of such district to the county board of education, the title to property in special charter districts being in the trustees of such districts, C. S., 5419, 5490(1), and Public Laws of 1933, chap. 562, sec. 4, not altering this policy, and the act of 1933 relating primarily to uniformity of taxation, Art. V, sec. 3, and not to title to the property.

8. Same—Whether county shall assume debt of school district incurred for necessary buildings is not a matter within its discretion.

Whether a county shall assume indebtedness incurred by its special charter school districts in the erection and equipment of school buildings necessary to the constitutional six months term is not a matter of discretion with the counties, and the courts have jurisdiction and may hear evidence as to whether the buildings in question are necessary to the constitutional term, and testimony of qualified witnesses on the question is competent.

9. Mandamus A a—Fact that official would be guilty of misdemeanor will not preclude mandamus where punishment would not provide remedy.

Mandamus will lie in favor of special charter districts of a county against the county commissioners and county board of education to compel the assumption by the county of indebtedness incurred by the districts for the erection and equipment of school buildings necessary to the constitutional school term, the defendants being public agencies charged by statute with the performance of the act, and the fact that the Constitution provides that county commissioners failing to perform their duties in regard to the maintenance of the required school term should be guilty of misdemeanor, Art. IX, sec. 3, does not preclude the writ, since the punishment of defendants would not provide plaintiffs the relief to which they are entitled.

APPEAL by defendants from *Hill, Special Judge*, at July Special Term, 1933, of CATAWBA.

The two actions were consolidated and tried together. The plaintiff in each case applied for a writ of mandamus to compel the defendants to assume payment of the school building and equipment indebtedness of the respective plaintiffs and to compel the defendant Catawba County to levy an *ad valorem* tax on the taxable property of the county to pay such indebtedness, with the interest thereon, as it becomes due and payable.

Pleadings were filed, a jury trial was waived, and upon the evidence introduced the court found the following facts:

1. The defendant, Catawba County, acting under Art. IX, sec. 3, of the Constitution of North Carolina, providing that "each county shall be divided into a convenient number of districts in which one or more public schools shall be maintained at least six months in every year," and section 5467 of the Consolidated Statutes of North Carolina, providing that "school buildings, properly lighted and equipped are necessary in the maintenance of a six months school term," from time to time and in school districts established throughout the county other than special charter districts, erected and equipped numerous public school buildings at a cost in excess of five hundred thousand dollars, which was and is represented by bonded and other indebtedness of the county and which is being paid through county-wide taxation.

2. At the time these consolidated actions were instituted and for some years prior thereto, the public schools of the city of Hickory were operated by a board of trustees of Hickory Special Charter School District, the boundaries of such district including all territory within and some territory without the corporate limits of the city of Hickory; and the plaintiff, Newton Graded School District, was and had been operating as a special charter school district its boundaries including territory

without as well as all territory within the corporate limits of the city of Newton.

3. Subsequent to the creation of said special charter districts and for the purpose of erecting and equipping public school buildings therein for the constitutional six months term, the defendant county of Catawba having failed to provide such buildings, the plaintiff city of Hickory from time to time issued and sold its municipal school bonds and from the proceeds thereof erected and equipped two public school buildings for colored children and four public school buildings for white children in said district, and its coplaintiff from time to time and for a similar purpose in Newton Graded School District issued and sold its school bonds and from the proceeds of such sales erected and equipped one public school building for colored children and two public school buildings for white children in said latter named district. A considerable portion of the indebtedness created by said bond issues has been liquidated by the collection of a tax levied in said districts for the purpose, and of said issues there are now outstanding and yet to mature bonds against the city of Hickory in the principal sum of $267,000, and against the Newton Graded School District in the principal sum of $64,000.

4. In addition to the aforesaid two special charter districts there were also established in said county of Catawba five other special charter districts, to wit: Catawba, Longview, Maiden, West Hickory and Conover, and said five districts, for the purpose of obtaining school buildings necessary for the six months school term issued and sold school bonds of said districts and on which there was due, at the time next hereinafter referred to, the principal sum of $179,000.

5. The defendant, Catawba County, in addition to constructing and equipping public schools in local and nonlocal tax districts throughout the county and levying a county-wide tax to pay therefor as aforesaid, on or about the ..... day of ....., 19..., and pursuant to statute authorizing the board of education and county commissioners to include in debt service the indebtedness "of all districts," took over and assumed school bonds of said five special charter districts in the amount of $179,000, and said districts surrendered their special charters and conveyed their school property to the board of education of Catawba County.

6. On 3 April, 1933, the plaintiffs requested that the defendants take over and assume payment of the outstanding bonds issued by them for constructing school buildings in said districts as aforesaid; the defendant, Catawba County, acting by and through its commissioners, inquired of plaintiff if they would be willing to surrender their special charters and convey their school properties to the defendant, board of education, if the county should agree to assume said bonds, and the plaintiffs replied that they would not. The defendant Catawba County

would have assumed said bonds, and on trial of this cause, through its counsel, states that it will now assume said bonds, if the plaintiffs would agree to surrender their special charter rights and convey their school properties to the defendant, county board of education.

7. By virtue of the School Machinery Act of 1933, the said Hickory and Newton special charter districts, insofar as the operation of the public schools therein is concerned, were declared nonexistent, and the public schools of the territory formerly embraced in such districts, with those of other territory thereto added by the State School Commission, are now operated and managed by trustees of city administrative units and as a part of the State general and uniform system of public schools.

8. The Hickory and Newton special charter districts contain approximately fifty per cent of the population, as well as about one-half in valuation of all taxable property in said county, and the taxpayers of said two districts, in addition to having paid the greater portion of the indebtedness incurred by said districts in erecting and equipping public schools therein for the six months school term, and paying an annual levy of 19 cents on each $100.00 of taxable property toward liquidation of the balance of said indebtedness, have been and now are required to pay approximately one-half of the indebtedness incurred by the county in erecting schools in districts other than Hickory and Newton, as well as about one-half of the bonded indebtedness of said five special charter districts which was assumed by the county.

9. The bonds issued by plaintiffs, respectively, do not exceed or equal five per cent of the taxable property within said districts, respectively, nor do they with the school building and equipment indebtedness of the county of Catawba exceed five per cent of the taxable valuation of properties within said county.

10. The county of Catawba has not provided any school buildings in the Hickory and Newton districts for the six months school term, and those erected and equipped therein by said districts were, and are, necessary and proper for the constitutional six months school term, and those erected and equipped therein by said districts were, and are, necessary and proper for the constitutional six months school term; the buildings in said two districts, on an average, are no more expensive than those erected by the defendants throughout Catawba County.

11. These actions were instituted in April, 1933, and the plaintiffs had no knowledge of the defendants' assumption of the indebtedness of said five special charter districts until after the first Monday in September, 1931. These actions are not barred by any statute of limitations.

Upon the foregoing facts the court rendered the following judgment:

The court being of opinion that the Constitution and laws of the State impose upon the counties the mandatory duty of constructing and

maintaining public school buildings for the six months school term, and that, therefore, it is proper for, and the duty of, the county of Catawba to assume the obligations heretofore incurred by the Hickory and Newton school districts in constructing and equipping schools for the six months term; and being of further opinion that if the statute with reference to the assumption by the county of the indebtedness of all school districts is discretionary, then, under the facts in these cases, that it would constitute an abuse of discretion for the commissioners of Catawba County to assume the indebtedness of five special charter districts and exclude the Hickory and Newton districts; therefore,

It is ordered and adjudged by the court, that the defendants be, and they are hereby commanded to assume payment of the $267,000 of school building and equipment indebtedness of plaintiff, city of Hickory; that said defendants be, and they are hereby commanded and required to assume payment of the $64,000 of school building and equipment indebtedness of the plaintiff, Newton Graded School District; and the defendant, Catawba County, is hereby commanded to levy such county-wide tax upon the taxable property within the county as may be necessary to pay said indebtedness with interest as same falls due.

For the purpose of identification the bonds and indebtedness of the city of Hickory referred to above and hereby adjudged to be obligations of Catawba County are as follows:

Amount	*Issued by*	*Rate of Int.*	*Date of Issue*
$ 8,000	City of Hickory	5%	1 June, 1916.
24,000	City of Hickory	6%	1 March, 1920.
25,000	Town of Highland	6%	1 January, 1921.
210,000	City of Hickory	5½%	1 January, 1924.

It is further ordered and adjudged that the plaintiffs recover of the defendants their costs in this action to be taxed by the clerk of the Superior Court of Catawba County.

The defendants excepted and appealed upon assigned error.

J. L. Murphy and W. C. Feimster for appellants.

Self, Bagby, Aiken & Patrick and G. A. Warlick, Jr., for appellees.

ADAMS, J. The defendants entered a general exception to the judgment and to the judge's findings of fact. As to the judgment, the exception points out no specific error and we find no irregularity on the face of the record (*Dixon v. Osborne,* 201 N. C., 489); and as to the facts, the exception is too indefinite to bring up for review the findings of the

trial court. *Boyer v. Jarrell*, 180 N. C., 479; *Sturtevant v. Cotton Mills*, 171 N. C., 119; *Riddick v. Farmers' Assn.*, 132 N. C., 118.

The appellants excepted to the court's refusal to find certain additional facts, but in this respect, also, the ruling is correct. Some of the requested findings embody conclusions of law; others, in substance at least, were adopted by the court; a few are incidental to the main controversy. Those which are more relevant are based upon the following circumstances: The charter of the city of Hickory provides that all the territory within the corporate limits of the city shall constitute a public school district to be known as the "Hickory School District" and that the city council shall be charged with the duty of maintaining within the district an adequate system of public schools and of constructing and maintaining buildings suitable for this purpose. Private Laws, 1913, chap. 68, Art. 15, sec. 1. The charter of the town of Newton likewise provides that all the territory within the corporate limits and all the territory without the corporate limits and within the boundaries of the Newton Special Tax School District shall constitute a public school district to be known as "Newton Graded School District" and to be under the exclusive control of a board of trustees. Private Laws, 1907, chap. 39, sec. 104, *et seq.*

It is contended by the defendants that to these respective districts, in which taxes may be levied and for which bonds may be issued, we should apply the principle that when a new governmental instrumentality is established it takes control of the territory and affairs over which it is given authority to the exclusion of other governmental instrumentalities. We have applied this principle in holding that the extension of a public highway through a city or town, or the inclusion within the corporate limits of additional territory, does not deprive the municipality of its exclusive control over its streets. *Gunter v. Sanford*, 186 N. C., 452; *Michaux v. Rocky Mount*, 193 N. C., 550; *Pickett v. R. R.*, 200 N. C., 750; *Cf. Hailey v. Winston-Salem*, 196 N. C., 17. But the doctrine is not allowed to prevail when the governmental instrumentality, as in this case, may be inconsistent with the organic law or with statutes subsequently enacted in contravention of its purpose. The trial judge was correct in declining to approve such of the requested findings of fact as do not appear in the judgment, and his refusal was equivalent to saying that the proposed findings are not supported by the evidence. *In re Trust Co., ante*, 12. The result is that we are concluded by the facts as found by the court. *Colvard v. Dicus*, 198 N. C., 270; *In the Matter of Assessment v. R. R.*, 196 N. C., 756; *Abbitt v. Gregory*, 195 N. C., 203.

It is incumbent upon the General Assembly to authorize the levy of taxes for the support of the public schools of the State (*Greensboro v.*

Hodgin, 106 N. C., 182), and when this is done the duty of providing for the maintenance of public schools in a county devolves primarily upon the board of county commissioners. "Each county of the State shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least six months in every year; and if the commissioners of any county shall fail to comply with the aforesaid requirements of this section, they shall be liable to indictment." Constitution, Art. IX, sec. 3. This section is mandatory, but the mode of performance is prescribed by statute. *Elliott v. Board of Equalization*, 203 N. C., 749; *Julian v. Ward*, 198 N. C., 480. Section 5467 of the Consolidated Statutes requires the county commissioners to provide funds for school buildings which shall be lighted and equipped with suitable desks for children and with suitable tables and chairs for teachers—such as are necessary for the maintenance of schools for a term of six months. Section 5596(c) defines the debt service fund and directs its application, and section 5599 provides that 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.

Partly in consequence of the foregoing statute this Court has recently approved the assumption by a county of the payment of bonds previously issued by school districts for the purpose of building and equipping such schoolhouses as were necessary for the maintenance of schools for the constitutional period (*Maxwell v. Trust Co.*, 203 N. C., 143); and in elucidation of the proposition the Court subsequently said that there is no sound reason why a school district should be required to pay out of its own taxable property a debt which the Constitution imposes upon a county. *Reeves v. Board of Education*, 204 N. C., 74.

This is the principle underlying the present case. It is recognized by the defendants who, according to the sixth finding of the facts, are willing to assume payment of the district bonds upon surrender by the plaintiffs of their special charter rights and upon conveyance of their school property to the county board of education. This situation raises the question whether the condition imposed by the defendants is a valid defense to the plaintiffs' actions.

It will be observed that the last paragraph of section 5599 is not restricted to districts of any special character; it applies to "all districts, including special charter districts." The limitation is to indebtedness lawfully incurred in the erection and equipment of necessary buildings. The release of special charter rights is not a necessary condition precedent to the defendants' assumption of the debt.

Nor is it prerequisite to convey the school property in the affected districts to the county board of education. Under the law in force when the present actions were instituted the title to the property of special charter districts was vested in the trustees of the districts (C. S., 5419, 5472, 5490(1), and the act of 1933, of which we take judicial notice, seems to contemplate continuance of this policy. Public Laws, 1933, chap. 562, sec. 4. The determinative question involves not so much the title to property as the uniformity of taxation, and under the decisions we have cited the latter point has been resolved against the contention of the appellants. Constitution, Art. V, sec. 3. The asserted discrimination is emphasized by the fact that the board of county commissioners has assumed the payment of bonds in the sum of $179,000 issued on behalf of five special charter districts for necessary school buildings, leaving the Hickory and Newton districts with the dual burden of maintaining their own schools and materially contributing to the support of all other public schools in the county. When the indebtedness of "all the districts" lawfully incurred for the necessary buildings and equipment is taken over for payment by the county as a whole, the local districts are relieved of their annual payments. Sec. 5599.

This is not a problem to be solved by the defendants in the exercise of their discretion, or one in the solution of which the courts are shorn of jurisdiction. The exercise of jurisdiction implies the right to hear evidence on the question whether buildings and equipment of certain types are essential to the operation of the schools, and as the witnesses who testified as to these things were qualified to speak, the exceptions addressed to the admissibility of their testimony cannot be sustained. To the admission of evidence there are other exceptions which upon inspection we find to be untenable; and this is true, likewise, with respect to the appellant's exceptions to the court's refusal to strike certain allegations from each of the complaints. In denying the motion for nonsuit there was no error.

It is suggested that relief cannot be obtained by mandamus. The writ, issuing from a court of competent jurisdiction, is directed to a person, officer, corporation, or inferior court commanding the performance of a particular duty which results from the official station of the party to whom it is directed or from operation of law. It is a writ of right to which every one is entitled when it is appropriate process for enforcing a demand. *Burton v. Furman,* 115 N. C., 166; *Lowery v. School Trustees,* 140 N. C., 33. The defendants are public agencies charged with the performance of duties imposed by the Constitution and by statutes and upon their failure or refusal to discharge the required duties resort may be had to the courts to compel performance by the writ of mandamus. It is contended that the plaintiffs' remedy is by

indictment (Const., Art. IX, sec. 3) and not by mandamus. There are decisions in which the writ was denied on the ground that the complaining party had a remedy by indictment; but the weight of authority sustains the position that to supersede the remedy by mandamus a party must not only have an adequate legal remedy but one competent to afford relief on the particular subject-matter of his complaint. Punishment of the defendants would not provide the relief to which the plaintiffs are entitled. 38 C. J., 565, sec. 35; *Fremont v. Crippen*, 70 A. D., 711; *Com. ex rel. Schaffer v. Wilkins*, 19 A. L. R., 1379 and annotation.

Judgment

Affirmed.

A. A. LOCKRIDGE v. B. A. SMITH AND WIFE, BESSIE T. SMITH, THE HOME BUILDING AND LOAN ASSOCIATION, A CORPORATION, AND A. H. PATTERSON, TRUSTEE.

(Filed 28 February, 1934.)

1. Mortgages H j — Where trustee or his agent purchases property trustor may elect to treat sale as a nullity.

Where the trustee or his agent purchases the property at a foreclosure sale under the terms of a deed of trust the trustor may elect to treat the sale as a nullity and demand a resale as against the trustee or his agent or purchasers from them with notice, even though competitive bidding at the sale was not discouraged and the purchase price represented the fair market value of the property at the time of the sale, and the trustor was present at the sale and made no objection thereto.

2. Same: Mortgages H m — Bona fide purchaser without notice from trustee bidding in property at sale obtains good title.

A bona fide purchaser for value without notice that his grantor was an agent of the trustee and bought in the property at the foreclosure sale conducted by himself, obtains good title free from the equitable right of the trustor to treat the sale as a nullity and demand a resale, and the purchaser's testimony that the purchaser at the sale was not his agent in bidding in the property, that he knew of no irrgularity in the sale, and that he paid the purchase price, and that the purchase price represented the fair market value of the property at the time of the sale is sufficient evidence to support a finding by the trial court upon exceptions to the report of the referee that the purchaser was a bona fide purchaser for value.

3. Reference C a—Court may review evidence on exceptions to referee's finding of fact and make contrary finding.

Where exceptions and assignments of error are aptly taken to a finding of fact by a referee the trial court has the power to reverse such finding, review evidence, and make a contrary finding of fact on the point, and this right applies both to compulsory and consent references.

4. Appeal and Error J c—Finding of fact by court is conclusive on appeal when supported by competent evidence.

Where the court, upon exceptions to the findings of fact by the referee, hears evidence and makes a finding contrary to the referee's finding, the court's finding is conclusive on appeal when supported by competent evidence.

5. Mortgages H p — Agent of trustee making sale and junior lienors should be parties to suit to set aside foreclosure.

In an action by a trustor to treat a foreclosure sale as a nullity and obtain an order for resale on the grounds that the property was bid in at the sale by an agent of the trustee, the agent of the trustee and the holders of junior liens against the property should be made parties. C. S., 456.

6. 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 plaintiff from *Warlick, J.*, at July Term, 1933, of CLEVELAND. Affirmed.

This is an action brought by plaintiff against defendants to set aside a sale under a deed of trust.

Plaintiff on 10 March, 1928, executed to defendant, A. H. Patterson, trustee, for the Home Building and Loan Association of King's Mountain, N. C., a deed in trust on certain land to secure the sum of $3,000. The same was duly recorded in the office of the register of deeds for Cleveland County, N. C., in Book 142, p. 227.

The Commercial Bank of King's Mountain held a second mortgage for some $1,800 or $2,000.

The plaintiff defaulted in the payments of the indebtedness to the Building and Loan and A. H. Patterson, trustee, offered the land for sale on 6 April, 1931, and defendant, B. A. Smith, became the last and highest bidder for same at the sum of $2,325. This bid was raised and a resale was made on 4 May, 1931, and J. R. Davis became the last and highest bidder at the sum of $2,450. A. H. Patterson, trustee, executed a deed to J. R. Davis for the purchase price of $2,450. A report was made by A. H. Patterson, trustee, to the clerk and a correct settlement was shown in the clerk's office. On the same day, J. R. Davis made a deed for said property to defendants, B. A. Smith and wife, Bessie T. Smith, for $2,500, who in turn on the same day, executed a deed in trust to A. H. Patterson, trustee, for the Home Building and Loan Association for $2,000.

The matter was referred to Joseph C. Whistnant, referee. The referee found among other facts: "That J. R. Davis acted as attorney and agent for A. H. Patterson, trustee, and as such conducted the sale and resale of said property. That the sale and resale were made in regular

form, and fair and open, and that there was no effort by the agent of the trustee to prevent fair competitive bidding. That B. A. Smith was present at the first sale and knew that J. R. Davis was acting as attorney and agent for A. H. Patterson, trustee, in conducting the said sale, and the resale."

"14. That B. A. Smith and wife, Bessie T. Smith, in purchasing the said property had knowledge of the capacity in which J. R. Davis served in connection with the sale and resale, in that as previously found herein B. A. Smith bid at the first sale made by J. R. Davis, and the resale was merely a continuation of same, and the records which were necessary to form the chain of title show specifically that J. R. Davis, acting as attorney and agent of A. H. Patterson, trustee, sold to himself."

The defendants, B. A. Smith and wife, Bessie T. Smith, denied the material allegation of the complaint and in answer said: "It is admitted that on or about 15 May, 1931, J. R. Davis sold and conveyed the said lands described in the complaint to this defendant, B. A. Smith and Bessie T. Smith, for price of $2,500, which amount these defendants paid in good faith; and the other allegations are untrue and denied. That as to the allegations of paragraph eight these defendants have no knowledge or information sufficient to form a belief as to the truthfulness thereof, therefore deny the same—it being alleged in this connection that these defendants are innocent purchasers for value."

The referee's conclusions of law are as follows: "The conclusions of law as herein set out are somewhat contrary to the conception which had formerly been entertained by me as the law in a case of this kind, but after intensive search I have been unable to find a case which seems to alter the ruling in *Gibson v. Barbour,* 100 N. C., page 192, and I conclude that this must be the law today. In this connection I have studied the cases of *Wood v. Trust Co.,* 200 N. C., 105; *Phipps v. Wyatt,* 199 N. C., 727, and many others which were believed by the defendant's counsel to change the former ruling, but I believe that there is a distinction between the cases, and that the later cases would not have the effect of changing the doctrine in the former case, and consequently I find: First: That the sale by A. H. Patterson, trustee, by J. R. Davis as attorney and agent to J. R. Davis is voidable in so far as it deprives the trustor, A. A. Lockridge, of the right of redemption, and since the trustor has elected to so treat same, as under the law he has the right to elect. Second: That the defendants, B. A. Smith and wife, Bessie T. Smith, having bought with notice are now the holders of the legal title to the said property, standing in the place of the trustee, A. H. Patterson, and from the date of the purchase until the date of election to avoid the sale, said B. A. Smith and wife, Bessie T. Smith, were entitled to

possession of said land and by the express terms of the deed of trust are still entitled to possession. Third: That A. A. Lockridge, on the payment to B. A. Smith of the secured indebtedness and money lawfully expended in connection with same, is entitled to said property, but if not done, then B. A. Smith is entitled to a sale of said property to clear title to the property of the right of redemption of A. A. Lockridge."

Exceptions and assignments of error were duly made to the report of the referee, by the defendants.

The court below rendered the following judgment: "This cause coming on to be heard before his Honor, Wilson Warlick, judge presiding, upon the report of Joseph C. Whisnant, referee, and the exceptions duly filed thereto, and being heard, and the parties having waived trial by jury:

And it further appearing to the court, upon the hearing of the matter, that B. A. Smith and wife, Bessie T. Smith, the present owners of said property, offered in open court to convey this property to the plaintiff, A. A. Lockridge, or to whomsoever he might direct, for the exact amount at which it was bid off at the last sale made of same by A. H. Patterson, trustee, and that the said B. A. Smith and wife, Bessie T. Smith, had previously offered to convey said property upon said terms and that said proposition was also renewed upon the hearing of this matter before the referee, and that the said A. A. Lockridge declined to repurchase;

And the court being of the opinion that the referee has correctly found that the sale of said property, made by A. H. Patterson, trustee, on 4 May, 1931, at which sale J. R. Davis became the last and highest bidder at the sum of $2,450, was fair and open and that said sale was made in regular form, and that there was no effort to prevent fair, competitive bidding, and that the plaintiff had knowledge of the date of both of said sales and had full opportunity to bid and that he declined to do so, and that the referee has further found as a fact that the price of $2,450 represented the market value of the property at the time of said sale and that the plaintiff failed to show by any evidence offered that he had been damaged by said sale, and that the plaintiff failed to either bid at said sale or to raise said bid thereafter within the time prescribed by law, although he had the opportunity to do so, the court upon a hearing of this matter, affirms the findings of the referee touching all of the foregoing matters and, in addition thereto, finds as a fact that B. A. Smith and wife, Bessie T. Smith, are innocent purchasers for value and without notice and are entitled to hold said property free and clear from any claim or demand for resale on the part of A. A. Lockridge, overruling the finding of the referee as to this fact and, upon the foregoing findings of fact.

It is ordered, adjudged and decreed that the sale made by A. H. Patterson, trustee, on 4 May, 1931, at which J. R. Davis became the last and highest bidder, was fair and open and that said real estate brought a full and fair price, and that the plaintiff had full opportunity to bid at said sale or to raise said bid during the intervening ten days thereafter.

And it is further ordered, adjudged and decreed that B. A. Smith and wife, Bessie T. Smith, are innocent purchasers for value and without notice, and that they are entitled to hold the said property free and clear from any claim or demand for resale on the part of the plaintiff, A. A. Lockridge.

It is further ordered that the plaintiff, A. A. Lockridge, take nothing by his action.

It is further ordered that an allowance of $75.00 be paid to Joseph C. Whisnant, referee, and that one-half be paid by the plaintiff and one-half by the defendants, and that the plaintiff be taxed with all the other costs of this action."

The plaintiff made several exceptions and assignments of error and appealed to the Supreme Court. The material ones will be considered in the opinion.

E. A. Harrill for plaintiff.

B. T. Falls and Ryburn & Hoey for defendants.

CLARKSON, J. The first question involved as stated by plaintiff, is as follows: "If the attorney and agent who acts for the trustee to sell property sells to himself, as the record in this case discloses was done, does the deed of the trustee conveying the property to his attorney and agent pass the equitable interest of the mortgagor?" We think not, if nothing else appeared.

We think the principle of law relied on by the referee, sound in principle and the law of this jurisdiction as set forth in *Gibson v. Barbour,* 100 N. C., 192 (197-198): "'It is an inflexible rule,' are the words of the late *Chief Justice,* an *Associate Justice* when they were uttered, 'that when a trustee buys at his own sale, even if he gives a fair price, the *cestui que trust* has his election to treat the sale as a nullity, not because there is, but because there may be, fraud. *Brothers v. Brothers,* 7 Ired. Eq., 150.

In *Joyner v. Farmer,* 78 N. C., 196, after land had been bid off by an agent of the mortgagee, the mortgagor being present and not objecting, and as tenant of the latter remaining in possession for a year, nevertheless, as no intervening rights had been acquired by others, and no misconduct in the selling was alleged, the mortgagor was held to be entitled to have a resale, because, as was said by *Rodman, J.,* in the opinion,

'the interest of a vendor and a purchaser are so antagonistic that the same man cannot be allowed to fill both characters.'

'In all cases where a purchase has been made by a trustee,' (we quote from section 322 of the 1st volume of *Mr. Justice Story's* excellent treatise on Equity Jurisprudence), 'on his own account, of the estate of his *cestui que trust,* although sold at public auction, it is in the option of the *cestui que trust* to set aside the sale, whether bona fide made or not.' "

In *Hayes v. Pace,* 162 N. C., 288 (292): "In *Jones v. Pullen,* 115 N. C., 471, it is said: 'There is no question, according to our authorities, that if a mortgagee with power to sell indirectly purchases at his own sale, the mortgagor may elect to avoid the sale, and this without reference to its having been fairly made and for a reasonable price. This is an inflexible rule, and it is not because there is, but because there may be fraud.' *Gibson v. Barbour,* 100 N. C., 192; *Froneberger v. Lewis,* 79 N. C., 426; *Cole v. Stokes,* 113 N. C., 270."

In *Owens v. Mfg. Co.,* 168 N. C., 397 (399): "In exercising such a right, however, the utmost degree of good faith is required, the mortgagee being looked upon as a trustee for the owner as well as the creditor, and, in applying the principle, it is very generally held that such a mortgagee is not allowed, either directly or indirectly, to become the purchaser at his own sale, and where this is made to appear the transaction, as between the parties and at the election of the mortgagor, is ineffective as a foreclosure, and the relationship of mortgagor and mortgagee will continue to exist. *Pritchard v. Smith,* 160 N. C., 79."

The serious question involved in this action is whether B. A. Smith and wife, Bessie T. Smith, obtained a good title? They contended that they were innocent (bona fide) purchasers for value and without notice. We think so under the facts and circumstances of this case. From the finding of the referee they did not get a good title. The referee found "that B. A. Smith and wife, Bessie T. Smith, in purchasing said property had knowledge of the capacity in which J. R. Davis served in connection with the sale and resale," *et cetera.* To this finding, defendants excepted and assigned error as follows: "For that the referee's findings of fact No. 14 are erroneous and unsupported by any of the evidence, and that his deductions therefrom are unwarranted, wherein the referee finds that B. A. Smith and wife, Bessie T. Smith, in purchasing the said property from J. R. Davis had knowledge of the fact that J. R. Davis acted as agent for the trustee, and that the said agent purchased at his own sale; and failed to state the agreement whereby J. R. Davis became the purchaser of the said lands, when the referee should have found for his fourteenth findings of fact that B. A. Smith and wife, Bessie T. Smith, were innocent purchasers for value,

and without notice of any infirmity in the sale by the trustee, if any existed."

The judge in the court below sustained defendants' exception and assignment of error and found: "As a fact that B. A. Smith and wife, Bessie T. Smith, are innocent purchasers for value and without notice and are entitled to hold said property free and clear from any claim or demand for resale on the part of A. A. Lockridge, overruling the finding of the referee as to this fact and, upon the foregoing findings of fact."

There was evidence to sustain these findings of fact. B. A. Smith testified in part: "I bid the first time it was sold. I was informed that my bid had been raised. I did not attend the second sale. For the time being, I was not further interested in the property. Mr. J. R. Davis did not represent me in bidding in the property at the second sale. . . . I know of no irregularity in the sale of this land, if there was any. I bought the property from Mr. Davis and paid for it. My wife and I executed a mortgage or deed of trust to the Home Building and Loan Association to borrow money on this property. . . . I had no knowledge or information that there was any controversy about the sale of this property, or I would not have bought it. . . . On 15 May, 1931, $2,500 for that property in controversy was a full and fair price. After buying it, I was willing to sell it. I will sell anything I have got except my wife and children."

Mrs. Bessie T. Smith testified in part: "I am the wife of B. A. Smith, who was just on the stand. I had no knowledge of any possible illegality in the sale, or of any complaint by Mr. Lockridge, at the time of the sale of this property. Mr. Davis was not representing me."

There was evidence to support the findings of the court below that B. A. Smith and wife, Bessie T. Smith "are innocent purchasers for value and without notice."

In *Polikoff v. Service Co.,* 205 N. C., 631 (634), speaking to the subject: "In *Trust Co. v. Lentz,* 196 N. C., 398 (at page 406), 145 S. E., 776, it is said: 'In view of the position taken by some of the parties that the judge was without authority to change the report of the referee—the reference being by consent—it is sufficient to say that, in a consent reference, as well as in a compulsory one, upon exceptions duly filed, the judge of the Superior Court, in the exercise of his supervisory power and under the statute, may affirm, modify, set aside, make additional findings, and confirm, in whole or in part, or disaffirm the report of a referee." Citing numerous authorities.

In Jones on Mortgages (8th ed.), Vol. 1, part sec. 417, p. 534, the law is thus stated: "An absolute conveyance intended as a mortgage will retain its character in the hands of subsequent purchasers with notice of the rights of the parties; and hence, if a purchaser from the original

grantee knew the nature of the transaction, or knew of facts sufficient to put him on inquiry, he cannot claim to be the absolute owner, but the mortgagor may redeem from him, as well as from the grantee. But where the third person has purchased in good faith for a valuable consideration, relying on the apparent absolute title of the original grantee, without notice of the defeasance agreement, he takes an indefeasible title, and the original grantor has no right of redemption against him."

Jones on Mortgages (8th ed.), part sec. 1060, p. 478, is as follows: "Most authorities treat an assignee who takes in good faith and for value, as a bona fide purchaser, protected against all equities and defenses of which he had no notice, both as against third persons dealing thereafter with the property, and as against the mortgagor and his grantees." *Corporation Commission v. Trust Co.,* 193 N. C., 696 (700); *Nissen v. Baker,* 198 N. C., 433 (438).

27 R. C. L., part sec. 466, p. 701, is as follows: "To entitle one to protection as a bona fide purchaser as against outstanding equities or an unrecorded deed his purchase must have been made without notice, actual or constructive, of the equity or the unrecorded deed."

Russell v. Roberts, 121 N. C., 322; *Wood v. Trust Co.,* 200 N. C., 105; *Cheek v. Squires,* 200 N. C., 661. In *Kelly v. Clark Co.,* 202 N. C., 750 (754), it is said: "The court's findings of fact, which are supported by the evidence, are as conclusive as the verdict of a jury."

In *Sash Co. v. Mooney,* 202 N. C., 830 (832): "In a reference it is well settled that the findings of fact of the trial court are conclusive, except when there is no evidence to support them."

In the present case there was evidence to support the findings of fact by the court below.

A person is an "innocent purchaser" when he purchases without notice, actual or constructive, of any infirmity, and pays valuable consideration and acts in good faith. *Republic Power & Service Co. v. Continental Credit Corporation,* 12 S. W. (2d), 906, 908, 178 Ark., 966.

To constitute "innocent purchaser," there must be purchase for valuable consideration in good faith and without notice, actual or constructive, of any defects in title to property purchased whether real or personal, so that receiver of organization having lien on property stands in no better position with reference to being innocent purchaser than organization would have been if it had acted in its own name. *Ledbetter v. Wright* (Tex.), 13 S. W. (2d), 388, 390.

The record discloses that there was paid $50.11 of the purchase price of the property on the junior mortgage.

The Commercial Bank and Trust Company, the junior mortgagee was not made a party to the action, nor was J. R. Davis. In *Guy v. Harmon,* 204 N. C., 226 (227): "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." *Bank v. Thomas,* 204 N. C., 599 (601). No question was made as to the junior mortgage or J. R. Davis, not being made parties. In foreclosures and also in actions of this kind all persons necessary to a complete determination of the controversy should be made parties. C. S., 456.

We repeat what was said in *Alexander v. Boyd,* 204 N. C., 103 (108): "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." This case further sets forth the equitable power of the courts to fix reasonable time and conditions in foreclosure proceedings.

In *Home Building and Loan Association v. Blaisdell,* United States Supreme Court L. Ed., advance opinions, Vol. 78, No. 5, 255 (273), handed down 8 January, 1934, quoting a wealth of authority, it is said: "In the absence of legislation, courts of equity have exercised jurisdiction in suits for the foreclosure of mortgages to fix the time and terms of sale and to refuse to confirm sales upon equitable grounds where they were found to be unfair or inadequacy of price was so gross as to shock the conscience."

These principles we adhere to but in the present action the court below found that third parties "are innocent (bona fide) purchasers for value and without notice." For the reasons given, the judgment of the court below is

Affirmed.

A. O. NEWBERRY, MERCHANTS TRANSFER AND STORAGE COMPANY, MRS. KATE McGEHEE AND MRS. AMANDA C. BLADES, v. MEADOWS FERTILIZER COMPANY, A CORPORATION; DAVISON CHEMICAL COMPANY, A CORPORATION; AND C. WILBUR MILLER.

(Filed 28 February, 1934.)

1. Appeal and Error L b—Court may declare order contrary to decision on prior appeal void ab initio.

Where a judge of the Superior Court enters a temporary restraining order in a pending cause contrary to the decision of the Supreme Court on a prior appeal of the case from an interlocutory judgment, a later order entered upon the hearing of the temporary order that such temporary order was null and void *ab initio* is not erroneous.

2. Garnishment E a—Attachment and execution against garnishees may issue prior to final judgment against defendant.

Defendant's property or choses in action in the hands of third persons may be attached under C. S., 798, and execution against the garnishees issued prior to final judgment against defendant, and the property held subject to the orders of the court pending final judgment. C. S., 397, 819.

3. Same — Clerk may issue execution on judgment against garnishees without notice or hearing.

Where judgment has been regularly entered against certain garnishees in proceedings under C. S., 798, the clerk of the Superior Court may issue execution on the judgment against the garnishees without notice or a hearing, C. S., 397, 666, 819, the statutes being construed *in pari materia.*

4. Garnishment E b—Amount of bond required of plaintiff before judgment against garnishees is within sound discretion of court.

Where garnishees several times move the court to increase the bond required of plaintiff before judgment against the garnishees should be rendered, and do not appeal from the court's refusal of their motions, they may not successfully contend upon a subsequent appeal from the issuance of execution on the judgments against them that the amount of the bond required of plaintiff rendered the issuance of execution oppressive and unlawful under the circumstances of the case, the amount of the bond being in the sound discretion of the trial court.

5. Constitutional Law E a—

C. S., 819, providing that judgment may be entered and execution awarded plaintiff against garnishees applies alike to residents and nonresidents, persons and corporations, and it will not be declared unconstitutional in an action instituted long subsequent to its enactment.

6. States A c—

A Federal Court subsequently appointing a receiver for the property may not interfere by injunction with the processes of our courts against the property to enforce a judgment obtained against the possessors of the property in proceedings in garnishment.

APPEAL by defendant and garnishees from *Grady, J.,* at February Term, 1933, of CRAVEN. Affirmed.

Order of Judge Grady: "This cause coming on to be heard upon the petition of the defendants, duly verified, and of Meadows Fertilizer Company *et al.,* garnishees, and it appearing to the court that on 2 February, 1933, execution was issued by the clerk of the Superior Court of Craven County, based upon an order or judgment of Lacy E. Lancaster, clerk of the Superior Court, commanding the sheriffs to whom the same was directed to levy upon all of the property of the garnishees in North Carolina, and it appearing from the petition filed, prima facie, that the issuance of said executions was irregular and unwarranted in law and in fact, it is now,

Ordered that the clerk of the Superior Court of Craven County immediately recall said executions, and the sheriff or sheriffs to whom the same were directed are ordered and directed to release all property seized thereunder, until further ordered by the court.

And the plaintiffs will take notice that they are required to appear before the undersigned presiding judge of the Superior Court, in the courthouse at New Bern, N. C., at 12 o'clock noon, on Wednesday, 8 February, 1933, and show cause, if any they have, why they should not be restrained from again issuing any execution in this cause until the final hearing thereof, and the liability of the principal alleged debtor is fixed and declared by the court. 4 February, 1933.

HENRY A. GRADY, *Judge.*"

"This cause coming on to be heard before the Honorable Henry A. Grady, judge presiding in the Fifth Judicial District, at this the February Term of the Superior Court of Craven County, and being heard upon the petition of the defendant Davison Chemical Company, Eastern Cotton Oil Company and Meadows Fertilizer Company, the order to show cause issued by this court on 4 February, 1933, and the answer of the plaintiffs to said petition, upon the return day of the said show-cause order, to wit, this 8 February, 1933; and it appearing to the court that said order was improvidently issued, and that the issuance of the executions and the levies thereof by the respective sheriffs of the counties of Wayne, Halifax, Pasquotank, Perquimans, Chowan and Craven were properly made, and the property of the said garnishees in the said respective counties came lawfully into the hands of the said respective sheriffs, under said writs of execution, so properly issued from the Superior Court of Craven County on 2 February, 1933, and so levied on 3 February, 1933.

It is thereupon considered, ordered and adjudged that the writs of execution issued by the Superior Court of Craven County on 2 February, 1933, were regular, and fully warranted in law and in fact; that the levies by the said respective sheriffs, under the said respective writs, on the respective properties of the garnishees, was in all respects regular and according to the due course of law and procedure; and that the property so levied upon came duly thereupon into the possession of the said several officers of the court. That the said order of 4 February, 1933, is wholly null and void, and the direction therein to the said sheriffs to whom said writs of execution came to release all property seized under the said executions, is wholly null and void, and of no more effect than if the same had never been ordered. That so much of said order as directed the clerk of the Superior Court of Craven County to recall said executions, and the recall by the said clerk, is likewise

null and void, to the same extent as though said order had never been entered.

It is further considered, ordered and adjudged that the said respective sheriffs, to whom said writs were issued, upon redelivery or reissuance of the same to them by the said clerk of the Superior Court, shall proceed in the same manner with levies heretofore made, as if said executions had not been recalled by the court under the order which is now declared to have been void and of no effect *ab initio*.

The clerk of the Superior Court of Craven County will certify this order to the respective sheriffs to whom executions have been issued, and to the clerks of the Superior Court of the counties to which said executions were issued, and said clerks will docket the same as is required by law of other judgments.

It was agreed by all parties, through counsel, that this order might be signed out of the county and out of term to have the same effect as if entered at the hearing in the courthouse of Craven County. Done at Clinton, N. C., this 13th February, 1933, as of 8th February, 1933.

HENRY A. GRADY, *Judge Presiding in the 5th Judicial District.*

To the foregoing judgment the defendant and garnishees except and appeal to the Supreme Court; notice waived. Appeal bond fixed at $100.00. It is ordered that the court roll proper, with the petition of defendants and garnishees, order of 4th February, 1933, answer of the plaintiffs, this judgment and defendants' assignments of error shall constitute the record and case on appeal. GRADY, *Judge.*"

"This cause coming on to be heard and being heard by his Honor, W. C. Harris, judge presiding, upon motion of the defendant, Davison Chemical Company, to require the plaintiffs to give an injunction bond to protect the defendant, Davison Chemical Company, from damages resulting from the injunction and restraining order issued herein, said motion being made in accordance with the opinion of the Supreme Court of North Carolina in this cause at the Fall Term, 1932, and upon said motion hearing was had at which it was made to appear to the court that the garnishees, Meadows Fertilizer Company and Eastern Cotton Oil Company might have funds in hand which could be applied to the debts due Davison Chemical Company but it does not appear that there are such funds now in the hands of the garnishees;

Now, therefore, it is considered, ordered and adjudged that the plaintiffs, on or before the 10th day of January, 1933, enter into a good and sufficient bond, to be approved by the clerk of the Superior Court of Craven County, North Carolina, in the sum of $25,000.00, conditioned that the plaintiff will pay to the Davison Chemical Company such

damages. not exceeding the sum of $25,000.00 as the Davison Chemical Company may sustain by reason of injunction, if the court finally decides that the plaintiff was not entitled to said injunction.

It is further considered, ordered and adjudged that the motion of the defendant, Davison Chemical Company, for the increase of the attachment bond be and the same is hereby denied.

This order is signed out of term and out of district by consent of all the parties with like effect as though signed in term and in the district.

W. C. HARRIS, *Judge Presiding.*"

Leon Tobriner, Spruill & Spruill, W. B. R. Guion, E. M. Green and R. E. Whitehurst for plaintiffs.

L. I. Moore and Kenneth C. Royall for defendants.

CLARKSON, J. We think that the questions presented on this appeal have hereto been adjudicated on the former appeal in this action. *Newberry v. Fertilizer Co.,* 203 N. C., 330.

In the former appeal is the following at p. 338: "When the officer serves a warrant of attachment and a writ of garnishment on a person supposed to be indebted to the defendant in the action, he shall at the same time summon in writing such person as garnishee. C. S., 819. Judgment may thereafter be rendered in favor of the plaintiff and against the garnishee for the amount of the debt due by the garnishee to the defendant in the action. No lien is acquired by the rendition of the judgment against any specific property of the garnishee, which is applicable to the payment of the debt. A lien can be acquired against such property, only by the issuance of an execution on the judgment, and by proceedings to enforce the execution."

C. S., 819, is as follows: "When the sheriff or other officer serves an attachment on any person supposed to be indebted to, or to have any property of the defendant in the attachment, he shall at the same time summon in writing such person as a garnishee. The summons and notice shall be issued by the clerk of the Superior Court, or justice of the peace, at the request of the plaintiff, to appear at the court to which the attachment is returnable, or if issued by a justice of the peace, at a place and time named in the notice, not exceeding twenty days from date of notice, to answer upon oath what he owes to the defendant and what property of the defendant he has in his hand and had at the time of serving the attachment, and to his knowledge and belief what effects or debts of the defendant there are in the hands of any other, and what person. When an attachment is served on a garnishee in the above manner, upon his appearance and examination, judgment may be entered up and execution awarded for the plaintiff against the

garnishee, for all sums of money due the defendant from him, and for all property of any kind belonging to the defendent, in his possession or custody, for the use of the plaintiff, or so much thereof as will satisfy the debt and costs and all charges incident to levying the same. All property whatsoever in the hands of any garnishee belonging to the defendant is liable to satisfy the plaintiff's judgment, and must be delivered to the sheriff or other officer serving attachment."

The action of plaintiffs against defendants, the prayer of the complaint:

"1. That they have and recover of the defendants, jointly and severally, the sum of $1,500,000.00;

2. That the defendants, and each of them, be required to account under oath for each of the matters and things herein complained of and that the records and accounts referred to on the books of the Meadows Fertilizer Company and Davison Chemical Company and C. W. Miller, be shown to the court and to an auditor to be appointed by the court and to set up the exact and accurate figures relating to said transaction.

3. For such other and further relief as these plaintiffs may show themselves entitled to receive."

In an appeal to this Court—see *Newberry v. Fertilizer Co.*, 202 N. C., 416; *S. c.*, 203 N. C., 330, it was held: "Where the complaint alleges a series of connected transactions constituting one general scheme, participated in by the defendants, resulting in damage to the plaintiff for which he is entitled to recover of the defendants jointly and severally, the defendants' demurrer for misjoinder of parties and causes is properly overruled."

The clerk of the Superior Court of Craven County issued an execution to the sheriff of Wayne County, North Carolina, after reciting the facts against the Eastern Cotton Oil Company, garnishee: "You are therefore commanded, as often before, to satisfy the said judgment out of the personal property of the said Eastern Cotton Oil Company, garnishee, within your county; or, if sufficient personal property cannot be found, then out of the real property found in your county belonging to said Eastern Cotton Oil Company, garnishee, on the day when the said judgment was docketed in your county, or at any time thereafter, in whose hands soever the same may be; and have you this execution, together with the money, before our said court, at the courthouse in New Bern, on 14 March, 1933, next, then and there to render the same to this court.

Witness my hand and seal of the Superior Court of Craven County this 2 February, 1933."

Also issued a like execution to Craven County on the same date after reciting facts, against the Meadows Fertilizer Company, garnishee. In

the order of Judge Grady, 8 February, 1933, in part is as follows: "It is further considered, ordered and adjudged that the said respective sheriffs, to whom said writs were issued, upon redelivery or reissuance of the same to them by the said clerk of the Superior Court, shall proceed in the same manner with levies heretofore made, as if said executions had not been recalled by the court under the order which is now declared to have been void and of no effect *ab initio.*"

We see no error in the judgment of Judge Grady declaring *ab initio* the former order that the clerk recall the executions and the sheriffs ordered and directed "to release all property seized thereunder until further ordered by the court." We think that the writs of execution against the garnishees issued by the clerk of the Superior Court of Craven County, North Carolina, is in accordance with the former decision of this case above set forth filed 19 October, 1932 (203 N. C., 330).

The main contentions of defendants were: "No execution could issue on Judge Frizzelle's order until a final judgment had been rendered in the principal action."

"The plaintiffs contend that this statute and this decision authorizes the issuance of an execution against the garnishees before there is any adjudication that the defendant is indebted to the plaintiffs in any amount whatsoever in the principal action. We contend that this is not the law and that no execution can be issued against the garnishees until the plaintiffs have established that the defendant is indebted to the plaintiff in some amount."

We think the plaintiffs' contention correct. The garnishees owe the money and it is no injustice to them that the property and fund be held until the plaintiffs obtain final judgment.

We have no authority direct in point, but an attachment can be granted under C. S., 798, in an action for unliquidated damages before judgment. If it were otherwise, a final judgment in the principal case might be fruitless.

C. S., 824: "If judgment is entered for the plaintiff in the action, the sheriff shall satisfy the same out of the property attached by him, if it is sufficient for that purpose," *et cetera.* This indicates that the property is held until final judgment and the sheriff can collect from the garnishee against whom judgment is entered.

It arrests the property in the hands of the garnishee, interferes with the owner's or creditor's control over it, subjects it to the judgment of the court, and therefore has the effect of a seizure. *Miller v. United States,* 11 Wall., 268, 297, 20 L. Ed., 135.

The proceeding by garnishment is designed to subject a debt due to the defendant, to the payment of the demand of his creditor, by invest-

ing the creditor with a judicial power to collect and apply the amount due. *Wanzer v. Truly,* 17 How., 584, 586, 15 L. Ed., 216; *Goodwin v. Claytor,* 137 N. C., 224, 225, 230.

The decisions contrary to the position here taken are not controlling as we think under a liberal interpretation of the statutes that the executions can issue against the garnishees before plaintiff obtains final judgment. We think the judgment of Judge Frizzelle is sufficient to authorize the execution against the garnishees.

28 C. J., part sec. 482, pp. 319-320 is as follows: "It follows from the ancillary character of garnishment proceedings that ordinarily a valid judgment against the principal defendant is essential to the validity of a final judgment against the garnishee. However, in some jurisdictions the garnishment proceeding is, under the statute, made essentially a suit or action against the garnishee by defendant in the name of and for the benefit of plaintiff and a final judgment may be entered against the garnishee in advance of judgment against defendant."

It is contended by defendants: "In no event may an execution be issued against the garnishees by the clerk of the Superior Court without notice and hearing."

Execution cannot issue against the garnishee without a specific order of the judge authorizing the same," and cites C. S., 819, *supra.* which provides that "Judgment may be entered up and execution awarded for the plaintiff against the garnishee." We think that when the judgment is entered up the execution is awarded as a matter of course and can be issued by the clerk without application to the judge. C. S., 397.

The defendants contend: "Execution must issue, if at all, as a matter of discretion after notice and hearing.

The other significant distinction between the language of C. S., 819, relating to executions against garnishees, and C. S., 666, relating to ordinary executions, is that in the case against garnishees it is provided that execution 'may be . . . awarded,' while in the case of ordinary executions it is specifically provided that execution 'shall issue.' This clearly shows that the issuance of execution against garnishees is at best a discretionary matter with the court; and it appears that it is the intention to provide for a notice and hearing before such execution shall issue."

We do not think this contention tenable. We can see no distinction between an execution on an ordinary judgment or an execution on a judgment against a garnishee. They are both judgments and statutes to be construed in *pari materia.* It is contended by defendants: "The issuance of execution upon a $200.00 bond and under the circumstances of this case was oppressive and unlawful."

This matter was discretionary and several times brought up on motion by defendant before the court below and no appeal taken from a refusal to increase the bond. We set forth above "addenda to record." We see nothing unconstitutional in C. S., 819. This law was on the statute books long before this controversy arose and litigants in this jurisdiction are bound by its provisions—both residents and nonresidents, persons and corporations alike.

Plaintiffs set forth: "Between the time that the first order was made returnable, to wit, 8 February, 1933, and the actual signing on 13 February, 1933, to wit, on 11 February, 1933, the defendants, apparently ignoring or forgetting that the final determination of the matter by Judge Grady was to be made as of 8 February, 1933, procured from the United States District Court, upon the uncontroverted petitions of Davison Chemical Company against the two garnisheed corporations. . . . Orders, appointing Federal receivers of all the properties of the two corporations, as well that theretofore attached in the State courts as that not attached. Under these receivership orders, these two Federal receivers have taken possession of the entire properties of the two corporations and are proceeding to administer the same over plaintiffs' protests."

In 85 A. L. R., p. 212, is the following: "The reported case (*Ke-Sun Oil Co. v. Hamilton, ante,* 204), in effect follows the rule established by the above cases. In that case, the receiver apparently conceded that the creditors whose attachments and executions were levied in state court prior to his appointment in the Federal court are entitled to a lien upon the property and to a preference in his administration thereof, but asked for an injunction against the sale thereof under judgments, attachments, or execution from the state court, on the ground that an orderly administration of his trust required that the money and property levied upon be reduced to his possession. It was held that the Federal court appointing the receiver had no jurisdiction to enjoin the enforcement of attachment and execution liens upon the property which had been perfected before the appointment of the receiver, on the ground that such an injunction would violate section 265 of the Judicial Code (36 Stat. at L., 1162, chap. 231, sec. 720, Rev. Stat. U. S. C., title 28, sec. 379.)" We see no error in the judgment of the court below. The judgment is

Affirmed.

STATE v. W. C. NORRIS.

(Filed 28 February, 1934.)

1. Criminal Law I j—Motion for nonsuit must be made at close of State's evidence in order for motion at close of all evidence to be considered.

C. S., 4643, serves the same purpose in criminal prosecutions as C. S., 567, serves in civil actions, and a motion for judgment of nonsuit under C. S., 4643, must be made at the close of the State's evidence in order for a motion thereunder made at the close of all the evidence to be considered.

2. Intoxicating Liquor G c—

Evidence of defendant's guilt in this prosecution for possession of intoxicating liquor and implements for its manufacture, C. S., 3411(b), (d), *is held* sufficient, and defendant's motion as of nonsuit was correctly refused.

3. Criminal Law F e—

A *nolle prosequi* in a criminal action will not support a plea of former jeopardy upon a subsequent prosecution for the same offense.

4. Criminal Law G m—

The judgment of a recorder's court must be proven by the records of the court, and its record may not be impeached collaterally by parol evidence.

5. Intoxicating Liquor G d—Evidence of defendant's guilt of possession held sufficient to support instruction in this case.

Uncontradicted evidence that upon the officers' showing of a search warrant to defendant, the defendant went out to feed his hogs and that other members of his family tried to dispose of or conceal intoxicating liquor and implements for its manufacture which were in the house, and that the officers found liquor and implements in the house and a rig lately fired near the house is held sufficient to support an instruction by the trial court that the jury should find defendant guilty if they believed the testimony beyond a reasonable doubt.

6. Intoxicating Liquor B a—

Actual or constructive possession of intoxicating liquor is sufficient for a conviction under C. S., 3411(b).

7. Criminal Law I j—

Where the uncontradicted evidence, if accepted as true, establishes defendant's guilt, the court may instruct the jury to find the defendant guilty if they believe the evidence beyond a reasonable doubt, but in crimes in which intent is an ingredient the question of intent is ordinarily for the jury.

APPEAL by defendant from *Sinclair, J.*, and a jury, at April Term, 1933, of COLUMBUS. No error.

The bill of indictment is as follows:

"The jurors for the State upon their oath present, that W. C. Norris, late of the county of Columbus, on 1 October, 1932, with force and arms, at and in the county aforesaid, did unlawfully and wilfully purchase, possess, sell, transport, intoxicating liquors or possess equipment, implements or ingredients for the purpose of manufacturing intoxicating liquors against the form of the statute in such case made and provided and against the peace and dignity of the State. KELLUM, *Solicitor.*"

A true bill was found by the grand jury against the defendant. The defendant entered a plea of not guilty and a plea of former jeopardy.

The evidence on the part of the State was as follows: H. B. Bruton testified in part: "I went there with a search warrant and found some liquor out in the field. There were three pints and some in a fruit jar; three short pints. We found it out in Mr. Norris' field. It was about as close to his house as from here to the end of the courthouse there. It was under some pea vines. I saw his wife go out in the field and hide it. She carried it from somewhere about the house. The defendant at the time was out in the field not far from the house, working, feeding his hogs. We found two cases of home brew in the chicken coop, put on two pieces over the door. The cases were like coca cola cases or bottled stuff. I reckon there were three dozen bottles to the case. I believe that's what there was. I never counted it. I believe there were three dozen to the case. That's about all I know about it. We found an old stand, a gasoline drum in the edge of the yard, wrapped up in some sacks. The sacks were not big enough to hold it; they were laid over it. I examined the drum. It had been smutted and it looked like it had been around fire, and it smelled like beer, the kind of beer they make whiskey out of. I don't remember whether or not we found any clay or mud on it about the top of it. I didn't go in the house; Mr. Watson and Mr. Stephens went in the house. I could not swear that the home brew is intoxicating. I have heard that the liquor they call home brew is intoxicating. We carried the home brew to Tabor."

N. A. Watson testified in part as follows: "I went up there with Mr. Stephens, and Mr. Stephens called Mr. Norris' attention to the search warrant he had to search his place, and he was going to feed some hogs, and he didn't go back with us and we drove the car in the yard, and his daughter run in the house, and I says, 'Boys, we will have to go now, or we won't get it,' and we went in the house and his wife run out with something in her lap, and his oldest boy taken two jugs under his arms and went across the field, and she put the liquor in the pea vines. Me and Mr. Bruton run up and we got the liquor and brought it to the house, and we found several jars and jugs in there that had had liquor in them, and we found two cases of home brew. I don't know whether there was two dozen or three dozen in the case. We did not catch the

boy. He run across the branch pouring the liquor out on the way, and we could smell it on the bushes. They were about half-gallon jars. The boy was a good runner, and he had a pretty good start on us. His daughter taken some sacks and throwed them over that old drum that looked to be about a thirty-gallon drum and it had clay on it, and she covered it up with some little bags, and it had four brackets and it was smutty, and there were two fifty-gallon barrels that had had mash in them, and they were muddy, and right back of the barn was a ditch that went through his field, and there was where the stuff had been poured out, or in, on Friday night and this was Saturday morning. That was the old mash. We found the place where the rig had been. There was a hole about like the size of the barrel, and the coals had been raked back in there, and they were still hot. I could not stand my hand in it, and there were some trees broke over the place to hide it. From the house the hole was about as far as that building across on the corner, fifty or seventy-five yards probably. The barn was between this hole, the ditch and the house. The field was between this hole, the ditch and the house. It was right side the ditch and there was a bridge below where the still was, or at least where it looked like it was manufactured, and he had the two empty barrels in his barn."

"The defendant offered and the State admitted in evidence judgment docket No. 4, county recorder's court, Columbus County, judgment No. 4214, which reads as follows: State *v.* W. C. and Jetty Norris, 11 October, 1932; N. P. Docketed 11 October, 1932.

The notation 'N. P.' was admitted by the State to indicate a *nolle prosequi.*"

Defendant introduced E. A. Maultsby, judge of the recorder's court, as a witness. The record is as follows: Q. "Did you try the case pending at bar now?" Mr. Kellum: "Objection." Q. "Did you try the case of State *v.* W. C. Norris and Jetty Norris?" Mr. Kellum: "Objection." Court: "That is not contradicting the record." A. "Yes, sir." Q. "Go ahead and tell just what happened at the trial?" A. "They were indicted for having whiskey still in their possession, is my recollection." Mr. Kellum: "It occurs to us that, this being a court of record, that the record would show what took place with reference to that case." Court: "Yes, sir, you can't contradict the record." Q. "Did you hear the evidence?" Mr. Kellum: "Objection." A. "Yes, sir." Q. "What disposition did you make of the case of State *v.* W. C. Norris and Jetty Norris?" Mr. Kellum: "Objection." Sustained.

At the close of all the evidence the defendant moved for a directed verdict of not guilty. Motion overruled. Defendant excepted.

The defendant moved that the jury be instructed, upon all the evidence, that as a matter of law the defendant should be discharged as

having been placed in former jeopardy in the trial in the recorder's court. Motion overruled. Defendant excepted.

Whereupon, his Honor charged the jury as follows: "(The court instructs you if you find beyond a reasonable doubt the facts as shown by the testimony of all the witnesses and the record evidence, it will be your duty to return a verdict of guilty.) If you do not believe the witnesses, you would return a verdict of not guilty."

To so much of his Honor's charge as is in brackets above the defendant excepts.

The jury returned a verdict of guilty. Judgment was rendered by the court below on the verdict. The defendant assigned errors on the above exceptions and appealed to the Supreme Court.

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

R. H. Burns & Son for defendant.

CLARKSON, J. The first exception and assignment of error of defendant is as follows: "For that the court refused to direct the jury to return a verdict of not guilty." This exception and assignment of error cannot be sustained. C. S., 4643, is as follows: "When on the trial of any criminal action in the Superior Court, or in any criminal court, the State has produced its evidence and rested its case, the defendant may move to dismiss the action or for judgment of nonsuit. If the motion is allowed, judgment shall be entered accordingly; and such judgment shall have the force and effect of a verdict of 'not guilty' as to such defendant. If the motion is not allowed, the defendant may except; and if the defendant introduces no evidence, the case shall be submitted to the jury as in other cases, and the defendant shall have the benefit of his exception on appeal to the Supreme Court.

Nothing in this section shall prevent the defendant from introducing evidence after his motion for nonsuit has been overruled; and he may again move for judgment of nonsuit after all of the evidence in the case is concluded. If the motion is then refused, upon consideration of all the evidence, the defendant may except and, after the jury has rendered its verdict, he shall have the benefit of such latter exception on appeal to the Supreme Court. If defendant's motion for judgment of nonsuit be granted, or be sustained on appeal to the Supreme Court, it shall in all cases have the force and effect of a verdict of 'not guilty.' "

This section serves, and was intended to serve, the same purpose in criminal prosecutions as is accomplished by section 567, in civil actions. *S. v. Fulcher,* 184 N. C., 663, 769; *S. v. Sigmon,* 190 N. C., 687.

This motion of the defendant was made at the close of all the evidence. No motion of nonsuit or to dismiss under the above statute was made. We think there was plenary evidence to be submitted to the jury. The second exception and assignment of error of defendant is as follows: "The defendant moved that the jury be instructed upon all the evidence that as a matter of law, the defendant should be discharged as having been placed in former jeopardy in the trial in the recorder's court." This exception and assignment of error cannot be sustained.

In *S. v. Thornton,* 35 N. C., 256 (257-258): "A *nolle prosequi* in criminal proceedings, is nothing but a declaration, on the part of the prosecuting officer, that he will not at that time prosecute the suit further. Its effect is to put the defendant without day—that is, he is discharged and permitted to leave the court, without entering into a recognizance to appear at any other time—1 Ch. Cr. L., 480; but it does not operate as an acquittal, for he may afterwards be again indicted for the same offense, or fresh process may be issued against him upon the same indictment, and he be tried upon it. 6 Mod., 261; 1 Sal., 21." *S. v. Smith,* 129 N. C., 546; *S. v. Faggart,* 170 N. C., 737 (744); *Wilkinson v. Wilkinson,* 159 N. C., 265.

The court below ruled out the parol evidence in regard to contradicting the record. The record judgment docket, in the county recorder's court for Columbus County is as follows: "State *v.* W. C. and Jetty Norris, 11 October, 1932. N. P. (*nolle prosequi.*)" We do not think that the record can be impeached in this collateral way under the facts and circumstances of this case by *parol* evidence.

Article 19, County Recorder's Court, C. S., 1563, is as follows: "In any county in which a municipal recorder's court may not be established under the provisions of this subchapter, or in which such court has in fact not been established in the county seat, the board of commissioners may, in their discretion, establish, in the manner provided by this article, a recorder's court for the entire county, which shall be a court of record and shall be held at the county seat."

Recorder's court for Columbus County is declared by statute, "shall be a court of record."

In *Foster v. Woodfin,* 65 N. C., 29 (30-31): "The proceedings of a court not of record may be proved as other similar facts are. The proceedings of courts of record can be proved by their records only; this is by reason of the vagueness and uncertainty of parol proof as to such matters, and of the facility which the record affords of proving them with certainty. Public policy and convenience require the rule, and a necessary consequence from it is the absolute and undeniable presumption that the record speaks the truth. This presumption, however,

would be inconsistent with justice, if it were held to mean anything more than that the record may not be impeached collaterally."

In *Hopkins v. Crisp,* 166 N. C., 97 (99): "It is well settled that where it appears upon the face of the record that the court had acquired jurisdiction of the parties and of the subject-matter of the action, the judgment therein is valid, however irregular it may be, and it must stand until set aside in a proper proceeding by competent authority. *England v. Garner,* 90 N. C., 197; *Harrison v. Hargrove,* 120 N. C., 106."

The third exception and assignment of error of defendant is as follows: "For that the court charged the jury that if it find beyond a reasonable doubt the facts as shown by the testimony of all the witnesses and the record evidence, it would be its duty to return a verdict of guilty." We do not think this exception and assignment of error can be sustained.

N. C. Code, 1931 (Michie), section 3411(b) (Public Laws, 1923, chap. 1, sec. 1), is as follows: "No person shall manufacture, sell, barter, transport, import, export, deliver, furnish, purchase, or possess any intoxicating liquor except as authorized in this article; and all the provisions of this article be liberally construed to the end that the use of intoxicating liquor as beverage may be prevented. Liquor for non-beverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed, but only as provided by Title II of 'The Volstead Act,' act of Congress enacted October twenty-eighth, one thousand nine hundred and nineteen, an act supplemental to the National Prohibition Act, 'H. R., 7294,' an act of Congress approved November twenty-third, one thousand nine hundred and twenty-one."

Latter part sec. 3411(d) (Public Laws, 1923, chap. 1, sec. 4), is as follows: "It shall be unlawful to have or possess any liquor or property designated for the manufacture of liquor intended for use in violating this article, or which has been so used, and no property rights shall exist in any such liquor or property." The learned solicitor drew the bill of indictment against the defendant under the above law.

The evidence was to the effect that certain parties with a search warrant went to defendant's place. The search warrant was called to defendant's attention, as they drove the car in the yard. (1) Defendant immediately went to feed some hogs. (2) His wife ran out of the house with three pints of liquor in her lap and some in a fruit jar and hid it near the house under some pea vines. (3) The boy took some liquor and ran across the branch, pouring out the liquor which he had in half-gallon jars, as he ran. (4) His daughter took some sacks and threw them over a 30-gallon drum. (5) Two cases of home brew were found

in the chicken coop, 3 dozen bottles in the case. They found several jars and jugs in the house. There was also found two 50-gallon barrels that had mash in them. They found the place where the rig had been, the coals still hot and trees broken over the still place to hide it, this was about 50 to 75 yards from the house. Two empty barrels in the barn.

When the searchers appeared, the man went to feed his hogs, the wife ran out of the house with liquor and hid it, the boy took some and ran and spilled it as he ran. The daughter covered up the old 30-gallon drum. The scene was like a chicken hawk flying into a barn lot and the chickens scattering. We do not think the charge of the court below prejudicial. In *S. v. Meyers,* 190 N. C., 239 (243), citing many authorities: "If the liquor was within the power of the defendant, in such a sense that he could and did command its use, the possession was as complete within the meaning of the statute as if his possession had been actual.

The possession may, within this statute, be either actual, or constructive."

In *S. v. Estes,* 185 N. C., 752 (754), speaking to the subject: "But where, as an inference of law the uncontradicted evidence, if accepted as true, establishes the defendant's guilt it is permissible for the court to instruct the jury to return a verdict of guilty if they find the evidence to be true beyond a reasonable doubt. *S. v. Vines,* 93 N. C., 493; *S. v. Winchester,* 113 N. C., 642; *S. v. Riley, ibid.,* 648; *S. v. Woolard,* 119 N. C., 779."

Where the intent is an ingredient of the crime, the rule is different. It is said in *S. v. Rawls,* 202 N. C., 397 (399): "The fraudulent intent in this case was a question of fact for determination by the jury and not an inference of law for the decision of the court."

The jury rendered a verdict of guilty. The verdict was a general one. In *S. v. Switzer,* 187 N. C., 88 (96-97), speaking to the subject: "There was a general verdict of guilty, which, in law, was a verdict of guilty on each and every count. The general verdict of guilty upon two counts will be sustained if the evidence justifies either. *S. v. Toole,* 106 N. C., 736; *S. v. Strange,* 183 N. C., 775."

We see on the entire record no prejudicial or reversible error. The case is a most flagrant violation of the law. The distillery was in the very shadow of the home. On the premises and in the home was liquor and the implements used in the traffic. This is a government founded on the consent of the governed, a democracy, the best so far devised by the human family. The will of the majority under constitutional limitations, the supreme law of the land.

The use of alcohol is recognized as a habit-forming drug. The General Assembly of North Carolina, Public Laws of 1929, chap. 96, passed an act to require in the public schools of the State instruction "of the effects of alcoholism and narcotism on the human system." This teaching to have the effect to prevent the use of these habit-forming drugs, so destructive to the human family.

The people of this State on 27 May, 1908, voted "against the manufacture and sale of intoxicating liquor" by a majority of 44,196. On 7 November, 1933, this State, out of a total vote of 415,536, voted 184,572 majority for dry delegates against the repeal of the Eighteenth Amendment. From these mandates of the people, it is the duty of all law officers to enforce and the people to obey this and we may say, all other laws on the statute books—our civilization depends on orderly government. The able and learned judge in the court below tried the case on the well settled principles of law applicable to the facts. In the record, we find

No error.

BULLUCK AUTO SALES COMPANY v. WILLIAM MEYER.

(Filed 28 February, 1934.)

Sales H e—

The execution of renewal notes for a note given for the purchase price of merchandise, with knowledge at the time of such renewals of breach of warranty, waives the maker's right to set up a counterclaim for breach of warranty in an action on the last renewal note.

APPEAL by defendant from *Barnhill, J.*, at October Term, 1933, of NASH.

Civil action to recover balance due on renewal note given for purchase of automobile, and to foreclose retained-title contract to said automobile.

Defense interposed, by way of counterclaim, to the amount of plaintiff's claim, and more, for alleged breach of warranty in the sale of said car.

It appearing from defendant's own testimony that the note held by plaintiff was "renewed, curtailed and renewed again" after the discovery of the alleged breach of warranty, the court nonsuited the counterclaim on the ground of estoppel, and granted judgment in accordance with the prayer of the complaint.

Defendant appeals, assigning errors.

Thorp & Thorp for plaintiff.
T. T. Thorne and J. L. Simmons for defendant.

PER CURIAM. Affirmed on authority of *Barco v. Forbes*, 194 N. C., 204, 139 S. E., 227, and *Bank v. Howard*, 188 N. C., 543, 125 S. E., 126.

In the latter case, the following was quoted from 8 C. J., 444, with approval: "One who gives a note in renewal of another note, with knowledge at the time of a partial failure of consideration for the original note, or of false representations by the payee, waives such defense and cannot set it up to defeat or reduce the recovery on the renewal note."

No error having been made to appear of which defendant can complain, the judgment will not be disturbed.

Affirmed.

MRS. V. H. COLVARD v. L. C. BEMIS ET AL.

(Filed 28 February, 1934.)

Appeal and Error G a—

Where appellants file no brief in the Supreme Court and no error is made apparent, the judgment will be affirmed upon motion of appellee.

APPEAL by defendants from *McElroy, J.*, at Chambers, Murphy, 22 January, 1934. From GRAHAM.

Proceeding under Declaratory Judgment Act, chap. 102, Public Laws, 1931, to determine plaintiff's rights in certain lots situate in the town of Robbinsville, Graham County.

From a judgment declaring plaintiff to be the owner in fee simple of the lands described in the complaint, the defendants excepted and gave notice of appeal.

R. L. Phillips for plaintiff.
No counsel for defendant.

STACY, C. J. As the appellants have filed no brief in this Court, and no error is made apparent, the judgment will be affirmed on motion of appellee, according to the usual course and practice in such cases. *Comrs. v. Dickson*, 190 N. C., 330, 129 S. E., 726.

Affirmed.

T. DAVID PARHAM v. W. R. HINNANT AND HIS WIFE, SALLIE HINNANT, H. S. STANBACK, TRUSTEE, AND MRS. M. C. PERRY.

(Filed 28 February, 1934.)

1. Appeal and Error J b—Motion to reinstate cause on docket after nonsuit for failure to appear is addressed to discretion of court.

After judgment of nonsuit has been entered for plaintiff's failure to appear when the action is called for trial, a motion to reinstate the action on the docket, made by plaintiff later on the same day the case was called for trial, is addressed to the discretion of the court, and the court's order denying the motion is not appealable.

2. Mortgages G c — Power of trustee to cancel deed of trust without knowledge of cestui que trust.

The trustor paid trustee the amount of the mortgage debt and the trustee entered a cancellation of the deed of trust on the records, C. S., 2594(1), without the knowledge of the *cestui que trust*. Thereafter trustor sold the property to a bona fide purchaser for value. The *cestui que trust* brought action to have the cancellation declared null and void. *Held*, upon the facts found by the trial court, unexcepted to by plaintiff, the court's conclusion upon a motion to reinstate the case after nonsuit by default, that plaintiff's cause of action was without merit is held in accord with the decisions.

APPEAL by plaintiff from *Barnhill, J.*, at November Term, 1933, of WILSON. Appeal dismissed.

The plaintiff is the holder of a note which was executed by the defendants W. R. Hinnant and his wife, Sallie Hinnant, and secured by a deed of trust executed by said defendants to the defendant, H. S. Stanback, trustee. The land conveyed by said deed of trust is situate in Wilson County. The deed of trust was duly recorded in the office of the register of deeds of said county.

The note secured by the deed of trust is dated 9 May, 1924, and was payable to the order of the Commercial Bank of Wilson on 1 November, 1924. The plaintiff purchased the said note from the North Carolina Mutual Life Insurance Company of Durham, N. C., to whom the said note had been negotiated by the payee on 23 June, 1927.

On 14 January, 1928, the defendants W. R. Hinnant and his wife, Sallie Hinnant, paid to the defendant H. S. Stanback, trustee, who was the cashier of the Commercial Bank, the payee, the amount due on said note, taking from said trustee his receipt for said amount. On 18 January, 1928, the defendant H. S. Stanback, trustee, without the knowledge of the holder of said note at said date, entered on the record in the office of the register of deeds of Wilson County, a cancellation of said deed of trust, C. S., 2594(1).

The defendant Mrs. M. C. Perry is now the owner of the land described in the deed of trust, claiming title thereto under a deed executed

by the defendants W. R. Hinnant and his wife, Sallie Hinnant, subsequent to the cancellation of the deed of trust by the defendant H. S. Stanback, trustee. Mrs. M. C. Perry is a purchaser for value of said land, without notice of any invalidity in the cancellation of the deed of trust securing the note held by the plaintiff, as shown by the record.

This action is for judgment that the cancellation of the deed of trust appearing in the record in the office of the register of deeds of Wilson County is null and void as against the plaintiff.

When the action was called for trial at November Term, 1933, of the Superior Court, the plaintiff failed to appear in person or by counsel to prosecute the same. After the plaintiff had been duly called, and had failed to appear and prosecute his action, the action was nonsuited.

Thereafter, on the same day, the plaintiff and his counsel appeared and moved the court to set aside the judgment of nonsuit, and to reinstate the action for trial. On its findings of fact, the court concluded that plaintiff's cause of action is not meritorious, and denied the motion. Plaintiff appealed to the Supreme Court.

M. Hugh Thompson and E. J. Gates for plaintiff.
Finch, Rand & Finch and David W. Isear for defendants.

PER CURIAM. The motion of the plaintiff that the judgment of nonsuit be set aside, and the action be reinstated on the docket for trial, was addressed to the discretion of the court. For that reason, the order denying the motion is not reviewable by this Court. The appeal from said order must be dismissed.

The plaintiff did not except to the findings of fact on which the court concluded that plaintiff's cause of action is without merit. On these findings, the conclusion of the court was correct, and is in accord with authoritative decisions of this Court. See *Guano Co. v. Walston*, 187 N. C., 667, 122 S. E., 663; *Bank v. Sauls*, 183 N. C., 165, 110 S. E., 865.

Appeal dismissed.

T. DAVID PARHAM v. JOHN H. MORGAN AND HIS WIFE, CORA MORGAN, H. S. STANBACK, TRUSTEE, HATTIE B. YOUNG, CAROLINA BUILDING AND LOAN ASSOCIATION AND D. S. BOYKIN, TRUSTEE.

(Filed 28 February, 1934.)

(For digest see *Parham v. Hinnant, ante*, 200.)

APPEAL by plaintiff from *Barnhill, J.*, at November Term, 1933, of WILSON. Appeal dismissed.

The plaintiff is the holder of a note which was executed by the defendants John H. Morgan and his wife Cora Morgan, and is secured by a deed of trust executed by the said defendants to the defendant H. S. Stanback, trustee. The land conveyed by said deed of trust is situate in Wilson County. The deed of trust was duly recorded in the office of the register of deeds of said county.

The note secured by the deed of trust is dated 2 January, 1925, and was payable to the order of the Commercial Bank of Wilson, on 8 January, 1926. The plaintiff purchased said note on 8 November, 1930, from North Carolina Mutual Life Insurance Company of Durham, N. C., to whom the said note was negotiated by the payee on 23 June, 1927.

On 25 January, 1928, the defendants John H. Morgan and his wife, Cora Morgan, paid to the defendant H. S. Stanback, trustee, who was also cashier of the Commercial Bank, payee of said note, the amount due thereon, taking from said trustee, his receipt for said amount. On the same day, without the knowledge of the holder of said note at said date, the defendant H. S. Stanback, trustee, entered on the records in the office of the register of deeds of Wilson County, a cancellation of said deed of trust, C. S., 2594(1).

The defendant Hattie B. Young is now the owner of the land described in the deed of trust, subject to a deed of trust executed by the defendants John H. Morgan and his wife, Cora Morgan, to the defendant D. S. Boykin, trustee, to secure a note payable to the order of the defendant Carolina Building and Loan Association. Both the deed under which the defendant Hattie B. Young claims title to said land, and the deed of trust to the defendant D. S. Boykin, trustee, were executed and recorded subsequent to the cancellation of the deed of trust by which the note held by the plaintiff is secured. Both the defendants, Hattie B. Young, and D. S. Boykin, trustee, are purchasers for value of the land described in said deed of trust, without notice of any invalidity in the cancellation, appearing on the record in the office of the register of deeds, of the deed of trust by H. S. Stanback, trustee.

This is an action for judgment that the cancellation of the deed of trust by which the note held by plaintiff is secured is null and void as against the plaintiff.

When the action was called for trial at the November Term, 1933, of the Superior Court, the plaintiff failed to appear in person or by counsel to prosecute the same. After the plaintiff had been duly called and had failed to appear and prosecute his action, the action was nonsuited.

Thereafter, on the same day, the plaintiff and his counsel appeared and moved the court to set aside the judgment of nonsuit, and to re-

instate the action on the docket for suit. On its findings of fact, the court concluded that plaintiff's cause of action was not meritorious, and denied the motion. Plaintiff appealed to the Supreme Court.

M. Hugh Thompson and C. J. Gates for plaintiff.
Finch, Rand & Finch and David D. Isear for defendants.

PER CURIAM. The motion of the plaintiff that the judgment of nonsuit be set aside, and the action be reinstated on the docket for trial, was addressed to the discretion of the court. For that reason the order denying the motion is not reviewable by this Court. The appeal must be dismissed.

The plaintiff did not except to the findings of fact on which the court concluded that plaintiff's cause of action is without merit. On these findings, the conclusion of the court was correct, and is in accord with authoritative decisions of this Court. See *Parham v. Hinnant, ante,* 200.

Appeal dismissed.

G. T. HAYNIE, ADMINISTRATOR OF THE ESTATE OF GEORGE HAYNIE, v. SOUTHERN RAILWAY COMPANY.

(Filed 28 February, 1934.)

Railroads D c—Evidence of contributory negligence of plaintiff's intestate held to bar recovery as a matter of law.

Judgment of nonsuit entered in an action by an administrator of a 13-year-old boy of normal intelligence to recover for the boy's death, resulting from an injury received when the boy fell between moving cars of a freight train on which he was riding, is affirmed on authority of *Tart v. R. R.*, 202 N. C., 52.

APPEAL by plaintiff from *McElroy, J.*, at September Term, 1933, of MADISON. Affirmed.

This is an action to recover damages for the death of plaintiff's intestate alleged to have been caused by the negligence of the defendant.

The plaintiff offered evidence tending to show that he is the father of George Haynie, who was living with plaintiff in, or near Marshall, in Madison County, N. C., at the time he sustained the injuries which occasioned his death, and that these injuries were the proximate cause of his death, which occurred in an Asheville hospital on the day following the injuries aforesaid; that plaintiff's intestate slept at the home of plaintiff, and got his meals there; plaintiff testified that his son, the intestate, was thirteen years and four months old at the time

of his death, though the school records show he was fourteen years and four months old; that plaintiff's intestate was a smart, bright boy, had completed the sixth grade in school, and was going into the seventh grade when school opened again; that said boy knew the difference between right and wrong, and that said George Haynie was riding on one of defendant's freight trains, contrary to his father's instructions, and without plaintiff's consent, and unlawfully, and without the knowledge or consent of the defendant, when he sustained the injuries which terminated his life.

That when injured, George Haynie, had fallen between the freight cars on defendant's freight train, traveling towards Asheville, from Marshall, and within sight of his father's home, on a hill near defendant's railroad track; that he apparently fell while climbing over a coal car partially filled with chat, in which he had been riding, and as if he were attempting to grasp the ladder on a box car immediately in front of the moving coal car.

That when he fell, one arm and leg fell across the track in such a manner that the defendant's freight train passed over them and crushed them between the wheels and the rail. That this injury occurred about midday, while said train was running between twelve and eighteen miles an hour on 11 May, 1932, and that a number of hoboes were riding on defendant's freight train at the time.

That defendant's freight trains, running through the town of Marshall and Madison County, were frequently used by hoboes as a means of transportation, and plaintiff had whipped his son, the intestate, for riding on defendant's freight trains.

That on the morning of 11 May, 1932, the day plaintiff's intestate was mortally injured, plaintiff had been informed that his son, George Haynie, was seen at Sandy Bottoms, a place about ten miles west of Marshall, on one of defendant's freight trains, which was going in a direction away from Marshall. That in consequence of this information plaintiff approached one of defendant's freight trains which had passed through Sandy Bottoms on its way to Asheville, and which had stopped in the town of Marshall, at defendant's water tank, to take water, and that the plaintiff accosted the conductor of said freight train, and told him he was looking for a boy on his freight train, and wanted to get his boy from said train; that he asked the conductor to put him off the freight train, whereupon the conductor replied that he had no time to fool with hoboes, and walked on towards the engine. Plaintiff remained where he was until the train left, and then returned into his restaurant.

That within about fifteen minutes after plaintiff's demand on the conductor, of defendant's freight train, plaintiff's intestate was mortally injured while riding on this train.

At the close of the evidence the court dismissed the action as in case of nonsuit. The plaintiff excepted and appealed.

George F. Meadows and Charles E. Jones for plaintiff.
R. C. Kelly and Jones & Ward for defendant.

PER CURIAM. The judgment of nonsuit is sustained by the following authorities: *Tart v. R. R.*, 202 N. C., 52; *Foard v. Power Co.*, 170 N. C., 48; *Baker v. R. R.*, 150 N. C., 562; *Meredith v. R. R.*, 108 N. C., 616.

Affirmed.

EDWARDS AND LEATHERWOOD v. W. L. MCCOY AND HIS WIFE, ADA MCCOY.

(Filed 28 February, 1934.)

Appeal and Error E d—

A motion for *certiorari* directing the trial court who settled the case on appeal to amend or correct the case on appeal will be dismissed where movant does not make it appear that the trial court is willing to make the requested changes.

APPEAL by defendants from *Alley, J.*, at November Term, 1933, of MACON. No error.

This is an action to recover for professional services rendered by the plaintiffs as attorneys and counsellors at law to the defendants, at their request, and on their promise to pay to the plaintiffs the reasonable value of said services.

The issues submitted to the jury were answered favorably to the contentions of the plaintiffs.

From judgment that plaintiffs recover of the defendants the sum of $1,000, and the costs of the action, the defendants appealed to the Supreme Court.

G. A. Jones and Geo. B. Patton for plaintiff.
W. L. McCoy for defendants.

PER CURIAM. Defendants' petition filed in this Court for a writ of *certiorari* directing the judge who presided at the trial of the action in the Superior Court, and who upon disagreement of counsel, settled the case on appeal, to amend the case on appeal, must be dismissed. It appears that no exception was taken by the defendants to the matter which they wish included in the case on appeal, and that on the contrary

the defendants agreed that the reading of the pleadings to the jury should be dispensed with. Further, it does not appear that if the writ is ordered by this Court the judge is willing to amend the case on appeal, as the defendants desire. For this reason the petition is denied. *S. v. Thomas,* 184 N. C., 666, 114 S. E., 12; *S. v. Faulkner,* 175 N. C., 787, 95 S. E., 171; *Barber v. Justice,* 138 N. C., 20, 50 S. E., 445. In the last cited case it is said: "It is only when the judge has settled the case in the exercise of his proper jurisdiction, that upon affidavit of error therein, and a letter from the judge stating that he will correct it if given the opportunity, that this Court will give him such opportunity. Such letter from the judge is required, not as a courtesy to him, nor as an acknowledgment of any inherent discretion in him, but because it would usually be doing a vain thing, and must often result in needless delay, to grant a *certiorari* to give the judge opportunity to correct a case already certified by him as correct unless counsel have had the diligence to procure a letter from the judge stating that he wishes to make the correction."

There was evidence at the trial tending to support the contentions of the plaintiffs with respect to the issues submitted to the jury. For that reason there was no error in the refusal by the trial court of defendants' motion for judgment as of nonsuit. An examination of the record discloses no error for which defendants are entitled to a new trial. The judgment is affirmed.

No error.

MOLLIE BUNCH HOLLOWELL v. NORTH CAROLINA DEPARTMENT OF CONSERVATION AND DEVELOPMENT.

(Filed 21 March, 1934.)

1. Master and Servant F a—Relation of master and servant or some appointment is prerequisite to application of Compensation Act.

A prerequisite to the right of a claimant to compensation under the Workmen's Compensation Act is some appointment or the existence of the relation of master and servant, which latter is contractual in its nature and is to be determined by the rules governing the establishment of contracts, express or implied.

2. Same—Witness is not employee of party in whose behalf he testifies.

A deputy forest warden employed by the Department of Conservation and Development, who is an *ex officio* game warden and paid a commission for reporting violations of the game laws, is not an employee of the Department of Conservation and Development in testifying at the trial of persons reported by him for violation of the game laws, his compensation as a witness being payable according to law as a part of the costs

of the action, and where the game warden is killed by those against whom he testified as a result of his testimony his dependents are not entitled to compensation for his death under the Workmen's Compensation Act.

3. Master and Servant F b—Warden's death resulting from testimony against game law violators held not to arise out of and in course of employment.

A game warden reported certain persons for a violation of the fishing laws and testified against them at the trial for such violation. He was killed by them as a result of his testimony at the trial: *Held*, his death did not result from an injury by accident arising out of and in the course of his employment.

APPEAL by plaintiff from *Cranmer, J.*, at March Term, 1933, of WAKE.

Proceeding under Workmen's Compensation Act to determine liability of defendant to dependents or next of kin of John W. Hollowell, deceased employee.

The hearing commissioner found the following essential facts, which were later adopted and approved by the full Commission:

1. That the parties are bound by and subject to the provisions of the Workmen's Compensation Act.

2. That the claimant, Mollie Bunch Hollowell, is the widow and sole dependent of John W. Hollowell, deceased.

3. That the deceased at the time of his death was in the employ of the North Carolina Department of Conservation and Development as a deputy forest warden and *ex officio* game warden, on a commission contract, charged with the duty of enforcing the fishing laws and regulations.

4. That the injury by accident, which resulted in deceased's death, arose out of and in the course of his employment.

Upon these findings, compensation was awarded.

On appeal to the Superior Court, the award of the Commission was reversed and the proceeding dismissed upon the evidence which shows:

1. That John W. Hollowell was appointed deputy forest warden 11 January, 1929, and became *ex officio* game warden by virtue of chap. 278, Public Laws, 1929.

2. That sometime prior to 30 August, 1930, John W. Hollowell reported to his superior, H. T. Layton, a violation of the fishing laws by Levi and Kermit Nixon, with the result that upon complaint made by the said Layton a warrant was issued against the said Nixons, charging them with violation of the fishing laws.

3. That a trial of the matter was had on 30 August, 1930, and the said John W. Hollowell appeared as a witness for the State, being under subpœna to do so.

4. That upon the conclusion of the trial, and after adjournment of court, the said John W. Hollowell, who had departed from the court room and had gone out into a public street, was assaulted and killed by the said Levi and Kermit Nixon.

5. That the deceased was receiving no compensation from the defendant, or any other agency of the State, other than the payment of a fee of five dollars allowed for reporting violations of the fishing laws.

Upon this evidence, the judge of the Superior Court concluded that the deceased was not in the employ of the defendant at the time of the assault, and that the injury by accident, which resulted in his death, did not arise out of and in the course of his employment as a warden of the Department of Conservation and Development.

Plaintiff appeals, assigning errors.

Privott & Privott for plaintiff.

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

STACY, C. J. It is manifest the assault, which resulted in Hollowell's death, was occasioned by the testimony given by him as a witness for the State on the trial of the two Nixons. The question then occurs: Is a witness, who appears at a judicial hearing and gives evidence under the court's precept, an employee of the party litigant in whose behalf he testifies? The answer is, No.

The liability of one to pay, and the right of another to receive, compensation, under the North Carolina Workmen's Compensation Act, depends, in the first instance, upon some appointment or the existence of the relation of employer and employee, which latter is essentially contractual in its nature, and is to be determined by the rules governing the establishment of contracts, express or implied. *Creswell v. Publishing Co.*, 204 N. C., 380, 168 S. E., 408; *Wilson v. Clark*, 110 N. C., 364, 14 S. E., 962.

There is no contractual relation between a party litigant and one who testifies in his behalf at a judicial inquiry. The only compensation a witness at such a hearing is entitled to receive is the witness fee allowed by law, or by order of court, and to be paid as a part of the costs, but in no sense is the witness a servant, employee, or agent of the party in whose behalf he testifies. Compare *Birchfield v. Dept. of Con. and Dev.*, 204 N. C., 217, 167 S. E., 855.

As presently applicable, the Workmen's Compensation Act, provides that the term "employee," as used in the act, means "every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written . . . excluding

persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer."

The courts of other jurisdictions have had occasion, under a variety of circumstances, to examine the tests for determining the relation of employer and employee, within the meaning of acts of similar import.

Thus, in *West Salem v. Ind. Com.*, 162 Wis., 57, 155 N. W., 929, one temporarily engaged in assisting a village marshal in suppressing a breach of the peace was held to be employed as a policeman of the village, and an employee within the Wisconsin Workmen's Compensation Act, which provides that policemen and firemen shall be deemed employees.

And in *County of Monterey v. Rader,* 199 Cal., 221, 248 Pac., 912, 47 A. L. R., 359, a bystander summoned by the sheriff to assist in making an arrest was held to be within the operation of the California Workmen's Compensation Act declaring an employee to be every person in service under any appointment.

To like effect is the decision in *Millard County v. Ind. Co.,* 62 Utah, 46, 217 Pac., 974, holding that one employed by the sheriff to help in capturing an escaped convict was in the service of the county and therefore an employee within the meaning of the Utah Workmen's Compensation Act.

On the other hand, in *Ind. Com., of Ohio v. Henderson,* 43 Ohio App., 20, 182 N. E., 603, one engaged to rebuild a highway bridge for a stipulated sum, according to plans and specifications prepared by county engineer, was held to be a contractor and not an employee within the meaning of the Ohio Workmen's Compensation Act.

And in *Bingham City v. Ind. Com.,* 243 Pac., 113, a member of a volunteer fire company, injured while fighting a fire, was held not to be an employee of the city within the meaning of the Utah Workmen's Compensation Act.

Again, in *In re Moore,* 187 N. E., 219, a laborer, injured while working in a furnace room of the State Teachers' College without expecting pay from said college and under an arrangement existing between the college, unemployment relief agencies, and township trustee for furnishing unemployed men to the college without cost, was held not to be an "employee," nor was the college, the relief agencies, or the trustee, an "employer," within the meaning of the Indiana Workmen's Compensation Act.

To like effect is the decision in *Vaivida v. Grand Rapids,* 264 Mich., 204, 249 N. W., 826, holding that when able-bodied citizens are set to work at common and unremunerative public tasks, there does not arise a contract of hire or the relationship of employer and employee, within the meaning of the Michigan Workmen's Compensation Act, but only a

helping hand in behalf of public charity invoked and extended. See, also, *Basham v. County Court* (W. Va., 1933), 171 S. E., 893.

The question has also been the subject of inquiry in this jurisdiction. For example, in *Creswell v. Publishing Co., supra,* a newsboy selling newspapers and retaining as his own a part of the proceeds—all over three cents apiece—and injured while engaged in the work, was held not to be an employee of the publishing company.

And in *Bryson v. Lumber Co.,* 204 N. C., 664, one hauling logs at a stipulated price per thousand feet, who was at liberty to haul the logs in his own way, without direction from the owner, and injured in the work, was held to be an independent contractor and not an employee of the Lumber Company, within the meaning of the Workmen's Compensation Act.

The cases of *Starling v. Morris,* 202 N. C., 564, 163 S. E., 584, and *Hanie v. Penland,* 194 N. C., 234, 139 S. E., 380, dealing with the status of special deputies sheriff under the Workmen's Compensation Act, are likewise instructive on the subject now under review.

The sum of the whole matter is, that before the provisions of the Workmen's Compensation Act are called into play, the relation of master and servant, or employer and employee, or some appointment, must exist, and this is the initial fact to be established. An employee is one who works for another for wages or salary, and the right to demand pay for his services from his employer would seem to be essential to his right to receive compensation under the Workmen's Compensation Act, in case of injury sustained by accident arising out of and in the course of the employment. *In re Moore, supra; Basham v. County Court* (W. Va., 1933), 171 S. E., 893.

But even if it be conceded that Hollowell was an employee of the Department of Conservation and Development, charged with the duty of enforcing the fishing laws and regulations, still the question remains as to whether the injury by accident, which resulted in his death, arose out of and in the course of his employment. The conditions antecedent to compensation were considered in *Conrad v. Foundry Co.,* 198 N. C., 723, 153 S. E., 266, *Harden v. Furniture Co.,* 199 N. C., 733, 155 S. E., 728, *Phifer v. Dairy,* 200 N. C., 65, 156 S. E., 147, *Davis v. Veneer Co.,* 200 N. C., 263, 156 S. E., 859, *Hunt v. State,* 201 N. C., 707, 161 S. E., 203, *Beavers v. Power Co.,* 205 N. C., 34, 169 S. E., 825. They are: First, relation of employer and employee, or some appointment; and, second, injury by accident arising out of and in the course of the employment. See, also, *Robertson v. Power Co.,* 204 N. C., 359, 168 S. E., 415, on what constitutes "course of employment."

Under these authorities, and the principles they announce, we think it must be held that Hollowell was not an employee of the Department

of Conservation and Development in appearing at the trial of the two Nixons and giving evidence on behalf of the State, and that his death was not the result of an (1) injury by accident, (2) arising out of and (3) in the course of his employment as an employee of the Department of Conservation and Development. *Conrad v. Foundry Co., supra.*

The case was here before on a question of procedure, 201 N. C., 616, 161 S. E., 89.

Affirmed.

E. A. HOLLAND ET AL. V. H. L. DULIN ET AL.

(Filed 21 March, 1934.)

1. Bills and Notes C a—Pledgee of note after maturity held not a holder in due course.

The beneficiary in a deed of trust was indebted to a corporation and executed his note for the sum to the corporation and gave as collateral security the deed of trust and the note secured by same. Upon being pressed for payment by the corporation he borrowed a sum of money from an officer of the corporation and paid the debt to the corporation, and received his canceled note from the corporation, and executed a new note to the officer of the corporation for the amount borrowed and gave the officer of the corporation certain collateral security including the note secured by the deed of trust, which at the time it was pledged anew to the officer of the corporation was past due. Thereafter the officer of the corporation, acting in behalf of the corporation, wrote the borrower congratulating him upon full payment of the sum owed the corporation: *Held,* the note to the corporation was paid and discharged and the officer of the corporation cannot successfully maintain that he was a holder in due course of the note secured by the deed of trust, he having acquired same after maturity.

2. Contracts B a—

The construction given a contract by the parties thereto before differences arise as to its meaning will be considered by the courts in interpreting the contract.

3. Appeal and Error B b: K f—

The appellant will not be allowed to change the theory of trial upon appeal from that upon which the case was tried in the lower court, nor will such change be allowed upon a petition to rehear.

PETITION by defendants to rehear this case, reported in 205 N. C., 202, 170 S. E., 784.

The facts are these:

1. On 16 August, 1921, S. M. Holland purchased from W. B. Fisher and wife two tracts of land in Cherokee County, giving notes due one,

two and three years after date for part of the purchase price and securing said notes by deeds of trust to T. J. Hill, trustee, on the lands purchased.

2. These purchase-money notes were hypothecated with the Anderson-Dulin-Varnell Company of Knoxville, Tenn., to secure a large indebtedness which Fisher owed to said company.

3. Thereafter, on 5 December, 1923, S. M. Holland and wife reconveyed the two tracts of land above mentioned to W. B. Fisher and wife in full settlement of the purchase indebtedness then outstanding against said lands. This deed was registered 23 March, 1925.

4. The original notes and deeds of trust were not delivered up and surrendered to S. M. Holland and wife for the reason that they were then held by Anderson-Dulin-Varnell Company as collateral security.

5. On 29 December, 1925, Fisher's indebtedness to Anderson-Dulin-Varnell Company had been reduced to $2,518.28, and they were pressing for payment. On that date, W. B. Fisher borrowed from H. L. Dulin enough money to pay his indebtedness to the Anderson-Dulin-Varnell Company, executing his note to H. L. Dulin in the sum of $2,766.70, and securing the same by collateral and taking from Dulin receipt for said collateral which included the notes and deeds of trust executed by S. M. Holland and wife mentioned in paragraph 1 above and other collateral not held by the corporation. In a letter to Fisher, dated 31 December, 1925, Dulin, writing on behalf of the corporation, said: "It has been very gratifying to us and we know it must be gratifying to you, that when you were here this week you were in a position to settle everything owing to Anderson-Dulin-Varnell Company with interest on all past due business and your account was closed up in full and in a very, very satisfactory way."

6. Thereafter, the lands in question were divided into lots, and, beginning in 1927, various conveyances were executed by W. B. Fisher and wife to the plaintiffs in this action for different portions of the tracts covered by the deeds of trust of S. M. Holland and wife. Moneys have been borrowed on other portions and secured by deeds of trust to some of the plaintiffs.

7. In 1932, Dulin caused T. J. Hill, trustee, to advertise the lands for sale under the powers contained in the Holland deeds of trust, and this action was instituted to enjoin the sales and to have the said deeds of trust removed as clouds on plaintiffs' titles.

The jury found, upon issue submitted, that the Holland notes were paid and extinguished by the reconveyance mentioned in paragraph 3 above, and, upon peremptory instruction, answered that H. L. Dulin was not a holder in due course of the Holland notes.

Judgment on the verdict, from which the defendants appeal, assigning errors.

Harkins, Van Winkle & Walton and Gray & Christopher for plaintiffs.

H. A. Tapp and Alfred S. Barnard for defendants.

STACY, C. J. It is the contention of H. L. Dulin that he stands in the shoes of Anderson-Dulin-Varnell Company with respect to the Holland notes and deeds of trust, because the money loaned by him to Fisher on 29 December, 1925, was advanced to take up the note held by the corporation; that the collateral transferred to him was a continuing security for the original indebtedness; and that the note executed to him was but an evidence of the original debt.

But the note held by Anderson-Dulin-Varnell Company was not transferred or assigned to Dulin. This obligation was canceled, and Fisher executed a new note direct to Dulin for an amount in excess of the corporation's debt. Dulin in turn gave Fisher a written receipt for the collateral "received of W. B. Fisher," which was more than that originally held by the corporation, additional collateral having been demanded and put up. "Mr. Degroat brought the collateral (held by the corporation) there and handed it to me (Fisher testifying) and I handed it to Mr. Dulin after a receipt was given." The Holland notes were past due and paid at this time. In no view of the written evidence in the case can Dulin maintain the position of a holder in due course of the Holland notes. He took them after maturity, and, therefore, subject to the equities of the plaintiffs. *Barnes v. Crawford,* 201 N. C., 434, 160 S. E., 464; *Sykes v. Everett,* 167 N. C., 600, 83 S. E., 585; *Bank v. Loughran,* 126 N. C., 814, 36 S. E., 281.

The case turns on what took place between Dulin and Fisher on 29 December, 1925. It nowhere appears from the record that Anderson-Dulin-Varnell Company was a party to the agreement of this date. Fisher's indebtedness to the corporation was paid, his note canceled and delivered up, together with the collateral held as security; the corporation had no further interest in the matter. Fisher pledged the collateral anew to Dulin, with other security not held by the corporation, to secure the payment of the note given to him. Two days later, Dulin wrote Fisher on behalf of the corporation and expressed gratification over the fact "that when you were here this week you were in position to settle everything owing to Anderson-Dulin-Varnell Company with interest on all past due business and your account was closed up in full and in a very, very satisfactory way." This was Dulin's understanding of the transaction at the time. It accords with Fisher's understanding now. *Cole v. Fibre Co.,* 200 N. C., 484, 157 S. E., 857.

"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 differ-

ences 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.

The case of *Smith v. Godwin*, 145 N. C., 242, 58 S. E., 1089, cited and relied upon by petitioners, is easily distinguishable. It is not an authority for the position urged.

In the petition to rehear, the defendants for the first time suggest that under the equitable doctrine of subrogation, they are entitled to succeed to the rights of the creditor corporation in the securities held by it, as the money advanced by Dulin was used to pay Fisher's debt, and cite in support thereof *Liles v. Rogers*, 113 N. C., 197, 18 S. E., 104, *Bank v. Bank*, 158 N. C., 238, 73 S. E., 157, *Grantham v. Nunn*, 187 N. C., 394, 121 S. E., 662. This is an afterthought and a shift in position. In the original brief, Dulin contended "that he was a holder in due course of the Holland notes by reason of a tri-lateral contract between himself, Anderson-Dulin-Varnell Company and W. B. Fisher, under the terms of which, and to which all parties assented at the time, the notes were delivered to him by Anderson-Dulin-Varnell Company, who held the same as a purchaser in due course." On this theory the case was heard and determined in the court below and on appeal.

A party is not permitted to try his case in the Superior Court and then ask the Supreme Court to hear it on another and different theory. *Shipp v. Stage Lines*, 192 N. C., 475, 135 S. E., 339; *Walker v. Burt*, 182 N. C., 325, 109 S. E., 43. A *fortiori*, the change will not be permitted between the decision here and a petition to rehear. *Jolley v. Telegraph Co.*, 205 N. C., 108, 170 S. E., 145; Rule 44, Rules of Practice in the Supreme Court, 200 N. C., 838. The case was correctly decided on the record as presented.

Petition dismissed.

MILLARD F. JONES, EMPLOYEE, v. PLANTERS NATIONAL BANK AND TRUST COMPANY, EMPLOYER, AND ROYAL INDEMNITY COMPANY, CARRIER.

(Filed 21 March, 1934.)

1. Master and Servant F i—

The finding of the Industrial Commission that claimant, at the time of his injury, was an employee is binding upon the courts when supported by competent evidence.

2. Master and Servant F a—Evidence that claimant was employee held sufficient to support Commission's finding to that effect.

Evidence that a bank cashier was required to do detailed and even manual labor as would be required of any other bank employee, and that

his name was on the bank pay roll submitted to insurer upon which premiums were based, and that the insurer was thereby estopped to deny that he was an employee *is held* sufficient to sustain the finding of the Industrial Commission that the cashier was an employee within the meaning of the Compensation Act.

3. Master and Servant F b—Finding that claimant was injured by accident arising out of and in course of employment held sustained by evidence.

Evidence that the cashier of a bank was injured in an automobile collision while on his way to another city under orders of his superior officer to obtain information in regard to the financing of the cotton crop for the use of the bank in its dealing with its customers in connection with their cotton, *is held* sufficient to support the finding of the Industrial Commission that claimant was injured by accident arising out of and in the course of his employment.

APPEAL by defendants from *Barnhill, J.,* at December Term, 1933, of NASH. Affirmed.

This was a claim under the North Carolina Workmen's Compensation Act, in which compensation is sought by Millard F. Jones for injuries sustained in an automobile accident on 29 October, 1931, while said Millard F. Jones was en route to Raleigh, N. C., to attend a meeting of a committee formed to give consideration to a plan for holding cotton off the market. At that time, the said Millard F. Jones was employed by the Planters National Bank and Trust Company of Rocky Mount, N. C., in the capacity of vice-president, cashier and trust officer, and his duties consisted of anything that was done in and around the average bank, at an average weekly wage exceeding $30.00 per week. The defendants admit that Millard F. Jones, an alleged employee, met with accident causing severe and serious personal injuries. They deny liability on the grounds that the accident did not arise out of and in the course of his employment or, if so, arose while he was engaged in performing executive duties. The case was first heard before Commissioner Dorsett, and compensation denied. The award of Commissioner Dorsett was reversed and compensation was granted by the full Commission.

"Opinion for the full Commission by Matt H. Allen, chairman, filed 20 February, 1933. Hearing before the full Commission at Raleigh, 16 November, 1932, plaintiff represented by J. P. Bunn, attorney, Rocky Mount, N. C., defendants by W. S. Wilkinson, attorney, Rocky Mount, N. C. This was an appeal to the full Commission from an award of Commissioner Dorsett denying compensation. There was little or no controversy between the parties as to the facts in this case. It appears from the evidence that the claimant, Millard F. Jones, at the time of his accident and injury was in the employ of the Planters National Bank and Trust Company of Rocky Mount as its cashier; that his duties

consisted of anything that was done in and around the average bank, such as clerical work, making loans, taking deposits, cashing checks, and consulting with customers about loans and investments and at times would supervise the general upkeep of the building and repairs; that J. C. Braswell was president of said bank and as such was the superior of the claimant; that on 29 October, 1931, the claimant was directed by Mr. J. C. Braswell, president of the defendant bank, to proceed to Raleigh, North Carolina, to obtain information pertaining to the handling of cotton for the customers of the bank and generally to discuss with other bankers the method of making loans upon cotton to the customers of the bank and to aid the financing of the cotton crop of that year through the aid of a Federal agency; that on said 29 October, 1931, while en route to Raleigh to attend the said meeting of the cotton committee of the Banker's Association, the claimant sustained an injury by accident."

"Commissioner Dorsett found the following facts: '(1) The plaintiff on 29 October, 1931, while regularly employed by the defendant, Planters National Bank and Trust Company, sustained an injury by accident as a result of an automobile wreck which occurred while he was en route to attend a meeting of the cotton committee for the purpose of procuring financial information for the use of the bank. (2) The accident arose out of and in the course of the plaintiff's employment. (3) The plaintiff was engaged in performing purely executive and administrative duties as cashier of the defendant bank at the time of the occurrence of the accident. (4) The salary of the plaintiff was included in the payroll reported to the Insurance Company and the premium was assessed thereon and paid by the bank. (5) The plaintiff was temporarily and totally disabled from 29 October, 1931, to 1 March, 1932. If he has sustained any permanent disability the amount of that disability cannot be ascertained at the present time. (6) The average weekly earnings of the plaintiff was in excess of $30.00. (7) The Royal Indemnity Company is the insurance carrier for the defendant Planters National Bank and Trust Company.' Upon the foregoing findings of fact Commissioner Dorsett concluded as a matter of law that the claimant was not entitled to recover under the ruling of the Supreme Court in the case of *Hodges v. Mortgage Co.*, 201 N. C., 701. The full Commission is of the opinion that the decision of the Supreme Court in the *Hodges case* does not preclude a recovery by the claimant in this case. In the *Hodges case* it affirmatively appeared that the salary or wages of Hodges were not listed on the payroll of the defendant company and that there was not insurance premium collected to cover Hodges as an employee, whereas, in the present case it appears from the undisputed evidence that the salary of this claimant was included in the payroll reported to the In-

surance Company and the premium was assessed thereon and paid by the employer of this claimant. Another distinction between the two cases is that the first paragraph of the decision of the *Hodges case* contains a statement by *Justice Brogden* that the question for consideration was 'Is an executive vice-president and managing head of a corporation an employee thereof within the contemplation of the Workmen's Compensation Act?' There is no such question presented in the case under consideration. It appears from the evidence that the chief executive and managing head of this defendant corporation was Mr. J. C. Braswell and that this claimant was expressly directed by the managing head to proceed to Raleigh to attend the conference. As we understand the *Hodges case,* the title of an officer does not determine the liability of a defendant for his injuries and we can conceive of cases where even the chief executive and managing head of a corporation might be entitled to compensation if his duties required that he perform manual or mechanical labor and he was injured while in the performance of such labor. According to the testimony of the claimant he performed ordinary detailed and even manual labor and such as would be required of any other bank employee and at the time of his injury he was following the express directions of his superior officer. Even if this were not true it would seem that the defendant insurance carrier, having received the name of this claimant as an employee of the defendant bank and having collected premiums based upon his payroll, has waived any question as to the status of the employee and it ought to be estopped to now claim that he is not an employee but the managing head of the corporation, and we so hold and find that Commissioner Dorsett erred in his conclusions of law. It is thereupon, ordered that the award of Commissioner Dorsett be and the same is hereby vacated and set aside and that an award issue providing for the payment of compensation to the claimant for temporary total disability at the rate of $18.00 per week from 29 October, 1931, to 1 March, 1932, together with all hospital and medical bills, and that this cause be retained for further hearing to determine any permanent disability that the claimant may have sustained. Matt H. Allen, chairman, for the full Commission."

"Before the full Commission, Raleigh, N. C., 21 February, 1933. Award: You, and each of you, are hereby notified that a hearing in the above entitled case was held before the full Commission on 16 November, 1932, Raleigh, N. C., and a decision thereupon was rendered by Chairman Matt H. Allen, for the full Commission, on 20 February, 1933, in which an award was ordered and adjudged as follows: Upon the finding that the salary of the plaintiff was included in the payroll of the defendant bank as an employee and a premium was assessed and paid thereon the carrier is estopped from denying that the plaintiff was

an employee of the bank. Further, upon the finding that the plaintiff sustained an injury by accident arising out of and in the course of his employment, and was temporarily totally disabled from 29 October, 1931, to 1 March, 1932, the award heretofore issued on 3 November, 1932, is vacated and set aside and the defendants will pay plaintiff compensation at the rate of $18.00 per week from 29 October, 1931, to 1 March, 1932. The case will be retained to determine if any permanent disability exists. Defendants to pay costs of medical and hospital treatment. Defendants to pay costs of hearing. North Carolina Industrial Commission. By: Matt H. Allen, chairman."

An appeal was taken to the Superior Court by defendants. The court below sustained the findings of the full Commission and in the judgment is the following: "It is, therefore, ordered and adjudged that the award of the full Commission be, and the same is hereby, ratified, confirmed and approved."

The defendants excepted to the judgment of the court below and assigned the following errors: "For that, the court erred in sustaining the North Carolina Industrial Commission in finding that the injuries sustained by Millard F. Jones were the result of an accident, arising out of and in the course of his regular employment, said Millard F. Jones not being engaged in the business of his employer at the time of the accident or, if so engaged, was performing executive duties and was therefore, for the time being, not an employee within the purview of the Workmen's Compensation Act."

"For that, the court erred in sustaining the conclusions of law of the North Carolina Industrial Commission, and in affirming and signing judgment herein rendered in this cause."

J. P. Bunn, O. B. Moss and Battle & Winslow for Millard F. Jones, employee.

W. S. Wilkinson for defendants, appellants.

CLARKSON, J. The questions involved: (1) Was the plaintiff at the time of his injury, an employee of the defendant bank? (2) Did his injury, by accident arise out of and in the course of his employment within the meaning of the Workmen's Compensation Act? We think both of the questions must be answered in the affirmative. As to the first question: It is a well settled rule in this jurisdiction 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, the Court will sustain the findings of fact made by the Commission. *Massey v. Board of Education* 204 N. C., 193 (196).

In *Hodges v. Mortgage Co.*, 201 N. C., 701 (706), it is said: "Hence, one of the fundamental tests of the right to compensation is not the

title of the injured person, but the nature and quality of the act he is performing at the time of the injury. This theory is undoubtedly sound. Certainly it is supported by the weight of authority." *Hunter v. Auto Co.*, 204 N. C., 723 (725).

It is found as a fact by the Industrial Commission and approved by the court below: "According to the testimony of the claimant he performed ordinary detailed and even manual labor and such as would be required of any other bank employee and at the time of his injury, he was following the express directions of his superior officer. Even if this were not true, it would seem that the defendant insurance carrier, having received the name of this claimant as an employee of the defendant bank and having collected premiums based upon his payroll, has waived any question as to the status of the employee and it ought to be estopped to now claim that he is not an employee but the managing head of the corporation, and we so hold."

In *Reeves v. Parker-Graham-Sexton, Inc.*, 199 N. C., 236 (240), we find: "The defendant, Travelers Insurance Company, having been paid the premium by defendant Parker-Graham-Sexton, Inc., employer, to pay compensation in death cases where there are no dependents, as in the present case, is hardly in a position to complain." *McPherson v. Motor Sales Corp.*, 201 N. C., 303 (309); *Columbia Casualty Co. v. Industrial Commission*, 200 Wis., 8, 227 N. W., 292; *Maryland Casualty Co. v. Wells*, 35 Ga. App., 759, 134 S. E., 788; *Kennedy v. Kennedy*, 163 N. Y. Supp., 944; *Strang v. Electric Co.*, 8 N. J. Mis. R., 873; 152 Atl., 242; *Republic Casualty Co. v. Industrial Commission*, 322 Ill., 169, 152 N. E., 479.

As to the second question: "Did his injury by accident, arise out of and in the course of his employment?" The facts found by the hearing Commissioner and approved by the full Commission: "The plaintiff on 29 October, 1931, while regularly employed by the defendant, Planters National Bank and Trust Company, sustained an injury by accident as a result of an automobile wreck which occurred while he was en route to attend a meeting of the cotton committee for the purpose of procuring financial information for the use of the bank. The accident arose out of and in the course of the plaintiff's employment." The case of *Williams v. Mills, Inc.*, 203 N. C., 848, was a *Per Curiam* opinion: "This is an appeal from a judgment of the Superior Court sustaining an award of the Industrial Commission in behalf of the plaintiff. The intestate, D. C. Williams, in a collision of automobiles suffered injury which caused his death. The Industrial Commission found that his injury arose out of and in the course of his employment. This finding is contested by the appellant. There is evidence tending to sustain the findings upon which the award was based. The judgment of the Superior Court is affirmed."

We have examined the facts in this case—although not set forth in the opinion—and find them similar to the present case.

We think the evidence was sufficient to sustain the finding of fact by the Industrial Commission and approved by the court below, that plaintiff on the trip when he sustained the injury "while he was en route to attend a meeting of the cotton committee for the purpose of procuring financial information *for the use of the bank.*" The judgment of the court below is

Affirmed.

FLORENCE E. STEELE v. THE WESTERN UNION TELEGRAPH COMPANY.

(Filed 21 March, 1934.)

1. Process B d—Foreign corporation doing business here may be served by service on its local agent in transitory action by nonresident.

Jurisdiction over the person of a foreign corporation may be obtained by our courts by service of process on its local agent in this State in an action brought by a nonresident plaintiff on a transitory cause of action arising in another state when the defendant corporation has property and is doing business in this State, and the cause of action is not contrary to our public policy, C. S., 483, the statute authorizing this method of service in such instances not being in contravention of either Art. I, sec. 8, or the Fourteenth Amendment of the Federal Constitution.

2. Same—Presence of foreign corporation in this State for purpose of service of summons.

A foreign corporation is doing business in this State so as to render it amenable to service of process by service on its local agents when it engages in transactions and carries on its corporate business here to such an extent as to manifest its presence within the State.

APPEAL by defendant from *McElroy, J.*, at December Term, 1933, of BUNCOMBE.

Transitory action brought by a nonresident in the General County Court of Buncombe County against a foreign corporation, doing business in this State, on a cause of action arising in the District of Columbia.

It appears from the complaint that the plaintiff is a resident and citizen of the District of Columbia; that the defendant is a corporation organized under the laws of the State of New York, doing business in the District of Columbia, the State of North Carolina, and elsewhere in the United States and foreign countries; and that the cause of action, upon which plaintiff sues, is one *in tort* to recover damages for personal

injuries alleged to have been caused by the negligent or wilful conduct of a servant or messenger boy of the defendant in the District of Columbia.

Service of process was made upon the defendant by reading and delivering a copy of the summons and verified complaint to E. N. Williams, local agent of the defendant and manager of its office at Asheville, Buncombe County, North Carolina, as provided by C. S., 483.

The defendant appeared specially and moved to quash the summons on the ground that it had not been brought into court on any valid and binding service of process. The motion was denied, to which ruling the defendant preserved its exception. After appropriate proceedings, final judgment was entered for plaintiff.

The defendant appeals, presenting the single question of the sufficiency of service of process to give the court jurisdiction over the person of the defendant.

Martin & Martin for plaintiff.
Francis R. Stark and Alfred S. Barnard for defendant.

STACY, C. J. The plaintiff is a nonresident; the defendant, a foreign corporation, having property and doing business in this State; the cause of action, transitory, disconnected with any corporate action of the defendant in this jurisdiction, but not contrary to the public policy of the State. The suit arises out of alleged transactions in the District of Columbia.

Is service of summons on a local agent of the defendant, as provided by C. S., 483, sufficient to bring the defendant corporation into court in the instant case so as to give the court jurisdiction over the person of the defendant? The answer is, Yes.

It is provided by the statute in question that in actions against corporations, service of summons may be had by delivering copy thereof to the president or other head of the corporation, secretary, treasurer, director, managing or local agent, and in this respect applies alike to all corporations, both domestic and foreign. Then follows a proviso as to who shall be considered local agents within the meaning of the section, and the last clause establishes certain restrictive conditions as prerequisites to a proper service on foreign corporations, *i. e.*, it is provided service on the officers or agents designated in the first clause can be made in respect to a foreign corporation only (1) when it has property, or (2) the cause of action arose, or (3) the plaintiff resides, in this State. And then a fourth method is established: When service can be made personally within the State on the president, treasurer, or secretary. *McDonald v. MacArthur Bros. Co.*, 154 N. C., 122, 69 S. E., 832.

That the court has jurisdiction of the cause of action is conceded. Such was the direct holding in *Ledford v. Tel. Co.*, 179 N. C., 63, 101 S. E., 533, and we are not asked to review this decision. Compare *La. St. Rice Milling Co. v. Mente & Co.*, 173 Ga., 1, 159 S. E., 497. There, a nonresident sued the present defendant in the Superior Court of Madison County on a transitory cause of action arising in *Tennessee*, and the jurisdiction of the court over the subject-matter of the action was upheld; but the question of sufficiency of service to give the court jurisdiction over the person of the defendant was not mooted.

Further, it is not controverted that if the plaintiff were a resident of Buncombe County, *Griffin v. S. A. L. Ry.*, 28 Fed. (2d), 998, or the cause of action had arisen in connection with the defendant's local business, *Maverick Mills v. Davis*, 294 Fed., 404, the service would have been sufficient. *Bryan v. Tel. Co.*, 133 N. C., 603, 45 S. E., 938; *Whitehurst v. Kerr*, 153 N. C., 76, 68 S. E., 913; *St. Clair v. Cox*, 106 U. S., 354. Nor is it presently denied that effective service might have been had upon an actual agent of the defendant, such as president, treasurer or secretary. *Jester v. Steam Packet Co.*, 131 N. C., 54, 42 S. E., 447; *Cunningham v. Express Co.*, 67 N. C., 425; *Bagdon v. P. & R. Coal and Iron Co.*, 217 N. Y., 432, 111 N. E., 1075, 64 L. R. A., 407; Annotation, 30 A. L. R., 255. Compare *James-Dickinson Farm Mfg. Co. v. Harry*, 273 U. S., 119; 12 R. C. L., 111.

The defendant's contention is, that if service on a local agent, in an action like the present, be held valid and binding on the defendant, then to this extent the statute offends not only against the commerce clause of the Federal Constitution, *Davis v. Farmers Cooperative Co.*, 262 U. S., 312, but also against the due process clause of the Fourteenth Amendment. *Simon v. So. Ry. Co.*, 236 U. S., 115.

The precise question here presented seems to be one of first impression in this jurisdiction, and we do not find any decision of the Supreme Court of the United States which exactly decides it. It is urged that the opinion in *L. & N. R. Co. v. Chatters*, 279 U. S., 320, contains expressions broad enough to cover it, but the case itself is not decisive of the point. Nor are the other Federal cases, cited by defendant, determinative of the question: *Davis v. Farmers Cooperative Co.*, 262 U. S., 312; *Atchison, Topeka & Santa Fe Ry. v. Wells*, 265 U. S., 101; *Michigan Central Ry. Co. v. Mix*, 278 U. S., 492; *Denver, etc. Ry. Co. v. Terte*, 284 U. S., 284; *Simon v. Southern Ry. Co.*, 236 U. S., 115; *Old Wayne Life Ins. Co. v. McDonough*, 204 U. S., 8.

The attitude of the Court of final authority, as said by *Mr. Chief Justice Taft* in *Mo. Pac. R. Co. v. Clarendon Boat Oar Co.*, 257 U. S., 533, indicates "a leaning toward a construction (of statutes providing for service on foreign corporations), where possible, that would exclude

from their operation causes of action not arising in the business done by them in the state." *Robert Mitchell Furn. Co. v. Const. Co.*, 257 U. S., 213; *Chipman v. Thomas B. Jeffery Co.*, 251 U. S., 373.

The one circumstance which differentiates the present case from those cited and relied upon by the defendant is the concession or admission that the defendant has property and is doing business in the State of North Carolina, which means, as we understand it, in the absence of a showing to the contrary, that the defendant has property and is doing business in this jurisdiction in such manner and to such extent as to warrant the inference that it is present here, engaged in corporate transactions through local agents. *L. & N. R. Co. v. Chatters, supra.*

A corporation is not always present where its officers are, but it is present in any place where its officers or agents transact business in its behalf under authority conferred upon them by the corporation. *Qui facit per alium facit per se. Green v. C. B. & Q. Ry. Co.*, 205 U. S., 530; *Lafayette Ins. Co. v. French*, 18 How., 404, 15 L. Ed., 451, 12 R. C. L., 108.

The presence of a corporation within a state, necessary to the service of process, is shown when it appears that the corporation is there engaged in transactions and carrying on its corporate business in such way as to manifest its presence within the State. *International Harvester Co. v. Kentucky*, 234 U. S., 579; *Lunceford v. Accident Association*, 190 N. C., 314, 129 S. E., 805; *Busch v. L. & N. Ry. Co.*, 322 Mo., 469, 17 S. W., (2d), 337, *certiorari* denied, 280 U. S., 569, *Alwood & Greene v. Buffalo Hardwood Lbr. Co.*, 152 Tenn., 544, 279 S. W., 795.

Speaking generally to the subject in *Anderson v. Fidelity Co.*, 174 N. C., 417, 93 S. E., 948, *Hoke, J.*, delivering the opinion of the Court, said:

"Authoritative cases on the subject are to the effect, further, that when a state by its statutes has established and provided a method of personal service of process on foreign corporations doing business therein, one that is reasonably calculated to give full notice to such companies of the pendency of suits against them, these provisions are to be regarded as conditions on which they are allowed to do business within the State, and when they afterwards come into the State and enter on their business they are taken to have accepted as valid the statutory method provided, and such a service will be held to confer jurisdiction. *St. Clair v. Cox*, 106 U. S., 350-356; Beale on Foreign Corporations, secs. 74 and 266.

"In citation to Beale, sec. 266, it is said: 'The consent to be sued may be implied from the conduct of the foreign corporation. If the law of the State provides that a foreign corporation doing business in the State shall be liable in its courts after process served in a prescribed

manner, this is to be regarded as the expression of the will of the State that a foreign corporation shall do business in the State only on condition that it consent to be sued,' etc."

The prevailing view of a majority of the state courts, is that, if a foreign corporation is doing business in a state, it may there be subjected to the jurisdiction of the courts of that state on service of process made according to the *lex fori,* for any cause of action of which the courts of the state will take cognizance. Bowers' Process and Service, 492. The decision in *Hoffman v. Foraker,* 274 U. S., 21, as said in *Winders v. Ill. Cent.,* 177 Minn., 1, 223 N. W., 291, and *Gegere v. C. & N. W. Ry. Co.,* 175 Minn., 96, 220 N. W., 429, seems to lend support to the correctness of this view.

In the leading case of *Reeves v. So. Ry. Co.,* 121 Ga., 561, 49 S. E., 674, 2 Ann. Cas., 207, 70 L. R. A., 513, *Cobb, J.,* delivering the opinion of the Court, states the rule as follows:

"The true test of jurisdiction is not residence or nonresidence of the plaintiff, or the place where the cause of action originated, but whether the defendant can be found and served in the jurisdiction where the cause of action is asserted. A corporation can be found in any jurisdiction where it transacts business through agents located in that jurisdiction, and suits may be maintained against it in that jurisdiction if the laws of the same provide a method for perfecting service on it by serving its agents. . . . The weight of modern authority seems to support the proposition that a foreign corporation may be sued on a transitory cause of action in any jurisdiction where it can be found in the sense that service may be perfected upon an agent or officer transacting business for the corporation within that jurisdiction, and that the residence of the plaintiff and the place at which the cause of action arose are not material questions to be determined to maintain jurisdiction if the corporation can be found and served."

Again, in a later case, *Hawkins v. U. S. F. & G. Co.,* 123 Ga., 722, 51 S. E., 724, the same Court declared: "A foreign corporation doing business in this State, and having agents located therein for this purpose may be sued and served in the same manner as domestic corporations, upon any transitory cause of action, whether originating in this State or otherwise."

To like effect are the decisions in *Dodgem Corp. v. D. D. Murphy Shows* (Ind., 1932), 183 N. E., 699; *Morgan v. Pa. R. Co.,* 148 Va., 272, 138 S. E., 566, *Hagerstown Brewing Co. v. Gates,* 117 Md., 348, 83 Atl., 570, *Lipe v. Carolina C. & O. Co.,* 123 S. C., 515; 116 S. E., 101, 30 A. L. R., 248, *Winders v. Ill. Cent. R. Co., supra. Contra: L. & N. R. Co. v. Dutsche Dampfschiffarts-Gesellschaft,* 43 Fed. (2d), 651.

It is suggested in some of the cases that there are serious constitutional objections to denying nonresidents the right to sue in the state

courts upon transitory causes of action arising elsewhere, or to withhold service of process on foreign corporations doing business in the State in such cases, when these rights are accorded to residents of the State. *McDonald v. MacArthur*, 154 N. C., 122, 69 S. E., 832.

Speaking to the subject in *Deatrick v. St. Life Ins. Co.*, 107 Va., 602, 59 S. E., 493, *Keith, J.*, delivering the opinion of the Court, observed "that a corporation may be sued upon a transitory cause of action wherever it is doing business in such a manner and to such an extent as to warrant the inference that, through its agents, it is there present. We further agree (though it is not necessary, perhaps, to decide it in this case), that by virtue of the Constitution of the United States, Art. IV, sec. 2, any citizen of the United States would have a similar right to bring suit."

And in *Erving v. C. & N. W. Ry. Co.*, 171 Minn., 87, 214 N. W., 12, *Wilson, C. J.*, after a full review of the authorities on the whole subject, says: "Article IV, sec. 2, of the U. S. Constitution will not permit the State legislature to say to nonresident plaintiffs: 'Our courts are open only to our residents to recover for personal injuries arising out of accidents in other states.' "

In the absence of an authoritative decision on the subject by the Supreme Court of the United States, we are disposed to follow the majority view and hold that when a foreign corporation has property in this State and is here present transacting its corporate business through local agents, such corporation is amenable to service of process according to the provisions of C. S., 483, in an action like the present one, and that this statute in the respect here assailed neither offends against the commerce clause of the Federal Constitution nor runs counter to the Fourteenth Amendment. *R. R. v. Cobb*, 190 N. C., 375, 129 S. E., 828; *Copland v. Telegraph Co.*, 136 N. C., 11, 48 S. E., 501.

Affirmed.

W. N. HARRELL, J. T. BARNES, G. T. LAMM AND RONEY WILLIAMSON, RESIDENTS AND TAXPAYERS OF THE COUNTY OF WILSON, NORTH CAROLINA, IN BEHALF OF THEMSELVES AND OTHER TAXPAYERS OF SAID COUNTY WHO DESIRE TO MAKE THEMSELVES PARTIES HERETO, v. THE BOARD OF COMMISSIONERS OF THE COUNTY OF WILSON.

(Filed 21 March, 1934.)

1. Counties E b—County may issue bonds for necessary repairs to county jail.

The county commissioners of a county are given power to erect and purchase a jail and to levy taxes necessary to pay for same, and if the power to make needed and necessary repairs is not expressly given by

the County Finance Act, chap. 81, sec. 8, Public Laws of 1927, it is necessarily implied from the larger powers therein enumerated, C. S., 1290, and taxpayers of the county cannot successfully maintain a suit to restrain the issuance of bonds for necessary repairs to the county jail and to enjoin the levy of taxes necessary to pay the principal and interest on such bonds. C. S., 1297(9), 1317.

2. Same—County may issue bonds to repair and make additions to public schools of county.

Counties are given authority, as administrative agencies of the State, in the maintenance of the constitutional school term, to erect and purchase school houses and the land necessary therefor, chap. 81, sec. 8, Public Laws of 1927, and the power to make repairs and additions to school buildings is necessarily implied from the powers granted, and the county may issue its bonds necessary for such repairs and additions and levy taxes to pay principal and interest on the bonds.

APPEAL from *Barnhill, J.*, 27 January, 1934. From WILSON. Affirmed.

This is an injunctive proceeding brought by plaintiffs, taxpayers, against the defendant to restrain it from issuing certain bonds. For a first cause of action, the plaintiffs allege: "At a session of the defendant board of commissioners for the county of Wilson, duly held at the courthouse in Wilson, North Carolina, on 6 November, 1933, a resolution was adopted by said defendant, having for its purpose the raising of a sum of money in excess of fifteen thousand dollars, for the purpose of providing funds with which to repair the jail owned by the county of Wilson. The said resolution contemplates, and the defendant intends to raise twelve thousand dollars of said sum by issuing and selling bonds of the county of Wilson as general obligations of said county; and for the payment of the principal and interest of said bonds the defendant proposes and intends to pledge the faith and the credit of the county of Wilson and to levy a tax on the taxable property in Wilson County, sufficient to meet and pay the interest and principal of said bonds."

For a second cause of action, the plaintiffs allege: "At a meeting of the defendant, duly held in the courthouse in the town of Wilson on 11 January, 1934, a resolution having for its purpose the issuance and sale by the defendant of thirty thousand dollars of the serial bonds, general obligations of the county of Wilson, for the purpose of providing funds with which to repair a Negro school building, build a Negro school building and add to the Winstead school building in the Wilson city unit, was duly adopted and passed. The plaintiffs are informed and believe, and upon such information and belief, allege that the proceeds arising from the sale of said bonds would be used for the following purposes: (a) For the erection of a school building for the use of the public schools of Wilson County; (b) For constructing and erecting an addition of five rooms to a school building, a part of the unit of the town of

Wilson, and known as the Winstead School. (c) For the replacement of toilet fixtures in a school building already constructed."

The judgment of the court below is as follows: "The above entitled cause coming on to be heard before the undersigned judge at Rocky Mount, this 27 January, 1934, and was heard by consent of all parties at said time and place. The plaintiffs moved the court for judgment as prayed for in the complaint upon the pleadings. The defendants moved the court that this action both as to the first and second cause of action be dismissed upon the pleadings. After giving the motions due consideration, the court being of the opinion that the defendants have ample power and authority to issue bonds and sell the same for the purpose of repairing the common jail of the county and also that the defendants have ample power and authority to issue bonds and sell the same for the purpose of making additions to the public schoolhouses and repairs thereto in Wilson County; It is, therefore, ordered that this action be dismissed and that the plaintiffs be taxed with the costs. Rocky Mount, North Carolina, this 27 January, 1934. M. V. Barnhill, resident judge of the Second Judicial District."

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

W. A. Lucas for plaintiffs.
Connor & Hill for defendant.

CLARKSON, J. The questions involved: May the defendant "the board of commissioners for the county of Wilson" (a) Issue bonds to repair the common jail of the county? (b) Issue bonds to repair and make additions to public school buildings in the county? These questions must be answered in the affirmative.

In regard to the first question. N. C. Code of 1931 (Michie), sec. 1321(a) (Public Laws, 1923, chap. 143, sec. 1): "The board of commissioners of the various counties throughout the State are authorized and empowered to issue bonds or notes for the purpose of borrowing money with which to erect, build, construct, alter, repair and improve courthouses and jails, and to purchase the necessary equipment and furniture to be used therein."

In the county finance act, Public Laws, 1927, chap. 81, sec. 8, is the following: "The special approval of the General Assembly is hereby given to the issuance by counties of bonds and notes for the special purposes named in this section, and to the levy of property taxes for the payment of such bonds and notes and interest thereon. Accordingly, authority is hereby given to all counties in the State, under the terms and conditions herein described, to issue bonds and notes, and to levy

property taxes for the payment of the same, with interest thereon, for the following purposes, including therein purchase of the necessary land and, in the case of building, the necessary equipment: (a) Erection and purchase of schoolhouses. (d) Erection and purchase of courthouse and jails, including a public auditorium within and as a part of a courthouse." Section 43 of the County Finance Act: "All acts and parts of acts, whether general, special, private or local, authorizing or limiting or prohibiting the issuance of bonds or other obligations of a county or counties, are hereby repealed," etc.

In rewriting the County Finance Act, the word "repair" was left out. N. C. Code of 1931 (Michie), section 1290, is as follows: "Every county is a body politic and corporate, and has the powers prescribed by statute, *and those necessarily implied by law,* and no others; which powers can only be exercised by the board of commissioners, or in pursuance of a resolution adopted by them." (Italics ours.)

C. S., 1297, is as follows: "The boards of commissioners of the several counties have power." (9) "To erect and repair county buildings.—To erect and repair the necessary county buildings and to raise, by taxation, the moneys, therefor."

C. S., 1317: "There shall be kept and maintained in good and sufficient repair in every county a courthouse and common jail, at the expense of the county wherein the same are situated. The boards of commissioners of the several counties respectively shall lay and collect taxes, from year to year, as long as may be necessary, for the purpose of building, repairing and furnishing their several courthouses and jails, in such manner as they think proper; and from time to time shall order and establish such rules and regulations for the preservation of the courthouse, and for the government and management of the prisons, as may be conducive to the interests of the public and the security and comfort of the persons confined."

C. S., 1302: "If any county commissioner shall neglect to perform any duty required of him by law as a member of the board, he shall be guilty of a misdemeanor, and shall also be liable to a penalty of two hundred dollars for each offense, to be paid to any person who shall sue for the same." *Moffitt v. Davis,* 205 N. C., 565.

In *Jackson v. Commissioners,* 171 N. C., 379 (382), it is said: "The building of a courthouse is a necessary county expense, and the board has full power, in their sound discretion, to repair the old one or to erect a new one, and in order to do so they may contract such debt as is necessary for the purpose. *Vaughn v. Commissioners,* 117 N. C., 429; *Brodnax v. Groom,* 64 N. C., 244; *Haskett v. Tyrrell Co.,* 152 N. C., 714. It should be borne in mind, however, by the county commissioners that while they are clothed with the necessary power to contract such

indebtedness, they have no power to levy a special tax out of which to pay the interest and create a sinking fund, unless they have the special authority of the General Assembly." *Spitzer v. Commissioners,* 188 N. C., 30.

It is the duty of the county commissioners to provide a sufficient courthouse and keep it in repair. It is their duty both to erect and keep in repair. They are cognate duties, and failure as to them is "neglect of duty." *S. v. Leeper,* 146 N. C., 655.

The plaintiff contends: "There is nothing unreasonable in the proposition that a local unit may be given the power to pledge the future to build a necessary public building but that it is limited to current income to keep the building in repair after erected."

We think this contention of plaintiff too narrow. Special approval of the General Assembly is given to levy tax for the "Erection and purchase of schoolhouses" and "Erection and purchase of courthouse and jails." We think the greater power includes the lesser, to repair and make additions. The power is given, we think, by statute to the county commissioners, but is "necessarily implied by law." C. S., 1290, *supra.* The commissioners could be indicted and if convicted, imprisoned under the *Leeper case, supra,* for not keeping the jail in repair, yet they could build a new one and not repair the old, would lead to an absurd construction when all the statutes on the subject are considered *in pari materia. Moffitt case, supra.* In 25 R. C. L., p. 1019, we find: "If the language employed admits of two constructions, and according to one of them the enactment would be absurd if not mischievous, while according to the other it will be reasonable and wholesome, the construction which will lead to an absurd result should be avoided." In the record the report of the grand jury at September Term, 1933, shows in regard to the jail "found conditions there very deplorable" and recommended "repairs."

As to the second question: Issue bonds to repair and make additions to public school buildings in the county. We think *Evans v. Mecklenburg County,* 205 N. C., 560, is decisive at p. 564 and 565: "The county of Mecklenburg is an administrative unit in the public school system. The Constitution directs that each county of the State shall be divided into a convenient number of districts in which one or more public schools shall be maintained at least six months in every year. Art. IX, sec. 3. By reason of this mandate it is within the power of the General Assembly to authorize and direct the counties of the State as administrative units or governmental agencies to provide the necessary funds by taxation or otherwise. *Tate v. Board of Education,* 192 N. C., 516; *Frazier v. Comrs.,* 194 N. C., 49. Specific authorization for this purpose is found in section 8 of the County Finance Act: 'The special approval

of the General Assembly is hereby given to the issuance by counties of bonds and notes for the special purposes named in this section, and to the levy of property taxes for the payment of such bonds and notes and interests thereon.' Among the enumerated purposes are the erection and the purchase of school houses, which by the express terms of the statute, include purchase of the necessary land and in the case of building, provision for necessary equipment and facilities. Public Laws, 1927, chap. 81, sec. 8. The resolutions of the county board of education and of the board of county commissioners include in the proposed improvements an auditorium for West Charlotte High School, a new shop for the Technical High School and for Hoskins Rural School and Oakdale Rural School sewage disposal plants, together with toilet facilities for the latter institution. As to these, we are of opinion that the auditorium and the shop are component parts of a general system and in a modern school are often no less serviceable than rooms for classes, and that provision for sanitation is a measure suitable and frequently indispensable to the promotion and preservation of the health of the pupils and to the general efficiency of the school. The order of the board of county commissioners is within the contemplation of the recent act."

We think that the power to "erect" schoolhouses would undoubtedly give the right to make additions and "repair" would be included in the greater "erect." It is not disputed that the bonds are in the statutory limitations. For the reasons given, the judgment of the court below is

Affirmed.

KATHLEEN W. HARDEN v. OCCIDENTAL LIFE INSURANCE COMPANY, A CORPORATION.

(Filed 21 March, 1934.)

Insurance J b—Under terms of policy insurer could not have applied dividend to payment of premium in absence of election by insured.

The policy of life insurance in suit provided for forfeiture upon insured's failure to pay the monthly premium thereon, and expressly provided in clear and explicit terms that dividends thereon should, at the option of insured, be applied to one of several purposes, and if insured made no election, should be paid in cash. Insurer notified insured of a dividend in a sum in excess of the monthly premium, but insured made no election, and died several days after the expiration of the grace period for the payment of the monthly premium due after the declaration of the dividend. Insurer tendered the beneficiary check for the accrued dividend plus interest. The beneficiary brought suit, contending that insurer should have applied the dividend to the payment of the premium so as to keep the policy in force: *Held*, under the terms of the policy insurer had no

right to apply the dividend to the payment of the premium in the absence of election by insured, and if it had done so insured could have nevertheless demanded it in cash, and the policy was forfeited for nonpayment of premium due subsequent to the declaration of the dividend.

APPEAL by plaintiff from *Harris, J.*, at October Term, 1933, of WAKE.

Controversy without action upon an agreed statement of facts which is substantially as follows:

1. On 13 May, 1931, the Colonial Life Insurance Company executed and delivered unto James Henry Harden, the insured, a "participating modified whole life" contract of insurance, No. C-5839, under the terms of which it agreed to pay $2,500, the face amount of the policy, to Kathleen W. Harden, as beneficiary, the plaintiff herein, immediately upon receipt of due proof of the death of the insured.

2. Subsequent to the execution and delivery of the aforesaid policy of insurance to James Henry Harden, the Occidental Life Insurance Company, a corporation existing under the laws of New Mexico and domesticated in this State with its principal place of business at Raleigh, defendant herein, succeeded to the rights and obligations of the said Colonial Life Insurance Company, under said contract of insurance.

3. Monthly premiums in the sum of $2.88 were paid by the insured through and including the premium which became due and payable on 13 June, 1933. Subsequent to the payment of the 13 June, 1933, premium, the insured, James Henry Harden, paid no further premium to the defendant herein.

4. More than five days prior to 13 April, 1933, the defendant mailed to the insured, James Henry Harden, at his Greenville, North Carolina, address, the following notice of accrued dividend on said policy, which was received by insured: "Accounting department home office stub . . . premium $2.88, No. C-5839P 13 day of April, 1933. Interest dividend, $4.02. Mr. James H. Harden, 1208 Chestnut Street, Greenville, N. C.

Said notice was accompanied by an envelope addressed to Occidental Life Insurance Company for reply.

5. The insured, James Henry Harden, died on 17 August, 1933, leaving the plaintiff, Kathleen W. Harden, beneficiary named in the policy, surviving him. The insured's death occurred four days after the expiration of the period of grace as to the premium due and payable on 13 July, 1933.

6. On 6 September, 1933, the defendant, Occidental Life Insurance Company, mailed its check in the sum of $4.07, payable to Kathleen W. Harden, beneficiary, in payment of accrued dividends apportioned to the policy and interest on the said dividends from date of declaration or apportionment thereof. The check was refused by the payee. Said

check, marked Exhibit "B," attached hereto, is made a part of this statement of facts.

7. The policy of insurance referred to in paragraph 1 above, together with the application of the insured, is attached hereto, marked Exhibit "A" and made a part of this statement of facts.

8. At the time of the death of James Henry Harden, the insured, the policy involved herein had no cash or loan value.

9. No option was ever elected by the insured as to the disposition of the accrued dividends apportioned to the said policy.

Upon these facts it was adjudged that the policy had lapsed for nonpayment of premium and was void and that the plaintiff was not entitled to recover of the defendant. The plaintiff excepted and appealed.

Shaw & Jones for appellant.

Willis Smith and John H. Anderson, Jr., for appellee.

ADAMS, J. The policy of insurance was issued on 13 May, 1931, in consideration of the application and the payment of premiums. The insured, James Henry Harden, contracted to pay a premium of two dollars and eighty-eight cents on or before the thirteenth day of every month, and in this respect complied with his obligations up to 13 June, 1933, paying the premium which then became due. He failed to remit the premium which was payable on 13 July, 1933, and died on 17 August, 1933, a few days after the period of grace had expired.

The policy and the attached rider contain the following clauses:

(a) "Except as herein expressly provided the payment of any premium or installment thereof shall not maintain the policy in force beyond the date when the next premium or installment thereof is payable."

(b) "Nonpayment of any installment when due, or within one month (not less than thirty-one days) thereafter, automatically voids this policy, except as provided by the policy or by law."

In regard to the payment of accruing dividends the policy has this provision:

"Beginning at the end of the first insurance year and each year thereafter the company shall annually apportion from the divisible profits the dividend payable to this policy and such apportioned amount upon payment of the succeeding premium shall, at the option of the insured, be either (1) paid in cash; or (2) applied toward payment of premiums; or (3) applied toward the purchase of participating paid up additions to the policy; or (4) left to accumulate as an interest bearing fund withdrawable at any time or payable at the maturity of this policy. Dividends so left shall be credited with interest, the rate to be determined annually by the company, but in no event to be less than 3½

per cent per annum. If no option has been elected by the insured the dividend shall be paid in cash."

More than five days before 13 April, 1933, the defendant mailed to the insured a notice that a dividend of $4.02 had accrued on the policy. The dividend was in excess of the unpaid premium. The question for decision is whether, as contended by the plaintiff, it was the defendant's duty to apply the dividend or any part of it to the payment of the premium which was due on 13 July, 1933, and thus to prevent a lapse of the policy, or whether, as insisted by the defendant, it was incumbent upon the insured to notify the defendant that he elected to have the dividend applied to one of the last three options.

There can be no doubt that the policy lapsed unless the defendant should have applied the dividend to the unpaid premium. With respect to the question under consideration the terms of the policy are clear and unambiguous. The insured had the right to determine whether the accrued dividend should be applied "toward payment of premiums" or to any one of the other designated options; the defendant was not required to make the election for him. See *Cason v. Mutual Life Ins. Co.*, (Colo.), 184 Pac., 296; *Dougherty v. Mutual Life Ins. Co.* (Mo., 1931), 44 S. W. (2d), 207; *Equitable Life Assur. Soc. v. Pettid* (Ariz.), 11 Pac. (2d), 833. The apportioned amount upon payment of the succeeding premium was to be paid in one of four ways at the option of the insured, and if the insured made no option the defendant was to pay the amount in cash. This was the express agreement: "If no option has been elected by the insured the dividend shall be paid in cash." The insured made no election; the defendant paid the dividend in cash and complied with its contract. Whether the contract of election was set out in the application or in the policy is a matter of indifference. In either event the contract was enforceable.

The question has been considered and decided adversely to the plaintiff's contention in *Gardner v. Ins. Co.*, 201 N. C., 716. There the policy provided that unless the insured should otherwise elect the dividend should be held by the company at interest to be withdrawn by the insured at any time or to be included in any cash settlement of the policy. Although he had notice of the dividend and of his right to apply the dividend to the payment of the premium which was due, the insured did not order the application. He elected that the dividend remain with the company. The Court by *Connor, J.*, said: "In view of the express provisions of the contract between the insured and the defendant, as clearly and plainly expressed in the policy, the defendant had no right, in law or in equity, to apply the dividend declared prior to 11 May, 1930, and due at said date, as a payment on the semiannual premium due on 11 May, 1930, or to the purchase of extended insurance. If in

violation of its contract with the insured, with respect to this dividend, the defendant had so applied it, it would have nevertheless been liable to the insured for the amount of the dividend, with interest, when called upon by him for its payment. There is no principle of law or equity upon which the defendant can be held liable to the plaintiff because after the death of the insured within the time for which the policy would have been extended, if the insured had directed that the dividend be applied to the purchase of extended insurance, it appeared that such application would have been to the interest of the plaintiff, as beneficiary in the policy."

A like conclusion is concisely stated by the Supreme Court of the United States in an opinion delivered by *Chief Justice Hughes* in *Williams v. Union Central Life Insurance Company* (decided 15 January, 1934), in which a similar question was considered: "If after the lapse (of the policy) and during the life of the insured, the company had attempted to apply that dividend to extended insurance, its action would not have been binding upon the insured and he would have been entitled to demand the cash payment explicitly promised him"—among other cases citing with approval *Gardner v. Ins. Co., supra.* In this opinion *Chief Justice Hughes* further observed: "While it is highly important that ambiguous clauses should not be permitted to serve as traps for policyholders, it is equally important, to the insured as well as to the insurer, that the provisions of insurance policies which are clearly and definitely set forth in appropriate language, and upon which the calculations of the company are based, should be maintained unimpaired by loose and ill-considered interpretations."

The decisions cited in the appellant's brief are not applicable to the facts in the case before us. Judgment

Affirmed.

IN THE MATTER OF THE WILL OF MRS. MARVIN AVERETT.

(Filed 21 March, 1934.)

Estoppel B a—Caveators held estopped by inconsistent position formerly taken in their petition for partition.

Petitioners for partition, upon learning of the death of one of the tenants in common and the probate of her will, filed an amended petition in which they alleged that under the terms of the will the devisee named therein owned the undivided interest in the lands formerly belonging to the testatrix. The land was sold for partition and objection to confirmation was made because of inadequacy of purchase price. Thereafter, the petitioners, as heirs at law of the testatrix, filed a caveat to the will. The only lands sought to be devised in the will was the testatrix's in-

terest as tenant in common in the lands sought to be partitioned. *Held*, although caveators are not technically parties, for all practical purposes the parties in the caveat proceedings and the partition proceedings are the same, and the land and the interests of the parties therein are the same, and the caveators are estopped from attacking the validity of the will by their former inconsistent position taken in the partition proceedings. After knowledge of the death of the testatrix and the probate of the will, the caveators could have asked to withdraw their petition on the ground that they were not in possession of the true facts at the time the petition was filed.

STACY, C. J., and CONNOR, J., dissenting.

CIVIL ACTION, before *Grady, J.*, at September Term, 1933, of SAMPSON.

On 3 April, 1933, S. H. Mize and wife, Zeta Mize; J. E. Coley and wife, Hannah Coley; E. L. Mize and wife, Lizzie Mize; W. K. Wood and wife, Hettie Wood; Elijah King and wife, Allie King; Fred Mize and wife, Effie Mize; Alfred Mize and wife, Bettie Mize; W. H. Tillotson and wife, Lucy Tillotson, and John Tillotson and wife, Maude Tillotson, instituted a special proceeding for partition of land in the Superior Court of Granville County against Marvin Averett and wife, Lottie Averett. Summons was duly issued on 3 April, 1933. On the same date the petitioners filed a petition for partition, alleging that the petitioners and the defendants "are the owners in fee simple as tenants in common and are in possession of a certain tract of land, . . . containing 150 acres more or less. . . . That the interest of said parties in said land is as follows: S. H. Mize, Hannah Coley, E. L. Mize, Hettie Wood, Alfred Mize, Lottie Averett, Lucy Tillotson, and Maude Tillotson own a one-ninth interest each and Allie King and Fred Mize own a one-ninth interest jointly." It was further alleged in the petition that on account of the location of the buildings on the land and the number of parties interested therein that an actual partition could not be had without injury to all parties concerned, and that a sale of the land for partition would be advantageous. The petition was verified on behalf of all the petitioners by S. H. Mize. The summons for the defendants, Marvin Averett and Lottie Averett, was addressed to the sheriff of Sampson County and he returned the same endorsed as follows: "This man is out of the county and his wife is dead." Mrs. Marvin Averett or Lottie Averett died 10 April, 1933.

Thereupon on 19 April, an alias summons was issued to the sheriff of Sampson County by the clerk of the Superior Court of Granville County for Marvin Averett. This summons was duly served on Marvin Averett on 27 April, 1933. On 5 May, 1933, the petitioners amended their petition, as aforesaid, as follows: "That since the filing of the original petition in this proceeding the defendant, Lottie Mize Averett, has died leaving a last will and testament, which was probated and filed

in Sampson County, North Carolina, on 2 May, 1933, and by the terms of which she devised all her interest in the land involved in this proceeding to her husband, Marvin Averett; that the said Marvin Averett, according to the terms of said will, is now the owner of a one-ninth undivided fee simple interest in and to said land, and that summons in this proceeding has been duly served upon said Marvin Averett." This amended petition was duly verified by S. H. Mize, one of the petitioners. On 26 May, 1932, the clerk of Granville County, finding that said land could not be actually partitioned, ordered and decreed "that said land be sold for partition." A commissioner was duly appointed to make the sale. Pursuant to the order of sale the land was duly sold by the commissioner at public auction on 1 July, 1933. Thereafter on 18 July, 1933, the petitioners filed exceptions to the report of sale upon the sole ground that the sum of $3,000 was not a fair and adequate price for the property. The purchaser joined in the request by the petitioners that the sale be not confirmed, and no order of confirmation has been made.

Thereafter the petitioners instituted the present proceeding in Sampson County to caveat the will of Mrs. Marvin Averett or Lottie Averett. The will of Mrs. Marvin Averett or Lottie Averett devised to her husband, the defendant, Marvin Averett, certain personal property "and all of my interest in my mother's and father's estate." The will also appointed Marvin Averett executor thereof. The caveat filed by the petitioners alleges that the defendant, Marvin Averett, procured said paper-writing to be admitted to probate in common form, and that the caveators "are the brothers, sisters, niece and nephew of said Mrs. Marvin Averett." It was further alleged in the caveat that the will was obtained from Mrs. Marvin Averett by her husband, Marvin Averett, by undue and improper influence and duress," and that said paper-writing was not the last will and testament of Mrs. Marvin Averett for the reason that she had not sufficient mental capacity to make a will." It was further alleged that Mrs. Marvin Averett believed that she was the lawful wife of Marvin Averett and was moved thereby to execute said will "when in truth and fact she was not the lawful wife of the said Marvin Averett, who as affiants are informed and believe, had induced her to enter into a bigamous marriage," etc. Marvin W. Averett, executor of the will, filed an answer to the caveat, denying the allegations thereof, setting out certain alleged facts surrounding his marriage and expressly pleading the partition proceeding in Granville County, and particularly the amended petition as an estoppel. After hearing the cause the trial judge, finding that the petitioners in the partition proceeding in Granville County and the caveators in Sampson County were the sole heirs at law of the said Mrs. Marvin Averett, held and adjudged "that the caveators are estopped to maintain this proceeding by virtue

of and on account of a certain proceeding instituted in the Superior Court of Granville County." The judgment further recites that "It was admitted by the caveators that Mr. T. Lanier, one of the attorneys for the caveators, was an attorney of record for the petitioners in the foregoing proceeding, and that the petitioners in said proceeding are the same parties, who are the caveators in this proceeding. . . . It is therefore ordered and adjudged that the caveat be dismissed and the judgment of the clerk of the Superior Court declaring said paper-writing to be the last will and testament of Mrs. Marvin Averett, is declared to be binding upon the parties to this proceeding."

From the foregoing judgment the caveators appealed.

T. Lanier, Butler & Butler and McLendon & Hedrick for caveators.

Royster & Royster, Parham & Lassiter, Henry A. Grady, Jr., P. D. Herring and A. McL. Graham for respondent.

BROGDEN, J. Does the partition proceeding in Granville County preclude the petitioners from becoming caveators in Sampson County to set aside the will of Mrs. Marvin or Lottie Averett?

In order to arrive at a conclusion it is necessary to observe the chronology of facts. The caveators in the proceeding in Sampson County were the petitioners in the partition proceeding in Granville County and are the sole heirs at law of the alleged testatrix, Lottie Averett, and, if the caveat is successful, will inherit the land. The said land, of course, involved in this caveat proceeding is identically the same land involved in the partition proceeding in Granville. In the proceeding in Granville County the caveators were petitioners. They caused summons to be issued and filed a petition alleging that Lottie Averett owned a one-ninth undivided interest in said land. She died in Sampson County before the summons was served. Thereupon the caveators, as petitioners in Granville County, went back into court and asked for an alias summons against Marvin Averett, the alleged husband of Lottie Averett and her sole devisee. Thereupon Marvin Averett was brought into court in Granville. Furthermore the caveators, as petitioners in Granville County, amended the original petition alleging the death of Lottie Averett, and that she had left a last will and testament "which was probated and filed in Sampson County, North Carolina, on 2 May, 1933, and by the terms of which she devised all her interest in the land involved in this proceeding to her husband, Marvin Averett; that the said Marvin Averett, according to the terms of said will, is now the owner of a one-ninth undivided fee-simple interest in and to said land." Consequently, with full knowledge of the probate of the will in common form, and that the defendant, Marvin Averett, was sole devisee named therein, the

caveators, as petitioners, further procured an order of sale for the land in Granville County, and after the sale had been had, filed exceptions to the sale upon the sole ground of inadequacy of price. Thereafter they proceeded to Sampson County to caveat the will, alleging that the will was void. It is manifest that, if such allegation should be sustained, the practical effect of it would be to deprive Marvin Averett of his interest in the land.

While strictly speaking, there are no parties to a caveat; nevertheless, for all practical purposes, the parties are the same, the land is the same, and the relationship of the parties to the land is the same.

The principle of law applicable to the facts may be found in *Holloman v. R. R.*, 172 N. C., 372, as follows: "Where a person, has, with knowledge of the facts, acted or conducted himself in a particular manner, or asserted a particular claim, title, or right, he cannot afterwards assume a position inconsistent with such act, claim or conduct to the prejudice of another. . . . A claim made or position taken in a former action or judicial proceeding will estop the party to make an inconsistent claim or take a conflicting position in a subsequent action or judicial proceeding to the prejudice of the adverse party, where the parties are the same and the same questions are involved." See *Tiddy v. Graves*, 127 N. C., 502, 37 S. E., 513; *Jenkins v. Renfrow*, 151 N. C., 323, 66 S. E., 212; *Owen v. Needham*, 160 N. C., 381, 76 S. E., 211; *Weston v. Lumber Co.*, 162 N. C., 166, 77 S. E., 430; *Propst v. Caldwell*, 172 N. C., 594, 90 S. E., 757; *Ellis v. Ellis*, 193 N. C., 216, 136 S. E., 350; *Harrey v. Knitting Co.*, 197 N. C., 177, 148 S. E., 45.

It is insisted by the caveators that the issues in a caveat proceeding are not the same as those in partition. This is technically true. However, the practical result of sustaining the caveat is to deprive Marvin Averett of the very land in Sampson, which the caveators in Granville alleged that he owned in fee simple. After knowledge of the death of Lottie Averett, and the probate of the will, the caveators could have asked to withdraw the amended petition and other proceedings in Granville upon the ground that they were not in possession of the true facts and then proceed to caveat the will. This they did not do and the "door was shut."

Affirmed.

STACY, C. J., and CONNOR, J., dissenting.

A. E. WOLTZ AND DAISY C. WOLTZ v. ASHEVILLE SAFE DEPOSIT COMPANY, TRUSTEE, J. C. ALEXANDER, CAROLINA CONSOLIDATED COMPANY, AND EARL WHITTON.

(Filed 21 March, 1934.)

1. Mortgages H i—Statute authorizing injunction against consummation of sale on ground of inadequacy of bid held constitutional.

Chapter 275, Public Laws of 1933, authorizing courts of equity to enjoin the consummation of sales under power of sale contained in deeds of trust and mortgages solely on the ground that the highest bid at the sales does not represent the reasonable value of the property, applies to sales made subsequent to its enactment under mortgages or deeds of trust executed prior to its enactment, and the statute is constitutional and valid, it being remedial only, and does not impair the obligations of contracts nor deprive the parties of property without due process of law, nor confer upon mortgagors or trustors exclusive privileges.

2. Same—Inadequacy of bond given in proceedings to enjoin consummation of sale is not ground for attacking validity of restraining order.

Where the mortgagee or *cestui que trust* is not satisfied with the bond given by the mortgagor or trustor in proceedings to enjoin the consummation of a sale under a mortgage or deed of trust for inadequacy of the bid at the sale, chapter 275, Public Laws of 1933, his remedy is by motion that plaintiffs be required to increase the penal sum of the bond and give additional sureties, and he may not attack the validity of the order restraining the consummation of the sale upon the ground that the bond is inadequate.

APPEAL by defendants, Asheville Safe Deposit Company, trustee, and J. C. Alexander, from *Harding, J.*, at Chambers, in the city of Charlotte, N. C., on 20 October, 1933. Affirmed.

This action was begun in the Superior Court of Mecklenburg County on 15 August, 1933. It is an action to restrain and enjoin the defendants, Asheville Safe Deposit Company, trustee, and J. C. Alexander, from consummating a sale of the land described in the complaint, made on 7 August, 1933, under a power of sale contained in a deed of trust executed on 1 September, 1932, by the defendant Carolina Consolidated Company to the defendant Asheville Safe Deposit Company, trustee, on the ground that the bid made at said sale by the defendant J. C. Alexander is inadequate, and that for that reason the consummation of said sale would be inequitable.

The plaintiffs are the owners in fee simple of said land, having acquired title thereto under a deed executed by the defendant Carolina Consolidated Company subsequent to the registration of the said deed of trust. After they had become the owners of said land, subject to the

terms and provisions of the said deed of trust, the plaintiffs conveyed the same by deed of trust to secure their note payable to the defendant Earl Whitton. The said note has not been paid.

On his finding that the bid made for said land at the sale on 7 August, 1933, by the defendant J. C. Alexander, was the only bid made at said sale, and that the amount of said bid, to wit: $40,000, is not a fair price for said land, but is only about half its reasonable value, Judge Harding issued a temporary restraining order, enjoining the defendants Asheville Safe Deposit Company, trustee, and J. C. Alexander from consummating said sale, and ordering the said defendants to appear before him, and show cause, if any they had, why said temporary restraining order should not be continued until the final hearing.

On the hearing of said order to show cause, the temporary restraining order was continued to the final hearing, and the defendants Asheville Safe Deposit Company, trustee, and J. C. Alexander appealed to the Supreme Court.

J. F. Flowers and J. Louis Carter for plaintiffs.

Heazel, Shuford & Hartshorn and Taliaferro & Clarkson for defendants.

H. L. Taylor for defendant, Whitton.

CONNOR, J. The questions presented by this appeal, as stated in defendants' brief filed in this Court, are as follows:

"1. Is chapter 275, Public Laws of North Carolina, 1933, entitled 'An act to regulate the sale of real property upon the foreclosure of mortgages or deeds of trust,' retroactive, and if so, is the statute unconstitutional in that it violates and is contrary to the provisions of Article I, section 10, of the Constitution of the United States of America, and the Fifth Amendment to the Constitution of the United States of America, and section 1 of the Fourteenth Amendment to the Constitution of the United States of America, and Article I, section 17, of the Constitution of the State of North Carolina, and Article I, section 35, of the Constitution of the State of North Carolina, and Article I, section 7, of the Constitution of the State of North Carolina?"

"2. Did the court err in refusing the motion of the defendants Asheville Safe Deposit Company, trustee, and J. C. Alexander to vacate and dissolve the temporary restraining order and to dismiss the action, for that plaintiffs have failed to make and file any injunction bond or undertaking?"

Only sections 1 and 2 of chapter 275, Public Laws of North Carolina, 1933, are involved in this appeal. These sections are as follows:

"Section 1. Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the Superior Court, prior to the confirmation of any sale of such real estate by a mortgagee, trustee, commissioner or other person authorized to sell the same, to enjoin such sale or the confirmation thereof, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground which the court may deem sufficient: *Provided,* that the court or judge enjoining such sale or the confirmation thereof, whether by a temporary restraining order or injunction to the hearing, shall, as a condition precedent, require of the plaintiff or applicant such bond or deposit as may be necessary to indemnify and save harmless the mortgagee, trustee, *cestui que trust,* or other person enjoined and affected thereby against costs, depreciation, interest and other damages, if any, which may result from the granting of such order or injunction; *Provided further,* that in other respects the procedure shall be as is now prescribed by law in cases of injunction and receivership, with the right of appeal to the Supreme Court from any such order or injunction."

"Section 2. The court or judge granting such order or injunction, or before whom the same is returnable, shall have the right before, but not after, any sale is confirmed to order a resale by the mortgagee, trustee, commissioner, or other person authorized to make the same in such manner and upon such terms as may be just and equitable: *Provided,* the rights of all parties in interest, or who may be affected thereby, shall be preserved and protected by bond or indemnity in such form and amount as the court may require, and the court or judge may also appoint a receiver of the property or the rents and proceeds thereof, pending any sale or resale, and may make such order for the payment of taxes or other prior lien as may be necessary, subject to the right of appeal to the Supreme Court in all cases."

It is the well settled policy of the law that no property, real or personal, which has been conveyed by a mortgage or deed of trust to secure the payment of a debt, shall be sold and conveyed by the mortgagee or trustee, or by a commissioner appointed by a court for that purpose, upon the foreclosure of the mortgage or deed of trust, until a bid for the reasonable value of the property has been received from a prospective purchaser. When a sale has been made under a judgment or decree of a court of competent jurisdiction, the sale must ordinarily be reported to and confirmed by the court, before it can be consummated by a conveyance of the property. In that case, the sale will not be confirmed, and a conveyance of the property ordered, unless it is made to appear to the court that the sale was fairly conducted, and the amount bid for the

property its reasonable value. When the sale has been made by the mortgagee or the trustee, under the power of sale contained in the mortgage or deed of trust, without the supervision of a court, and it is made to appear to a court of competent jurisdiction, in an action instituted by the mortgagor or grantor, that the sale was not fairly conducted, with the result that the amount bid by the prospective purchaser is not the reasonable value of the property, the sale will be set aside, and a resale ordered. In *Bolich v. Ins. Co.*, 202 N. C., 789, 164 S. E., 335, it is said: "The power of a court of equity to restrain sales of real estate made in pursuance of the terms of a mortgage or deed of trust is undoubted, and the decisions of the court disclose that the restraining power of equity in proper cases has been frequently exercised." In that case, it was held that a proposed sale under the power of sale contained in a deed of trust will not be restrained solely because of apprehension on the part of the grantor in the deed of trust that a bid for the reasonable value of the property conveyed by the deed of trust, will not be received, because of unfavorable business conditions existing at the time of the proposed sale. It was not held, however, that when a sale has been made and the bid received is not the reasonable value of the property, a court of equity has no power to enjoin the consummation of the sale, solely on that ground. Whether or not, prior to the enactment of chapter 275, Public Laws of North Carolina, 1933, a judge of the Superior Court had the power to restrain the consummation of a sale of property made under the power of sale contained in a mortgage or deed of trust, on the sole ground that the bid at the sale was not for the reasonable value of the property, need not be discussed or decided, now. The power is expressly conferred by the statute and was properly exercised in the instant case, if the statute is valid, and is applicable, notwithstanding it was enacted subsequent to the execution of the deed of trust under which the sale was made.

The statute does not violate any provision of the Constitution of the United States or of the State of North Carolina, by which limitations are imposed upon the legislative power of the General Assembly of this State. It does not impair the obligation of the contract entered into by and between the parties to a mortgage or deed of trust; it does not deprive either party of property without due process of law; nor does it confer upon mortgagors or grantors in deeds of trust any exclusive privilege. The statute is remedial only, and is valid for that purpose. It is applicable to a sale made since its enactment, although the sale was made under the power of sale contained in a mortgage or deed of trust executed prior to its enactment.

The contention that the action should have been dismissed because the plaintiffs failed to file a bond as required by the statute, cannot be

sustained. The record shows that plaintiffs did file a bond. If the bond was not or is not satisfactory to the appellants, they may move in the Superior Court that the plaintiffs be required to increase the penal sum of the bond and to give other or additional sureties. There is no error in the judgment.

Affirmed.

MILDRED SHERWOOD v. SOUTHEASTERN EXPRESS COMPANY, B. E. HAYNES AND G. W. REAMS.

(Filed 21 March, 1934.)

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

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

2. Automobiles C g—

The violation of a city ordinance passed for the safety and protection of the traveling public is negligence *per se*, and the question of whether such violation is the proximate cause or one of the proximate causes of the injury in suit is ordinarily for the jury.

3. Automobiles C d—Whether backing of truck in violation of ordinance proximately caused plaintiff's injuries held for jury.

The driver of a truck backed same on a city street in violation of a municipal safety ordinance, and the driver of a car standing behind the truck backed his car, after sounding his horn, in order to keep from being hit by the truck, and his car struck and injured a pedestrian attempting to cross the street. *Held*, the question of whether the negligence of the truck driver was the proximate cause of the pedestrian's injuries was properly submitted to the jury, and where the jury finds that the driver of the car was not negligent and that plaintiff was injured by the negligence of the driver of the truck, the court's judgment thereon will be upheld on appeal.

APPEAL by defendants, Southeastern Express Company and B. E. Haynes from *McElroy, J.*, at December Term, 1933, of BUNCOMBE. No error.

This is an action for actionable negligence alleging damage brought by plaintiff against the defendants. The case was tried before Judge J. P. Kitchin and a jury in the General County Court of Buncombe County, N. C.

The issues submitted to the jury and their answers thereto were as follows: "(1) Was the plaintiff injured by the negligence of the defendant, G. W. Reams, as alleged in the complaint? Answer: No. (2)

If so, did the plaintiff contribute to her injury by her own negligence, as alleged in the answer of the said G. W. Reams? Answer: ..... (3) Was the plaintiff injured by the negligence of the defendants, Southeastern Express Company and B. E. Haynes? Answer: Yes. (4) What damage, if any, is the plaintiff entitled to recover? Answer: $1,000."

The Southeastern Express Company and B. E. Haynes made certain exceptions and assignments of error in the General County Court and appealed to the Superior Court. The court below overruled these exceptions and assignments of error and in the judgment is the following: "It is further ordered, adjudged and decreed that the judgment rendered by his Honor, J. P. Kitchin, judge of the General County Court of Buncombe County, be and the same is hereby in all respects ratified, confirmed and approved."

The appealing defendants made certain exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

Vonno L. Gudger and Mark W. Brown for plaintiff.

Johnson, Smathers, Rollins & Uzzell for Southeastern Express Company and B. E. Haynes.

CLARKSON, J. The appealing defendants, Southeastern Express Company and B. E. Haynes introduced no evidence on the trial of the action in the General County Court of Buncombe County, North Carolina, and at the close of plaintiff's evidence, made a motion for judgment as in case of nonsuit, C. S., 567. This motion was overruled, defendants excepted and assigned error. Upon motion for nonsuit evidence which makes for plaintiff's claim, or tends to support her cause of action, whether offered by plaintiff or elicited from defendants' witnesses, will be considered in its most favorable light, and plaintiff is entitled to the benefit of every reasonable intendment and inference to be drawn therefrom. The issue submitted and the answer thereto was as follows: "Was the plaintiff injured by the negligence of the defendants, Southeastern Express Company and B. E. Haynes? Answer: Yes."

The jury awarded plaintiff damages. The defendants excepted, assigned error and appealed to the Superior Court and made the same motion in the court below, which was overruled and appealed to this Court. We can see no error in overruling the motion of the appealing defendants. The sole question was there any sufficient, competent evidence of actionable negligence to be submitted to the jury. The evidence was to the effect, that plaintiff, on Saturday afternoon, 26 November, 1932, was on Haywood Street, in Asheville, N. C. The safety street signs are green and red. Before crossing the street, plaintiff stopped for the red light and the line of traffic to pass. The truck of the South-

eastern Express Company, B. E. Haynes at the wheel, passed, and G. W. Reams, driving a Buick Sedan, followed the truck and stopped. She started to cross between the "white lines" on the street. The traffic "stopped for signals"—"I had a perfect right to pass"—"I had the right of way." The Reams' car backed and the bumper of the car struck plaintiff's right knee and threw her to the pavement and she was seriously injured. The truck stopped in front of the Bon Marche and the Reams' car behind it. Reams testified: "We (Reams and the driver of the truck), both sat there for probably a minute or maybe more. During that time he was just sitting there looking back this way to the rear of the truck, back at my car. He was making no motions during that time we were sitting there. About a minute we were just both sitting there. I glanced back just then, probably at the end of that minute, and saw the street was clear. I didn't see a soul anywhere. When I glanced back around to the front, the express truck was already in motion. I tapped my horn and moved back. I didn't move back over three feet. . . . I felt something strike the rear fender. I immediately reached down and pulled up the emergency brake. I got out and went around to the other side of the car as fast as I could. When I got there, this lady, Miss Sherwood, was on Haywood Street upon her hands and knees getting up. . . . In other words, there was not room enough for me to cut out and go around the truck. . . . There was room enough for a man to walk in behind the bumper of my car and the back of the truck." After the car struck plaintiff: "I looked back this way at the back end of my car and the express truck and this man, driver of the truck, was standing behind the truck in the act of taking a package out of the back of the truck. . . . The last I saw of the driver he was going into the door of the Bon Marche with a package in his arms and this metal notebook. I did not see him again at the time. . . . When I backed, the truck in front of me was in motion, backing towards me. I blew my horn. Before I started backing I blew the horn."

The plaintiff contended that the appealing defendants were violating ten traffic ordinances of the city of Asheville. The one mainly relied on is as follows: "Section 45. No motor vehicle or vehicle shall be turned around on any public street in the congested district, but if the driver of such vehicle desires to travel in a direction opposite to the direction in which said vehicle is headed said driver must proceed around the block in order to make such turn and no motor vehicle or vehicle shall be driven in a backward direction except so far as is *absolutely necessary to avoid accident or to proceed on its way.* . . ."

It is well settled in this jurisdiction that the violation of a statute or ordinance intended to prevent injury to persons or property, is negli-

gence *per se*, but to become actionable negligence, there must be a causal connection between the injury sustained and the statutory prohibition. The violation of the statute or ordinance must be the proximate cause or one of the approximate causes of the injury complained of. *Ledbetter v. English*, 166 N. C., 125; *Godfrey v. Coach Co.*, 201 N. C., 264 (267); *S. v. Durham*, 201 N. C., 724 (732); *Johnson v. R. R.*, 205 N. C., 127 (132); *Barrier v. Thomas and Howard Co.*, 205 N. C., 425 (427). Where the violation of an ordinance is admitted or established by the evidence, it is ordinarily a question for the jury to determine, whether such negligence is the proximate or one of the approximate causes of injury which resulted in damage. *Godfrey, supra*, p. 267. The famous *"Squib case"* is similar to the present. *Scott v. Shepherd*, 2 W. Bl., 892, cited in Shirley's Leading Cases in the Common Law (3d Eng. Ed.), p. 259: "Mr. Shepherd, of Milbourne Port, determined to celebrate the happy deliverance of that august and wise monarch James I, in the orthodox fashion; and, with that intention, he some days before the 5th laid in a plentiful pyrotechnic supply. Being not only of a pious and patriotic spirit, but also a man not destitute of humour, he threw a lighted squib into the market house at a time when it was crowded with those that bought and sold. The fiery missle came down on the shed of a vender of ginger-bread, who, to protect himself, caught it dexterously and threw it way from him. It then fell on the shed of another ginger-bread seller, who passed it on in precisely the same way; till at last it burst in the plaintiff's face and put his eye out.

Scott brought an action against the original thrower of the squib, who objected that he was not responsible for what had happened, when the squib had passed through so many hands; but, though he persuaded the learned *Mr. Justice Blackstone* to agree with him, the majority of the court decided that he *must be presumed to have contemplated all the consequences* of his wrongful act and was answerable for them."

The appealing defendants contended: "The jury having found that the defendant, Reams, was guilty of no negligent act, the court should have set aside the answer of the jury to the third issue, as a matter of law, and rendered judgment in favor of the appellants, Haynes and the Southeastern Express Company." This contention cannot be sustained.

Contrary to the ordinance, the driver of the truck backed it, after being warned by Reams—by blowing his horn—and then, Reams backed his car to avoid the truck and the bumper struck the plaintiff. The matter was properly left to the jury. The charge of the learned judge in the General County Court of Buncombe is not in the record, the presumption is that the court charged the law correctly applicable to the facts. In the judgment we find

No error.

VIRGINIA TRUST COMPANY AND CURTIS BYNUM v. CHARLES A. WEBB AND JESSIE C. WEBB.

(Filed 21 March, 1934.)

1. Pleadings D a—

A demurrer admits the complaint and must be overruled if the allegations are sufficient to constitute a cause of action.

2. Assignments D a—Assignment of contract as collateral security does not deprive assignor of interest therein.

Where an option is assigned as collateral security for the assignor's note to the assignee, both the assignor and assignee have an interest therein, and if the contract is not assignable, the assignor has not relinquished his interest therein and may sue thereon, and where either party can maintain the suit the other is merely an unnecessary party, which is not a defect for which a demurrer will lie.

3. Pleadings D b—

A demurrer will not lie for joinder of an unnecessary party, it being necessary to sustain the demurrer that there be misjoinder of parties and causes of action.

4. Specific Performance B a—Right to specific performance rests upon inadequacy of damages and not distinction between realty and personalty.

While as a general rule contracts relating to personalty are not specifically enforceable, the ground for the relief of specific performance is the inadequacy of damages at law, and on this principal there are exceptions to the general rule.

5. Pleadings A f—

The relief to which plaintiff is entitled is to be determined by the allegations of the complaint established by evidence, and not the prayer for relief.

6. Pleadings D a—Where complaint, in any view, states cause of action a demurrer thereto should be overruled.

Where the allegations of a complaint are broad enough to state a cause of action for specific performance and for breach of contract the prayer for relief does not limit the scope of the right to relief, and a demurrer on the ground that the contract is not specifically enforceable cannot be sustained, since if either cause of action can be maintained the demurrer should be overruled.

CLARKSON, J., not sitting

APPEAL by defendants from *McElroy, J.*, at October Term, 1933, of BUNCOMBE. Affirmed.

On 1 December, 1930, Curtis Bynum and five others executed and delivered to the Virginia Trust Company two promissory notes in the respective sums of $46,350 and $20,400, securing the first by the deposit of forty-five Asheville Country Club gold bonds, each in the sum of

$1,000, and the second by the deposit of four second lien principal notes of Asheville Country Club, Incorporated, each in the sum of $5,000.

On 24 July, 1930, the defendants executed and delivered to Bynum, plaintiff, the following paper:

"Mr. Curtis Bynum,
Asheville, N. C.

Dear Sir:

This confirms our understanding and agreement that you shall have the option at any time on or after 1 January, 1932, to require the undersigned to purchase from you, at par and accrued dividends, the preferred stock of the Asheville Citizen, Incorporated (a corporation to be formed by the consolidation of the Asheville Citizen, Incorporated, and the Asheville Times Company), which stock is presently to be issued to you in exchange for $60,000, in par value, of preferred stock and accrued dividends of the Asheville Times Company, now held by you.

It is stipulated and agreed that should you exercise your option to require us to purchase said stock, then, in that event, we hereby, jointly and severally, bind ourselves, our executors and administrators, to purchase, pay for and take delivery of said stock, $20,000, in par value thereof, within one year, $20,000, in par value thereof, within two years, and the balance thereof within three years after the date of the exercise of your said option. Yours very truly,

Charles A. Webb, Jessie C. Webb."

On 1 December, 1930, when the notes above referred to were executed, Bynum signed and delivered the following instrument:

"For a valuable consideration, receipt whereof being hereby acknowledged, I, the above mentioned Curtis Bynum, do hereby assign, transfer, make and deliver over to the Virginia Trust Company, of Richmond, Va., all and every of my rights, privileges and powers in and under the foregoing agreement, with full right of assignment and reassignment.

Dated at Asheville, N. C., as of and on 1 December, 1930.

Witness my hand and seal. Curtis Bynum. (Seal.)"

On 1 December, 1930, Bynum executed another paper reciting the delivery to the Virginia Trust Company, as collateral security for the payment and renewal of the two notes, of 727 shares of the preferred stock of the Asheville Citizen-Times Company, together with the writing signed by the defendants obligating them to purchase from Bynum 682 shares of said stock on or before 1 January, 1932.

In their complaint the plaintiffs set out the foregoing facts and alleged that the Virginia Trust Company is the holder of the notes referred to

and has power and authority to enforce collection and that no part of either note has been paid.

They further alleged that Bynum owned preferred stock in the Asheville Times Company of the par value of $60,000 and was interested in the consolidation of this company and the Asheville Citizen, Incorporated; that he agreed to surrender his preferred stock to the Times Company and to accept in exchange for it stock in the new corporation to be known as the Asheville Citizen-Times Company; that the defendants executed the option above set out in order to effect the consolidation of the two companies; that Bynum surrendered his stock and accepted a certificate for 682 shares of preferred stock in the new corporation, each of the par value of $100.00; that Bynum assigned or endorsed the papers held by him for the purpose of securing the notes executed by him and his comakers to the Virginia Trust Company; that Bynum exercised his option and with the consent of his coplaintiff notified the defendants to purchase his stock and they declined to do so; and that the plaintiffs have at all times been ready, able, and willing to perform all their obligations to the defendants and that the defendants have failed and refused to comply with their contract.

The defendants demurred for misjoinder of parties and causes of action; and on the further ground that the complaint is defective in that the plaintiffs are seeking specifically to enforce against the defendants a contract alleged to have been executed by them to the plaintiff, Bynum, and assigned to the Virginia Trust Company, and that the contract shows upon its face that it was a personal obligation to Bynum, which he could not assign and transfer; and that it appears that the interest of Bynum in the stock and in the contract has ceased to exist, and neither of the plaintiffs is entitled to a specific performance of the contract, or to any of the relief prayed for in said complaint.

The demurrer was overruled and the defendants excepted and appealed.

Martin & Martin and Alfred S. Barnard for appellants.
John M. Robinson and Hunter M. Jones for appellees.

ADAMS, J. The demurrer admits the complaint and must be overruled if the allegations are sufficient to constitute a cause of action. *Yarborough v. Park Commission,* 196 N. C., 284; *Meyer v. Fenner, ibid.,* 476.

The appellants take the position that Bynum has no interest in the action because his assignment to the Virginia Trust Company was complete; that if the option executed by the defendants was assignable the Trust Company has acquired all rights thereunder and Bynum has none. It is hence argued that Bynum is not a necessary or proper party

in an action brought by the Trust Company on the assignment, that the Trust Company is not a necessary or proper party in an action brought by Bynum on his contract with the defendants, and that the demurrer should be sustained and the action dismissed.

This argument ignores the fact that according to the plaintiffs' allegations and the written assignments Bynum did not relinquish his interest in the option; he assigned it as collateral security for the payment of the notes. (Exhibit D.) The complaint states a cause of action in which both plaintiffs have an interest. Let us assume for the moment, however, that the action could be maintained by one of the plaintiffs. The joinder of unnecessary parties is not a defect of parties; and for superfluous parties plaintiff, a demurrer does not lie. An action is dismissed for misjoinder only when there is a misjoinder of parties and causes. *Furniture Co. v. R. R.*, 195 N. C., 636; *Abbott v. Hancock*, 123 N. C., 99.

The appellants say that the contract growing out of Bynum's acceptance of the option was not assignable. If this be conceded, Bynum retains his interest and can maintain an action against the defendants, his coplaintiff being merely an unnecessary party. It is insisted, however, that this Court has resolved the question against the position of the defendants. *R. R. v. R. R.*, 147 N. C., 368; *Trust Co. v. Williams*, 201 N. C., 464.

It is contended further that the complaint does not state a cause of action in that neither of the plaintiffs is entitled to specific performance of the contract or to the relief demanded. The contract relates to personal property and in such case specific performance as a general rule will not be decreed; but there are recognized exceptions. Jurisdiction to enforce specific performance rests, not on the distinction between real and personal property, but on the ground that damages at law will not afford a complete remedy. *Paddock v. Davenport*, 107 N. C., 710; *Tobacco Association v. Battle*, 187 N. C., 260. The nature of an action is determined by the allegations in the complaint, not by the prayer for relief. A plaintiff may recover any relief to which he is entitled upon the facts alleged in his complaint and established by his proof. *Jones v. R. R.*, 193 N. C., 590. Here the allegations are broad enough to set out two causes of action as in *Paddock v. Davenport, supra*—specific performance and breach of contract. If either can be maintained the judgment must be overruled. Bynum's acceptance of the option within the stipulated period consummated a contract to the performance of which he and the defendants were mutually bound. *Paddock v. Davenport, supra.*

Affirmed.

CLARKSON, J., not sitting.

IN RE CENTRAL BANK AND TRUST COMPANY OF ASHEVILLE, NORTH CAROLINA.

(Filed 21 March, 1934.)

1. **Appeal and Error A f: Banks and Banking H c—Held: court gave implied authority to receiver of insolvent bank to appeal.**

Objection that the statutory receiver of an insolvent State bank has no right of appeal to the Supreme Court from an adverse judgment of the Superior Court without the approval of the court is untenable when it appears that the Superior Court judge gave at least implied authority for appeal by approving the agreement of the parties as to what should constitute the case on appeal after notice of appeal by the receiver. C. S., 632.

2. **Same—The statutory receiver of an insolvent bank may appeal from an adverse judgment without approval of the court.**

The authority and duties of the statutory receiver of an insolvent State bank to defend and prosecute actions involving the management and distribution of the bank's assets in course of liquidation are derived under the statute itself, and it is devolved upon the receiver to take such action as will preserve the rights of those in interest as may be proper, by appeal from an adverse ruling of the Superior Court or otherwise.

3. **Banks and Banking H e—Interest may not be allowed on preferred claim subsequent to statutory receiver's possession of assets of bank.**

Where there is a judgment that the statutory receiver of an insolvent bank allow plaintiff's claim as a preference with other preferred claims against the insolvent bank, such claimant is entitled to dividends, when declared, calculated upon the principal sum due together with interest from the date of the bank's wrongful conversion of the fund to the date the receiver took possession of the bank's assets, but claimant is not entitled to have interest on the fund after the receiver's possession included in calculating the amount of his dividend. In this case claimant did not except to the provision of the judgment that the same rate of interest should be allowed on the claim as claimant was receiving on the bonds converted, and *semble* otherwise 6 per cent interest might have been allowed.

APPEAL by respondent, the Commissioner of Banks, from *Schenck, J.*, at January Term, 1934, of BUNCOMBE. Reversed.

The above entitled cause was heard on the petition of the First National Bank and Trust Company, as receiver and trustee of the Central Securities Company of Asheville, Incorporated, for an order directing the Commissioner of Banks, who is now liquidating the assets of the Central Bank and Trust Company of Asheville, N. C., to pay dividends which have been or shall be declared by him on the principal amount of its claim with interest at 4¼ per cent per annum, from 30 September, 1930, to the dates of such dividends.

The Commissioner of Banks has heretofore paid two dividends—one of 20 per cent and the other of 10 per cent—on claims against the

Central Bank and Trust Company, which have been allowed by him or adjudged by the court as preferred claims. The assets of the Central Bank and Trust Company are not sufficient in amount for the payment in full of all the preferred claims against the Central Bank and Trust Company. No assets are now or will be available for the payment of any dividend on claims which are not entitled to preference. All the assets will be exhausted in the payment of dividends on preferred claims.

The Commissioner of Banks has paid, and unless ordered by the court, will continue to pay dividends on the principal amount of petitioner's claim, with interest at 4¼ per cent per annum, from 30 September, 1930, to 19 November, 1930, the latter being the date on which the Commissioner of Banks took possession of the Central Bank and Trust Company, because of its insolvency. The petitioner's claim is founded on a judgment which it recovered against the Commissioner of Banks, in the Superior Court of Buncombe County, and which was affirmed, on defendant's appeal, by the Supreme Court. See *Bank v. Hood,* 204 N. C., 351, 168 S. E., 528. This judgment is for $117,500, with interest at 4¼ per cent per annum from 30 September, 1930. The judgment was rendered on a cause of action which arose out of the wrongful and unlawful conversion by the Central Bank and Trust Company, on or about 30 September, 1930, of United States Liberty Bonds of the par value of $117,500, bearing interest at 4¼ per cent per annum. The said bonds were owned by the Central Securities Company of Asheville, Incorporated, and were held in trust for said Securities Company by the Central Bank and Trust Company. The claim of the petitioner for damages resulting from the wrongful and unlawful conversion of said bonds was adjudged a preferred claim against the Central Bank and Trust Company, and was ordered paid by the Commissioner of Banks, out of the assets of the Central Bank and Trust Company which had or should come into his hands, as such. The claim has no priority over other preferred claims against the Central Bank and Trust Company.

On the facts found by the court, to which there were no exceptions, it was ordered that the respondent Commissioner of Banks be and he was directed to pay to the petitioner dividends of 20 per cent and of 10 per cent on the amount which was due as interest on the principal of petitioner's claim from 19 November, 1930, to the dates of the dividends theretofore paid by him, respectively. It was further ordered that for the purpose of determining the amount of petitioner's claim on which future dividends shall be paid, the Commissioner of Banks shall compute interest at the rate of 4¼ per cent per annum on the principal of said claim from 30 September, 1930, to the date of each dividend, and add the amount of such interest to the said principal. From this order, the Commissioner of Banks appealed to the Supreme Court.

Alfred S. Barnard for petitioner.
Johnson, Smathers, Rollins & Uzzell and C. I. Taylor for respondent.

CONNOR, J. The record in this proceeding shows that the respondent Commissioner of Banks duly excepted to the order of the court, and gave due notice of his appeal from said order to this Court; that, with the approval of the court, it was agreed that the notice of appeal, the petition of the petitioner and the answer of the respondent, and the order of the court, containing its findings of fact, should constitute the case on appeal for this Court; and that it was adjudged by the court that an appeal bond in the sum of $50.00 was sufficient.

In this Court, the appellee contends that the appellant Commissioner of Banks had no interest which was affected by the order of the court, and was therefore not a person aggrieved by the order. For this reason, it is argued that the Commissioner of Banks had no right to appeal from the order, and that his appeal should be dismissed. C. S., 632. The appellee relies on the principle that a receiver, being an officer of the court, has no right, in the absence of authority from the court by which he was appointed, to appeal from an order instructing him with respect to the performance of his duties as a receiver, 23 R. C. L., 133. This principle has been recognized by this Court in *Bank v. Bank,* 127 N. C., 432, 37 S. E., 461, and in *Strauss v. Loan Association,* 118 N. C., 556, 24 S. E., 116. If the principle is applicable at all to the Commissioner of Banks, who is a statutory receiver of insolvent banks doing business in this State (*Blades v. Hood,* 203 N. C., 56, 164 S. E., 828, *Buncombe County v. Hood,* 202 N. C., 792, 164 S. E., 370), it is not applicable in the instant case, for the reason that the record shows that the exception to the order was noted, and the appeal was taken, with the approval of the court. The appeal entries in the record justify the inference that the appeal was authorized by the court, if its authority was required.

The Commissioner of Banks, when engaged in the liquidation of the assets of an insolvent bank, as authorized by statute, does not derive his power or his authority from the court. His power and authority, both to take possession of an insolvent bank, and to liquidate its assets for distribution among its creditors according to their respective rights, are derived from the statute. Chapter 113, Public Laws of 1929, as amended by chapter 243, Public Laws of 1931. In a proper case, it is both his right and his duty to appeal from the order or the judgment in an action or proceeding to which he is a party. The contention of the appellee in the instant case, that the Commissioner of Banks has no right to prosecute his appeal in this Court is not sustained. The purpose of the statute is to secure an equitable distribution of the assets of an insolvent bank among its creditors in accordance with their respective

rights. An order or judgment which defeats this purpose is erroneous and will be reversed by this Court in the exercise of its appellate jurisdiction.

The rule approved generally by the courts, with respect to the computation of interest on claims against an insolvent person or corporation which are to be paid out of the assets of such person or corporation, is that "in the distribution of the estate of an insolvent, interest should be computed to the time of the institution of insolvency proceedings upon all debts drawing interest either by agreement of the parties, or as legal damages for nonpayment." 32 C. J., 884.

This is the rule which was applied by the Commissioner of Banks in the instant case, and is, we think, not only a practical but a just rule. There was error in the order directing the Commissioner of Banks to disregard this rule in the instant case. It may be that the petitioner would have been entitled to interest on the amount of his damages for the wrongful and unlawful conversion of the Liberty Bonds at 6 per cent per annum. It did not, however, except to the judgment by which interest at only 4¼ per cent was allowed. The judgment is therefore conclusive in all respects on both the petitioner and the respondent. The order is

Reversed.

STACY WHARTON v. HOME SECURITY LIFE INSURANCE COMPANY.

(Filed 21 March, 1934.)

1. Insurance D a—Where beneficiary has no insurable interest in life of insured the policy taken out by him is void.

The beneficiary named in a policy of life insurance who pays the premiums thereon will not be allowed to recover on the policy upon the death of the insured where the beneficiary had no insurable interest in the life of the insured, such policies being void as gaming contracts contrary to our public policy.

2. Insurance D b—

Nephews and nieces have no insurable interest in the life of their aunt merely by virtue of the relationship.

3. Insurance E b—

An incontestable clause in a policy of life insurance cannot deprive our courts of the power to declare the policy void as being in contravention of well settled public policy.

APPEAL by defendant from *Sink, J.*, at June Term, 1933, of FORSYTH.

Reversed.

This is an action by the plaintiff as the beneficiary to recover the amount due on a policy of insurance issued by the defendant on the life of Grace Love.

The action was begun and tried in the Forsyth County Court.

The policy of insurance sued on was issued by the defendant on 12 March, 1928. The insured, Grace Love, died on 27 June, 1932. At the date of her death, the policy was in full force and effect, according to its terms. All the premiums required to keep the policy in force had been paid to the defendant. The amount due under the policy is $328.00.

The policy was issued by the defendant on the application of Elbert Sprinkle, who is a nephew of the insured, Grace Love. He was the beneficiary named in the policy when it was issued. He agreed to pay and did pay the first and all succeeding premiums on the policy until some time during the year 1930, when he ceased to pay the premiums. After he ceased to pay the premiums, the plaintiff, who is a niece of the plaintiff, began to pay the same and continued to do so until the death of the insured. She was present when Elbert Sprinkle, on the solicitation of an agent of the defendant, applied for the policy, and knew that he then agreed to pay and subsequently did pay the premiums on the policy from the date of its issuance until she began to pay the same. There was no evidence at the trial tending to show that Grace Love, the insured, knew that a policy on her life had been issued by the defendant, and that her nephew, Elbert Sprinkle, or her niece, the plaintiff, were paying premiums on such policy. She did not live with either Elbert Sprinkle, or the plaintiff. She had no relationship in blood or otherwise to either, except as aunt.

The policy sued on in this action bears an endorsement as follows:

"Durham, N. C., 2/24/1930. Beneficiary under this policy is changed to Stacy Wharton, niece. R. M. Moise, president."

The policy contains a clause as follows:

"8th. Incontestability. After this policy has been in force for two full years, it shall be incontestable except for nonpayment of premiums, fraud, misstatement of age or violation of article third. In case of misstatement of age, however, no greater amount will be paid hereunder than the amount which the premium paid would have purchased for the true age at the rate in use at the date of this policy, except when the true age at time of entry is more than fifty-five years the liability of the company will be a refund of the premiums paid and no more."

At the trial the defendant contended and offered evidence tending to show that at the time the policy was issued, the insured, Grace Love, was over fifty-five years of age. Evidence offered by the plaintiff tended to show that the insured was only forty years of age at the time the policy was issued, as stated in the application for the policy.

The issues submitted to the jury were answered as follows:

"1. Did the defendant execute and deliver its policy of insurance on the life of Grace Love as alleged in the complaint? Answer: Yes (by consent).

2. Was the beneficiary changed in said policy by the defendant as alleged in the complaint? Answer: Yes.

3. Was Grace Love, the insured, over fifty-five years of age at the time the policy was issued on her life, as alleged in the answer? Answer: No.

4. In what amount, if any, is the defendant indebted to the plaintiff? Answer: $328.00, with interest from the death of the insured."

From judgment that plaintiff recover of the defendant the sum of $328.00 with interest from 27 June, 1932, and the costs of the action, the defendant appealed to the Superior Court of Forsyth County. At the hearing of this appeal the judgment was affirmed, and defendant appealed to the Supreme Court.

Stratton Coyner for plaintiff.

Wm. H. Boyer and Manly, Hendren & Womble for defendant.

CONNOR, J. Neither Elbert Sprinkle, the original beneficiary, nor the plaintiff, the substituted beneficiary, in the policy of insurance sued on in this action, had an insurable interest in the life of Grace Love, the insured, by reason of their relationship to her, as nephew and niece, respectively. In *Hardy v. Ins. Co.*, 152 N. C., 286, 67 S. E., 767, it is said that it is very generally held that the relationship of uncle and nephew does not of itself create an insurable interest in favor of either. This principle is manifestly applicable to the relationship of aunt and nephew and of aunt and niece. See 37 C. J., 394.

There was no evidence at the trial of this action tending to show any facts on which it could be held that the original beneficiary, at the time the policy was issued, or that the substituted beneficiary, at the time the beneficiary was changed by the endorsement on the policy, had any pecuniary interest in the continuance of the life of the insured.

It is well settled as the law in this and other jurisdictions that a person cannot take out a valid and enforceable policy of insurance for his own benefit on the life of a person in which he has no insurable interest; such a policy or contract of insurance is void and unenforceable on grounds of public policy, it being merely a wagering contract. 37 C. J., 385, and cases cited in support of the text.

Conceding this to be the law in this State with respect to the validity of the policy of insurance sued on in this action, it is contended on behalf of the plaintiff, that the principle is not applicable because of the presence in the policy of the incontestable clause. This contention cannot be

sustained. The parties to a contract which is void because in contravention of a well settled public policy, cannot bind themselves by such contract, and thus deprive the courts of the power to enforce the public policy of the State by their judgments. In *Bromley v. Ins. Co.* (Ky.), 92 S. W., 17, 5 L. R. A. N. S., 747, it is well said: "It is also insisted for the plaintiff that as the policies contain a clause to the effect that they are incontestable after one year, the company cannot rely upon this defense. But the incontestable clause is no less a part of the contract than any other provision of it. If the contract is against public policy, the Court will not lend its aid to its enforcement. The defense need not be pleaded. If at any time it appears in the process of the action that the contract sued upon is one which the law forbids, the Court will refuse relief."

In the instant case, there was error in the refusal of the trial court to dismiss the action at the close of all the evidence. The judgment of the Superior Court, affirming the judgment of the county court, is for that reason

Reversed.

T. C. POTTS, ADMINISTRATOR OF JOSEPH W. ABEL, v. LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 21 March, 1934.)

1. **Insurance I b—Policy issued without medical examination may be attacked for fraudulent misrepresentations by insured as to health.**

N. C. Code, 6460, expressly provides that policies issued without a medical examination may not be declared forfeited by insurer for misrepresentations by insured as to health except in cases of fraud, and where fraud in the procurement of the policy is alleged and proved the beneficiary named in the policy may not recover, and a representation by insured that he had never consulted a physician or been in a hospital is material, C. S., 6289, and testimony of physicians that insured was not in sound health at the date of the delivery of the policy is competent on the issue of fraud.

2. **Same: Insurance P d—Where insurer does not tender issue of fraud, unsound health of insured will not preclude recovery on policy.**

Where insurer does not tender an issue of fraud in the procurement of a policy issued without medical examination, but tries its case solely on the theory that insured was not in sound health at the date the policy was issued, and does not except to the issue submitted by the court based on this theory, testimony of physicians that insured was not in sound health at the date of the delivery of the policy is incompetent as being testimony of the very question to be decided by the jury, and the exclusion from the evidence of insured's application containing the alleged

misrepresentations will not be held for error, since, upon the theory of trial, insured's unsound health at the date the policy was issued would not preclude recovery, N. C. Code, 6460.

3. Appeal and Error B b—

Appellant's exceptions and assignments of error will be considered upon appeal in the light of the theory upon which the case was tried in the lower court.

CIVIL ACTION, before *Sink, J.*, at August Term, 1933, of GUILFORD.

This action was instituted and tried in the municipal court of the city of High Point. It was alleged that on 20 July, 1931, the defendant executed and delivered a certain policy of life insurance upon the life of Joseph W. Abel in the sum of $500.00, said policy being No. 5942823. The insured died on 8 January, 1932. The defendant admitted the execution and delivery of the policy, but alleged that it was provided therein that "this policy shall be void if upon its date and delivery the insured be not alive and in sound health," etc., and that the insured was not in sound health on the date of delivery.

The defendant also alleged by way of cross action that the insured signed a written application for said insurance, and that in response to certain questions propounded in said application, gave false answers and made false representations therein, and that said representations were known by the insured at the time to be false and were made with knowledge of falsity, with intent to deceive. Question 13 in said application is as follows: "(a) What is present condition of health?" "(b) When last sick?" The insured answered the first question "Good," and the second question "Never." Question 15 was: "Has said life ever been under treatment in any dispensary, hospital or asylum," etc.? The insured answered "No." Question 16 related to certain diseases including disease of the heart, disease of kidneys, disease of lungs, disease of liver, etc. The insured answered "No." Question 17 was: "Has life proposed been attended by a physician during the past twelve months? If so, for what diseases? When? Names of physicians? Residence?" The insured answered "No." The application signed by the insured also contained the following: "And I declare that the answers to the above questions and those made or to be made to the medical examiner on the back hereof are complete, strictly correct and true; that the several questions were duly asked, and that the answers given by me are truly recorded hereon," etc.

The policy was issued without medical examination except such as was made by an agent of the defendant, who was not a physician. The judge of the municipal court excluded the application as evidence and the defendant excepted.

Dr. McCain testified that he treated the insured in February or March, 1931, preceding the application for insurance, and that he came to his office every two weeks "from February until June or July, 1931." Dr. Flagge testified that he treated the insured from 9 June until the time of his death, approximately each week, and that the insured was suffering with a stone "in the kidney." This physician stated that he had an opinion as to whether the insured was in sound health on 9 June, 1931, preceding the application for insurance, and on 20 July, 1931, when the policy was delivered, but the court would not permit witness to state that in his opinion the insured was not in sound health on the date of the delivery of the policy, and the defendant excepted. The trial judge declined to permit the defendant to offer the testimony of the superintendent of the policy department of defendant to the effect that the application signed by the insured influenced him in acting favorably and in delivering the policy.

Without objection the following issues were submitted to the jury:

1. "Was the deceased, Joseph W. Abel, in sound health on 20 July, 1931?"

2. "What amount, if any, is plaintiff entitled to recover of the defendant?"

The jury answered the first issue "Yes," and the second issue "$500.00."

From judgment upon the verdict exceptions were filed and heard by the judge of the Superior Court, who overruled the exceptions and affirmed the judgment of the municipal court. From such judgment the defendant appealed.

T. W. Albertson and David H. Parsons for plaintiff.

W. Ney Evans for defendant.

BROGDEN, J. Does N. C. Code, 6460, apply to the policy issued to the plaintiff?

It must be noted that this case does not involve a limitation of the coverage clause of the policy as in *Gilmore v. Ins. Co.*, 199 N. C., 632, 155 S. E., 566; *Reinhardt v. Ins. Co.*, 201 N. C., 785.

The policy was issued without medical examination by a physician, and N. C. Code, 6460, provides "that where there has been no medical examination the policy shall not be rendered void nor shall payment be resisted on account of any misrepresentation as to the physical condition of applicant except in cases of fraud." It was held in *Holbrook v. Ins. Co.*, 196 N. C., 333, 145 S. E., 609, that if an insurance company issued a policy to a person it knew to be physically unsound or took a chance upon physical unsoundness without medical examination that such company could not resist payment except in cases of fraud.

Manifestly it was not the purpose of N. C. Code, 6460, to permit a recovery on an insurance policy issued without medical examination irrespective of the facts surrounding the transaction; otherwise the expression "except in cases of fraud" would have neither meaning nor significance. It is apprehended that if fraud in the procurement of a policy is alleged, an issue tendered or submitted together with competent evidence, and a jury shall find the existence of fraud in such procurement, then and in such event no recovery can be had. That is to say, "in cases of fraud" a policy issued without medical examination stands upon the same footing as policies issued upon such examination.

The defendant pleaded fraud and offered the application in evidence, and also offered the testimony of physicians tending to show that the representations made by the insured in the application were false. Obviously the statements made by the insured to the effect that he had never consulted a physician or been in a hospital were material. C. S., 6289. This evidence was competent upon an issue of fraud, but no such issue was tendered. Moreover, the issue submitted by the trial court was not objected to. Hence the parties chose "sound health on 20 July, 1930" as the battleground, and the theory upon which to determine the merits of the controversy. "If the defendant did not consider the issues submitted by the court proper or relevant, it was his duty to tender other issues, and having failed to do so, he cannot now complain." *Greene v. Bechtel,* 193 N. C., 94, 136 S. E., 294. McIntosh, North Carolina Practice & Procedure, p. 545. McIntosh states the proposition of law as follows: "If the parties consent to the issue submitted, or do not object at the time or ask for different or additional issues, the objection cannot be made later."

Consequently, the opinion of the physician, who was not qualified as an expert, that the insured was not in sound health on the date of the delivery of the policy was incompetent for the reason that "sound health" was the very question to be determined not by the witness, but by the jury. *Marshall v. Tel. Co.,* 181 N. C., 292, 106 S. E., 818; *Trust Co. v. Store Co.,* 193 N. C., 122, 136 S. E., 289; *Denton v. Milling Co.,* 205 N. C., 77. The theory upon which a cause is tried must prevail in considering the appeal, and in interpreting a record and in determining the validity of exceptions. *Walker v. Burt,* 182 N. C., 325, 109 S. E., 43; *Shipp v. Stage Lines,* 192 N. C., 475, 135 S. E., 339; *Holland v. Dulin, ante,* 211.

Affirmed.

W. F. JENNINGS v. STANDARD OIL COMPANY OF NEW JERSEY AND S. W. TWIFORD, TRADING AS QUINN FURNITURE COMPANY.

(Filed 21 March, 1934.)

1. Negligence D c—Plaintiff must establish negligence or facts upon which to invoke doctrine of res ipsa loquitur.

Where in an action to recover for injuries received when oil in an oil stove exploded when plaintiff attempted to light the oil, there is no evidence of defect in the stove or in the quality or adaptability of the oil furnished therefor, a nonsuit is proper unless the doctrine of *res ipsa loquitur* applies.

2. Negligence A e—Doctrine of res ipsa loquitur held not to apply upon facts of this case.

Plaintiff attempted to light the oil in an oil stove in his own way and according to his own judgment and was injured by an explosion of the oil. Immediately after the injury and for the rest of the winter the stove was lit, without repair or change of oil, and burned in the ordinary way without accident or injury. *Held*, more than one inference can be drawn from the evidence as to the cause of plaintiff's injury, and the doctrine of *res ipsa loquitur* does not apply.

CIVIL ACTION, before *Cowper, Special Judge,* at October Term, 1933, of PASQUOTANK.

The defendant Twiford, trading as Quinn Furniture Company, is a merchant and is a distributor for a certain type of stove known as the Superfex Oil Burning Heater and certain of these stoves were installed in his store in Elizabeth City in the winter of 1931. The stove was heated by means of oil, which is sometimes called fuel oil or heating oil. The oil was furnished the defendant Twiford by the defendant, Standard Oil Company of New Jersey. The plaintiff said: "I worked for the Quinn Company around seven years. I was not working for them at the time of my injury, as I had stopped about a month and a half prior to that. At the time of my services with them I usually lighted the Superfex Oil Burning Heater. . . . When the fire is out we generally turn the valve down and wait about a minute and light a match and throw it in. The oil is kept in a container back of the stove and runs down in the stove in the pan and that is lighted with a piece of paper or a match. The oil got down from the tank to the pan from a tube about one-fourth inch in diameter, and I opened a valve to cause the oil to run from the tank to a pan which would take about a minute. A lighted match or a piece of burning paper was then thrown into the stove through an opening in the front. . . . On the morning I was hurt I went down to the store with Mr. Hales in his car. . . . About a minute after I got there I saw Mr. Davis, the head

clerk. . . . The stove was not burning that morning when I went in but was cold. . . . Mr. Davis went somewhere . . . and he came back and told me to light the stove and don't catch the cap. To strike a lighted match and put it in there, but not to catch the cap. There was but one cap on the stove. I then attempted to do what he told me. I lighted the match and threw it in there and started to put back the cap with my right hand, but I never did get it in the hole. It caught up and blew out before I could get the cap in the hole. When I threw that lighted match in, the oil blew up and blew out. I mean the oil exploded. It blew out, blew the pipe out and hit me all over, and I was in a burning place in the store about eight feet square. It just seemed to flash when the lighted match struck the oil. It just blew out. The flame struck me right in the face and went all over me and laid me out and blew me down. . . . They had used the Superfex Oil Burner just a month or two to the time I quit. . . . I operated a Superfex stove." . . .

The evidence further tended to show that the same oil had been used in the heater since the installation of the stove, and that all of the oil had been supplied by the Standard Oil Company. The stove continued to be used that same day Mr. Jennings was injured and no repairs or changes were made on it. It was used the next day and so on during the winter. It worked fine and in number one shape. A witness said: "I looked at the oil in the tanks on the stove after it had flared out, and it was the same kind of oil that was in those two barrels and the same kind that we continued to use in the stove up until the present time." The defendant Twiford said: "Shortly after he was hurt this very stove was lighted up again with the same oil in it. . . . After the accident and Mr. Jennings was carried home, the stove was lighted again and it went off burning as it always did, and we had in the stove at that time exactly the same oil it had when Mr. Jennings attempted to light it. . . . After Mr. Jennings was hurt the stove was lighted and did not explode but went off burning as it always did. . . . After the accident nothing at all had to be done by way of repairing the stove. It looked exactly as it does now except it might not have been as clean."

At the conclusion of the evidence the trial judge entered a judgment of nonsuit and the plaintiff appealed.

M. B. Simpson and McMullan & McMullan for plaintiff.
J. H. LeRoy, Jr., and John H. Hall for Twiford.
Thompson & Wilson for Standard Oil Company.

BROGDEN, J. There was no evidence of any defect in the stove or in the quality or adaptability of the oil furnished therefor. The stove did

not explode, but the oil flashed out of the pan when the plaintiff threw a lighted match therein. Consequently, if the principle of *res ipsa loquitur* does not apply, the judgment of nonsuit was correct. Everybody knows that a lighted match will ignite kerosene or fuel oil. The plaintiff knew that. Moreover, he undertook to light the stove in his own way and according to his own judgment.

Upon all the facts disclosed by the evidence "the existence of negligent default is not the more reasonable probability" and "the proof of the occurrence without more leaves the matter resting only in conjecture." Obviously, more than one inference can be drawn from the evidence as to the cause of the injury, and therefore, the case falls within the exceptions pointed out in *Springs v. Doll,* 197 N. C., 240, 148 S. E., 251, rather than within the principle underlying the typical explosion cases, such as *Howard v. Texas Co.,* 205 N. C., 20.

Affirmed.

T. J. TAYLOR v. BOARD OF EDUCATION OF DAVIDSON COUNTY ET AL.

(Filed 21 March, 1934.)

Counties E b—County held authorized to issue bonds for sanitary improvements for school houses necessary to constitutional school term.

A county is authorized by specific or special legislation to issue without a vote bonds for sanitary improvements for its schoolhouses necessary for it to maintain, as an administrative unit of the State, the constitutional school term in the county, when the maturity dates of the bonds are within the limits fixed by the County Finance Act, and the bonded indebtedness of the county after issuance of the bonds will not exceed five per cent of the assessed valuation of the taxable property therein. 3 C. S., 1291(a). Chapter 81, sec. 8, Public Laws of 1927, as amended by chapter 60, Public Laws of 1931, 3 C. S., 5475, 5479.

APPEAL by plaintiff from *Sink, J.,* at Chambers in Rockingham, 9 January, 1934. From DAVIDSON.

Civil action to restrain the defendant board of commissioners of Davidson County, from issuing bonds of the county to care for necessary improvements of the consolidated schools of the county.

The case was heard on an agreed statement of facts, which may be abridged and stated as follows:

1. On 4 September, 1933, pursuant to notice from the State Board of Health, the board of education of Davidson County met in joint session with the board of commissioners of said county and found as a fact that the water supply, sewage disposal plant, heating system and building facilities for some of the consolidated schools of the county

(operated by the county as an agency of the State on the county-wide school plan) were inadequate, and that the requisite permanent improvements and additional equipment necessary to operate and maintain said schools for the constitutional six months period would call for the expenditure of $80,000. Said estimate was arrived at after a careful survey by a committee appointed for the purpose.

2. On 6 November, 1933, the board of education of Davidson County duly authorized application for loan for said amount and for said purposes from the Federal Emergency Administration of Public Works.

3. On the same day, the board of commissioners of Davidson County, acting on the resolution of the board of education of said county, and a joint resolution of both boards, authorized a bond issue in the sum of $80,000 to provide the necessary improvements and additional building facilities required for the operation and maintenance of the consolidated schools of the county, operated on the county-wide plan.

4. In the same resolution, the board of county commissioners authorized the borrowing of $80,000 from the Federal Emergency Administration of Public Works, and the issuance and delivery therefor of county bonds, in said sum, with maturity dates as follows: $4,000 per year from 1935 to 1944, inclusive; $7,000 per year from 1945 to 1949, inclusive; $5,000 in the year 1950; said bonds to bear interest at the rate of 4 per cent per annum.

5. It is agreed that $31,612,143 was the assessed valuation of taxable property in Davidson County for the last preceding assessed valuation; and that the total bonded indebtedness of the county is $697,000.

6. Application has been filed with the Federal Emergency Administration of Public Works to borrow said amount of money on the bonds of Davidson County, and said application has been approved.

7. Plaintiff sues as a resident and taxpayer of the county to restrain the issuance of said bonds. *Eaton v. Graded School,* 184 N. C., 471, 114 S. E., 689.

From a judgment upholding the validity of said proposed bonds and dismissing plaintiff's petition with costs, he appeals, assigning error.

D. L. Pickard and Martin & Brinkley for plaintiff.

P. V. Critcher for defendants.

STACY, C. J. We have held in a number of cases that the commissioners of a county, acting as an administrative agency of the State, may issue notes and bonds of the county for the purpose of acquiring sites, building the necessary schoolhouses and operating the public schools of the county without submitting the matter to a vote of the people "where such schoolhouses are required for the establishment or

maintenance of the State system of public schools in accordance with the provisions of the Constitution." *Julian v. Ward*, 198 N. C., 480, 152 S. E., 401; *Hall v. Comrs. of Duplin*, 195 N. C., 367, 142 S. E., 315.

It was said in *Frazier v. Comrs.*, 194 N. C., 49, 138 S. E., 433, that the counties of the State were, by the "County Finance Act," chap. 81, Public Laws 1927 (amended by the "Local Government Act," chap. 60, Public Laws, 1931), authorized to issue bonds and notes "for the erection of schoolhouses and for the purchase of land necessary for school purposes, and to levy taxes for the payment of the same, principal and interest, not as municipal corporations, organized primarily for purposes of local government, but as administrative agencies of the State, employed by the General Assembly to discharge the duty imposed upon it by the Constitution to provide a State system of public schools."

Section 8 of the County Finance Act provides, among other things, that the counties of the State may issue bonds and notes, and levy taxes for the payment of the same, for the "erection and purchase of schoolhouses."

It is also provided by 3 C. S., 5475, that the county board of education of any county, upon recommendation of the State Board of Health, shall provide for proper sanitation at each public school, deemed an essential and necessary part of the equipment of such school, and a failure on the part of the officers charged with this duty, or of county commissioners to provide the necessary funds, is made a misdemeanor.

Likewise, by 3 C. S., 5479, the duty is imposed upon the county board of education of the several counties to make such provisions as will give the teachers and pupils of the various schools a good supply of wholesome water during the school term.

Thus, it appears that specific or special legislative authority exists for the issuance of the bonds in question for the purposes designated. *Glenn v. Comrs. of Durham*, 201 N. C., 233, 159 S. E., 439.

It also appears that the bonded indebtedness of the county, after the issuance of said bonds, will not exceed 5 per cent of the assessed valuation of the taxable property in the county, the limit fixed by 3 C. S., 1291(a).

The maturity dates of said bonds are well within the limits fixed by the County Finance Act.

We find nothing in the School Law of 1933, chap. 562, Public Laws, 1933, which militates against any of the positions herein taken.

No error having been made to appear in the ruling of the court below, the judgment will be upheld.

Affirmed.

LOVE PENDER v. THE NATIONAL CONVOY AND TRUCKING COMPANY AND FLOYD S. WILLIAMS.

(Filed 21 March, 1934.)

Automobiles C d—Under circumstances of this case driver was under duty to warn approaching motorists that highway was blocked by his truck.

The driver of a truck and trailer, in attempting to turn the truck around on the highway within the corporate limits of a town, drove the truck into an unpaved side road, and the truck became stuck in the soft dirt of the road, leaving the trailer across the highway completely blocking it at a point where motorists approaching around a curve down a steep grade might not be able to see the trailer in time to avoid hitting it. Plaintiff introduced evidence that while defendant's truck and trailer were in this position he approached in his truck around the curve and was unable to avoid hitting the trailer, and that the driver of defendant's truck, although knowing of the danger to approaching motorists, failed to warn them of the danger by flagman or other danger signal, and that such failure was the proximate cause of plaintiff's injuries. *Held*, under the circumstances it was the duty of defendant's driver to exercise due care to warn approaching motorists of the danger, and defendant's motion as of nonsuit was properly denied.

APPEAL by defendants from *McElroy, J.*, at October Term, 1933, of MADISON. No error.

This is an action to recover damages for injuries to the person and to the property of the plaintiff, caused, as alleged in the complaint, by the negligence of the defendants in the operation of a truck and trailer owned by the defendant, the National Convoy and Trucking Company, and operated by the defendant, Floyd S. Williams, its employee.

The evidence at the trial tended to show that on 3 November, 1932, a truck owned and driven by the plaintiff collided with a trailer attached to a truck owned by the defendant, the National Convoy and Trucking Company, and operated by the defendant, Floyd S. Williams, its employee, within the corporate limits of the town of Marshall, N. C., on State Highway No. 20, with the result that plaintiff's truck was badly injured, and that plaintiff suffered painful and permanent injuries to his person.

At the time of the collision, the trailer attached to the truck extended across and completely obstructed the highway. The truck and trailer were about 61 feet in length; the highway through the town of Marshall, and at the place of the collision, was 18 or 20 feet wide. The defendant Floyd S. Williams had undertaken to turn the truck and trailer around on the highway, by driving the truck into a side-road, which was not paved, leaving the trailer extending across and completely obstructing

the highway. The wheels of the truck stuck in the soft ground of the side-road, and for this reason the defendant was unable to move the truck or the trailer. He was in this situation for 10 or 15 minutes before the collision, and during that time made no effort to warn drivers of approaching automobiles or trucks of their peril, although he could see that a curve in the highway would prevent such drivers from seeing the trailer until they were so close to it that they might not be able to stop and thus avoid a collision. All his efforts were devoted to moving the truck and trailer. There were several persons present, attracted by his situation, but defendant did not request any one of them to warn drivers of approaching automobiles or trucks of their peril, by flags or otherwise.

While defendant's trailer thus obstructed the highway, the plaintiff, driving his truck, which was heavily loaded, approached on the highway, coming down grade. Because of a curve in the highway, the plaintiff did not see, and could not see, the trailer, until he was within 25 or 30 feet of the obstruction. After he saw that the trailer was across the highway, completely obstructing it, the plaintiff was unable to stop his truck, because of the steep grade and his heavy load. Despite his efforts to avoid a collision, he was unable to do so. Plaintiff suffered painful and permanent injuries to his person as the result of the collision. His truck was badly injured.

Issues involving defendants' negligence, plaintiff's contributory negligence, and the amount of damages sustained by the plaintiff, as a result of his injuries, were submitted to the jury and answered in favor of the plaintiff.

From judgment that plaintiff recover of the defendants the sum of $10,150, the amount of the damages assessed by the jury, and the costs of the action, the defendants appealed to the Supreme Court.

J. C. Ramsey, M. E. Ramsey, J. H. McElroy and Carter & Carter for plaintiff.

J. H. Sample and Weaver & Miller for defendants.

CONNOR, J. In the 9th paragraph of his complaint, the plaintiff alleges that the collision between his truck and the truck owned by the defendant, the National Convoy and Trucking Company, and operated at the time of the collision by the defendant, Floyd S. Williams, its employee, was caused by the negligence of the defendants, in that:

"(a) Defendants knowingly, wilfully, carelessly, recklessly and negligently attempted to turn an automobile truck more than 61 feet long, on a narrow road, on a curve completely blocking said road to other vehicles using the same;

(b) Defendants wilfully, recklessly, and negligently, without due care for the safety of others using said road, blocked the same without giving warning by flagman or other danger signals, to drivers of vehicles coming down a steep grade and around a curve above the point so blocked by defendants;

(c) By driving and operating upon the highways of the State a truck with a trailer attached dangerous to the traveling public without having thereon some signal of danger to show others using said highways of their danger; said trailer being of a length in excess of that allowed by law."

Conceding that there was no evidence at the trial of this action, tending to show negligence on the part of the defendants as specified in sections (a) and (c) of paragraph 9 of the complaint, we are of the opinion that there was evidence tending to show negligence as specified in section (b) of said paragraph. For this reason, there was no error in the refusal by the trial court of defendants' motion for judgment as of nonsuit, at the close of all the evidence. The defendant, Floyd S. Williams, after he found himself unable to move the truck and the trailer, because the wheels of the truck had stuck in the soft ground off the pavement, owed the duty to plaintiff and others approaching the obstruction in the highway, on automobiles or trucks, to exercise reasonable care to warn them of their peril. A failure to perform this duty was negligence. There was evidence tending to show that such negligence was the proximate cause of the collision, resulting in injury to the plaintiff.

The exceptions to the charge of the court to the jury are without merit. The instructions with respect to negligence on the part of the defendants, and contributory negligence on the part of the plaintiff, were in accord with well settled principles of law. There was no error in the trial. The judgment is affirmed.

No error.

BRANCH BANKING AND TRUST COMPANY v. GURNEY P. HOOD, COMMISSIONER OF BANKS.

(Filed 21 March, 1934.)

1. Banks and Banking H e—Funds deposited in bank acting as financial agent under ch. 299, Public-Local Laws in 1927, held not entitled to preference.

After the expiration of his term of office the ex-clerk of the Superior Court turned over to a banking institution acting as county financial agent funds in his possession belonging to minors, wards and estates

with itemized statement showing to whom the funds belonged. The bank, instead of investing the funds as required by statute, commingled them with its general deposits, and later became insolvent while part of the funds were still on deposit. *Held*, its successor as financial agent is not entitled to a preference in the bank's assets for the amount of the deposit, the statute under which the funds were deposited in the bank as financial agent failing to show an intention to create a preference for such funds upon the financial agent's insolvency as against other creditors. Chapter 299, Public-Local Laws of 1927.

2. Statutes B a—

The legislative intent is controlling in the construction of statutes.

APPEAL by defendant from *Barnhill, J.*, at November Term, 1933, of WILSON.

Civil action to establish preference, or priority of 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 alleged and admitted or not denied:

1. On 2 January, 1931, J. D. Bardin, ex-clerk Superior Court for Wilson County (his term of office having expired first Monday in December, 1930) turned over to the Planters Bank of Wilson, as the financial agent of Wilson County, the sum of $18,621.40, as directed and required to do by the provisions of chap. 299, Public-Local Laws, 1927, the same being funds in the hands of the clerk belonging to minors, wards, and estates, and received by him by virtue of his office. An itemized statement showing the persons to whom the various funds belonged was duly presented, and the same were received with full knowledge of the character and details of the different accounts.

2. The Planters Bank as financial agent of Wilson County, executed and delivered receipt for said funds "in full discharge to the said clerk for any liability incurred by him because of the receipt of said funds." Section 2, chapter 299, Public-Local Laws, 1927.

3. By section 3 of said act it is provided that the financial agent "shall keep said funds until they shall become due and payable to the person entitled to receive them; . . . shall invest the same in good, safe, interest-bearing securities . . . and shall annually render to the clerk of the Superior Court an account as is required of guardians, administrators and other trustees."

4. The funds in question were received under and by virtue of the provisions of this act.

5. The Planters Bank instead of investing said funds in good, safe, interest-bearing securities, mixed and commingled the same with other funds and moneys of said bank.

6. On 28 December, 1931, the said Planters Bank closed its doors on account of insolvency, and the Commissioner of Banks duly took over

its assets for liquidation. Of the amount originally received and credited to this account, the sum of $11,769.29 was on deposit to the credit of said account at the time of the bank's closing.

7. The Branch Banking and Trust Company was duly appointed financial agent of Wilson County as successor to the Planters Bank. As such successor, claim was duly made for the above amount and allowed as a common claim, but denied as a preferential one.

This suit is to determine the priority of plaintiff's claim, which was allowed as such by the court below on the foregoing undisputed facts, and from this ruling the defendant appeals.

S. G. Mewborn and Finch, Rand & Finch for plaintiff.
Connor & Hill for defendant.

STACY, C. J. Perhaps the impolicy of turning over trust funds belonging to minors, wards, and estates, to a financial agent, though a banking institution, without requiring any bond for their security, is what led the trial court to perceive that a preference was intended by the General Assembly in case of insolvency of such institution. But there is nothing in the act which conveys the impression that the Legislature intended to make the creditors of the financial agent, in case of insolvency, insurers of said funds.

The heart of a statute is the intention of the law-making body.

Under the decisions in *Hicks v. Corp. Co.*, 201 N. C., 819, 161 S. E., 545, *Bank v. Corp. Com.*, 201 N. C., 381, 160 S. E., 360, and *Roebuck v. Surety Co.*, 200 N. C., 196, 156 S. E., 531, plaintiff's claim is properly provable as one of commonalty, but not as one of preference.

The cases of *Flack v. Hood*, 204 N. C., 337, 168 S. E., 520, and *Parker v. Trust Co.*, 202 N. C., 230, 162 S. E., 564, upon which plaintiff relies, are easily distinguishable.

Error.

MRS. WARDY HEADEN v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 21 March, 1934.)

Insurance I b—Policies issued without medical examination may not be declared forfeited for ill health of insured in absence of fraud.

The provisions of N. C. Code, 6460, that where a policy of life insurance in a sum less than $5,000 is issued without a medical examination, insurer may not avoid same for insured's misrepresentations as to health except in cases of fraud, enter into and become a part of all such policies written

in this State after the enactment of the statute, and, except in cases of fraud, insurer may not declare a forfeiture under the provisions of the policy that insurer should not be liable if insured was not in sound health at the time of the delivery of the policy, or had not been in good health for two years prior thereto, etc., since the provisions of the policy in conflict with the statute are void.

APPEAL by defendant from *Oglesby, J.*, at March Term, 1933, of MECKLENBURG.

Civil action to recover on a policy of life insurance.

On 28 July, 1930, the defendant issued a policy of insurance on the life of Mrs. Salem Knuckley, plaintiff's intestate, in the sum of $320.00. The policy was issued without medical examination of the insured. The premiums were duly paid until the insured's death on 27 October, 1931.

The policy provides that "if the insured is not in sound health on the date hereof," or if "within two years before the date hereof," the insured has "been attended by a physician for any serious disease or complaint," or before said date, has had any "disease of the heart, liver or kidneys," not specifically recited in the space for endorsements, "then, in any such case, the company may declare this policy void and the liability of the company in the case of any such declaration or in the case of any claim under this policy, shall be limited to the return of premiums paid on the policy, except in the case of fraud, in which case all premiums will be forfeited to the company."

The evidence offered by the defendant tends to show that the insured was not in sound health on 28 July, 1930; that within two years prior thereto she had been attended by physicians for serious diseases, and that before said date, she had had diseases of the heart, liver and kidneys. Whereupon, the defendant tendered a return of the premiums paid on said policy, with interest, and moved for a dismissal of the action.

The court directed a verdict for the plaintiff, it appearing that defendant's agent at the time of soliciting the applicant, when invited to have a physician examine her, stated he was "going to take a chance on the old lady," and that no fraud is pleaded or suggested.

Defendant appeals, assigning errors.

J. D. McCall for plaintiff.

Cansler & Cansler for defendant.

STACY, C. J. Manifestly, if the insured were not in sound health at the time of the issuance of the policy, or if within two years prior thereto, she had been attended by a physician for any serious disease, or before said date, had had any disease of the heart, liver or kidneys, she is not entitled to recover according to the express terms of the con-

tract of insurance. *Gilmore v. Ins. Co.*, 199 N. C., 632, 155 S. E., 566. But it is provided by N. C. Code, 6460, that when a policy of life insurance, not to exceed $5,000 in amount, has been issued without medical examination of the insured "the policy shall not be rendered void nor shall payment be resisted on account of any misrepresentation as to the physical condition of the applicant, except in cases of fraud." The provisions of this statute, being in force at the time of the execution of the policy, entered into and became a part of the convention of the parties as much so as if they had been expressly incorporated in its terms. *Bateman v. Sterrett*, 201 N. C., 59, 159 S. E., 14; *Trust Co. v. Hudson*, 200 N. C., 688, 158 S. E., 244; *House v. Parker*, 181 N. C., 40, 106 S. E., 136; *Mfg. Co. v. Holladay*, 178 N. C., 417, 100 S. E., 567. Therefore, the defendant may not now declare the policy in suit void, pursuant to the stipulation of the contract, as this is in direct conflict with the statute, and the chance which the agent said he was going to take, precludes the defense set up, except in cases of fraud. *Holbrook v. Ins. Co.*, 196 N. C., 333, 145 S. E., 609; *McNeal v. Ins. Co.*, 192 N. C., 450, 135 S. E., 300. Fraud is neither pleaded in the answer nor suggested in the evidence.

There was no error in directing a verdict for the plaintiff, hence the verdict and judgment will be upheld.

No error.

CITIZENS BANK AND TRUST COMPANY v. R. S. MCCOIN AND MRS. R. S. MCCOIN, DEFENDANTS, AND I. B. WATKINS, R. B. CARTER, M. C. PEARCE, AND P. A. SMITH, GARNISHEES.

(Filed 21 March, 1934.)

1. Process B c—Evidence held sufficient to support finding that defendant is nonresident for purpose of service and attachment by publication.

Evidence that a resident of this State had left this State and gone to another state, and that since said date his whereabouts had remained unknown to his business associates, relatives and friends in this State, without evidence that he had ever returned to this State, or intended to do so, or that he is dead, *is held* sufficient to support a finding that he is a nonresident for the purpose of service of summons and warrant of attachment against him by publication.

2. Garnishment D c—

Where the Superior Court has jurisdiction of both the cause of action and the principal defendant, the garnishees cannot attack the validity of the garnishment proceedings against them on other grounds.

APPEAL by the garnishees from *Parker, J.*, at November Special Term, 1933, of VANCE. Affirmed.

This is an action to recover on certain notes aggregating the sum of $11,050. The notes sued on were executed by the defendant R. S. McCoin, and are payable to the plaintiff. All of said notes are past due.

The summons in this action and a warrant of attachment were issued on 30 March, 1933. The summons was duly returned by the sheriff of Vance County, endorsed "After due and diligent search, R. S. McCoin cannot be found in Vance County." Thereafter, both the summons and the warrant of attachment were duly served on the defendant R. S. McCoin by publication, pursuant to an order of the clerk of the Superior Court of Vance County, made on findings by said clerk that R. S. McCoin is a nonresident of the State of North Carolina, and cannot, after due diligence, be found within said State, and that plaintiff has a good cause of action against the said R. S. McCoin, on the notes sued on.

On 1 May, 1933, the sheriff of Vance County, under the warrant of attachment issued to him by the clerk of the Superior Court of said county, levied on the indebtedness of I. B. Watkins, R. B. Carter, M. C. Pearce, and P. A. Smith to the defendant R. S. McCoin, and on 2 October, 1933, the said garnishees were ordered by the judge of the Superior Court of Vance County, to appear before the said judge, at the courthouse in said county, on 8 November, 1933, and there and then answer, each on his oath, as to the amount of his indebtedness to the defendant, R. S. McCoin.

At November Special Term, 1933, of the Superior Court of Vance County, judgment was rendered in the action, that plaintiff recover of the defendant, R. S. McCoin, the sum of $11,050, with interest and costs. It was ordered in said judgment that the sheriff of Vance County sell the property, real and personal, on which he had levied under the warrant of attachment, and apply the proceeds of said sale as payments on said judgment.

On 8 November, 1933, the garnishees appeared pursuant to the order of the judge, and filed pleas in abatement, challenging the validity of the warrant of attachment in this action.

From judgment overruling their pleas in abatement, and denying their motion that the attachment proceeding in this action be dismissed, the garnishees appealed to the Supreme Court.

Perry & Kittrell and A. A. Bunn for plaintiff.

M. C. Pearce, R. B. Carter and I. B. Watkins for garnishees.

CONNOR, J. Judge Parker's finding that the attachment proceedings in this action against the principal defendant R. S. McCoin are valid

in all respects, is supported by evidence appearing in the case on appeal as certified to this Court.

The evidence shows that R. S. McCoin, for many years a resident of this State, left his home in Henderson, N. C., on 22 December, 1932, and went to the State of Virginia. Since that date, his whereabouts have been and are unknown to his business associates, relatives, and friends in this State. There is no evidence tending to show that since he left his home in Henderson, he has at any time returned to this State, or that he has any intention to do so. There is no evidence tending to show that he is dead. This evidence is sufficient to support the finding by Judge Parker that the defendant R. S. McCoin is now and was at the date of the commencement of this action a nonresident of this State. *Brann v. Hanes,* 194 N. C., 571, 140 S. E., 292.

As the Superior Court of Vance County has jurisdiction of both the cause of action alleged in the complaint, and the principal defendant, the garnishees cannot attack the validity of the garnishment proceedings against them on other grounds. 28 C. J., p. 276, 12 R. C. L., p. 830. The judgment is

Affirmed.

ROBERT JACKSON v. NORTH CAROLINA EMERGENCY RELIEF ADMINISTRATION, CITY OF RALEIGH, AND THE WELFARE DEPARTMENT OF WAKE COUNTY.

(Filed 21 March, 1934.)

Master and Servant F a—

A person furnished work for the relief of himself and family and paid with funds provided by the Federal Emergency Relief Administration is not an "employee" of the relief administrative agencies within the meaning of the Compensation Act. N. C. Code, 8081(i), (b).

APPEAL by plaintiff from *Harris, J.,* at October Term, 1933, of WAKE. Affirmed.

This proceeding was begun and was prosecuted by the plaintiff before the North Carolina Industrial Commission for compensation under the provisions of the North Carolina Workmen's Compensation Act, chapter 120, Public Laws of 1929, chapter 133(a), N. C. Code of 1931.

From an award made by the Industrial Commission to the plaintiff, the defendants appealed to the Superior Court of Wake County. The judge of the Superior Court reversed the award, and dismissed the proceeding. The plaintiff appealed to the Supreme Court.

Ball & Ball for plaintiff.

Charles B. Aycock for defendant.

CONNOR, J. During the month of July, 1933, the plaintiff, a resident of the city of Raleigh in Wake County, was in need of means of support for himself and family, because of his inability to procure employment. In this situation, he appealed to the Welfare Department of Wake County for work. The Welfare Department undertook to procure work for plaintiff as a "relief worker." Plaintiff was assigned to work for the city of Raleigh, at its woodyard. Arrangements were made by which the North Carolina Emergency Relief Administration paid to plaintiff, while he was at work for the city of Raleigh, the sum of $2.25 per week. This sum was paid out of funds provided by the Federal Emergency Relief Administration pursuant to an act of Congress.

While plaintiff was at work, under this arrangement, at the woodyard of the city of Raleigh, on 23 August, 1933, he was injured by an accident, which arose out of and in the course of his work. The Industrial Commission awarded plaintiff as compensation for his injury the sum of $7.00 per week, for a period of one week. This award was reversed by the judge of the Superior Court, on the ground that plaintiff was not an employee of the defendants or of either of them, within the meaning of that term as used in the North Carolina Workmen's Compensation Act, at the time he was injured. On his appeal to this Court, plaintiff contends that there was error in the judgment of the Superior Court. This contention cannot be sustained.

The word "employee," as used in the North Carolina Workmen's Compensation Act, means, "every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written." Public Laws of 1929, chapter 120, section 2, paragraph b, N. C. Code of 1931, section 8081(i), (b). Plaintiff was not an employee: he was a "relief worker." He was not employed by the defendants or either of them: he was provided with work, because of his need of means of support for himself and his family. The money paid to him each week was not paid as remuneration for his work, but was paid for the relief of himself and his family. See *Bosham v. County Court of Kanawa County* (W. Va.), 171 S. E., 893. The judgment is

Affirmed.

RUFUS H. BELL v. CITY OF RALEIGH AND OTHERS.

(Filed 21 March, 1934.)

Master and Servant F a—

A person furnished work for the relief of himself and family and paid with funds provided by the Federal Emergency Relief Administration is not an "employee" of the relief administrative agencies within the meaning of the Compensation Act. N. C. Code, 8081(i), (b).

APPEAL by plaintiffs from *Harris, J.*, at October Term, 1933, of WAKE. Affirmed.

This proceeding was begun and was prosecuted by the plaintiff before the North Carolina Industrial Commission for compensation under the provisions of the North Carolina Workmen's Compensation Act. Chapter 120, Public Laws of 1929. Chapter 133(a), Code of N. C., 1931.

From an award made by the Industrial Commission to the plaintiff, the defendants appealed to the Superior Court of Wake County. The judge reversed the award, and dismissed the proceeding. The plaintiff appealed to the Supreme Court.

Ball & Ball for plaintiff.
Charles B. Aycock for defendants.

CONNOR, J. On 1 August, 1932, the plaintiff was at work on a school building owned by the Raleigh Township School Committee. He had been assigned to said work by the Wake County Welfare Department, and was receiving from the North Carolina Emergency Relief Administration the sum of $2.25 per week, as relief. While at work, plaintiff suffered an injury by an accident which arose out of and in the course of his work.

The plaintiff was not an employee of the defendants or of either of them at the time of his injury, within the meaning of that word as used in the North Carolina Workmen's Compensation Act. See *Jackson v. Relief Administration, ante,* 274. There is no error in the judgment of the Superior Court, reversing the award of the Industrial Commission, and dismissing the proceeding. The judgment is

Affirmed.

IN THE MATTER OF THE GUARDIANSHIP OF ANNE CANNON REYNOLDS II.

(Filed 21 March, 1934.)

1. Guardian and Ward C a—Held: court should have authorized guardians to institute proceedings challenging validity of consent judgment of ward.

In a proceeding under C. S., 1667, for the support and subsistence of defendant's wife and minor child, judgment was entered approving a contract whereby, among other provisions, a trust estate was established for the benefit of the child, and the contingent interests of the minor in trust estates created by the wills of her paternal grandparents were precluded. Thereafter the minor's father married again, and died before obtaining his majority. Upon disagreement between the guardians of the minor child by the first marriage, one of the guardians applied to the Superior Court for authority and direction to proceed to attack the con-

sent judgment, in so far as it affected the interests of their ward, on the grounds that their ward was not properly represented therein, and that her interests were not properly presented to the court, and for other alleged irregularities. The other guardian filed a counter-petition alleging that a tentative family agreement had been drawn up under which the ward would receive additional benefits, and that it was to the best interest of the ward to accept the consent judgment and seek to consummate the proposed family agreement. The amount the ward would receive under the trust estates of her grandparents precluded by the consent judgment is much larger than the benefits that would accrue to her under the proposed family agreement. *Held*, the court should have authorized and directed the guardians to institute proper proceedings to challenge the validity of the consent judgment in so far as it affected the interest of their ward.

2. Same—Instrument purporting to divest ward's contingent interest in trust estate held not to justify refusal of guardian's application to attack ward's consent judgment renouncing interest in the trust, it appearing that instrument purporting to divest ward's interest was void.

A minor's interest in the trust estates created by her grandparents' wills was contingent upon her father's death prior to his reaching the age of twenty-eight without exercising the power of disposition granted in the grandparents' wills. The minor's mother and father were divorced, and in the proceedings under C. S., 1667, the court approved a contract providing, among other things, for a trust estate for the minor and precluding the minor's assertion of any right in the trust estates created by her grandparents. Thereafter the minor's father married again, and while still in his minority, attempted, by will executed in another state, to exercise the power of disposition under the trust estates created by the minor's grandparents. It appeared that the minor's father was a resident of North Carolina and had his domicile in this State. The minor's father thereafter died during his minority. *Held*, the purported will executed by the minor's father is not sufficient grounds for a court of equity to refuse the petition of the minor's guardian to be authorized and directed to enter proceedings to attack the consent judgment on grounds of irregularity and that it was not binding on the minor, it appearing that the purported will executed by the minor's father seeking to divest the minor's interest in the trust estates was void, the minor's father at the time of executing the instrument being under twenty-one years of age, C. S., 4128.

3. Executors and Administrators F c—

The rule that the law looks with favor upon family agreements affecting the distribution of an estate does not prevail where the rights of an infant are unfavorably affected.

4. Infants B a—

Courts of equity look with a jealous eye on contracts that materially affect the rights of an infant.

ADAMS, J., concurs in the result.

STACY, C. J., concurring.

BROGDEN, J., concurring in result.

CONNOR, J., dissenting.

IN RE REYNOLDS.

APPEAL by Cabarrus Bank and Trust Company, one of the guardians of Anne Cannon Reynolds II, from *Warlick, J.*, at April Term, 1933, of CABARRUS. Reversed.

Joseph F. Cannon on 8 September, 1931, petitioned the clerk of the Superior Court of Cabarrus County to appoint the Cabarrus Bank and Trust Company and Mrs. Annie L. Cannon guardians of the estate of Anne Cannon Reynolds II and that she was entitled to income from $500,000. The clerk made the order:

"Now these are therefore to authorize and empower the said guardians to enter in and upon all and singular the goods and chattels, rights and credits, of said minor child, wheresoever to be found, and the same to take into possession, secure and improve, and further to manage said estate and every part thereof for the benefit and advantage of the said minor child, and according to law."

We think the digest of this whole controversy is set forth in the judgment and decree tendered by the Cabarrus Bank and Trust Company, one of the guardians of Anne Cannon Reynolds II, and the judgment and decree signed by the court below which are as follows: Judgment and decree tendered by petitioner: "This cause coming on to be heard before his Honor, Wilson Warlick, judge presiding, at the regular April Term, 1933, of the Superior Court of Cabarrus County upon the petition of Cabarrus Bank and Trust Company, one of the guardians of Anne Cannon Reynolds II; and it appearing to the court that an order has heretofore been served upon Annie L. Cannon, coguardian of Anne Cannon Reynolds, II, directing her to show cause, if any she have, why the guardians of the said Anne Cannon Reynolds II should not be advised, ordered and directed to forthwith make the proper motion in the Superior Court of Forsyth County in the case of 'Anne Cannon Reynolds II, a minor, acting by and through her next friend, J. F. Cannon, and Anne Cannon Reynolds II, a minor, acting through her next friend, Howard Rondthaler, *v.* Zachary Smith Reynolds, a minor, *et al.*,' for the purpose of having the alleged judgment and decree of the court therein, and the alleged contract therein referred to, declared null and void in so far as they affect any of the property rights or interests of the said Anne Cannon Reynolds II in the trust estates created for her benefit by the wills of her paternal grandparents, and in the personal estate of her deceased father, Zachary Smith Reynolds; and it further appearing that, in response to said order, the said Annie L. Cannon, coguardian of Anne Cannon Reynolds II, having filed a response to said petition; and affidavits having been filed herein on behalf of both guardians.

"After reading and considering said petition and response thereto, and the affidavits appearing in the record, and the various exhibits appearing

in the record, and after hearing argument of counsel, the court, upon the undisputed facts, finds that the petitioner has shown reasonable, adequate, sufficient and probable cause for filing a motion in the Superior Court of Forsyth County, in the action above entitled, praying that the decree in said action be set aside upon the following grounds, to wit: (1) The alleged contract, referred to in the judgment and decree in the Forsyth County action, was null and void, in so far as the said Anne Cannon Reynolds II was concerned, inasmuch as she was a minor without legal capacity to enter into said contract, and inasmuch as no one had authority to enter into said contract for or on her behalf. (2) The alleged decree in said action simply attempted to ratify and confirm said illegal contract and, consequently, was itself null and void. (3) That Anne Cannon Reynolds II was neither a proper nor necessary party to said action; and had no existing cause of action properly before the court in said action. (4) The alleged contract and decree constituted an illegal, unwarranted and ineffectual attempt to alter and modify the wills of the infant's grandparents, R. J. Reynolds and Katherine S. Johnston. (5) The alleged contract and decree constituted an illegal and ineffectual attempt to release and extinguish any future contingent rights or interest which the said infant might have in the trust estates created by her said grandparents. (6) The alleged contract and decree constituted an illegal and ineffectual attempt to change the status or relationship of the said infant as a grandchild of her paternal grandparents. (7) The alleged contract and decree constituted an illegal and ineffectual attempt to divert the trust estates established by the wills of the grandparents of said infant by cutting the said infant out of any future participation therein. (8) The said alleged contract and decree constituted an illegal and ineffectual attempt to cut the said infant out of any future contingent rights she might have had in the trust estates created by her grandparents when there was obviously no necessity, and no finding by the court of a necessity, for so doing. (9) The proceedings in the action in Forsyth County were merely formal and were instituted and carried on only to give an apparent sanction to an alleged settlement previously agreed upon by the parties, and that the judgment entered in pursuance of the agreement, and by consent, merely, was only colorable. (10) That the said alleged contract and said alleged decree constituted an illegal and ineffectual attempt to divert a part of the trust estate created by the will of R. J. Reynolds for the benefit of Zachary Smith Reynolds from the said infant, Anne Cannon Reynolds II, in the event the said Zachary Smith Reynolds should die before reaching the age of twenty-one years, leaving her surviving; that, at the time of the entry of said contract and said decree, neither Zachary Smith Reynolds, nor anyone else for or on his behalf, was capable of thus

diverting any part of said trust estate from the beneficiaries named in the will of R. J. Reynolds; nor did any party, or court, at said time, have the power or authority to change, modify or alter the will of the said R. J. Reynolds or the will of Katherine S. Johnston to such an extent as to eliminate the infant, Anne Cannon Reynolds II, as a prospective beneficiary under said wills, and any attempt to do so was utterly null, void and ineffective. (11) That, upon the death of the said Zachary Smith Reynolds, intestate, before reaching the age of twenty-eight years, the said Anne Cannon Reynolds II, under the terms and provisions of the wills of her grandparents, would participate in the trust estates therein created, as a child of Zachary Smith Reynolds in spite of the alleged contract and decree. (12) The said contract and decree did not involve the ordinary case of the sale of a future contingent interest to a definite grantee, which is sometimes enforceable in equity, but presented an attempted contract between a living father and his child by the terms of which the child, for a present consideration, purported to release and extinguish any future or contingent rights which she might have, in the trust estates established by her grandparents, by reason of her status as child of her father. The court holds that, upon the showing made by the petitioner, it is the duty of the guardians to file the proper and appropriate motion in the said action in Forsyth County for the purpose of having the decree entered therein set aside in so far as it affects the rights of the said Anne Cannon Reynolds II, the merits of said motion to be finally passed upon and determined upon the hearing thereof in the Superior Court of Forsyth County. The court further holds that the guardians should immediately take the necessary steps to protect the interests of their ward in the Maryland action referred to in the petition.

"The court further holds that the alleged new proposal, purporting to be submitted for or on behalf of the relatives of Zachary Smith Reynolds, involving the establishment of a foundation to the memory of Zachary Smith Reynolds, is not before this court. That the persons for or on behalf of whom said proposal is submitted are not parties properly before this court upon the hearing of the petition in this matter; that, consequently, in any event, this court could not properly consider such alleged proposal upon the hearing of the petition herein; that, if any new proposal is to be made, it should be addressed to the Superior Court of Forsyth County, in the action to which all persons in interest are parties. Wherefore, the said guardians are hereby authorized and directed to file the motion in the Superior Court of Forsyth County hereinbefore referred to and to take the necessary steps to protect the interests of their ward in the Maryland action referred to in the petition."

The judgment and decree signed by the court below is as follows: "This cause coming on to be heard before his Honor, Wilson Warlick, judge of the Superior Court, regularly holding the Superior Courts of the Fifteenth Judicial District in which is situate Cabarrus County, and regularly holding the April Term of the Superior Court of Cabarrus County on 27 April, 1933, upon the duly verified petition and motion of the Cabarrus Bank and Trust Company, one of the guardians of Anne Cannon Reynolds II, together with the exhibits attached thereto and made a part thereof, and the duly verified response and counter-petition of Mrs. Annie L. Cannon, the other guardian of Anne Cannon Reynolds II, together with the exhibits attached thereto and made a part thereof, and the affidavits of J. F. Cannon, Howard Rondthaler, W. N. Reynolds, W. M. Hendren, W. E. Church, Anne Cannon Reynolds I (now Anne Cannon Smith), the duly verified reply of said Cabarrus Bank and Trust Company with the affidavits thereto, and second affidavit of J. F. Cannon, and the arguments of counsel, representing the said Cabarrus Bank and Trust Company, guardian, the said Mrs. Annie L. Cannon, guardian, and the said Anne Cannon (Reynolds) Smith. After having heard and considered said petition, said response and counter-petition, with all exhibits thereto, the reply and the exhibits thereto, and all the other affidavits and argument of counsel, and conducting such hearing so that full investigation was made by the court of all matters referred to and involved in said petition, response and counter-petition and reply as they affect the infant, Anne Cannon Reynolds II, and the estate present and prospective of said infant, the court finds: That it is not for the best interest of said infant, under the existing conditions, that the prayer of the petition of Cabarrus Bank and Trust Company, guardian of Anne Cannon Reynolds II, be allowed, authorizing and instructing it to make a motion in the proceeding in Forsyth County referred to in said petition to set aside the judgment and decree entered therein, and therefore said petition is disallowed. That it is for the best interest of said infant, Anne Cannon Reynolds II, that the tentative proposition set out by Mrs. Annie L. Cannon, guardian, in her response and counter-petition, which is based upon a family agreement of the Cannon kin and the Reynolds kin of said infant and the representatives of Elizabeth Holman Reynolds and her infant, as contained in the letter of W. M. Hendren and affidavit filed in the record, etc., be made effective, and if said tentative proposition and family agreement can be made effective, that it would not only be for the best interest of said infant, Anne Cannon Reynolds II, but would be a fair, just and equitable settlement, in so far as said infant is concerned, of all the matters referred to in the petition, response and counter-petition. It is now, therefore, ordered, adjudged and decreed, after full and complete investigation

by the court: That it is not for the best interest of the infant, Anne Cannon Reynolds II, under the existing conditions that the prayer of the petitioner, Cabarrus Bank and Trust Company, be granted, and it is therefore denied. That it is for the best interest of said infant, Anne Cannon Reynolds II, that the tentative proposition and family agreement referred to and set out in the response and counter-petition of Annie L. Cannon, guardian of said Anne Cannon Reynolds II, be made effective and binding, and it is further ordered, adjudged and decreed that the said Mrs. Annie L. Cannon and Cabarrus Bank and Trust Company, guardians of said infant, Anne Cannon Reynolds II, be and they are hereby authorized, ordered and instructed to do all things such as appearing in court, conferring with interested parties, and all other things necessary or expedient to bring about and make effective the tentative proposition and family agreement referred to in said response and counter-petition, and when and if this proposition and agreement is put in final form, subject to the approval of the necessary court decrees, that the same be presented to this court for its further consideration and action. This cause is held for further orders and decrees."

The petitioner appellant groups its exceptions and assigns errors as follows: "That the court erred in refusing to advise and instruct the guardians of Anne Cannon Reynolds II to proceed forthwith to file the necessary motion and petition to set aside the consent judgment signed by his Honor, Judge Oglesby, on 4 August, 1931, in the Forsyth County Superior Court, in the case of Anne Cannon Reynolds I and II *v.* Zachary Smith Reynolds and others, upon the grounds and for the reasons specifically set forth in the petition filed before his Honor, Judge Warlick, in the Superior Court of Cabarrus County on 1 April, 1933, as shown by petitioner's exception No. 1, page 272, of the record.

"That the court erred in refusing to sign the decree tendered by the petitioner in the above entitled case. That the court erred in signing the decree appearing in the record for that his Honor thereby finally determined: (a) By implication, at least, that the said decree entered in Forsyth County Superior Court, hereinbefore referred to, was valid and binding against Anne Cannon Reynolds II, and effectually extinguished all her property rights under the wills of her grandparents; and (b) That it was for the best interests of said Anne Cannon Reynolds II that the 'tentative proposition' set forth in the response of Annie L. Cannon, coguardian, should be accepted, and that the said guardians be instructed to proceed forthwith, on behalf of said infant, to coöperate with the other interested parties to bring about a settlement based upon said tentative proposition, and join with the other said interested parties in an attempt to have said settlement, if and when made, approved by the court." An appeal was taken by the petitioner to the Supreme Court. The necessary facts in the controversy will be set forth in the opinion.

IN RE REYNOLDS.

Cansler & Cansler, William H. Beckerdite, Mabel C. Moysey and John M. Robinson for petitioner.

Brooks, Parker & Holderness for respondent.

Hartsell & Hartsell for Anne Cannon Reynolds (Smith).

CLARKSON, J. In the judgment and decree that the petitioner, Cabarrus Bank and Trust Company, one of the guardians of Anne Cannon Reynolds II, submitted to the court below, to sign is the following: "Upon the undisputed facts, finds that the petitioner has shown reasonable, adequate, sufficient and probable cause for filing a motion in the Superior Court of Forsyth County, in the action above entitled, praying that the decree in said action be set aside," etc. We think from the record, the petitioners' judgment and decree should have been the judgment and decree of the court below. Winnowing the chaff from the grain, the controversy resolves itself into simple problems. Conceding on this record, the good intentions of all concerned in this controversy, yet the court below in the exercise of its equitable power should have granted petitioners' prayer. Courts of equity have always recognized infants' need for special care. Certain facts of record are undisputed. On 16 November, 1929, Anne Cannon and Zachary Smith Reynolds were married. On 23 August, 1930, Anne Cannon Reynolds II was born of this union. The parties to said marriage separated, because of "incompatibility," the infant being left with the mother. On 4 August, 1931, an alleged action was instituted, and terminated, at the July, 1931, criminal term of the Superior Court of Forsyth County, all the proceedings in said action being taken on the same day. The judgment and decrees in said action purporting to approve a contract releasing and extinguishing all rights which the infant might have in the trusts created by her paternal grandparents. In said action, it was alleged and admitted that Zachary Smith Reynolds "is a citizen and resident of the State of North Carolina, and has been such since his birth, and that the defendants, W. N. Reynolds and R. E. Lasater are the duly, legally and regularly constituted general guardians of and for the said Zachary Smith Reynolds." Seventeen days later, to wit, on 21 August, 1931, the said Zachary Smith Reynolds, claiming to be a resident of New York, attempted to execute a will which has never been probated, whereby he attempted to exercise his powers of appointment under the wills of his parents, in such a way as to preclude his wife and child from participating in the trusts therein set up. On 5 October, 1931, Anne Cannon Reynolds, the mother, went to Reno, Washoe County, Nevada. On 23 November, 1931, Anne Cannon Reynolds obtained a decree of divorce from Zachary Smith Reynolds in the Washoe County Court. On 23 November, 1931, Zachary Smith Reynolds obtained a license to

marry Elizabeth Holman Reynolds, said marriage being performed on 29 November, 1931. On 6 July, 1932, Zachary Smith Reynolds died in Winston-Salem, North Carolina, being at the time, under the age of twenty-one years. On 10 January, 1933, a child was born to Elizabeth Holman Reynolds, said child bearing the name of Zachary Smith Reynolds, Jr. On 24 March, 1933, the Safe Deposit and Trust Company of Baltimore, trustee of the hereinafter named trusts, instituted an action in the Circuit Court of Baltimore City, Maryland, for the purpose of having determined the proper administration and distribution of said trusts.

On these undisputed facts, if the will of Zachary Smith Reynolds made in New York (when an infant) was inoperative and void and the proceeding as to Anne Cannon Reynolds II in the Forsyth Superior Court is void, the property of Zachary Smith Reynolds, which he would participate in under the will of his father, R. J. Reynolds and mother, Katherine S. Johnston—formerly Mrs. R. J. Reynolds, would descend to his two infant children: (1) Anne Cannon Reynolds II (child of Anne Cannon Reynolds (Smith), now three years of age; and (2) Zachary Smith Reynolds, Jr. (child of Elizabeth Holman Reynolds), now a year old, who would share equally in said trusts. When Zachary Smith Reynolds would have reached 28 years of age (October, 1939), the entire corpus of that trust would be equally divided between them. Among the provisions in the will of R. J. Reynolds, in substance: Upon reaching the age of twenty-eight years, Zachary Smith Reynolds was to receive the corpus of the trust. Before reaching the age of twenty-eight years, if Zachary Smith Reynolds died, leaving a will, the trust continued for the benefit of his devisees until he would have arrived at the age of twenty-eight years, whereupon the corpus of the trust was to be turned over to the devisees. Before reaching the age of twenty-eight years, if Zachary Smith Reynolds died intestate leaving issue, the trust was continued for the benefit of his children—living at his death—until the time when he would have arrived at the age of twenty-eight years, whereupon the corpus of the trust became vested in his children, then surviving.

The will of Katherine S. Johnston, among its provisions, in substance: Established a trust for her son, Zachary Smith Reynolds. The trust continued during the life of Zachary Smith Reynolds. Upon his death, the corpus of the trust went to his devisees by will; and, "in default of such appointment" to his "descendants" living at his death, with an immaterial proviso as to a limited continuance of the trust. During her lifetime, she, by deed, also established for Zachary Smith Reynolds, a comparatively small trust upon the same terms as those outlined in her will.

At the time of the institution of the action in Forsyth County, on 4 August, 1931, the corpus of the trust established for Zachary Smith Reynolds, by will of R. J. Reynolds, had a value of some twenty million dollars. The trust established for Zachary Smith Reynolds by the will of his mother, Katherine S. Johnston, yielded an annual income of some fifty thousand dollars.

Zachary Smith Reynolds had made no support for his wife after he had left her, although the child had been born on 4 August, 1931. J. F. Cannon petitioned the clerk of Forsyth County Court to appoint next of friends to Anne Cannon Reynolds and Anne Cannon Reynolds II. The petition contained the following allegations: "The said Zachary Smith Reynolds abandoned his wife and child and has not made suitable provision for their needs and requirements; that the said Zachary Smith Reynolds is possessed of a considerable estate, and it is necessary and desirable that an action should be instituted against him by his said wife and child to protect their property rights and to secure suitable compensations and allowances from the court for them." Application was made that he be appointed as next friend to his daughter, Anne Cannon Reynolds, and he also made application that the court appoint Howard Rondthaler as next friend to Anne Cannon Reynolds II, with power and authority to institute and prosecute to final judgment such actions and proceedings as they may be advised are necessary and desirable to completely protect the financial and property rights of both said infants.

The appointment was duly made. A complaint was filed the same day against Zachary Smith Reynolds and other Reynolds heirs and the guardians of Zachary Smith Reynolds and the Safe Deposit and Trust Company, of Baltimore, as trustee, under the wills of R. J. Reynolds and Katherine S. Johnston. The allegations of the complaint, in part, were as follows: "That under the laws of the State of North Carolina, the plaintiffs, Anne Cannon Reynolds and Anne Cannon Reynolds II are entitled to allowances for their support and maintenance and to assure their continued support and maintenance, all in accord with and in keeping with the estate, financial position and social conditions of the said Zachary Smith Reynolds. That pending the institution of this action, negotiations have been in progress between the plaintiffs and defendants in an effort to reach a settlement and avoid litigation. That as a result of these negotiations and conferences, the conclusion was reached by all concerned that it was for the best interest of all parties to this action that a contract be entered into which should constitute a final and complete accord and settlement of the property rights of the parties as between themselves, and in and to the trust estates created by the wills of R. J. Reynolds and Katherine S. Johnston; that pursuant

to these negotiations, a contract has been prepared and agreed upon, which is hereto attached, marked Exhibit A, and hereby made a part of this complaint, which is submitted to the court for confirmation and approval; if the court should be of the opinion that said contract is fair, that it is within the power of the parties, upon approval by the court, to make it, and that said contract constitutes a full, fair, complete and final accord and settlement as provided therein."

The answers of defendants were filed on 4 August, 1931. The judgment was signed the same day, some hour or so after the matter was presented, by the judge holding the 27 July Term of Forsyth County Superior Court. In the judgment is the following: "And the court being of opinion that under the general law now obtaining and by virtue of the provisions of chapter 102 of the Public Laws of North Carolina, Session of 1931, authorizing declaratory judgments in such cases, that it has the power and authority to approve the contract and trust agreement herein submitted for its consideration."

The complaint seems to have been founded on C. S., 1667, which, in part, is as follows: "If any husband shall separate himself from his wife and fail to provide her and the children of the marriage with the necessary subsistence according to his means and condition in life," etc., but reached out to cover an agreement which deprived Anne Cannon Reynolds II of her interest in the trust funds set up by her grandfather, R. J. Reynolds and grandmother, Katherine S. Johnston, in their wills.

Public Laws, 1931, chap. 102, provides for declaratory judgments. The action was not brought under the declaratory judgment act. In the proceedings, declaratory relief is not sought. *Walker v. Phelps,* 202 N. C., 344; *Light Co. v. Iseley,* 203 N. C., 811; *Wright v. McGee, ante,* 52. The prayer for judgment was for a suitable allowance according to the allegations of the complaint which would be under C. S., 1667, and joined with that is the prayer that the contract, a separate instrument, be ratified and confirmed by the court.

No summons was issued in said action. The complaint was simply placed in the clerk's office and the defendants, including the nonresident trustee and several other nonresidents, some of whom appear to have been minors, purported to come in and answer, practically admitting all the allegations of the complaint and consenting that the requested judgment and decree be entered. The action has the appearance of being instituted solely for the purpose of obtaining maintenance and support. The complaint in said action, sets out no controversy as to the property rights of the infant, Anne Cannon Reynolds II. There is no allegation as to any dispute in reference to the infant's contingent interest in said trusts. No reason is alleged for seeking to alter or modify the terms of said trusts, in so far as the infant, Anne Cannon Reynolds II, is con-

cerned. No necessity is set forth for seeking to eliminate or change her interests in said trusts. Neither Anne Cannon Reynolds nor Zachary Smith Reynolds was present. It is doubtful if the wills of R. J. Reynolds and Katherine S. Johnston, which established the trusts, were read, the only statement being that they "were presented to the court." No evidence was introduced. No reason was given to the court for attempting to alter the trusts so as to exclude the infant, Anne Cannon Reynolds II, from future participation therein, except the statement that Zachary Smith Reynolds had threatened to exercise the powers of appointment in such a way as to exclude her. No one called the court's attention to the fact that the entire provision which was being made for the infant, Anne Cannon Reynolds II—was being made out of the accumulated income from one of the trusts—and that, consequently, it was not necessary to disturb the corpus of said trusts in any way.

The judgment further, in part, was: "That the defendant, the Safe Deposit and Trust Company of Baltimore, as trustee, under the will of R. J. Reynolds, deceased, has the power and authority to set aside, out of the accumulated, and, or current income of the share held in trust for the defendant, Zachary Smith Reynolds, under said will—the two trust funds for the creation of which provision is hereby made. . . . That the minor plaintiffs, Anne Cannon Reynolds and Anne Cannon Reynolds II, upon the execution and delivery of said contract and trust agreement and the setting up of the trust estates therein provided, be and they are hereby declared forever estopped and barred from making other or further claims for financial support, aid or maintenance from the said Zachary Smith Reynolds, or any estate owned or left by him, whether the same be held in trust or otherwise, and from making the further claim to the whole or any part of the trust estates created by the will of R. J. Reynolds or Katherine S. Johnston, distribution of said trust estates at the time fixed for distribution as provided in said wills, to be made to the persons entitled thereto as if Zachary Smith Reynolds and Anne Cannon Reynolds had never been married and Anne Cannon Reynolds II had never been born. That the said contract and trust agreement is hereby made a part of this decree as fully and completely as if entirely incorporated herein, and the clerk of the court will record said contract and trust agreement along with this judgment."

The trust set up under the agreement, for Anne Cannon Reynolds II, the infant, was $500,000. The estates which under changed conditions, her portion is now estimated under the facts of this record, to be worth some $12,000,000. In this proceeding, it appears that at least one of the infant defendants who, with others, were made defendants, was never served with summons. Speaking to the subject in *Wyatt v. Berry,* 205 N. C., 118 (122), in reference to proceedings of this kind, it is said:

"The facts disclosed by the record in this case, show the wisdom of the language used by *Bynum, J.*, in *Moore v. Gidney*, 75 N. C., 34, who in speaking of the statutory requirements for a valid judgment against an infant, says: 'So careful is the law to guard the rights of infants, and to protect them against hasty, irregular, and indiscreet judicial action. Infants are in many cases, the wards of the courts and these forms enacted as safeguards thrown around the helpless, who, often the victims of the crafty, are enforced as being mandatory and not directory only. Those who venture to act in defiance of them, must take the risk of their action being declared void or set aside.'"

In North Carolina Practice and Procedure in Civil Cases (McIntosh), p. 721, is the following: "In the case of infant parties, the next friend, guardian *ad litem*, or guardian cannot consent to a judgment or compromise without the investigation and approval by the court."

In *Rector v. Logging Co.*, 179 N. C., 59 (62 and 63), quoting with approval *R. R. v. Lasca*, 79 Kas., 311, is the following: "Where the proceedings in court are merely formal, and are instituted and carried on only to give an apparent sanction to the settlement, and there is no judicial investigation of the facts upon which the right or extent of the recovery is based, a judgment entered in pursuance of the agreement, and by consent merely, is only colorable, and will be set aside in a proper proceeding when its effect, if allowed to stand, would be to bar the infant's substantial rights."

In *Marsh v. Dellinger*, 127 N. C., 360 (363), it is said: "The defendants are infants, and the court of equity, while it has the power to order the sale, must see that the infants are properly represented and protected, and must find as a fact that a sale of this property, made before the death of the life-tenant—the time specified in the will for its sale—will be for their benefit. In courts of equity, in such cases, the usual rule was for the court to refer the matter to the master, or to some other competent person, who inquired, took evidence by affidavit—of reliable disinterested persons—as to whether it would be to the interests of the infants to order the sale, which he reported to the court, with a statement of the evidence. We do not mean to say or to intimate that anything intentionally wrong has been done in this matter, but to say that it devolves on the court to take these means of informing itself, in order that infants may be protected. *Ferrell v. Broadway*, 126 N. C., 258." *Bunch v. Lumber Co.*, 174 N. C., p. 8; *Patrick v. Bryan*, 202 N. C., 62.

The case of *Oates v. Texas Co.*, 203 N. C., 474, is distinguishable. The action was for *tort* brought "after the lapse of twelve years," and in this *tort* action, "after investigation by the court." This controversy is equitable in its nature, involving an infant's interest in large estates of her grandparents—done hurriedly, practically by consent—hardly ad-

versary—in a proceeding for one purpose: For necessary subsistence under C. S., 1667, and made elastic—to reach out and deprive this infant, Anne Cannon Reynolds II, of her rights in the estates of her grandparents. We think where such important rights of an infant are concerned, the facts should fully appear and be set forth and if necessary found by a referee, under the old system by the master taking testimony. Conclusions in affidavits are not sufficient to base a decree, the facts must appear in detail so that a court of equity can weigh everything and then make the decree. It will be noted in *Spencer v. McCleneghan,* 202 N. C., 662, all the facts are fully and at length set forth and it appears from these facts that the agreement was not harmful, but was beneficial to the infant. "The court below found the facts at length with care."

As to the power to alter a testamentary trust, the following is stated in 26 R. C. L., at p. 1283: "A court of equity has the power to do whatever is necessary to be done to preserve the trust from destruction, and in the exercise of this power it may, under certain unusual circumstances, modify the terms of the trust to preserve it, but not to defeat or destroy it. Courts are slow to exercise their power to modify the terms of a trust, and will only do so when it clearly appears to be necessary." In *Bank v. Alexander,* 188 N. C., 667 (672): "The object is not to destroy the trust, but preserve it." The alleged threat of Zachary Smith Reynolds, who was under age, to execute an unfavorable will, furnished no necessity to destroy the trusts or alterations of the terms of the trusts. C. S., 1667, gave the wife a legal right to make her husband provide for her and her child with the necessary subsistence according to his means and condition in life. This, in the beginning, seemed the primary object, but the proceeding reached out and attempted to destroy the trust and forever to bar this infant, Anne Cannon Reynolds II, as if she "had never been born." It is contended by petitioner that the Forsyth judgment and decree is in effect to change the infant's status so as to prevent her participation in the testamentary trusts set up by her grandfather and grandmother, and cites *Cannon v. Nowell,* 51 N. C., 436. In 28 A. L. R., p. 433, this case is placed under the minority rule.

In 17 A. L. R., at page 601, we find: In equity, the general rule: "It is well established that a person expecting to receive property by will, distribution, or descent may make a transfer of the expectancy to a third person, which will be valid and enforceable in equity." Citing many North Carolina cases. In *James v. Griffin,* 192 N. C., 285 (286), citing many authorities, we find: "A contingent interest in land is generally descendible and devisable; it may also be released if the contingent remainderman is specified and known." This attitude we do not think

material under the facts of this record. It is debated by the contestants, at length. The language of the Forsyth judgment and decree may not be construed as a sale or release from an examination of R. J. Reynolds' will under the facts and circumstances of this case. In *Shannonhouse v. Wolfe,* 191 N. C., 769 (773), citing numerous authorities, it is said: "It is true, the exercise of that power can only be justified by some exigency which makes the action of the court, in a sense, indispensable to the preservation of the interests of the parties in the subject-matter of the trust, or, possibly, in case of some other necessity, of the most urgent character." *Woody v. Christian,* 205 N. C., 610.

In Item 8 of R. J. Reynolds' will in clear and unmistakable language it states: "I hereby provide that all payments to be made hereunder to my beneficiaries shall be into their own hands and not into the hands of others, whether claiming by their authority, or otherwise." As to the principal trusts, therefore, the above quoted language manifested an intention on the part of the testator to negative any contracts or assignments by a beneficiary affecting his interests.

The alleged will of Zachary Smith Reynolds appears to be inoperative and void. When the alleged will was executed in New York, he was under the age of 21 years. C. S., 4128, is as follows: "No person shall be capable of disposing of real or personal estate by will until he shall have attained the age of twenty-one years." General Laws of State, in force at time of execution and performance of contract, become part thereof. *Ryan v. Reynolds,* 190 N. C., 563; *Monger v. Lutterloh,* 195 N. C., 274; *Steele v. Ins. Co.,* 196 N. C., 408. By analogy, to show R. J. Reynolds' intent, it can be inferred that his will was made with the North Carolina law in view. No language gives the right of appointment under 21 years of age. In this connection, it should be noted that the judgment and decree was signed in Forsyth County Superior Court on 4 August, 1931, which expressly states that Zachary Smith Reynolds "under the statute law of North Carolina, cannot validly make a will disposing of his share in said estate until he reaches the age of twenty-one years," and further, "that in the event of the death of the said Zachary Smith Reynolds, prior to his reaching the age of twenty-one years, the said infant child, Anne Cannon Reynolds II, would inherit his entire estate."

The wills of R. J. Reynolds and Katherine S. Johnston appear to indicate an intention that Zachary Smith Reynolds could only exercise the power of appointment after he became 21 years of age and on that account, the New York will would appear to be inoperative and void. It appears that his domicile was in North Carolina. In the complaint filed in the Forsyth County proceedings on 4 August, 1931, just seventeen days before the alleged execution of the New York will, it was

alleged: "That the defendant, Zachary Smith Reynolds, is a citizen and resident of the State of North Carolina, and has been such since his birth, and that the defendants, W. N. Reynolds and R. E. Lasater, are the duly, legally and regularly constituted general guardians of and for the said Zachary Smith Reynolds." In the answer filed on his behalf by his guardians, this allegation is admitted.

In *Thayer v. Thayer,* 187 N. C., 573, it is said at p. 574: "A domicile of choice is a place which a person has chosen for himself, but an unemancipated infant, being *non sui juris,* cannot of his own volition, select, acquire or change his domicile." We do not think that marriage changed his status in this jurisdiction. In some instances, where the right is given him under the statute, the marriage of an infant emancipates the infant as to his rights to earnings. See *Wilkinson v. Dellinger,* 126 N. C., 46; *Little v. Holmes,* 181 N. C., 413; C. S., 4134. It is strongly urged by appellees that this is a family agreement and for the peace and tranquility of families and that contracts of this nature are favorites of the law. In *Tise v. Hicks,* 191 N. C., 609 (613), it is said: "Family settlements, such as that made by these brothers and sisters, when fairly made, and when they do not prejudice the rights of creditors, are favorites of the law." This is the well settled rule in this jurisdiction. These settlements are usually between members of families who are *sui juris,* of full age, with capacity to act, but not so in this case where we are dealing with the *rights of an infant.* Courts of equity look with a jealous eye on contracts that affect materially, the rights of infants.

In Goodrich on Conflict of Laws (1927), speaking to the subject at p. 51: "So the courts say without dissent, that the domicile of the legitimate minor child is that of his father, if the latter is living. The domicile of origin is that of the father at the time of the infant's birth. If the father's domicile is changed, that of the infant necessarily follows. And, as in the case of the wife, physical presence of the infant is not necessary to establish his domicile at the domicile of the father. Nor can the minor by his own act, while under the disability of infancy, establish a separate domicile for himself, either by leaving the parental home of his own volition, being taken away by another or sent by the parents. Thus far the law seems clear." . . . At p. 56: "If both parents are dead, many statements may be found saying that the domicile of the minor is that of the last surviving parent at the time of the latter's death, and that the minor cannot acquire another until he becomes of age." We think it unnecessary to consider the threat of Zachary Smith Reynolds' purpose in going to New York to acquire a domicile to make a will and its illegality in this jurisdiction. It must be borne in mind also that Zachary Smith Reynolds' guardians under

the will of his father, were domiciled in Forsyth County. After the Forsyth County decree and the alleged will of Zachary Smith Reynolds was made in New York, the following is in the record: "A proposition was made by the counsel of the uncle and aunts on the Reynolds side, and agreed to by counsel for Elizabeth Holman Reynolds and her child, wherein it is proposed that notwithstanding the former contract and agreement, in order to make her child's inheritance in every way equal to that received by the child of Elizabeth Holman Reynolds, to pay to Anne Cannon Reynolds II, an additional one and one-half million dollars, and that the balance of the estate, which, under the will of Zachary Smith Reynolds executed in New York, descends to his brother and sisters, shall be devoted to the establishment of a foundation in memory of Zachary Smith Reynolds, to be used for charitable and eleemosynary purposes in the State, whether supported by fraternal orders or by religious denominations."

Of course, if the will in New York is void, this "proposition" cannot be enforced. This foundation idea is commendable, but not out of this infant's property, if it is hers, she can only speak when she arrives at the age of twenty-one years. It is to their credit that those parties to the Forsyth County Court decree think it an act of bad faith on their part to repudiate same and are "unwilling to be put in such a position." The judgment of the court below after refusing the prayer of petitioners, the Cabarrus Bank and Trust Company, one of the guardians of Anne Cannon Reynolds II, then the "tentative proposition" is set forth and it is ordered, adjudged and decreed that the guardians, including this petitioner: "Are hereby authorized, ordered and instructed to do all things such as appearing in court, conferring with interested parties, and all other things necessary or expedient to bring about and make effective, the tentative proposition and family agreement referred to in said response and counter-petition, and when and if this proposition and agreement is put in final form, subject to the approval of the necessary court decrees, that the same be presented to this court for its further consideration and action."

The Reynolds' legatees, under the alleged New York will, Elizabeth Holman Reynolds and her baby, Zachary Smith Reynolds, Jr., are not parties to this proceeding. There is nothing in the record to bind any of them to anything. They could have a change of mind at any moment. If the Forsyth judgment and decree stands and Anne Cannon Reynolds II is cut off from any participation in the testamentary trust funds of her grandparents, and the New York will is declared void, Elizabeth Holman Reynolds' baby would be the sole beneficiary of the testamentary trust. If the Forsyth judgment and decree is set aside, each of the children of Zachary Smith Reynolds would share alike. From a careful

review of the law and facts of this case we see no good reason why the petition of the Cabarrus Bank and Trust Company, one of the guardians of Anne Cannon Reynolds II, should not be granted to the end, that the Forsyth judgment and decree be inquired into and such judgment adjudged and decreed as the facts and circumstances under the law may warrant.

If this judgment and decree is set aside and the New York will is void, each of Zachary Smith Reynold's children would get some $12,000,000. If this Forsyth judgment and decree is not set aside and the New York will is not void, the baby child of Elizabeth Holman Reynolds would get the entire estate. The Forsyth judgment and decree if it stands, has the effect to deprive this infant, Anne Cannon Reynolds II, now 3 years old, of some $12,000,000 and as stated in that judgment and decree, to the extent as if Anne Cannon Reynolds II "had never been born." We think that petitioner's procedure in this matter correct. Before this petition by the Cabarrus Bank and Trust Company, one of the guardians of Anne Cannon Reynolds II, was instituted, from the record it appears that all consideration and courtesy was shown the parties and their attorneys interested in this controversy. As one of the guardians, it had a duty to perform. In the performance of this duty, it seems that from $500,000 given in the Forsyth Court judgment and decree, the estate of this infant was by a "tentative proposition," increased $1,500,000 more. The guardians should take necessary steps to protect the interest of their ward, Anne Cannon Reynolds II, in the Maryland action referred to in the petition.

The petition of the Cabarrus Bank and Trust Company, guardian of Anne Cannon Reynolds II, should have been granted. For the reasons given, the judgment and decree of the court below is

Reversed.

ADAMS, J., concurs in the result.

STACY, C. J., concurring: The case, briefly stated, is this:

1. On 8 September, 1931, the Cabarrus Bank and Trust Company and Mrs. Annie L. Cannon were duly appointed by the clerk of the Superior Court of Cabarrus County guardians of the estate of Anne Cannon Reynolds II, an infant at that time a little over a year old.

2. It is alleged that said infant has certain rights in the testamentary trusts established by the wills of her paternal grandparents, R. J. Reynolds and Katherine S. Johnston, which, if still subsisting, amount to approximately $12,000,000.

3. It is further alleged that at the July Criminal Term, 1931, Forsyth Superior Court, in a consent proceeding, an agreement was ostensibly authorized whereby said infant was to get $500,000 in settlement of her interests in said testamentary trusts.

4. It is the opinion of the Cabarrus Bank and Trust Company that the alleged contract sought to be approved by the decree in the Forsyth County proceeding is null and void, in so far as it attempts to deal with the rights of Anne Cannon Reynolds II, because the matter was not properly before the court and no one was legally authorized to enter into the alleged contract on behalf of said infant, and for other reasons.

5. Conceiving it to be its duty, therefore, in the discharge of its obligation as guardian, suggestion was made to the coguardian that they seek to have the decree in the Forsyth County proceeding vacated and set aside.

6. Upon disagreement between the guardians as to their duty in the premises, the Cabarrus Bank and Trust Company applied to the Superior Court for instruction and authority to proceed as it feels in duty bound to do.

7. Mrs. Annie L. Cannon, coguardian, sets out in her response and counter-petition a "tentative proposition," which, if accepted and carried out, it is alleged, will result in said infant's estate profiting to the extent of an additional $1,500,000. This "tentative proposition" is based on a proposed family agreement, and that the matters, suggested on the hearing, be not further stirred.

8. The court being of opinion that, under the existing conditions, the best interests of the infant ward would be subserved by accepting the "tentative proposition" of the respondent, and not by granting the prayer of the petitioner, denied the same, and instructed the guardians "to do all things such as appearing in court, conferring with interested parties, and all other things necessary or expedient to bring about and make effective the tentative proposition and family agreement referred to in said response and counter-petition."

The ruling was evidently based upon the assumption that the Forsyth decree is valid, otherwise the amount probably surrendered is disproportionate to the amount tentatively offered. But the validity of the Forsyth decree was not before the court for determination. The question was whether sufficient showing had been made to warrant the instruction that the validity of the decree should be challenged. Apparently the showing was such as to justify the court in informing itself upon the validity of this decree before finally foreclosing the rights of the infant ward in the respect suggested.

Nevertheless, it is said the practical certainty of a million and a half under the circumstances disclosed by the record, is better for the infant than the uncertainty of the quest for twelve millions. The matter was not presently before the court with sufficient knowledge and in such shape as to call for the exercise of its discretion on the acceptance or rejection of this tentative proposition. The two guardians are the only parties to this proceeding, and they alone in their representative capacity

would be bound by the judgment. No ward can complain if his guardian in good faith and in the exercise of his best judgment pursues the mandate of the law and loses a tentative offer of settlement such as here disclosed, but he might question a departure from established rules of procedure.

BROGDEN, J., concurring in result: Anne Cannon Reynolds II had two guardians duly appointed and qualified. On 4 August, 1931, a decree had been entered in Forsyth Superior Court in her behalf, whereby she received $500,000 in full settlement and satisfaction of all claim, right and interest in the estate of her father, Smith Reynolds, and in certain trust funds set up in the wills of her grandfather and grandmother. Her father died before reaching twenty-one, and by reason of the far-reaching change in her status occasioned by the death of her father, it appeared that she would probably be entitled to receive twelve million dollars unless she was foreclosed by the decree awarding her a half-million dollars. She could not act for herself by reason of the fact that she was an infant of tender years. Should those who had her property rights in charge undertake to assert a claim to the twelve million dollars or to assume that her rights had been foreclosed by the Forsyth County judgment as though "she had never been born?"

The solution of this question by reason of the large amount involved, constituted a momentous decision, particularly for one who, by reason of legal disability, was unable to either speak or think for herself. The guardians disagreed as to the proper course to pursue. The grandmother of the infant was firmly of the opinion that the Forsyth judgment ought to stand for the reason, among others, that it was the product of patient negotiation within the councils of the families and interested parties. Upon the other hand, the Cabarrus Bank and Trust Company, the other guardian, held the view that, by reason of changed circumstances resulting from the death of the father, the minor ought to have a fair chance and an open field in which to assert her property rights, and that a difference between a half-million and twelve millions in money was of too much moment to justify inaction.

Thereupon the Cabarrus Trust Company called to the coguardian to join in an attack upon the Forsyth County judgment, which unassailed obviously stood as an estoppel upon the assertion of the future or contingent rights of the minor. The coguardian refused to join in the attack. Consequently, the Cabarrus Trust Company filed a petition in the Superior Court of Cabarrus County, setting out the history of the proceeding in Forsyth and asked specifically for "the advice and instructions of the court as to whether it and its coguardian, Mrs. Annie L. Cannon, should be ordered and directed forthwith to make the proper motion in the Superior Court of Forsyth County in the case of Anne

Cannon Reynolds, a minor, acting by and through her next friend, J. F. Cannon, and Anne Cannon Reynolds II, a minor, acting by and through her next friend, Howard Rondthaler *v.* Zachary Smith Reynolds, a minor, and others for the purpose of having the alleged contract and decree of said court attempting to confirm the same and authorize the execution thereof by the parties therein named set aside and declared null and void insofar as they affect any of the property rights of any and every nature and description of his said ward, Anne Cannon Reynolds II, in the trust estates created for her benefit by the wills of her paternal grandparents, and in the personal estate of her deceased father," etc. Obviously, the petitioner could not in Cabarrus County attack a final judgment in Forsyth County; nor could the judge sitting in Cabarrus County set aside or modify the said judgment in Forsyth. *Cahoon v. Brinkley,* 176 N. C., 5, 96 S. E., 650; *Gaster v. Thomas,* 188 N. C., 346, 124 S. E., 609; *Bisanar v. Suttlemyre,* 193 N. C., 711, 138 S. E., 1. Hence, the sole question before the chancellor was whether the minor, Anne Cannon Reynolds II, had the right to proceed to Forsyth County and lodge a motion to set aside a judgment which shut the door of the law in her face so far as asserting any further right in and to the property specified. There were no parties before the court except the guardians. The petition alleged grave irregularities and fatal defects in the Forsyth judgment. These allegations were denied and evidence offered in support of such denial. The New York will was not upon the lap of the chancellor. The family settlement and the laudable intentions of the family were not upon the lap of the chancellor. The actual validity of the Forsyth judgment was not upon the lap of the chancellor. The ultimate question was whether the minor had alleged and shown the existence of such facts or probable facts as to entitle her to be heard by the law of her country in a proceeding in Forsyth County to unloose the bar of that judgment. The guardians held in good faith opposite opinions as to the wisest course to pursue. Notwithstanding, it must be borne in mind that Anne Cannon Reynolds II is the heroine of the play and the clashing judgment of the guardians is incidental and secondary.

The trial judge found that it was not for the best interest of the minor to be allowed to be heard in Forsyth County. Both the history and traditions of equity as held and applied in this State demonstrate that it always lends an attentive ear to the call of widows, orphans and minors, and in determining the bare right to be heard upon the merits of a proposition, it has not required the highest and most technical degree of proof. I am of the opinion that the facts disclosed in the record are sufficient to entitle Anne Cannon Reynolds II to a chance to be heard in the courts in a proper proceeding in Forsyth County. Of course, even a minor ought not to be heard in an assault upon a final judgment for inconsequential or captious reasons. Neither should the right to be

heard upon the merits be denied because the evidence produced is not "horse high, bull strong and pig tight." Therefore, I am of the opinion that the trial judge erred in denying to the minor the right to be heard upon the merits of the controversy.

The Forsyth decree may have been eminently proper and advantageous not only at the time it was rendered, but even now. The proposed family settlement may be eminently wise and proper. That, however, is not the point. The right of the minor to question the proceeding in Forsyth in the due and orderly manner prescribed by law, is the point as I conceive it, and that right has been improvidently denied by the judgment rendered.

CONNOR, J., dissenting: After a full hearing of this cause, and a careful consideration of all the matters presented by the guardians of the infant, in support of their respective contentions as to the best interest, financial and otherwise, of their ward, with respect to the matters and things referred to in the petition of the Cabarrus Bank and Trust Company, one of the guardians, and in the response and counter-petition of Mrs. Annie L. Cannon, the other guardian, Judge Warlick found:

"1. That it is not for the best interest of said infant, under the existing conditions, that the prayer of the petition of the Cabarrus Bank and Trust Company, guardian of Anne Cannon Reynolds II, be allowed, authorizing and instructing it to make a motion in the proceeding in Forsyth County referred to in said petition to set aside the decree entered therein.

"2. That it is for the best interest of said infant, Anne Cannon Reynolds II, that the tentative proposition set out by Mrs. Annie L. Cannon, guardian, in her response and counter-petition, which is based upon a family agreement of the Cannon kin and the Reynolds kin of said infant, and the representatives of Elizabeth Holman Reynolds and her infant, as contained in the letter of W. M. Hendren and affidavit filed in the record, etc., be made effective, and if said tentative proposition and family agreement can be made effective, that it would not only be for the best interest of said infant, Anne Cannon Reynolds II, but would be a fair, just and equitable settlement, in so far as said infant is concerned, of all matters referred to in said petitions, response and counter-petition."

On these findings made by him, it was ordered, adjudged, and decreed by Judge Warlick:

"A. That it is not for the best interest of the infant, Anne Cannon Reynolds II, under the existing conditions, that the prayer of the petitioner, Cabarrus Bank and Trust Company, be granted, and it is therefore denied.

"B. That it is for the best interest of said infant, Anne Cannon Reynolds II, that the tentative proposition and family agreement referred to and set out in the response and counter-petition of Annie L. Cannon, guardian of said Anne Cannon Roynolds II, be made effective and binding, and it is further ordered, adjudged, and decreed that the said Mrs. Annie L. Cannon and Cabarrus Bank and Trust Company, guardians of said infant, Anne Cannon Reynolds II, be and they are hereby authorized, ordered, and instructed to do all things such as appearing in court, conferring with interested parties, and all other things necessary or expedient to bring about and make effective the tentative proposition and family agreement referred to in said response and counter-petition, and when and if said proposition and agreement is put in final form, subject to the approval of the necessary court decrees, that the same be presented to this court for its further consideration and action.

This cause is held for further orders and decrees."

The only questions presented to Judge Warlick at the hearing of the cause were (1) whether, in view of the conditions now existing and affecting the estate of their ward, it is for her best interest that her guardians be authorized and instructed by the court to move in the Superior Court of Forsyth County that the decree rendered in the action referred to in the petition be set aside and vacated as to their ward, on the ground that said decree is void as to her; and (2) whether, if the court be of the opinion that the guardians should not be so authorized and instructed, it is for the best interest of their ward, that her guardians be authorized and instructed by the court to enter into negotiations with the proper persons for the purpose of effectuating the tentative proposition based upon the family agreement referred to in the response and counter-petition, and in the event said proposition is made effective by the approval of courts having jurisdiction of the parties thereto and of the subject-matter thereof, to report the same to the court for its further consideration and action.

These are the only questions which were considered and decided by Judge Warlick.

I am of the opinion that there was no error in his decision of these questions, and that his judgment should be affirmed. I do not concur in the judgment of this Court, reversing the judgment of Judge Warlick, nor do I think that the questions of law involving the validity of the decree of the Superior Court of Forsyth County, and the will of the father of the infant, discussed and apparently decided by this Court, are presented by this appeal.

COUNTY OF BUNCOMBE v. J. A. PENLAND AND WIFE, ADDIE PENLAND.

(Filed 21 March, 1934.)

1. Taxation H c—Legal and equitable owners of land may appear and move to set aside foreclosure of tax sale certificate.

The legal and equitable owners of land, although not parties to the suit to foreclose a tax certificate on the land, N. C. Code, 8037, may appear and make a motion to cancel the deed to the purchaser at the sale, and to make the purchaser at the sale a party to the action, on the grounds that the land was not listed in the name of the true owner, N. C. Code, 7971(15), (36), and that the service by publication obtained in the action was void because the listed owner was a resident of the county.

2. Same—Appearance upon motion to set aside deed to purchaser at foreclosure of tax sale certificate is a general appearance.

Where the legal and equitable owners of land appear in a suit in which a tax sale certificate had been foreclosed and the land sold under the provisions of N. C. Code, 8037, and move that the deed to the purchaser at the sale be set aside and that the purchaser be made a party for the purpose of the motion, the appearance of the movants is a general and not a special appearance although they term their appearance a special appearance in their motion. C. S., 401.

3. Appearance A a—

Whether an appearance is a general or special appearance is to be determined by the relief asked, and if the prayer affects the merits or the motion involves the merits the appearance is general. C. S., 401.

4. Taxation H c—

The procedure to set aside a deed to the purchaser at a foreclosure of a tax sale certificate on the grounds that the property had not been correctly listed and that the service by publication was void, is by motion in the cause.

5. Same—Parties who should be joined upon motion to set aside deed to purchaser at foreclosure of tax sale certificate.

On a motion to set aside a deed to the purchaser at a foreclosure of a tax sale certificate, the listed owners of the property, the purchaser at the sale, the mortgagor, and all persons having a legal or equitable interest in the property should be made parties to the proceeding for a complete determination of the controversy. C. S., 460.

APPEAL by A. P. Grice, trustee, and R. M. Wendell, movants, from *McElroy, J.*, at September Term, 1933, of BUNCOMBE. Reversed.

This is an action brought by plaintiff against defendants to foreclose a certificate of tax sale of a certain lot in Buncombe County, N. C., "listed as the property of J. A. Penland" for $317.50. The record discloses affidavit of publication which contains "due search made and the defendants, J. A. Penland and wife, Addie Penland, cannot be found

in Buncombe County." Publication is ordered and notice of publication is set forth. Judgment appointing a commissioner and ordering sale and notice of publication set forth. Report of sale, confirmation and decree "County of Buncombe, who became the highest bidder for cash thereof for the sum of $413.13." Assignment of bid to Auburn-Asheville Company for $413.13 and request to commissioner to make deed. A. P. Grice, trustee, and R. M. Wendell entered a special appearance and made motion: "Now come A. P. Grice, trustee, and R. M. Wendell, and enter a special appearance in this action for the sole purpose of moving the court for an appropriate order and decree (a) setting aside, canceling and striking from the records that certain purported deed from Lamar Galloway, commissioner, to Auburn-Asheville Company, dated the ..... day of May, 1932, and recorded in the office of the register of deeds of Buncombe County, North Carolina, in Deed Book 454, page 28, as constituting a cloud on the legal and equitable titles to the land and premises hereinafter described, (b) vacating and setting aside the interlocutory judgment and the purported confirmation of the attempted foreclosure sale herein, (c) striking out the purported and attempted affidavit and order of publication, (d) striking out the sheriff's return on the summons, and (e) dismissing the action for want of jurisdiction of the court; and the said moving parties expressly save and reserve all of their rights in this behalf. For the purpose hereof, the moving parties respectfully show the court:

"That A. P. Grice, trustee, is a citizen and resident of the city of Norfolk, Virginia, and is the owner and holder of the legal title to the land and premises hereinafter described, under and by virtue of a conveyance of the same by J. H. Morris and Ruth H. Morris, his wife, by a certain deed in trust, dated 15 April, 1928, and duly recorded in said register's office in Book of Mortgages and Deeds in Trust No. 285, page 339, and that R. M. Wendell is a citizen and resident of Buncombe County, N. C., and is the lawful owner and holder of the equitable title to said land and premises under and by virtue of a conveyance thereof, by J. H. Morris and Ruth H. Morris, his wife, by a certain deed dated 8 September, 1928, and duly recorded in said register's office in deed Book 396, page 262, which said deed in trust and deed, and the records thereof, are hereby specifically referred to and made parts hereof. . . . That said lands and premises have a present actual market value of at least $12,000, as nearly as the moving parties can ascertain the same. That the moving parties had no knowledge of the pendency of this action prior to 29 August, 1932, on which date it was discovered that a purported corporation, known as Auburn-Asheville Company, had, on 24 August, 1932, recorded an alleged deed to said land and premises in pursuance of this action, and that subsequently, on 10 Sep-

tember, 1932, the moving parties brought a civil action in this court against the said Auburn-Asheville Company for the purpose of removing its claim under the said alleged deed as a cloud on the legal and equitable titles of the moving parties to said land and premises."

The moving parties pray that the court make "appropriate order and decree" on the grounds: "That the 1928 tax list upon which this action was predicated is erroneous, irregular and utterly false, for that it purports to show that the defendant, J. A. Penland, was the owner of said land and premises on 1 May, 1928, whereas neither the said defendant nor his wife and codefendant, Addie Penland, ever owned the said land and premises or any right, title, interest, estate or equity therein or thereto, the said tax list having been made and signed in the name of J. A. Penland, but without his knowledge or consent, by one J. H. Morris, who at that time was the true owner of said land and premises, and who should have listed the same in his own name."

Various other grounds are set forth and that the whole foreclosure procedure is irregular, illegal and void. In the record is also the following: "And movants further move the court that the said Auburn-Asheville Company be made a party to this proceeding for the purpose hereof."

Notice of the special appearance and motion was duly served on the county of Buncombe, J. A. Penland, Addie Penland and the Auburn-Asheville Company. The county of Buncombe answered admitting and denying certain of the allegations made by the movants. It admitted: "That no personal service was had on the defendants, but the plaintiff alleges that service was made by publication as is provided by law. . . . The plaintiff expressly alleging that each and every part of the foreclosure proceeding in question was carried out in accordance with the provisions of the statutes of North Carolina. . . . Wherefore, the plaintiff prays the court that the special appearance and motion of the said A. P. Grice, trustee, and R. M. Wendell, be dismissed."

The court below made the following order and decree: "This cause coming on to be heard before his Honor, P. A. McElroy, judge presiding and holding the courts of the Nineteenth Judicial District, at this the September Term, 1933, on the special appearance and motion of A. P. Grice, trustee, and R. M. Wendell, lodged in said cause for the purpose of securing an appropriate order and decree by the court setting aside and canceling a certain deed from Lamar Galloway, commissioner, to Auburn-Asheville Company, dated the ..... day of May, 1932, and recorded in the office of the register of deeds of Buncombe County, North Carolina, in deed Book 454, at page 28, and for other purposes specifically set out in said special appearance and motion, and being heard upon the arguments of counsel for the said movants, and for said

Auburn-Asheville Company, and it appearing from the record herein that said A. P. Grice, trustee, and R. M. Wendell, have never been made parties to this cause, and that said Auburn-Asheville Company has never been made a party hereto, by reason whereof the court is of the opinion that the said movants are not entitled at the present time, under the existing state of the record, to have their said motion heard upon the merits thereof. It is now, therefore, upon motion, considered, ordered, adjudged and decreed that said special appearance and motion be and the same is hereby dismissed at the cost of said movants, to be taxed by the clerk."

The movants, A. P. Grice, trustee, and R. M. Wendell excepted and assigned error to the judgment as signed and appealed to the Supreme Court.

Carter & Carter for the movants, A. P. Grice, trustee, and R. M. Wendell.

CLARKSON, J. The question involved: Where land is sold in an action to foreclose certificate of tax sale under N. C. Code, 1931 (Michie) section 8037, and the owners are not named as parties defendant, but appear specially, does the court have the power and authority to hear and determine their motion to set aside and vacate the proceedings, on the ground that the same is void for want of jurisdiction and make additional party? We think so under the facts and circumstances of this case, as the appearance was general and the motion could be made. This action is brought to foreclose a certificate of tax sale on a certain lot in Buncombe County, North Carolina. In N. C. Code of 1931 (Michie), section 8037, is the following: "Such relief shall be afforded only in an action in the nature of an action to foreclose a mortgage," etc.

N. C. Code of 1931 (Michie), part section 593, the clerk under a foreclosure proceeding: "May issue writs of assistance and possession upon ten days notice to parties in possession."

The movants contend that they have the legal and equitable title to the lot in controversy. If the real owner is in possession, the purchaser at the foreclosure sale could seek a "writ of assistance" and dispossess him. Further, it is contended that the attempted foreclosure proceeding is a cloud on movants' title.

N. C. Practice and Procedure in Civil Cases (McIntosh), speaking to foreclosure proceedings at page 217, we find: "As to prior and subsequent incumbrancers, it is generally held that, if the purpose of the proceeding is to get a sale of the property discharged of all liens so that a purchaser will be protected, it is necessary that they should be made parties. The prior mortgagee has the first right and if the land

is sold at the suit of a subsequent mortgagee, the purchaser will take it subject to the lien of the prior mortgage. If subsequent mortgagees are not made parties, it was formerly held that the sale of the land would discharge their liens, which would be transferred to the fund received; but it is now held that subsequent mortgagees or lienholders are not bound by the action unless they are made parties, and that they would still have the right to redeem."

Jones v. Williams, 155 N. C., 179; *Madison Co. v. Coxe,* 204 N. C., 58 (66); in *Guy v. Harmon,* 204 N. C., 226 (227), is the following: "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."

Bank v. Thomas, 204 N. C., 599; *Ferebee v. Thomason,* 205 N. C., 263. In *Craven County v. Investment Co.,* 201 N. C., 523 (528), the principle is thus stated: "In courts of equity the object sought is a complete decree on the general merits—the administration of justice by settling the rights of all parties interested in the subject-matter of the suit. Hence it is that all persons materially interested therein, whether legally or beneficially, should be made parties, however numerous, so that all may be bound by the final decree. Story's Equity Pleadings, sec. 72, *et seq.*" A motion in the cause was proper. "A judgment void upon its face, is subject to both direct and collateral attack." *Fowler v. Fowler,* 190 N. C., 536 (539); *Davis v. Brigman,* 204 N. C., 680. We find in 34 C. J., p. 345-346, the following: "A void judgment may be vacated and stricken from the record as a nullity at the instance of any person interested or affected thereby. A fraudulent judgment may likewise be attacked by creditors or others as to whom it is fraudulent, although they are strangers to the record. Persons who, while not parties to the record, are the real parties in interest affected by the judgment stand in such relation to the judgment that they are entitled to move to set aside or vacate it." C. J., *supra,* cites the case of *Reynolds v. Cotton Mills,* 177 N. C., 412, to sustain the principle and at p. 425 is the following: "Any party interested or affected by a void judgment may attack it collaterally, in a proper case, or by a direct proceeding to have it stricken from the record as a nullity. The Court, by *Rodman, J.,* (who was of most excellent learning in such matters), held in *Hervey v. Edmunds,* 68 N. C., 243, that an irregular judgment as, for instance, when the court lacked jurisdiction, could be attacked collaterally where the validity appeared on its face, or directly when it did not, and this could be done by any person interested in it or affected by it, whether a party to it or not. And it was intimated, if not held, that where the judgment is void it may be avoided or stricken from the record by the court, *ex mero motu,* or at the instance of any person not interested

in having it done, and he added, 'this was decided in *Winslow v. Anderson,* 20 N. C., 1, and we take it to be reasonable.' To the same effect are *Dobson v. Simonton,* 86 N. C., 492; *Walton v. McKesson,* 101 N. C., 428, 442. In the *Winslow case, supra, Chief Justice Ruffin* said that any person who is affected in interest by it may claim, for the purpose of justice (*ex debito justiciæ*), the exercise of the court's power to vacate a judgment which is void." *Clark v. Homes,* 189 N. C., 703 (708). In Freeman on Judgments (5th ed.), part sec. 260 p. 523, is the following: "The rule that none but parties to the judgment are permitted to interfere admits of exceptions, excluding from its operation persons not nominal parties to the action, but who are necessarily affected by the judgment, and who have equities entitled to be protected from its operation."

We think the appearance of the movants general. In *Scott v. Life Association,* 137 N. C., 515 (518), is the following: "The test for determining the character of an appearance is the relief asked, the law looking to its substance rather than to its form. If the appearance is in effect general, the fact that the party styles it a special appearance will not change its real character. 3 Cyc., pp. 502, 503. The question always is what a party has done, and not what he intended to do. If the relief prayed affects the merits or the motion involves the merits, and a motion to vacate a judgment is such a motion, then the appearance is in law a general one. *Ibid.,* pp. 508, 509. The court will not hear a party upon a special appearance except for the purpose of moving to dismiss an action or to vacate a judgment for want of jurisdiction, and the authorities seem to hold that such a motion cannot be coupled with another based upon grounds which relate to the merits. An appearance for any other purpose than to question the jurisdiction of the court is general. 2 Enc. of Pl. & Pr., 632. . . . 'A special appearance,' says *Mitchell, J.,* in *Gilbert v. Hall,* 115 Ind., 549, 'may be entered for the purpose of taking advantage of any defect in the notice or summons, or to question the jurisdiction of the court over the person in any other manner; but filing a demurrer or motion, which pertains to the merits of the complaint or petition, constitutes a full appearance, and is hence a submission to the jurisdiction of the court.' Whether an appearance is general or special does not depend on the form of the pleading filed, but on its substance. If a defendant invoke the judgment of the court in any manner upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general." *Motor Co. v. Reaves,* 184 N. C., 260; *McCollum v. Stack,* 188 N. C., 462.

It has been decided that the appearance is general and not special: The filing of answer or a demurrer, *Comrs. v. Scales,* 171 N. C., 523; *Reel v. Boyd,* 195 N. C., 273; asking for a restraining order in a pending

action. *McDowell v. Justice,* 167 N. C., 493; making a motion for change of venue, *Grant v. Grant,* 159 N. C., 528; asking for an order for time in which to file answer. *Garrett v. Bear,* 144 N. C., 23; motion to set aside a judgment and file answer, *Abbitt v. Gregory,* 195 N. C., 203 (209).

It may be noted that the decisions on special appearances have been written in cases where counsel thought they were entering special appearances and appeared generally instead. The whole tenor of the movants' motion was for the purpose of "securing an appropriate order and decree by the court setting aside and canceling a certain deed from Lamar Galloway, Commissioner to Auburn-Asheville Company." The Auburn-Asheville Company that held the deed to be set aside and canceled was not a party to the proceeding and the record discloses that "movants further move the court that the said Auburn-Asheville Company be made a party to this proceeding for the purpose hereof." We think the movants' appearance general, not special. C. S., 401.

C. S., 460, in part: "When a complete determination of the controversy cannot be made without the presence of other parties, the court must cause them to be brought in." *Barbee v. Cannady,* 191 N. C., 529.

N. C. Code, 1931 (Michie), 7971(15), is as follows: "Real property shall be assessed in the township or place where situated to the owner, if known; if the owner be not known and there be an occupant, then to such occupant, and either or both shall be liable for taxes assessed on such property; and if there be no owner or occupant known, then as unknown," etc.

C. S., 7971(36), is as follows: "Every person owning property, real or personal, is required to list and shall make out, sign and deliver to the assistant supervisor, list taker or assessor, a statement, verified by his oath, of all the real and personal property, money credits, investments in bonds, annuities or other things of value, and the value of all improvements on or changes in real property since same was assessed at the last quadrennial assessment, which was in the possession or control of such person or persons on the first day of April, either as owner or holder thereof or as parent, guardian, trustee, executor, administrator, agent, or factor, or in any other capacity," etc.

The contention of movants are: (1) J. A. Penland did not own the land in controversy and if he did he was a resident of Buncombe County, North Carolina, and the attempted service by publication was therefore, illegal and void. *Fowler v. Fowler, supra.* (2) The land was not listed in the owner's name, J. H. Morris, in accordance with the statute and for other irregularities, the sale was therefore, illegal and void. *Buncombe County v. Arbogast,* 205 N. C., 745.

J. H. Morris and wife on 15 April, 1928, made a deed in trust to A. P. Grice, trustee and conveyed the equity of redemption to R. M.

Wendell on 8 September, 1928. They were not made parties to the foreclosure proceedings. There are other serious allegations (made by movants) as to the invalidity of the foreclosure proceedings that we need not now consider. The movants were in court on a general appearance. The movants' motion to make Auburn-Asheville Company, a party, should have been granted. It seems that notice of the movants to make this motion was personally served on J. A. Penland and Addie Penland. J. H. Morris was not made a party. All these should be made parties for a "complete determination of the controversy." No brief has been filed by the county of Buncombe in this Court.

It is necessary for the purpose of government that taxes be levied and collected. It is so easy in proceedings of this kind to make all who have an interest in the land parties to the controversy. Notice and opportunity to be heard are fundamental bulwarks of the law, necessary to preserve orderly government, in any enlightened civilization. In the present case, without notice or opportunity to be heard, the land was sold, if the facts set forth by the movants are correct, the Auburn-Asheville Company attempted to purchase from Buncombe County for $413.13 the tax and cost, property which the present actual market value is worth $12,000. The rattlesnake before it attempts to inject its deadly poison will give notice to its victim, so should courts of justice see to it that the rights of persons or property should not be endangered without notice and an opportunity to be heard. It goes without saying that the county has a lien on the land in controversy for the tax and in final adjustment should be paid by the proper party. The learned and able judge who heard the case in the court below dismissed it on the ground that the movants had entered a special appearance. We think although the movants called it special, it was a general appearance and the controversy should be heard on its merits. For the reasons given, the judgment is

Reversed.

A. P. GRICE, TRUSTEE, AND R. M. WENDELL, v. AUBURN-ASHEVILLE COMPANY.

(Filed 21 March, 1934.)

(For digest see *Buncombe County v. Penland, ante*, 299.)

APPEAL by plaintiffs from *McElroy, J.*, at November Term, 1933, of BUNCOMBE. Affirmed.

Carter & Carter for plaintiffs.

CLARKSON, J. We see no error in the judgment of the court below. The remedy of plaintiffs was a motion in the cause. This whole controversy will be heard on its merits in the action, *Buncombe County v. Penland, ante,* 299. The judgment is

Affirmed.

IN RE WILL OF SUDIE HARGROVE.

(Filed 21 March, 1934.)

1. Wills D h—Testimony of incapacity of testator to make will within reasonable time before and after its execution is competent.

Upon the issue of mental capacity of a testator to make a will at the time of its execution evidence of incapacity within a reasonable time before and after its execution is competent, and what is a reasonable time cannot be definitely limited, but must be determined in accordance with the facts and circumstances of each particular case.

2. Same: Evidence K a—Nonexpert may testify as to mental capacity of testator.

Nonexperts are competent to give opinions as to the mental capacity of a testator at the time of the execution of the will, but such opinions must be based on the witnesses' acquaintance with, observation of or experience with the testator.

3. Same—Testimony of mental incapacity of testatrix held too remote from time of execution of will to be competent.

Testimony of a witness that the testatrix did not have sufficient mental capacity to execute a will when he talked with her some nineteen years after the execution of the will caveated *is held* too remote to be competent on the issue of the testatrix's mental capacity at the time of the execution of the will.

4. Same—Testimony of witness held not responsive to question and was incompetent on issue of mental capacity of testatrix.

In this caveat proceeding the sole issue was the mental capacity of the testatrix at the time of the execution of the will. A witness was asked his opinion as to testatrix's mental capacity and answered that he thought she knew she was making a will but did not know the purport of it because of undue influence exerted upon her: *Held,* the answer was not responsive to the question, and was not relevant to the issue of mental capacity, and propounders' motion to strike out the answer should have been allowed.

5. Appeal and Error J g—

Where a new trial is awarded propounders upon appeal the question of the correctness of the taxing of the costs in the lower court becomes immaterial.

IN RE WILL OF HARGROVE.

CIVIL ACTION, before *Grady, J.*, at August Term, 1933, of SAMPSON.

Sudie Hargrove executed a will on 27 February, 1906. This will appears in the opinion in a former appeal reported in 205 N. C., at page 72. She died 15 April, 1930. She was never married. In 1931 two nephews filed a caveat alleging that "Sudie Hargrove did not have the capacity to make and execute a will, and that she was not of sound and disposing mind and memory at and during said time." More than one hundred witnesses were examined by the parties and more than one hundred and forty exceptions taken during the trial. The evidence tended to show that Sudie Hargrove was a college graduate, attending Saint Mary's at Raleigh and a northern institution, and as a young woman had been a school teacher for some time. During her life she had executed and delivered several deeds and conveyances of land and timber.

The evidence tending to show mental incapacity may be capitulated as follows:

1. That she and her maiden sister, who predeceased her, did not live with the mother after the death of her father.

2. That she had sold timber to a witness several times and when he would ask her to make another sale, she would refuse to do it, but afterwards conveyed the timber.

3. That a couple of times since 1910, when in church and the preacher would say something that she approved, she would say in a low tone so it could be heard by those sitting around her, "That's the truth," and frequently when in church if the preacher said something that she did not like she would say, "That's a lie."

4. She was very excitable. If you crossed her "she went up in the air."

5. On one occasion her dog followed her to church and disturbed the preacher, and he put the dog out the window. Thereupon the testatrix got up and said: "If my dog can't stay I shall not either."

6. She attempted to list a piano for taxes at a valuation of one dollar.

7. That she did not recognize her brother in 1923 when he came back home after an absence of about forty years.

8. That she kept her dogs in the room with her. "They had a bed and she had one." She prepared for the dogs like she would one of the family; made cakes for them and bought candy for them and cooked chicken for them, and she cooked cakes for the dogs Christmas.

9. That she had not erected a tombstone at the grave of her parents.

10. "In her dress she was always behind the date."

11. That she threatened to shoot a witness if he cut any of her trees.

12. That in 1904 or 1905, prior to making the will, she asked witness every time he met her who his father was and if he had any mutton suet. She ran the tax collector off her land. She allowed the plantation to run down and grow up in bushes and trees.

13. That in 1909, after the will was made, the testatrix had said: "They expect me to leave my money to the church, but I am not going to do it."

There was much opinion evidence by nonexpert witnesses as to the mental capacity of testatrix. Twenty of these witnesses first knew the testatrix after the execution of the will. These witnesses were permitted to testify as to various acts as above capitulated, extending from the year 1909 to the time of her death. Some of these witnesses had not known the deceased until more than twenty years after the will was made. There were other witnesses who lived in the community and had known the deceased prior to 1906 and thereafter, who testified that in their opinion she did not have sufficient mental capacity to make a will. The propounders offered the testimony of approximately twenty-five witnesses, who testified that the deceased was a college graduate, devoted to the church, a shrewd business woman, a subscriber and reader of magazines and newspapers, including the *New York Herald, Saturday Evening Post,* and well informed on the general topics of the day, intellectual and cultured.

The jury found that the testatrix did not have mental capacity to execute a will on 27 February, 1906, and judgment was rendered in favor of the caveators. The judgment further taxed the costs of the proceeding against the trustees "of the Eastern Diocese of North Carolina, and James Hargrove, Isaac Hargrove and Everett Simmons."

From the foregoing judgment the propounders appealed.

Butler & Butler for propounders.

J. Faison Thomson and Hugh Brown Campbell for caveators.

Henry E. Faison of counsel.

BROGDEN, J. (1) What limitations are imposed by law upon the admissibility of the acts, conversation and general conduct of a testator or testatrix subsequent to the execution of a will in a caveat proceeding based upon mental incapacity at the time the will was executed?

(2) Was the cost properly taxed?

The ultimate quest of the trial was to discover the mental condition or testamentary capacity of the testatrix on 27 February, 1906. This idea was expressed *In re Ross,* 182 N. C., 477, 109 S. E., 365, as follows: "The competency of testatrix to make the will in question is to be determined as of the date of its execution, or of its republication, as by a codicil, . . . and not when instructions for its preparation were

given. . . . Of course, the conduct of testatrix at the time of this conference is competent and relevant, as bearing upon the question of her testamentary capacity; but, notwithstanding her mental condition at that time, this would not necessarily establish her competency to execute the will at the subsequent date." The same thought was exemplified in *In re Smith's Will*, 163 N. C., 464, 79 S. E., 977. In that case a will was executed on 26 September, 1911. The caveators undertook to offer in evidence the record in a special proceeding entitled "W. R. Smith, lunatic," dated April, 1912. The trial judge excluded the evidence and in discussing the objection to such ruling, the Court said: "If the record had any relevancy to the issue, the date to which it related was too remote for any legal bearing upon the case. There must, of course, be some rational connection between the two and some reasonable proximity in point of time, so that the proof that is offered will have at least some tendency to establish the fact embodied in the issue. Such was not the case here. The record was made some time after the date of the will."

The caveators offered in evidence the testimony of approximately sixteen witnesses, to wit, O. L. Taylor, Ben. W. Oates, A. W. Oates, C. E. Weatherington, Dr. Paul Crumpler, Joe Creel, John R. Price, George W. Massey, S. G. Avant, Walter Kelly, Dave Raynor, Amy Jackson, Paul Armstrong, Arthur King, M. L. Hobbs, L. H. Ellis, and A. L. Sutton. These witnesses all testified that in their opinion the testatrix did not have testamentary capacity on 27 February, 1906. It appeared, however, that none of said witnesses knew the deceased in 1906. Two of the witnesses first became acquainted with her in 1908 or 1909, one in 1911, two in 1912 or 1913, some in 1914 and 1915, others in 1918, 1919, 1920, one in 1924, and two in 1926. Hence, the opinions of these witnesses were based upon acts and conduct of deceased after the execution of the will and ranging in time from two to twenty years. The decided weight of authority upon the subject is to the effect that the conversation, acts, conduct and general demeanor of a testator or testatrix previous to the execution of a will, at the time of the execution, and subsequent to the execution thereof are competent and relevant upon the issue of testamentary capacity. The common sense of mankind knows that material changes may occur in both body and mind within comparatively short periods of time. Hence the question occurs: When is such evidence to be deemed proximate and when remote? The answer given by textwriters and decided cases are as variable as the particular point of view or approach.

The rule of reason has been adopted as the law in this State. In the *Will of Stocks*, 175 N. C., 224, 95 S. E., 360, the Court quoted with approval the utterance of the Minnesota Court, as follows: "Where the issue is the mental capacity of the testator at the time of making

the will, evidence of incapacity within a reasonable time before and after, is relevant and admissible." Naturally, it will be inquired what is meant by reasonable time. No precise or mathematical definition can be fashioned. The term itself is ordinarily clearer than definitions. Usually definitions cloud rather than clarify.

The interpretation of the term must ultimately depend upon the variability of given facts and circumstances. In the *Smith case, supra,* it was intimated by the Court that a lunacy proceeding for the testator instituted approximately seven months after making the will was too remote. In the case of *Mitchell v. Corpening,* 124 N. C., 472, 32 S. E., 798, it was held that evidence of mental condition a "very few days" after the execution of the will was competent. Finally, in *Wood v. Sawyer,* 61 N. C., 251, it was held that a paper written two years after the date of the will, setting forth the reasons for making it, was competent upon testamentary capacity. Likewise, in *Norwood v. Marrow,* 20 N. C., 578, it was held that evidence of mental capacity the next day was competent on the question of capacity to make a deed. Upon the other hand, it has been held *In re Burns' Will,* 121 N. C., 336, 28 S. E., 519, that the declarations and conduct of a testator "are not received as a part of *res gestæ,* but whether made long before or after making the will is immaterial as to their competency." See Wigmore on Evidence, 2d ed., Vol. I, section 233, *et seq.*

An examination of many authorities discloses that the rule of reason in such matters is the prevailing judicial thought. Certainly it is the latest utterance of this Court.

There is no evidence that the testatrix suffered with a disease tending to produce mental impairment and progressive in its nature. The opinions of the witnesses referred to were based upon disconnected and unrelated incidents. Courts and textwriters all agree that the opinions of nonexperts are competent to show testamentary capacity at a given time. However, such opinions must be fashioned out of some sort of acquaintance, observation or experience. The material out of which such opinions must be formed was pointed out in the case of *Will of Stocks, supra.* The Court said: "These witnesses, ten in number, all testified that they knew the testator well; had conversations or business transactions with him, and from what they saw of him and their dealings with him, seeing him, hearing him talk, and association with him, in their opinion he had mental capacity to know what he was doing, what property he had and to whom he wished to give it." Consequently, the final inquiry is whether association, acquaintance, transactions and conversations that took place between witnesses and the testatrix from two to twenty years after the execution of the will have any "rational connection" or "reasonable proximity in point of time" to the vital issue. At least, it can be

stated that no case in this State has been called to the attention of the Court in which disconnected incidents occurring more than two or three years after the execution of the will have been approved in determining mental capacity. Therefore, the Court is of the opinion that such evidence, whether offered by propounders or caveators, is incompetent. However, it is not to be assumed that the Court intends to prescribe a time limit. The best that appellate courts can do in dealing with the subtle processes of the mind is to interpret facts in such cases by the rule of reason and common sense.

Caveators offered a witness named George W. Massey, who testified he saw testatrix one time in 1925, and had an opportunity to talk with her. The following question was propounded: "From your observation and conversation with Miss Sudie Hargrove, did you form an opinion satisfactory to yourself, as to whether or not Miss Sudie Hargrove at the time in 1925 when you observed her had sufficient mental capacity to know and understand the nature and extent of her property, to know who were the natural objects of her bounty, and to realize the full force and effect of the disposition of her property by will?" The propounder objected and excepted. The witness answered: "I don't think she was." Testamentary capacity in the year 1925, or nineteen years after the will was executed, was not the point, and the question should have been excluded. The caveators offered a witness named Sam H. Hobbs, who testified that he had known testatrix forty years. On cross-examination he was asked the following question: "When she was writing her will, don't you think she knew she was going to make a will?" The witness answered: "I think she thought she was making a will, but didn't know the purport of it. To my mind, there had been undue influence on her to the extent that she didn't know what she was doing." The propounder moved to strike out the answer. Motion was denied and propounder excepted. The caveat did not allege undue influence as a basis for invalidating the will, and obviously the answer was in nowise responsive to the question and should have been excluded.

The Court is of the opinion that the questions of estoppel by deed debated in the briefs have no bearing upon the essential and determinative issue.

There was competent evidence of mental incapacity to be submitted to the jury, but as we interpret the record, the errors specified warrant a new trial of this cause. Undoubtedly, it is the policy of the law to bring an end to litigation as speedily as exact justice to all parties may permit. Notwithstanding, it is also the policy of the law to guarantee to each and every party a trial in reasonable accord with the principles which the experience and enlightened judgment of mankind have found necessary in the due administration of justice.

The second question relates to the taxing of cost against the trustees and other propounders. The caveators assert that C. S., 1244, governs the ruling and the propounders assert that C. S., 1254, is determinative. Apparently 1244, subsection 2, has been interpreted to mean that the court has the power to tax the cost against the estate, although the will may be upheld. See *Mayo v. Jones*, 78 N. C., 406; *In re Winston's Account*, 172 N. C., 270, 90 S. E., 201. However, this question becomes immaterial as a new trial must be awarded.

New trial.

NOAH HOBBS v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 21 March, 1934.)

1. Telegraph Companies A c—Proof of failure to deliver message in reasonable time establishes prima facie case of negligence.

Where it has been shown that a telegraph company failed to deliver a death message between its offices within the State in twenty-four hours a prima facie case of negligence is made out, placing the burden on defendant to rebut the prima facie case, if it chooses to do so, the burden remaining on plaintiff on the issue of defendant's negligence.

2. Same—Where there is no conflict in telegraph company's evidence in rebuttal of prima facie case, directed verdict in its favor is not error.

Where all the evidence introduced by defendant telegraph company tends to rebut a prima facie case of negligence on its part in delivering a telegram, and there is no conflict in the evidence as to the facts constituting such rebuttal, the company is entitled to an instruction that if the jury finds the facts to be as testified by the witnesses to answer the issue of negligence in defendant company's favor.

3. Telegraph Companies A b—Where address indicates that sendee lives beyond free delivery limits, company need not advise sender of fact.

Where the address given on a telegram shows that the sendee and the person in whose care the message is sent lives on a rural free delivery mail route from the terminal office beyond the free delivery limits of the telegraph company and probably beyond the limits of the city, the company may assume that the sender knew the facts and had given the best address known, and it is not under duty to send a service message to sender giving notice that the telegram could not be delivered by messenger without the payment of an additional charge, and having failed, after due diligence, to locate the sendee or the person in whose care the message was sent by telephone, it is justified in delivering the message by posting it at the terminal office.

CLARKSON, J., dissenting.

APPEAL by plaintiff from *Shaw, Emergency Judge*, at March Special Term, 1933, of DAVIDSON. Affirmed.

This is an action to recover damages for mental anguish suffered by plaintiff as the result of the alleged negligent failure of the defendant to deliver, within a reasonable time after its receipt at defendant's office in Lexington, N. C., a telegram addressed to the plaintiff, advising him of his mother's death.

At 9:16 a.m., on 1 September, 1932, a telegram was delivered to the defendant at its office in Monroe, N. C., by Mrs. E. M. Flow, a sister of the plaintiff, for transmission and delivery to the plaintiff, at his home near Lexington, N. C., which was in words as follows:

"Monroe, N. Car. 9:16 A 1 Sept. 1932.

Noah Hobbs

R. F. D. 5. Care J. S. Deal, Lexington, N. Car. Mother died this morning at 6:30. Mrs. M. E. Flow."

This telegram was received at defendant's office in Lexington, N. C., at 9:23, on 1 September, 1932. It was delivered to the plaintiff, by mail, at his home on R. F. D. No. 5, near Lexington, N. C., at 12:30 p.m., on 2 September, 1932, by the wife of J. S. Deal, who had found the telegram in an envelope addressed to the plaintiff, in her husband's mail box. The envelope containing the telegram was deposited in the mail box by the carrier who had left Lexington at 9:00 a.m. that morning, as required by his daily schedule.

Upon his receipt of the telegram, the plaintiff immediately left his home in Davidson County in an automobile, and drove to Monroe, in Union County, a distance of 70 miles. Upon his arrival at Monroe, at about 5:00 o'clock, p.m., on 2 September, 1932, the plaintiff had learned that his mother's funeral had been held that morning at 11:30 o'clock. He testified that the fact that he had not attended his mother's funeral affected him deeply, causing him great suffering in both mind and body. He said: "If I had got the telegram in time, I could have attended my mother's funeral."

The manager of defendant's office at Lexington, N. C., testified as follows:

"At 9:23 a.m., on 1 September, 1932, a telegram addressed to Noah Hobbs, R. F. D. 5, care J. S. Deal, Lexington, N. C., came to my office from Monroe, N. C. I did not know Mr. Hobbs or Mr. Deal. I did not know where either of them lived. Upon receipt of the telegram, which was a death message, I got the telephone directory of the city of Lexington to see if either Mr. Hobbs or Mr. Deal had a telephone. I found that neither of them had a telephone. Their names were not in the directory. I then called the rural operator, and was informed by him that neither Mr. Hobbs nor Mr. Deal had a telephone connecting with

the city exchange. I then called Reed's Exchange, which is in Davidson County, about five or six miles from my office—in the country. I was informed that neither Mr. Hobbs nor Mr. Deal had a telephone connecting with Reed's Exchange. No one at the exchange knew either of them. I then called Churchland Exchange, which is a little further in the country from Lexington than Reed's Exchange. I was informed that neither Mr. Hobbs nor Mr. Deal had a telephone connecting with Churchland Exchange. No one at the exchange knew either of them. The reason I called these two exchanges was that route No. 5 from Lexington goes in the direction of these exchanges, and persons living on said route are served by these exchanges. After I had been unable to locate either Mr. Hobbs or Mr. Deal, I called the agent of the defendant at Monroe, by wire, and advised him that I had been unable to locate either Mr. Hobbs or Mr. Deal, that neither of them had a telephone, and that I had mailed the telegram to Mr. Hobbs, at the address given in the telegram. I mailed the telegram some time before dinner, as I now remember, on 1 September, 1932. The mail for route No. 5, leaves Lexington each morning at 9:00 o'clock. The telegram addressed to the plaintiff left Lexington on the first mail which went out of Lexington for route No. 5 after its receipt.

"The defendant's free delivery limits at Lexington extend one mile from its office. Both Mr. Hobbs and Mr. Deal live beyond the free delivery limits. I did not know either of them on 1 September, 1932, and did not know where either of them lived. Sometimes when I know where the addressee in a telegram lives, beyond the free delivery limits, I take a chance and send the telegram by special mssenger, expecting him to pay the charge for delivery. If I know where the addressee lives, and his home is beyond the free delivery limits, I have the sender advised, so that the extra charge for delivery may be paid or guaranteed by him, if he desires us to deliver the telegram by messenger."

Mrs. E. M. Flow, the sender of the message, testified that she paid the amount charged by the defendant's agent at Monroe for the transmission and delivery of the telegram to the plaintiff, and that she was not informed by said agent or by any one else, that an extra charge would be made for the delivery of the telegram to her brother, by a special messenger. She would have been willing to pay the extra charge, if advised by the defendant that such charge was required.

At the conclusion of all the evidence, the court refused to allow defendant's motion for judgment as of nonsuit, but intimated that it would instruct the jury that if they should find the facts to be as testified by the witnesses, they should answer the first issue, to wit: "Did the defendant negligently fail to transmit and deliver the telegram from Monroe, N. C., as alleged in the complaint," "No."

Upon this intimation by the court, the plaintiff submitted to a nonsuit, and appealed to the Supreme Court.

D. L. Pickard for plaintiff.

Walser & Walser, Chas. W. Tillett and Francis R. Stark for defendant.

CONNOR, J. It is not contended on this appeal that there was any evidence at the trial of this action tending to show negligence on the part of the defendant in transmitting the telegram addressed to the plaintiff from Monroe to Lexington. All the evidence showed that the telegram was filed at defendant's office in Monroe at 9:16 a.m. and was received at defendant's office in Lexington at 9:23 a.m., on the same day. The defendant fully performed its contract with the sender and its duty to the sendee of the telegram with respect to its transmission from Monroe to Lexington. On the facts shown by all the evidence, there is and can be no contention to the contrary.

The telegram, however, although received by defendant at its office in Lexington at 9:23 a.m., on 1 September, 1932, was not delivered to the plaintiff until 12:30 p.m. on 2 September, 1932. There was a delay of more than twenty-four hours in the delivery of the telegram after its receipt by the defendant at its office in Lexington. Nothing else appearing in the case, such delay would constitute at least evidence of negligence on the part of the defendant, with respect to the delivery of the telegram, sufficient to carry the case to the jury, and if unaccounted for by the defendant would entitle the plaintiff to a verdict on which the defendant would be liable to the plaintiff for the damages sustained by him and resulting from the negligence of the defendant. It is well settled that where a telegraph company has received a telegram for transmission and delivery to the sendee, and after its prompt transmission to its terminal office, has failed to deliver the telegram to the sendee within a reasonable time, because of its failure to exercise due diligence to make a prompt delivery, the company is prima facie liable to the sendee for any damages he has sustained which resulted from the unreasonable delay to deliver the telegram to him. *Hendricks v. Telegraph Co.*, 126 N. C., 304, 35 S. E., 43. In such case the burden is on the defendant, if it denies liability, to offer evidence to rebut the prima facie case for the plaintiff. The burden of the issue involving liability, however, remains on the plaintiff. Such burden is not shifted to the defendant, who may or may not offer evidence to rebut the prima facie case made by the evidence offered by the plaintiff. *Speas v. Bank*, 188 N. C., 524, 125 S. E., 398. Where all the evidence offered by the defendant rebuts the prima facie case made by the evidence offered by

the plaintiff, and there is no controversy between the parties as to the facts shown by the evidence, the defendant is entitled to an instruction of the court to the jury that if the jury shall find the facts to be as all the evidence tends to show, they should answer the issue involving the liability of the defendant to the plaintiff, in the negative. McIntosh Prac. & Pro., p. 632; *Bank v. Noble,* 203 N. C., 300, 165 S. E., 722; *Somersette v. Stanaland,* 202 N. C., 685, 163 S. E., 804; *Reinhardt v. Ins. Co.,* 201 N. C., 785, 161 S. E., 528. This principle is not in conflict with the right to trial by jury of controverted issues of fact but affords parties to the action the protection of the law, when there is no controverted issue of fact.

In the instant case, the address of the sendee as shown by the telegram delivered by the sender to the defendant at Monroe, and received by the defendant at Lexington, showed that the plaintiff, Noah Hobbs, and the person in whose care the telegram was to be delivered, J. S. Deal, both lived on Rural Free Delivery Route No. 5, out of Lexington. All the evidence at the trial showed that defendant's manager at Lexington did not know Mr. Hobbs or Mr. Deal, and did not know where either of them lived on Route No. 5. In such case, what was the duty of defendant's manager at Lexington with respect to the delivery of the telegram to the sendee?

The address given in the telegram showed that both Mr. Hobbs and Mr. Deal lived beyond the free delivery limits of the defendant at Lexington, and probably beyond the corporate limits of the city. It was a reasonable inference and the evidence shows such to be the fact, that the sender of the telegram knew these facts, and had given the defendant the only address of the sendee which she knew. In such case, the principle that when the sendee of a telegram cannot be located by the agent of the company, because of an insufficient or erroneous address, given by the sender, it is the duty of the agent to ask, by wire, for a better address, is not applicable. It was manifestly the duty of defendant's manager at Lexington to use reasonable diligence to locate Mr. Hobbs, or Mr. Deal, at the address given by the sender of the telegram. He undertook to perform this duty by the use of the telephone, and it was only after he had been unable to locate either Mr. Hobbs or Mr. Deal, by telephone, that he mailed the telegram to the address given by the sender. The telegram was delivered by mail to J. S. Deal, and by his wife to Mr. Hobbs. Whether the defendant's manager would have been justified in mailing the telegram before he used the telephone for the purpose of locating Mr. Hobbs, or Mr. Deal, under the principle on which *Gainey v. Telegraph Co.,* 136 N. C., 262, 48 S. E., 653, was decided, need not be decided. Having failed to locate either Mr. Hobbs or Mr. Deal by telephone, he was justified in using the mail for the

delivery of the telegram to the address given by the sender. On the facts shown by all the evidence, he was not required to notify the sender that the telegram could not be delivered at the address given by her by special messenger. He had a right to presume that she knew this, when she delivered the telegram to the defendant at Monroe.

The intimation of the court as to the instruction which it would give the jury in this case is supported in principle by the decision in *Gainey v. Telegraph Co., supra,* and is in accord with the decision in *Garner v. Telegraph Co.,* 100 S. C., 302, 84 S. E., 829. In that case it was held that the addressing of a telegram to the addressee, "R. F. D. 1," is a direction to the telegraph company to use the mail for delivery, and that the company was not liable for delay thereby occasioned. See 62 C. J., 169. The judgment in the instant case is

Affirmed.

CLARKSON, J., dissenting: The following telegram was sent and the charges paid:

"Monroe, N. Car., 9:16 A, 1 Sept., 1932.

Noah Hobbs
R. F. D. 5 care J. S. Deal, Lexington, N. Car.
Mother died this morning at 6:30. Mrs. M. E. Flow."

It was a pathetic message to a brother from a sister on the death of their mother. Mrs. Flow was a sister of Noah Hobbs. He never received the message in time and was thus prevented from seeing the mother's face once more, before her body was committed to the ground.

"Earth to earth, ashes to ashes, dust to dust; looking for the general Resurrection in the last day."

It was alleged and proved "That at the time of sending of the telegram, this plaintiff resided within a quarter of a mile of the corporate limits of the city of Lexington on a good road, and was known generally by a large number of people in and around Lexington, and his home was readily accessible, and if said telegram would have been handled in the usual and customary manner, it would have been delivered to the addressee, this plaintiff, immediately after it arrived in the city of Lexington on the morning of 1 September, 1932." Lexington is a town of about 10,000 inhabitants.

Under the facts and circumstances of this case, I think the matter should have been left to the jury as to due care, such care as an ordinarily prudent person would exercise under the conditions existing at the time he is called upon to act.

I do not think it can be said as a matter of law that the delivery of the telegram in this case was a compliance by the Western Union Telegraph Company with its contractual duty. On a motion as of nonsuit, the evidence is to be considered in the light most favorable to the plaintiff. C. S., 567; *Lynch v. Tel. Co.*, 204 N. C., 252; *Thigpen v. Ins. Co.*, 204 N. C., 551. The evidence in this case should have been submitted to the jury.

While it was held in *Gainey v. Tel. Co.*, 136 N. C., 261, that where a death message was sent to plaintiff directed "Mr. Noel Gainey (P. O. Idaho), Fayetteville, N. C.," and asked plaintiff to "write" if he could not come, the telegraph company was not liable for negligence on receiving the telegram at Fayetteville, in placing it in the postoffice, addressed to the plaintiff. *Associate Justice Walker,* in an exhaustive opinion, clearly limited that decision to the peculiar facts of that case. He pointed out that not only was it indicated that there was a double address, one of them as being the farthest reach of the telegraph service and the other as being the plaintiff's postoffice address, but that it was also indicated that "celerity in the communication between the parties was not in this case the sole inducement for using the electric telegraph" as the plaintiff was directed to "write if you cannot come."

"But whatever the reason of this peculiar wording of the message, we think if the plaintiff was requested to use the mails, the defendant may well be excused for doing likewise," said *Justice Walker.* "It is so apparent from the language of the telegram that the company had the right to suppose that it was expected not to make a special delivery, but simply to post the message at Fayetteville, that there is no conceivable ground upon which we could hold it to have been negligent to deliver by mail instead of by special messenger."

It can readily be seen that the Court, in that case, distinguished the facts so as to make it inapplicable in the instant case. The learned justice, who wrote the opinion, left no doubt that it was decided upon the peculiar facts of that particular case. As further evidence of his intention to limit his decision to the peculiar facts of that case, we quote the following dicta from that opinion: "We have held that when a message is received at a terminal office to which it has been transmitted for delivery to the person addressed, it is the duty of the company to make diligent search to find him and, if he cannot be found, to wire back to the office from which the message came for a better address, and likewise it is the duty of the company, when it has discovered that the person for whom the message is intended, lives beyond its free delivery limits, either to deliver it by a special messenger or to wire back and demand payment or a guarantee of payment, as it may choose to do, of the charge for special delivery and, if it fails to deliver without de-

manding and being refused payment of the charge it will be liable for its default. It is not liable, though, if the sender of the message, when proper demand is made, refuses to pay the extra charge for a special delivery beyond the limits established for free delivery by the company, provided these limits are reasonable."

In the present case, the telegram addressed to "Noah Hobbs, R. F. D. 5, care J. S. Deal, Lexington, N. C.," contained no qualifying or explanatory matter, such as was contained in the message in the *Gainey case,* but conveyed only the statement: "Mother died this morning at 6:30."

While evidence was offered on behalf of the defendant, in the instant case, through its agent at Monroe, that when Mrs. M. E. Flow, sister of the plaintiff, delivered the telegram she was asked to pay an extra charge to guarantee delivery. This was denied by her. It was also testified by the agent of the defendant at Lexington, that he called the agent of the defendant at Monroe and advised him that he had been unable to locate either Mr. Hobbs or Mr. Deal and that he had mailed the telegram to Mr. Hobbs, at the address given in the telegram, however, there was no evidence that the agent at Monroe made any effort to get in touch with Mrs. Flow, sender of the telegram.

Unless the inclusion of the words "R. F. D. 5" as a part of the telegram brings this case into a separate category, there is no doubt that the evidence in this case was sufficient to carry it to the jury. In *Willis v. Tel. Co.,* 188 N. C., 114, this Court, in upholding the admissibility of evidence with reference to the telegraph company's failure to notify the sender of the nondelivery of a message, quoted the following from *Cogdell v. Tel. Co.,* 135 N. C., 431: "If for any reason it (telegraph company) cannot deliver the message, it becomes its duty to so inform the sender, stating the reason therefor, so that the sender may have the opportunity of supplying the deficiency, whether it be in the address or additional cost of delivery. The failure to notify the sender of such nondelivery is of itself evidence of negligence."

While it was held in *Garner v. Tel. Co.,* 100 S. C., 302, 84 S. E., 829, that the addressing of a telegram to the addressee, "R. F. D. 1" is a direction to the telegraph company to use the mail for delivery, and that the company was not liable for the delay thereby occasioned, there is equally impressive authority to the contrary. In the recent case of *Western Union Telegraph Company v. Scarborough* (Tex. Civ. App.), 44 S. W. (2d), 751, it was held that: "The mailing of a telegram which designates the postoffice box of the addressee is not a fulfilment of the telegraph company's contractual or legal duty." In *Western Union Telegraph Co. v. Freeland* (Tex. Civ. App.), 12 S. W. (2d), 256, it was held that: "The addressing of a telegram to a postoffice box was a direction

to deliver the telegram to a person, not a box number." That case, as in the instant case, involved a death message, and the Texas Court logically and correctly points out: "In the very nature of the transaction, notice was given of the importance of the delivery of the message to the person named therein, and it was not a direction for the delivery of same to an inanimate receiver. It is true that it has been held that where a telegram is addressed to one person in care of another, the delivery of the telegram to the party in whose care it is sent is a compliance with the duty that the telegraph company owes under its contract. *Western Union Telegraph Co. v. Young,* 77 Tex., 245, 13 S. W., 985; 19 Am. St. Rep., 751. In that case the sender contracted for it to be delivered to a party who would naturally be supposed to see that it reached the hands of the one for whom it was intended. It might be true that a telegram sent to a particular residence number without being addressed to any person, but delivered to that address, would be a compliance with the contract, but it cannot reasonably be supposed that, when the telegraph company delivered this telegram to box 102, it was thereby making a personal delivery to Mrs. Freeland."

It was pointed out in that case that the telegraph company received the message without requesting more specific directions as to its delivery and that the sender was not requested to furnish a fee for delivery outside of its delivery limits. The Court concluded that "we cannot therefore say, as a matter of law, that the delivery of the telegram in this case was a compliance by the company with its contractual duty." Hence, it was held that the trial court properly submitted the issue, "Did the defendant Western Union Telegraph Company use ordinary care to deliver the death message to Mrs. Freeland?"

The very nature of the use of telegraph facilities contradicts the idea that mails are to be used in the delivery of telegrams. As was pointed out in *Sturtevant v. Western Union Telegraph Co.,* 84 A., 998: "Telegrams are sent because the sender desires the contents communicated to the addressee at once. That method is employed, instead of the mail, because of its dispatch. The message showed that it was the acceptance of an offer. Its importance was apparent upon its face, and when the defendant accepted it, and the money to forward it, in law it undertook to forward and deliver it at once. That was the consideration for which it accepted the plaintiff's money."

Under all the evidence of this case, it was clearly a matter for the jury to decide and the judgment of the court should be reversed.

W. W. GUY v. AVERY COUNTY BANK AND E. C. GUY.

(Filed 21 March, 1934.)

Evidence D e—

Where a communication is made by a client to an attorney under a sense of absolute privilege and on the faith of the relationship of attorney and client, such communication is absolutely privileged.

APPEAL by defendant E. C. Guy from *Schenck, J.*, at September Term, 1933, of MCDOWELL. Affirmed.

The cause was referred by consent; the referee made his report; exceptions were filed and overruled; the report was confirmed; and E. C. Guy excepted to the judgment of the Superior Court and appealed.

Dillard S. Gardner and W. T. Morgan for appellant.
J. Will Pless, Jr., and Winborne & Proctor for appellees.

PER CURIAM. The only question to be considered is presented by an exception to the exclusion of evidence. Rule 27½—Practice in the Supreme Court. The defendant offered the deposition of J. P. Kitchin for the purpose of showing, as a basis of E. C. Guy's alleged counterclaim, that the plaintiff had admitted his indebtedness to E. C. Guy and his purpose to convey certain lots to him as security. The plaintiff objected for the reason that between the witness and the plaintiff there existed the relation of attorney and client and that the answer would involve the disclosure of a confidential communication. The referee excluded the evidence and the appellant's exception was overruled by Judge Schenck.

The witness was a practicing attorney. He testified that he had not been retained by the plaintiff with respect to the conveyance of the lots but that he had represented the plaintiff in practically all his real estate transactions in Buncombe County for a number of years as the plaintiff called on him from time to time, and that he and the plaintiff occupied the "confidential relationship of attorney and client"; that all the information he had received came to him by reason of this relation; that when they "discussed these things the plaintiff was talking to him as his attorney"; that he had not been released from the privilege of nondisclosure; and that the plaintiff would not have made the disclosure except for these facts.

When the relation of attorney and client exists all communications made by the latter to his attorney on the faith of such relation are privileged and the attorney will not be permitted to disclose them. *Hughes v. Boone,* 102 N. C., 137; *Carey v. Carey,* 108 N. C., 267. The

attorney's disqualification with respect to communications between himself and his client is absolute. McKelvey on Evidence (4 ed.), sec. 244. In 2 Jones on Evidence (2 ed.), sec. 749, it is said: "The privilege has been recognized, even in cases where the attorney did not consider that he was acting as counsel, when the circumstances were such as to show that the relation of attorney and client actually existed. Communications made to an attorney in the courts of any personal employment, relating to the subject thereof, and which may be supposed to be drawn out in consequence of the relation in which the parties stand to each other are under the seal of confidence, and entitled to protection as privileged communications. . . . Although the burden of showing that the communication is privileged rests on the one asserting the facts, whenever the communication relates to a matter so connected with the employment as attorney as to afford a presumption that it was drawn out by the relation of attorney and client, it is privileged from disclosure."

We are not inadvertent to the doctrine that to be privileged the communication should be made as a part of the purpose to obtain advice, but it is manifest in the present case that the communication was made by the client under a sense of absolute privilege.

Affirmed.

THE PEOPLES BANK OF BURNSVILLE v. R. L. PENLAND ET AL.

(Filed 21 March, 1934.)

Judgments K a—Held: movant rebutted presumption of attorney's authority and order setting aside consent judgment is upheld.

While the authority of an attorney is presumed when he professes to represent a client, where the alleged client has assumed the burden of proof and satisfied the court that an attorney signing a consent judgment in her behalf was without authority and that she was not present at the hearing and had not agreed to the judgment or authorized anyone to agree thereto, the court's judgment setting aside the consent judgment will be upheld on appeal.

APPEAL by plaintiff from *Schenck, J.*, at August Term, 1933, of YANCEY. Affirmed.

This is a motion made by Sallie Hensley to set aside a judgment purporting to have been rendered against her by her consent at January Term, 1930, of the Superior Court of Yancey County. According to the entry on the judgment she was represented by attorneys; but the court found the facts to be that her alleged consent resulted from misinformation imparted to the attorneys by another person and that she did not

in fact consent to the judgment or employ attorneys; that she had filed an answer in the cause denying her liability; that she was not represented by authorized counsel at the hearing in which the consent judgment was rendered; and that she is entitled to the relief prayed.

It was adjudged that the judgment be set aside and that the plaintiff return to court the money collected, to be held until the final determination of the appeal. The plaintiff excepted and appealed.

G. D. Bailey, R. W. Wilson and Charles Hutchins for appellant.
C. R. Hamrick and W. K. McLean for appellee.

PER CURIAM. There is a presumption in favor of an attorney's authority to act for any client whom he professes to represent. 6 C. J., 631, sec. 128. The judgment was signed by attorneys professing to represent Sallie Hensley, and upon her devolved the burden of showing that she did not consent to the judgment. *Chemical Co. v. Bass,* 175 N. C., 426; *Gardiner v. May,* 172 N. C., 192. She assumed the burden and satisfied the trial court that she had not employed counsel to represent her in the matter then adjudicated; that the attorneys who signed the judgment had not been authorized to do so; that she was not present at the hearing; and that she neither agreed nor authorized any one to agree to the judgment.

The judgment is therefore affirmed. *Lynch v. Loftin,* 153 N. C., 270, 274.

Affirmed.

BEACON MANUFACTURING COMPANY v. GURNEY P. HOOD, COMMISSIONER OF BANKS, LIQUIDATING THE CENTRAL BANK AND TRUST COMPANY OF ASHEVILLE, NORTH CAROLINA.

(Filed 21 March, 1934.)

Banks and Banking H e—Depositor relying solely on bank's published financial statement is not entitled to a preference.

Where a depositor makes his deposit in reliance on the published statement of the bank's financial condition, but without misrepresentation by an officer of the bank as to the bank's condition, the depositor is not entitled to a preference upon the bank's insolvency.

APPEAL by plaintiff from *Schenck, J.,* at January Term, 1934, of BUNCOMBE. Affirmed.

This is an action to have plaintiff's claim against the Central Bank and Trust Company of Asheville, N. C., now in the hands of the defendant Commissioner of Banks for liquidation because of its insolvency, adjudged a preferred claim and ordered paid out of the assets of said

Bank and Trust Company in preference to the claims of its other depositors and creditors, on the ground that said claim is founded on a deposit which was made by reason of false and fraudulent representations by officers of said Bank and Trust Company with respect to its financial condition.

From judgment denying said order, and directing payment of plaintiff's claim only as a general claim against the Central Bank and Trust Company, the plaintiff appealed to the Supreme Court.

James F. Armstrong and Alfred S. Barnard for plaintiff.
Johnson, Smathers, Rollins & Uzzell and C. I. Taylor for defendant.

PER CURIAM. On the facts found by the judge of the Superior Court, to which there were no exceptions, the plaintiff is not entitled to preference in the payment of its claim out of the assets of the Central Bank and Trust Company, over other depositors of said Bank and Trust Company, who are not preferred creditors. The facts found by the judge are substantially as alleged in the original complaint. See *Mfg. Co. v. Hood,* 204 N. C., 349, 168 S. E., 523, in which it was held that these facts are not sufficient to constitute a cause of action on which plaintiff is entitled to preferential payment.

The letter written to the plaintiff by the president of the Central Bank and Trust Company on 15 February, 1930, contains no representation as to the financial condition of said Bank and Trust Company at said date. The plaintiff did not rely on this letter, but on published statements as to the financial condition of said Bank and Trust Company, both prior and subsequent to the date of this letter. In the absence of a finding that an officer of the Bank and Trust Company made a false and fraudulent representation to the plaintiff, specifically, and thereby induced the plaintiff to continue as a depositor with said Bank and Trust Company, the judgment is

Affirmed.

GROVER C. HUTSON v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 21 March, 1934.)

Insurance J b—Insured held estopped from asserting that policy was not forfeited for nonpayment of premiums.

Where an insured signs a statement for reinstatement of a policy containing material misrepresentations as to his health, cashes checks from the insured in payment of his dividend on the policy and waits over three

years before bringing action to have the policy declared to be in force, he is estopped from asserting that he had paid the premiums on the policy within the grace period, and insured is entitled to a judgment as of nonsuit.

APPEAL by plaintiff from *McElroy, J.*, at October Term, 1933, of BUNCOMBE. Affirmed.

This is an action brought in the General County Court of Buncombe County, N. C., on an insurance policy of $20,000 which was issued plaintiff on 14 May, 1920, by defendant. The policy was on the life of plaintiff, containing supplemental indemnity agreement and supplemental permanent and total disability agreement, both of said supplemental agreements bearing date of 14 May, 1920.

The plaintiff contends: "That the annual premium on the policy in suit came due 14 May, 1929, but under the terms of the policy, a 31-day period of grace was allowed for payment, thereby extending the maturity to 14 June, 1929.

On Friday, 14 June, 1929, the plaintiff, as he had often done in the past, took all of his policies in the defendant company, including the one in suit, to the Knoxville offices of the defendant and presented himself at the window between the waiting room or lobby and the main office through which premium matters were adjusted, whereupon one of the ladies in the main office came to the window and plaintiff asked to see the manager, Mr. Charles S. Lee, he told the lady that he wanted to pay his premium on the policy in suit; that he would and could pay it in cash at that time, but preferred to take advantage of whatever loan value there was on his various policies, and a dividend then due on the policy in suit, amounting to $99.84. He gave all the policies to the lady who came to the window. In consequence of and as a result of his conversation with this lady, he left all of his policies at the office and returned on Monday, 17 June, at which time he was waited on by the cashier, Miss Edith Denton, who still had his policies, and had since his last visit on the 14th, made the necessary calculations in order to determine the loan values on each of the policies and had filled in the necessary loan blanks or notes which she presented to the plaintiff for signature, stating that he would get a small check back. Plaintiff signed the papers and left the same, together with the policies, with the cashier. Plaintiff heard nothing further in regard to the matter for some time. Plaintiff, some time prior to 1929 had contracted tuberculosis, on account of which he was totally disabled and incapacitated, and in connection with an application by the plaintiff to the defendant for sick benefits on one of his other policies, the plaintiff was finally advised by the manager of the Knoxville office that the defendant company had declared a forfeiture on the policy in suit and refused to make any payments of the

benefits, the policy itself finally having been returned to the plaintiff some time in 1930. The application of sick and disability benefits on the other policies of the plaintiff was allowed by the defendant and are now being paid. The defendant attempted to declare the policy in suit forfeited and refused to make any payment of benefits accruing thereunder."

Prayer of the plaintiff: "That the said contract of insurance, represented by policy No. 2608872-A, and all of its provisions be declared in full force and effect and binding upon defendant, and that it be required and directed to reinstate said policy and perform all the provisions thereof as of the date of the attempted cancellation; that plaintiff have and recover of defendant, the sum of $2,500 damages sustained by plaintiff on account of attempted cancellation of said policy and refusal to pay the disability benefits already accrued under its terms. For such other and further relief as the plaintiff may be entitled to at law and in equity under the facts and circumstances of the case. For the costs of the action to be taxed by the clerk."

The defendant denied the material allegations of the complaint and as a further answer and defense: "That the said premium due on said policy 14 May, 1929, was not paid on said date or within thirty-one (31) days thereafter as required by paragraph No. 1 'Provisions and benefits' of said policy, nor did plaintiff offer to pay, nor has he at any time since that date, paid or offered to pay any premiums on said policy. That the policy further provides under paragraph No. 5 entitled, 'Option of surrender or lapse,' that upon failure to pay any premium when due said policy, except as otherwise provided thereunder, shall immediately lapse. That by reason of the failure of the plaintiff to pay said premium due 14 May, 1929, said policy lapsed in accordance with said paragraph No. 5. That the policy provides in provision 7 as the plaintiff well knew, the condition, 'if this policy shall lapse in consequence of the nonpayment of any premium when due, it may be reinstated at any time upon the production of evidence of insurability satisfactory to the company, and the payment of all overdue premiums with interest at six per cent per annum; any loan which existed at date of reinstatement, to be, at the option of the owner upon application for such reinstatement, either repaid in cash or continued as an indebtedness against the policy.' That the plaintiff did on 17 June, 1929, make application in writing, for reinstatement of said policy which had lapsed 14 May, 1929, and in which application for reinstatement he stated he was in sound health and had been since the date of the issuance of the said policy; and no illness or injury and had consulted no physician or physicians, and the information contained in said application is the only information defendant had as to the state of the plaintiff's health at that time or prior thereto.

That on 17 June, 1929, plaintiff made an application for a loan on said policy, and all other policies held by him in the defendant company, with which to pay the premium on said policy and was duly and promptly advised by defendant that there was insufficient loan value available on said policy and all other policies held by him in the defendant company to pay the said past due premiums.

That thereafter the defendant advised the plaintiff that upon the payment of the premium due and upon the production of evidence of insurability satisfactory to the company, policy 2608872-A would be reinstated, but the plaintiff has never paid said premium or produced evidence of insurability satisfactory to the defendant; on the contrary, he has advised the defendant that he cannot produce such evidence.

That the plaintiff knew, as he admits in his complaint, that his premium to this defendant on policy 2608872-A was due and payable on 14 May, 1929, and also that he had in addition thereto, a grace period of thirty-one days without interest charge in which to pay said premium on said policy after 14 May, 1929, as this provision appears in the first paragraph of the provisions and benefits of said policy. . . . That in due time the plaintiff in this action was fully advised and knew on and prior to 17 June, 1929, that he was entitled to a dividend earned on policy No. 2608872-A in the amount of $99.84, and on or about 22 August, 1929, the defendant sent to the plaintiff a check for $99.84 in payment of the earned dividend on policy No. 2608872-A which the plaintiff received and cashed on or about 29 August, 1929, in payment and acceptance of the dividend due him on the said policy, and this defendant avers that the plaintiff by his act and conduct has waived any right to ask for the reinstatement of the said policy and is estopped by his act and conduct from instituting this action by reason of any of the matters and things contained in his complaint."

The defendant further pleaded the three-year statute of limitation. C. S., 441. In the General County Court, the following issues were submitted to the jury and their answers thereto: "(1) Was the defendant's policy No. 2608872-A on the life of the plaintiff, forfeited on account of the alleged nonpayment of the premium due 14 May, 1929, thereon? Answer: No. (2) If so, did the defendant waive such forfeiture? Answer: ..... . (3) Is the claim of the plaintiff barred by the statute of limitations? Answer: No. (4) What amount, if any, is the plaintiff entitled to recover of the defendant under said policy? Answer: $8,372."

Judgment was rendered on the verdict. The defendant made numerous exceptions and assignments of error and appealed to the Superior Court. Some of these exceptions and assignments of error were sustained and some overruled. The material ones sustained are as follows: "For that

the court erred in failing to grant the defendant's motion for judgment as of nonsuit at the close of the plaintiff's evidence.

For that the court erred in failing to grant the defendant's renewed motion for judgment as of nonsuit at the close of all of the evidence."

The plaintiff made numerous exceptions and assignments of error and appealed to the Supreme Court.

Merrimon, Adams & Adams for plaintiff.
John Izard and Harkins, Van Winkle & Walton for defendant.

PER CURIAM. The plaintiff contends that the question involved, was there sufficient evidence justifying the trial court to submit the first issue to the jury, said issue being as follows: "Was the defendant's policy No. 2608872-A on the life of the plaintiff forfeited on account of the alleged nonpayment of the premium due 14 May, 1929, thereon?" We think the policy of insurance on plaintiff's life, if not forfeited by nonpayment of premium that plaintiff has waived any rights he may have had and estopped to enforce them.

The record discloses: (1) It is not denied that to pay the premium due 14 May, 1929, if defendant had made plaintiff a loan on the policy, it was necessary for plaintiff to pay $189.03 which he has never done. (2) That plaintiff on 17 June, 1929, signed a "request for reinstatement of policy." In which is the following: "Are you now in sound health? Yes. Are your habits sober and temperate? Yes. Have you since date of issue of the above policy (a) Had any illness or injury? If yes, give date and particulars. (a) No. (b) Consulted any physician or physicians? If yes, give date, and name and address of physician or physicians, and state for what illness or ailment. (b) No." The grace period provided in the insurance policy expired on 14 June, 1929. (3) The plaintiff was sent a check by defendant for $99.84 on 22 August, 1929, payable to his order. "Territory dividend due policy number and detail 1929, 2608872-A." The check was endorsed by plaintiff "received payment in full as detailed on reverse side." (4) Plaintiff brought the present suit on 27 May, 1932, over three years from 14 May, 1929, when the premium was due but within the 31 days of grace period. The action is brought to reinstate the policy that had been canceled by defendant.

In *Murphy v. Ins. Co.*, 167 N. C., 334 (336), quoting numerous authorities, it is said: "It is also held by well considered cases on the subject here and elsewhere that this provision as to forfeiture, being inserted for the benefit of the company, may be waived by it, and such a waiver will be considered established and a forfeiture prevented whenever it is shown, as indicated, that there has been a valid agreement

to postpone payment or that the company has so far recognized an agreement to that effect or otherwise acted in reference to the matter as to induce the policyholder, in the exercise of reasonable business prudence, to believe that prompt payment is not excepted and that the forfeiture on that account will not be insisted on."

This is well settled and salutary law, but the plaintiff, being *sui juris,* signed the application for reinstatement and made certain representations as to his being in sound health—which was untrue—cashed the check and waited over three years, from 14 May, 1929, before bringing this action. The nonsuit was properly granted. On the entire record, we see no evidence of fraud on the part of the defendant. We have gone through the record and examined the able briefs of the litigants, but for the reasons given, the judgment must be

Affirmed.

S. CARTER WILLIAMS AND WILLIAMS COMMERCIAL INVESTMENT COMPANY v. J. H. GOOCH, LAURA REID GOOCH, D. S. REID, ALLIE GOOCH REID, AND L. C. McKAUGHAN, TRUSTEE.

(Filed 21 March, 1934.)

Pleadings D b—Demurrer for misjoinder of parties and causes should have been sustained in this case.

Where only two of five defendants are liable on the cause of action alleged for breach of contract and two other defendants are liable on the cause of action alleged in tort, and all the defendants are liable on the cause alleged for wrongful conspiracy, defendant's demurrer for misjoinder of parties and causes should be sustained.

APPEAL by defendants from *Finley, J.,* at September Term, 1933, of YADKIN. Reversed.

This action was heard on defendants' demurrer to the complaint for misjoinder of causes of action and of parties.

From judgment overruling their demurrer, the defendants appealed to the Supreme Court.

Jones & Brown, F. D. B. Harding, A. T. Grant and Wade Reavis for plaintiffs.

W. T. Wilson and Ratcliff, Hudson & Ferrell for defendants.

PER CURIAM. Three separate, distinct and disconnected causes of action are alleged in the complaint. It does not appear from the complaint that the corporate plaintiff has any interest in either of these

causes of action. Only the individual plaintiff would be entitled to recover on either of the causes of action alleged in the complaint.

On the first cause of action which is for the breach of a contract between the individual plaintiff and two of the defendants, the plaintiff would be entitled to recover of these defendants only. Neither of the other defendants is liable to the plaintiff on this cause of action.

On the second cause of action, which is for a tort committed by two of the defendants, the plaintiff could recover of these defendants only. He could not recover of the other defendants on this cause of action.

On the third cause of action, which is for a wrongful and unlawful conspiracy to cheat and defraud the individual plaintiff, in which all the defendants participated, the plaintiff could recover of all the defendants. This is the only cause of action on which all the defendants are liable to the plaintiff.

The demurrer should have been sustained on the ground that there is a misjoinder of causes of action and of parties. See *Harrison v. Transit Co.*, 192 N. C., 545, 135 S. E., 460. The judgment overruling the demurrer must be

Reversed.

IN RE CLAIM OF THELMA C. READE.

(Filed 21 March, 1934.)

Receivers E b—

The claim for services rendered an individual is not entitled to a preference upon the individual's insolvency and receivership, C. S., 1197, applying only to employees of an insolvent corporation.

CIVIL ACTION, before *McElroy, J.*, at November Term, 1933, of BUNCOMBE.

A receiver was appointed for the defendant in a civil action duly constituted in the Superior Court. Thereafter the wife of defendant filed a petition with the receiver to have allowed a claim of $363.05 for services rendered the defendant prior to the receivership and claiming a lien for said sum by virtue of C. S., 1197. The judge of the county court allowed the claim of the petitioner as a common creditor in the sum of $160.00. The judge of the Superior Court affirmed the judgment of the county court, and the claimant appealed.

John C. Cheesborough for claimant.
Frank Walton for receiver.

PER CURIAM. Liens are created by statute except such as arise from the application of equitable principles. C. S., 1197, created a lien for certain employees of an insolvent corporation. The claimant was an employee of an individual and not of a corporation, and hence does not come within the provisions of the statute.

Affirmed.

FRANK THOMAS v. CAROLINA POWER AND LIGHT COMPANY.

(Filed 21 March, 1934.)

Master and Servant C b—Held: evidence failed to show that employee's injuries were caused by want of due care on part of employer.

Evidence that an employee was injured when struck by a plank which flew up when struck by the wheels of employer's truck when the truck crossed a bridge, and that the employee was injured when wire which he was carrying caught in his sleeve and jerked his hand against a piece of steel, *is held* to show that the injuries were caused by accidents which could not have been reasonably foreseen, and not by employer's failure to exercise due care for employee's safety.

APPEAL by plaintiff from *Barnhill, J.*, at January Term, 1934, of LEE. Affirmed.

This is an action to recover damages for personal injuries suffered by plaintiff while at work as an employee of the defendant.

Two causes of action are alleged in the complaint, both predicated on allegations of actionable negligence on the part of the defendant.

The injury for which plaintiff seeks to recover on the first cause of action was caused when a plank "flew up," and struck plaintiff on the ankle, as he was riding on a truck owned and operated by the defendant. The plank was on a bridge over which the truck was driven, and "flew up" when it was struck by the wheels of the truck.

The injury for which plaintiff seeks to recover on the second cause of action was caused when plaintiff's hand was suddenly jerked by a wire which had caught plaintiff's sleeve, and thereby caused to strike a piece of steel. The wire was in a bundle of wires, which plaintiff and another employee of defendant were carrying to a steel tower, which was under construction by the defendant.

At the close of the evidence for the plaintiff, the defendant moved for judgment as of nonsuit. The motion was allowed, and plaintiff excepted.

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

K. R. Hoyle for plaintiff.

Ruark & Ruark, A. Y. Arlidge and Williams & Williams for defendant.

PER CURIAM. There was no evidence at the trial of this action, which tends to show that either of the injuries suffered by the plaintiff was caused by the failure of the defendant to exercise due care for his safety. Both injuries were caused, as shown by all the evidence, by accidents which no reasonable foresight on the part of the defendant could have prevented. In the absence of any evidence tending to show actionable negligence on the part of the defendant, there is no error in the judgment dismissing the action.

The injuries shown by the evidence were suffered by plaintiff, while at work as an employee of defendant, prior to the enactment of the North Carolina Workmen's Compensation Act, chapter 120, Public Laws of North Carolina, 1929. In the absence of negligence on its part, the defendant is not liable to the plaintiff for the damages which resulted from his injuries. The judgment is

Affirmed.

HAFLEIGH AND COMPANY AND N. B. HAFLEIGH v. J. H. CROSSINGHAM.

(Filed 21 March, 1934.)

Appeal and Error A d—

The refusal of a motion for judgment upon the pleadings is not appealable, it being the duty of appellant to except to the refusal and present the question on appeal from final judgment.

CIVIL ACTION, before *Cowper, Special Judge,* at July Term, 1933, of SURRY.

The plaintiffs alleged that on or about 1 May, 1929, a contract was entered into between the plaintiffs and the defendant and his associates, to wit, F. L. Hatcher, T. R. Robertson, D. A. Robertson, and J. W. Lovill, wherein it was agreed by Crossingham and his associates "to sell and transfer to N. B. Hafleigh or Hafleigh and Company at his or its request, within ten years from this date, their stock in Carolina Button Corporation at its book value, such payment to be made by N. B. Hafleigh or Hafleigh and Company, either in cash, or, if so desired, by the parties of the first part or any of them, by the exchange and issuing to such parties of the first part stock in Hafleigh and Company at book value," etc. It was further alleged that on 9 September, 1932, the plaintiffs tendered to Crossingham $2,788.36 as payment for five shares of "A" stock of the Carolina Button Corporation at $130.11 per share, and

71 shares of the "B" stock of the Carolina Button Corporation at $30.11 per share, "but the said defendant refused to comply with his agreement to transfer this stock to said plaintiffs and to this day has failed and still refuses to comply with the terms of Exhibit A hereto attached. Thereupon the plaintiffs demanded that the defendant be required to transfer said stock in accordance with the contract.

The defendant filed an answer alleging "that it was the intent and purpose of said agreement and paper-writing that said Hafleigh and Company or N. B. Hafleigh should be empowered and authorized to purchase the stock of J. H. Crossingham and his associates, the said Hafleigh and Company and N. B. Hafleigh thus becoming the entire owners of the Carolina Button Corporation, but it is untrue and denied that the plaintiffs or either of them were to have the right or authority under said agreement or contract to purchase from this defendant his stock without purchasing the stock then held by D. A. Robertson, F. L. Hatcher, T. R. Robertson and J. W. Lovill."

The defendants further alleged that contemporaneously with and as a part of the agreement that the defendant on the same day, to wit, 1 July, 1929, entered into an agreement with the Carolina Button Corporation whereby Hafleigh and Company agreed to "dispose of the Carolina Button Corporation's by-products, such as button scrap and bone meal," etc., and further stipulating that Hafleigh and Company shall purchase and pay therefor the entire production of buttons of the Carolina Button Corporation," etc.

The defendants further alleged that the sole consideration moving Crossingham, Hatcher, the Robertsons and Lovill to execute the stock sale agreement was the contemporaneous agreement of the plaintiffs to buy and pay for the entire output of the corporation. The defendants further alleged that the plaintiffs had breached the button purchase agreement, and, therefore, were not entitled to enforce the stock sale agreement referred to in the complaint.

When the case was called plaintiff made a motion for judgment on the pleadings, which motion was denied, and the plaintiffs appealed.

DuBose & Weaver for plaintiffs.
Folger & Folger for defendant.

PER CURIAM. The trial judge ruled correctly. The denial of a motion for judgment on the pleadings is not appealable, as the same is not a final judgment. It was the duty of the plaintiff to have excepted to the refusal of the judge to grant the motion so that it could have been considered on an appeal from the final judgment. *Gilliam v. Jones,* 191 N. C., 621, 132 S. E., 566.

Affirmed.

T. LEE WHITAKER v. J. T. CHASE, GURNEY P. HOOD, COMMISSIONER OF BANKS OF NORTH CAROLINA; VIRGINIA-CAROLINA POWER COMPANY, G. HAROLD MYRICK, LIQUIDATING AGENT OF WELDON BANK AND TRUST COMPANY; ROANOKE RAPIDS PROPERTIES, INCORPORATED; B. J. WAGNER, TRUSTEE OF W. G. BODELL COMPANY, INCORPORATED; AND LAWYERS TITLE INSURANCE CORPORATION.

(Filed 11 April, 1934.)

1. Mortgages H b—

A junior mortgagee may maintain an action to restrain the foreclosure of a first mortgage or deed of trust on the lands upon allegations of serious dispute between the parties as to the amount due on the first encumbrance.

2. Mortgages H i—Held: junior mortgagee's injunction against consummation of sale under first mortgage was properly continued to hearing.

The holder of a junior mortgage on lands obtained a temporary order restraining the consummation of the foreclosure sale under the first mortgage on the lands. Upon order to show cause the court found as a fact that serious dispute existed between the parties as to the adequacy of the bid at the sale and the amount due the senior mortgagee upon the debt and that delay was necessary to the protection of the rights of plaintiff. *Held*, the court's order continuing the temporary injunction to the hearing upon condition that plaintiff file bond to indemnify defendant against any loss by reason of the delay was within its discretionary equitable power, the provisions of chapter 275, Public Laws of 1933, being constitutional and valid.

APPEAL by defendants, J. T. Chase, Gurney P. Hood, Commissioner of Banks of North Carolina, trustees and Virginia-Carolina Power Company from *Parker, J.*, at Chambers, 6 January, 1934. From HALIFAX. Affirmed.

The following is the judgment of the court below:

"This action came on to be heard before the undersigned resident judge of the Third Judicial District of North Carolina at Chambers in Roanoke Rapids, N. C., at 10:00 a.m. on 6 January, 1934, upon motion of the answering defendants, J. T. Chase, Gurney P. Hood, Commissioner of Banks of North Carolina, trustees, and Virginia-Carolina Power Company, that the temporary restraining order heretofore issued in this action be dissolved—the plaintiff being represented by his attorneys, Messrs. E. L. Travis and J. W. Crew, and the answering defendants being represented by their attorneys, Messrs. Spruill, Moore and Allsbrook—the court finds the following facts from the admissions in the pleadings, admissions of counsel, and affidavits filed by the plain-

tiff and by answering defendants, which are attached to this order and made a part hereof as if fully written herein, to wit:

1. That on 21 November, 1927, the Roanoke Rapids Properties, Incorporated, was indebted to the Virginia-Carolina Power Company in the amount of $87,341, the purchase price of the land described in the complaint in this action; to secure the payment of said indebtedness the said Roanoke Rapids Properties, Incorporated, executed and delivered to J. T. Chase and to the Weldon Bank and Trust Company, trustees, a deed of trust on a tract of land containing 873 acres, more or less, lying in and being adjacent to the town of Roanoke Rapids, N. C., which said deed of trust is of record in the public registry of this county, as set forth in paragraph 2 of the complaint.

2. That on 16 December, 1930, the Weldon Bank and Trust Company, by reason of insolvency closed its doors, and the assets of said bank, by virtue of law, are now vested in Gurney P. Hood, as Commissioner of Banks of the State of North Carolina.

3. That on 13 February, 1928, the Roanoke Rapids Properties, Incorporated, executed and delivered a ..... deed of trust to George C. Green, trustee, upon the land hereinbefore described by reference to said petition, to secure a debt due to the Weldon Bank and Trust Company, of $10,438.30, which said deed of trust is a second mortgage upon said land; that there is now due and unpaid upon said second deed of trust the amount of approximately $11,800.

4. That on 15 April, 1929, the Roanoke Rapids Properties, Incorporated, became indebted to the plaintiff, T. Lee Whitaker, in the sum of $17,500 and to secure the same, executed to Geo. C. Green, trustee, a deed of trust upon 596 acres of said land described in the complaint in said action, which constitutes a third lien upon said land: That there remains due and unpaid upon said notes secured by said third deed of trust, the sum of $17,500 and interest.

5. That the second deed of trust in favor of the Weldon Bank and Trust Company and the third deed of trust in favor of the plaintiff, are properly recorded in the public registry of this county.

6. From time to time, subsequent to 21 November, 1927, the Roanoke Rapids Properties, Incorporated, sold off lots and parcels of said land covered by the deed of trust in favor of the Virginia-Carolina Power Company procuring therefor, in accordance with the terms of an agreement theretofore made in all cases where sales were ratified, deeds of release from the Virginia-Carolina Power Company, and that said sales reduced the acreage of said land covered by said deed of trust from 873.41 acres to 538 acres, more or less.

7. That from time to time from 21 November, 1927, until 30 January, 1933, the Roanoke Rapids Properties, Incorporated, made certain pay-

ments upon its said note of $87,341 to the Virginia-Carolina Power Company; that the Virginia-Carolina Power Company has offered evidence tending to show that on 31 December, 1933, the Roanoke Rapids Properties, Incorporated, owed upon the principal of said note of $87,341, the sum of $8,942.28 and interest of $8,291.14 as of 4 December, 1933.

8. That on 4 December, 1933, there was due and unpaid upon said tract of land taxes due to Halifax County, to the town of Roanoke Rapids, and to the public schools of Roanoke Rapids in the amount of $8,879.25, which amount of taxes at the time that this order is signed is still due and unpaid, and for some reason, the county and town have made no effort to collect these taxes; that the taxes run for the years 1928, 1929, 1930, 1931, 1932, and 1933.

9. That by reason of the failure of the Roanoke Rapids Properties, Incorporated, to pay the taxes properly levied and due upon said lands, there was a breach of the conditions of the deed of trust by the said Roanoke Rapids Properties, Incorporated, and the power of sale contained therein became absolute.

10. That during the summer of 1933, the trustees, under said deed of trust which is declared upon in paragraph 2 of the complaint, advertised said land for sale at the request of the holders of the note secured thereby; that at the request of the plaintiff, and of Roanoke Rapids Properties, Incorporated, the sale as advertised originally was called off, and the same was continued for a period of 90 days; that said sale was postponed until 4 December, 1933, when said land, pursuant to said deed of trust, was offered for sale by said trustees at the courthouse door in the town of Halifax, N. C., pursuant to said notices of sale, when and where the Virginia-Carolina Power Company became the last and highest bidder at the price of $27,680; that the plaintiff was present at said sale, but did not make a bid; that the only bid was made by the Virginia-Carolina Power Company; that the land was offered for sale first per acre and then as a whole.

11. That there was accrued as costs in said foreclosure for printing and advertising the sum of $230.00.

12. That on 14 December, 1933, a temporary restraining order was issued in this action as will appear from the pleadings.

13. That no increased bid has been filed by anyone at any time since said sale on 4 December, 1933.

14. That said land was sold in 1927 at the price of $100.00 per acre; that the best part of said land has been sold off at a price of $1,000 to $1,200 per acre, since 1927, by the Roanoke Rapids Properties, Incorporated.

15. That the plaintiff has offered evidence tending to show that the amount due by the Roanoke Rapids Properties, Incorporated, to the

Virginia-Carolina Power Company upon the note declared upon in paragraph 2 of the complaint is not in excess of $15,000.

16. That answering defendants have offered ten affidavits tending to show that the land at said sale on 4 December, 1933, brought a fair, just, reasonable and adequate price, and some of the affiants in their affidavits have stated that they believed that the land brought more than it was worth.

17. The plaintiff has offered six affidavits tending to show that the price that said land brought at the foreclosure sale on 4 December, 1933, was grossly inadequate, and that the fair and normal value of said land is from $100.00 to $150.00 per acre.

18. The court finds as a fact that there is a dispute in respect to the amount of the indebtedness due by the Roanoke Rapids Properties, Incorporated, to the Virginia-Carolina Power Company upon the note declared upon in paragraph 2 of the complaint, and further finds that a serious issue of fact has been raised by the evidence offered in said case in respect to the value of said land, and as to whether it brought a price that was fair, just and adequate, or a price that was grossly inequitable.

19. The court finds as a fact that the dissolution of this injunction may cause great injury to the plaintiff if it is dissolved; that serious questions have been raised by the pleadings and the evidence offered in support of the allegations thereof, and that a continuance of said injunction is reasonably necessary to protect the plaintiff's rights, and the court further finds as a fact that the rights of the answering defendants can be fully and amply protected by an injunction bond in this case. The court states that if the answering defendants desire it, upon proper motion, it will sign an order appointing a receiver for said property during said litigation. Whereupon, it is ordered, adjudged and decreed by the court that the temporary restraining order heretofore issued in this case be, and it hereby is continued in full force and effect until the final disposition of this action, on the express condition that before noon on Tuesday, 9 January, 1934, the plaintiff execute and deliver to the clerk of the Superior Court of Halifax County, as prescribed by law, an injunction bond in the sum of $20,000, said bond to be signed by a surety to be approved by the clerk of the Superior Court, which said surety shall verify by oath the amount of his worth, or a mortgage bond in lieu of said surety bond in said amount, the note secured by said mortgage to be made payable to the clerk of the Superior Court of Halifax County, and the said clerk shall approve the value of the property conveyed in said mortgage. If this bond is not given by noon of Tuesday, 9 January, 1934, said injunction shall be dissolved *ipso facto instanter*.

It is further ordered that any of said defendants shall have the right to except to the clerk's approval of said bond, and from his finding to appeal to the judge presiding over the Superior courts of this district. It is further ordered that if a mortgage bond is given it shall be a first lien upon the property thereby conveyed.

R. HUNT PARKER, *Judge, etc.*"

To the above order or judgment as signed, the defendants except, assign errors and appeal to the Supreme Court.

E. L. Travis and J. Winfield Crew, Jr., for plaintiff.
T. Justin Moore, J. R. Allsbrook and Spruill & Spruill for defendants.

CLARKSON, J. The exceptions and assignments of error of defendants, are as follows: "(1) For that the findings of fact by the court, upon which the judgment is hypothecated, are not supported by the evidence in the case: (a) As to the adequacy of the price bid for the property; (b) as to the amount of the indebtedness due to the *cestui que trust,* Virginia-Carolina Power Company. (2) For that the statute, upon which the remedy of injunction is sought, to wit: Chapter 275 of the Public Acts of 1933, is violative of the Constitution of the United States, to wit: Section 10, Article I."

We do not think these exceptions and assignments of error made by defendants, can be sustained. In this jurisdiction, it is settled that: "A junior mortgagee may maintain an action to restrain the foreclosure of a senior mortgage and to ascertain the amount due thereon." Wiltsie on Mortgage Foreclosure, 4th ed., citing *Broadhurst v. Brooks,* 184 N. C., 123. *Wilson v. Trust Co.,* 200 N. C., 788 (791); 59 A. L. R., 346, note.

The facts found by the court below and the conclusions of law were to the effect that: On 21 November, 1927, the Roanoke Rapids Properties, Incorporated, gave its note for $87,341 to the Virginia-Carolina Power Company, payable 1 November, 1934, for the purchase price of 873 acres of land, and executed a deed of trust on the land to J. T. Chase and the Weldon Bank and Trust Company (now Gurney P. Hood, Commissioner of Banks of North Carolina, receiver of Weldon Bank and Trust Company). Later, on 13 February, 1928, it gave a second deed of trust to George C. Green on the same land to secure a note to the Weldon Bank and Trust Company for $10,438.30, and thereafter on 15 April, 1929, gave a third deed of trust to George C. Green, trustee, to secure a debt of $17,500 due the plaintiff, T. Lee Whitaker, for money borrowed. The 873 acres of land lie in and adjacent to the town of Roanoke Rapids, and was bought for the purpose of being divided into building lots and sold; the deed of trust providing for this. Accordingly, the Roanoke Rapids Properties, Incorporated, sold

off lots and made payments on the first mortgage debt until it was reduced from $87,341 down to $17,233.42 as claimed by the defendants. This amount represents principal $8,942.28 and interest $8,291.14. The plaintiff contends that the balance due is less than $15,000. The acreage was also reduced from 873 to about 538 acres. The Roanoke Rapids Properties, Incorporated, had no revenue producing property whatsoever, and was entirely dependent on the sale of lots for operating expenses.

Taxes have accumulated on the property amounting to $8,879.23. The note was not due by its terms until November, 1934, the holder, by virtue of a provision in the deed of trust, declared it in default for nonpayment of taxes. Nothing has been paid on the debts secured by the second and third deeds of trust. The defendants, J. T. Chase and Gurney P. Hood, Commissioner of Banks, trustees, sold the land under the deed of trust on 4 December, 1933, at public auction for cash. It was bid in by Virginia-Carolina Power Company, holder of the note, for $27,680, which is the amount the defendants claim was due on the note, plus the taxes, trustee's commissions and expense of sale. There was no other bid on it. Before the statutory time for making a deed arrived, the plaintiff brought this action to enjoin the trustees from making the deed, and alleged that the balance due on the first deed of trust was not over $15,000, and that the price bid for the land was inadequate and inequitable.

It was in evidence that on the part of plaintiff, that the sum bid at the sale, $27,680 was "grossly inadequate" and the sum of $150.00 per acre, "a fair and normal value for such lands." The evidence in regard to plaintiff's contention that the note of defendant Virginia-Carolina Power Company, is not in excess of $15,000 is not very strong. The court below found as "a fact" that there is a dispute in respect to the "amount of the indebtedness" and further found, "that a serious issue of fact has been raised by the evidence offered in said case, in respect to the value of said land and as to whether it brought a price that was fair, just and adequate or a price that was grossly inequitable." The court further found, "that the dissolution of this injunction may cause great injury to plaintiff if it is dissolved; that serious questions have been raised. . . . That the rights of the answering defendants can be fully and amply protected by an injunction bond in this case."

The plaintiff was required to give a $20,000 bond with surety to be approved by the clerk of the Superior Court which has been done. The court below, "states that if the answering defendants desire it, upon proper motion, it will sign an order appointing a receiver for said property during said litigation."

In *Wentz v. Land Co.*, 193 N. C., 32 (34), is the following: "The rights of the parties to the controversy are complicated. Certain prin-

ciples of law are applicable, when the facts are ascertained. On the record, as to material facts, there is serious conflict. In injunction proceedings, this Court has the power to find and review the findings of fact on appeal, but the burden is on the appellant to assign and show error, and there is a presumption that the judgment and proceedings in the court below are correct." *Realty Co. v. Barnes,* 197 N. C., 6; *Land Co. v. Cole,* 197 N. C., 452 (455); *Roebuck v. Carson,* 197 N. C., 492 (493).

In *Parker Co. v. Bank,* 200 N. C., 441 (443), speaking to the subject citing numerous authorities, it is said: "It is the general practice of equity courts, upon 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."

The court below under the facts and circumstances of this case, with its equitable power, had the discretion to continue the injunction to the hearing. *Alexander v. Boyd,* 204 N. C., 103.

In 14 R. C. L. (Injunctions), part sec. 172, p. 472, is the following: "The power of the court to impose terms and conditions, including the giving of a bond, in connection with the issuance of an injunction, is one which is generally recognized." In *Woltz v. Safe Deposit Co., ante,* 239, the constitutionality of chapter 275, Public Laws of 1933, entitled, "An act to regulate the sale of real property upon the foreclosure of mortgages or deeds of trust," is upheld and the reasons given therefor. The brief of defendants is learned and persuasive, but not convincing from the facts and circumstances of this case. We think for the reasons given, the judgment of the court below must be

Affirmed.

MRS. ETHEL DeSHA RUSSELL, WIDOW, MARY DAY RUSSELL, DAUGHTER, AND GRADY JACKSON RUSSELL, SON OF LONNIE G. RUSSELL, DECEASED, v. WESTERN OIL COMPANY, EMPLOYER, AND MARYLAND CASUALTY COMPANY, CARRIER.

(Filed 11 April, 1934.)

1. Master and Servant F a—Evidence held sufficient to support finding that deceased was an employee and not an independent contractor.

Evidence that an oil company owned a filling station for the sale of its products and obtained a license therefor and retained full control over its operation and the persons working thereat, including the right of firing such persons, and put an operator in charge of the station to be paid a certain sum per gallon of gasoline sold thereat, directed the hours

during which the station should be open and to whom credit should be given, and upon the death of such operator by accident arising out of and in the course of his work, filed a report on a form furnished by the Industrial Commission stating that the relationship of employer and employee existed between the company and the operator, and took over all unsold gasoline at the station as its own *is held* sufficient to support a finding by the Industrial Commission that the operator was an employee within the meaning of the Compensation Act, and the finding is conclusive upon appeal from the award of compensation, the distinction between an employee and an independent contractor depending primarily upon the principal's retention of control.

2. Master and Servant F d—Report of company to Industrial Commission held competent on question of whether deceased was an employee.

A report filed by the president of a company on blanks furnished by the Industrial Commission stating that the company was the employer and the deceased was its employee *is held* competent evidence before the Industrial Commission on the question of whether the deceased was an employee or an independent contractor.

3. Master and Servant F i—

The recitation of the award of the Industrial Commission in the judgment of the Superior Court affirming the award upon appeal will not be held for prejudicial error where the award is for a death claim and the amount is definitely fixed.

4. Master and Servant F k: Constitutional Law G a: Provision for taxing cost of appeal on insurer is constitutional and valid.

The provisions of the Compensation Act, N. C. Code, 8081(rrr), that upon appeal from an award brought by the insurer the court or the Industrial Commission might tax the costs of the appeal, including reasonable attorney's fee for the claimant, against the insurer when it is determined that claimant is entitled to compensation, is valid and is not in contravention of the Fourteenth Amendment to the Federal Constitution.

APPEAL by defendants from *McElroy, J.*, at November Term, 1933, of BUNCOMBE. Affirmed.

This was a claim under the Workmen's Compensation Act, in which the claimants sought compensation for the death of Lonnie G. Russell under the provisions of the North Carolina Workmen's Compensation Act. The defendants denied liability on the ground that at the time of the death of Lonnie G. Russell he was not an employee of the Western Oil Company.

A hearing was had in the matter before John C. Root, deputy commissioner, on 13 February, 1933, and an opinion filed 14 March, 1933, by Commissioner T. A. Wilson, directing an award in favor of the claimants. Thereafter, an award was duly made on 16 March, 1933, in favor of the claimants. From this award, the defendants appealed to the full Commission, and the case came on for argument on 19 Sep-

tember, 1933, before the full Commission. Commissioner Dorsett, under date of 21 September, 1933, wrote an opinion for the full Commission directing that the award theretofore entered in favor of the claimants be affirmed, and under date of 22 September, 1933, a formal award of the Industrial Commission was made directing the payment of death benefits to the claimants.

From this award, the defendants appealed to the Superior Court, and the case came on for hearing at the regular November Term, 1933, of the Superior Court of Buncombe County before the Hon. P. A. McElroy. After hearing argument of counsel, the court signed the judgment appearing in the record, affirming the decision of the Industrial Commission, and in addition thereto, directing the defendants to pay the costs of the appeal and directing that such costs shall include the attorneys' fees for the claimants, to be determined by the North Carolina Industrial Commission.

The judgment also held that the defendants' objection to the introduction of certain reports made by the Western Oil Company to the North Carolina Industrial Commission should be overruled, and that said reports were competent evidence to be considered by the Industrial Commission. To this judgment, and each and every part thereof, the defendants objected and excepted and gave notice of appeal to the Supreme Court of North Carolina, and all further notice of appeal was waived by the plaintiffs. Appeal bond in the sum of $50.00 was adjudged sufficient.

The defendants admit that on the night of 27 September, 1932, Lonnie G. Russell was shot and killed in a hold-up of a filling station at the intersection of Charlotte Street and Woodfin Street. The defendants made the following exceptions and assignments of error and appealed to the Supreme Court:

"1. The Superior Court erred in overruling defendants' exception to the introduction of the report of accident on the Industrial Commission Form No. 19, for the reason that the said form was incompetent, immaterial and irrelevant, and further, for the reason that the said form is made out by the North Carolina Industrial Commission and required to be filed by them and is not binding on the defendants.

2. The Superior Court erred in signing the judgment appearing in the record, for that the said judgment is based on an erroneous conclusion of law, in that it holds that Lonnie G. Russell at the time of his death was an employee of the Western Oil Company, when all of the evidence shows that he was not such an employee.

3. The Superior Court erred in signing the judgment appearing in the record, for that it holds that the report of accident filed by the defendants with the North Carolina Industrial Commission, pursuant to

the rules of said Commission and on the form made out by the said Commission, being Form No. 19, is competent evidence to establish that Lonnie G. Russell was an employee of the Western Oil Company, at the time of his death.

4. The Superior Court erred in signing the judgment appearing in the record, for that the said judgment attempts to direct the payment of benefits to the claimants, which is a matter exclusively within the jurisdiction of the Industrial Commission.

5. The Superior Court erred in signing the judgment appearing in the record, for that the said judgment directs that the costs be taxed against the defendant and that said costs shall include a reasonable attorneys' fee for plaintiffs' counsel, which is a matter exclusively within the jurisdiction of the Industrial Commission.

6. The Superior Court erred in signing the judgment appearing in the record, for that the said judgment overrules defendants' objection and exception to the award of the Industrial Commission directing payment of benefits under the Compensation Act to the claimants."

The material facts will be set forth in the opinion.

R. R. Williams for plaintiff.
Johnston & Horner for defendants.

CLARKSON, J. The following questions are involved on this appeal: (1) Was Lonnie G. Russell at the time of his death, an employee of the Western Oil Company within the meaning of the Workmen's Compensation Act of North Carolina? We think so.

(2) Is the report of accident made by the defendant employer to the Industrial Commission competent evidence before the trial Commissioner? We think so.

(3) Is the judgment erroneous because, after affirming the award of the Industrial Commission, it recites the terms of said award? We think not.

(4) Is section 8081(rrr) of the Consolidated Statutes of North Carolina constitutional? We think so.

The first question: Was Lonnie G. Russell an employee of the Western Oil Company? We think so. The evidence of plaintiff was to the effect that the Western Oil Company was the owner of the service station on the corner of Charlotte and Woodfin streets in the city of Asheville, N. C. "That is the only filling station we operate direct." The contract dated 2 September, 1932, between Russell and the Western Oil Company, says: "The station to be operated under direction and control of Western Oil Company." Russell to sell the Western Oil Company gasoline on a margin of 2 cents per gallon and keep the station open from 6:00

o'clock a.m. to 10:30 p.m., etc. J. Ray Stephens was working at the time, as service station operator, when Russell was killed and was employed by the president of the Western Oil Company, Incorporated. The president came around 3 or 4 times a day. The accounts of oil and gasoline sold on a credit were on forms furnished by the Western Oil Company and kept by them and those to whom credit was given, were designated by the president. The license to run the station was paid by Western Oil Company. W. A. McGeachey, witness for defendant, testified in part: "When this matter of giving this station to Mr. Russell to operate came up, Mr. Shuey, president of Western Oil Company, said, 'We want to have that station absolutely under our control and supervision, so we can dictate at any time the method of operation and can have full control of the station.' One of our objects, of course, was to keep it up to the standard which Mr. Shuey had set for it, and in addition to that we wanted the right to have complete control of everybody that worked at this station and the employees of the station, if necessary; if one should become unsatisfactory to the Western Oil Company, we wanted the right to go in and replace that employee." . . . "Mr. Shuey gave instructions to Russell as to how that filling station should be run more than I did, because he was the boss." . . . "We were paying and guaranteeing Mr. Russell as a part of his employment a two-cent per gallon commission on the gas he sold." . . . "When Mr. Russell died, the Western Oil Company took over the gasoline in that station; they took it over as their gasoline."

In the employer's report of accident to employee, signed by W. C. Shuey, president, is the following: "(1) Name of employer—Western Oil Company." "(16) Name of injured employee—Lonnie Grayden Russell." In *Aderholt v. Condon,* 189 N. C., 748 (755), we find: "The test of independence and agency or servant is laid down in 14 R. C. L., pp. 67-8, as follows: 'The vital test in determining whether a person employed to do certain work is an independent contractor or a mere servant is the control over the work which is reserved by the employer. Stated as a general proposition, if the contractor is under the control of the employer, he is a servant; if not under such control, he is an independent contractor.'" The case of *Creswell v. Publishing Co.,* 204 N. C., 380, is readily distinguishable from the facts in this case.

In *Webb v. Tomlinson,* 202 N. C., 860 (861), is the following: "The evidence on the mooted question as to whether the deceased was an employee or an independent contractor is susceptible of either interpretation. The findings of the Industrial Commission, therefore, are conclusive and binding as to all questions of fact."

The second question: As to the report of the accident filed with the Industrial Commission by the Western Oil Company, we think it com-

petent evidence. The Western Oil Company, a corporation, by its president, signed the report. He was *sui juris*. No fraud or mistake is set up. It was in the nature of an admission and competent to be considered in passing on the fact as to whether Russell was an employee.

The third question: As to the judgment of the court below being erroneous; that in affirming the award of the Industrial Commission, it recites the terms of the award. We do not think this, if error, prejudicial. In *Francis v. Wood Turning Co.*, 204 N. C., 701 (704), it is said: "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 judgment of the court below affirms the judgment of the N. C. Industrial Commission and reiterates its terms. N. C. Code 1931 (Michie), 8081(bbb), is as follows: "Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this chapter, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys paid but no such review shall be made after twelve months from the date of the last payment of compensation pursuant to an award under this chapter."

Defendants contend that the judgment under this section should merely affirm or reverse the decision, but on this record the judgment is not prejudicial. This is a death claim where the amount is fixed definitely.

The fourth question: Is 8081(rrr), N. C. Code of 1931 (Michie), constitutional? We think so. The section is as follows: "If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this chapter, shall find that such hearing or proceedings were brought by the insurer, and the Commission or court by its decision, orders the insurer to make, or to continue, payments of compensation to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings, including therein reasonable attorney's fee to be determined by the Commission, shall be paid by the insurer as a part of the bill of costs."

Defendants contend that this impinges the Fourteenth Amendment to the Constitution of the United States, that "the employer and the in-

surer are both defendants in the case, and any act which puts a greater burden or penalty on one defendant than it puts on the other is a clear discrimination and denies to the two defendants, the equal protection of the laws and is void and inoperative." The insurer is practically the real party to the controversy and controls the litigation. This very provision was considered and approved in *Williams v. Thompson*, 203 N. C., 717 (720).

In *Ahmed's case* (Mass.), 79 A. L. R., 669, this question of cost and attorney's fees was fully considered citing cases from the United States Supreme Court and the opinion by *Chief Justice Rugg*, sustains fully the plaintiff's contention. (Headnote (1) is as follows: "A statute providing that a workmen's compensation insurer seeking review by the reviewing board of an award and ordered to make or continue payments shall pay the cost to the injured employee of such review, including reasonable counsel fees, but not providing for the allowance of costs or counsel fees to the insurer if successful, and operating to impose them on an insurer successful in getting an award reduced, does not deprive the insurer of the equal protection of the laws, or of property without due process of law, or infringe the constitutional right to obtain justice without purchase." For the reasons given, the judgment of the court below is

Affirmed.

F. C. FORESTER, A. F. PHILLIPS, L. S. LOWE, C. T. DOUGHTON, C. A. DIMMETTE, L. A. HARRIS, W. T. COLVARD, J. C. McNEILL, C. E. JENKINS, W. A. McNEILL, GOLDSTON SMITH AND T. C. CAUDILL, ON BEHALF OF THEMSELVES AND OTHER TAXPAYERS OF THE TOWN OF NORTH WILKESBORO, v. TOWN OF NORTH WILKESBORO, S. V. TOMLINSON, I. E. PEARSON, RALPH DUNCAN AND J. C. REINS, COMMISSIONERS OF TOWN OF NORTH WILKESBORO, AND W. P. KELLY, TAX COLLECTOR, AND W. B. SOMERS, SHERIFF AND TAX COLLECTOR OF WILKES COUNTY.

(Filed 11 April, 1934.)

1. Schools and School Districts B c—Request for special election by school administrative unit held made in reasonable time under facts.

In this case the defendant city school administrative unit was not set up until after 15 June, 1933, and on 30 June, it filed written request with the board of commissioners of the city for an election to vote on a proposed special supplementary school tax in the city. Notice of the registration and election were published substantially as required by law. *Held*, the collection of the special tax voted for at the election will not be enjoined for failure of the administrative unit to file the written request for the election on or before 15 June, it appearing that the machinery for the election was commenced within a reasonable time under the facts and circumstances of the case. Chapter 562, Public Laws of 1933.

2. Same: Elections I d—Irregularity in election held not prejudicial on whole record and result of election is not disturbed on appeal.

The registration books for an election to vote on a special supplementary tax in a city school administrative unit were kept open for registration for four consecutive Saturdays prior to the election, but through inadvertence of the officials were closed the third Saturday before the election instead of the second Saturday prior thereto. Notice of the registration and election were duly published and the question was widely discussed in the locality for over a month before the election, and it appeared that the result of the election was not affected by the inadvertence in failing to keep the registration books open the second Saturday before the election. *Held*, although election officials should be careful to conduct elections in substantial compliance with law, the levy of the special tax approved at the election will not be enjoined upon suit of some of the taxpayers, it appearing that the inadvertence complained of was not prejudicial upon the entire record.

APPEAL by plaintiffs from *Sink, J.*, at Chambers in Charlotte, N. C., 27 October, 1933. From WILKES. Affirmed.

This is a civil action brought by the plaintiffs, who are taxpayers and citizens of the town of North Wilkesboro, which is a school administrative unit under the School Machinery Act of 1933, against the defendants, the town of North Wilkesboro, and W. P. Kelly, tax collector of the town, restraining the defendants from collecting an alleged special school tax, for the reason as alleged by the plaintiffs, that the election held for said special school tax in said special school tax unit, is void and of no effect, and that both the levy and the tax is illegal and void; the chief relief sought in this action is injunctive, praying for a permanent injunction against the defendants enjoining them from the collection of the alleged tax. The plaintiffs applied for and obtained a temporary restraining order, which by consent of the parties under C. S., 853, was heard by his Honor, Judge Hoyle Sink, and from an order dissolving the temporary restraining order, the plaintiffs appealed to the Supreme Court and made exceptions and assignments of error hereafter set forth. The judgment of the court below is as follows:

"This cause coming on to be heard before his Honor, Hoyle Sink, judge holding the courts of the Fourteenth Judicial District, and it appearing to the court by written stipulation between the plaintiffs and the defendants, as provided for in section 853 of North Carolina Code of 1927, the parties have mutually agreed that the temporary restraining order issued in this cause be heard before his Honor, Hoyle Sink, holding the courts of the Fourteenth Judicial District, at Charlotte, N. C., on Friday, 27 October, 1933, and after the reading of the pleadings and affidavits in this cause, and after argument of counsel for the plaintiffs and defendants, the court finds as facts:

"That a special election was called in the city administrative school unit for the town of North Wilkesboro on 4 July, 1933, by the board of town commissioners, upon a written request filed by all of the members of the board of trustees of North Wilkesboro city school administrative unit; that an election was held for the purpose of voting a special levy to supplement the school funds in said school on 15 August, 1933; that notice of said election was duly given in a local newspaper published in the town of North Wilkesboro, as provided by law, and that said notice set forth that on Saturday, 8 July, Saturday, 15 July, Saturday, 22 July, Saturday, 29 July, were designated as registration days and that all parties desiring to vote in said election would have to register during this period before he or she would be entitled to cast their ballot in said election; that Saturday, 12 August, 1933, was designated as challenge day; that the registration books for said election closed on the third Saturday instead of the second Saturday before the election; that there were 715 duly qualified electors registered for said special election and that a majority of the duly qualified electors registered for said election cast their vote in favor of the special levy; that the election was fairly and honestly conducted by the election officials; that a judge and marker were appointed in favor of the special levy and against the special levy; that the election was conducted and carried on under the law governing general elections and the Australian ballot system as near as practical; that during the period the registration books were open for registering voters, there were a number of newspaper articles in the local newspapers circulated in the town of North Wilkesboro in favor of the special levy and against the special levy; that the election was widely discussed by the voters of the town of North Wilkesboro; that the registration books were kept open for four consecutive Saturdays and that the closing of the books on the third Saturday instead of the second Saturday before the election did not change the result of the election. That the North Wilkesboro city administrative unit was not set up by the State School Commission of North Carolina until after 15 June, 1933; that the board of trustees of North Wilkesboro city administrative unit, within a few days after the school commission had set up the North Wilkesboro city administrative unit, filed a written request with the board of town commissioners asking the town commissioners to call an election within the corporate limits of the town of North Wilkesboro, which request was not filed until after 15 June, 1933.

"That the School Machinery Act, Public Laws, 1933, provides, that upon written request of the school trustees of the city administrative unit filed with the tax levying authorities of such unit, that the tax levying authorities of such unit shall provide that an election be held

under the law governing such elections, as set forth in Articles 23, 24 and 26 of chapter 95 of Consolidated Statutes of North Carolina, Volume 3: That the election held on 15 August, 1933, did not include any territory outside of the city limits of the town of North Wilkesboro; that the special election held on 15 August, 1933, was carried on and conducted in accordance with provisions of Articles 23, 24 and 26 of chapter 95 of Consolidated Statutes, Volume 3.

"It is therefore ordered, considered and adjudged, that the temporary restraining order heretofore issued be dissolved and that this action be dismissed and that the plaintiffs be taxed with the cost of this action."

The following exceptions and assignments of error were made by plaintiffs: (1) That his Honor erred in refusing to find the facts requested by the plaintiffs. (2) That his Honor erred in signing the order dismissing the temporary restraining order. (3) That his Honor erred in refusing to continue the restraining order until the final hearing of this cause. The necessary facts will be set forth in the opinion.

T. C. Bowie for plaintiffs.
Jones & Brown and J. A. Rousseau for defendants.

CLARKSON, J. We have examined the record and briefs of the litigants with care and see no prejudicial error in the record. The exceptions and assignments of error made by plaintiffs cannot be sustained.

Chapter 562, Public Laws, 1933, is entitled: "An act to promote efficiency in the organization and economy in the administration of the public schools of the State; to provide for the operation of a uniform system of schools in the whole of the State, for a term of eight months, without the levy of any *ad valorem* tax therefor." Section 35 of said act, in part, is as follows: "All Public, Public-Local or Private Laws and clauses of laws in conflict with this act, to the extent of such conflict only, are hereby repealed." See *S. v. Kelly,* 186 N. C., 365 (371-2). Section 17, in part: "That the county board of education in any county administrative unit, and the board of trustees in any city administrative unit, with the approval of the tax levying authorities in said county or city administrative unit and the State School Commission in order to operate the schools of a higher standard than those provided for by State support, but in no event to provide for a term of more than 180 days may supplement any object or item of school expenditure," etc.

Provision is made to submit the matter to a vote of the people in the administrative unit. From an examination of the record, we think there are only two main contentions of plaintiffs to be considered: First, is to the effect that the request shall be filed "with the tax levying authorities in each city, county and city administrative unit on or before the

15th day of June on forms provided by the State School Commission." Plaintiffs contend this provision is mandatory. It is contended by defendants that the administrative unit for the town of North Wilkesboro was not set up until after 15 June, 1933, and therefore it was impossible to file a request for a special election until after that date—on 30 June, 1933. The board of trustees of the North Wilkesboro unit filed a written petition requesting that a special election be held to levy a tax of 20 cents on the $100.00 valuation of property, the tax to be used to supplement the salaries of teachers and other expenses incidental to the opening of the North Wilkesboro high school. The board of commissioners of the town of North Wilkesboro on 4 July, 1933, called the special election to be held on 15 August, 1933, appointing a registrar and two judges, one in favor of the tax and one against the tax. Notice of the registration and election was published substantially as required by law.

The defendants contend that the matter was directory. The plaintiffs' contention cannot be sustained from the facts and circumstances of this case. The machinery for the election was commenced within a reasonable time under the facts and circumstances of this case.

The second contention of plaintiffs, is to the effect that the election was held on 15 August, 1933, but the registration books were ordered and kept open on Saturdays: 8, 15, 22, and 29 July, and not the following Saturday in August—the law requiring four Saturdays and a Saturday for challenge day prior to the election. On the other hand, the defendants contend this was inadvertently done by the commissioners, but this did not affect the result of the election; that on the Saturday in question, no voters presented themselves for registration, either at the polling place or to the registrar personally. The election was discussed pro and con from the date of 4 July, 1933, when it was ordered by the commissioners, to 15 August, 1933, when the election was actually held, 715 voters registered for the special election. At the election, there were 383 votes cast for tax and 93 votes against the tax.

Under the facts and circumstances of this case, we see no harm has come to plaintiffs from this inadvertence and plaintiffs' contention cannot be sustained. "In *Hill v. Skinner,* 169 N. C., at page 412, it is held: 'The ultimate conclusions from the authorities is thus stated in A. & E., Enc. (2 ed.), at pp. 755, 767: The general principles to be drawn from the authorities are, that honest mistakes or mere omissions on the part of the election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not avoid an election, unless they affect the result, or at least render it uncertain. But if the irregularities are so great that the election is not conducted in accordance with law, either in form or substance, and there are matters of substance that render the result uncertain, or whether they are fraudulent and the result is

made doubtful thereby, the returns should be set aside.'" *Penland v. Bryson City,* 199 N. C., 140 (148).

We do not think on the entire record that the court below erred in refusing to continue the temporary restraining order to the final hearing. It appears from the record that the taxes to a great extent, have been paid under the levy made. As to them, the question may be academic. We see no prejudicial error on the record, but we may say that all elections should be carefully conducted under the law, of course a substantial compliance is all that is required, but public officers cannot be too careful in these matters. The judgment of the court below is

Affirmed.

BOB PRESSLEY v. H. Z. AUDETTE.

(Filed 11 April, 1934.)

Malicious Prosecution A a—Search warrant obtained maliciously and without probable cause will support action for malicious prosecution.

Allegations that defendant maliciously and without probable cause and with intent to injure plaintiff, etc., obtained a search warrant for plaintiff's premises upon an affidavit signed by defendant that defendant had reasonable ground to believe that property stolen from defendant was concealed on plaintiff's premises, and that plaintiff's house was searched in the presence of himself, the defendant and several of plaintiff's friends, that no goods belonging to defendant were found on plaintiff's premises and no further action taken *is held* to state a cause of action for malicious prosecution for the recovery of both actual and punitive damages, and defendant's demurrer to the complaint was properly overruled.

APPEAL by defendant from *Finley, J.,* at January Term, 1934, of HENDERSON. Affirmed.

The plaintiff in this action is a citizen of the State of North Carolina, and a resident of Hendersonville Township, in Henderson County in said State; the defendant is a nonresident of the State of North Carolina, but owns and maintains a summer home in Hendersonville Township, which adjoins the home of the plaintiff.

In his complaint in this action, the plaintiff alleges:

"4. That the defendant, contriving and maliciously intending to injure said plaintiff in his good name, fame and credit, and in utter disregard of the consequences of his act, and maliciously intending to bring the plaintiff into public scandal, infamy and disgrace and to impoverish, oppress and ruin him, the plaintiff, heretofore, to wit, on 20 December, 1933, without any probable cause whatever, charged him,

the said plaintiff, before W. P. Whitmire, justice of the peace, within and for Hendersonville Township, said county and State, with feloniously stealing or concealing upon the premises of the plaintiff, situate in Hendersonville Township, certain stolen personal property, to wit: One sewing machine, day bed and linen, mattress and pad, one lot of silver, one clock, etc., and with having said stolen articles concealed on the premises of the plaintiff, and that the said defendant maliciously and without probable cause, procured said justice to grant a warrant to search the house and premises of the plaintiff, and that said justice issued said warrant accordingly, and that the said issuance of the search warrant was obtained after the said justice had commented that he was greatly surprised to hear of such charge against Bob Pressly, the plaintiff herein, and after due caution by the justice to the defendant that the said plaintiff was a man of excellent and high standing, and due caution from the said justice that defendant should be very careful in such undertaking, and after the said defendant had inquired of the said justice the consequences of said action upon his, the defendant's, part, in the event no stolen goods were found upon the premises of the said plaintiff; and after the said defendant had made efforts through the police officers of the city of Hendersonville to obtain a similar warrant, and had been refused such warrant and had been told by the police officers that said Pressly was a man of the highest standing in the community and could not be reasonably suspected of such felony or other violation of the law; that, as plaintiff is advised and believes, defendant had been informed by telegram or otherwise at Miami, Fla., that some of the articles of personal property in his residence here had been removed, and that defendant arrived in Hendersonville, in aforesaid State and county, on 20 December, 1933, and without other cause than his own maliciousness against the plaintiff, and his malicious disposition to do the plaintiff harm and injury, as hereinafter alleged, and in utter disregard of the consequences to the plaintiff of his, the defendant's, act, procured the issuance of the aforesaid search warrant."

"5. That said search warrant, when it had been procured by the defendant, as aforesaid, was delivered by the aforesaid justice into the possession of Zeb Corn, deputy sheriff, of the aforesaid State and county, and Seth Edmondson, police officer of the city of Hendersonville, for execution; that the aforesaid officers immediately came to the place of business of McIntyre Plumbing and Heating Company in Hendersonville, where plaintiff is employed as a plumbing and heating expert, and advised plaintiff of the action taken against him by defendant, whereupon plaintiff immediately departed his place of business, with the officers, and went to plaintiff's home, in Hendersonville, where the defendant was waiting, and that thereupon, and in the presence of plain-

tiff's wife, and some of the plaintiff's neighbors, who were at that time visiting plaintiff's wife at his home, plaintiff's house was searched by the aforesaid officers, and in the presence of defendant, and one other person who was with the defendant at the time, whose identity is not exactly known to plaintiff, but who was, as plaintiff is now advised and believes, a friend and attorney of the defendant, who had accompanied the defendant from Miami to Hendersonville; that the home of plaintiff was completely searched by the aforesaid officers, from top to bottom, they having examined beds and other articles for the discovery of any alleged stolen property belonging to the defendant, in the presence of the defendant."

"6. That after said diligent search had been made, and none of the goods searched for found, said Zeb Corn, deputy sheriff, as aforesaid, the defendant, the defendant's friend and attorney, and the aforesaid Seth Edmondson, departed from plaintiff's premises, but before doing so, plaintiff asked the defendant if he was satisfied and through, and the defendant replied that he was; that thereupon the said complaint and search warrant, copy of which is hereto attached, marked Exhibit A, and prayed to be made a part and parcel of this paragraph of the complaint, was duly returned by Zeb Corn, deputy sheriff, as aforesaid, to W. P. Whitmire, justice of the peace, as aforesaid, duly endorsed in words and figures as follows:

"20 December, 1933, due search made and no property found—Zeb Corn, D. S.; that no property belonging to the defendant was found upon the premises of the plaintiff, nor has any such property ever been in the possession of the plaintiff."

"7. That since the return of the aforesaid complaint and search warrant endorsed by Zeb Corn, deputy sheriff, as aforesaid, the defendant has not further prosecuted plaintiff, and as plaintiff is advised and believes, has abandoned said prosecution, and has in nowise made reparation for the colossal injury done plaintiff thereby."

The plaintiff further alleges that as the direct and proximate result of the wrongful and malicious acts of the defendant as alleged in the complaint, he has suffered actual damages in the sum of $10,000, and is entitled to recover of the defendant punitive damages in the sum of $10,000. He prays judgment that he recover of the defendant the sum of $10,000, as actual, and the sum of $10,000, as punitive damages.

Attached to and forming a part of the complaint is a copy of the affidavit signed by the defendant, on which the search warrant was issued by the justice of the peace.

In apt time, the defendant demurred to the complaint on the ground that the facts stated therein are not sufficient to constitute a cause of action. The demurrer was overruled, and the defendant excepted and appealed to the Supreme Court.

W. C. Meekins for plaintiff.
Edward H. McMahan and D'Arcy S. Williams for defendant.

CONNOR, J. The facts alleged in the complaint in this action are sufficient to constitute a cause of action for malicious prosecution in which the plaintiff is entitled to recover of the defendant damages, both actual and punitive. 56 C. J., 1255, 24 R. C. L., 727. See *Shaw v. Moon* (Or.), 245 Pac., 318, 45 A. L. R., 600. There is no error in the order overruling the demurrer. It is

Affirmed.

THE TEXAS COMPANY v. CHARLES W. PHILLIPS.

(Filed 11 April, 1934.)

1. Reference A a—

Where defendant sets up no plea in bar, and the pleadings indicate the necessity of examining a long account between the parties, defendant's exception to an order for compulsory reference will not be sustained. N. C. Code, 573(1).

2. Reference D b—

Where a party excepts to an order of reference, and files exceptions to the report of the referee, and tenders issues thereon, but fails to demand a jury trial thereon in apt time as required by statute, he waives his right to trial by jury.

APPEAL by defendant from *Harding, J.,* at August Term, 1934, of CABARRUS. Affirmed.

This is an action brought by plaintiff to recover from the defendant, $290.75. Allegations of the complaint, in part, are as follows: "(2) That the defendant was employed by the plaintiff, as its agent, to sell and deliver gasoline and other products of the Texas Company and to collect for and remit same. (3) That the defendant, as such agent, received and collected, or was otherwise possessed of divers sums of money from divers persons, within three years from the date of the summons in this action, and after deducting all credits due the defendant, there still remains due and owing to the plaintiff from said defendant, the sum of $290.75."

The answer of defendant, in part, is as follows: "(2) That defendant was employed by the plaintiff as its salesman, to sell and deliver gasoline and other products of the Texas Company and collect for same, and to report and turn over the amount collected by him to the plaintiff's Concord agent, which he did; except as herein admitted, the allegations of paragraph 2 of plaintiff's complaint are expressly denied. (3) That it

was the duty of defendant, when a sale was made, to make out an order or memorandum thereof in duplicate and to deliver one copy thereof to the customer and to turn one copy over to plaintiff's Concord agent, which he did; except as herein admitted, the allegations of paragraph 3 of plaintiff's complaint are expressly denied." The defendant set up no plea in bar.

The defendant denied the indebtedness and set up a counterclaim of $120.00. An order of reference by Judge Clement, at the August Term, 1930, is as follows: "This action having been called and it appearing to the court that the trial of the issues of fact requires the examination of a long account: It is, therefore, ordered that a compulsory reference be had and that W. H. Beckerdite be, and he is hereby appointed referee to hear and determine the issues both of law and fact in this cause and report his findings to this court. To the above order both plaintiff and defendant except. J. H. CLEMENT."

The report of the referee is as follows: "To the Superior Court of Cabarrus County: The undersigned having been appointed as a referee to hear this cause and report his findings of fact and law, files the following report: The cause was heard and a transcript of evidence, together with exhibits filed and introduced as evidence, is herewith transmitted, and from the evidence I find the following facts: (1) The defendant was appointed as agent for the plaintiff and in accordance with his duties as such agent, delivered merchandise to various customers, and collected for such deliveries of merchandise. (2) That the defendant delivered the merchandise represented by the tickets introduced in evidence and I find as a fact that the defendant failed to pay over and account for a sum in excess of $290.75, which said sum was collected for merchandise delivered as agent for the plaintiff. (3) That the defendant subscribed for certain stock and paid from time to time to plaintiff to apply on said stock subscription the total sum of $120.00; that said stock was not delivered to defendant by plaintiff. (4) That by reason of his failure to account for collections for merchandise, and after applying as a set-off, the sum paid on his stock subscription, defendant is indebted to plaintiff in the sum of $170.75. Conclusions of law: From the foregoing findings of fact, I conclude and find that the plaintiff is entitled to judgment against the defendant in the sum of $170.75, and costs of this action. Respectfully submitted, this 4 August, 1933. W. H. BECKERDITE, *Referee.*

Filed 4 August, 1933."

To the report of the referee, the defendant filed exceptions and tendered two issues, but nowhere does it appear in the record, that he demanded a jury trial upon the issues tendered. The judgment of the

court below is as follows: "This cause coming on to be heard, counsel for plaintiff and counsel for defendant being present in open court, counsel for plaintiff moves the court for judgment confirming the report of the referee. Counsel for the defendant *ore tenus* made demand for a jury trial on the issues set out in exceptions of the defendant to the report of the referee. Upon inspection of the report of the referee and the exceptions filed by the defendant to the report of the referee and the order appointing the referee and exceptions made to such appointment, the court is of opinion that the defendant has waived his right to trial by a jury, for that no demand for trial by jury has been made in apt time as required by statute and the opinions of the Supreme Court construing such statute, and the defendant excepts to the order of the court holding that the defendant has waived his right to have a jury trial and appeals to the Supreme Court."

The exceptions and assignments of error made by defendant are as follows: "Defendant assigns as an error the ruling and order of Judge Clement wherein he orders a reference of the case over defendant's objection. Defendant assigns as an error the ruling and order of Judge Harding wherein he holds that the defendant has waived his right to have a jury trial on the issues submitted and tendered with his exceptions to the report of the referee."

Hartsell & Hartsell for plaintiff.
H. S. Williams for defendant.

CLARKSON, J. We do not think that either one of the exceptions and assignments of error made by defendant can be sustained. As to the first: N. C. Code, 1931 (Michie), sec. 573(1), is as follows: "Where the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases: (1) Where the trial of an issue of fact requires the examination of a long account on either side; in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein."

The pleading of plaintiff and the answer of the defendant, indicated "the examination of a long account on either side." The defendant set up no plea in bar. *Lumber Co. v. Pemberton,* 188 N. C., 532. In *Bank v. Evans,* 191 N. C., 535 (539), is the following: "It is generally agreed that the civil issue dockets of the State are greatly congested by reason of the overwhelming increase in business incident to the progress and expansion of commercial and industrial activities, and for this reason, it is perhaps, not amiss to be reminded of the practical wisdom contained in an utterance by *Faircloth, C. J.,* in *Jones v. Bea-*

man, 117 N. C., 259: 'Our statutes relating to trials by referees serve a useful purpose, and must be liberally construed. They aid and simplify the work which would otherwise fall upon the court and jury, and often expedite the litigation and save the parties from trouble and expensive trials, and are a saving in time to witnesses and attorneys.'" *Driller Co. v. Worth*, 117 N. C., 515; *Alley v. Rogers*, 170 N. C., 538; *Baker v. Edwards*, 176 N. C., 229; *Bank v. McCormick*, 192 N. C., 42; *Booker v. Highlands*, 198 N. C., 282; *Mfg. Co. v. Horn*, 203 N. C., 732.

As to the second: The defendant did not demand a jury trial upon the issues tendered, by not doing so, it is well settled that a trial by jury is waived. In *Cotton Mills v. Maslin*, 200 N. C., 328 (329), it is held: "A party who would preserve his right to a jury trial in a compulsory reference must object to the order of reference at the time it is made, and on the coming in of the report of the referee, if it be adverse, he should seasonably file exceptions to particular findings of fact made by the referee, tender appropriate issues based on the facts pointed out in the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered. *Wilson v. Featherstone*, 120 N. C., 446, 27 S. E., 124; *Yelverton v. Coley*, 101 N. C., 248, 7 S. E., 672. This was not done in the instant case. Although a party may duly enter his objection to the order of reference, he may yet waive his right to a jury trial by failing to assert such right definitely and specifically in each exception to the referee's report and by his failing to tender the proper issues. *Alley v. Rogers*, 170 N. C., 538."

It may be noted that the testimony taken before the referee is not in the record, C. S., 577. For the reasons given, the judgment of the court below must be

Affirmed.

HENDERSON BUILDING AND LOAN ASSOCIATION AND I. B. WATKINS, TRUSTEE, v. S. B. BURWELL, CITY CLERK, THE CITY OF HENDERSON, CITIZENS BANK AND TRUST COMPANY AND FIRST NATIONAL BANK AND HENDERSON BUILDING AND LOAN ASSOCIATION AND I. B. WATKINS, TRUSTEE, v. J. E. HAMLETT, SHERIFF VANCE COUNTY; CITIZENS BANK AND TRUST COMPANY AND FIRST NATIONAL BANK.

(Filed 11 April, 1934.)

Attachment E b: Taxation D b—Levy under attachment has priority over subsequent levy on personalty for payment of taxes.

Where personal property is seized under valid writ of attachment prior to the time it is pointed out by a mortgagee or purchaser of real property from the owner of the personalty for the collection of taxes levied against the realty, N. C. Code, 8006, the levy on the personalty for taxes is

subject to the prior levy under attachment, and the attaching creditors are entitled to a prior claim on the proceeds of sale of the personalty. N. C. Code, 8008.

APPEAL by plaintiff from *Parker, J.,* and a jury, at November Special Civil Term, 1933, of VANCE. No error.

The record contains this agreement of counsel: "It is understood and agreed by the attorneys, representing the Henderson Building and Loan Association *et al.,* plaintiffs in this case, and the attorneys representing the defendants, S. B. Burwell *et al.,* and J. E. Hamlett *et al.,* that the pleadings herein filed against S. B. Burwell *et al.,* are the same as in the case of Henderson Building and Loan Association *et al. v.* J. E. Hamlett, sheriff, *et al.,* with the exception that S. B. Burwell did not file an answer, and stated that he would be guided by the court's decision in the case of Henderson Building and Loan Association *et al. v.* J. E. Hamlett *et al.,* and it is further agreed that the clerk of the Superior Court of Vance County, North Carolina, shall certify to the Supreme Court of the State of North Carolina only the case of Henderson Building and Loan Association *et al. v.* J. E. Hamlett *et al.,* and that S. B. Burwell *et al.,* will be guided by the court's decision in that case."

The judgment of the court below was as follows: "This cause coming on to be heard before Hon. R. Hunt Parker, judge presiding, and a jury, at the November Special Civil Term of Vance County Superior Court, 1933, on motion, the foregoing actions having been consolidated; the issue having been submitted to the jury and found as follows: When the Chrysler automobile, office furniture and fixtures, law library and bookcases of R. S. McCoin, as described in the complaint, were seized on 8 April, 1933, by J. E. Hamlett, sheriff of Vance County, and S. B. Burwell, city clerk and tax collector of Henderson, were they held under a valid attachment lien issued in the case of Citizens Bank and Trust Co. *v.* R. S. McCoin on 30 March, 1933? Answer: Yes. The court finding as a fact upon the admissions of the plaintiff that the property situated on Young Street in the city of Henderson and known as the McCoin office building on which plaintiff held notes secured by deed of trust, was sold under foreclosure by I. B. Watkins, trustee, on 25 March, 1933, at which time and place the Henderson Building and Loan Association, a solvent, going and responsible corporation, became the last and highest bidder in the sum of $12,500. That no advanced bid was made on said property, and no report thereof was made to the clerk of Superior Court of Vance County, and that more than ten days had elapsed from the date of the sale on 25 March, until the notice given by Henderson Building and Loan Association for said property under their bid made on 25 March, 1933, and said trustee credited said note with purchase price of said property in the sum of $12,500.

"Wherefore, on motion of A. A. Bunn and Perry & Kittrell, attorneys for defendants, it is ordered, adjudged and decreed that plaintiffs take nothing by their action; it is further ordered, adjudged and decreed that when other property belonging to R. S. McCoin attached by defendants has been sold and the proceeds thereof applied to their debt; if such proceeds from said other property is sufficient to pay the debts of said defendants as evidenced by judgments and attachments of said defendants in full, then and in that event, the money now in the hands of the clerk of the court, being the proceeds from the sale of the personal property now in controversy and amounting to $360.00, shall be subject to the tax levy of the sheriff of Vance County and the tax collector of the city of Henderson.

"It is further ordered, adjudged and decreed that the restraining order heretofore issued be and the same is dissolved, and the sheriff of Vance County and the tax collector of the city of Henderson authorized to proceed in the collection of taxes as provided by law in the cases of delinquent taxes. Plaintiffs' actions are dismissed and plaintiffs are taxed with the costs of these actions to be computed by the clerk.

R. HUNT PARKER, *Judge Presiding.*"

The plaintiff made numerous exceptions and assignments of error and appealed to the Supreme Court.

Irvine B. Watkins and M. C. Pearce for plaintiff.
Perry & Kittrell and A. A. Bunn for defendants.

CLARKSON, J. We think that it is only necessary on this appeal to consider one question: Did the Citizens Bank and Trust Company, the defendant, have a prior right to plaintiff, on account of its attachment against the personal property of R. S. McCoin? We think so.

N. C. Code (Michie), 1931, section 7986, in part, is as follows: "Taxes shall not be a lien upon personal property, except where otherwise provided by law, but from a levy thereon," etc. The lien for the payment of taxes assessed against personal property attaches only from the date of levy thereon, subject to certain exemptions specified in Const., Art. V, secs. 3 and 5, *Carstarphen v. Plymouth,* 186 N. C., 90.

N. C. Code (Michie), section 8006, is as follows: "The personal property of the taxpayer shall be levied upon and shall be sold for the satisfaction of his taxes before resorting to his real estate, if sufficient personalty subject to levy and sale can be found in the county of the sheriff having the tax list in hand: *Provided,* it shall be incumbent upon the taxpayer, mortgagee or other lienholder on taxpayer's realty, if said mortgagee or other lienholder has notified the sheriff that he holds such mortgage or other lien, to point out to the sheriff personalty out of

which the taxes may be made or else such taxpayer shall forfeit his rights under this section and his real estate shall be subject to the lien for taxes as if no other property had been listed by him."

The defendant sheriff, J. E. Hamlett, testified: "I don't recall the date, but I had seized this same property under an attachment of the Citizens Bank and Trust Company before the property was pointed out to me for taxes. At the time the property was pointed out to me with request to levy on it for taxes, it was then in my custody under an attachment."

The plaintiff pointed out the property to the sheriff, after the warrant of attachment by defendant bank. In *Trust Co. v. McCoin, ante,* 272, this attachment was held valid. In *Penland v. Leatherwood,* 101 N. C., 510 (514): "There can be but one actual levy of one or more executions upon personal property at one and the same time, because the officer in making the same seizes or gets possession and control of it and has a special property therein and ownership thereof that excludes and prevents other like levies, which levy, however, as we have already seen, places the property in *custodia legis,* to be applied in proper cases if need be, to other executions. Other officers having like executions, may make other levies upon the same property, but these will be constructive in their nature and entitle the officers making them, in their order, to have the property or the proceeds of the sale thereof after the executions under and in pursuance of which the first actual levy proper was made shall be satisfied."

In *Hambley v. White,* 192 N. C., 31 (*S. c.,* 192 N. C., 624), 34, we find the following: "Attachment partakes of the nature of an execution before judgment (*Johnson v. Whilden,* 166 N. C., 104); and as the lien begins with the levy of the attachment (*McMillan v. Parsons,* 52 N. C., 163), it is subject to all others of prior date and superior to those of subsequent date. *Morehead v. R. R.,* 96 N. C., 362. As remarked by *Mr. Justice Matthews* in *Freedman's S. & T. Co. v. Earle,* 110 U. S., 717, 'It is the execution first begun to be executed, unless otherwise regulated by statute, which is entitled to priority.'"

Plaintiff cites N. C. Code, 1931 (Michie), 8008: "What subject of levy." We cannot give it the construction put on it by plaintiff, it does not impinge on the priority of the defendant bank, under its attachment. The position here taken is determinative of the controversy. The other matters we need not discuss. The exceptions and assignments of error made by plaintiff cannot be sustained. We find no error in the judgment of the court below.

No error.

IN THE MATTER OF THE ESTATE OF H. L. FINLAYSON, DECEASED.

(Filed 11 April, 1934.)

1. Wills D a—Evidence held to support finding that deceased's domicile was in county in which will was offered for probate.

The last actual place of residence of the deceased is not determinative of his domicile in regard to the jurisdiction of the clerk in probating his will, but change of domicile is to be determined by his intent to abandon his first domicile and acquire another elsewhere, and where there is evidence that he was born in the county in which his will was offered for probate and continued to live there except for temporary residence for business purposes in other states at various times, and that he intended to return here and regarded this State as his domicile, *is held* sufficient to base a finding that his domicile was the county of probate, although there was some conflict in the evidence.

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

Where the clerk of the Superior Court has found from sufficient evidence that the deceased was domiciled in the county of probate, and this finding is affirmed by the Superior Court, it is conclusive on appeal to the Supreme Court although the evidence is conflicting.

APPEAL by petitioners from *Moore, Special Judge,* at December Special Term, 1933, of WAYNE. Affirmed.

This is a special proceeding instituted by the petitioners before the clerk of the Superior Court of Wayne County, on 28 August, 1933, for an order that letters testamentary issued by said clerk to Mrs. Emma Finlayson Cannon, executrix of H. L. Finlayson, deceased, be revoked and canceled, and that the probate by said clerk on 28 May, 1931, of a certain paper-writing as the last will and testament of the said H. L. Finlayson, deceased, in which the petitioners are named as legatees, be set aside and vacated, on the ground that the said clerk was without jurisdiction to probate said paper-writing as the last will and testament of H. L. Finlayson, deceased, or to issue said letters testamentary, for that:

1. H. L. Finlayson was not domiciled at the date of his death, or immediately previous thereto, in Wayne County, North Carolina, or in any other county in said State.

2. Not being domiciled in the State of North Carolina at or immediately previous to the date of his death, H. L. Finlayson died out of said State, leaving no assets in Wayne County, or in any county in said State.

At the hearing of the proceeding by the clerk of the Superior Court of Wayne County on the petition of the petitioners and the answer

thereto of the respondent, evidence was offered by both the petitioners and the respondent, Mrs. Emma Finlayson Cannon, in support of their respective contentions, the respondent contending that at the date of his death, H. L. Finlayson was domiciled in Wayne County, North Carolina, the petitioners contending the contrary. On consideration of all the evidence, the clerk found as a fact that at the date of his death, H. L. Finlayson was domiciled in Wayne County, North Carolina, and on this finding denied the petition. The petitioners excepted and appealed to the judge of the Superior Court of Wayne County. At the hearing of the appeal, the judge found from all the evidence that "the testator, H. L. Finlayson, was born and raised in the city of Goldsboro, in Wayne County, North Carolina; that Wayne County is the domicile of his origin and that he had never abandoned said domicile, or acquired a domicile in any other county or State; and that at the date of his death, H. L. Finlayson was domiciled in Wayne County, North Carolina."

From judgment affirming the order of the clerk denying their prayer that the letters testamentary issued to Mrs. Emma Finlayson Cannon, executrix, be revoked and canceled, and that the probate of the last will and testament of H. L. Finlayson, deceased, be set aside and vacated, the petitioners appealed to the Supreme Court.

W. A. Dees, F. P. Parker, Jr., Langston, Allen & Taylor and Christian, Barton & Parker for petitioners.

R. D. Johnson, T. Gray Haddon and Dickinson & Bland for respondent.

CONNOR, J. The findings of fact, with respect to the domicile of H. L. Finlayson, at the date of his death, made by the clerk, and approved by the judge of the Superior Court of Wayne County, on petitioners' appeal from the order of the clerk, were supported by competent evidence, and are therefore conclusive. Although there was conflict in the evidence, the findings of fact are not subject to review by this Court. *Lumber Co. v. Finance Co.*, 204 N. C., 285, 168 S. E., 219; *Tyer v. Lumber Co.*, 188 N. C., 268, 124 S. E., 305; *In re Martin*, 185 N. C., 472, 117 S. E., 561.

In the last cited case, it is said: "Domicile is a question of fact and intention. Hence, to effect a change of domicile, there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence at another place, or within another jurisdiction, coupled with the intention of making the last acquired residence a permanent home. The judge finds that no such change took place here."

The fact, as shown by all the evidence in the instant case, that at the time of his death in the city of Richmond, Virginia, H. L. Finlayson resided in said city, is not determinative of the question presented by this proceeding. The evidence was at least conflicting as to his intention to make his permanent home in the city of Richmond. There was evidence tending to show that he resided in the city of Richmond, as he had in Norfolk, and New York, from time to time, for business reasons only, and that at no time did he intend to make his permanent home elsewhere than in the city of Goldsboro, Wayne County, North Carolina, where he was born, and where, at her death, he brought the body of his wife for burial. It is significant that as one of the executors of his wife's will, he caused the said will to be probated in Wayne County, and that he returned to Goldsboro, in Wayne County, to have his last will and testament drawn by an attorney at law who resided in Goldsboro. The will offered for probate by his daughter, whose domicile is in this State and who is named therein as his executrix, begins with these words: "I, H. L. Finlayson, of the city of Goldsboro, said county and State." This will was executed by him while he was residing in the city of Richmond, but contains no recital that his home was in said city. There is no error in the judgment.

Affirmed.

MRS. ROSA BELLE PADGETT v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 11 April, 1934.)

Insurance P b: R a—Held: all evidence showed that death did not result from accidental means covered by policy, and nonsuit was proper.

Where a policy of life insurance contains a provision for additional benefit if insured should be killed by accidental means as defined by the policy, and the policy expressly provides that the provision should not cover death while insured was riding in an aeroplane otherwise than as a fare-paying passenger: *Held*, an action on the accidental death provision is properly nonsuited where all the evidence tends to show that insured was killed while riding as a guest in an aeroplane piloted by his employer who had a private pilot's license expressly providing that the holder thereof was not authorized to carry passengers for hire, and that no fare was paid or contemplated by either.

APPEAL by plaintiff from *Shaw, Emergency Judge,* at January Term, 1934, of LINCOLN. Affirmed.

This is an action to recover on a contract attached to and made a part of a policy of insurance issued by the defendant on the life of Walton E. Padgett, husband of the plaintiff, who is named as the beneficiary in said policy. The contract is in words and figures as follows:

"ACCIDENTAL DEATH BENEFIT

Benefit payable in the event of death from accident as herein limited and provided. Supplementary contract attached to and made part of life insurance policy No. 3821917-A, issued on the life of Walton E. Padgett.

METROPOLITAN LIFE INSURANCE COMPANY

In consideration of the application for this contract, as contained in the application for said policy, the latter being the basis for the issuance hereof, and in consideration of six dollars and forty cents, payable annually as an additional premium herefor, such payment being simultaneous with and under the same conditions as the regular premium under the said policy, except as hereinafter provided,

Hereby agrees to pay to the beneficiary or beneficiaries of record under said policy, in addition to the amount payable according to the terms of said policy, the sum of six thousand dollars, upon receipt, at the home office of the company in the city of New York, of due proof of the death of the insured as the result, directly and independently of all other causes, of bodily injuries sustained through external, violent, and accidental means, provided (1) that such death shall have occurred while said policy and this supplementary contract are in full force, and prior to the anniversary date of said policy nearest to the sixty-fifth birthday of the insured; and (2) that all premiums under said policy and this supplementary contract shall have been duly paid; and (3) that said policy shall not then be in force by virtue of any nonforfeiture provision thereof; and (4) that death shall have ensued within ninety days from the date of such injuries; and (5) that death shall not have been the result of self-destruction, whether sane or insane, or caused by or contributed to, directly or indirectly, or wholly or partially, by disease, or by bodily or mental infirmity; and (6) that death shall not have resulted from bodily injuries sustained while participating in aviation or aeronautics, except as a fare-paying passenger, nor while the insured is in the military or naval service in time of war, nor as the result of violation of law by the insured."

The insured, Walton E. Padgett, died on 31 October, 1932. At said date, both the policy of insurance and the contract attached thereto were in full force and effect, according to their terms. The death of the insured resulted, directly and independently of all other causes, from

bodily injuries sustained by him while riding in an aeroplane, owned and driven by E. H. Byars, Jr., from Lincolnton, N. C., to Charlotte, N. C. The fatal injuries were sustained through external, violent and accidental means.

The defendant admitted liability to the plaintiff under the provisions of the policy, and paid to her the amount thereof. It denied liability under the contract on the sole ground that the insured was not a fare-paying passenger in the aeroplane at the time he sustained the injuries which resulted in his death.

At the close of all the evidence, the court being of opinion that there was no evidence tending to show that the insured was a fare-paying passenger in the aeroplane at the time he sustained his fatal injuries, allowed defendants motion for judgment as of nonsuit, and plaintiff appealed to the Supreme Court.

Jonas & Jonas for plaintiff.
Clyde R. Hoey and P. W. Garland for defendant.

CONNOR, J. At the trial of this action it was admitted by the defendant that the death of Walton E. Padgett, the insured, was the result, directly and independently of all other causes, of bodily injuries sustained by him through external, violent and accidental means, to wit: the crash of an aeroplane in which he was riding and which was owned and driven at the time of the accident by E. H. Byars, Jr. The defendant denied liability to the plaintiff under the supplementary contract solely upon the ground that the death of the insured resulted from bodily injuries sustained by him while participating otherwise than as a fare-paying passenger, in aviation or aeronautics.

All the evidence tended to show that at the time he sustained his fatal injuries, the insured was participating in aviation or aeronautics. He was riding in an aeroplane, en route from Lincolnton, N. C., to Charlotte, N. C. There was no evidence tending to show that the insured was a fare-paying passenger. He was riding in the aeroplane with his employer, E. H. Byars, Jr., who held a private pilot's license, issued to him by the United States Department of Commerce. It was expressly provided in said license that the holder thereof was not authorized to transport persons or property, for hire. All the evidence showed that the insured was riding with his employer, upon the latter's invitation, and that no fare was paid or contemplated by either. There was no error in the judgment dismissing the action. It is

Affirmed.

EASTERN BANK AND TRUST COMPANY v. W. R. SHAW AND HIS WIFE, RUTH SHAW, BRADHAM DRUG COMPANY ET AL.

(Filed 11 April, 1934.)

Banks and Banking H d—Maker may not set off deposit in assignor bank against assignee when assignment is made prior to assignor's insolvency.

Where a bank, the holder of a note in due course, endorses and assigns same before maturity to another bank, and thereafter the assignor bank becomes insolvent, the maker of the note, having a sum on deposit in the assignor bank sufficient to pay the note at the time it closed its doors, may not contend that the assignment was void in the absence of evidence that the assignor bank was insolvent at the time of its assignment or contemplated insolvency at that date, and the assignee bank may maintain an action on the note as a holder in due course.

APPEAL by defendants, W. R. Shaw and his wife, Ruth Shaw, from *Daniels, J.*, at January Term, 1934, of CRAVEN. No error.

On 25 April, 1927, the defendants, W. R. Shaw and his wife, Ruth Shaw, executed and delivered to the defendant Bradham Drug Company their note for the sum of $500.00. The said note is payable to the order of the Bradham Drug Company, and was due on 25 October, 1929. Before its maturity, the Bradham Drug Company endorsed said note, and transferred and assigned the same, for value, to the First National Bank of New Bern.

On 9 October, 1929, the First National Bank of New Bern endorsed the said note, and transferred and assigned the same, for value, to the plaintiff. The plaintiff is now the holder in due course of the said note. Interest accrued on said note was paid to 25 April, 1929.

The note sued on in this action is one of a series of notes executed by the defendants W. R. Shaw and his wife Ruth Shaw, and payable to the order of the Bradham Drug Company. The said notes were secured by a chattel mortgage executed by the makers and duly recorded in the office of the register of deeds of Craven County. All the notes secured by said chattel mortgage, except the note sued on, have been paid. The said chattel mortgage was wrongfully canceled in the record by the Bradham Drug Company. There is now due on the note sued on the sum of $500.00, with interest from 25 April, 1929.

From judgment that plaintiff recover of the defendants, W. R. Shaw and his wife, Ruth Shaw, the sum of $500.00, with interest on said sum from 25 April, 1929, and the costs of the action, and that the cancellation of the chattel mortgage entered on the record by the defendant Bradham Drug Company be stricken therefrom, the defendants, W. R. Shaw and his wife, Ruth Shaw, appealed to the Supreme Court.

Warren & Warren for plaintiff.
Ernest M. Green for defendants.

CONNOR, J. The First National Bank of New Bern was the holder in due course of the note sued on in this action on 9 October, 1929. At said date, the said National Bank endorsed and assigned said note, for value, to the plaintiff. The note was due and payable on 25 October, 1929.

The First National Bank of New Bern closed its doors and ceased to do business on 25 October, 1929, because of its insolvency. At said date, the defendant, W. R. Shaw, had on deposit with the said First National Bank of New Bern, a sum more than sufficient for the payment of said note. There was no evidence at the trial of this action tending to show that the First National Bank of New Bern was insolvent on 9 October, 1929, or that it contemplated insolvency at said date. For that reason, the contention of the defendants that the transfer and assignment by said National Bank of the note sued on was void, and that the plaintiff did not become the holder in due course as the result of said transfer and assignment, cannot be sustained.

There was no error in the instruction of the court to the jury to the effect that if the jury should find the facts to be as all the evidence tended to show, they should answer the third issue "Yes." The judgment is affirmed.

No error.

ATLANTIC LIFE INSURANCE COMPANY v. SADIE JONES DEY.

(Filed 11 April, 1934.)

Bills and Notes H a—Complaint alleging deficiency after foreclosure and interest held not demurrable for failure to allege maturity and demand.

In an action to recover deficiency after foreclosure, a complaint alleging the execution of the notes and deed of trust, foreclosure of the deed of trust and application of proceeds of sale to the notes, deficiency in proceeds of sale in a sum named with interest from date of foreclosure *is held* not demurrable on the ground that it does not allege said balance is due and unpaid or that demand therefor has been made and refused, the allegation of deficiency in payment with interest from date of foreclosure being sufficient to charge the maturity of the unpaid balance, and the foreclosure being tantamount to demand for payment, the complaint being liberally construed as a whole upon demurrer.

APPEAL by defendants from *Frizzelle, J.*, at December Term, 1933, of CARTERET.

Civil action to recover $635.12, with interest from 7 July, 1933, balance due on ten promissory notes, executed by Sadie Jones Dey and her husband, C. P. Dey, to plaintiff.

The complaint alleges:

1. Execution by defendants to plaintiff, the present holder, of ten notes aggregating $3,750, dated 10 January, 1929, and deed of trust to secure same duly registered in Book 63, page 20-C, registry of Carteret County. Notes were not given for purchase of land mortgaged to secure their payment.

2. Foreclosure of deed of trust and application of proceeds as payment on notes, 7 July, 1933. Defendants' attorney present and made no objection to sale. No upset bid filed. Report of settlement was filed in office clerk Superior Court, Carteret County, to which reference is hereby made and asked to be taken as part hereof as though so exhibited.

3. Deficiency in proceeds from sale amounts to $635.12, with interest from date of foreclosure. Said notes were tendered to be enrolled in the judgment as and when entered in this cause.

4. Prayer for judgment.

Demurrer interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action, in that, it is not alleged said balance is now due and unpaid, or demand has been made therefor and refused. Overruled; exception; appeal.

Julius F. Duncan for plaintiff.
Ward & Ward for defendants.

STACY, C. J. Viewing the allegations of the complaint with the liberality which the law requires on demurrer, it would seem that the allegation of deficiency in payment with interest from date of foreclosure is sufficient to charge the maturity of the unpaid balance, and, if not otherwise alleged, the foreclosure was tantamount to demand for payment. *Worth v. Stewart,* 122 N. C., 258, 29 S. E., 579; 21 R. C. L., 119; 1 Abbott's Forms of Pleading (3d), 338.

It is true, the complaint is little more than a skeleton (*Thompson v. Johnson,* 202 N. C., 817, 164 S. E., 357)—wholly devoid of redundancy—but considering it in its entirety, it would seem to be sufficient as against a demurrer. *Meyer v. Fenner,* 196 N. C., 476, 146 S. E., 82; *Blackmore v. Winders,* 144 N. C., 212, 56 S. E., 874.

Affirmed.

R. O. ABERNETHY v. W. W. BURNS ET AL.

(Filed 11 April, 1934.)

1. Trial A a—

It is within the discretion of the court, for cause shown, to place a case at the end of the trial docket, but a provision in the order that the case thus remain until plaintiff, appearing *in propria persona*, should employ counsel is erroneous.

2. Attorney and Client A c—

A party has the alternative right to appear either *in propria persona* or by counsel. C. S., 401.

APPEAL by plaintiff from *Warlick, J.*, at November Term, 1933, of CATAWBA.

Civil action to recover damages for alleged (1) malicious prosecution, (2) abuse of process, (3) trespass, and (4) wrongful conversion.

The answer denies the material allegations of the complaint, sets up estoppel by judgment and the statute of limitations.

It appearing that the issues are involved, that plaintiff is accustomed to bringing suits and trying them without the aid of counsel at great loss of time to the court, that he is undertaking to prosecute the present action *in propria persona*, and that a trial of the cause, under these circumstances, will consume a great deal of unnecessary time, the court ordered the case to be placed at the end of the trial docket, there to "remain as the last case on the trial docket if and until counsel licensed to practice in North Carolina signs his name, or their names as counsel for the plaintiff, which when done, shall be authority to the clerk to take the case from the foot of the trial calendar and place it on the docket for trial at term."

Plaintiff appeals, assigning error.

R. O. Abernethy in propria persona.
No counsel appearing for defendants.

STACY, C. J. It was clearly within the discretion of the court, for cause shown, to place the case at the end of the trial docket. But it is provided by C. S., 401 that a party may appear "either in person or by attorney in actions or proceedings in which he is interested." Thus, the provision requiring plaintiff to employ counsel would seem to be at variance with the statute.

It is the general holding that a party has the right to appear *in propria persona* or by counsel. This right is alternative. A party has no right to appear both by himself and by counsel. Nor should he be

permitted *ex gratia* to do so. *Talbot v. Talbot's Reps.*, 25 Marshall's Reports (Ky.), 3; *Comrs. v. Younger*, 29 Cal., 147, 87 Am. Dec., 164, and note; 4 C. J., 1322; 2 R. C. L., 937.

In the instant case, the plaintiff prefers "to go it alone." This is his right. He may not get to first base, but he is entitled to come to the bat.

The order will be modified as indicated, and, as thus modified, it will be affirmed.

Modified and affirmed.

HAZEL BATSON v. CITY LAUNDRY COMPANY.

(Filed 11 April, 1934.)

Judgments L a—In order to sustain plea of estoppel in action after nonsuit court must find that allegations and evidence are practically identical.

In order for a judgment of nonsuit to operate as *res adjudicata* in a subsequent action brought under the provisions of C. S., 415, it is required that the trial court find as a fact that the second suit is based upon substantially identical allegations and evidence as the first, and where the trial court hears no evidence and finds no facts his judgment dismissing the action upon the plea of estoppel by the former judgment is prematurely and inadvertently made.

CIVIL ACTION, before *Cranmer, J.*, at September Term, 1933, of NEW HANOVER.

This cause was tried in the Superior Court and the plaintiff recovered damages in the sum of $12,250. The trial judge set the verdict aside and allowed motion of nonsuit upon the ground that the plaintiff "upon her own testimony is guilty of contributory negligence." Upon appeal to the Supreme Court the cause was remanded. See *Batson v. Laundry*, 202 N. C., 560, 163 S. E., 600. This judgment of nonsuit was affirmed. Subsequently the plaintiff instituted the present action.

The complaint contained many allegations substantially similar to the allegations in the former complaint. However, there were new allegations of negligence. The defendant filed an answer denying negligence and pleaded contributory negligence, and for further defenses pleaded the three-year statute of limitations and estoppel by judgment, asserting that the judgment affirmed in *Batson v. Laundry*, 205 N. C., 93, constituted *res adjudicata*.

When the case was called for trial in the Superior Court the plaintiff lodged a motion *ore tenus* to strike from the answer the pleas of the statute of limitation and of *res adjudicata*. In arguing the motion plain-

tiff offered in evidence the original complaint in the former action and the complaint and answer in this action and used "the former judgments and opinion of the Supreme Court." The defendant thereupon moved for judgment upon the ground that the opinion of the Supreme Court was *res adjudicata*. The court denied plaintiff's motion to strike the said pleas from the defendant's answer and dismissed the action upon the defendant's motion, and the plaintiff appealed.

Herbert McClammy, Burney & McClelland and Rountree, Hackler & Rountree for plaintiff.

L. Clayton Grant and Bryan & Campbell for defendant.

BROGDEN, J. C. S., 415, permits a plaintiff to bring a new action within one year after a judgment of nonsuit. No point is made that the present suit was not brought within a year after the judgment of nonsuit reported in *Batson v. Laundry*, 205 N. C., p. 93. Consequently the plaintiff had a right to bring a new action. If it should be held that the plea of *res adjudicata* was applicable to the remedy set up by C. S., 415, it is manifest that this statute would be whittled down to a nullity because every judgment of nonsuit could then be set up as a bar to a new action. The essentials of estoppel by judgment are summarized in *Hardison v. Everett*, 192 N. C., 371, 135 S. E., 288, but it is apparent that C. S., 415, was enacted for the express purpose of giving a plaintiff another chance if the allegations and evidence warranted it. The case of *Hampton v. Spinning Co.*, 198 N. C., 235, 151 S. E., 266, undertook to prescribe a standard by which to test and determine the maintainability of the new action. This limitation is stated as follows in the *Hampton case:* "But, if upon the trial of the new action, upon its merits, . . . it appears to the trial court, and is found by such court as a fact, that the second suit is based upon substantially identical allegation and substantially identical evidence, and that the merits of the second cause are identically the same, thereupon the trial court should hold that the judgment in the first action was a bar or *res adjudicata*, and thus end that particular litigation." In the case at bar the trial judge heard no evidence and found no facts. Hence it does not appear whether the merits of the present case are substantially identical to the former case or not. Therefore, the Court is of the opinion that the judgment dismissing the action upon the plea of estoppel was prematurely and inadvertently made.

Reversed.

STATE OF NORTH CAROLINA EX REL. THENIE E. DUNN, ADMINISTRATRIX OF G. P. DUNN, DECEASED, v. E. R. DUNN, FORMER ADMINISTRATOR OF G. P. DUNN, DECEASED, AND NEW AMSTERDAM CASUALTY COMPANY.

(Filed 11 April, 1934.)

Limitation of Actions B a—Right of action against bondsman of former administrator by administrator d. b. n. accrues upon his appointment.

An administrator *d. b. n.* appointed after the removal or death of the former administrator has a right to sue the bondsman and the former administrator or his personal representative for breach of the statutory bond, and since the cause of action by the administrator *d. b. n.* does not accrue until his appointment, the action by such administrator is not barred as against the bondsman until three years subsequent to his appointment. C. S., 441(6).

APPEAL by the defendant New Amsterdam Casualty Company from *Moore, Special Judge,* at November Term, 1933, of JOHNSTON. Affirmed.

G. P. Dunn died intestate in Johnston County on 23 April, 1926.

On 27 April, 1926, the defendant E. R. Dunn, having first filed bond as required by statute (C. S., 33), was duly appointed and duly qualified as administrator of the said G. P. Dunn, deceased.

On 7 December, 1929, the defendant E. R. Dunn, who had not filed a final account as administrator of G. P. Dunn, deceased, prior to said date, pursuant to an order of the clerk of the Superior Court of Johnston County, filed another bond as administrator of his intestate, in the sum of $6,000, with the defendant New Amsterdam Casualty Company as surety.

On 1 August, 1932, the defendant E. R. Dunn, who had not filed a final account as administrator of G. P. Dunn deceased prior to said date, was removed by the clerk as administrator of his intestate.

On 8 October, 1932, the plaintiff was duly appointed and duly qualified as administratrix *d. b. n.* of G. P. Dunn, deceased.

This action was begun by the plaintiff on 22 October, 1932, to recover of the defendant E. R. Dunn, former administrator of her intestate, and of the defendant New Amsterdam Casualty Company, surety on his bond, the amount due to the plaintiff by the said E. R. Dunn as former administrator of his intestate.

The action was referred to a referee for trial and was heard on exceptions to his report. The exceptions were overruled, and the defendant, New Amsterdam Casualty Company, appealed from the judgment that plaintiff recover of the defendants the sum of $6,000, to be discharged upon the payment to the plaintiff by the defendants of the sum of $3,639.32, with interest from 27 April, 1928, and the costs of this action.

Lee & Lee for plaintiff.
James D. Parker and V. F. Williams for defendants.

CONNOR, J. It is well settled as the law in this State that where an administrator, who has not fully administered the estate of his intestate, has died or has been removed from his office, an action may be maintained against his personal representative or against him, as the case may be, and the surety on his bond, to recover the amount due by him to the estate of his intestate, by one who has been duly appointed and has duly qualified as administrator *d. b. n.* of his intestate. *Tulburt v. Hollar*, 102 N. C., 406, 9 S. E., 430. The failure to account for and to pay such amount is a breach of the statutory bond, C. S., 33.

In such case, the cause of action accrues to the plaintiff upon his qualifications as administrator *d. b. n.* of the deceased, and arises as against both the former administrator and his surety upon a breach of his official bond. The action is, therefore, not barred as to the surety until the lapse of three years from the date of the qualification of the plaintiff as administrator *d. b. n.* of the deceased. C. S., 441(6).

There is no error in the judgment in the instant case, overruling the exception to the referee's conclusion of law that this action is not barred by the three-year statute of limitation as against the surety. The judgment is

Affirmed.

STATE v. JAMES SHEFFIELD.

(Filed 11 April, 1934.)

1. Homicide G d—Intended victim, hit by some of shots, may exhibit wounds to jury to show range of bullets and that fatal shot might have hit him.

Where the State's evidence tends to show that the accused intended to kill a person against whom he had animus, and fired several shots at him from a garage, and that the first shot hit and killed an innocent bystander who was near the intended victim at the time of the firing and that other shots fired by defendant struck the intended victim, inflicting injury upon him as he was fleeing to a point of safety, it is not error for the trial judge to permit the intended victim to exhibit his wounds to the jury as tending to show the range of the bullets and that the first shot might have been aimed at him, and in corroboration of other evidence as to where defendant was standing when he fired the shots, and does not fall within the objection that it permitted an injured bystander to exhibit wounds to the jury upon the trial of the accused for the murder of another person.

2. Homicide A a—Person shooting at another and killing third person is guilty in same degree as though he had killed intended victim.

Where the evidence upon a trial for murder tends to show that the defendant fired several shots with the purpose of killing a certain person, that one of the shots hit and killed an innocent bystander, the degree of the crime will be governed by the same principles as if the one defendant actually killed was the one for whom the fatal shot was intended.

3. Homicide G d—Animus between defendant and intended victim held competent in prosecution for murder of innocent bystander.

Where upon a trial for murder the evidence tends to show that the defendant intended to kill a person against whom he had malice, and that one of the shots hit and killed an innocent bystander, it is competent to show that the intended victim and the accused had a serious quarrel with each other of several years standing that continued up to the time of the fatal shooting, and as both parties gave their version of the quarrel, the admission of the intended victim's testimony thereof was not prejudicial.

4. Criminal Law G b—Testimony held competent as tending to contradict defendant's testimony constituting alibi.

Where defendant sets up an alibi that he was with another person at another place at the time the crime was committed, testimony that such other person was seen near the scene of the crime shortly thereafter is properly admitted for the purpose of contradicting defendant's testimony constituting the alibi if the jury should find that it did so.

5. Criminal Law G a—An alibi is not an affirmative defense and defendant has no burden of proof in establishing same.

Where an alibi is set up as a defense on the trial for a murder the burden of proof of establishing guilt beyond a reasonable doubt does not shift, and the evidence tending to establish the alibi is to be considered by the jury only in determining whether the State has proven guilt beyond a reasonable doubt.

6. Criminal Law I g—

Defendant setting up an alibi is entitled to an instruction thereon without making a special request therefor.

7. Criminal Law J b—After verdict motion for new trial for prejudice of juror is addressed to discretion of court.

After a jury has been regularly selected and empaneled in a case and has returned its verdict, a motion to set aside the verdict and for a new trial for later discovery that one of the jurors was prejudiced against defendant, is addressed to the sound discretion of the trial court, and the court's refusal to grant the motion is not appealable in the absence of abuse.

APPEAL by defendant from *Alley, J.*, and a jury, at November-December Special Term, 1933, of HAYWOOD. No error.

The defendant was convicted of the murder in the first degree of James Miller, whom he was charged with shooting on the night of 6 August, and died on 7 August, 1933. He was sentenced to be electro-

cuted. The judgment of death by the court below concludes with these words: "And it is considered, adjudged and ordered that the said warden then and there cause a current of electricity of sufficient intensity and voltage to cause death, to pass in and through your body until you are dead; and may the Great God, Who notes even the sparrow's fall, in his infinite pity, have mercy on your soul."

The evidence, in part, by the witnesses for the State, is as follows: James L. Welch: "This was on 6 August, Sunday night, just after dark. I don't recall for sure who was there at the time of the shooting; Alvin Parker and three or four was sitting around but I can't remember who it was, but anyway the night of the shooting Bud (James) Miller came in the store and bought some cigars from me and he said that Mr. Pipes was out in the car. As soon as I got the cigars I turned around and we walked to Pipes' car, which was parked toward Rickman's steps that goes to the house, about four to six feet from the northwest corner of Rickman's corner toward the gas tank. I could not tell from where he had come. Miller and myself stood outside the car and talked to Mr. Pipes in the car some few minutes and Mr. Pipes said—Miller turned around to go in the store to get some matches and when he turned, to go back I turned around just behind him, following him. Prior to that, I had seen James Sheffield in front of Cogburn's store about 15 or 20 minutes before that. As Miller turned around to go back in the store, he was something like six to eight feet ahead of me and I followed him back in and as he stepped on the concrete under Rickman's shed at the left window as you go in, it looked like he jumped up about that high (indicating) and as he done that he turned his face back to me and he hollered 'Oh, Lord, Oh, Lord, I am shot, I am killed,' and he fell like you had picked him up and throwed him down, and I walked up to him and I said, 'You know you are not shot,' and he said. . . ." By the court: "How long was it after you heard the shot fire until you got to him? Answer: Two or three seconds.

"And I said, 'You know you are not shot,' and he said, 'Yes, I am killed,' and I squatted down over him on the balls of my feet, and Alvin Parker walked up behind me and said, 'He is not shot, is he?' The shooting continued after that until six shots were fired. I squatted down over Miller and put this finger on the hole and I noticed the blood, and Parker said, 'He ain't shot, is he?' And I said, 'I will be damned if he ain't,' and right then I was hit in the jaw and it knocked me over and I caught on Miller with that hand, and as I raised up, one bullet cut me across there (indicating shoulder), that just scraped the hide and I got up and I kept facing where the shooting was coming from; I got up and started to back up, was backing up around the corner of Rickman's store, and I saw the fire come out of the Sheffield Garage, and I backed

up around the corner of the building and I saw the man as I backed around and he, Sheffield, was in between his candy car, parked on the left side of that double door, and he was in on the right side of it, and I backed around this building and I put my hands up on the building and I looked back around at him and he shot the last shot at me and I was looking at him and he knowed it. I saw him. Six shots were fired in all. I was hit twice. Q. Did you see him any more after the shooting? Answer: No, but while I was around there, I had backed around the building, and Jud Pipes kept wanting to know what was going on, or what was happening." By the court: "Did he ask you that while the shooting was going on? Answer: Yes, sir.

"I backed around the building and Mr. Pipes was turned like he was trying to get out of his car and I said, 'Jud, don't get out, it is Jim Sheffield over in that garage shooting at me and he might shoot you,' and just after the shooting, I said to Mr. Pipes, he had got out of the car, and I said, 'Miller is bad hurt and we will have to get him to town, and if I don't get to a doctor, I will bleed to death.' I was wounded here and it come out here (indicating on right jaw where the bullet entered, and the left jaw where it came out). Q. Come down and tell the jury where you were hit and how many teeth were knocked out? Answer: (Witness shows jury.) Here on the right side, it went in and come out here and it bursted the jaw bone and they took out some pieces at the hospital. I don't know how many teeth it knocked out. Q. State whether or not you and Jim Sheffield had ever had any trouble prior to this time? Answer: Yes, we had. Q. About how long before this, Mr. Welch? Answer: We hadn't had any trouble in some time; it has been nearly three years ago, the last words we had. Q. Tell just what happened on that occasion? Q. What did James Sheffield try to do to you, if anything, and what he did?"

The witness gave in detail, the trouble he had with Sheffield 3 years before: "James Sheffield and I have not talked any and have had nothing to do with each other since that time. . . . When I backed around the corner, I saw where the fire was coming from when the fourth shot was fired, and saw the man when the fifth shot was fired. I saw the fire from the fourth shot and backed around the corner of the building; as I backed around the corner of the building, before I got around it, is when the fifth shot was fired and when the sixth shot was fired, I was standing there looking around the corner. I wasn't sure who it was until the last shot, but I saw Jim Sheffield when the fifth shot was fired. Six shots were fired and he fired one shot after I recognized him. When the sixth shot was fired, his candy truck was parked on the left side of the door and there was a space there and he was on the right side of that candy wagon, on the right side of the car. I can't say how far he

was standing from the front door, he come up into the light. I can't tell you how far back in the building he was; he was somewhere about five or six feet of the front. There were no lights in the building, nothing except the reflection from Rickman's store. The first lights of Rickman's store would be about sixty or seventy feet away. There was 160 watt electric light globe in front of Rickman's store. I recognized him six feet back in the garage; I can't say that is as far out as he come. . . . After the shooting, I said I would have to get Miller to a doctor, and I said I was going to have to get to one or I was going to bleed to death. I came to Waynesville in the same car with Miller. Hugh Cathey was driving and John Michael and Turner Vance was in the back seat with Miller. I told the jury I made some statement to Jud Pipes. He said, 'What is going on, what does that shooting mean?' as I backed up around the building and I heard him trying to get out of his car and I said, 'Jud, don't get out, it is Jim Sheffield over in that garage and it is me he is after, and he might shoot you.' At that time I was awful mad at Jim Sheffield, about as mad as a man could be."

Kenneth Lowe: "I am the son of the sheriff and was over at Silver Bluff that night. I went in the garage as described by Mr. Welch and found some cartridge hulls. That looks like the same ones I found. I found them on the floor of the garage about six or eight feet from the door, on the right side of the candy car as you went in. I only noticed one car in the garage. These are calibre 25-20. The candy wagon was in this garage when I went over there."

Jud Pipes: "I know Jim Sheffield, James Welch and knew James Miller, the deceased. I remember this Sunday evening. I was with James Miller, who is known as Bud Miller. He come to Waynesville with me and then went back out with me. We reached Rickman's store about good dark, the best I remember, and stopped there. Miller got out to get some cigars and went in the store and got them and come back and gave them to me and he went back to get some matches; he asked me if I had any matches and he had started back to the store to get the matches. Jim Welch was with him.

"Bud was in front when they started back, and about the time he got under the shed I heard a shot fire and in a second or two Bud hollered and said he was shot; he said he was shot and killed. When I got up to where I could see out, Welch was stooping down over Miller, I was sitting with my back to them practically, and there was another shot or two fired and Jim Welch come back out like he was backing out around the corner of the building. I asked Jim Welch what was going on and what that shooting meant, and I started to get out of the car and he told me not to get out; he said it was Jim Sheffield over in the garage shooting at him and I might get shot. After the shooting was over,

I got out of the car and was helping carry Miller over to put him in the car to take him to the hospital and there was another gun fired after we got across the road. I wasn't in position to see where the shots were coming from because I was setting with my back toward them. I thought there were six shots fired, and I thought it was coming from across the road, that is the way it sounded."

Alvin Parker: "I was present at the Rickman store the night James Miller was shot and lost his life. I had been there about thirty minutes before the shooting occurred and saw Jim Sheffield there, saw him drive his candy truck in the garage. That was about twenty minutes before the shooting, but not more than fifteen minutes before the shooting I saw him standing in front of the garage talking to some fellows. I was under the shed at Rickman's store when the shooting took place. I was standing there and a shot fired. James Miller was walking toward the door of Rickman's store and I was facing him. Jim Welch was right by the side of him or a step or two behind him. When the first shot fired, Miller sort of wheeled around and hollered, 'I am shot, I am killed,' and he fell with his back to the ground, and Jim Welch and me walked up about the same time to Miller and Jim Welch made the statement to Miller, 'Bud, you are not shot,' and I said, 'I don't believe he is shot' and Jim Welch stooped down and felt of the place where he was shot and he said, 'Yes, he is shot,' and he said 'Let's pick him up,' and we reached down to pick him up and the second shot fired and hit Jim Welch in the face and he said, 'Run, I am shot,' and I ran in Rickman's store and I looked back and Jim Welch was backing up around the corner of the building. Six shots were fired. . . . I guess it is about 75 feet from this garage to where Miller was shot. The lights were burning. . . . I live near Sheffield's store. I saw this Winchester rifle, this 25-20, three weeks before the shooting. It was on Friday. I saw it in the garage, saw Leonard shooting fish with it. I didn't have the gun in my hands. I saw him load it; it was a repeater, a 25-20."

James Cogburn: "I was in the garage before this shooting; James Sheffield was in there. I had a conversation with him that night; noticed him drive his candy truck in the garage and just in a minute or so, some time, I stepped in the garage and asked him if there was anything I could help him do and he said he was waiting on his son, Leonard, to come and change his tires for him. That was some little time before the shooting, that was when he drove his car in, it was getting good dusky dark. Q. Did he (Leonard) ever come to help fix the car before the shooting? Answer: No, sir."

Dr. J. F. Abel: "That shot killed James Miller. I took the bullet out. The bullet you hand me is the bullet I took out of the body of James

Miller; it appears to me to be a 25-20 calibre. . . . I talked to James Welch, he said Jim Sheffield shot him."

John Mitchell: "I have borrowed a 25-20 Winchester rifle from James Sheffield, and had it at my home almost a year before that; it was on the following October, I had last seen the gun in Mr. Sheffield's garage, about three or four weeks before the shooting. It was in the garage that has been described here. The shells you hand me, which have been introduced in evidence, are 25-20 shells. That is the kind of shells the gun I saw in the garage shoots. I was inside of Rickman's store at the time of the shooting. I did not see James Sheffield there that evening; didn't see him at all. This gun was returned in October before that, almost a year before; I am not sure whether I brought the gun back or whether Leonard came after it. I heard five or six shots that night. I was inside of Rickman's store when the shooting took place. The shooting was coming from across the road, that is where the sound come from as near as I could tell; that is in the direction of the garage. The gun will shoot about eight times with a full magazine."

Turner Vance: "It was Sunday night. I was sitting on the right side of the door of Rickman's store as you go in at the front, we were all sitting there and the first thing we knowed a gun fired and Bud Miller jumped up and hollered that he was shot and he fell back toward Jim Welch, and Jim stooped over to pick Bud up and the Parker boy said, 'He is not shot, is he?' and Jim said, 'Yes, he is, he is shot right here,' and about that time another shot fired and that is when Welch was shot in the jaw, and by that time, they began to scatter and I went in the store and as I went in the store, Welch began to back out and I never come out of the store any more until the last shot was fired. It sounded like the shots were coming from the garage across the road. Five or six shots were fired. The last time I saw Jim Welch when I started in the store, he straightened up and started backing up in front of Rickman's store. I have seen the bullet holes there since. When Miller was hit, he fell about the edge of the window in front of Rickman's store. . . . I had seen Jim Sheffield there prior to the shooting, saw him about Cogburn's or the garage about fifteen or twenty minutes before the shooting. The garage doors were open and he was standing in front. The lights had not been on long when this shooting took place."

Deaver Gaddis: "I know James Sheffield and saw him there that night, between five and fifteen minutes before the shooting. He was at his garage door talking to Dr. Hair. He went into the garage door as I came across the road. Dr. Hair was getting ready to leave. Dr. Hair left before the shooting. That was five to fifteen minutes before the shooting. The shooting came from the garage. Five or six shots were fired. I helped put Miller in the car."

Theodore Hartgrove: "I know James Welch. I saw him the next morning after he was shot. He told me he knew who shot him. He said, 'I know who shot me.' Sometime after that, I don't remember whether he was out of the hospital or not, I was there about three times while he was in the hospital, and one time after that he said, 'Jim Sheffield shot me, I saw him.' "

E. B. Rickman: "I own the store where James Miller lost his life. I was at home on Sunday night, 6 August. I have lived at that place about five years. . . . I saw Jim Welch. When I raised the window, he was standing at the corner of the building. That was in the direction of where I thought this bullet hit the steps. I looked to see if it had hit the steps, and it had. I saw Jim Welch standing at the corner of the building. As I come out, I started over to my car, and I asked the question: 'Where is this shooting from and who is it?' and Jim Welch walked up next to me and he said, 'It is that damned Jim Sheffield over in the garage.' "

The defendant denied that he shot the deceased James Miller and set up an alibi. On cross-examination, he gave his version of the trouble that he had, in detail, with Welch 3 years previous. Evidence was introduced by defendant contradicting Welch and favorable to defendant. Both Welch and Sheffield's general reputation were proved to be good, by numerous witnesses.

The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and other necessary facts will be set forth in the opinion.

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

F. E. Alley, Jr., Ennis Sentelle, Morgan, Stamey & Ward and Jones & Ward for defendant.

CLARKSON, J. On the record, there is no question made by the defendant as to the sufficiency of the evidence to be submitted to the jury. The facts are exclusively in the province of the jury to determine. In the exceptions and assignments of error made by the defendant, we can see in law, no error, but will consider the material ones and the law applicable. The first contention of defendant: Should the court have permitted an injured by-stander to exhibit his injuries before the jury? This question we do not think is borne out by the State's evidence. When Miller started to go into the store, he was followed by Welch and after Miller was shot down and Welch had squatted down to give him aid, he was shot in the jaw and knocked over and as he raised up, a bullet cut across his shoulder and scraped his hide, and as he backed

up around the corner of Rickman's store, the defendant Sheffield, kept firing at him—"he shot the last shot at me"—six shots were fired in all. The evidence clearly indicated that it was Welch that Sheffield was trying to kill and not Miller. The testimony of Welch was to the effect that the trouble between them had started three years before and the feeling continued down with the shooting. The question and answer objected to was as follows: "Q. Come down and tell the jury where you were hit and how many teeth were knocked out? Answer: (Witness shows jury.) Here on the right side, it went in and come out here and it bursted the jaw bone and they took out some pieces at the hospital. I don't know how many teeth it knocked out."

Welch testified from where Sheffield fired the shots. It was competent for the State to show the range of the bullet, this would tend to corroborate Welch as to where Sheffield was standing when he fired. We cannot see how it would be prejudicial or unnecessarily arouse the feeling of the jury. They could see the witness on the stand and could see the injuries better when closer to the jury. The ill will of Sheffield in this case was towards Welch not the dead man. The range of his rifle indicated that it might have been for Welch on the first shot, as he was close to Miller, but the other five shots—two hit and the others followed Welch as he backed away. The evidence indicated that Sheffield had malice towards Welch and killed Miller when shooting at Welch.

In Whartons' Criminal Law, 12th ed., Vol. 1, part sec. 442, pp. 677-678, we find: "Where A. aims at B. with malicious intent to kill B., but by the same blow unintentionally strikes and kills C., this has been held by authorities of the highest rank to be murder." *S. v. Benton*, 19 N. C., 196; *S. v. Fulkerson*, 61 N. C., 233; *S. v. Cole*, 132 N. C., 1069.

The law is thus stated where numerous authorities are cited, in *S. v. Dalton*, 178 N. C., 779 (781): "In cases of this character, it is the generally accepted principle that, where one man, engaged in an affray or difficulty with another, unintentionally kills a bystander, his act shall be interpreted in reference to his intent and conduct towards his adversary, and criminal liability for the homicide, or otherwise, and the degree of it must be thereby determined." On this aspect, the court below charged the jury, which was not excepted to, as follows: "I also charge you, gentlemen, that it is the law of this State that if one, attempting to commit a premeditated and deliberate murder, shall, while in the act, and as a result of it, kill another, he will in respect to the person killed be guilty of murder in the first degree; as if one lay poison for A. and it is taken by B., from which he dies, it is murder in the first degree; or if one, of malice, either express or implied, but without premeditation, and without deliberation, be in the act of killing A., and while in the act and as a result thereof, he kills B., it is murder in the second degree."

The second contention of defendant: Did the court err in admitting evidence of ill will between the prisoner and a witness, and the details of a former controversy between them? This contention we do not think is borne out by the State's evidence. The shots indicated defendant was trying to kill Welch, the witness, and not the one he killed. It is well settled in this jurisdiction that: Motive is not an essential element of murder in the first degree, nor is it indispensable to a conviction even in cases of circumstantial evidence, though it may tend to show the degree of the offense, or to establish the identity of the defendant as the slayer. *S. v. Adams,* 138 N. C., 688 (697); *S. v. Lawrence,* 196 N. C., 562 (565).

In *S. v. Merrick,* 172 N. C., 870 (873-4), we find: "In *S. v. Norton,* 82 N. C., 629, it is held that in an assault and battery evidence of previous declarations of the defendant tending to show malice is incompetent, but 'If the defendant had been indicted for murder, for an assault with intent to kill, for a conspiracy or forgery, or any other offense where the *scienter* or the *quo animo* constitutes a necessary part of the crime charged, such acts and declarations of the prisoner as tend to prove such knowledge or intent are admissible, notwithstanding they may in law constitute a distinct crime.' The declarations here made, especially in view of the immediate facts surrounding the homicide, probably had exceedingly small if any weight with the jury. But the fact that it may have been made 6 or even 12 months previously did not make such evidence incompetent as a matter for them to consider as to the weight to be given the evidence. In *S. v. Exum,* 138 N. C., 599, declarations showing ill will made several months previously were held by *Hoke, J.,* 'undoubtedly competent.' To same purport, *S. v. Rose,* 129 N. C., 575, and other cases. Indeed, if previous threats are competent, the prisoner cannot complain of the competency of evidence less effective to show animus." *S. v. Ballard,* 191 N. C., 122. The testimony of Welch was to the effect that the ill will from the trouble, continued down to the shooting.

The version of the trouble between the two men three years before, was testified to by both Welch and Sheffield. The jury heard both sides, we do not think the admission to show malice was prejudicial.

The third contention of defendant: Did the court commit error in allowing evidence to be introduced as to the conduct of the son of the prisoner? From a perusal of this evidence, we do not think it merits the view taken by defendant. The defendant set up an alibi that he and Leonard Sheffield, his son, at the time of the shooting, were at his home in bed. The testimony objected to was to the effect that Leonard never came to fix the car before the shooting and was seen 3 to 5 minutes after the first shot in the vicinity. This was admitted by the court below

solely for the purpose of contradicting the defendant Sheffield, if the jury so found that it did.

The fourth contention of defendant: Did the court commit error in its charge to the jury as shown by the various assignments? We think, taking the charge as a whole, it was not prejudicial, but carefully gave the contentions of the State and defendant and the law applicable to the facts. The charge in reference to burden of proof applicable to civil cases, was immaterial and harmless. The law applicable to murder in the first degree and the duty of the State to establish same beyond a reasonable doubt, was clearly set forth. What was wilful, deliberation, premeditation and reasonable doubt was properly defined. The law of murder in the second degree and malice was accurately defined, also manslaughter. The law in regard to substantive evidence explained and corroborative and contradictory evidence applicable to certain witnesses was especially called to the attention of the jury. The law of circumstantial evidence, was fully set forth. The court below charged the jury: "But motive is not an essential element of murder in the first degree, nor is it indispensable to a conviction, even though the evidence is circumstantial. It is the intention deliberately formed after premeditation, so that it becomes a definite purpose to kill, and a consequent killing, without legal provocation or excuse, that constitutes murder in the first degree. (S) The existence of a motive may be evidence to show the degree of the offense, or to establish the identity of the prisoner, as the slayer. (T) But motive is not an essential element of the crime, nor is it indispensable to a conviction of the person charged with its commission. Gentlemen of the jury, as I have already indicated, the prisoner says he wasn't there at the time, that he was at home asleep and knew nothing about the shooting nor about Mr. Welch having been shot nor about Mr. Miller having been fatally shot until an hour or so afterwards. (U) In other words, the prisoner relies in part on what is known in law as alibi. An alibi, meaning elsewhere, is not, properly speaking, a defense within any accurate meaning of the word 'defense' but is a mere fact which may be used to call in question the identity of the person charged, or the entire basis of the prosecution. (V) The burden of proving an alibi, however, does not rest upon the prisoner. The burden of proof never rests upon the accused to show his innocence, or to disprove the facts necessary to establish the crime with which he is charged. The prisoner's presence at, and participation in the crime charged, are affirmative, material facts that the prosecution must show beyond a reasonable doubt to sustain a conviction. For the prisoner to say he was not there is not an affirmative proposition; it is a denial of the existence of a material fact in the case. (W) It is only necessary for the prisoner in his defense to produce such an amount of testimony,

whether by evidence tending to show an alibi or otherwise, as to produce in the minds of the jury a reasonable doubt of his guilt. (X).

"Now, bearing in mind that the burden rests upon the State throughout the trial to prove the prisoner guilty beyond a reasonable doubt, I charge you if upon a consideration of all the evidence in the case, it leaves a reasonable doubt in your mind, then he would be entitled to a verdict of not guilty, and it would be your duty to so find."

To the parts of the charge in brackets in capital letters, defendant excepted and assigned as error. We cannot, under the facts and circumstances of this case, hold same to be error. In Wharton's Criminal Evidence, 10th ed., sec. 333, in part, pp. 673-674: "The defense of an alibi not only goes to the essence of guilt, but it traverses one of the material averments of the indictment, namely, that the defendant did then and there the particular act charged. It is not an affirmative, nor an extrinsic defense. The presence of the accused at the time and place must be shown as essential to the commission of the crime. To hold that where the accused, by the evidence of an alibi, has cast a reasonable doubt on the averment of his presence and participation, he must be convicted unless he establishes his noncoöperation by a preponderance of proof, is to confound burden of proof with the presumption of innocence. When his proof is in, the final question remains, are the essential averments of the indictment proved beyond a reasonable doubt? If this question cannot be answered affirmatively, the accused is entitled to an acquittal, without regard to the manner in which such doubt was raised, whether by evidence or lack of evidence or any other factor in the case. The rule that the burden of proof never shifts, in criminal cases, applies to the defense of an alibi, which need only be proven so as to raise a reasonable doubt as to whether or not the accused was present when the crime was committed. It is error to charge the jury that the alibi must be established by a preponderance of proof, because the evidence offered as to the alibi is to be considered only in connection with all the other evidence adduced, to determine whether, on the whole case, the guilt of the defendant has been established beyond a reasonable doubt. To hold that the accused must, by his evidence, cover the exact time and the whole time during the commission of the crime charged, is error, the general rule being well established that evidence of absence is relevant and competent, even though it does not cover the exact time nor all of the time. Insufficiency of the evidence is not sufficient to exclude its consideration, as the final question of its sufficiency to raise a reasonable doubt is for the jury to determine from all the evidence."

In *S. v. Jaynes,* 78 N. C., 504 (506), we find: "It is not 'essential' to the successful proof of an alibi, that it should cover the whole time of the occurrence. Whether it covers the whole, or a part only, the

effect of the evidence is a matter for the jury and they may give it the weight they may think it entitled to. The evidence was competent and therefore admissible, and it was an invasion of the province of the jury to tell them that unless the proof covered the whole time of the transaction, it lacked the essential element of successful proof. The burden of proving an alibi did not rest upon the prisoner. The burden remained upon the State to satisfy the jury upon the whole evidence of the guilt of the prisoner. It was only necessary for the prisoner in his defense to produce such an amount of testimony, whether by evidence tending to show an alibi or otherwise, as to produce in the minds of the jury, a reasonable doubt of his guilt."

In *S. v. Bryant,* 178 N. C., 702 (707), it is said: "The judge's charge on the question of the alibi was, it seems to us, not prejudicial to the defendant. He charged substantially that the prisoner relies upon an alibi, which means that he was not, and could not have been at the place of the homicide when it was committed, as he was elsewhere at that time. He is not required to satisfy you of the alibi beyond a reasonable doubt, but if the jury is satisfied from the evidence that he was not at the place when the homicide was committed, and at the time when the deceased met her death, then a verdict of not guilty should be returned, etc., but if the jury is not satisfied, then it is for the jury to consider all the evidence and say whether or not they are satisfied from the evidence, beyond a reasonable doubt, that the prisoner killed the deceased, etc. This instruction was not erroneous but followed our decisions. *S. v. Jaynes,* 78 N. C., 504; *S. v. Reitz,* 83 N. C., 634; *S. v. Starnes,* 94 N. C., 973; *S. v. Freeman,* 100 N. C., 429; *S. v. Rochelle,* 156 N. C., 641."

A defendant is entitled to instruction on alibi without special prayer. *S. v. Melton,* 187 N. C., 481; C. S., 564; *S. v. Steadman,* 200 N. C., 768 (769).

The fifth contention of defendant: Should the court have set the verdict aside on account of the prejudice and ill will of one of the jurors toward the prisoner? Affidavits to the effect, were presented to the court below by the defendant, who asked for a new trial on the ground that one of the jurors had expressed an opinion that the defendant was guilty before he was sworn and empaneled to try the case. The affidavits were presented to the court about 5:00 o'clock p.m., 16 December, 1933, the court was about to expire by limitation of law. The juror, that the charge was made against, was in the courthouse at the time. In the record is the following: "The court would have to proceed to judgment, and that it would treat the affidavits of the State as being in denial of said affidavits of the prisoner, and that the same could be filed the following Monday, if the solicitor so desired, as of Saturday, 16 Decem-

ber, 1933. That the affidavits filed by the State, bearing date of 16 December, 1933, were in fact executed and filed on Monday, 18 December, 1933. That before pronouncing judgment, the court announced that it would find as a fact that the prisoner was not prejudiced in his trial by reason of such alleged misconduct of the juror May, and so held."

The record imports verity: "Upon the coming in of the verdict, the prisoner moves to set the same aside and for a new trial, upon the ground set forth in the affidavits filed upon which he bases his motion, and for errors already assigned and hereafter to be assigned. Whereupon, the court finds the following facts: That the juror, Jack May, who is alleged to have made the statement prior to his selection as a juror, as set out in the affidavits of O. M. Scroggs and Lloyd Parham, together with each juror finally selected, was thoroughly examined when called and before he was chosen as a juror, and by answers made to all interrogations by both the State and the prisoner, fully qualified himself as a fair and impartial juror. That the said Jack May is a man of high character, as indicated by the numerous affidavits filed, and is a man of intelligence and standing in his community. And the court being of the opinion that the prisoner was not prejudiced in his trial by the matters set forth in said affidavits and in said findings of fact, the motion of the prisoner for a new trial on said grounds is overruled and the prisoner excepts."

In *S. v. Levy,* 187 N. C., 581 (588), is the following: "Challenges to the polls, or objections to individual jurors, must be made in apt time, or else they are deemed to be waived. It is too late after the trial has been concluded. In capital cases a challenge *propter defectum* or *propter affectum* should be made as the juror is brought to the book to be sworn and before he is sworn. *S. v. Davis,* 80 N. C., 412. The fact that an incompetent juror was permitted to sit on the case does not vitiate the verdict. *S. v. Upton,* 170 N. C., p. 771. But when the incompetency is not discovered until after the verdict, it is then discretionary with the judge presiding as to whether he will, under the circumstances, order a new trial, and his action in this respect is final. *S. v. Lambert,* 93 N. C., 618."

In *S. v. Cox,* 202 N. C., 378, (380), speaking to the subject: "The law applicable to the decision of this question is well settled. In *Goodman v. Goodman,* 201 N. C., 808, 161 S. E., 868, it is said by *Stacy, C. J.,* that rulings of the Superior Court on matters addressed to the discretion of the court, which involve no questions of law or legal inference, are not subject to review on appeal to this Court. Numerous cases in which this principle has been applied are cited in the opinion in that case. The motion for a new trial on the ground of newly discovered evidence, whether made at the trial term, or at a subsequent

term, of the court in cases where the motion may be made and allowed or disallowed at such term, are addressed to the discretion of the court. The order allowing or disallowing the motion is not subject to review by this Court; it is made in the discretion of the judge and is conclusive, when made in a criminal action, on both the State and the defendant. *S. v. Branner,* 149 N. C., 559, 63 S. E., 169."

The matter complained of by defendant was in the sound discretion of the court below and not subject to review by this Court. We have examined with care all the exceptions and assignments of error made by defendant and think they cannot be sustained. Some of them are premised on facts that we do not think susceptible from the record. Some of the exceptions and assignments of error relate to contentions. The whole matter was one mainly of fact for the jury. In the record, we can find no prejudicial or reversible error.

No error.

STATE v. WALTER L. COHOON.

(Filed 11 April, 1934.)

1. Embezzlement A a—Fraudulent intent is essential element of embezzlement.

The mere converting or appropriating the property of another to one's own use is not sufficient to constitute the crime of embezzlement, fraudulent intent in the act of such conversion or appropriation being an essential element of the offense. C. S., 4268.

2. Embezzlement B c—Held in this prosecution for embezzlement: nonsuit should have been granted, there being no evidence of fraudulent intent.

In this prosecution of an administrator for embezzlement the State offered in evidence the administrator's affidavit in contempt proceedings stating, in effect, that upon receipt of the funds of the estate, the administrator, deeming it his duty to invest same for a period of two years to hold them for payment of debts that might be proven and to ascertain the distributees, advanced them to his wife for improvements on her separate realty, and received therefor as administrator his notes executed to his wife and secured by a junior deed of trust on certain of his lands, that at the time of the transaction his lands were worth a great deal more than the total indebtedness against them, and that the administrator thought that the money would be available at any time upon demand, but that on account of depreciation in value of farm products and general financial conditions, he was unable at the time of the suit or before to convert the security into cash by sale or refinancing although he had attempted to do so at a personal loss, and that he intended at all times to pay the debt and still intends to so do, and acted throughout in good

faith. There was no other evidence of intent and no evidence in conflict with the statements in the affidavit. *Held*, defendant's motion as of nonsuit should have been allowed, there being no evidence of any fraudulent intent in the conversion of the funds.

3. Executors and Administrators C d—Executor making loan from estate may not be held criminally in absence of fraudulent intent.

Ordinarily it is the duty of an executor or administrator to collect the assets of the estate and disburse the funds promptly, and he makes loans or advances money of the estate at his peril and the peril of his bondsman, but where there is no fraudulent purpose or corrupt intent in making such advancements he may not be held criminally liable.

4. Criminal Law G r: Evidence D f—While party may not impeach own witness, he may show facts to be contrary to witness's testimony.

While a party will not be allowed to impeach the character of his own witness, he may show the facts to be otherwise than as testified by his witness, and where in a prosecution in which intent is an essential element, the State introduces an affidavit of defendant showing an honest purpose and good faith, defendant's motion of nonsuit must be allowed if the State introduces no evidence of fraudulent intent at variance with the affidavit.

CRIMINAL ACTION, before *Parker, J.*, at June Term, 1933, of PASQUOTANK.

The defendant was indicted for the embezzlement of $4,652.12. The evidence disclosed that the defendant had been duly appointed administrator of the estate of Jos. Ellis on 27 May, 1930. On 27 May, 1931, he filed an annual account showing certain proper disbursements and a balance due of $4,678.83. On 4 May, 1933, he tendered a final account showing a balance to be paid to the distributees of $4,652.16. The clerk did not accept this as a final account and issued a citation and order to show cause. The defendant appeared at the hearing and through counsel stated that he had invested the money in certain notes and presented the notes, stating that he held these notes as administrator as security for the money, and that, while there were two mortgages ahead of the ones securing the notes, arrangements had been made to cancel one of them.

The State also offered the evidence of Mr. LeRoy, a practicing attorney, who testified that he represented some of the heirs at law of decedent and that he had made a demand for settlement. It did not appear from the evidence where the heirs at law were living or who they were. Thereupon the State offered an affidavit of the defendant, which is as follows:

"That he is the respondent in this cause; that he was duly appointed and qualified as administrator of the estate of Joseph Ellis on 27 May, 1930, with the American Surety Company as surety upon his bond

in the amount of $10,000, and that shortly thereafter he received, as assets of said estate, the sum of $5,000, same being proceeds of United States Government Savings Certificates. That, while at the time of his appointment and qualification as aforesaid, respondent had information as to the beneficiaries of said estate, he was not at that time nor is he now sufficiently advised as to the personnel of said beneficiaries, or their relationship to his intestate, or the nature and propriety of their claims upon said estate as to authorize or permit the respondent to make a settlement with them or their legal attorney in fact and law. That, at such time, too, the respondent was not advised as to the amount of debts, if any, owing by said estate, for which he was required by law to make advertisement; that for these and other reasons respondent actually believed at such time, whether rightly or wrongly, that he was required by law to retain possession of said fund for the full term of two years, and was further required to invest same during said period.

"That prior to his qualification as administrator, as aforesaid, to wit, on 18 November, 1929, this affiant, being largely indebted to his wife, Margaret W. Cohoon, for advances accumulating over a period of years, executed to her in payment and satisfaction of said indebtedness, twelve certain notes aggregating the sum of $24,000, secured by a deed of trust on a certain farm in Pasquotank County belonging to affiant, known as Black Acre Farm. That at the time when, as aforesaid, affiant received the funds belonging to said estate, to wit, the sum of $5,000, the said Margaret W. Cohoon was in need of ready money in order to make improvements upon certain real estate belonging to her. And that, in this situation, this affiant, honestly believing, as aforesaid, whether rightly or wrongly, that it was not only his right but his duty to hold and invest said funds during said two-year period, and having further the honest purpose to secure said estate against any possibility of loss, proposed to the said Margaret W. Cohoon, that he would advance her a large portion of said fund, provided that she would thereupon deposit with this affiant, as said administrator, the notes aforesaid, aggregating $24,000, to be held by affiant as such administrator, as security for said estate and the due settlement thereof. That while it is true that at the time of the execution of said notes, secured by said deed of trust, there was upon the records of Pasquotank County two prior deeds of trust, one securing the Virginia-Carolina Joint Land Bank in the sum of $8,000, payable in installments, and the other securing the First and Citizens National Bank in the sum of $5,000, the latter of these deeds of trust had been executed for a temporary purpose only, with an intent at all times on the part of this affiant to substitute other security for it. That while the effectuation of this intent had been delayed for some

time, due solely to procrastination, this affiant had, long prior to the institution of this proceeding, or to the issuance of the order of 17 February, arranged with said bank to substitute other security for said deed of trust. That this has now been done, with the result that said notes in the sum of $24,000 are now secured by a deed of trust, which is subject only to the claim of the land bank aforesaid, in the sum of only $8,000, and with the result, further, that the security held by said estate for the due settlement thereof is now, as it has always been under the intent of this affiant, ample and sufficient.

"That Black Acre Farm is situate in the upper reaches of Pasquotank County, and contains approximately 360 acres, of which 240 acres are under cultivation, the remainder being cut-over timber lands suitable for pasturage. That said 240 acres of cleared land is, and was in 1930, of extraordinary fertility, highly improved and intensely cultivated. That it is equipped with a modern home and modern outbuildings. That the barn, particularly, is one of the most modern and best equipped in this section. That the soil is peculiarly adapted to the raising of corn and soybeans, for which purpose it was used in 1930, and since, together with the raising and breeding of hogs and cattle. That said farm, with its equipment, represents an investment of over $60,000 on the part of this affiant, and that, in the opinion of this affiant, said farm was well worth the sum of $50,000 in April or May, 1930, when the investment of the funds of said estate was made. That at such time corn was selling for $1.00 per bushel; soybeans for $1.40 per bushel; live hogs for 10 cents per pound, and veal calves were 7 and 8 cents per pound. And that, while at said time the imprint of the later catastrophic depression had been manifested, it was then the belief of this affiant, and of the general public, including experienced economists as affiant is advised, that such deflation was but temporary, and that prices of farm products would soon return to their former level, together with general prosperity.

That through a process of general and gradual decline farm products reached their low level in 1932. That during said year corn was selling at 25 cents per bushel; soybeans for 35 to 50 cents per bushel; live hogs from 3 to 3½ cents per pound, and live veal calves for 5 cents per pound—with the result that, as the price of farm products, and particularly of those raised upon the Black Acre Farm, sank to these unprecedented levels, the market value of farm land, including the Black Acre Farm, shrunk in such proportions as to render it impossible to sell them, or to borrow upon them any appreciable portion of their real intrinsic value. And that, while it is true that the price of farm products has notably increased in the last month or two, such increase has not been sufficiently prolonged or become so stabilized, as yet, as to seriously affect the selling or borrowing value of farm land.

"That this affiant has had no intent to commit a contempt of court. That the investment of the funds belonging to said estate aforesaid, whether or not authorized by law, was made in good faith, with the present intention of repayment, which still abides, and in the full and honest belief that the security for said investment was far more than ample. That in the opinion of this affiant the intrinsic value of said Black Acre Farm, even under present conditions, is not less than $25,000 to $30,000. That at the time of said investment affiant had not the slightest doubt but that the money required to settle said estate would be forthcoming from said investment, and could be realized thereon at the time when settlement of said estate was required by law. That he has no purpose now, and has never had the purpose, to evade the due settlement of said estate; but that a cash settlement at this time is absolutely impossible. That the affiant has exhausted his resources in the effort to borrow the money, and has been unable to do so, due in part to the reason aforesaid, and due even more to the fact that there is no money available. That he has further tried to sell said farm at a heavy sacrifice—without avail. That these efforts, both to borrow the money and to sell the farm, have been constant and persistent, originating at a time long prior to the institution of this action, or the issuance of the citation to file a final account for settlement. That affiant has never had the purpose to evade or postpone his duty to file said final account, or any other account. That he has read the affidavit of Thomas J. Markham filed in this cause, and that the same is in all respects true. That in May, 1931, and in December, 1932, affiant filed with the clerk of this court accounts which show fully and accurately the totality of receipts and disbursements with reference to said estate. That he has heretofore filed a final account, which is as comprehensive as is possible under the circumstances. That as aforesaid, it has been and is now impossible for him to settle said estate, but that, if affiant can be afforded a reasonable time, the full and just settlement of said estate is assured."

There was no further evidence offered by the State and the defendant moved for judgment of nonsuit. The motion was overruled and the defendant excepted. The defendant was convicted and it was adjudged that he be confined in the State's prison for a term of not less than five years nor more than eight years.

From the foregoing judgment the defendant appealed.

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

P. W. McMullan and R. Clarence Dozier for defendant.

BROGDEN, J. In general terms embezzlement "is the fraudulent conversion of property by one who has lawfully acquired possession of it for the use and benefit of the owner." The mere act of converting or appropriating property to one's own use is not sufficient to constitute the offense. In order to convict, the State must not only offer evidence of appropriation, but it must go farther and offer evidence that such act was done with a fraudulent purpose or corrupt intent. This idea was expressed in *S. v. McDonald,* 133 N. C., 680, 45 S. E., 582, in these words: "We think, therefore, that the conversion of funds by a person who has been entrusted with them becomes criminal as an embezzlement only by reason of this corrupt intent, and it is as necessary for the State to establish the intent as a fact independent of the conversion as it is to prove the bad intent in a prosecution for a larceny as a fact apart from the taking. The intent to defraud is no more implied in a case of embezzlement than the felonious intent is from the act of taking in a case of larceny. . . . It follows, therefore, from what we have said that if the mere act of taking will not raise the presumption of a felonious intent in a prosecution for a larceny, there can be no valid reason why the act of conversion should do so in the trial of an indictment for embezzlement." See *S. v. Morgan,* 136 N. C., 628; 48 S. E., 670; *S. v. Falkner,* 182 N. C., 793, 108 S. E., 756; *S. v. Grace,* 196 N. C., 280, 115 S. E., 399; *S. v. Lancaster,* 202 N. C., 204, 162 S. E., 367; *S. v. Rawls,* 202 N. C., 397, 162 S. E., 899. In order to secure evidence of corrupt intent or fraudulent purpose the State went into the defendant's camp. It offered an affidavit made by the defendant in a contempt proceeding. This was the only evidence of intent produced at the trial. Consequently, this affidavit is the sole evidence upon which conviction could be predicated. Analyzing the affidavit, the State's evidence shows the following facts:

1. That the defendant was duly qualified as administrator of the estate of Joseph Ellis on 27 May, 1930, and received the sum of $5,000 due said estate, and that at the time of such appointment and qualification the defendant did not know who the beneficiaries of the estate were or the nature of their claims or the amount of debts due by the deceased, and that under these circumstances the defendant "actually believed at such time, whether rightly or wrongly, that he was required by law to retain possession of said funds for the full term of two years and was further required to invest same during said period."

2. The defendant owned a valuable and fertile farm in Pasquotank County, containing 360 acres of land. 240 acres of said land was cleared, of extraordinary fertility, highly improved and intensely cultivated, and equipped with a modern home and modern outbuildings. That said

farm with improvements thereon had cost over $60,000 and was well worth the sum of $50,000 in May, 1930.

3. That in November, 1929, the defendant was indebted to his wife in the sum of $24,000, and as evidence of said indebtedness he had executed and delivered to her twelve promissory notes in the sum of $24,000, and in order to secure the same had executed and delivered a deed of trust upon the farm aforesaid; that at the time said deed of trust securing said $24,000 was executed and delivered, there were two prior mortgages upon the property, to wit, one for $8,000, payable to a land bank, and one for $5,000 payable to the Citizens Bank. The $5,000 mortgage had been executed for a temporary purpose and had subsequently been canceled, leaving the land bank mortgage of $8,000 as a first mortgage upon the property and the $24,000 mortgage as a second encumbrance upon the property.

4. That after receiving the funds as administrator "the said Margaret W. Cohoon was in need of ready money in order to make improvements upon certain real estate belonging to her, and that in this situation this affiant honestly believing, as aforesaid, whether rightly or wrongly, that it was not only his right but his duty to hold and invest said funds during said two-year period, and having further the honest purpose to secure said estate against any possibility of loss, proposed to the said Margaret W. Cohoon that he would advance her a large portion of said fund, provided that she would thereupon deposit with this affiant as said administrator the notes aforesaid, aggregating $24,000, to be held by affiant as such administrator as security for said note and the due settlement thereof."

5. That the value of real estate in Pasquotank County and the value of farm products theretofore raised in abundance upon said land, declined and dwindled as a result of the depression and shrunk to unprecedented levels, rendering it impossible to sell the farm or to convert the security into cash.

6. "That the investment of the funds belonging to said estate as aforesaid, whether or not authorized by law, was made in good faith with the present intention of repayment, which still abides, and in the full and honest belief that the security for said investment was far more than ample. That in the opinion of this affiant the intrinsic value of said Black Acre Farm, even under present conditions, is not less than $25,000 to $30,000; that at the time of said investment affiant had not the slightest doubt that the money required to settle said estate would be forthcoming from said investment and could be realized thereon at the time when settlement of said estate was required by law. That he had no purpose now and never had had the purpose to evade the due settlement of said estate, but that a cash settlement at this time is absolutely

impossible; that affiant has exhausted his resources in an effort to borrow the money and has been unable to do so; . . . that he has further tried to sell said farm at a heavy sacrifice without avail."

The foregoing constituted substantially all the evidence offered by the State. While other testimony was offered, there was no contradiction of any of the foregoing facts. The defendant offered no evidence.

Reducing the transaction to its fundamental aspects, it appears that an administrator with approximately $4,600 in his hands belonging to an estate, advances the money to his wife and receives in consideration therefor as administrator the notes of the administrator payable to the wife and secured by a third mortgage upon land owned by the administrator, and when the total encumbrance upon the land at the time of the trial did not exceed fifty per cent of the present market value or twenty per cent of the original cost of the property.

Upon the foregoing facts the State proceeded upon the theory that the advancement of the money to the wife and the taking of his own note secured by a third mortgage constituted a fraudulent and wilful misapplication and conversion of the fund to his own use within the meaning of C. S., 4268.

This Court held in *Dortch v. Dortch,* 71 N. C., 224, that an administrator: "If there are reasons why he should not retain it, in order to meet the exigencies of his office, or as in our case, to pay debts, if established, or because there was no one here authorized to receive it, he is not only permitted but encouraged to invest it in interest-bearing securities, for the benefit of the fund." In that case an administrator loaned money belonging to an estate upon personal security which was admitted to have been good at that time, but afterwards became worthless as a result of war. Thereafter the administrator took a note secured by a mortgage from the debtor, and it was conceded that the land was amply sufficient to pay the debt, although the money had not been collected by reason of protracted litigation. The *Dortch case* was cited in *Marshall v. Kemp,* 190 N. C., 491. See, also, 44 L. N. S., 928-n. However, under ordinary circumstances it is the primary duty of an administrator or executor to collect the assets of the estate and disburse the funds promptly as provided by law, and the unmistakable trend of the decisions in this State indicates that an administrator loans or advances money of the estate at his peril and at the peril of his bondsman. Nevertheless, such transactions, in extraordinary cases, such as in *Dortch v. Dortch,* are not criminal acts, certainly, unless consummated in pursuance of a fraudulent purpose or corrupt intent.

But, where is the evidence of fraudulent or corrupt intent? All of the evidence offered by the State disclosed that the defendant did not use for his own direct benefit a penny of the money. The wife used it

for making improvements upon her own land. All of the evidence of the State disclosed that the property securing the advancement, even under present conditions, greatly exceeded the amount of the entire indebtedness. All of the evidence for the State disclosed that the transaction was made in good faith and in the honest belief that the money could be made presently available upon demand of the proper parties. Therefore, when the State offered the affidavit of the defendant as the sole evidence of fraudulent or corrupt intent, the law, speaking through *S. v. Mace*, 118 N. C., 1244, 24 S. E., 798, said: "The rule is that while a party cannot introduce testimony to discredit or impeach the moral character of his own witness, yet, if the facts which the witness testified to are against the party introducing him, he is not precluded from showing by other witnesses a different state of facts."

Again, this Court has said in *Smith v. R. R.*, 147 N. C., 603, 61 S. E., 575, that: "While it is accepted doctrine that one who offers a witness presents him as worthy of belief, and except, perhaps, where an examination is required by the law, as in the cases of subscribing witnesses to wills and deeds . . . a party will not be allowed to disparage the character or impeach the veracity of his own witness, nor to ask questions or offer evidence which has only these purposes in view, it is always open to a litigant to show the facts are otherwise than as testified to by his witness. . . . And this he may do, not only by the testimony of other witnesses, but from other statements of the same witness, and at times by the facts and attending circumstances of the occurrence itself, the *res gestæ*." See, also, *Worth Co. v. Feed Co.*, 172 N. C., 335, 90 S. E., 295.

In the case at bar the State did not show or attempt to show a different state of facts, but staked the fortunes of battle upon the affidavit. Therefore, the State proved: (1) That the defendant, without the slightest evidence of collusion, advanced the money to his wife and thus did not receive any pecuniary benefit from the transaction; (2) that the security for such advancement at the time it was made was wholly sufficient and ample; (3) that the advancement was made in the exercise of good faith and reasonable prudence and in the honest belief that the money would be presently available upon demand; (4) that the advancement was made without fraudulent or corrupt intent.

The law does not build the crime of embezzlement upon such proof, and the motion for nonsuit should have been allowed.

Reversed.

FRED A. SMITHDEAL v. NONNIE M. SMITHDEAL.

(Filed 11 April, 1934.)

Divorce A d—Cause of action need not have existed for six months in action for divorce by either party on ground of two years separation.

In an action for divorce on the ground of two years separation, brought by either party under chapter 72, Public Laws of 1931, as amended by chapter 163, Public Laws of 1933, Michie's Code, 1659(a), it is not required that the jurisdictional affidavit, required by 1661, contain the averment that the facts set forth in the complaint, as grounds for divorce, have existed to the knowledge of plaintiff at least six months prior to the filing of the complaint, the legislative intent to this effect being apparent from the proviso in the act of 1925, dispensing with the necessity that the cause of action should have existed for six months when the grounds for divorce is separation, the period of separation then being prescribed as five years, which was reduced to two years by the act of 1931.

ADAMS, J., dissenting.

APPEAL by plaintiff from *Shaw, Emergency Judge,* at October Term, 1933, of FORSYTH.

Civil action for divorce under chapter 72, Public Laws, 1931, as amended by chapter 163, Public Laws, 1933, Michie's Code, 1659(a), on the ground of separation of husband and wife for two years.

Plaintiff has been a resident of the State all his life; he and the defendant were married 20 July, 1922; they separated 28 July, 1931, and have lived separate and apart continuously since that date; summons in this action was issued 7 August, 1933, served 26 August, 1933; complaint filed at the time of issuing summons. It is not alleged that plaintiff is the injured party.

The affidavit filed with the complaint contains no averment that the grounds for divorce "have existed to the knowledge of the plaintiff at least six months prior to the filing of the complaint." Indeed, it appears the action was instituted within a month following the expiration of the two-year period of separation.

There was a verdict establishing the above facts, and, upon motion of defendant, the action was dismissed, the court being of opinion that said action cannot be maintained under chapter 72, Public Laws, 1931, as amended by chapter 163, Public Laws, 1933, Michie's Code, 1659(a), "for the reason that the pleading and proof disclose the cause of action did not arise six months before the institution of the suit."

Plaintiff appeals, assigning errors.

Parrish & Deal for plaintiff.
Fred S. Hutchins for defendant.

STACY, C. J. When an action for divorce is brought by either party under chapter 72, Public Laws, 1931, as amended by chapter 163, Public Laws, 1933, Michie's Code, 1659(a), on the ground of separation of husband and wife for two years, is it necessary that the jurisdictional affidavit, required by C. S., 1661, contain the averment that the facts set forth in the complaint, as grounds for divorce, have existed to the knowledge of the plaintiff at least six months prior to the filing of the complaint? The answer is, No.

The statute under which the plaintiff is proceeding provides that marriages may be dissolved on application of either party "if and when there has been a separation of husband and wife . . . for two years."

C. S., 1661, provides that the plaintiff in an action for divorce shall file with his or her complaint an affidavit setting forth, among other things, that the grounds for divorce have existed to his or her knowledge at least six months prior to the filing of the complaint. But this section was amended by chapter 93, Public Laws, 1925, as follows: "*Provided, however,* that if the cause for divorce is five years separation, then it shall not be necessary to set forth in the affidavit that the grounds for divorce have existed at least six months prior to the filing of the complaint, it being the purpose of the act to permit a divorce after separation of five years and without waiting an additional six months for filing the complaint."

At the time of this amendment, five years' separation was required as ground for an absolute divorce. C. S., 1659. The question then arises: Does this proviso, eliminating the necessity of waiting six months after the expiration of the requisite period of separation, when the ground for divorce is that of separation, still apply with the reduction in time from five to two years?

This reduction was made in two ways: First, by chapter 397, Public Laws, 1931, amending C. S., 1659, which brought forward the substance of the proviso added to C. S., 1661, in 1925; and, second, by chapter 72, Public Laws, 1931, as amended by chapter 163, Public Laws, 1933, Michie's Code, 1659(a), which is an independent act, giving either party the right to sue, and omits any reference to the jurisdictional affidavit.

It is the contention of the defendant that, since the amendment to C. S., 1659, specifically brought forward the substance of the 1925 amendment to C. S., 1661, and the independent act, chapter 72, Public Laws, 1931, as amended by chapter 163, Public Laws, 1933, Michie's Code, 1659(a), giving either party the right to sue, omits any reference to the jurisdictional affidavit, the intention of the Legislature is manifest, that in actions under this latter statute, an additional period of six months following the two years separation, shall elapse before the filing of the complaint.

If the defendant's interpretation of the statutes be correct, the result is, that the required length of separation under C. S., 1659, as amended, is two years, while the required length of separation under Michie's Code, 1659(a), is two years and six months. *Nichols v. Nichols,* 128 N. C., 108, 38 S. E., 296; *Carnes v. Carnes,* 204 N. C., 636, 169 S. E., 222.

We think the General Assembly intended to make the period of separation the same under both statutes. For this intention, reference is had to the declaration of policy in the proviso of 1925, "it being the purpose of the act to permit a divorce after a separation of five (later reduced to two) years without waiting an additional six months for filing the complaint," and to the use of the expression "if and when" in Michie's Code, 1659(a), the words "and when" not appearing in C. S., 1659. Furthermore, the reason for the six months requirement in the affidavit does not exist when separation is the ground for the divorce. *Taylor v. White,* 160 N. C., 38, 75 S. E., 941. The plaintiff is entitled to judgment on the verdict.

Reversed.

ADAMS, J., dissenting: It is admitted that the action was brought under chapter 72, of the Public Laws of 1931, as amended by chapter 163, of the Public Laws of 1933, herein set forth. No other act is applicable.

The separation of the parties occurred on 28 July, 1931, and the summons was issued on 7 August, 1933, within less than six months after the expiration of the two-year period. The verification of the complaint omits the allegation that the grounds for divorce "have existed to the knowledge of the plaintiff at least six months prior to the filing of the complaint." Judge Shaw held that the omission was fatal and that the action could not be maintained. *Nichols v. Nichols,* 128 N. C., 108; *Martin v. Martin,* 130 N. C., 27; *Hopkins v. Hopkins,* 132 N. C., 23; *Clark v. Clark,* 133 N. C., 28.

Section 1659, of the Consolidated Statutes is entitled, "Grounds for absolute divorce." With the exclusion of the amendment of subsection four contained in chapter 397, Public Laws, 1931, which is not pertinent to the immediate question, the law provides that marriage may be dissolved on application of the injured party, "if there has been a separation of husband and wife, whether voluntary or involuntary, provided such involuntary separation is in consequence of a criminal act committed by the defendant prior to such divorce proceedings, and they have lived separate and apart for five successive years, and the plaintiff in the suit for divorce has resided in this State for that period." C. S., 1659(4).

Amending this subsection in 1933, the General Assembly enacted the following statutes, which became effective when ratified:

"Section 1. That section one thousand six hundred and fifty-nine, subsection four, of the Consolidated Statutes of North Carolina, be, and the same is hereby amended by striking out the word 'five' in line two of said subsection, and inserting in lieu thereof the word 'two,' and by striking out after the word 'for' in line three of said subsection, the words 'that period,' and inserting in lieu thereof the words 'one year.'

"Section 2. That it shall not be necessary to set forth in the affidavit filed with the complaint in suits brought under subsection four of section one thousand six hundred fifty-nine that the grounds for divorce have existed at least six months prior to the filing of the complaint, nor to allege or prove such fact.

"Section 3. That section one thousand six hundred sixty-one of the Consolidated Statutes of North Carolina be amended by striking out the words 'two years,' in line eleven, following the word 'for' and preceding the word 'next' and inserting in lieu thereof the words 'one year.'

"Section 4. That all laws and clauses of laws in conflict with the provisions of this act are hereby repealed." Public Laws, 1933, chap. 71.

At the session of 1931 the Legislature passed the following statute:

"Section 1. Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of either party, if and when there has been a separation of husband and wife, either under deed of separation or otherwise, and they have lived separate and apart for five years, and no children have been born to the marriage, and the plaintiff in the suit for divorce has resided in the State for that period.

"Section 2. That this act shall be in addition to other acts and not construed as repealing other laws on the subject of divorces.

"Section 3. That this act shall be in force from and after its ratification." Public Laws, 1931, chap. 72.

It is important to notice the significance of the second section. It describes the statute as an independent act, as an addition to other acts, and as repealing no other law. It is not an amendment of section 1659 or section 1661. This will become more manifest by reference to chapter 397, Public Laws, 1931, which is designated subsection five of section 1659—chapter 72 above cited having no placing under section 1659 and purporting to have no relation to any other section.

In 1933 chapter 72 of the Public Laws of 1931 was amended and reads as follows:

"Section 1. Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of either party,

if and when there has been a separation of husband and wife, either under deed of separation or otherwise, and they have lived separate and apart for two years, and the plaintiff in the suit for divorce has resided in the State for a period of one year.

"Section 2. That all laws and clauses of laws in conflict with the provisions of this act are hereby repealed." Public Laws, 1933, chap. 163.

The present action was brought under this section. This, as I have said, is admitted. Section 2, chapter 71, Public Laws, 1933, has no application to chapter 72, Public Laws, 1931, as amended by chapter 163, Public Laws, 1933.

The case, then, is this: In 1933 the General Assembly enacted two statutes relating to divorce, one of which is independent of and unrelated to the other. The one first enacted provides that it shall not be necessary to set forth in the affidavit filed with the complaint in suits brought under subsection four of section 1659 that the grounds for divorce have existed at least six months prior to the filing of the complaint; the statute last enacted contains no such provision. It is obvious that the section, as to the affidavit, is restricted to suits brought under the fourth subsection of section 1659. *Expressio unius est exclusio alterious.*

The use of the words "if and when" is not conclusive. If so, why was it necessary to insert the provision concerning the affidavit in the statute amending subsection four when the word "if" is found in the original act?

Chapter 71, *supra,* reduces the period of separation, when the suit is brought under subsection four of section 1659 from five to two years. Neither statute purports to amend section 1661. Neither chapter 397, Laws of 1931, nor chapter 72, Laws of 1931, as amended by the act of 1933, makes reference to the proviso in section 1661.

The proper interpretation of this act is properly stated, I think, in the following excerpt from "A Survey of Statutory Changes" published in the North Carolina Law Review, Vol. 11, No. 4, p. 222: "A difficulty is created by reason of the fact that the first of these two amendatory measures, chapter 71, is fitted in with C. S., 1661, while the second, chapter 163, is not. C. S., 1661, requires the plaintiff seeking divorce to file an affidavit setting forth, among other things, that the grounds for the divorce have existed to the plaintiff's knowledge for six months prior to the filing of the complaint. Divorce for 'five years separation,' which of course included divorce under either C. S., 1659(4) or the act of 1931, before they were amended, was exempt from this requirement. Naturally divorce for two years separation, *i. e.,* divorce under the new amendments, would not be included in the exemption. Chapter 71, paragraph

two takes care of the matter by specifically providing that plaintiff's affidavit in suits brought under C. S., 1659(4) need not set forth that the grounds for divorce have existed for six months prior to the filing of the complaint. But the Legislature did not include in chapter 163 a section similar to chapter 71, par. 2. Therefore it would seem that divorces under the act of 1931 are subject to the requirement that the grounds must have existed to plaintiff's knowledge for six months before suit. This follows because C. S., 1661, excepts divorces for 'five years separation' and divorces under the act of 1931 are now for two years separation. It could be argued that divorce for two years separation has succeeded divorce for five years separation and should succeed to the exemption also, but the flaw in the argument is that the legislature specifically exempted divorces under C. S., 1659(4), and if it had intended the same result for divorces under the act of 1931 it would have made the same specific exemption." See, also, Popular Government, by Institute of Government, p. 173.

It may be desirable to have the statutes uniform, but I do not concur in the statement that they are uniform. We can ascertain the intent of the Legislature only by the language it has used. *McIver v. McKinney*, 184 N. C., 393.

In my opinion the judgment of the Superior Court is correct and should be affirmed.

THE LIFE INSURANCE COMPANY OF VIRGINIA v. A. H. EDGERTON AND W. F. TAYLOR AND ROBERT E. HENLEY, TRUSTEES.

(Filed 11 April, 1934.)

1. Reformation of Instruments A d—Instrument may be reformed for mistake of draughtsman to make it express true intent of parties.

Where a clause in which the grantee in a deed personally assumes payment of a prior mortgage on the lands is inserted in the deed by the mistake of the draughtsman or mutual mistake of the parties, and the mistake is not ratified by the parties and is not discovered by them until just prior to demand for payment by the mortgagee upon his discovery of the clause in the deed, equity may relieve the grantee of personal liability for the mortgage debt by reformation of the deed to make it express the true intent of the parties.

2. Evidence J d—On issue of reformation of deed for mistake of draughtsman, parol evidence tending to establish mistake is competent.

Parol evidence of the grantor and grantee in a deed to the effect that the parties did not contemplate that the grantee should assume personal liability in his deed for a prior mortgage on the lands, and testimony of the draughtsman that he was given no specific instruction to insert the

debt assumption clause in the deed *is held* competent upon the issue of reformation of the deed for the mistake of the draughtsman or the mutual mistake of the parties.

3. Reformation of Instruments C d—

The degree of proof required for the reformation of a deed for mistake of the draughtsman or the mutual mistake of the parties is clear, strong and convincing evidence.

4. Same—Evidence in this case held sufficient to be submitted to jury on issue of reformation of deed for mistake of draughtsman.

In a suit by a mortgagee against the mortgagor's grantee upon the debt assumption contract in the grantee's deed, the grantee set up the defense that the debt assumption clause was inserted in the deed through the mistake of the draughtsman or the mutual mistake of the parties, and introduced testimony of the grantor and grantee that they did not contemplate that the grantee should assume personal liability for the mortgage debt but that the grantee was to take the property subject to the encumbrance, and testimony of the draughtsman that he had no specific instructions to insert the debt assumption clause in the deed. On cross-examination of the grantee the mortgagee elicited testimony from the grantee that he had deducted the amount of the mortgage debt in listing his solvent credits for taxation. *Held*, the conflict in the testimony does not justify the withdrawal of the issue from the jury, the credibility of the evidence being for it to determine, and the court properly submitted the issue to the jury under instructions that the defense must be established by clear, strong and convincing evidence.

5. Corporations K g—Transferee of corporate property immediately prior to dissolution held not liable for corporate debt under the facts.

Plaintiff's contention that defendant taking over the property of a corporation immediately prior to its dissolution is personally liable for a mortgage indebtedness existing against the corporate realty at the time the corporation deeded same to defendant is not sustained, it appearing that plaintiff does not seek to set aside the deed to defendant but attempts to hold defendant liable thereunder, and that the corporate property taken over by defendant was of little value.

6. Pleadings E a—

A motion to allow an amendment of a pleading after it is filed is addressed to the sound discretion of the trial court, and no appeal lies from the court's refusal of the motion. C. S., 547.

APPEAL from *Moore, Special Judge,* and a jury, at December Special Term, 1933, of WAYNE. No error.

This is an action brought by plaintiff against the defendant, A. H. Edgerton, to recover the sum of $25,000 with interest from 19 December, 1930. The plaintiff alleges: (1) That the defendant assumed the payment of the indebtedness due it in a deed from the Professional Building Company to A. H. Edgerton. That the indebtedness be declared a lien on that certain land described in the complaint and deed, and that commissioners be appointed to sell same and apply the proceeds on the

indebtedness. (2) That a receiver be appointed to collect the rents. (3) Other and further relief. The defendant denied the indebtedness and set up mutual mistake. The plaintiff replied and later requested the court below to allow an amendment, so it could plead the three-year statute of limitation, C. S., 441(9). The amendment was denied by the court below.

The judgment in the court below is as follows: "This cause coming on to be heard at this December Special Term, 1933, of the Superior Court of said Wayne County, and being heard before his Honor, Clayton Moore, special judge presiding, and a jury, and the jury having answered the issues submitted to them as follows: '(1) Was the clause, as written in the deed from the Professional Building Corporation to the defendant Edgerton, providing for the assumption and payment of said indebtedness by the defendant inserted in said deed by the mutual mistake of the parties, or by the inadvertence and oversight of W. F. Taylor, the draughtsman of said deed, as alleged in the answer? Answer: Yes. (2) If so, did defendant learn of such mistake in October, 1926? Answer: No." It is now, therefore, in accordance with the verdict rendered, considered, ordered, adjudged, and decreed by the court that the deed executed by the Professional Building Company to A. H. Edgerton, dated 24 August, 1926, and recorded in Book 183, at page 435, in the office of the register of deeds for said Wayne County, be and the same is hereby corrected and reformed by striking and erasing from said deed, and the record thereof, that clause therein reading as follows: 'It is mutually understood and agreed that in consideration for this conveyance, the party of the second part shall and does hereby assume and agree to pay off all debts, dues, and obligations of every kind and description now outstanding against the Professional Building Company, party of the first part herein, including the indebtedness due the Life Insurance Company of Virginia above mentioned.' It is further ordered, adjudged, and decreed by the court that the said plaintiff recover no personal judgment against the defendant, A. H. Edgerton, and that the said defendant, A. H. Edgerton, recover of the plaintiff his costs of suit. And it further appearing to the court from the duly verified complaint filed herein that on 19 June, 1925, the Professional Building Company executed and delivered to the plaintiff herein its promissory note in the sum of $35,000, the balance due thereon being the sum of $25,000, all of which with interest thereon from 19 December, 1930, is now due the plaintiff, and as security to said indebtedness executed and delivered to the defendants, W. F. Taylor and Robert E. Henley, trustees, a certain deed of trust dated 19 June, 1925, which is registered in Book 175, at page 529, in the office of the register of deeds for said Wayne County, conveying the lands described in the complaint herein

and hereinafter described, and that the said W. F. Taylor and Robert E. Henley, trustees, have been duly made parties defendant herein and summons duly served upon the defendant, W. F. Taylor, trustee, on 12 December, 1930, and service thereof having been accepted by the defendant, Robert E. Henley, trustee, on 4 December, 1931, and that the said defendants, W. F. Taylor and Robert E. Henley, trustees, have filed no answer or demurrer to the complaint filed herein; and it further appearing to the court from the allegations set forth in the complaint that the plaintiff is entitled to a decree of foreclosure of the deed of trust hereinabove referred to. It is now, therefore, further considered, ordered, adjudged and decreed by the court that the land described in the deed of trust executed by the Professional Building Company to W. F. Taylor and Robert E. Henley, trustees for the Life Insurance Company of Virginia, above referred to, be and the same is hereby condemned to be sold in foreclosure of said deed of trust, after due advertisement as provided by law, at public auction, at the courthouse door in Goldsboro, N. C., and that the said Professional Building Company and all persons claiming by, through, or under it, be and they are hereby forever barred and foreclosed of all equity of redemption in and to said land and premises; it is further ordered by the court that K. C. Royall and J. Faison Thomson be and they hereby are appointed commissioners of this court to make said sale and execute title to the purchaser upon confirmation thereof by the court; that the said lands are in said deed of trust described as follows: 'A certain lot of land in the city of Goldsboro, Wayne County, adjoining the lands of First Baptist Church of Goldsboro and Best and Thompson, and bounded as follows: Beginning at a point on the west side of South John Street 190.7 feet south of the center of Walnut Street or 160 feet south of the northeast corner of Yelverton Hardware Company's store; thence with John Street southwardly 75 feet; thence westwardly parallel with Walnut Street 75 feet to a point even with the eastern wall of Best and Thompson's brick warehouse; thence northerly with the line of the warehouse wall 75 feet to an alley; thence with said alley easterly 75 feet, more or less, to John Street, the beginning corner and known in the plan of said city as part of lot No. 55, together with any interest said corporation may have to join the wall of said Best and Thompson warehouse and also all of the corporation's right and interest by reason of the covenants contained in the deed hereinafter mentioned from the First Baptist Church to H. L. Grant, wherein said church agreed that there shall forever remain vacant a space 8 feet wide fronting on John Street and running westerly 75 feet as a walkway for the joint use of H. L. Grant and his assigns and the church, and its successors and assigns. It being the same tract of land deeded to H. L. Grant by the

First Baptist Church, through its trustees, by deed dated 15 May, 1913, recorded in the office of the register of deeds for Wayne County, in Book 117, page 261, and deeded to the Grant Realty Company by H. L. Grant by deed dated 1 April, 1914, and recorded in the office of the register of deeds for Wayne County, in Book 114, page 382.'

"It is further ordered and decreed by the court that a copy of this judgment be certified to the register of deeds of said Wayne County and recorded in his office, the costs of such registration to be taxed in the bill of costs herein."

The plaintiff made many exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

J. Faison Thomson, Kenneth C. Royall and Allen Langston for plaintiff, the Life Insurance Company of Virginia.

Dickinson & Bland and W. A. Dees for defendant, A. H. Edgerton.

CLARKSON, J. The main question involved on this appeal: Can the grantee in a deed be held personally liable for the payment of a pre-existing debt against the property conveyed, if the assumption agreement contained in the deed was incorporated therein by mutual mistake of the parties or by inadvertence of the draughtsman, when such mistake or inadvertence was unknown to the parties until just prior to the demand for payment, and was never ratified by them? We think not.

The evidence was to the effect that the Professional Building Company, a corporation, in Goldsboro, N. C., had a large office building in said city. The building alone costing some $96,000. On 19 June, 1925, it borrowed from the plaintiff $35,000, executed its promissory note, secured by deed of trust to the defendants, W. F. Taylor and Robert E. Henley, trustees, nine payments in the sum of $2,000 each, due, respectively, one, two, three, four, five, six, seven, eight, and nine years after date; and one payment in the sum of $17,000 due ten years after date, said note containing the provision that if default be made in the payment of the principal or interest of the note, or of any installment of either, then the entire principal should become due and payable. The following is part of the note-instrument: "The undersigned hereby endorse individually the first five annual installments of this note aggregating $10,000 and the interest thereon. Mrs. W. R. Allen, A. H. Edgerton, W. R. Allen, John D. Langston."

This $10,000 was duly paid. The complaint alleges: "That the first five installments have been paid on said note, and that interest has been paid thereon up to 19 December, 1930. . . . There is due to the plaintiff by the defendant, A. H. Edgerton, the sum of $25,000 with

interest from 19 December, 1930; and that the plaintiff is entitled to a foreclosure of the deed of trust hereinabove referred to and the application of the proceeds from said sale as part payment of said judgment."

On 24 August, 1926, the Professional Building Company executed to the defendant, A. H. Edgerton, a deed for the property. In the deed was the following: "Also all money, bills receivable, notes, accounts, and other personal property of every kind and description now owned by the party of the first part herein. . . . That the same are free and clear from all encumbrances, except a deed of trust securing a loan due the Life Insurance Company of Virginia in the sum of $35,000. . . . It is mutually understood and agreed that in consideration for this conveyance, the party of the second part shall and does hereby assume and agree to pay off all debts, dues, and obligations of every kind and description now outstanding against the Professional Building Company, party of the first part herein, including the indebtedness due the Life Insurance Company of Virginia above mentioned."

The law in the present controversy is thus stated in Black on Rescission and Cancellation, Vol. 1, 2d ed., part sec. 137, pp. 136-7: "It is a well settled principle that equity may correct or reform an instrument which fails to express the true purpose and intention of the parties in consequence of mistakes made by the draftsman, whether through negligence, inadvertence, or lack of familiarity with technical terms. But cases are much more rare in which application to equity for the rescission or cancellation of instruments is made on this ground. However, there are authorities to the effect that where an instrument is executed which professes to carry into execution an agreement previously entered into, but which by mistake of the draftsman, either as to fact or law, does not accomplish the intended purpose, equity will relieve from such mistake."

The principle is thus stated in *Crawford v. Willoughby,* 192 N. C., 269 (271): "The principle that a court of equity, or a court exercising equitable jurisdiction, will decree the reformation of a deed or written instrument, from which a stipulation of the parties, with respect to some material matter, has been omitted by the mistake or inadvertence of the draughtsman, is well settled, and frequently applied. *Strickland v. Shearon,* 191 N. C., 560. The equity for the reformation of a deed or written instrument extends to the inadvertence or mistake of the draughtsman who writes the deed or instrument. If he fails to express the terms as agreed upon by the parties, the deed or instrument will be so corrected as to be brought into harmony with the true intention of the parties. *Sills v. Ford,* 171 N. C., 733. All the authorities are agreed, says *Hoke, J.,* in *King v. Hobbs,* 139 N. C., 170, that a deed or written instrument will be reformed so as to express the true intent of the

parties when by a mistake or inadvertence of the draughtsman, a material stipulation has been omitted from the deed or instrument as written. If the deed or written instrument fails to express the true intention of the parties, it may be reformed by a judgment or decree of the court, to the end that it shall express such intent whether the failure is due to mutual mistake of the parties, *Maxwell v. Bank,* 175 N. C., 183, to the mistake of one, and the fraud of the other party, *Potato Co. v. Jeanette,* 174 N. C., 236, or to the mistake of the draughtsman, *Pelletier v. Cooperage Co.,* 158 N. C., 405."

The testimony of grantor of his intention to exempt part of property covered in conveyance was proper. *Lee v. Charitable Brotherhood,* 191 N. C., 359. Stenographer's contradictory testimony as to instructions given for drawing deed was admissible on issue of reformation, *ibid.* Admission of mortgagor's testimony that he would not have signed mortgage, if not made subject to other mortgages, was not error. *Gray v. Mewborn,* 196 N. C., 770. The parol evidence was permissible. *Alexander v. Bank,* 201 N. C., 449. Proof of mistake authorizing correction of deed must be clear, strong, and convincing, *Lloyd v. Speight,* 195 N. C., 179. *Burton v. Insurance Co.,* 198 N. C., 498. Facts applicable to issues in suit to reform deed for mutual mistake were for the jury's determination. *Hardin v. Myers,* 197 N. C., 775. The testimony of the vice-president of the Professional Building Company, who signed the deed, was plenary and also the secretary, that the provision was placed in the deed by mistake. The vice-president testified, in part: "There was no agreement whatever made by Mr. Edgerton and by the Professional Building Company with respect to that indebtedness to the Life Insurance Company of Virginia. There was no reference to the indebtedness to the Life Insurance Company of Virginia, and no reference at any time by Mr. Edgerton or any one else as to any assumption of that indebtedness by Mr. Edgerton. I was a most astounded man when it was called to my attention in 1931. When it was called to my attention, I just blurted out, 'I will be darned.' I was absolutely astounded. Mr. Edgerton or the Professional Building Company, at no time during these negotiations, had any agreement or understanding that Mr. Edgerton was to personally assume the mortgage indebtedness that was made to the Life Insurance Company of Virginia."

The secretary testified, in part: "There was no agreement that Mr. Edgerton was to pay this note that has been exhibited here. No agreement by him that he was to pay that."

The defendant, A. H. Edgerton, testified, in part: "Q. What was your understanding and agreement as to the deed transferring the Professional Building Company to you, the real estate? Answer: The understanding in the purchase was that I was to buy their interest or their equity, and

the deed was to be made to me, subject to the mortgage of the Life Insurance Company of Virginia." He further testified that he never saw the deed assuming the liability.

The attorney who drafted the deed, connected as attorney or partner with both plaintiff and defendants, testified, in part: "I was present in the prior negotiations, but I was not present at the final. At that time, I was not a stockholder, and was not present at the final meeting of the stockholders. I drafted the deed, to which reference has been made in this suit. I drew the deed like I understood it was to be drawn. I can't say that Mr. Edgerton or any one instructed me how to draw the deed. It has been a source of great deal of regret to me. Of course, I drew the deed as I understood, and I have my own explanation as to why now. My explanation does not involve any instructions by Mr. Edgerton. The only thing that I can say is that someone simply asked me to prepare the deed for this transaction, and that I drew the deed without any definite instruction from any particular one, but drew it as I understood at that time, I thought it should be drawn. Q. Did the Professional Building Company, through its officers, give you any instructions? Answer: I can't say that anyone instructed me to put that provision in there. . . . Mr. Lewis came to Goldsboro to discuss the situation. He came to my office, and after talking about the prospect of a purchaser on any terms that could be given and discussing the question of Mr. Edgerton giving up the building, he said, 'By the way, I would like to go to the courthouse and see the deed Mr. Edgerton got this property by,' and asked me if I would go down with him. I did so. We looked up the deed and it had this provision in it, and he said to me at that time, 'Well, I don't know now what we will do about it.' . . . Q. What did you tell the life insurance company, or the representative of the life insurance company, was Mr. Edgerton's statement with regard to the clause? Answer: I stated that Mr. Edgerton stated he did not assume the indebtedness; that the provision was put in the deed without his knowledge or authority, and that he did not discover it until a few days prior to the time Mr. Lewis was here himself."

From the testimony of this witness, it would appear that Mr. Lewis, who represented plaintiff was not aware of this assumption agreement in the deed. The attempt to hold plaintiff personally for the debt was perhaps an afterthought of plaintiff, but the plaintiff's rights are set forth in *Bank v. Page, ante,* p. 18 (22): "The law undoubtedly is, that when a purchaser of mortgaged lands, by a valid and sufficient contract of assumption, agrees with the mortgagor, who is personally liable therefor, to assume and to pay off the mortgage debt, such agreement inures to the benefit of the holder of the mortgage, and upon its acceptance by him, or reliance thereon by the mortgagee, thenceforth as between them-

selves, the grantee occupies the position of principal debtor and the mortgagor that of surety, and the liability thus arising from said assumption agreement may be enforced by suit in equity, under the doctrine of subrogation, *Baber v. Hanie,* 163 N. C., 588, 80 S. E., 57, or by action at law, as upon a contract made for the benefit of a third person, *Rector v. Lyda,* 180 N. C., 577."

We think the evidence ample to be submitted to the jury. The court below charged the jury correctly several times: "The burden on the first issue is on the defendant, Mr. Edgerton, to satisfy you by evidence which is clear, strong and convincing before you can answer it 'Yes.' If he has so satisfied you, it would be your duty to answer 'Yes'; if not so satisfied, answer 'No.'"

The most serious aspect of this case is the testimony of Edgerton, on cross-examination (in part): "I did not agree to pay this thirty-five thousand dollar debt, except in so far as my endorsement was on the ten thousand dollar note with three others. I did not assume any beyond my endorsement of the ten. . . . I used this indebtedness of thirty-five thousand dollars in those years from my solvent credits as a debt due by me. I used it until 1931, when I contemplated giving up this building. . . . I had no more agreement about the debt in 1931 than in 1927, except in those years I was paying a couple of thousand dollars property tax, paid insurance, over $3,600 a year for interest and installments, and felt under these circumstances that it was entirely proper for me, contemplating to go through with it. In 1931, I changed my mind and didn't use it. As an offset against solvent credits I felt I was justified in using it. . . . There had never been any agreement on my part to pay this indebtedness to the life insurance company."

The court below on this aspect, give the plaintiff's contention to the jury as follows: "Contends that from year to year when he listed his taxes, he deducted from solvent credits all of the principal amount due, and that he only curtailed as he paid it and admitted he knew it and was taking that away from his solvent credits, and contends that you ought not to be satisfied from the evidence in this case, clear, strong and convincing, that it was a mutual mistake, and that you should answer the issue, 'No'; that he did assume it and put it in the deed, and that it remained there, and that he received all the benefits and deducted from solvent credits, that he paid and acted under that deed to dissolve the corporation, and that it was his benefit so to do, and that he received benefits from it. Plaintiff contends that you ought to answer the issue 'No.'"

We think on the whole record, this matter was properly left to the jury to determine. In *Shell v. Roseman,* 155 N. C., 90 (94): "We are not inadvertent to the fact that the plaintiff made a statement on cross-

examination as to a material matter, apparently in conflict with his evidence when examined in chief, but this affected his credibility only, and did not justify withdrawing his evidence from the jury. *Ward v. Mfg. Co.*, 123 N. C., 252." *Collett v. R. R.*, 198 N. C., 760 (762).

If plaintiff desired more specific instruction as to mutual mistake, it should have presented prayers for instruction. It is too late to complain now. The plaintiff relies mainly on *Cromwell v. Logan,* 196 N. C., 588, and cites other cases, contending that it was entitled to its peremptory instructions that on the entire record, defendant Edgerton was liable to plaintiff for the $25,000 and interest. We cannot so hold. The *Cromwell case* was one where actionable fraud was relied on to defeat the assumption agreement. The evidence in the case did not sustain actionable fraud. As to the plaintiff's contention that the conveyance to Edgerton and the dissolution of the corporation made Edgerton liable, we cannot so hold. A. H. Edgerton took the corporate property under the conveyance to him, the chose in possession and in action were practically of little value. He testified: "I took possession of the building and some rents had been accumulating that never were paid . . . I don't know of any furniture that they owned. There might have been a few dollars worth of floor oil or a little coal. Whatever the assets of the company, I took all of them." This action is not brought to set aside the conveyance to Edgerton—in fact, the plaintiff claims under it. *Cotton Mills v. Knitting Co.,* 194 N. C., 80 (87); C. S., 1183 and 1194.

The plaintiff has a lien on the corporate real property and seeks to subject it to the payment of its debt and also a personal judgment against the defendant, Edgerton, but the jury has found that Edgerton bought the equity of redemption and did not assume the debt due plaintiff. The plaintiff moved the court below to allow it in a reply after the original reply to Edgerton's defense, to plead the following statute of limitation: C. S., 441: "Within 3 years an action." (9) "For relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." The court below refused to allow this motion. This was discretionary in the court below from which no appeal lies. C. S., 547. The many exceptions or assignments of error made by plaintiff cannot be sustained. The nature of the defense permitted parol evidence, at least none of the exceptions or assignments of error are prejudicial on this record.

The jury has found that the draughtsman of the deed, by inadvertence and oversight, made the mistake. "To err is human." In the present action, it may be noted that the plaintiff was not prejudiced by the mistake. The plaintiff corporation has a lien on property. The building

cost $96,000—outside the value of the lot. It loaned $35,000 on the property. $10,000 has been paid. It has exactly what it contracted for and will, no doubt get the property, by foreclosure, that at one time was worth perhaps four or five times the value of the loan. On the record, we find

No error.

ATLANTIC JOINT STOCK LAND BANK OF RALEIGH v. ZEB V. FISHER AND HIS WIFE, MARY M. FISHER, ET AL.

(Filed 11 April, 1934.)

Reference D b—Where issues tendered do not arise upon exceptions to referee's report refusal of trial by jury is not error.

Where a case is one properly subject to a compulsory reference, C. S., 573, a party excepting to the order of reference is not entitled to have issues tendered upon the hearing of exceptions to the referee's report submitted to the jury when the issues do not arise upon the exceptions.

APPEAL by defendants Zeb V. Fisher and his wife, Mary M. Fisher, from *Oglesby, J.*, at October Term, 1933, of ROWAN. Affirmed.

This is an action to foreclose a mortgage executed by the defendants, Zeb V. Fisher and his wife, Mary M. Fisher, to secure their note payable to the plaintiff for the sum of $15,000. It is alleged in the complaint that by reason of the default of the defendants in the payment of taxes levied on the lands described in the mortgage for the year 1931, and of the semiannual installment due on 1 June, 1932, there is now due on said note the sum of $13,243.92, with interest on said sum from 1 December, 1931, subject to a credit of $6,000 paid by the defendants on 6 January, 1932, by the sale of one of the tracts of land described in the mortgage. The defendants admitted the execution of the mortgage, but denied that the note secured thereby was due at the date of the commencement of the action. They alleged that it was agreed by and between the plaintiff and the defendants that the sum of $6,000 paid by the defendants on said note on 6 January, 1932, should be applied to the payment of the successive semiannual installments becoming due next thereafter, and that by reason of such agreement the installment due on 1 June, 1932, had been paid. This allegation was denied by the plaintiff. The action was begun on 13 July, 1932.

The action was heard on exceptions to the findings of fact and conclusions of law of the referee to whom it was referred for trial. The defendants having in apt time excepted to the order of reference, demanded a trial by jury of the issues raised by the pleadings, and ex-

cepted to the refusal of the judge to submit such issues to a jury. The exceptions were heard and considered by the judge. They were overruled by him.

It was thereupon ordered and adjudged, in accordance with the report of the referee, that plaintiff recover of the defendants Zeb V. Fisher and his wife, Mary M. Fisher, the sum of $13,243.92, with interest on said sum from 1 December, 1931, less the sum of $6,000, with interest from 6 January, 1932, and the costs of the action. It was further ordered and decreed that the land described in the complaint be sold by a commissioner appointed by the court for that purpose, and that upon the confirmation by the court of such sale, the proceeds be applied first to the payment of the judgment in this action, and then in accordance with the decree. The defendants excepted to the judgment and appealed to the Supreme Court.

J. L. Cockerham, Hudson & Hudson and McLean & Stacy for plaintiff.

R. Lee Wright and T. C. Bowie for defendants.

PER CURIAM. Although the defendant Zeb V. Fisher, in his answer prayed that "this clause be referred to a referee to take and state an account between the plaintiff and the defendants, and report same to the court as provided by law," the said defendant joined with his co-defendant, Mary M. Fisher, in an exception to the order of reference. It is not contended by either of said defendants in this appeal that there was error in the order of reference, for the reason that this is not a proper case for a compulsory reference, C. S., 573. The exception to the order of reference was apparently for the sole purpose of preserving the right of the defendants to a trial by jury of the issues arising on the pleadings. Their only contention on this appeal is that there was error in the refusal of the judge to submit the issues appearing in the record to a jury. These issues, however, do not arise in the defendants' exceptions to the report of the referee. For that reason, there was no error in the refusal of the judge to submit the issues tendered to a jury. By their failure to tender appropriate issues arising on their exceptions, the defendants waived their right to a trial by jury. See *Booker v. Highlands,* 198 N. C., 282, 151 S. E., 635.

The judgment is supported by the findings of fact made by the referee, and approved by the judge. For that reason, the judgment is

Affirmed.

HENRY HAYES v. LEE FERGUSON, MRS. LEE FERGUSON, SHERMAN TUGMAN AND MRS. SHERMAN TUGMAN.

(Filed 11 April, 1934.)

1. Mortgages H h—Acknowledgment of feme trustee's deed held sufficient.

The presumption is in favor of the legality of an acknowledgment to a deed, and where a trustee's deed is signed by the *feme* trustee as trustee, and the notary knew her as the person who executed the deed "for the purposes therein expressed" the acknowledgment is sufficient and will not be declared void for a typographical error on the contention that it was executed by the *feme* trustee, prior owner of the land, in her individual instead of her representative capacity.

2. Trial E f—Erroneous statement of fact must be brought to trial court's attention in time to correct same upon the trial.

Where the court states to the jury in its charge that there was no issue of fraud and that this feature of the case had been abandoned, appellant's contention that the question of fraud should have been considered by the jury under one of the issues submitted will not be sustained where the matter was not brought to the trial court's attention in time for correction at the trial.

3. Mortgages H h—Trustee may make sale by agent or attorney, and it is not required that trustee be present at the sale.

Recitals in a trustee's deed that the trustee made the sale in pursuance of the power contained in the deed of trust are taken as prima facie correct, and under the statute, C. S., 2581, the sale may be made by an agent or attorney of the trustee appointed for that purpose, and it is not necessary that the trustee be present at the sale.

4. Trial E h—Where verdict of jury is inconsistent the court may give additional instructions and require redeliberation.

Where defendants in an action to recover land have no counterclaim because of the elimination of fraud from the case or the abandonment of that element alleged in the answer, it is not error for the court upon the return of a verdict assessing damages on the issue of defendants' counterclaim to give additional instructions that defendants were not entitled to recover damages if the jury should find that plaintiffs were entitled to the land.

APPEAL by defendants from *Finley, J.*, at October Term, 1933, of WILKES. No error.

This is an action to recover about three acres of land. Lee Ferguson and his wife were tenants of Phœbe Tugman. All parties claim under J. I. Myers and are estopped to deny his title. *Collins v. Swanson,* 121 N. C., 67. The plaintiffs offered the following deeds:

1. Deed from J. I. Myers and Retta Myers, his wife, to Phœbe Tugman, dated 1 May, 1924.

2. Deed of trust from Phœbe Tugman and Sherman Tugman, her husband, to Retta Myers, trustee, to secure a debt of $200.00 held against them by J. I. Myers, dated 1 May, 1924.

3. Deed from Retta Myers, trustee, to J. W. Jones, dated 2 June, 1932.

4. Deed from J. W. Jones and Mary Jones, his wife, to Henry Hayes, dated 14 June, 1932.

During the trial on motion of defendants J. W. Jones was made a party plaintiff.

On the debt secured by the deed of trust to Retta Myers, the defendants Phœbe Tugman and her husband were due J. I. Myers $45.00 and the note for this amount was assigned by J. I. Myers to J. W. Jones, who became the holder and had the deed of trust foreclosed. Jones held against Phœbe Tugman and her husband another debt of $96.96 with interest from 13 August, 1930, for merchandise, which was secured by a mortgage they subsequently gave to Jones.

The defendants pleaded fraud in the execution of the latter mortgage, but the jury was instructed that this defense had been abandoned.

Verdict:

1. Is the plaintiff the owner and entitled to the possession of the lands in controversy? Answer: Yes.

2. If so, what amount, if any, is the plaintiff entitled to recover as damages by reason of the defendants being in the unlawful possession of the land, as alleged in the complaint? Answer: None.

3. What amount, if any, are the defendants entitled to recover by reason of the counterclaim, as alleged in the answer? Answer: None.

Judgment for plaintiffs; appeal by defendants.

Ralph G. Bingham and Charles G. Gilreath for appellants.

B. T. Henderson, J. A. Rousseau and J. H. Whicker for appellees.

PER CURIAM. A number of exceptions were taken during the trial but all except those referred to in the opinion have been abandoned.

First exception. The appellants excepted to the introduction of the deed executed by Retta Myers as trustee on the ground that the acknowledgment is defective. The parties admit that the record of the acknowledgment contains a typographical error and that the only question is whether the grantor acknowledged the deed individually or in her capacity as trustee. She signed the deed as trustee and was known to the notary as the person who executed it "for the purposes therein expressed." The certificate is in substantial conformity with the law. *Finance Co. v. Cotton Mills,* 182 N. C., 408. The presumption is in favor of its legality. *Power Co. v. Power Co.,* 168 N. C., 219.

Fourteenth exception. In his charge to the jury his Honor remarked, "There is no issue of fraud, and I take it that feature is abandoned. . . . No issue of fraud is submitted to you." The appellants say that the jury should have been permitted to consider the question of fraud under the third issue. If they were of this opinion they should have called the court's attention to it. The question arose in *Hardy v. Mitchell,* 161 N. C., 351, in reference to which the Court said: "It is true, we find no such admission in the record, but it may have been made orally during the trial and not appear of record, but the instruction was a statement of a fact made to the jury by the court. It was not a conclusion of law. If it was an inadvertence upon the part of the judge, it was the duty of counsel for defendant at the conclusion of the charge, or at some appropriate moment before the case was finally given to the jury, to call the judge's attention to it, so that the misunderstanding could be cleared up and the error corrected at the time. Counsel will not be permitted to sit still and acquiesce in a statement by the court that a fact is admitted when it is not. Counsel should give the court opportunity to correct the error, if in fact one was made." To the same effect are *Randolph v. Lewis,* 196 N. C., 51; *S. v. Johnson,* 193 N. C., 701; *LaRoque v. Kennedy,* 156 N. C., 360.

Fifteenth exception. It is provided by statute that a sale of property under a mortgage or deed of trust to secure the payment of money may be made by an agent or attorney appointed for that purpose by the mortgagee or trustee and it is not essential that the mortgagee or trustee be present at the sale. C. S., 2581.

The deed of trust executed by Phœbe Tugman and her husband provided that upon their failure to pay the secured debt the beneficiary, or his assignee, or any other person entitled to the money could apply to the trustee and it should be the duty of the trustee to make sale of the property. The holder of the secured note demanded a sale; the sale was made by his attorney in the absence of the trustee. There was evidence that Phœbe Tugman and her husband knew that the land had been advertised for sale; there is no evidence that an offer was made to raise the bid as provided by section 2591 of the Consolidated Statutes.

The recitals in the trustee's deed, as the court told the jury, are prima facie correct so far as they tend to show that the trustee made the sale in pursuance of the power contained in the deed of trust. *Shaffer v. Gaynor,* 117 N. C., 15.

On both of these points the court correctly instructed the jury and the fifteenth exception cannot be sustained.

Sixteenth exception. The jury first answered the first issue "Yes," the second, "None," and the third, "$125.00."

The judge gave further instructions to the effect that the defendants pleaded fraud, which could have been considered only in connection with the first issue; but that this defense had been abandoned and that if the first issue was answered in favor of the plaintiffs the defendants would not be entitled to damages. In this instruction we find no error. Fraud having been eliminated the defendant had no counterclaim. The motion for nonsuit was properly denied.

No error.

STATE v. MARSHALL DICKEY.

(Filed 2 May, 1934.)

1. Homicide G d—Where defendant relies upon self-defense, testimony of uncommunicated threats made by deceased is competent.

Where defendant in a prosecution for homicide contends he killed deceased in self-defense, and introduces evidence in support of the contention, testimony that on the afternoon preceding the night on which the killing occurred deceased had threatened to kill defendant upon sight is competent in support of the contention of self-defense, although the threat was not communicated to defendant prior to the homicide, and the exclusion of such evidence will be held for reversible error.

2. Criminal Law L e—Exclusion of testimony is not cured by admission of testimony of another witness to same act done on different occasion.

In this prosecution for homicide defendant contended that he killed deceased in self-defense. The court admitted without objection testimony of one witness that deceased, shortly before the homicide, had made threats against defendant which were not communicated to defendant prior to the homicide, and excluded testimony of another witness of such threats made by deceased on a different occasion shortly before the homicide: *Held*, the error in the exclusion of the testimony of such threats by one of the witnesses was not cured by the admission of the testimony of the other witness, defendant being entitled to the credibility and weight of the testimony of the witness whose testimony was excluded.

APPEAL by defendant from *Stack, J.*, at January Term, 1934, of MECKLENBURG. New trial.

This is a criminal action in which the defendant was tried on an indictment for the murder of Edith Proctor, on 19 November, 1930, in Mecklenburg County.

When the action was called for trial, the solicitor for the State announced to the court, that on the evidence which he would offer at the trial, he would not ask for a verdict of guilty of murder in the first degree, but would ask for a verdict of guilty of murder in the second degree, or of manslaughter, as the jury might find the facts from all the evidence. The defendant entered a plea of "not guilty."

The evidence for the State tended to show that at about 8:00 o'clock p.m., on Saturday, 19 November, 1930, the defendant went to the home of Edith Proctor, in Mecklenburg County, and after knocking twice at her door, opened the door, and entered the house, with a knife in his hand. He said to Edith Proctor, who was in the house, "What in the hell do you mean?" As she walked toward him, he met her, and knocked her down, and threw a lamp at her. He then cut her in and across her abdomen. She bled profusely from the wound, and died within about three minutes, after the defendant had assaulted and cut her. When the defendant was arrested, he had a deep cut in his chest, inflicted apparently by a knife. Defendant told the officers who arrested him, that the deceased had cut him on his hand, and had stabbed him in the chest. Neither of the officers saw any wound on his hand. They did see a wound on his chest.

The defendant as a witness in his own behalf testified as follows:

"I am twenty-nine years old. I went to Edith Proctor's house about 8:00 o'clock on Saturday night, 19 November, 1930, to get my laundry from Lillie Ingram, who lived in the house with Edith Proctor. She had been washing for me about four weeks. When I got there I knocked at the door, and Edith said, 'Come in.' I walked in. She shut the door and said, 'What do you want?' I said, 'I came to get my laundry. Where is Lillie?' Edith answered, 'You get to hell out of here.' I said, 'Let me out,' and started toward the door. She cut me on the hand. I said, 'Let me out, girl.' She cut me on the hand again. I backed and started to go out of the house. She stabbed me when I reached for the door. I had done nothing except ask for Lillie. Every time I would reach for the door she would cut me. I was bleeding fast, and thought she was going to kill me. I ran my hand into my pocket, and opened my knife. I was begging her all the time to let me out. She made another dive at me, and I cut her. I did not try to kill her. I tried to keep her from killing me. When I went out the door, Edith threw a lamp at me. When I left the house she was standing up. She looked as if she might have been drinking. She cursed me and seemed to be mad. I guess she was mad at me, because I was engaged to another girl."

Evidence offered by the defendant tended to corroborate his testimony as to the circumstances surrounding the homicide.

Lila Chisholm, a witness for the defendant, testified as follows:

"I lived close to Edith Proctor. I saw her on that Saturday night at about 7:30 o'clock. She came to my house with a switch-blade knife open in her hand, and asked me if I had seen Marshall Dickey since dark. I told her 'No.' She said she was going to find him, and cut him when she found him. She was mad when she was talking to me. I did not know what the trouble was between her and Marshall, but she

was hunting Marshall. I know Lillie Ingram, and know that she washed for Marshall."

Pearl Lee Spencer, a witness for the defendant, testified as follows: "I knew Edith Proctor. I saw her at my house on the afternoon of the day she was killed. She had a knife—a switch-blade knife, about that long."

Counsel for defendant asked this witness: "What, if anything, did Edith Proctor say to you?" The defendant excepted to the ruling of the court, sustaining the State's objection to this question. The witness, if permitted by the court would have testified that Edith Proctor said she was going to kill Marshall Dickey as soon as she found him.

On all the evidence submitted to the jury, under the charge of the court, there was a verdict that the defendant is guilty of manslaughter.

From judgment that he be confined in the State's prison for a term of twenty years, the defendant appealed to the Supreme Court.

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

Kirkpatrick & Kirkpatrick and J. M. Scarborough for defendant.

CONNOR, J. In this case the defendant admitted that he killed the deceased by cutting her with a knife—a deadly weapon. He offered evidence tending to show that at the time he cut the deceased, and inflicted upon her the fatal wound, she was assaulting him with a knife, and that under all the circumstances as disclosed by the evidence, he was unable to escape from the murderous assault the deceased was then making upon him. This evidence was amply sufficient to support the contention of the defendant that he killed the deceased in self-defense, and that for this reason he was not guilty.

In support of his contention that he killed the deceased in self-defense, the defendant offered as evidence the testimony of a witness that shortly before the homicide, she saw the deceased, and that she then had a knife and said that as soon as she saw the defendant, she was going to cut him. This testimony was admitted without objection on the part of the solicitor for the State, and was submitted by the court to the jury as evidence in behalf of the defendant. There was no evidence tending to show that this threat of the deceased was communicated to the defendant prior to the homicide.

In further support of his contention that he killed the deceased in self-defense, the defendant offered as evidence the testimony of another witness that she saw the deceased during the afternoon preceding the homicide, and that deceased then had a knife, and said that she was going to kill Marshall Dickey, the defendant, as soon as she saw him. There

was no evidence tending to show that this threat was communicated to the defendant prior to the homicide. Upon objection by the State, this testimony was excluded, and defendant excepted. On his appeal to this Court, the defendant assigns the exclusion of this testimony as error. The assignment of error must be sustained.

In *S. v. Baldwin,* 155 N. C., 494, 71 S. E., 212, it is said: "It was insisted further that his Honor made an erroneous ruling in excluding evidence of certain uncommunicated threats of the deceased uttered shortly before the homicide, tending to show animosity towards the prisoner, and a purpose to do him serious bodily harm. It is now generally recognized that in trials for homicide uncommunicated threats are admissible (1) where they tend to corroborate threats which have been communicated to the prisoner; (2) where they tend to throw light on the occurrence and aid the jury to a correct interpretation of the same, and there is testimony ultra sufficient to carry the case to the jury tending to show that the killing may have been done from a principle of self-preservation, or the evidence is wholly circumstantial and the character of the transaction in doubt. *Turpin's case,* 77 N. C., 473; *S. v. McIver,* 125 N. C., 645; Hornegan & Thompson Self-defense, 927; *Stokes' case,* 53 N. Y.; *Holler v. State,* Ind., 57; *Cornelius v. Commonwealth,* 54 Ky., 539. In the present case, while there was evidence, on the part of the State tending to show that the prisoner fought wrongfully, and killed without necessity, there is testimony on his part tending to show a homicide in his necessary self-defense, and the proposed evidence, tending as it did to throw light upon the occurrence should have been received."

It cannot be held that the error in excluding the testimony of this witness tending to show threats by the deceased to assault the defendant with a knife as soon as she saw him, was harmless for the reason that the testimony of another witness for the defendant tending to show similar threats on another occasion, was admitted and submitted to the jury. In *Eaves v. Cox,* 203 N. C., 173, 165 S. E., 345, it is said: "Obviously, if a party offers the competent testimony of a given number of witnesses, but the court excludes the testimony of one, even though the testimony of others is admitted without objection, notwithstanding, the offering party is entitled to the credibility and weight of the testimony of the excluded witness." This principle is particularly applicable in the instant case, where the excluded evidence tended to show threats by the deceased, on a different occasion than that shown by the testimony which was admitted. The defendant is entitled to a new trial. It is so ordered.

New trial.

BOARD OF EDUCATION OF McDOWELL COUNTY, AND R. W. GOODMAN, CHAIRMAN, C. A. MORRIS, M. R. NANNEY, J. W. McCALL, F. C. DAVES, COMPRISING AND BEING THE SCHOOL DISTRICT COMMITTEE FOR THE GLENWOOD-DYSARTVILLE HIGH SCHOOL DISTRICT, THE LATTER FIVE PERSONS BEING TAXPAYERS AND CITIZENS IN GLENWOOD-DYSARTVILLE HIGH SCHOOL DISTRICT, v. MRS. MARY G. BURGIN, COUNTY ACCOUNTANT FOR THE COUNTY OF McDOWELL.

(Filed 2 May, 1934.)

1. Schools and School Districts C b—Held: new administrative unit had authority to expend fund on hand for purpose for which it was created.

A local-tax school district voted to levy a special tax to furnish funds to supplement the six months school term in the district. The district was abolished pursuant to chap. 562, Public Laws of 1933, and a new district comprising the same territory was established by the board of education and State School Commission as an administrative unit in the State-wide system of public schools. At the time of the abolition of the old district and the creation of the new, there was an unexpended sum in the fund created by the tax to supplement the school term: *Held*, the new district, as successor to the old, has authority to expend the fund for the purpose of supplementing the six-months school term of the district, that being the purpose for which the tax providing the fund was levied, and this result is not affected by the provisions of chap. 562, sec. 4, which requires certain funds to be placed in the debt service fund, section 4 applying only to funds collected from designated sources subsequent to the effective date of the statute, and not to funds on hand at the time of the creation of the new district.

2. Same—Objection that funds were not properly budgeted and appropriated to supplement school term, held untenable in this case.

In a suit to compel a county accountant to sign vouchers for the distribution of certain funds it was alleged that the funds in question came into possession of plaintiff school administrative unit as successor to a local-tax district, and that the funds represented a sum saved by economy out of funds appropriated and budgeted by the former district to supplement the six-months term of school and raised by a special tax voted for this purpose, and that plaintiff was attempting to expend the funds to supplement the six-months term of school for the following year. The county accountant filed a demurrer on the ground that the funds had not been properly budgeted and appropriated: *Held*, the demurrer admitted that the funds had been properly budgeted and appropriated to supplement the six-months school term, for which purpose plaintiff sought to expend them, and the budget is designed as a tentative basis for determining the tax levy necessary to operate the schools and the disposition of the funds involved no question of taxation.

3. Mandamus A b—

Mandamus will lie to compel a county accountant to sign vouchers which he is required to sign by law, since under such circumstances the signing of the vouchers is a purely ministerial duty.

BOARD OF EDUCATION *v.* BURGIN.

CIVIL ACTION, before *Schenck, J.*, at December Term, 1933, of McDOWELL.

The story told by the complaint is substantially as follows:

1. In 1904 there was created according to law in McDowell County, Glenwood High School District, same being a local tax district, and was established by the holding of an election in the district by the taxpayers thereof, who voted upon themselves a tax rate not to exceed thirty cents on the $100 valuation "for the purpose of supplementing the six months school term funds in that district." At various times the district was duly enlarged in the manner prescribed by law and by a vote of the taxpayers accepting the tax theretofore levied in Glenwood High School District for said purposes of supplementing the six months school term fund. Thereafter in June, 1933, pursuant to chapter 562 of the Public Laws of 1933 all existing school districts in McDowell County were abolished and the board of education and the State School Commission for purposes of administration and levying taxes, redistricted the county, creating a new district known as Glenwood-Dysartville High School District, which said district comprises the identical territory and patrons therein formerly comprising the Glenwood High School District.

2. The Glenwood High School District by virtue of the levy of taxes from year to year from 1929 to 1933, had by the exercise of thrift and strict economy so managed the financial affairs of the district that there had been a saving of $3,160.20, which said money is now to the credit of the Glenwood-Dysartville High School District "as a balance to said district as successor to the Glenwood High School District."

3. That the Glenwood High School District prepared each year a budget setting forth items of expenditure of funds so raised supplementing the six months school term funds "submitting the same each year to the county board of education of McDowell County for approval, which board in turn submitted the same to the board of county commissioners for McDowell County for approval," and that following the approval of said budget by both the board of education and the board of commissioners taxes had been duly levied in said local tax district sufficient to meet the school needs of the district.

4. The Glenwood-Dysartville High School District committee in November, 1933, adopted a budget involving the expenditure for purposes of supplementing the needs of the six months school term, including the said balance then due the Glenwood-Dysartville High School District. The budget was approved by the county board of education, and thereupon said committee "incurred certain indebtedness by virtue of the purchase of sundry and various items for school purposes, and further by virtue of certain labor and work done on school property

and for school purposes, all of which indebtedness was lawfully incurred in accordance with the budget for expenditure of supplementary school funds as set out above. That in order to pay such indebtedness certain vouchers in proper form were issued by the county superintendent of McDowell County, signed by the chairman of the county board of education and drawn on the balance due the Glenwood-Dysartville High School District.

5. These vouchers were duly presented to the defendant, Mary G. Burgin, county accountant for McDowell County, for her inspection and signature as required by law. Thereupon, "the said Mary G. Burgin, acting in her capacity as county accountant, failed, neglected and refused to sign said vouchers, without good cause therefor, and as required by law. That the plaintiff, Glenwood-Dysartville High School District committee, has no fund other than these which can be used to defray school expenses incurred in supplementing the six months school term." Upon the refusal of the county accountant to sign the checks or vouchers, this suit was instituted by the county board of education and the school committee of Glenwood-Dysartville High School District against said county accountant.

The defendant, county accountant, demurred to the complaint for that (a) the funds on which the vouchers were drawn, was an accumulation of taxes levied in the Glenwood High School District which had been abolished by chapter 562, Public Laws of 1933, and that the plaintiffs, school committee of the new district, have no jurisdiction of the fund; (b) the fund had not been budgeted as required by law; (c) no appropriation order had been made; (d) the attempted budget had not been approved by the board of county commissioners of McDowell County.

The plaintiffs prayed for a writ of mandamus, requiring the defendant, county accountant, to sign the vouchers referred to in the complaint.

After hearing the argument of the cause the trial judge was of the opinion that the demurrer should be sustained, and so ruled. Whereupon the plaintiffs appealed.

Carter Hudgins and P. J. Story for plaintiffs.
W. T. Morgan and Winborne & Proctor for defendant.

BROGDEN, J. Does the school committee of Glenwood-Dysartville High School District, as successor of the Glenwood High School District, have the right to expend the fund produced by taxes heretofore duly levied in said district and now in hand to its credit, for the purpose of supplementing the six months school term in said district?

Glenwood High School District by a vote of the taxpayers therein, levied a tax upon all property within the district for the purpose of

supplementing the six months school term. By economy and wise management an unexpended balance of $3,060.20 had been accumulated. By virtue of chapter 562, Public Laws of 1933, the district was abolished and a new district known as Glenwood-Dysartville High School District set up in its stead, covering, however, the identical territory theretofore comprising the Glenwood District.

The initial inquiries, therefore, are: to whom does this money belong and who has the power to spend it, and for what purpose?

The fund was raised by taxation in a particular governmental subdivision, to wit, Glenwood High School District. The tax producing the fund was levied by virtue of a vote of the people in the said particular district and for the express purpose of supplementing the six months school term therein. Consequently, nothing else appearing the conclusion would be inevitable, that when the district was abolished, the money should return to the taxpayers or be used for the school needs of the district through the instrumentality of its successor, the Glenwood-Dysartville High School District.

The defendant, however, asserts that chapter 562, section 4, of the Public Laws of 1933, directs the application of the money. The language relied upon is substantially as follows: "All uncollected taxes which have been levied in the respective school districts of the State . . . upon collection shall be made a part of the debt service fund of the special bond tax unit along with such other funds as may accrue to the credit of said unit; and in the event there is no debt service requirement upon such district, the amount so collected shall be covered into the county treasury to be used as a part of the county debt service for schools," etc.

It does not appear that Glenwood School District had any outstanding bonds. Manifestly, the expressions "uncollected taxes" and "such other funds as may accrue" refer to funds becoming available in the future, and hence do not operate upon the money specified in the complaint. Therefore, even if it be granted that the Legislature had the power to take this money and spend it for the benefit of other governmental subdivisions, it has not sought to do so, and hence so far as the law is concerned, the money is still in the treasury to the credit of the school district, and available for the very purposes for which the taxpayers provided it.

It is further asserted that the fund has not been properly budgeted and appropriated. It would seem that this contention is water that has passed over the dam, because it is alleged and admitted by demurrer that this money has been budgeted each year and that appropriations have been duly made during the existence of the Glenwood High School District. Moreover, the budget is designed as a tentative basis for de-

termining the tax levy necessary to operate the school. The disposition of the particular sum of money would in this case invoke no taxing power.

While the county auditor perhaps acted wisely in proceeding cautiously because of changes in the law, no sound reason occurs to the court why she should not sign the voucher or vouchers specified in the complaint, to the end that the money shall be used for the purpose for which it was accumulated. Indeed, it was alleged in the complaint and admitted by demurrer that the defendant "refused to sign said vouchers without good cause therefor and as required by law." The signing of the vouchers upon the facts disclosed in the pleadings, does not involve the exercise of discretion, but would seem to fall within the category of purely ministerial acts.

Reversed.

TOWN OF WAKE FOREST v. HARVEY HOLDING, ADMINISTRATOR OF THE ESTATE OF T. E. HOLDING, DECEASED.

(Filed 2 May, 1934.)

Municipal Corporations G d—Irregularities in paving assessments held waived by accepting benefits and paying installments without objection.

A property owner signed a petition for public improvements adjacent to his property, and paid two installments of the assessments levied against his property by the town. Upon his death his administrator resisted payment of further installments on the ground that the assessments were void for the reason that the town failed to give notice and hold the hearing required by N. C. Code, 2712, 2713: *Held*, the property owner signed the petition and had notice that the improvements were to be made, and had notice that the assessment roll giving the amount of the assessment against his property, was filed in the office of the city clerk, it being required by statute that it be so filed, N. C. Code, 2713, and by accepting the benefits and paying installments of the assessment without objection, N. C. Code, 2714, he ratified same, the assessment as to him being voidable and not void, and his administrator in his fiduciary capacity is estopped to deny the validity of the assessments.

APPEAL by plaintiff from *Harris, J.*, at January Special Term, 1934, of WAKE. Reversed.

The judgment of the court below is as follows: "This cause coming on to be heard and being heard before his Honor, W. C. Harris, judge, upon the following agreed statement of facts: 'That during the year 1924, the town of Wake Forest caused to be made certain improvements in said town, said improvements, consisting of the construction of side-

walks, paving, etc., on White, Waitt and Jones streets, located in said town of Wake Forest, and attempted to assess against the abutting owners thereof special assessments to pay for said improvements; that said improvements were made and done under and by virtue of the provisions of chapter 56, Public Laws of 1915; that all the acts and things done by the authorities of the town of Wake Forest in connection with said improvements, were in all respects regular and according to law, except that there was no publication of notice as required by sections 2712 and 2713, of The Code of 1931, nor was any meeting held by the board of commissioners of the town of Wake Forest for the purpose of hearing objections, as required by sections 2712 and 2713 of said Code; the minutes of the board of commissioners of the town show the following under date of 6 July, 1925: The following resolution was adopted: Be it resolved by the board of commissioners of the town of Wake Forest: Section 1. That the assessments for street improvements, as submitted by the town engineer be and are hereby approved and confirmed as of 1 July, 1925. Section 2. That the first installment of said assessment shall be as of 1 July, 1925, and paid by 1 September, 1925, and all subsequent installments shall be due on 1 July, of each succeeding year. Section 3. That the interest on said assessments shall run from 1 July, 1925. T. E. Holding signed the petition requesting the local improvements and paid two of the assessments levied, to wit: Assessments for 1925 and 1926.

After argument, the court finds as a matter of law: That the failure on the part of the town of Wake Forest to give the notice and hold the hearing required by sections 2712 and 2713, of The Code of 1931, rendered null and void the said attempted assessments, and no lien upon the lands of T. E. Holding for the payment thereof attached to the lands of T. E. Holding. And further that the action of the board of commissioners of 6 July, 1925, does not amount to a proper and valid confirmation of the said assessments as required by section 2713, of Code of 1931. It is therefore, upon motion of counsel for the defendant, ordered, adjudged and decreed: (1) That the special assessments on White, Waitt and Jones streets, against the lands of T. E. Holding's estate, be and the same are hereby declared null and void and of no effect. (2) That defendant go hence without day and recover his cost in this action."

The only exception and assignment of error made by plaintiff is to the judgment as signed.

Wilson & Green and Morehead & Murdock, for plaintiff.
John G. Mills, Jr., and Clem B. Holding for defendant.

CLARKSON, J. The court below on the admitted facts, found as a matter of law: "That the failure on the part of the town of Wake Forest to give the notice and hold the hearing required by sections 2712 and 2713, of the Code of 1931, rendered null and void the said attempted assessments, and no lien upon the lands of T. E. Holding for the payment thereof attached to the lands of T. E. Holding."

We think, under the facts and circumstances of this case, there was error in the holding of the court below. Code of 1931 (Michie), sec. 2712, reads as follows: "Immediately after such assessment roll has been completed, the governing body shall cause it to be deposited in the office of the clerk of the municipality for inspection by parties interested, and shall cause to be published, a notice of the completion of the assessment roll, setting forth a description in general terms of the local improvement, and the time fixed for the meeting of the governing body for the hearing of allegations and objections in respect to the special assessment, such meeting not to be earlier then ten days from the first publication or posting of said notice. Any number of assessment rolls may be included in one notice."

Section 2713, reads: "At the time appointed for that purpose, or at some other time to which it may adjourn, the governing body, or a committee thereof, must hear the allegations and objections of all persons interested, who appear and may make proof in relation thereto. The governing body may thereupon correct such assessment roll, and either confirm the same or may set it aside, and provide for a new assessment. Whenever the governing body shall confirm an assessment for a local improvement, the clerk of the municipality shall enter on the minutes of the governing body the date, hour, and minute of such confirmation, and from the time of such confirmation the assessments embraced in the assessment roll shall be a lien on the real property against which the same are assessed, superior to all other liens and encumbrances. After the roll is confirmed a copy of the same must be delivered to the tax collector or other officer charged with the duty of collecting taxes."

Section 2714, gives the right to appeal to the Superior Court when the person assessed is dissatisfied "with the amount of the charge."

Notice and an opportunity to be heard is a fundamental principle in our jurisprudence too well settled to need citation of authorities. The record discloses that "T. E. Holding signed the petition requesting the local improvements and paid two of the assessments, levied to wit, assessments for 1925 and 1926." He signed the petition and had notice that the improvement was to be made under the statute; the assessment roll when completed "the governing body shall cause it to be deposited in the office of the clerk of the municipality for inspection by parties in-

terested." The statute gave him notice that the assessment roll was filed and he could inspect it. It is further in evidence, from the record, that for nine years and during his lifetime, he made no protest as to the amount of the assessments. The defendant administrator of the estate, acting in a fiduciary capacity, attacks the assessments, and in this we see no criticism. T. E. Holding, by signing the petition, had notice of the local improvement being made, stood by and saw it going on under his request and made no protest. He received the benefits. It is contended that he had no notice or hearing on the amount the plaintiff governing body assessed against his property. It is presumed that the assessment roll was filed in the office of the clerk of the municipality for inspection and the statute gave him notice that it was there and the amount assessed. There were 10 assessments of equal amount running from 1 July, 1925. He paid the assessments of 1925 and 1926. Under the facts and circumstances of this case, the proceeding as to him, was not void, but voidable and by his acts and conduct, and in making the payments, he ratified the assessment.

In *Charlotte v. Alexander,* 173 N. C., 515 (519), it is said: "There is no valid reason why citizens who wish to have their property improved by street paving may not expressly waive the charter restrictions and contract with the city to pay the actual cost. There is nothing against public policy in such agreement. On the contrary, it conduces to the general improvement of the municipality. When such contracts are entered into with full knowledge by the property owner, the law will not permit him to repudiate it after the work is done and he has received the benefits. This principle is approved by numerous authorities." *In the Matter of Assessment Against R. R.,* 196 N. C., 756; *Carpenter v. Maiden,* 204 N. C., 114. T. E. Holding could expressly waive the provisions of the statute if he had any objection as to the amount of the assessment, and ratify same by acts and conduct as was done in this case.

In *Sugg v. Credit Corporation,* 196 N. C., 97 (99), speaking to the subject: "The doctrine of equitable estoppel is based on an application of the golden rule to the everyday affairs of men. It requires that one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed. *Boddie v. Bond,* 154 N. C., 359, 70 S. E., 824; 10 R. C. L., 688, etc." For the reasons given, the judgment of the court below is

Reversed.

MARTHA L. BLACKMAN v. NEW YORK LIFE INSURANCE COMPANY.

(Filed 2 May, 1934.)

1. Trial D a—

On a motion as of nonsuit all the evidence is to be considered in the light most favorable to plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. Insurance R c—Evidence of total and permanent disability within provisions of policy held sufficient to be submitted to the jury.

The policy in suit provided for benefits if insured should become wholly and presumably permanently disabled, and provided that disability should be deemed total if insured should become wholly disabled by bodily injury or disease and prevented thereby from engaging in any occupation whatsoever for remuneration or profit, and that disability should be deemed permanent if insured should be presumably so disabled for life, or if insured should become so disabled for not less than three consecutive months immediately preceding receipt of proof thereof, and further provided that the irrecoverable loss of sight in both eyes should be considered total and permanent disability. Plaintiff testified that as a result of an injury to her eye her vision had become double and that she was unable to read or work with her eyes except for a minute or so, that she could not keep books or sew as she had done prior to her injury, that she had attempted to work but could not keep her job because of the disability, and testified without objection that she was unable to engage in any occupation whatsoever for remuneration or profit. Defendant's expert witness testified on cross-examination that such double vision would be confusing in working and would be disabling, and on direct examination that it is usually due to a diseased condition of the optic nerve and that he had never heard of such condition being corrected: *Held*, the evidence was sufficient to be submitted to the jury on the question of whether plaintiff was totally and presumably permanently disabled within the meaning of those terms as used in the policy contract.

APPEAL by defendant from *Stack, J.*, and a jury, at February Term, 1934, of MECKLENBURG. No error.

This was a civil action, tried at the February Term, 1934, of the Superior Court for Mecklenburg County, before his Honor, A. M. Stack, and a jury, wherein the plaintiff sought to recover of the defendant, the sum of $20.00 per month for total and permanent disability from 5 August, 1930, to 12 February, 1934, under a policy of insurance issued on 18 August, 1924, by the defendant on the life of the plaintiff, and including disability benefits for total and permanent disability. The defendant denied liability for any permanent and total disability after 6 June, 1930, the defendant contending that plaintiff's disability under the terms of the policy ceased on or before that date. At the close of the plaintiff's evidence, the defendant moved for judgment as in case of nonsuit, and the motion was overruled. The defendant excepted. The

defendant renewed the motion at the close of all of the evidence. The court again denied the motion, and the defendant excepted. The defendant offered prayers for instruction, which the court refused, and the defendant excepted.

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

"(1) Has the plaintiff been wholly disabled since 5 August, 1930, by bodily injury or disease so that she is thereby prevented from engaging in any occupation whatsoever for remuneration or profit, as alleged in the complaint? Answer: Yes.

(2) Is the plaintiff presumably totally disabled for life, as alleged in the complaint? Answer: Yes.

(3) In what amount, if any, is the plaintiff entitled to recover, since 5 August, 1930, and up to 12 February, 1934? Answer: $646.70."

The defendant moved to set aside the verdict on the ground that the verdict was contrary to the undisputed evidence. The court denied the defendant's motion. The defendant excepted and moved to set aside the verdict and for a new trial for errors committed on the trial of the cause, to be assigned in the case on appeal. The court denied this motion and the defendant excepted. Judgment was signed in favor of the plaintiff, and the defendant excepted, assigned errors and appealed to the Supreme Court.

The judgment of the court below is as follows: "This cause coming on to be heard before his Honor, A. M. Stack, judge presiding, and a jury, and having been heard upon issues submitted by the court, as appear in the record, and all the issues having been answered in favor of the plaintiff and against the defendant, and awarding the plaintiff the sum of six hundred forty-six and 70/100 dollars ($646.70), payments that are past due to 12 February, 1934, upon the insurance policy after making all proper deductions: Now, therefore, upon motion of Carswell and Ervin, attorneys for plaintiff, it is ordered, adjudged, and decreed, that the plaintiff have and recover of the defendant the sum of six hundred forty-six and 70/100 dollars ($646.70), and for the costs of this action, to be taxed by the clerk. This 21 January, 1934.

A. M. STACK, *Judge Presiding.*"

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

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

Cansler & Cansler and R. M. Gray, Jr., for defendant.

CLARKSON, J. At the close of plaintiff's evidence, and at the close of all the evidence, the defendant made motions for judgment as in case of nonsuit, C. S., 567. The court below overruled these motions

and in this we can see no error. On motion, as in case of nonsuit, the evidence is to be taken in a light most favorable to plaintiff and he is entitled to every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom.

The material parts of the terms of the policy to be considered, are as follows: "Disability benefits: Twenty dollars each month ($10.00 per $1,000 of the face of this policy) during the lifetime of the insured, and also to waive the payment of premiums, if the insured becomes wholly and presumably permanently disabled before age 60, subject to all the terms and conditions contained in section 1 hereof. . . . (1) Total disability—Disability shall be deemed to be total whenever the insured is wholly disabled by bodily injury or disease so that he is prevented thereby from engaging in any occupation whatsoever for remuneration or profit. (2) Permanent disability— Disability shall be presumed to be permanent (a) whenever the insured will presumably be so totally disabled for life; or (b) after the insured has been so totally disabled for not less than three consecutive months immediately preceding receipt of proof thereof. . . . (5) It is further agreed that the total and irrecoverable loss of the sight of both eyes, or of the use of both hands or of both feet, or of one hand and one foot, shall be considered total and permanent disability."

The plaintiff testified, in part: "I was doing some sewing and was sewing with a wool dress on and the stitches from my work had caught in my dress and I noticed the scraps and stitches all over my dress, and I took the pins out and as I brushed the scraps off my clothes the needle flashed right back up into my eye. It struck my hand as my hand went down and the needle went right into the sight of my right eye. I almost fell, and my eye sprang full of water. . . . I then came back to Dr. Gambel's office and waited until I could get him. He came in and examined my eye and told me I had injured it, had ruined it. *I could not see anything at all then, and I suffered terribly.* . . . He told me that it would have to be operated on; that there was a cataract on it. The operation did very little good; it gave me enough vision to see something moving in a light; I could tell it is a bulk moving. Up to that time, I had kept books, had been cashier for Express Company in Lenoir for four or five years, have always done book work and lots of sewing. I tried to work after that. *It seems like I have a double vision and anything that moves I see the motion, but instead of being over here, it is over on this side. I can't stay at anything any time; the minute I start, it goes widening, that widening effect and double vision. I can read a minute or two, then it runs together.* I could not see to keep books. I have been a seamstress. I got a position at Ivey's after that. I could not do the work and they let me

go. I studied sewing and before this thing happened, I could do anything I wanted to; since then, I can't do anything. . . . *My eyes were perfect before my injury.* I did not wear glasses and I never had any trouble with my eyes. I am forty years old and was thirty-six when this happened. *I am not able to engage in any occupation whatsoever for remuneration or profit.* I can't see a bit of improvement in my eye as time goes by; it is not as good as it was. The insurance company made an investigation of my claim, and I wrote up there about it. They paid me two payments while I was disabled, $20.00 each, one in June and one in July, 1930. . . . When I was cashier for the Express Company, I was required to write all day long. *I cannot do that now. I cannot sew now.*"

Dr. H. L. Sloan, witness for defendant, testified on cross-examination: *"Her double vision causes her to see two where she should see one."*

Dr. J. R. Gamble, witness for defendant, testified on cross-examination: "If she had double vision, it would be confusing, as far as her doing any work is concerned. I think it would be disabling." Re-direct examination: *"A double vision is usually a diseased condition of the optic nerve. I never heard of one being corrected."*

The defendant admits that the premiums were paid up until the suit was brought. There was no exception or assignment of error to the charge of the court below. The plaintiff testified without objection, "I am not able to engage in any occupation whatsoever for remuneration or profit." There was other evidence to like effect. We think the evidence sufficient to be submitted to the jury as to total and permanent disability, within the meaning of the policy in suit. The evidence in this case is similar to that in *Misskelley v. Insurance Co.*, 205 N. C., 496. *Baker v. Insurance Co., ante,* 106; *Guy v. Insurance Co., ante,* 118. In the judgment of the court below, there is

No error.

GURNEY P. HOOD, COMMISSIONER OF BANKS FOR NORTH CAROLINA, ON RELATION OF MERCHANTS AND MANUFACTURERS BANK OF ANDREWS, NORTH CAROLINA, v. CLYDE S. FREEL, ADMINISTRATOR OF GEO. B. WALKER, DECEASED, ET AL.

(Filed 2 May, 1934.)

1. Interveners A b: Judgments M b—Creditor of heir held entitled to intervene in proceeding to sell intestate's lands to make assets.

Intestate died owning certain lands and personalty. His wife and children partitioned the lands among themselves by deed and disposed of the personalty. Plaintiff, the holder of a note signed by intestate and his son, brought suit against the administrator, later appointed, and the

widow and children, to have the lands sold to make assets for the payment of the note, in which suit the son signing the note was served by publication. Judgment was entered for the sale of necessary lands and the cause retained for further orders. Before sale of any lands a creditor of the son signing the note filed petition for intervention alleging that the son had mortgaged the land obtained by him by partition to secure an indebtedness to petitioner, that petitioner had no notice of the action, that plaintiff's note should have been paid from intestate's personalty, that the judgment for sale to make assets was obtained by collusion between the widow and heirs at law and plaintiff under agreement that only lands partitioned to the son should be sold, and that intestate had signed plaintiff's note as an accommodation endorser for his son and that the right of action thereon against the estate was barred by the statute of limitations: *Held*, the judgment for sale to make assets was not a final judgment, and as it affected the rights of petitioner's debtor was obtained by substituted service, giving petitioner the right under C. S., 492, to come in and defend the action within the time limits therein imposed upon such terms as may be just, and upon petitioner's allegations he should have been allowed to intervene in the action.

2. Judgments M b—

C. S., 492, giving a party served by substitution or his representatives the right to appear and defend the action within a prescribed time after judgment will be broadly construed to include within the term "representatives" all persons succeeding the rights of such party, in this case a mortgage creditor.

CIVIL ACTION, before *Alley, J.*, at November Term, 1933, of CHEROKEE.

The findings of fact are substantially as follows:

(1) The Merchants and Manufacturers Bank of Andrews closed its doors on 9 October, 1931, and Gurney P. Hood, Commissioner of Banks, entered upon the liquidation thereof according to law.

(2) Among the assets of the bank was a note for $2,744.23, dated 6 December, 1923, and executed by W. B. Walker and Geo. B. Walker. The interest on same had been paid up to and including 22 May, 1930, but no further payments of principal or interest was thereafter made.

(3) Geo. B. Walker died intestate on 22 January, 1928, while said note was outstanding and unpaid, seized and possessed of several tracts of land, which were specifically described in the pleadings. The deceased left him surviving a widow, Martha Walker, and the following children, who are all of age, to wit: W. B. Walker, Ethel Slagle, Margaret Freel, Gerald B. Walker and G. Wayne Walker.

(4) After the death of intestate and within two years thereof and before an administrator had been appointed, the widow and children aforesaid partitioned the real estate among themselves by warranty deeds executed by said widow and heirs at law to each other.

(5) At the time of the death of G. B. Walker he had and owned personal property of the value of $4,000, which property was disposed of by the widow and children aforesaid.

(6) Thereafter on 27 October, 1931, Clyde S. Freel duly qualified as administrator of the estate of G. B. Walker, deceased. On 29 July, 1932, Gurney P. Hood, Commissioner of Banks, instituted an action against Freel, administrator, and the heirs at law of G. B. Walker, deceased, praying for judgment on the note aforesaid, and that a decree be entered requiring a sale of the lands to make assets to pay said note. The summons was served on all the defendants by personal service except W. B. Walker and wife, Daisy Walker, who at the time were nonresidents of North Carolina, and substituted service was had upon them. The complaint was filed on 29 July, 1932, and answer filed by the administrator on 25 August, 1932. Judgment was rendered at the January Term, 1933, adjudging among other things "the recovery of the aforesaid indebtedness, and also directing the administrator to proceed by proper special proceedings to sell such of the lands of said W. B. Walker as might be necessary to pay the indebtedness of his estate, including the lands conveyed to W. B. Walker and wife by the other heirs of G. B. Walker, deceased."

(7) C. W. Key filed a petition in apt time in 1933 to set aside the said judgment and to be allowed to intervene and answer and defend the same upon the grounds fully set out in his petition filed in said cause, to which reference is hereby made, and the essential parts of said petition are adopted as a part of these findings of fact.

The petition filed by Key referred to in the findings of fact, alleged in substance that on 10 July, 1928, W. B. Walker and wife became indebted to J. B. Carringer, of Knoxville, Tennessee, in the sum of $8,500, and as evidence of said indebtedness they executed and delivered to said Carringer their promissory note for said sum and to secure the same on 10 July, 1929, executed and delivered a deed of trust to J. H. Abernethy, trustee, conveying the land which the said W. B. Walker had received from the estate of his father, G. B. Walker in the partition aforesaid. Carringer had endorsed the note for value to Key as trustee, who alleged that he was the owner and holder of the notes in due course. Key further alleged that neither he nor Abernethy was a party to the action and had no notice whatever of the proceeding until 5 October, 1933, when he came to North Carolina for the purpose of foreclosing his deed of trust, and then for the first time discovered that a judgment had been entered for the sale of the land to make assets to pay the note held by Gurney P. Hood, Commissioner of Banks.

Key contended that he was entitled to be made a party for that: (a) the personal property of intestate should have been applied to the payment of the indebtedness; (b) that the judgment "attempting to subject the said land to sale was procured by collusive action by which the said Martha B. Walker and other heirs at law of George B. Walker, de-

ceased, withdrew their answers in said cause upon agreement with the plaintiff that the other lands of said Geo. B. Walker, deceased, should not be subjected to sale for the purpose of satisfying the alleged indebtedness sued upon, etc.; (c) that if the plaintiff has any note signed by Geo. B. Walker, deceased, that he was an accommodation endorser thereon for the benefit of W. B. Walker, and that more than three years elapsed after the maturity of said obligation and the death of G. B. Walker, and that said obligation is barred by the three-year statute of limitations.

Upon the facts found and after considering the petition of C. W. Key, the trial judge "being of the opinion that the said C. W. Key, petitioner, is not entitled to intervene in this action and have said judgment set aside, or to defend the same, and being of the opinion that his remedy would be by independent action, or at all events, an intervention in the special proceeding ordered and directed by his Honor, Judge Clement, it is therefore considered, adjudged and ordered by the court that the petition of said C. W. Key be, and it is hereby denied and disallowed."

From the foregoing judgment the petitioner Key appealed.

M. W. Bell for Commissioner of Banks.
R. L. Phillips for administrator estate of Geo. B. Walker.
D. Witherspoon for C. W. Key.

BROGDEN, J. Can a creditor of the heir intervene in a proceeding to sell the land of the intestate to make assets to pay the debts of such intestate?

The judgment rendered by Judge Clement, at the January Term, 1933, was not a final judgment because it ordered the administrator "to proceed promptly and with diligence to make the necessary sale or sales in order to obtain assets to pay said debt . . . and this cause is retained for further orders." Consequently the right to intervene is not foreclosed. *Wadford v. Davis,* 192 N. C., 484, 135 S. E., 353. See, also, *Page v. McDonald,* 159 N. C., 38, 74 S. E., 642. Moreover, the judgment affected the rights of W. B. Walker and was based upon substituted service. Consequently Walker would have been entitled to invoke the remedy contained in C. S., 492. This section provides in substance that "the defendant against whom publication is ordered or his representatives may in like manner upon good cause shown be allowed to defend every judgment, or at any time within one year after notice thereof and within five years after its rendition, on such terms as are just," etc. It is asserted that the word "representatives" used in the statute is not broad enough to include a creditor like the petitioner. The courts, however, have been disposed to give the word broad in-

terpretation. For instance, Black's Law Dictionary (second edition), page 1020, declares: "Moreover, the phrase is not always used in its technical sense nor always with reference to the estate of a decedent; and in such other connections its import must be determined from the context; so that, in its general sense of one person representing another, or succeeding to the rights of another, or standing in the place of another, it may include an assignee in bankruptcy or insolvency, an assignee for the benefit of creditors, a receiver, an assignee of a mortgage, a grantee of land, a guardian, a purchaser at execution sale, a widow, or a surviving partner," etc.

Therefore, the court is of the opinion that, in view of the allegations contained in the petition, the petitioner was entitled to intervene. The administrator relies upon *Battle v. Duncan,* 90 N. C., 546, to defeat the right of intervention, but it must be observed in that case the proceeding to make assets had been completed and the funds actually in hand. Hence, the court properly ruled that no intervention was allowable in a proceeding that had already spent its force.

Reversed.

J. H. BROOKS v. GREENVILLE BANKING AND TRUST COMPANY.

(Filed 2 May, 1934.)

1. Actions B f—Held: action was for deceit and not for breach of warranty of title of property mortgaged.

Before signing the note in question as endorser plaintiff communicated with the vice-president of the payee bank and was told that the bank, in making another loan, had investigated the maker's realty securing the loan, and that the papers were all right, and referred plaintiff to the attorney investigating the title as to the amount of encumbrance against the property. The attorney told plaintiff he had found one encumbrance against the property. Plaintiff then signed the note, and after the note became due and the amount thereof had been charged against his deposit in the bank, discovered that there was another encumbrance against the property, and brought action against the bank, alleging "representation, warranties and guaranties" made by the bank's vice-president: *Held,* the cause of action was the wrongful act of the bank in charging plaintiff's deposit with the note, and is founded on deceit and not a warranty of title by a mortgagee.

2. Fraud A a—Essential elements of action for deceit.

The elements of an action for deceit are a misrepresentation with knowledge of its falsity or with culpable ignorance of its truth or falsity, with intent that the other party should act upon it, and reliance on the misstatement by the other party to his damage.

3. Fraud A d—Evidence held insufficient to show maker's knowledge of falsity on representation of culpable ignorance of its truth or falsity.

The evidence tended to show that the vice-president of the payee bank told plaintiff, a prospective endorser of a note, that he did not remember the amount of encumbrance against the property mortgaged by the maker of the note as security, but that the bank had investigated the title in making another loan and that there was but one encumbrance against the property, and referred the endorser to the attorney investigating the title. The attorney told plaintiff that he had found only one encumbrance against the property. After being forced to pay the note, plaintiff discovered that there was another encumbrance against the property. The attorney's investigation of the title was made about a year before the execution of the note: *Held*, even conceding the attorney was the bank's agent, the evidence was insufficient to show knowledge of the falsity of the statement on the part of the vice-president of the bank or culpable ignorance of its falsity sufficient to support an action for deceit.

CLARKSON, J., concurs in result.

APPEAL by plaintiff from a judgment of nonsuit rendered by *Daniels, J.*, at January Term, 1934, of PITT. Affirmed.

In April, 1929, G. C. Buck, Jr., applied to the defendant for a loan of $1,000 to be secured by a crop lien and a deed of trust on a house and lot in the village of Graingers in Lenoir County. The defendant required an endorser of the note who was satisfactory to the vice-president. Buck asked the plaintiff to endorse the note, in consequence of which the plaintiff had an interview with W. H. Woolard, the vice-president of the defendant.

S. T. Carson, an attorney practicing at the Greenville bar, had sometime previously investigated the title to the house and lot when the defendant had made a loan to Buck upon the endorsement of B. B. Sugg. In the conversation Woolard said to the plaintiff, "The paper (Buck's) is all right; we have had an attorney to look it up; I have the records right here." Not finding the records in his file Woolard, after communicating with the attorney who had examined the title, said, "Brooks, Sam has the records." In reference to encumbrances he did not remember the exact amount but thought C. A. Broadway held a mortgage on the house and lot for $2,400. He suggested that the plaintiff examine the records of Mr. Carson, and said that the Broadway mortgage was the only encumbrance on the property. The attorney said he had found a mortgage of $2,400 against the house and lot. The plaintiff then endorsed the note.

The plaintiff testified, "Two years later I learned for the first time that a Mrs. Lancaster in Lenoir County held a note against the property for $1,500 prior to the deed of trust securing the note which I endorsed."

The defendant charged the plaintiff's account with $4.92 interest due on the note, and on 28 December, 1931, the vice-president wrote the plaintiff as follows:

"Dear Mr. Brooks: This is to advise that we are today charging to your savings account $749.63 covering the amount due on the G. C. Buck, Jr., note in amount of $1,000, dated 29 April, 1929, and bearing your endorsement. This is amount due exclusive of the credit made on 30 September, 1930, of $200 by charge of this amount of the account of G. C. Buck, Jr., which credit is attached by Mr. Jefferson of Washington, claiming that this money was proceeds of a crop on which he had a first mortgage, and that this amount is now in litigation which you understand. The note and mortgage will be forwarded to you under separate cover by registered mail. Yours very truly, W. H. Woolard, vice-president."

The plaintiff received the note and mortgage and afterwards went to the bank where the following notation, which he does not deny, was signed: "Note and mortgage referred to above received. 12/29/31. J. H. Brooks."

The plaintiff testified that in drawing out his checking account he left sufficient money in the savings account to pay the note and that he felt it his duty to pay it if he owed it.

At the close of the plaintiff's evidence the court dismissed the action as in case of nonsuit and the plaintiff excepted and appealed.

Gaylord & Harrell for appellant.
Albion Dunn for appellee.

ADAMS, J. The plaintiff brought suit to recover of the Greenville Banking and Trust Company the sum of $4.92 charged against his account for the payment of interest on the note to 2 January, 1932, and the sum of $749.63 charged against his account in payment of the remainder due on the note. In his complaint the plaintiff refers to "representations, warranties, and guaranties" alleged to have been made by the defendant's vice-president; but as he admitted he had never heard of the warranty by a mortgagee of the title he had taken as security for a loan and as the alleged cause of action is "the unlawful and wrongful act" of the defendant in charging the two items against the appellant's account, it is manifest that the plaintiff treats the proceeding in its essential features as an action for deceit. This becomes more apparent by reference to an excerpt in his brief: "Also, if a bank officer in the apparent scope of his duties makes false and fraudulent assertions, in reliance upon which a person acts to his injury the bank is responsible therefor." 3 R. C. L., 456.

The several elements essential to liability for deceit may be reduced to two general heads: (1) the wrongful conduct of the defendant; (2) its effect upon the plaintiff. As to the first, as was said in *Robertson v.*

Halton, 156 N. C., 215, 220, there must be a statement by the defendant (a) which is untrue; (b) the person making the statement, or the person responsible for it, either must know it to be untrue or be culpably ignorant (that is, recklessly and consciously ignorant) whether it be true or not; (c) it must be made with the intent that the plaintiff shall act upon it; and as to the effect, the plaintiff must act in reliance on the statement in the manner contemplated, and thereby suffer damage.

The principle is maintained in a number of cases among the more recent of which are *Peyton v. Griffin*, 195 N. C., 685; *Electric Co. v. Morrison*, 194 N. C., 316; *Rice v. Ins. Co.*, 177 N. C., 128; *Pritchard v. Dailey*, 168 N. C., 330; *Tarault v. Seip*, 158 N. C., 363.

We think his Honor was correct in holding that the plaintiff's evidence is insufficient. The contention that the defendant had employed an attorney to examine the title as a basis for the loan in question is not satisfactory. The vice-president told the plaintiff he did not remember the amount of the encumbrance and referred him to the attorney for specific information of the title, but he did not engage the attorney to examine the title. Concede Woolard's statement that "Mr. Carson was his attorney." The examination which the attorney referred to had been made a year before this interview and the time when the Lancaster mortgage was registered does not appear. We see no culpability upon which the action can be sustained.

After his account had been charged with the interest due and the remainder unpaid, the plaintiff took an assignment of the note and mortgage which are now in his possession. Two years afterwards he first learned of the Lancaster claim.

The act of the vice-president did not subject the defendant to liability. *Quarries Co. v. Bank*, 190 N. C., 277. Judgment

Affirmed.

CLARKSON, J., concurs in result.

A. B. HOPKINS v. SARAH F. SWAIN, ADMINISTRATRIX OF THE ESTATE OF H. F. SWAIN, DECEASED.

(Filed 2 May, 1934.)

1. Mortgages H i—

Chapter 275, Public Laws of 1933, providing that the court might enjoin the consummation of a sale under a mortgage or deed of trust upon certain conditions upon grounds of inadequacy of the bid at the sale is constitutional and valid.

2. Same—Held: court had authority to hear motion to enjoin consummation of sale out of term and county after action for specific performance.

Under sec. 1, chap. 275, Public Laws of 1933, providing that the procedure for enjoining the consummation of a sale under a mortgage or deed of trust should be the same as in cases of injunction and receivership, *it is held,* that where the last and highest bidder at the sale institutes action for specific performance, and the personal representative of the deceased mortgagee gives notice in apt time that she would make application to the resident judge of the district out of term and out of the county for an order restraining the consummation of the sale made by her under the mortgage on the grounds of inadequacy of the bid, and for an order for a resale, the court has authority to hear the motion, and his judgment setting aside the sale and ordering a resale upon his finding that the bid offered at the sale was inadequate, etc., is affirmed on appeal. In this case the notice of sale stipulated that the mortgagee reserved the right to reject all bids, and the court also found as a fact that the bid in question had been rejected.

3. Appeal and Error J c—

The findings of fact by the lower court are presumed correct, with the burden on appellant to assign and show error.

APPEAL by plaintiff from *Small, J.,* at Chambers, 10 February, 1934. From TYRRELL. Affirmed.

The court below made the following order: "This cause coming on to be heard this 10 February, 1934, at Elizabeth City, and being heard by the court upon the affidavits and proofs offered, and the court finding as facts that the lands were offered for sale on 19 December, 1933, at the courthouse door in Tyrrell County, when and where A. B. Hopkins appeared and bid for the same at the sum of $2,650; that the said notices of sale contained a provision that any and all bids could be rejected, and it further appearing that the defendant rejected the bid of the plaintiff and that the clerk of Superior Court of Tyrrell County did not confirm the sale but ordered a resale, and it further appearing that the bid offered was an inadequate one and the court so finds as a fact; and it further appearing that the indebtedness against the said lands was in excess of $4,900, and that irreparable damage would accrue to the defendant both in her representative capacity and individually, it is, therefore, ordered and adjudged by the court that the said sale be and the same is hereby set aside, and that a second sale be held after due and proper advertisement for fifteen days. The defendant is hereby required to enter into a bond to be approved by the clerk of Superior Court of Tyrrell County in the amount of five hundred dollars, conditioned to pay such damages as the plaintiff may sustain if he shall prevail at the final termination of this action.

W. L. SMALL, *Judge First Judicial District.*"

The plaintiff before beginning the hearing objected to the hearing of this matter out of term and out of Tyrrell County Superior Court, and excepted and assigned error. Other exceptions and assignments of error were made by plaintiff and an appeal taken to the Supreme Court.

W. L. Whitley for plaintiff.
J. C. Meekins and M. B. Simpson for defendant.

CLARKSON, J. We do not think that any of the exceptions and assignments of error made by plaintiff can be sustained. In the record, we find: The report of sale, the motion before the clerk to order a resale, the order of resale, the complaint by plaintiff for specific performance, notice of *lis pendens* by plaintiff, answer of defendant. The following notice was served on plaintiff: "The plaintiff is hereby notified that the defendant will, on 10 February, 1934, at 4:00 o'clock p.m., move before his Honor, Walter L. Small, at Elizabeth City, N. C., to vacate the sale heretofore held on 19 December, 1933, under the deed of trust referred to in the complaint in this cause, and for a resale of the lands therein conveyed."

Numerous affidavits at the hearing on the part of plaintiff and defendant are in the record. The plaintiff's are to the effect that the bid on the farm in controversy was a "fair price"—$2,650. The defendant's are to the effect that the cash value of the farm today is "comparatively from $4,000 to $5,000." In the notice of the sale made by defendant that plaintiff contends he became the purchaser, is the following: "The right is reserved to reject any and all bids." Defendant contends that the bid was rejected by her.

In chapter 275, Public Laws, 1933, entitled "An act to regulate the sale of real property upon the foreclosure of mortgages or deeds of trust," is the following: "*The General Assembly of North Carolina do enact:* Section 1. Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the Superior Court, prior to the confirmation of any sale of such real estate by a mortgagee, trustee, commissioner or other person authorized to sell the same, to enjoin such sale or the confirmation thereof, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground which the court may deem sufficient; *Provided,* that the court or judge enjoining such sale or the confirmation thereof, whether by a temporary restraining order or injunction to the hearing, shall, as a condition precedent, require of the plaintiff or applicant such bond or deposit as may be necessary to indemnify and save harmless the mort-

gagee, trustee, *cestui que trust,* or other person enjoined and affected thereby against costs, depreciation, interest and other damages, if any, which may result from the granting of such order or injunction: *Provided further,* that in other respects, the procedure shall be as is now prescribed by law in cases of injunction and receivership, with the right of appeal to the Supreme Court from any such order or injunction.

Section 2. The court or judge granting such order or injunction, or before whom the same is returnable, shall have the right before, but not after, any sale is confirmed to order a resale by the mortgagee, trustee, commissioner, or other person authorized to make the same in such manner and upon such terms as may be just and equitable: *Provided,* the rights of all parties in interest, or who may be affected thereby, shall be preserved and protected by bond or indemnity in such form and amount as the court may require, and the court or judge may also appoint a receiver of the property or the rents and proceeds thereof, pending any sale or resale, and may make such order for the payment of taxes or other prior lien as may be necessary, subject to the right of appeal to the Supreme Court in all cases."

Section 3, in substance: Right of mortgagee to prove in deficiency suits reasonable value of property by way of defense. Inapplicable to purchase by third persons. Court foreclosures unaffected.

Section 4, in substance: Conflicting laws repealed and act not applicable "to tax foreclosure suits or tax sales." We think the act constitutional. *Home Building and Loan Association v. Blaidsdell,* United States Supreme Court Law Edition, Advance Opinion, Vol. 78, No. 5, p. 255. *Woltz v. Safe Deposit Co., ante,* 239. We think under the language of the act, the objection of plaintiff to the jurisdiction that Judge Small had no power or authority to hear the matter out of term and out of the county, cannot be sustained. The act says "The procedure shall be as is now prescribed by law in cases of injunction and receivership." N. C. Code, 1931 (Michie), sec. 843, 851, 852, and 859. *Parker v. McPhail,* 112 N. C., 502. In *Worth v. Bank,* 121 N. C., 343 (347), is the following: "Ordinarily the motion for a receiver must be made before the resident judge of the district, or one assigned to the district or holding the courts thereof by exchange, at the option of the mover. Code, secs. 379, 336 (C. S., 859); *Corbin v. Berry,* 83 N. C., 27. Or, at most, in analogy to the granting of restraining orders, if the motion for a temporary receiver is granted by any other judge than one of those just named, the order must be made returnable before one of such judges. *Galbreath v. Everett,* 84 N. C., 546; *Hamilton v. Icard,* 112 N. C., 589." The action of the plaintiff grew out of the alleged sale. That the price bid was inadequate, inequitable and would result in

irreparable damage. The clerk had certain duties in reference thereto. We think, under the facts and circumstances of the case and under a liberal construction of the before mentioned act, that the court below had full power and authority to hear and pass on the matters in controversy. The findings of fact by the court below are presumed to be correct and the burden is on the appellant to assign and show error. *Seip v. Wright,* 173 N. C., 14. For the reasons given, the judgment of the court below must be

Affirmed.

STATE v. MIKE STEFANOFF AND R. E. BLACK.

(Filed 2 May, 1934.)

1. Criminal Law G l—

A confession otherwise voluntary is not rendered involuntary and therefore incompetent merely by the fact that at the time the one making the confession was under arrest.

2. Same—

The competency of a confession is a matter for the court.

3. Criminal Law G i—Nonexpert witness may testify from observations as to sanity or insanity of defendant.

A nonexpert witness is competent to testify from his observation of defendant, when he had reasonable opportunity to form an opinion based thereon, as to the sanity or insanity of defendant, and defendant's objections that such nonexpert testimony was admitted against him cannot be sustained.

4. Homicide B a—

Where defendants conspire to rob a certain place, and a murder is committed by one or more of them in the attempt to perpetrate the robbery, each of them is guilty of murder in the first degree. C. S., 4200.

APPEAL by defendants from *Finley, J.,* at September Term, 1933, of ALEXANDER.

Criminal prosecution tried upon indictment charging the defendants, Mike Stefanoff and R. E. Black, and two others, in one count, with conspiracy to rob the Merchants and Farmers Bank of Taylorsville, and, in a second count, with the murder of T. C. Barnes committed in the attempted perpetration of said robbery.

Verdict as to the two defendants on trial: Guilty of murder in the first degree (as shown by return to writ of *certiorari*).

Judgment as to each defendant on trial: Death by electrocution.

The prisoners appeal, assigning errors.

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

Trivette & Holshouser, J. F. Jordan and F. J. McDuffie for defendants.

STACY, C. J. The record discloses that on Thursday, 27 July, 1933, the defendants, Mike Stefanoff and R. E. Black, and two others not yet taken, planned to rob the Merchants and Farmers Bank of Taylorsville. The conspiracy took place at the home of Mike Stefanoff in North Wilkesboro. The four conspirators drove to Taylorsville the next day, Friday, in a Chevrolet sedan, looked over the situation, but presently desisted from their purpose upon seeing a number of policemen on the street. They returned again the following morning, Saturday, in the same automobile, and entered the bank, not together but one at a time, so as to give the appearance that they were strangers. Stefanoff asked the cashier, T. C. Barnes, to change a quarter, and as the latter turned to get the change, two of the bandits presented their guns, and, in the melee and firing which ensued, they shot the cashier to death.

Both of the defendants, after apprehension and incarceration, confessed their part in the attempted robbery and homicide. The admission of these confessions, made, as they were, while the defendants were under arrest, forms the basis of a number of exceptions. It is elementary that a voluntary confession is admissible in evidence against the one making it; an involuntary confession is not. A confession is voluntary in law when—and only when—it was in fact voluntarily made. *S. v. Jones,* 203 N. C., 374, 166 S. E., 163.

Where there is no duress, threat or inducement, and the court found there was none here, the fact that the defendants were under arrest at the time the confessions were made, does not *ipso facto* render them incompetent. *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187; *S. v. Drakeford,* 162 N. C., 667, 78 S. E., 308. "We are not aware of any decision which holds a confession, otherwise voluntary, inadmissible because of the number of officers present at the time it was made. Nor has the diligence of counsel discovered any." *S. v. Gray,* 192 N. C., 594, 135 S. E., 535.

The competency of the confessions was a matter for the judge. *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603. He ruled them admissible. No error in this respect has been made to appear on the record.

The defendant, Mike Stefanoff, interposed the further defense of mental irresponsibility or insanity. *S. v. Keaton,* 205 N. C., 607. He offered evidence tending to show that he is suffering from *dementia praecox,* but the jury found against him on this plea. *S. v. Jones, supra.* His objections that nonexperts were allowed to express opinions upon

his sanity, or ability to know the difference between right and wrong, are not well founded. *S. v. Keaton, supra; S. v. Jones, supra; S. v. Houser,* 202 N. C., 738, 164 S. E., 114. Anyone who has observed another, or conversed with him, or had dealings with him, and a reasonable opportunity, based thereon, of forming an opinion, satisfactory to himself, relative to the mental condition of such person, is permitted to give his opinion in evidence upon the issue of mental capacity, though the witness be not a psychiatrist or expert in mental diseases. *S. v. Keaton, supra.* "One not an expert may give an opinion, founded upon observation, that a certain person is sane or insane." *Whitaker v. Hamilton,* 126 N. C., 465, 35 S. E., 815.

The case was tried upon the theory that if a conspiracy were formed to rob the bank, and a murder committed by any one or more of the conspirators in the attempted perpetration of the robbery, each and all of them would be guilty of the murder. This is a correct principle of law. *S. v. Bell,* 205 N. C., 225, 171 S. E., 50. It is provided by C. S., 4200 that a murder "which shall be committed in the perpetration or attempt to perpetrate any . . . robbery, burglary or other felony, shall be deemed to be murder in the first degree." *S. v. Donnell,* 202 N. C., 782, 164 S. E., 352; *S. v. Miller,* 197 N. C., 445, 149 S. E., 590; *S. v. Logan,* 161 N. C., 235, 76 S. E., 1. There was no evidence of a lesser degree of homicide. *S. v. Spivey,* 151 N. C., 676, 65 S. E., 995.

A searching investigation of the record leaves us with the impression that it is free from reversible error. The verdict and judgment will be upheld.

No error.

HENRY O. WOMACK v. FEDERAL LIFE INSURANCE COMPANY.

(Filed 2 May, 1934.)

1. Insurance R a—Evidence held sufficient to support finding that insured had not changed occupation to more hazardous one.

Insured brought suit on a policy of accident insurance providing for a diminishing schedule of liability if the insured should change his occupation to one classified in the policy as more hazardous. When the policy was issued plaintiff was employed as warehouse foreman, and as a part of his duties he was sometimes required to run the machinery in the plant. Thereafter, plaintiff was discharged, and while unemployed, returned to the plant to cut dewberry stakes for his garden, and while using a circular saw for this purpose, accidentally cut his hand off. Defendant contended that plaintiff was injured while engaged in the more hazardous occupation of "sawyer not using automatic guard": *Held,*

the change of occupation referred to in the policy did not relate to mere temporary acts generally performed by those in other occupations, and as the act causing the injury in suit could have been done while insured was engaged in the occupation of warehouse foreman, the jury's finding from the evidence was that the insured had not changed his occupation to one classified by the policy as more hazardous will not be disturbed on appeal.

2. Insurance E b—

Clauses in insurance policies providing for forfeiture of all or part of the benefits provided therein will be construed favorably to assured.

APPEAL by defendant from *Sink, J.*, at October Special Term, 1933, of MECKLENBURG.

Civil action to recover on a policy of accident insurance.

Liability is admitted, but the amount is contested over the following provisions in the suit policy:

"This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the company's classification of risks and premium rates in the event that the insured is injured after having changed his occupation to one classified by the company as more hazardous than that stated in the policy or while he is doing any act or thing pertaining to any occupation so classified except ordinary duties about his residence or while engaged in recreation, in which event the company will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limit so fixed by the company for such more hazardous occupation."

The application upon which the policy was issued contains the following questions and answers:

"3. What is your occupation? Superinted. of warehouse, not foreman. 4. What are the duties of your occupation? Office and superintending duties only."

The plaintiff was employed at the Grinnell Company, dealers in sprinkler systems, and it was a part of his duties to instruct the workmen in the use of the machinery, including the operation of a ripsaw, etc., and, in emergencies, to run the machinery in the shop.

In July, 1932, the plaintiff was relieved of his duties with the Grinnell Company due to poor business conditions. He joined the army of the unemployed and retired to his home near Charlotte. On 5 October, 1932, plaintiff went to the Grinnell plant to saw some posts into stakes to use in staking dewberries on his place. While so using the circular saw, his foot slipped on a round piece of pipe and he fell against the saw and cut off his left hand nearly half way to the elbow.

Plaintiff contends that, under the terms of the policy, he is entitled to recover $2,250, the amount provided for the loss of one hand, plus $75.00 surgical fee.

It is the contention of the defendant that the plaintiff had changed his occupation from that which he held when the policy was issued, "Superintendent," and was engaged in an act or thing pertaining to an occupation, "Sawyer, not using automatic guard," classified as six times more hazardous when he was injured; and that the maximum liability under the policy is $375.00. Judgment was tendered for this amount.

Upon the issues thus joined and raised by the pleadings, the jury returned a verdict in favor of the plaintiff's contention. From the judgment entered thereon, the defendant appeals, assigning errors.

Taliaferro & Clarkson for plaintiff.
J. Laurence Jones and J. L. Delaney for defendant.

STACY, C. J. The evidence shows, and the jury found, that plaintiff was engaged in no more hazardous undertaking at the time of his injury than was imposed by his duties as superintendent when the policy was issued. *Hoffman v. Ins. Co.*, 127 N. C., 337, 37 S. E., 466. In the face of this showing and finding, it would seem that plaintiff is entitled to recover the full amount provided for the loss of a hand, as stipulated in the policy, and not according to the schedule of diminished liability. *Smith v. Ins. Co.*, 179 N. C., 489, 102 S. E., 887. There was no change to a more hazardous occupation as contemplated by the clause in question. Indeed, in no legitimate sense could it be said that plaintiff was pursuing the occupation of a "Sawyer not using automatic guard" at the time of his injury. *Simmons v. Travelers' Asso.*, 112 N. W. (Neb.), 365.

It is contended, however, that, at the time of the accident, plaintiff was doing an act or thing pertaining to the more hazardous occupation of sawyer, which automatically reduced the indemnity under the policy. *Non constat* that the same act or thing might not have been done by the plaintiff as superintendent, the position he held when the policy was issued.

It appears, then, that as superintendent of the Grinnell plant, plaintiff might have been engaged in the same act which produced his injury without diminishing the liability under the policy. Hence, it is just as reasonable to say that at the time of plaintiff's injury he was engaged in an act or thing pertaining to the occupation of superintendent, as it is to refer it to the more hazardous occupation of sawyer. The evidence supports the verdict, and we are bound by the jury's finding.

The provision with respect to diminished liability has reference to a changed occupation, classed as more hazardous than the one stated in the policy, and not to mere temporary acts generally performed by those in other occupations, where there has in fact been no change to a more hazardous occupation, but only a loss of assured's position. *Redmond v. Ins. Co.*, 96 Neb., 744, 148 N. W., 913; *Thorne v. Casualty Co.*, 106 Me., 274, 6 Atl., 1106; *Miller v. Ins. Co.*, 168 Mo. App., 330.

The clause in question, being one in the nature of a forfeiture of a portion of the benefits provided for in the policy, will be construed favorably to the assured. *Smith v. Ins. Co.*, 175 N. C., 314, 95 S. E., 562; *Cottingham v. Ins. Co.*, 168 N. C., 259, 84 S. E., 274; *Gazzam v. Ins. Co.*, 155 N. C., 330, 71 S. E., 434. The courts look with disfavor upon forfeitures. *Johnson v. Ins. Co.*, 172 N. C., 142, 90 S. E., 124.

The plaintiff had not changed his occupation to a more hazardous one. He was unemployed at the time and had temporarily returned to do an act or thing which might have pertained to his original occupation. This did not increase the hazard against which the defendant's policy was intended to protect him. The verdict and judgment will be upheld.

No error.

ADELL CARR ET AL. v. E. S. PARSONS.

(Filed 2 May, 1934.)

Deeds and Conveyances F b—Benefits arising from exercise of option in timber deed for renewal period held to inure to grantee of fee.

The timber deed in this case provided that at the expiration of the time stipulated therein for the cutting of the timber the grantee might renew the right to cut timber for a stipulated renewal period by paying taxes from year to year within the renewal period on that portion of the land upon which he exercised the option. Thereafter the grantor in the timber deed conveyed the fee to another subject to the rights of the grantee in the timber deed: *Held*, under *Bateman v. Lumber Co.*, 154 N. C., 248, the right arising upon the exercise of the option inures to the benefit of the owner of the fee at the time the option is sought to be exercised, and the right under the option can be acquired only by notice and payment to the then owner of the fee.

APPEAL by defendant from *Frizzelle, J.*, at January Term, 1934, of DUPLIN.

Civil action to restrain defendant from entering upon lands, cutting and removing timber therefrom, under extension provision in deed.

The case was heard on an agreed statement of facts which may be abridged and stated as follows:

1. On 14 January, 1927, E. R. Penny and wife conveyed to E. S. Parsons all the timber of every kind and description on 375 acres in Goshen Swamp, Duplin County, by deed duly registered, which contains the following stipulation:

"It is understood and agreed that the said party of the second part, his heirs and assigns shall have until 14 January, 1932, in which to enter upon the tract of land above described and remove the timber therein conveyed, and if the said timber has not all been removed then it is agreed that the said party of the second part shall have five years longer in which to do so, by paying to said E. R. Penny the yearly tax assessed against that part of said lands on which the timber has not been removed, such payments to be made from year to year as said taxes may fall due, but it shall not be obligatory on the said party of the second part to pay for any more years extension than used by him in the cutting and removal of said timber."

2. Thereafter, on 13 December, 1928, E. S. Parsons and wife, by deed duly registered, conveyed all the rights to the gum and cypress timber, acquired under the Penny deed, to L. D. Adkins.

3. On the following day, Adkins, by deed duly registered, conveyed all the rights he had acquired under the Parsons deed to E. McN. Carr. This deed contains the following stipulation:

"The said party expressly reserves to said E. S. Parsons, his heirs and assigns, the rights which they now have to enter upon said lands and cut and remove other timber therefrom and to exercise all other rights to them conveyed by said E. R. Penny and wife, in cutting and removing the timber described in said conveyance except that which is conveyed to the said party of the second part hereby."

4. On 6 March, 1929, E. R. Penny and wife, by deed duly registered, conveyed to E. McN. Carr the fee in the lands described in the timber deeds above mentioned, with the following exception:

"Except timber rights which have been sold to E. S. Parsons, Clarkton, N. C."

5. E. McN. Carr died intestate, 13 September, 1930, leaving him surviving the plaintiffs herein.

6. E. S. Parsons did not notify the plaintiffs on or before 14 January, 1932, or thereafter, that he intended to exercise any rights under the extension clause in the deed from E. R. Penny and wife to E. S. Parsons, nor did he tender to plaintiffs any sum of money in payment of said extension right.

7. On 24 June, 1933, E. R. Penny gave to E. S. Parsons the following receipt: "Received of E. S. Parsons Lumber Co. $13.50—thirteen dollars and fifty cents, same being for taxes for one year's extension on land according to timber deed. This is for the year 1932."

8. Plaintiffs have paid taxes on the land in question for the year 1932, but not for 1933.

9. Defendant is ready, able and willing to pay the taxes on land on which timber has not been cut and removed, as per stipulation in deed.

10. Summons was issued herein prior to the due date of the taxes in 1933.

From a judgment enjoining the defendant from further cutting any timber upon the land in question, he appeals assigning error.

George R. Ward for plaintiffs.
Rivers D. Johnson and Hector Clark for defendant.

STACY, C. J. The extension clause in question partakes of the nature of an option and is available to the grantee only upon notice and payment when due of "the yearly tax assessed against that part of the land on which the timber has not been removed." The right, therefore, which arises from the exercise of this option, inures to the benefit of the present owners or those primarily liable for the yearly tax. *Hood v. McGill, ante,* 83.

Speaking to the subject in *Bennett v. Lumber Co.,* 191 N. C., 425, 131 S. E., 741, it was said:

"The decisions on the subject are to the effect that these extension provisions, of the kind here presented, are in the nature of options, or unilateral executory contracts subject to be converted into bilateral executed contracts only upon compliance with the terms stated therein, and that the estates or interests resulting therefrom arise at the time the conditions are complied with and the options exercised. Hence, nothing else appearing, the prices to be paid for said extension rights belong to those who own the property at the time the options are exercised, and from whose estates the interests then arising necessarily pass. *Dill v. Reynolds,* 186 N. C., 293."

The case of *Bateman v. Lumber Co.,* 154 N. C., 248, 70 S. E., 474, is so nearly like the present one in principle that we are content to rest our decision on the *Bateman case* and the principles announced therein, without further elaboration. The authorities cited by appellant are distinguishable.

Affirmed.

A. H. VANN AND J. A. MOORE, EXECUTORS OF THE LAST WILL AND TESTAMENT OF S. C. VANN, DECEASED; AND A. H. VANN AND J. A. MOORE, PERSONALLY, v. JAMES J. COLEMAN AND F. N. SPIVEY, SHERIFF OF FRANKLIN COUNTY.

(Filed 2 May, 1934.)

Pleadings H a—Clerk's order allowing nonresident served by publication to file answer after time under C. S., 492, held without error.

A nonresident defendant served by publication, and failing to file answer within the time prescribed by law, may make application to the clerk before judgment for good cause shown to be allowed to file pleadings and defend the action, C. S., 492, and where upon such application and affidavits filed by him setting forth facts showing prima facie good cause and a meritorious defense, the clerk finds as a fact that he has a meritorious defense and has shown good cause, the clerk's order allowing him to file answer and defend the action will not be held for error for the clerk's failure to more specifically find the facts constituting such meritorious defense, and it is within the discretion of the judge of the Superior Court on appeal to enter an order allowing an extension of time for filing answer. C. S., 536, 637.

APPEAL by plaintiffs from *Harris, J.*, at November Term, 1933, of FRANKLIN. Affirmed.

The plaintiffs made several exceptions and assignments of error and appealed to the Supreme Court.

G. M. Beam, J. B. Hicks and J. H. Bridgers for plaintiffs.
Simms & Simms and W. L. Lumpkin for defendants.

CLARKSON, J. The question presented, as stated by plaintiffs; has the court the power to allow a defendant to plead after service of summons in the manner provided by law for nonresidents: unless the court finds facts showing good cause and a meritorious defense upon proper and competent evidence? On the first proposition, we think on the record, the facts showed good cause and the clerk so found. On the second proposition, we think, on the record there must be set forth facts showing prima facie a valid defense which was shown in this case, and the clerk so found that the defendants had a good meritorious defense. The present case was brought after the decision of this Court in *Coleman v. Vann,* 205 N. C., 436. In this action, the service of summons was by publication—the time limit was 16 September, 1933, or within 30 days thereafter, to answer or demur to the complaint. The defendant before judgment, made a motion on 20 October, 1933, before the clerk of the Superior Court of Franklin County, North Carolina, to file pleadings. The motion was accompanied by affidavit of defendant

Coleman, setting forth that his home was in Washington, D. C., and that he instantly undertook to defend the action as soon as he heard of it, on 18 October, 1933; that he had a good and meritorious defense and set forth the facts showing same, and for other reasons.

The order of the clerk, in part, is as follows: "The court further finds for the purpose of this order that the said defendant, James J. Coleman, has a good and meritorious defense to the plaintiffs' alleged cause of action, and finds that for the purposes of this order the facts are as set forth in the affidavit which the said James J. Coleman has filed in this action. The court further finds and adjudges that good and sufficient cause has been shown by the defendant, James J. Coleman, for allowing him to defend this action and for making of this order, and that this order should be made; and hereupon, it is ordered and adjudged that the defendant, James J. Coleman, be and he is allowed to defend this action, and he shall be and is permitted within thirty days from this date to plead herein. Dated this 20 October, 1933."

We see no error in this order. C. S., 492; *Burton v. Smith,* 191 N. C., 599; *Foster v. Allison Corporation,* 191 N. C., 166; North Carolina Practice and Procedure in Civil Cases (McIntosh), sec. 654. In *Montague v. Lumpkin,* 178 N. C., 270 (272), it is said: "It is also equally well settled that a judgment by default will not be set aside unless facts are alleged which, if true, would establish a defense. 'The court having jurisdiction of the subject and the parties, there is a presumption in favor of its judgment, and the burden of overcoming this presumption is with the party seeking to set aside the judgment. He must set forth facts showing prima facie a valid defense, and the validity of the defense is for the court and not with the party. Although there was irregularity in entering the judgment, yet unless the court can now see reasonably that defendants had a good defense, or that they could not make a defense that would affect the judgment, why should it engage in the vain work of setting the judgment aside now and then be called upon soon thereafter to render just such another between the same parties? To avoid this, the law requires that a prima facie valid defense must be set forth.' *Jeffries v. Aaron,* 120 N. C., 169, approved in *Miller v. Smith,* 169 N. C., 210, and in other cases." *Garner v. Quakenbush,* 187 N. C., 603; *Holcomb v. Holcomb,* 192 N. C., 504; *Helderman v. Mills Co.,* 192 N. C., 626; *Crye v. Stoltz,* 193 N. C., 802; *Bowie v. Tucker,* 197 N. C., 671; *Fellos v. Allen,* 202 N. C., 375.

In the present action, a prima facie defense was set forth by defendants and the clerk found that defendants had a good and meritorious defense. The plaintiff made certain exceptions and assignments of error to the order of the clerk and appealed to the Superior Court. The judgment of the court below, in part, is as follows: "It is ordered by the

court, in the exercise of its discretion, that the time for pleading by the said James J. Coleman be and is extended so as to permit the filing of said pleading, and said James J. Coleman is allowed to file said pleading and defend in this action, and that his said pleading shall remain of record as heretofore filed. This 6 November, 1933. W. C. Harris, resident judge, etc."

It is not necessary to consider the order of Judge Harris, at the November Term, 1933, it was made by consent. We see no error in the judgment of the court below. We think the matter was in the sound discretion of the court below on appeal. C. S., 536; C. S., 637; *McNair v. Yarboro,* 186 N. C., 111; *Howard v. Hinson,* 191 N. C., 366; *Manufacturing Co. v. Kornegay,* 195 N. C., 373; *Bell v. Tea Co.,* 201 N. C., 839; *Goodman v. Goodman,* 201 N. C., 808. The judgment of the court below is

Affirmed.

JOHN P. DAIL, EXECUTOR OF THOMAS HILL, DECEASED (THOMAS HILL ORIGINAL PARTY PLAINTIFF), v. J. T. HEATH, C. S. C. (AND MRS. ANNIE BARWICK, MRS. ELIZA J. SUTTON AND J. M. ALDRIDGE, ADMINISTRATOR OF BARBARA HILL, DECEASED, ADDITIONAL PARTIES DEFENDANT).

(Filed 2 May, 1934.)

1. Evidence D c—Objection that witness testifying in regard to bonds did not identify them as those in suit is not sustained.

Testimony of a declaration of deceased against his interest in respect to the bonds in suit which were in the possession of one of the litigants was objected to on the ground that the bonds were not identified. It appeared that the only bonds in possession of the litigant were the bonds in suit, and the objection is not sustained.

2. Evidence E b—Silence in face of adverse claim by another under circumstances of this case held competent as admission by acquiescence.

Testimony that the person under whom defendants claim stated in the presence and hearing of the person under whom plaintiff claims that the bonds in suit belonged to her, and that the statement was heard and understood by the party under whom plaintiff claims and that he had ample opportunity to deny or dissent and did not do so, *is held* competent as an admission by acquiescence.

3. Trial E f—

Exceptions to the court's statement of the contentions of a party will not be sustained on appeal where the alleged error was not called to the court's attention in apt time and no exceptions entered at the time.

4. Appeal and Error J e—Instruction held not to constitute reversible error in view of all the evidence adduced at the trial.

An instruction in this case that if the husband bought the bonds in suit with money derived from crops grown on his wife's lands the bonds

would belong to the wife in the absence of evidence that he had rented the lands from his wife *is held* not to contain reversible error because of the provisions of C. S., 2514, that the husband should be liable for rents only for one year prior to the institution of action, there being evidence that the wife had repeatedly claimed title to the bonds, and there being no evidence that the husband had bought the bonds except that they were thereafter in his possession, and the evidence tending with equal force to show that the bonds were in the possession of the wife.

APPEAL by plaintiff from *Grady, J.*, at November Term, 1933, of LENOIR. No error.

The purpose of the action is to determine the ownership of three unregistered United States 4¼ per cent coupon gold bonds, payable to bearer, held by J. T. Heath as clerk of the Superior Court pending the trial. The claimants are the plaintiff John P. Dail, executor of Thomas Hill, last husband of Barbara Hill, the defendants Annie Barwick and Eliza J. Sutton, children of Barbara Hill by her former husband Levi Hill, and J. M. Aldridge, administrator of Barbara Hill.

Barbara Hill under the will of Levi Hill had an estate for life in the farm on which she and her husband Thomas Hill resided and Annie Barwick and Eliza J. Sutton were remaindermen. It does not definitely appear who purchased and paid for the bonds.

The jury returned the following verdict:

1. Were the $2,000 worth of Liberty Bonds in question the property of Mrs. Barbara Hill, as alleged by the defendants? Answer: Yes.

2. If so, did Mrs. Barbara Hill give said bonds to her two daughters, Mrs. Barwick and Mrs. Sutton, during her lifetime as alleged? Answer: Yes.

Judgment declaring Annie Barwick and Eliza J. Sutton the owners and entitled to the immediate possession of the bonds. Plaintiff excepted and appealed.

Rouse & Rouse for appellant.

Wallace & White and Shaw & Jones for appellees.

ADAMS, J. In a conversation with the plaintiff's testator, F. A. Garner referred to government bonds found in Mrs. Barwick's home and the testator (Thomas Hill) remarked, "Yes, the bonds were some I gave my wife; they were her bonds." An exception was taken by the plaintiff on the ground that the bonds had not been identified; but the only bonds claimed by either party were those in the possession of Mrs. Hill and of her two daughters and their identity could not reasonably be questioned.

Mrs. Murvin testified that Mrs. Hill had said in the presence and hearing of her husband, Thomas Hill, that she had given the bonds to

her daughters, Mrs. Barwick and Mrs. Sutton, and had given Mrs. Barwick the keys to the trunk in which the bonds were kept; also that the statement had been made while they were resting during the noon hour. The husband heard and understood his wife's statement at a time when he had ample opportunity to deny or dissent, and from his passiveness or silence an inference of acquiescence might naturally be deduced. *S. v. Jackson,* 150 N. C., 831; *S. v. Walton,* 172 N. C., 931; *S. v. Pitts,* 177 N. C., 543.

Exceptions 7, 8, 9, and 10 are addressed to the statement of contentions which were not called to the attention of the court and to which no exception was entered, and the appellant cannot first complain when the case comes up on appeal. *Proctor v. Fertilizer Co.,* 189 N. C., 243; *S. v. Ashburn,* 187 N. C., 717. It is objected, however, that his Honor erroneously instructed the jury that upon the admitted facts Thomas Hill had no interest in the crops grown upon the lands occupied by him and his wife; that in the absence of evidence tending to show he had rented the lands from her the presumption is the crops were hers; and if he invested the rents and profits of the farm the property purchased by him would belong to his wife and not to him.

As a rule property purchased by a husband with the money of his wife creates a resulting trust in her favor (*Tyndall v. Tyndall,* 186 N. C., 272); but the appellant relies on C. S., 2514, which provides, "But no husband who, during the coverture (the wife not being a free trader under this section) has received, without objection from his wife, the income of her separate estate, shall be liable to account for such receipt for any greater time than the year next preceding the date of the summons issued against him in an action for such income or next preceding her death." If this section should be deemed applicable to suits of this character the instruction complained of does not call for a new trial. There is evidence that Thomas Hill received the income from his wife's farm and at one time had the bonds in his possession, and there is evidence that his wife had them in her possession, claimed them, and repeatedly said that she had given them to her two daughters. There is no evidence that Thomas Hill bought the bonds with his wife's money or, indeed, that he had bought them at all, apart from evidence tending to show they were in his possession. On the latter point the evidence tends with equal force to sustain the possession of the defendants. In these circumstances we do not regard the instruction complained of as just cause for disturbing the judgment and verdict. *McNeill v. R. R.,* 130 N. C., 256; *Pressly v. Yarn Mills,* 138 N. C., 410; *Eubanks v. Alspaugh,* 139 N. C., 520.

We think the evidence tending to show Mrs. Hill's delivery of the bonds to her daughters was properly submitted to the jury.

No error.

IN THE MATTER OF THE WILL OF H. L. ROWLAND, DECEASED.

(Filed 2 May, 1934.)

Wills D c—Where execution of paper-writing unequivocally dispositive on its face is duly proven, animus testandi is conclusively presumed.

Where propounders introduce ample evidence that the paper-writing was in the handwriting of deceased and there is no evidence to the contrary, and the paper-writing is dispositive on its face and unequivocally shows the intention of deceased that it should operate as his will, the *animus testandi* is conclusively presumed, and it is error for the court to submit the question of such intention to the jury over the objection of propounders.

APPEAL by propounders from *Harris, J.*, at November Term, 1933, of FRANKLIN. New trial.

This is a proceeding for the probate in solemn form of a paper-writing propounded as the will of H. L. Rowland, who died in Franklin County on 29 June, 1930.

At the trial, three witnesses, whose credibility was not impeached, testified, each, that he knew the handwriting of H. L. Rowland, deceased, and verily believed that the paper-writing propounded as his will, and every part thereof, including his name which is inserted therein, is in his handwriting. There was no evidence to the contrary. It was admitted by the caveators that said paper-writing is in the handwriting of H. L. Rowland.

There was evidence tending to show that said paper-writing was found, after the death of H. L. Rowland, among his valuable papers and effects. There was evidence to the contrary.

The paper-writing propounded as the will of H. L. Rowland is testamentary in form and purports on its face to be the will of the writer, who thereby gives to persons named therein as devisees, parcels of land described in said paper-writing.

The propounders tendered the following issues:

"1. Is the paper-writing offered for probate, and every part thereof, in the handwriting of H. L. Rowland, deceased, with his name subscribed thereto, or inserted in some part thereof?

2. Was said paper-writing found after the death of H. L. Rowland, deceased, among his valuable papers and effects?"

The court declined to submit these issues to the jury, and in lieu thereof submitted issues which were answered as follows:

"1. Did H. L. Rowland write all of the paper-writing propounded with the intention that it should be operative as his last will and testament, and was it found, after his death, among his valuable papers or effects? Answer: No.

2. Is said paper-writing the valid last will and testament of said H. L. Rowland? Answer: No."

From judgment that the paper-writing propounded in this proceeding as the will of H. L. Rowland, deceased, is not his will, the propounders appealed to the Supreme Court.

Yarborough & Yarborough for propounders.
Thos. W. Ruffin for caveators.

CONNOR, J. On a former appeal by the propounders from a judgment in this proceeding adverse to them (*In re Will of Rowland,* 202 N. C., 373, 162 S. E., 897), it was said: "Whether the paper-writing in question is the valid will of H. L. Rowland, deceased, we express no opinion, but there was error in holding, as a matter of law, that it is not sufficient in form to constitute a will. *In re Johnson,* 181 N. C., 303, 106 S. E., 841; *Alexander v. Johnston,* 171 N. C., 468, 88 S. E., 785. It is dispositive on its face, and the name of the alleged testator is inserted therein, in his own handwriting, followed by the words: 'This being my will.' C. S., 4131. *In re Westfeldt,* 188 N. C., 702, 125 S. E., 531; *In re Harrison,* 183 N. C., 457, 111 S. E., 867; *In re Bennett,* 180 N. C., 5, 103 S. E., 917."

In *In re Southerland,* 188 N. C., 325, 124 S. E., 632, it is said: "It is not denied that the burden was on the propounders to establish the formal execution of the writing (*In re Chisman,* 175 N. C., 420, 95 S. E., 769), but it is insisted that, upon proof of such execution, the *animus testandi* was to be inferred. This principle obtains where the testamentary character of the instrument appears on its face, and only a question of construction is presented (*Outlaw v. Hurdle,* 46 N. C., 150); for when the *animus testandi* is established the character of the instrument is fixed; but when the instrument on its face is equivocal and it is doubtful whether it is intended to operate as a will, a deed, or a gift, parol evidence may be considered."

The paper-writing offered for probate in this proceeding as the will of H. L. Rowland is not equivocal on its face, nor can there be any doubt that it was intended by the writer as his will, to become effective at his death, as a disposition of the lands described therein. The *animus testandi* is conclusively presumed from the language of the paper-writing. It was error to submit to the jury the question of the intention of the writer of the instrument.

The proceeding is remanded for a new trial on the issues tendered by the propounders.

New trial.

GEORGE H. READ v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 2 May, 1934.)

Insurance R c—Proof of disability temporary in nature is not sufficient for recovery on total and permanent disability clause in policy.

Plaintiff brought suit on a clause in an insurance policy providing certain benefits if plaintiff should furnish due proof of total and permanent disability and that such disability had existed for three months. It was admitted at the trial that at the time of instituting the action plaintiff was totally disabled and had been so disabled for more than three months, but the only evidence as to the permanency of the disability was the certificate of plaintiff's physician that the disability was probably temporary and would be removed by operations on plaintiff's eyes for cataracts. *Held*, in the absence of evidence that such disability was at least probably permanent at the time of instituting the action, defendant's motion as of nonsuit should have been allowed.

APPEAL by defendant from *Hill, Special Judge,* at October Special Term, 1933, of MECKLENBURG. Reversed.

This is an action to recover the sum of $50.00, alleged to be due by the defendant to the plaintiff, under the provisions of a supplementary contract attached to and made a part of a policy of life insurance issued by the defendant to the plaintiff.

The action was begun in the court of a justice of the peace of Mecklenburg County, on 19 July, 1932, and was tried by said court on 19 August, 1932.

From judgment that the plaintiff recover of the defendant the sum of $50.00, and the costs of the action, the defendant appealed to the Superior Court of Mecklenburg County.

At the trial in the Superior Court, issues submitted to the jury were answered as follows:

"1. Did the plaintiff become totally and permanently disabled as a result of bodily injury or disease occurring and originating after the issuance of the policy sued on herein, so as to be prevented thereby from engaging in any occupation and performing any work for compensation or profit, and did such disability continue uninterruptedly for a period of at least three months, as alleged in the complaint? Answer: Yes."

2. What sum, if any, is plaintiff entitled to recover of the defendant? Answer: $50.00."

From judgment that plaintiff recover of the defendant the sum of $50.00, with interest from 1 May, 1932, and the costs of the action, the defendant appealed to the Supreme Court.

Shore & Townsend for plaintiff.
Cansler & Cansler for defendant.

CONNOR, J. The supplementary contract attached to and made a part of the life insurance policy issued by the defendant to the plaintiff, provides that in consideration of the application for said contract, and the payment of the premium stipulated therein, annually, upon receipt by the defendant from the plaintiff of due proof (1) "that the insured has, while said policy and this supplementary contract are in full force and effect and prior to the anniversary date of said policy nearest to the sixtieth birthday of the insured, become totally and permanently disabled, as the result of bodily injury or disease occurring and originating after the issuance of said policy, so as to be prevented thereby from engaging in any occupation and performing any work for compensation or profit, and (2) that such disability has already continued uninterruptedly for a period of at least three months," the defendant will, during the continuance of such disability, pay to the plaintiff the sum of $50.00, monthly.

It is further provided in said supplementary contract that "notwithstanding that proof of disability may have been accepted by the company as satisfactory, the insured shall at any time on demand from the company, furnish due proof of the continuance of such disability, but after such disability shall have continued for two full years, the company will not demand such proof oftener than once in each subsequent year."

At the trial, it was admitted that the plaintiff was totally disabled from December, 1931, to September, 1933, on account of cataracts on his eyes, and therefore totally disabled at the date of the commencement of this action. It was further admitted, however, that the cataracts had been removed by operations on his eyes, and that the plaintiff is no longer totally disabled.

The only evidence offered by the plaintiff in support of his contention that his disability was not only total but also permanent was the certificate of the physician who performed the operations for the removal of the cataracts from his eyes. This certificate was filed with the defendant as proof of disability in accordance with the provisions of the supplementary contract. The last operation on plaintiff's eyes was performed by the physician on 8 March, 1932. The physician certified that plaintiff's disability was probably temporary, and that he would be able to resume his work probably within three or four months.

In the absence of evidence tending to show that plaintiff's disability on account of the cataracts on his eyes, was not only total, but also at least probably permanent, at the date of the commencement of this

action, there was error in the refusal by the court to allow defendant's motion for judgment as of nonsuit. See *Mitchell v. Assurance Society*, 205 N. C., 721, 172 S. E., 497, where the following quotation from *Metropolitan Life Insurance Co. v. Blue*, 222 Ala., 665, 133 So., 707, 79 A. L. R., 852, is approved:

"Appellee conceives that because the policy provides for payments to begin within three months after total disability intervenes, and because the insurer reserves the right to call for additional proofs from time to time, after accepting proofs of permanent total disability, the expression 'totally and permanently disabled' covers that disability for three months, or some other undefined period. Some authority for such construction is not lacking. But the great weight of authority is otherwise, and for good reason. 'Permanent' has a well known obvious meaning; is in contradiction to 'temporary,' so used in legal enactments as well as in contracts. The construction insisted upon would wipe out all distinction between 'temporary' and 'permanent' disability."

In the instant case, as in *Mitchell v. Assurance Society, supra*, "in the last analysis, it all comes to this; the policy covers a total and permanent disability. Plaintiff has shown a total and temporary disability. The disability shown by the plaintiff is not covered by the policy."

The motion for judgment dismissing the action should have been allowed. The judgment rendered on the verdict is

Reversed.

NORTH CAROLINA BANK AND TRUST COMPANY ET AL. v. PILOT LIFE INSURANCE COMPANY.

(Filed 2 May, 1934.)

1. Insurance E a: J b—Under terms of policy local agent held without authority to extend credit for payment of first annual premium.

The application and the policy of insurance sued on in this case expressly provided that the policy would not be in force until after the first annual premium had been actually paid in cash and the company's receipt therefor delivered to insured, and that the provisions in respect thereto could be waived only by certain executive officers of the company in writing. The policy was issued and sent to insurer's local agent, who allowed insured to take possession thereof without paying the first annual premium and without delivery of the company's receipt. Insured became totally disabled under the terms of the policy, and suit on the disability clause was instituted prior to the payment of the premium: *Held*, the local agent was without authority to bind insurer to an extension of credit for the payment of the first annual premium, and in the absence of waiver by insurer, a nonsuit should have been entered.

2. Insurance K a: Estoppel C a—Knowledge and intention held basis for waiver under facts of this case.

All the evidence was to the effect that insurer had no knowledge that its local agent had delivered the policy in suit without receiving payment of the first annual premium and without delivering the company's receipt therefor. The policy provided that it should not be effective until these acts had been done, and that its local agent should have no authority to waive the provisions of the policy in this respect: *Held*, a letter written insured by insurer's president thanking insured for the business and stating that the policy had been delivered, and a notice mailed by the company of the due date of a subsequent premium is insufficient to constitute a waiver by insurer of the provisions of the policy relating to payment of the first annual premium, knowledge and intention being the basis of waiver in such cases.

CLARKSON, J., concurs in result.

CIVIL ACTION, before *Barnhill, J.*, at November Term, 1933, of EDGECOMBE.

On 25 July, 1931, William Sherwood Baker applied in writing to the defendant for a policy of life insurance. Thereafter the defendant issued policy No. 120495 and forwarded same to its local agent. William Sherwood Baker became totally disabled within the definition set out in the policy by reason of mental incapacity, on 30 November, 1931, and this action was instituted to recover certain disability benefits specified in the policy. The application signed by Baker contained the following clause: (a) "I hereby declare and agree that unless I shall have made settlement for the first year premium at the time this application is signed and have binding receipt for same in my possession, there shall not be any contract of insurance until the policy shall have been issued and delivered to me and the first premium paid thereon, during my lifetime and continued good health," etc. (b) "That only an executive officer of the company has authority to make or alter a contract of insurance or to bind the company in any manner whatsoever."

The policy also contained the following provisions: (1) "This policy does not take effect until it has been delivered to the insured and the first premium has been actually paid, during the lifetime and good health of the insured." (2) "The premiums are payable at the home office of the company, but may be paid on or before the dates due to the company's agent in exchange for the company's official receipt, signed by one of the officers referred to below and countersigned by the agent." (3) "Only the president, a vice-president, the secretary, actuary, treasurer, an assistant secretary or other executive officer, is empowered by the company to make or modify this or any other contract of insurance, or to extend the time for paying any premium, or to waive

any forfeiture, or to bind the company in any manner whatsoever. These powers cannot be delegated, and must be exercised only in writing, which shall be the only evidence of such exercise."

The local agent for the defendant was a minister and he testified as follows: "When the policy came I went to Mr. Baker and he said he could not pay for it. I kept the policy and went back time after time, and finally I said: 'Mr. Baker, you take this policy and read it over and see what it means to your children if something should happen to you,' and he took the policy and set a date for me to come and collect the money for it. He set a date for me to go and get the money for the policy. I went on that day and he said he had some extra expense, that he had to go to Knoxville to get his children and he could not pay it. I said, 'I am going down to Elizabeth City to be in a meeting about ten days,' told him the day I would be back, and I said, 'You be sure to have the money ready,' and he said, all right he would. When I got back he still said he did not have the money, and shortly I found that his company was going to send him to Enfield, and I went to him and I said, 'Now, Mr. Baker, you must not take this policy with you to Enfield,' and he said, 'I won't.' . . . I found he had gone to Enfield and I wrote him still trying to collect for the policy, and I had a letter from him, and this is about the extent of our dealings. He never paid me a cent on the policy and I never turned the receipt over to him. At the time I gave him that policy he did not pay me a cent and has never paid me a cent. . . . If he had paid me, I would have signed the receipt and turned it over to him, but it has never left my hands until it was turned over to the company unsigned. . . . The premium on this policy was never paid during the lifetime and good health of the insured. It was not paid to me or to anybody else. I never paid to the Pilot Life Insurance Company any amount whatever on this policy. No money of any kind ever passed from Mr. Baker to me or from me to the company representing this policy."

On 3 October, 1931, Charles W. Gold, president of defendant, wrote a letter to William S. Baker, thanking him for the business. Subsequently the company sent to Baker a notice of a quarterly premium which would be due on 14 December, 1931.

The following issues were submitted to the jury:

1. "Was the policy sued upon delivered to the insured as alleged?"

2. "If so, was the premium thereon paid at the time of said delivery?"

3. "If not, was credit therefor extended to the insured by the defendant?"

4. "Was there a consummated valid and binding contract of insurance between the ward of the plaintiff, Wm. S. Baker, and the defendant company as alleged in the complaint?"

The jury answered the first issue "Yes"; the second issue "No"; the third issue "Yes"; and the fourth issue "Yes."

From judgment upon the verdict in favor of plaintiffs, the defendant appealed.

Gilliam & Bond for plaintiffs.

Spruill & Spruill and Smith, Wharton & Hudgins for defendant.

BROGDEN, J. 1. Can a soliciting agent of a life insurance company deliver a policy and waive the payment of the first premium or extend credit for the payment thereof when both the application and the policy provide that the contract of insurance shall not become effective until the first premium has been paid; and further, that only an executive officer as specified shall have authority to alter or modify the contract?

2. Did the company itself waive the provisions of the application and policy with reference to payment of the first premium?

The first question involved has been discussed in *Foscue v. Ins. Co.*, 196 N. C., 139, 144 S. E., 689, and in *Burch v. Ins. Co.*, 201 N. C., 720. Both of these cases hold that the local or soliciting agents as such have no authority to extend credit to the insured in the payment of premiums or waive the payments provided in the policy or extend the time of payment thereof. Moreover, it has been declared in *Perry v. Insurance Co.*, 150 N. C., 143, 63 S. E., 679, that: "The parties to a proposed contract of insurance may make such agreement as to the payment of the first premium as they may desire, and such agreement, whether express or implied, must be performed or waived. In the absence of any agreement, it is generally understood that prepayment of the first premium is not necessary to the validity of an oral preliminary contract, but that payment must be made upon delivery of the policy. When, however, it is expressly agreed that the contract shall not become binding until the first premium has been paid, no contract, oral or otherwise, can be considered as complete unless such prepayment has been made or waived." A clear-cut opinion upon the subject reaching the same conclusion as announced in the foregoing North Carolina cases, is contained in *Curtis v. Prudential Co. of America*, 55 Fed. (2d), p. 97.

The second question of law is raised by a letter written by the president of defendant company to the insured on 3 October, 1931. The opening sentences in the letter are as follows: "We were much pleased to learn that this policy in the Pilot was delivered to you recently. I want to thank you personally for placing this business with us. We believe that our greatest asset is the confidence and loyalty of our great army

of policyholders and friends throughout the south," etc. Another item of evidence which the plaintiffs assert, constitutes a waiver, is the notice sent out by the defendant company of a quarterly premium to be due on 14 December. The evidence discloses, without contradiction, that the defendant had no knowledge of the fact that the first premium had not been paid or that the soliciting agent had delivered the policy without receiving the money and without delivering the official receipt. Waiver in such cases rests chiefly upon intention and knowledge. Both of these elements are lacking. See *Gazzam v. Ins. Co.*, 155 N. C., 330, 71 S. E., 434; *Turlington v. Ins. Co.*, 193 N. C., 481, 137 S. E., 422.

Upon the undisputed facts the plaintiff was not entitled to recover and the motion for nonsuit should have been granted.

Reversed.

CLARKSON, J., concurs in result.

CHARLES S. BRYAN v. MRS. ALICE H. BRYAN.

(Filed 2 May, 1934.)

1. Pleadings D c—

A demurrer on the grounds that the complaint fails to state a cause of action admits the allegations and presents the single question of the sufficiency of the complaint.

2. Life Estates D a—Remainderman need not pay taxes before bringing action for forfeiture of life estate for nonpayment of taxes.

It is not required that a remainderman should settle for the taxes against the property before bringing action against the life tenant under C. S., 7982, to have her estate forfeited for allowing the property to be sold for taxes and failing to redeem same within the time prescribed by law.

APPEAL by defendant from a judgment of *Frizzelle, J.*, overruling a demurrer to the complaint. From CRAVEN. Affirmed.

The plaintiff alleges that since the first day of January, 1924, the defendant has been tenant for life and the plaintiff remainderman of a lot or parcel of land in the city of New Bern; that the defendant listed the lot for taxation for the years 1930, 1931, 1932, and 1933, and has suffered it to be sold both by the sheriff of the county and by the tax collector of the city for the nonpayment of taxes due in 1930 and 1931, amounting to the sum of $623.99, including costs; that more than a year has elapsed since the sales were made on 2 November, 1931, and that

the defendant has failed to redeem; that the taxes due the county for 1932 amount to $168.50 and to $84.00 for 1933, and that the taxes due the city for 1932 amount to $120.75 and for 1933 to $60.37, no part of which has been paid; that the plaintiff has suffered damage in the sum of $1,057.60; and that for several years the defendant has received $75.00 a month as rent for a part of the property.

For ground of demurrer the defendant says the complaint does not constitute a cause of action in that it contains no allegation that the plaintiff has actually paid the taxes or any part thereof. The demurrer was overruled, and the defendant excepted and appealed.

R. A. Nunn for plaintiff.
Ward & Ward for defendant.

ADAMS, J. By demurring the defendant admits the plaintiff's allegations, thereby presenting the single question whether the complaint states a cause of action.

After providing that every person shall be liable for the taxes assessed or charged upon the property or estate of which he is tenant for life, C. S., 7982, proceeds as follows: "If any tenant for life of real estate shall suffer the same to be sold for taxes by reason of his neglect or refusal to pay the taxes thereon, and shall fail to redeem the same within one year after such sale, he shall thereby forfeit his life estate to the remainderman or reversioner. The remainderman or reversioner may redeem such lands, in the same manner that is provided for the redemption of other lands. Moreover, such remainderman or reversioner shall have the right to recover of such tenant for life all damages sustained by reason of such neglect or refusal on the part of such tenant for life."

The defendant advances the proposition that the plaintiff must settle the unpaid taxes before he can maintain an action to declare the life estate forfeited. We find no such prerequisite either in the statute or in the decisions of this Court. The statute is specific: the life tenant forfeits his estate to the remainderman or reversioner when he suffers it to be sold for taxes by reason of his neglect or refusal to pay the taxes and to redeem the property within a year after the sale. C. S., 7982. The remainderman's payment of the taxes due by the life tenant is not a condition antecedent to the institution of his action for forfeiture. The necessity of protecting the remainderman or reversioner is obvious. Under the former law a sale for taxes conveyed the interest of the delinquent; under the present law it is intended to convey the property. *Smith v. Proctor,* 139 N. C., 314, 324. In *Tucker v. Tucker,* 108 N. C., 235, 237 (reheard on other facts in 110 N. C., 333), the Court observed: "It is not a reasonable construction of the statute that the remainderman

should be held to payment of the taxes for the indefinite period of the life of the widow, who meantime enjoys the rents and profits, under penalty of losing his ultimate right to the fee. The reasonable and just construction is that the widow, who possesses the premises and enjoys the rents and profits thereof 'during widowhood,' comes within the class of 'tenants for life' designated by the statute, and when she permitted her interest to be sold for nonpayment of taxes and failed to redeem, instead of the premises going out of the family the law permitted the remainderman, the 'next in title,' to redeem it, as he elected to do, within the prescribed time. The defendant, therefore, comes within the words of the statute and was subject to forfeiture of her estate by permitting the land to be sold for taxes and failing to redeem it."

As the complaint states a cause of action the court was correct in overruling the demurrer. In reference to the question of damages the facts will no doubt be fully developed when the case is heard upon the merits. *Smith v. Miller,* 158 N. C., 98.

Affirmed.

W. V. MARSHALL v. BANK OF BEAUFORT, H. H. TAYLOR, LIQUIDATING AGENT, C. I. TAYLOR, LIQUIDATING AGENT, AND GURNEY P. HOOD, COMMISSIONER OF BANKS.

(Filed 2 May, 1934.)

1. Appeal and Error J c—

Where the parties waive a jury trial, the findings of fact by the court are as conclusive as a verdict of the jury.

2. Banks and Banking H c—Claimant held not entitled to preference in assets of insolvent bank under facts of this case.

Plaintiff wrote a check on his savings deposit in a bank and gave same to the bank cashier with instructions to purchase for him North Carolina bonds. The cashier wrote a receipt, which plaintiff accepted, stating that the check had been received and that the bonds were to be delivered to plaintiff upon demand and the surrender of the receipt and that the check was not to be entered on plaintiff's book until the bonds were delivered. Upon repeated demands for the delivery of the bonds the cashier informed plaintiff that delivery was not convenient, and sometime after receipt of the check the bank became insolvent without ever charging plaintiff's savings account with the check or delivering the bonds: *Held*, under the terms of the receipt the parties contemplated no change in their relations until the delivery of the bonds, and as the simple relation of debtor and creditor existed between the parties at the time of the closing of the bank, plaintiff is not entitled to a preference in the bank's assets.

APPEAL by plaintiff from *Frizzelle, J.,* at December Term, 1933, of CARTERET. Affirmed.

The plaintiff brought suit to declare his claim of $8,000 against the Bank of Beaufort a first lien or preference on the assets of the bank. The parties waived a trial by jury and agreed that the court should find the facts, which as found are set out in the judgment as follows:

1. On 6 April, 1929, and theretofore and thereafter until 15 September, 1931, the Bank of Beaufort was a banking corporation at Beaufort, N. C., and J. A. Hornaday was at all times its cashier.

2. On 6 April, 1929, plaintiff had a deposit in said bank of more than $8,000 and on said date drew his check for $8,000 on said savings account in words and figures, viz.:

"Beaufort, N. C., 4/6, 1929. No..... Savings department. The Bank of Beaufort, 66-183. Pay to the order of the Bank of Beaufort $8,000—eight thousand dollars—bonds of North Carolina, W. V. Marshall; and delivered said check to Hornaday, cashier, for the purchase of $8,000 worth of tax free bonds of the State of North Carolina; and at said time said cashier delivered to said plaintiff a receipt in words and figures as follows:

"The Bank of Beaufort, Beaufort, N. C., 6 April, 1929. Received of W. V. Marshall check for eight thousand dollars on savings account for investment in tax free bonds of the State of North Carolina. The bonds to be delivered to him upon demand and the surrender of this receipt and record of the check for $8,000 to be entered on his book only when the bonds are delivered. The Bank of Beaufort, by J. A. Hornaday, cashier"; which receipt plaintiff still holds; a copy of said receipt attached to said check came into the hands of the liquidating agent of said bank.

3. Plaintiff, from time to time, made deposits and drew on his said account, but at no time during period was the balance less than $8,200.

4. After 6 April, 1929, the plaintiff called at the bank and asked that the North Carolina bonds be gotten and delivered to him, but was advised that delivery was not then convenient; and thereafter plaintiff repeatedly called at the said bank for said bonds, but was repeatedly advised by the cashier that delivery was not convenient; and the said bonds were not delivered.

5. Said bank became insolvent on and after 15 September, 1931, and thereafter plaintiff called at the bank requesting the bonds to be delivered, but was advised that there were no bonds in the bank belonging to him but there was a saving account in the sum of $8,000; and being ignorant of the law and being advised by the liquidating agent to file a claim, he did file a claim for his deposit, intending to file a claim for the $8,000 North Carolina bonds.

6. The check for the $8,000, dated 6 April, 1929, has never been charged to plaintiff nor entered on his savings book. The books of the bank show savings deposit to plaintiff's credit at closing, of $8,949.78.

Upon the foregoing facts the court adjudged that the plaintiff is not entitled to a preference in the distribution of the assets of the bank but only to a general claim in like manner with other creditors. The plaintiff excepted and appealed.

E. W. Hill and W. B. R. Guion for plaintiff.
Julius F. Duncan for defendants.

ADAMS, J. The controversy must be determined upon the facts found by the court, which are no less conclusive than the verdict of a jury. When the plaintiff delivered his check for $8,000 to the cashier for the purchase of State bonds, the bank gave the plaintiff a receipt in which it was stipulated that the bonds should be delivered to him upon demand and upon his surrender of the receipt, and that record of the check should be entered on his book only when the bonds were placed in his hands. The parties evidently contemplated no change in the relation previously existing between them until the bonds were turned over to the plaintiff. The simple relation of debtor and creditor does not constitute a preference. *Williams v. Hood, Comr.*, 204 N. C., 140. There is no finding that the plaintiff actually withdrew any funds from the savings department and then gave them to the bank under a specific agreement that the money was to be used in purchasing the bonds. *Blakey v. Brinson*, 286 U. S., 254, 76 L. Ed., 1089. Indeed, the findings of fact set out in the judgment are wanting in about all the indicia by which a trust deposit or a deposit for a specific purpose is usually established. *Parker v. Trust Co.*, 202 N. C., 230. According to all the recent decisions of this Court dealing with the subject the judgment should be affirmed. *Dupree v. Harrell*, 205 N. C., 595; *In re Bank of Pender*, 204 N. C., 143; *Bank v. Corp. Com.*, 201 N. C., 381.

Affirmed.

MRS. A. S. HOOVER, ADMINISTRATRIX OF A. S. HOOVER, DECEASED, v. GLOBE INDEMNITY COMPANY.

(Filed 2 May, 1934.)

1. Principal and Agent C d—Held: Complaint failed to show that wrongful act of agent was done in scope of authority or was ratified.

Plaintiff's intestate was injured by an accident covered by the Workmen's Compensation Act. Plaintiff brought action against the insurer liable for the injury and alleged that the intestate procured medical services for the injury and also for other ailments not covered by the Compensation Act, that defendant's agent, employed to provide medical

attention only for injuries to employees for which defendant was liable, took charge of intestate and prevented him from obtaining medical attention for the ailments not covered by Compensation Act, and that as a result of not getting medical attention for such ailments, intestate died. *Held*, defendant's demurrer to the complaint should have been sustained, it not appearing upon the face of the complaint by a most liberal construction that the acts of defendant's agent complained of were done in the course of his employment, or that such acts were authorized or ratified by defendant.

2. Master and Servant F a—Semble: action for wrongful act of insurer's agent relating to medical attention for injured employee was in jurisdiction of Industrial Commission.

Plaintiff brought suit for the wrongful act of insurer's agent in preventing plaintiff's intestate from obtaining medical attention for ailments not connected with intestate's injury covered by the Compensation Act. Insurer's agent was employed to procure medical attention only for injuries to employees covered by insurer's policy. *Semble*, the Industrial Commission had exclusive jurisdiction of the action.

APPEAL by defendant from *Harding, J.*, at December Term, 1933, of GASTON. Reversed.

This is an action to recover damages for the wrongful death of plaintiff's intestate, upon the allegation that this death was caused by the wrongful act of the defendant.

During the month of January, 1930, plaintiff's intestate was injured by an accident which arose out of and in the course of his employment. At the date of the accident, both plaintiff's intestate and his employer were subject to the provisions of the North Carolina Workmen's Compensation Act. The employer carried insurance in accordance with the provisions of said act. The defendant was the insurance carrier of the employer.

It is alleged in the complaint that after he was injured by said accident, plaintiff's intestate procured a competent and capable physician to treat him for his injuries, and also for certain bodily ailments, which developed thereafter, but which were in nowise connected with said injuries; that while said physician was treating plaintiff's intestate in a skillful and successful manner, an agent of the defendant assumed and took absolute and complete control of plaintiff's intestate, and prevented him from procuring medical treatment for his bodily ailments which had developed after his injuries, and which were in nowise connected with said injuries; and that thereafter, as the result of his failure to procure medical treatment of his said bodily ailments, plaintiff's intestate died on or about 26 July, 1930.

It is further alleged in the complaint that the wrongful act of defendant's agent prevented plaintiff's intestate from procuring medical treatment for his bodily ailments, and was the proximate cause of his death;

and that by the death of her intestate, plaintiff has suffered damages in the sum of $3,000.

The defendant demurred to the complaint on the ground that the Superior Court of Gaston County is without jurisdiction of the action, and on the further ground that the facts alleged in the complaint are not sufficient to constitute a cause of action against the defendant.

The demurrer was overruled, and the defendant appealed to the Supreme Court.

S. J. Durham, J. L. Hamme and J. C. Taylor for plaintiff.
P. W. Garland for defendant.

CONNOR, J. Conceding, without deciding, that the facts alleged in the complaint are sufficient to constitute a cause of action in favor of the plaintiff and against the agent of the defendant, and that the Superior Court of Gaston County would have jurisdiction of an action instituted by the plaintiff against said agent to recover on such cause of action, we are of the opinion that the facts alleged in the complaint are not sufficient to constitute a cause of action against the defendant. It does not appear from the complaint, construed most liberally in favor of the plaintiff, that the wrongful act of its agent was within the scope of his employment by the defendant, or that such act was authorized or ratified by the defendant. The agent of the defendant was authorized by his employment to procure medical treatment for persons who had been injured by accidents which arose out of and in the course of this employment, where the defendant by reason of its contracts with their employers, was liable for compensation for such injuries, under the provisions of the North Carolina Workmen's Compensation Act. He was not authorized by his employment to procure medical treatment for ailments which were in nowise connected with such injuries. The act of the agent as alleged in the complaint was beyond the scope of his employment, and for that reason, in the absence of allegations that said act was specially authorized by the defendant, or that defendant had ratified the act of its agent, the defendant is not liable for damages resulting from the act of its agent. The defendant's demurrer should have been sustained.

If by a most liberal construction of the allegations of the complaint, it would be held that the defendant is liable to the plaintiff in this action, upon the allegations of the complaint, it would seem that the North Carolina Industrial Commission would have jurisdiction of the claim of the plaintiff against the defendant. See *Hoover v. Indemnity Co.*, 202 N. C., 655, 163 S. E., 758. The order overruling the demurrer is

Reversed.

FEDERATED TEXTILES, INCORPORATED, v. MOORESVILLE SHIRT CORPORATION.

(Filed 2 May, 1934.)

Execution G a—Under facts found by clerk in this case it was not error for him to refuse to confirm execution sale and to order resale.

Where upon a motion to confirm an execution sale the clerk finds that the announcement of the auctioneer at the sale that the sale would stand open for twenty days chilled the bidding and that the sale was not conducted in a prudent and just manner, and that the price bid was grossly inadequate, it is not error for the clerk to decline to confirm the sale and to order a resale.

APPEAL by P. M. Dillon from *Harding, J.*, at March Term, 1934, of IREDELL.

Motion by P. M. Dillon to confirm execution sale and to require sheriff to turn over to movant all personal property of the defendant offered at said sale on 2 December, 1933.

The facts found by the clerk are these:

1. The sheriff of Iredell County, under order of execution, levied upon the stock of goods belonging to the defendant and advertised the same for sale on 2 December, 1933.

2. The sheriff's representative announced at the sale that the same would stand open twenty days for a 10 per cent advance bid.

3. This announcement chilled the bidding.

4. The property offered for sale had a cash value of $3,000. It was knocked down to P. M. Dillon for $700. An increased bid of $1,000 was filed with the sheriff within ten days. The debts of the defendant are in excess of $3,300.

5. The bid of P. M. Dillon was grossly inadequate and the sheriff did not conduct the sale in a prudent and just manner, so as to realize a fair price for the property offered for sale.

Whereupon the clerk declined to confirm the sale and ordered a resale of the property. This order was approved by the judge of the Superior Court, and the movant appeals, assigning error.

No counsel appearing for plaintiff.
A. B. Raymer for movant, Dillon.
J. G. Lewis for sheriff, Kimball.
Zeb. V. Turlington for defendant.

STACY, C. J. The case is distinguishable from *Weir v. Weir*, 196 N. C., 268, 145 S. E., 281, cited and relied upon by movant, in that, it is found by the clerk: (1) that the announcement of the auctioneer

chilled the bidding; (2) that the sale was not conducted in a prudent and just manner; (3) that the price bid was grossly inadequate.

Under the findings made by the clerk, there was no error in declining to confirm the sale. The rights and remedies of the parties are fully discussed in annotation: 69 L. R. A., 33.

Affirmed.

STATE v. ED LEE.

(Filed 2 May, 1934.)

Assault B b—Evidence held sufficient to support verdict of simple assault and refusal to submit question in prosecution for graver offense held error.

The evidence tended to show a simple assault by defendant on prosecuting witness and a later encounter between the parties in which defendant was armed with a deadly weapon. Defendant testified that in the second encounter he only defended himself when the prosecuting witness approached him in a threatening manner armed with an open knife. *Held*, the jury might have found from the evidence that defendant was without fault in the second encounter and convicted him of simple assault in the first, and it was error for the court to charge the jury that they could convict defendant of assault with intent to kill, or assault with a deadly weapon or not guilty, and refuse to charge the jury that they might convict defendant of simple assault. C. S., 4640, and upon appeal from a conviction of assault with a deadly weapon a new trial is awarded.

APPEAL by defendant from *Harris, J.*, at December Term, 1933, of WAKE.

Criminal prosecution tried upon indictment charging the defendant with an assault upon Sam Wall in a secret manner, with a deadly weapon, with intent to kill, in violation of C. S., 4213.

On the evening of 25 November, 1933, the defendant and one Emmit Hodge were fussing with each other in front of Woodard's store on the Pool Road about eight miles from Raleigh, when Sam Wall came up and remonstrated with the defendant, in consequence of which the defendant struck Wall with his fist and knocked him against an automobile.

The defendant then went to his home, got his gun, and in two or three hours returned to Woodard's store. The gun was not loaded. The defendant contends that he took it, at the suggestion of his wife, only for the appearance of protection. He had failed to get some groceries for which he was returning. The State's evidence is to the effect that the defendant called Wall from Woodard's store and struck him over the head with the barrel of his gun, inflicting serious injury. The defendant

testified that Wall was approaching him with an open knife and that he struck him with the gun barrel only in self-defense.

The court directed a nonsuit on the charge of secret assault (*S. v. Oxendine*, 187 N. C., 658, 122 S. E., 568), and instructed the jury as follows: "Now you can find the defendant guilty of assault with intent to kill, or assault with a deadly weapon, or not guilty. You may bring in any one of these three verdicts as you find the same to be from the evidence." Exception.

Verdict: "Guilty of assault with deadly weapon and asks mercy of the court."

Judgment: Twelve months on the roads.

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

Albert Doub for defendant.

STACY, C. J. The evidence discloses, first, a simple assault when neither the defendant nor the prosecuting witness was armed with a deadly weapon, then, later, an assault with a gun. The defendant contended that all he did in the second encounter was to defend himself.

In this state of the record, the court should have submitted for the jury's consideration the question of simple assault. *S. v. Merrick*, 171 N. C., 788, 88 S. E., 501. The rule is, that when it is permissible under the bill, as here, to convict the defendant of "a less degree of the same crime" (C. S., 4640), and there is evidence tending to support a milder verdict, the case presents a situation where the defendant is entitled to have the different views presented to the jury, under a proper charge, and an error in this respect is not cured by a verdict convicting the defendant of a higher offense charged in the bill of indictment, for in such event it cannot be known whether the jury would have convicted of a less degree of the same crime if the different views, arising on the evidence, had been correctly presented in the court's charge. *S. v. Newsome*, 195 N. C., 552, 143 S. E., 187; *S. v. Lutterloh*, 188 N. C., 412, 124 S. E., 752; *S. v. Robinson*, 188 N. C., 784, 125 S. E., 617; *S. v. Williams*, 185 N. C., 685, 116 S. E., 736.

While the first affray, in which no deadly weapons were used, may have been the cause of the second and more serious one (*S. v. Bailey*, 205 N. C., 255, 171 S. E., 81, *S. v. Bryson*, 203 N. C., 728, 166 S. E., 897), nevertheless the jury might have found, had the whole case been submitted to it, that the defendant was in the wrong only in the beginning. At least, this is a permissible interpretation of the record.

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

New trial.

O. A. EDWARDS AND C. H. HALL, ADMINISTRATORS, ET AL., v. J. B. PERRY.

(Filed 2 May, 1934.)

1. Reference D b—

An order entered by consent of the parties upon a hearing of exceptions to a referee's report that issues raised by the exceptions should be submitted to the jury is valid although the original reference was by consent.

2. Courts A f—

A judge of the Superior Court may not strike out *ex mero motu* an order entered in the cause at a prior term by another Superior Court judge, or disregard such prior order.

APPEAL by plaintiffs and defendant from *Barnhill, J.*, at February Special Term, 1934, of WAKE.

Civil action for an accounting with respect to transactions had between plaintiffs' intestate and the defendant over a period of approximately twenty years.

The defendant denied liability and set up a counterclaim.

At the April Term, 1933, there was an order of reference by consent entered in the cause.

At the December Term, 1933, the matter came on for hearing upon exceptions filed by both sides to the report of the referee. After a full consideration of the case, it was ordered, Judge Harris, presiding, with the consent of the parties, that certain issues raised by the exceptions be submitted to a jury at a subsequent term of court.

At the February Special Term, 1934, Judge Barnhill, presiding, the order entered at the previous December Term was stricken out *ex mero motu*, or disregarded, on the ground that a jury trial was not in order as the original reference was by consent and both parties had thereby waived their rights to a jury trial. To this ruling the plaintiffs objected and excepted.

The court thereupon considered the exceptions to the referee's report, sustained some and overruled others, and entered judgment accordingly.

Both sides appeal, assigning errors.

E. D. Flowers and J. G. Mills for plaintiffs.
Gulley & Gulley for defendant.

STACY, C. J. The consent order entered at the December Term, 1933, which provided for a jury trial upon certain issues, would seem to be valid. *Deaver v. Jones*, 114 N. C., 649, 19 S. E., 637; *Stump v. Long*, 84 N. C., 616. True, it could not have been entered except by consent. *Driller Co. v. Worth*, 117 N. C., 515, 23 S. E., 427; *Lance v. Russell*,

157 N. C., 448, 73 S. E., 151; *Flemming v. Roberts,* 77 N. C., 415. But having been entered by consent of the parties and without objection, it became a valid order in the cause. *Weaver v. Hampton,* 204 N. C., 42, 167 S. E., 484; *Morisey v. Swinson,* 104 N. C., 555, 10 S. E., 754; *Deaver v. Jones, supra.*

This order was not subject to review at a subsequent term of court. *Caldwell v. Caldwell,* 189 N. C., 805, 128 S. E., 329; *Phillips v. Ray,* 190 N. C., 152, 129 S. E., 177; *Dockery v. Fairbanks,* 172 N. C., 529, 90 S. E., 501; *S. v. Lea,* 203 N. C., 316, 166 S. E., 292. It was error, therefore, for the court to strike it out *ex mero motu,* or to disregard it. The remaining exceptions are not considered.

New trial.

LESTER CARSON v. C. E. JENKINS ET AL.

(Filed 2 May, 1934.)

Ejectment C a—Where complaint in ejectment fails to allege title in plaintiff a demurrer thereto is properly sustained.

Plaintiff brought action in ejectment alleging that he was one of a class for whose benefit an industrial school was created by the General Assembly, that certain lands were conveyed to the school in fee and used by it until it ceased to function when no trustees were elected to succeed the original trustees, that plaintiff was qualified to be a student at the school and desirous of obtaining the instruction formerly available at the school, and that defendants were in wrongful possession of the property. The school was not made a party to the action. *Held,* defendant's demurrer was properly sustained, it being necessary in ejectment for plaintiff to allege and prove title to the property, and he may not rely upon weakness of defendant's title.

APPEAL by plaintiff from *Finley, J.,* at Chambers, North Wilkesboro, 30 December, 1933. From WILKES.

Civil action in ejectment and for damages.

The complaint alleges:

1. That plaintiff is a citizen and resident of Wilkes County, and that "there are numerous other infants or minors in similar situation to his own."

2. That in 1895 the General Assembly of North Carolina incorporated the "North Wilkesboro Academical and Industrial Institute," named twelve trustees, all of whom are now dead or their whereabouts unknown, and that no successors have been elected in their stead. That the said institute was duly organized for the purpose of affording, and did for a number of years afford, instructions in agriculture and trades of various kinds for Negro youths.

3. That in July, 1895, the Winston Land and Improvement Company for a valuable consideration, conveyed to the North Wilkesboro Academical and Industrial Institute 15.18 acres of land (describing it).

4. That the plaintiff and numerous others in similar situation are duly qualified persons, desirous of pursuing the various courses of study which were offered by the institute during the time of its active existence, and as such are entitled to the use and occupation of the premises above described.

5. That the defendants have unlawfully taken possession of said premises, demolished two buildings, and the Home Missions Presbyterian Church is wrongfully claiming title thereto.

Wherefore, plaintiff demands possession and damages.

Demurrer interposed on the grounds: (1) that the complaint does not state facts sufficient to constitute a cause of action; (2) that there is a defect of parties; (3) that several causes of action have been improperly united in the same complaint.

From a judgment sustaining the demurrer, the plaintiff appeals, assigning error.

Cecil A. McCoy for plaintiff.
Jones & Brown for defendants.

STACY, C. J. It is not perceived upon what theory the plaintiff is entitled to eject the defendants from the land in question or to recover damages. He shows no present title, legal or equitable, in himself or in the North Wilkesboro Academical and Industrial Institute, which is not a party. At most, he alleges that many years ago the said institute owned the *locus in quo*, and, when in active existence, certain courses were there taught Negro youths, which he is now desirous of pursuing. Upon these allegations, he demands possession of the land and damages for its detention.

It is elementary that, in ejectment, the plaintiff must rely upon the strength of his own title, and not upon the weakness of his adversary's. *Rumbough v. Sackett*, 141 N. C., 495, 54 S. E., 421. To recover in such action, the plaintiff must show title good against the world, or good against the defendant by estoppel. *Mobley v. Griffin*, 104 N. C., 112, 10 S. E., 142. It can make no difference whether the defendant has title or not, the only inquiry being whether plaintiff has it, and upon this issue the plaintiff must assume the burden of *allegata* as well as of *probata*. *Hayes v. Cotton*, 201 N. C., 369, 160 S. E., 453; *Timber Co. v. Cozad*, 192 N. C., 40, 133 S. E., 173; *Pope v. Pope*, 176 N. C., 283, 96 S. E., 1034.

It appears upon the face of the complaint that it is fatally defective. C. S., 511. The demurrer was properly sustained.

Affirmed.

CAROLINA MORTGAGE COMPANY v. DR. V. M. LONG ET AL.

(Filed 2 May, 1934.)

Appeal and Error L b—Adverse party held entitled to notice of motion for judgment on certificate of Supreme Court.

Plaintiff is entitled to notice of a motion by defendant for judgment on the certificate of the Supreme Court reversing judgment of the lower court refusing defendant's motion for change of venue as a matter of right. In this case plaintiff was seeking a voluntary nonsuit, and is held entitled to move therefor before the judge prior to judgment on the certificate.

APPEAL by plaintiff from *Grady, J.*, at February Term, 1934, of WAKE.

Civil action to recover on promissory note, secured by deed of trust on land situate in Forsyth County.

On motion to remove cause to Forsyth County for trial, as a matter of right, there was judgment denying the motion, which was reversed on appeal, opinion filed 10 January, 1934, and certified to the Superior Court of Wake County 24 January. *Mortgage Co. v. Long*, 205 N. C., 533.

In the meantime, on 15 January, the plaintiff appeared before the clerk of the Superior Court of Wake County, paid the costs, and moved for voluntary judgment of nonsuit, which was allowed and entered of record. Costs in the Supreme Court were paid 19 January.

Thereafter, on 2 February, without notice to plaintiff's counsel, judgment was tendered and signed directing the clerk of the Superior Court of Wake County to transfer the action, together with all necessary papers filed therein, to the Superior Court of Forsyth County. Immediately after the signing of this judgment, the defendant filed answer with the clerk of the Superior Court of Wake County setting up a counterclaim for alleged usury.

The record states that at the time of signing the order of removal, the court was advertent to the fact that a voluntary judgment of nonsuit had previously been entered before the clerk, and that no notice had been given to plaintiff's counsel of the motion then being made for judgment on the certificate.

Plaintiff appeals, assigning error.

John N. Duncan and W. G. Mordecai for plaintiff.
Elledge & Wells for defendants.

STACY, C. J., after stating the case: Conceding, without deciding, that the judgment of voluntary nonsuit taken before the clerk was ineffectual,

because entered prior to receipt of opinion from this Court (*Mfg. Co. v. Buxton*, 105 N. C., 74, 11 S. E., 264, *R. R. v. Sanford*, 188 N. C., 218, 124 S. E., 308, *Huntley v. Express Co.*, 191 N. C., 696, 132 S. E., 786, *Bohannon v. Trust Co.*, 198 N. C., 702, 153 S. E., 263), still it would seem that plaintiff's counsel was entitled to notice of application for judgment on the certificate, so that nonsuit might then be entered before the judge, if the plaintiff so desired. *Carpenter v. Hanes*, 167 N. C., 551, 83 S. E., 577. This right will yet be accorded.

Error.

COUNTY OF WAKE v. A. P. JOHNSON AND HIS WIFE, ANNIE JOHNSON.

(Filed 2 May, 1934.)

Taxation H c—Title of purchaser at tax foreclosure sale may not be attacked upon hearing of its motion for writ of assistance.

The title of the purchaser at a tax foreclosure sale may not be challenged by the listed owner upon the purchaser's motion for a writ of assistance. In the instant case the land was bought by a municipality and it does not appear of record that the purchase of the land was *ultra vires*, a municipality having the power to purchase land for certain purposes. C. S., 2623(3).

APPEAL by defendants from *Harris, J.*, at October Term, 1933, of WAKE. Affirmed.

This is an action to foreclose a tax certificate owned by the plaintiff. Under a decree rendered in the action, the land listed by the defendants for taxation by the county of Wake, and described in the tax certificate, was sold and conveyed by a commissioner appointed by the court for that purpose to the town of Wake Forest, a municipal corporation of this State.

The action was heard on a motion by the town of Wake Forest, the purchaser at the foreclosure sale, for a writ of assistance to be directed to the sheriff of Wake County, commanding the said sheriff to remove the defendants from and to put the said purchaser in possession of the land conveyed to the said purchaser by its deed. The defendants resisted the said motion on the ground that the town of Wake Forest had no power or authority to purchase the land described in its deed, and for that reason acquired no title to said land by the said deed.

From an order that the clerk of the Superior Court of Wake County issue the writ in accordance with the motion, the defendants appealed to the Supreme Court.

Wilson & Green for town of Wake Forest.
Gulley & Gulley for defendants.

CONNOR, J. The title of the purchaser at a foreclosure sale, to whom the land described in the complaint has been conveyed by the commissioner appointed by the court for that purpose, cannot be challenged by a party to the action in which the decree of foreclosure was rendered, upon the application of the purchaser for a writ of assistance. The decree and all proceedings pursuant thereto are binding and conclusive on the parties to the action, and on their privies. See *Bank v. Leverette*, 187 N. C., 743, 123 S. E., 268; *Exum v. Baker*, 115 N. C., 242, 20 S. E., 448.

In the instant case, the deed of the commissioner to the town of Wake Forest is not void. A municipal corporation has the power to purchase land for certain purposes. C. S., 2623(3). It does not appear from the record in this case that the purchase of the land described in its deed by the town of Wake Forest was *ultra vires*.

The order that the clerk of the Superior Court issue the writ of assistance in accordance with the motion of the town of Wake Forest is Affirmed.

STATE v. J. E. BANKS.

(Filed 2 May, 1934.)

Bills and Notes D f—Indictment for issuing worthless check must charge "insufficient credits" in addition to "insufficient funds."

It is necessary that an indictment for issuing a worthless check charge, in addition to charging that defendant knew at the time of issuing same that he did not have sufficient funds in the drawee bank for its payment, that he knew he did not have sufficient credits with the bank for its payment upon presentment, and that there be evidence at the trial of both "insufficient funds" and "insufficient credits."

CRIMINAL ACTION, before *Schenck, J.*, at September Term, 1933, of MCDOWELL.

A warrant was issued for the defendant by a justice of the peace, charging that on or about 15 February, 1932, that "J. E. Banks did unlawfully, wilfully and feloniously issue and utter a worthless check for the amount of $26.34, drawn on the First National Bank of Marion, N. C., in favor of Eastern Oil and Gas Company. He, J. E. Banks, knowing at the time of issuing and uttering said check that he had not sufficient funds in said bank to cover same, contrary to the form

of statute and against the peace and dignity of the State." The defendant was convicted in the recorder's court and appealed to the Superior Court. A jury trial was waived in accordance with chapter 23 of the Public Laws of 1933. The evidence for the State tended to show that the check was signed "Lake City Coal and Motor Company of Maryland, by J. E. Banks." The witness said: "I never sold J. E. Banks a gallon of oil and gas or anything while he was out there. It was to the Lake City Motor Company. . . . I never received a check from J. E. Banks personally for any of the gas I ever delivered. It was on the Lake City Motor Company, a check just like that one." The evidence discloses that the Lake City Coal and Motor Company was a corporation.

There was evidence that the check had been presented to the bank upon which it was drawn and payment declined on the ground of insufficient funds.

At the conclusion of evidence for the State the defendant moved for judgment of nonsuit and not guilty. The motion was denied and the trial judge upon the facts aforesaid, being of the opinion that the defendant was guilty, so adjudged, and sentenced the defendant to jail for a term of thirty days to be worked upon the roads. Whereupon the defendant appealed.

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

G. D. Bailey and Charles Hutchins for defendant.

BROGDEN, J. The motion for a verdict of not guilty made by the defendant should have been granted. This Court in *S. v. Edwards,* 190 N. C., 322, says: "It will readily be seen, therefore, that the indictment must charge both 'insufficient funds' and 'insufficient credits'; for though the funds on deposit may be insufficient, the 'credits'—'the arrangement or understanding with the bank or depository'—may be amply sufficient to protect the check or draft upon its presentation. The indictment is fatally defective in that, while charging 'insufficient funds on deposit' it makes no reference whatever to a want of credits; and the defect is not cured by the clause which affords the drawer an opportunity to provide funds or credits for payment upon presentation of the check or draft or within ten days after notice of nonpayment." Moreover, there was no evidence that the defendant had failed to have an "arrangement or understanding with the bank or depository for the payment of any such check or draft."

Error.

J. H. McNEELEY, LESSEE OF RELIANCE COAL COMPANY, v. JOHN B. ANDERSON.

(Filed 2 May, 1934.)

1. Appeal and Error G c—

As a rule only propositions or exceptions pointed out in the briefs are considered by the Supreme Court upon appeal.

2. Justices of the Peace E a—

It is not required that an appeal from a judgment of the justice of the peace be first taken to the general county court of the county, but the appeal may be taken directly to the Superior Court. Art. IV, sec. 27.

APPEAL by defendant from *McElroy, J.*, at December Term, 1933, of BUNCOMBE.

On 21 June, 1933, the plaintiff recovered judgment against the defendant for $31.00 with interest from 9 April, 1931, in the court of a justice of the peace in Buncombe County. The defendant appealed to the Superior Court, and at the December Term of 1933 the plaintiff moved the court *ore tenus* to dismiss the appeal on the ground that the appeal should have been taken to the General County Court and not directly to the Superior Court. The motion was allowed and the appeal was dismissed. The defendant excepted and appealed.

Carter & Carter for appellant.

Joseph F. Ford, Vonno L. Gudger, J. G. Merrimon, A. S. Barnard and J. L. Jones for Buncombe County Bar Association.

ADAMS, J. It is not improbable that the judgment of the trial court was influenced, if not governed, by the decision in *S. v. Baldwin*, 205 N. C., 174. The *Baldwin case* was heard and determined in the Superior Court by the learned judge from whom the appeal was taken in the case at bar. There the two defendants were tried before a justice of the peace on separate warrants charging an assault, and were convicted. They appealed to the Superior Court and at the hearing the cases were consolidated. The solicitor moved to dismiss the appeal and Judge McElroy being of opinion that the motion should be allowed adjudged that the "appeal taken from the justice of the peace by the defendants be dismissed." The defendants excepted and on appeal the judgment was affirmed.

The case was not argued in this Court but was submitted on printed briefs. The brief of the State was confined to the construction of one or two statutes involving the right of appeal from the judgment of a justice of the peace to the recorder's court. Indeed, both briefs seem to have been addressed to a question of statutory construction. No

constitutional or other fundamental questions, such, for example, as those which are raised in the case before us, were debated or referred to in the briefs, and as a rule only propositions or exceptions pointed out in the briefs are considered by the court on appeal. Whether this is the ground upon which the appellant does "not deny the possibility of differentiation" between this and the *Baldwin case*, we need not inquire. Any comparison or differentiation of the several statutes dealing with the jurisdiction of general county courts and courts over which recorders preside would unnecessarily prolong the opinion. As the recorder's court has never been operative in excepted counties, the statute referred to in *S. v. Baldwin, supra*, in no event had any application to Buncombe County.

Upon consideration of the exhaustive argument submitted on behalf of the defendant's right of appeal we are of opinion that the appeal in the present case should have been allowed directly from the justice of the peace to the Superior Court, and that the judgment in this action should be reversed. Constitution, Art. IV, sec. 27; *Rhyne v. Lipscombe*, 122 N. C., 650.

Reversed.

STATE v. R. M. KEETER.

(Filed 2 May, 1934.)

1. Homicide E a—

A person assaulted by an unarmed assailant, but who is never apprehensive of his life or great bodily harm, commits manslaughter at least in repelling the assault by killing his assailant with a pistol.

2. Criminal Law L e—

Where defendant on trial for homicide is guilty of manslaughter on his own statement, error, if any committed on the trial is cured or rendered harmless by the jury's verdict of guilty of manslaughter.

APPEAL by defendant from *Stack, J.*, at January Term, 1934, of MECKLENBURG.

Criminal prosecution tried upon indictment charging the defendant with the murder of one Nick Neos.

Verdict: Guilty of manslaughter.

Judgment: Imprisonment in the State's prison for a period of not less than 13 nor more than 20 years.

Defendant appeals, assigning errors.

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

A. A. Tarlton and J. F. Newell for defendant.

STACY, C. J. The record discloses that on 3 January, 1934, the defendant shot and killed Nick Neos on a public street in the city of Charlotte, under circumstances which rendered the homicide unlawful. The two were rival suitors, and it seems that the deceased had outdistanced the defendant in the affections of the woman in the case. They chanced to meet upon the street.

According to the State's evidence, the killing amounted to an unprovoked murder. The strongest exculpatory evidence is that of the defendant who testified that he shot the deceased "to get him loose from me. . . . I didn't intend to take his life." The defendant shot, not once, but twice. The deceased was unarmed. The evidence is conflicting as to who brought on the difficulty, but, at no time, did the defendant apprehend that he was in danger of losing his life or sustaining great bodily injury. He used excessive force to repel the assault, even if the deceased were the aggressor, which is denied by the State's evidence. *S. v. Cox,* 153 N. C., 638, 69 S. E., 419; *S. v. Robinson,* 188 N. C., 784, 125 S. E., 617.

As the defendant is guilty of at least manslaughter on his own statement, it is not worth while to consider his exceptions *seriatim.* Any error committed on the trial was harmless or cured by the verdict.

No error.

J. M. FERGUSON ET AL. V. G. D. FERGUSON.

(Filed 2 May, 1934.)

Deeds and Conveyances A e—

Delivery of a deed is essential to its validity, and where the pleadings and evidence raise the question of delivery, the court's refusal to submit an issue thereon entitles appellant to a new trial.

APPEAL by plaintiffs from *Schenck, J.,* at October Term, 1933, of YANCEY.

Civil action to quiet title and to remove cloud therefrom, or "to kill a deed," as was said in *Barbee v. Bumpass,* 191 N. C., 521, 132 S. E., 275.

The plaintiffs being feeble and desirous of providing for their care, maintenance and support in old age, executed a deed to a tract of land in Yancey County conveying the same to their nephew, G. D. Ferguson, upon certain "conditions precedent to the vesting of the title," with which, it is alleged, the defendant has failed to comply, and further that said deed was never delivered to the grantee; wherefore plaintiffs

bring their action under C. S., 1743, to quiet their title and to remove said deed as a cloud therefrom.

The jury found that the defendant had "breached the contract set out in the deed," but further found that such breach was "caused by the conduct of the plaintiffs."

The pleadings raise an issue as to the delivery of the deed, and the plaintiffs asked that such issue be submitted to the jury, which was declined by the court.

From a judgment on the verdict adjudging that the plaintiffs take nothing by their action and the defendant recover his costs, the plaintiffs appeal, assigning errors.

Charles Hutchins for plaintiffs.
Watson & Fouts for defendant.

STACY, C. J. Delivery of the deed being essential to its validity and the question having been put in issue by the pleadings, it would seem that the matter should have been submitted to the jury for determination. *Lynch v. Johnson,* 171 N. C., 611, 89 S. E., 61. Indeed, it may be doubted whether the defendant ever acquired title to the property under the deed in question, it appearing that the "conditions precedent to the vesting of the title" have not been met. *Helms v. Helms,* 135 N. C., 164, 47 S. E., 415. But, however this may be, the issue of delivery remains undetermined on the record.

New trial.

LOTTIE MAE CAUDLE v. DURWOOD E. CAUDLE.

(Filed 2 May, 1934.)

Divorce E a—

In an application for alimony *pendente lite* under C. S., 1666, it is required by the statute that the court find the facts in determining whether the wife is entitled to alimony, her right thereto being a question of law, and it is error for the court to refuse applicant's request for a finding of facts upon which the court denies the application.

APPEAL by plaintiff from *Harris, J.,* at Chambers, Raleigh, 24 October, 1933. From WAKE.

Civil action for divorce *a vinculo* on ground of adultery, with application for alimony *pendente lite* and counsel fees.

Upon application for alimony and counsel fees, made under C. S., 1666, the court denied the same, after a full hearing, upon conflicting evidence.

The plaintiff, in apt time, moved the court to find the facts, which motion was overruled, the court simply adjudging that it "is unable to find such facts as will justify the allowance of alimony *pendente lite* or counsel fees to the plaintiff."

From this ruling, the plaintiff appeals, assigning errors.

Walter L. Spencer for plaintiff.
W. H. Sawyer for defendant.

STACY, C. J. It was said in *Moore v. Moore,* 130 N. C., 333, 41 S. E., 943, that upon application for alimony *pendente lite* under C. S., 1666, "whether the wife is entitled to alimony is a question of law upon the facts found," reviewable on appeal by either party, and the "court below must find the facts" upon request.

The court erred, therefore, in declining to find the facts. Not until the facts are found can we determine the correctness of the ruling as a matter of law. *McManus v. McManus,* 191 N. C., 740, 133 S. E., 9.

It should be observed, perhaps, that plaintiff makes her application under C. S., 1666, and not under C. S., 1667. The dissimilarity of the two statutes has been pointed out in a number of cases, notably *Price v. Price,* 188 N. C., 640, 125 S. E., 264, and *McManus v. McManus, supra.*

Error.

CITY OF RALEIGH, A MUNICIPAL CORPORATION, IN BEHALF OF ITSELF, AND OF ALL CITIZENS OF THE MUNICIPALITY, INCLUDING THE SICK AND AFFLICTED POOR OF THE CITY OF RALEIGH, AND GRAHAM WADDELL, ONE OF THE SICK AND AFFLICTED POOR OF THE CITY OF RALEIGH, IN BEHALF OF HIMSELF AND ALL OTHER CITIZENS OF THE CITY OF RALEIGH IN THE CLASS DESIGNATED AS THE SICK AND AFFLICTED POOR OF THE CITY OF RALEIGH, *v.* TRUSTEES OF REX HOSPITAL, A CORPORATION, AND W. B. WRIGHT, MRS. ELIZABETH HICKS JOHNSON, MRS. ELLEN D. SHORE, J. WILBUR BUNN, AND J. W. MCGEE, CONSTITUTING THE INDIVIDUAL MEMBERS OF SAID CORPORATE BOARD OF TRUSTEES.

(Filed 2 May, 1934.)

Charities B b—Act creating charitable corporation held to give court of equity power to authorize it to mortgage property to preserve its facilities.

A testator devised and bequeathed certain land and personalty in trust for the purpose of erecting and endowing a hospital for the sick and afflicted poor of a certain city, and directed that the property be conveyed to trustees for the purpose specified as soon as such trustees were named by the city. Thereafter a corporation was created for the purpose of carrying out the trust by act of the Legislature expressly providing

that the corporation should be subject to the orders of a court of equity in enforcing strict compliance with the design of the testator. The property devised was conveyed to the corporation by the trustees named in the will, and the corporation sold the land and bought other land with the proceeds of the sale, obtaining title thereto in fee simple by deed containing no restriction on alienation or encumbrancing. The corporation erected a hospital on the land bought by it, and received donations from various persons over a period of years in an amount greatly in excess of the property devised, maintained charity wards for the sick and afflicted poor, and paid its operating expenses out of funds received from its pay patients. Thereafter the corporation sought to obtain a loan for improvements from a Federal agency, and to mortgage the corporate property to secure the loan. The city and others brought this action to restrain the corporation from obtaining the loan, and upon the hearing the trial judge found as a fact that the loan was necessary to preserve the purposes of the corporation in that pay patients would not continue to use the hospital in its present state, and therefore the source of its operating revenues would fail, and entered judgment that the corporation should proceed to obtain the loan and mortgage its property to secure same: *Held*, under the provisions of the act creating the corporation, it was to hold the property devised and donated to it subject to the orders of a court of equity, and upon the facts found the judgment of the lower court is affirmed. Whether an individual or corporate trustee holding property in fee simple subject to a charitable trust imposed by will, deed or other instrument creating the trust, has the power, with or without the approval of a court of equity, to mortgage the property to preserve the facilities for carrying out the purposes of the trust is not presented or decided by this appeal.

APPEAL by plaintiffs from *Grady, J.*, at March Term, 1934, of WAKE. Affirmed.

This is an action to restrain and enjoin the defendants from consummating a loan of money by the Public Works Administration, an agency of the government of the United States of America, to the corporate defendant, and from executing a mortgage or deed of trust on property, real or personal, owned by the corporate defendant, for the purpose of securing the payment of said loan in accordance with the terms set out in the complaint, on the ground that the corporate defendant is without power to consummate said loan, and to execute the said mortgage or deed of trust.

The action was begun on 14 March, 1934. At the trial, judgment was rendered as follows:

"This cause coming on to be heard before the undersigned, Henry A. Grady, judge presiding over the courts of the Seventh Judicial District, at the regular March Term, 1934, of Wake County Superior Court, and a jury trial having been waived, and it having been agreed between D. Staton Inscoe, attorney for the plaintiffs, and Thos. W. Ruffin, attorney for the defendants, that the court might hear the

evidence, find the facts and render judgment; and evidence having been offered by both the plaintiffs and the defendants, and the court having heard the argument of counsel, the following facts are found to be true:

1. This action was instituted by the city of Raleigh, a municipal corporation, in behalf of itself and all of its citizens, and by Graham Waddell, a person found by the court to be one of the sick and afflicted poor of the city of Raleigh, in behalf of himself and all other persons residing in the city of Raleigh belonging to the class of sick and afflicted poor of said city of Raleigh, against the trustees of Rex Hospital, a corporation, and the individual members of the board of trustees of said hospital; and the court finds that all persons interested in this controversy, who are necessary and proper parties for a determination of the questions presented, are before the court, and represented by counsel.

2. This action was brought for the purpose of securing a restraining order against the defendants, prohibiting and enjoining them from consummating a loan on the lands and property belonging to the defendant corporation from the P. W. A. Loan Corporation, a Department of the United States Government, and the pleadings filed herein will disclose the purpose for which the action was instituted and the contentions of the parties.

3. During the month of February, 1839, John Rex, of the county of Wake, died, leaving a last will and testament, which was duly probated and recorded in Will Book 24, at page 261, in the office of the clerk of the Superior Court of Wake County, which will is here referred to and incorporated as a part of this finding of fact.

Under the provisions of said will, the said John Rex devised to the trustees of Rex Hospital a twenty-one acre tract of land adjoining the city of Raleigh, and certain personal property, in trust for the purpose of erecting and endowing a hospital; that said will does not restrict in any manner the power of the trustees therein provided for to alienate or encumber said property; nor does it prohibit either expressly or impliedly the borrowing of money by said trustees and the pledging of said property as security therefor.

4. The General Assembly of North Carolina duly passed an act, authorizing the commissioners of the city of Raleigh to appoint the trustees named in said will, subject to the approval of the Supreme Court of North Carolina, said act being found in the Private Laws of 1840-41 of North Carolina, chapter 6; the original trustees of Rex Hospital, after a full investigation, according to the records hereinafter referred to, found that the twenty-one acre tract of land devised to them under said will was unsuitable for a hospital site or for hospital purposes; and thereupon they petitioned the court of equity, at the

October Term, 1892, of Wake County Superior Court, to allow said original trustees of Rex Hospital to sell the original 21-acre tract of land and to use the proceeds therefrom in the purchase of other property and erect a hospital thereon. In said proceeding the court, after a full consideration of the matter, entered a judgment approving the sale of said 21-acre tract of land, which judgment is recorded in judgment docket No. 7, p. 171, C. I. Docket No. 5318, and Minute Docket 1892, page 546, in the office of the clerk of Superior Court of Wake County, N. C., which records are hereby referred to and incorporated as a part of this finding of fact.

5. The sale of said 21-acre tract of land produced approximately $10,000, which money, together with private contributions made by various citizens of Wake County, was used in the year 1899 in the erection and equipment of the institution on South Street in the city of Raleigh, Wake County, North Carolina, known as Rex Hospital. The site of the present hospital was purchased from a charitable organization known as St. John's Guild of the city of Raleigh, and the deed from St. John's Guild to the trustees of said Rex Hospital amounted to a conveyance in fee simple, without any restrictions whatever, upon the power of alienation or of encumbering said property; said deed appears of record in Book 124, at page 179, in the office of the register of deeds of Wake County, and the said record is hereby made a part of this finding of fact.

6. At the present time the total investment, including lands, buildings and equipment, constituting the institution known as Rex Hospital, amounts to $222,090, of which investment the sum of only $10,000 was derived from the estate of John Rex. That various private donors, including the city of Raleigh, have invested in said institution known as Rex Hospital, the sum of $212,090 as against the trust fund of $10,000 acquired under the will of John Rex, deceased; and said fund of $10,000 derived from the estate of John Rex is merely nominal in comparison with funds contributed from other sources.

7. The expense, maintenance and upkeep of said Rex Hospital has been paid almost in its entirety through the patronage of pay patients, entering said hospital, and being sent there by the majority of the physicians of the city of Raleigh, who have consistently patronized said hospital in an effort to keep the same a going concern. That in spite of the patriotic patronage and support given it by said physicians, and by the citizens of the city of Raleigh, needing medical attention, said hospital has been hardly able to exist. The building of said hospital is old and dilapidated, and unsuitable at this time for the practice of modern medicine and surgery; and the court finds as a fact that as a result of said depreciated condition, and the inability of the defendant

corporation to provide the necessary equipment for the treatment of patients, many of the best patients, residing in the city of Raleigh, have sought hospitalization elsewhere, to the great detriment and loss of the defendant institution. During the past five-year period the court finds that only forty-six per cent of the patients cared for in said hospital were pay patients. That in addition to funds derived from these pay patients the city of Raleigh and the Duke Foundation have donated approximately $25,000 per annum towards the operation and upkeep of said hospital; and in spite of these generous donations, and owing to the facts hereinbefore and hereinafter found, said hospital is hardly able to exist under present conditions, and will probably not continue to exist unless its pay patients can be retained and increased; and unless material aid can be had from some source, said institution will cease to operate and those poor and destitute people of the city of Raleigh, for whom the original donation under the will of John Rex was intended, will lose the benefit thereof.

8. The defendant corporation, acting through its board of trustees, finds itself faced with the dire necessity of improving the physical property and adding new and up-to-date equipment to said institution; and it is found as a fact that if said board of trustees is prevented from securing the aid and assistance referred to in the answer said institution will soon cease to function and the entire property belonging to said corporation will escheat to the University of North Carolina, as provided by law; not only will the small trust fund of $10,000, donated by John Rex be forfeited, but also the tremendous sum of $212,000 contributed by the public generally and the city of Raleigh will be lost insofar as the beneficiaries named in the will of John Rex are concerned.

9. Facing the dire necessity of improving its property or forfeiting its trust, the board of trustees of Rex Hospital, applied to the United States Government, through its subsidiary, the said P. W. A. Loan Corporation, for a loan of $350,000, the proceeds of which are to be used exclusively in erecting new buildings, or remodeling the present building of Rex Hospital, and adding thereto such new and up-to-date equipment as may be required for the protection and care of the sick and afflicted poor of the city of Raleigh, including such pay patients as may be encouraged to patronize said hospital under a modernized and up-to-date equipment; and the United States Government, acting through the P. W. A. Loan Corporation has agreed to lend to said corporation said sum of $350,000, and agreed to accept as security therefor a mortgage or deed of trust upon the property of said institution, under the terms and conditions set forth in the loan application attached to the answer, marked Exhibit A, and made a part of this finding of fact.

10. The court finds as a fact that the consummation of said loan will be to the great, lasting and material advantage of all parties concerned; that if said loan is consummated and said Rex Hospital modernized, as hereinbefore referred to, the class of persons known and designated as the sick and afflicted poor of the city of Raleigh will be given free of charge, modern and efficient hospital facilities; that the public generally of the city of Raleigh, and vicinity, will be induced thereby to patronize said institution and will be attracted thereto on account of its modern and up-to-date facilities; that the income of said institution will be thus greatly augmented and increased.

The court finds as a fact that in consideration of said loan, and the resultant improvement to said hospital, now in contemplation, the city of Raleigh has agreed to contribute at least $10,000 per annum towards the operation and upkeep thereof; and the commissioners of Wake County have also agreed to contribute towards the upkeep and maintenance of said institution, and it is highly probable that private donors will be encouraged thereby to contribute towards the maintenance of said hospital. The court estimates that the income alone from pay patients will be increased at least $25,000, annually, which, together with the $10,000 annual appropriation from the city of Raleigh, will amount to $35,000 per annum, which amount is more than sufficient in itself to amortize both principal and interest of the proposed loan from the P. W. A. Loan Corporation. The amount of the loan requested is $350,000, of which $109,000 is requested as a gift or grant, for the cause of a public charitable enterprise. The proposed loan is to run for thirty years, the annual maturity or curtailment being $11,666.67, and the interest rate is four per cent per annum; the average amount required annually to amortize the entire loan will be $18,666.67; and the court finds that in all human probability the increased appropriation and income from pay patients will amount to a sum largely in excess of $35,000 per annum, thus leaving a surplus of approximately $16,333.33 over and above the amount necessary to amortize said loan. The court finds that the proposal, if consummated, will cause the hospital to be self-sustaining and the government of the United States has recognized that fact and approved said loan, under the terms and conditions as set out in the application attached to the answer, which is hereinbefore referred to and made a part of these findings of fact. The court also finds that the governing body of the city of Raleigh, the Raleigh Academy of Medicine, which comprises the majority of the leading physicians of the city of Raleigh, the various civic clubs of the city of Raleigh, and the public generally, are of the opinion that said loan ought to be approved and that the consummation thereof will be for the material benefit of Rex Hospital and of the

objects of charity for which it was originally instituted; and the court further finds as a fact that if said loan is not permitted by the court and consummated, that said hospital and those for whom it was originally instituted will suffer a serious and irreparable loss.

The changed conditions as hereinbefore indicated have so altered the situation since the year 1839, when the will of John Rex was filed for probate, that the trustees of said hospital will either have to forfeit their trust or borrow such funds as may be necessary to place the same in a condition such as is hereinbefore referred to and thereby meet the demands of the public and of the sick and afflicted poor of the city of Raleigh, for a modern, up-to-date hospital. The court finds that the borrowing of this money is an absolute necessity for the further continuation of the merciful and charitable facilities offered and extended to the public generally by this institution and as foreseen and contemplated by John Rex at the time of the execution of his last will and testament.

11. The court further finds as a fact that Rex Hospital is a public body corporate in contemplation of law and also within the purview of the ruling of the Federal Emergency Administration of Public Works.

CONCLUSIONS OF LAW.

Upon the foregoing findings of fact the court concludes:

1. That all persons interested in this controversy are now within the jurisdiction of the court and properly before the court.

2. That the defendant, board of trustees of Rex Hospital, on account of the facts as found, and under the will of John Rex, deceased, is a public charitable institution rather than a strict charitable trust; that under the provisions of the will of said John Rex, there is no restriction upon the powers of alienation, nor is there any restriction upon the borrowing of money and the pledging of the corporate property as security for such loan; that the interest of the public generally and of the sick and afflicted poor of the city of Raleigh are sufficient, under the facts and circumstances hereinbefore found, to give to this court, in its equitable jurisdiction, the power and authority to approve the contemplated loan hereinbefore referred to, and the court does approve the same.

The court holds as a matter of law that it is absolutely necessary for said board of trustees of said hospital to consummate said loan in order to prevent a forfeiture of said property under the escheat laws of North Carolina; and the court does now hold as a matter of law that said trustees, in their corporate capacity, have the full power to accept said loan and to pledge as security therefor the physical property

now in their hands, by way of mortgage, deed of trust, or other legal instrument, and to do and perform all things necessary and proper to the consummation of said loan, according to the terms and conditions described in the pleadings; the proceeds of which are to be used solely for the purpose of improving the present hospital building and equipment, or the construction of such additional buildings and the purchase of such additional equipment as may be necessary for the carrying out of the plans submitted to the United States Government.

It is therefore on motion of Thos. W. Ruffin, attorney for the defendant, considered, ordered and adjudged:

1. That the defendant, board of trustees of Rex Hospital, a corporation, be and it is hereby authorized, empowered and directed to consummate the loan referred to in the pleadings and in this judgment, and to execute and deliver to such trustees or agency of the United States Government as may be required, a mortgage or deed of trust upon the physical property belonging to said Rex Hospital, and to execute and deliver to the same person or governmental agency, such other legal instruments as may be required, pledging said property as security to said loan, and to execute such notes or bonds as may be necessary, representing the indebtedness involved, and to do any and all things which may be found necessary to a proper and legal conclusion of said loan; and the defendant is hereby adjudged to have full power to accept said loan from the P. W. A. Corporation; and the plaintiffs' prayer for a restraining order is hereby denied, and the plaintiffs' cause of action is hereby dismissed, it being found as a fact that this action was brought solely for the purpose of restraining the defendants from consummating the said loan.

2. That the defendants recover their costs to be taxed against the plaintiffs. HENRY A. GRADY, *Judge Presiding.*"

The plaintiffs excepted to the foregoing judgment and appealed to the Supreme Court, assigning as error the holding of the court that the corporate defendant has a right to accept a loan of money from the Public Works Administration, and to secure the payment of the same by a valid mortgage or deed of trust on the property, real or personal, owned by said defendant.

D. Staton Inscoe and W. H. Yarborough for plaintiffs.
Thos. W. Ruffin for defendants.

CONNOR, J. The land situate in the city of Raleigh, on which Rex Hospital is located, was conveyed to the defendant, trustees of Rex Hospital, a corporation created by the General Assembly of this State, by a deed dated ..... day of August, 1893. This deed was executed by St.

John's Guild, a corporation organized under the laws of this State, and is duly recorded in the office of the register of deeds of Wake County, in Book 124, at page 179. By virtue of this deed, the corporate defendant, trustees of Rex Hospital, is now the owner in fee simple of said land. There is nothing in the deed, which appears in the record, which limits or restricts the title or estate of the defendant, in or to said land, or its right to convey the same by deed or mortgage. It appears, however, from the record, that the purchase price for said land was paid by the defendant out of the proceeds of the sale of a parcel of land, containing twenty-one acres, which was conveyed to the defendant by the executors of John Rex, pursuant to the provisions of his last will and testament. John Rex, a citizen of this State, and a resident of the city of Raleigh, died in 1839. His last will and testament was duly probated and recorded in the office of the clerk of the Superior Court of Wake County, and contains the following:

"It being my desire to provide a comfortable retreat for the sick and afflicted poor belonging to the city of Raleigh, in which they may have the benefit of skillful medical aid and proper attention, it is my will that a lot or parcel of land containing twenty-one acres adjoining the city of Raleigh on the southwest side, being the same purchased by me of the commissioners appointed for selling a part of the public lands, and which is comprised in the general devise of all my lands to the aforesaid Duncan Cameron and Geo. W. Mordecai in trust as before mentioned, be appropriated for the erection thereon of an infirmary or hospital for the sick and afflicted poor of the city of Raleigh and for no other use or purpose whatsoever.

"And for the endowment of said hospital as far as I have the ability to do so, it is my will that all the money belonging to me, all the debts due me, and all the rest and residue of my estate hereinbefore given, devised and bequeathed by me to the said Duncan Cameron and Geo. W. Mordecai in trust and not otherwise specially appropriated be, and they are hereby appropriated to the endowment of said hospital, and whenever the constituted authorities of the city of Raleigh shall legally appoint trustees capable in law of holding the same, then the said Duncan Cameron and Geo. W. Mordecai or the survivor of them, or the executor or executors of the survivor of them, shall convey the said lot or parcel of land and the fund accruing from the money belonging to me, the debts due and the rest and residue of my estate as above described to the said trustees, or their successors duly appointed in trust forever, for the execution and endowment of such hospital, and no other use or purpose."

After the probate of said last will and testament, the General Assembly of this State, by chapter 6, Private Laws of 1840-41, authorized

the commissioners of the city of Raleigh, to nominate, and with the approval of the Supreme Court of the State, to appoint five persons as trustees of Rex Hospital. The said persons and their successors were declared to be a body corporate by the name of the "trustees of Rex Hospital." The said corporation was authorized to receive and hold the property and effects devised, and bequeathed by John Rex by his last will and testament, and to use and apply the same to and for the purposes specified in said will, and no other, and also to receive and hold donations of lands and personal property for the purposes aforesaid.

Section 3, chapter 6, Private Laws of North Carolina, 1840-41, is as follows:

"And be it further enacted: That the commissioners of the city of Raleigh, for the time being may, at any and all times, by petition in equity in the Supreme Court, call on the said trustees for an exhibition of their accounts and doings in discharge of this trust, and such proceedings shall be summary, and the Court may make any order or orders thereupon from time to time as may be necessary to enforce a strict compliance with the design of the testator, to correct and prevent abuses, to remove or displace any trustee or trustees, who shall appear to have been guilty of any wilful default or gross neglect in the discharge of his duty, or to have become incompetent by bodily or mental infirmity; and generally to do and order what shall seem to the said Court best in the premises."

The question presented by this appeal is not whether trustees, individual or corporate, who own property, real or personal, in fee simple or absolutely, but which is subject to a charitable trust imposed thereon by the testator, grantor, or other donor in the will, deed, or other instrument by which the trust was created, in the absence of express authority contained in said will, deed or other instrument, have the power, with or without the approval of a court of competent jurisdiction, to convey said property by mortgage or deed of trust to secure money borrowed by said trustees, in good faith, to enable them to improve or add to said property, and thereby to preserve or enlarge their façilities for carrying out the charitable purpose of their testator, grantor, or donor. For obvious reasons, this question cannot be decided, and ought not to be discussed by this Court unless and until it has been properly and clearly presented for decision. See *Wright v. McGee, ante*, 52, 173 S. E., 31.

It was held by this Court in *Shannonhouse v. Wolfe*, 191 N. C., 769, 133 S. E., 93, that in the absence of authority from the grantor in the deed by which a charitable trust was created, and of the approval of a court with equitable jurisdiction, the trustees had no such power. In

that case, the trustees of a charitable trust had executed a mortgage on the land held by them to secure money borrowed by the trustees, and expended by them in the improvement of the property. It was held that the mortgage was void, because the trustees had no power to convey the land by mortgage. That case was distinguished from *Hall v. Quinn*, 190 N. C., 326, 130 S. E., 18, in which it was held that a mortgage executed by a corporate trustee to secure notes for borrowed money was valid. In the latter case, the corporate trustee was authorized by the statute by which it was created, to use and enjoy, alien, exchange, invest, convert and reinvest all its property and assets in like manner with other corporations similarly chartered. The statute was construed by this Court as authorizing the corporate trustee to mortgage as well as to sell and convey its property. In that case, the mortgage had not been approved by a court of competent jurisdiction.

In *Ellerherst v. Pythian* (Ky.), 63 S. W., 37, the question presented to the Court of Appeals of Kentucky was whether the trustees of a charitable trust created by a will, with the approval of a court of competent jurisdiction, on the facts involved in that case, had the power to mortgage the property devised and bequeathed to the trustees for the establishment and maintenance of a hospital. The judgment of the Circuit Court, which had original equitable jurisdiction, approving the mortgage, was affirmed. In that case, it was provided in the will of the testator that the trustees should report, annually, all their acts and doings to the highest court in the county in which the hospital was located, having equitable jurisdiction. In that case it is said: "It would be unfortunate if there was no power anywhere to enable the trustees to relieve the institution of its present embarrassment, and place it in a position where it can take care of the sick, and thus accomplish the beneficial purpose of the testatrix."

In the instant case, it is expressly provided by the statute by which the corporate defendant, trustees of Rex Hospital, was created, that said corporation should hold the property, real and personal, which should be conveyed to it by the executors of John Rex, pursuant to the provisions of his will, or which should be donated to it from time to time, subject to such orders as a court of equity should make. For this reason, the judgment of the Superior Court, which had original jurisdiction of this action, on the facts found by said court, approving the mortgage or deed of trust, which the corporate defendant, trustee of Rex Hospital, has agreed to execute to secure the loan to be made to it by the Public Works Administration, is

Affirmed.

C. E. LIGHTNER AND R. H. LIGHTNER v. CITY OF RALEIGH, A MUNICIPAL CORPORATION; GEORGE A. ISELEY, MAYOR AND COMMISSIONER OF FINANCE; C. C. PAGE, COMMISSIONER OF PUBLIC WORKS; AND CARL L. WILLIAMSON, COMMISSIONER OF PUBLIC SAFETY, CONSTITUTING THE BOARD OF COMMISSIONERS AND GOVERNING BODY OF THE CITY OF RALEIGH.

(Filed 2 May, 1934.)

1. Municipal Corporation E d: Easements A e—

A municipal corporation can acquire no easement in lands by the continual discharge of raw sewage in a stream running through the lands when such acts constitute a public nuisance.

2. Limitation of Actions B a—Damages for trespass to land from sewer system prior to three years from institution of action are barred.

Where a municipal corporation constructs a sewer system which empties quantities of raw sewage and other obnoxious matter in a stream, which matter is periodically washed upon contiguous lands by freshets, in an action against the city by the owner of the land, all damages to the land based on trespass occurring prior to three years before the institution of the action are barred by the three-year statute of limitation, N. C. Code, 405, 441(3), and an instruction to the jury to this effect is not erroneous.

3. Same—Where trespass to land by sewer system is continuing and has existed for more than three years plaintiff may recover only increased damage resulting since three years prior to institution of action.

Where plaintiff brings action against a city to recover damages resulting to plaintiff's lands from the city's sewer system, alleging that the city discharged raw sewage and other obnoxious matter into a stream running by plaintiff's land and that such matter was periodically washed upon plaintiff's land by freshets, greatly damaging the land and rendering it impossible of use or habitation, and demands the recovery of permanent damage for such wrongful taking, the trespass is a continuing one, and where the first acts of trespass are barred by the three-year statute of limitation, N. C. Code, 441(3), an instruction that plaintiff could recover only the difference in the value of the land before and after the three-year period prior to the institution of the action is not erroneous, and where the jury finds that there was no increase in the damage to the land subsequent to three years prior to the institution of the action, a verdict that plaintiff recover nothing will be upheld on appeal.

4. Trial E e: Municipal Corporations E d—

Where plaintiff, in an action to recover damages to lands from a municipal sewer system, desires more specific and detailed instructions on the issue of permanent damage he should present prayers for special instructions.

5. Trial F a—

Where the issues submitted arise upon the pleadings and are determinative of the facts in dispute they will not be held for error on appeal.

6. Appeal and Error A a—

On appeal in a civil action the Supreme Court is limited to matters of law or legal inference. Art. IV, sec. 8.

APPEAL by plaintiffs from *Grady, J.*, and a jury, at January Term, 1934, of WAKE. No error.

The plaintiffs, C. E. Lightner and R. H. Lightner, instituted suit 13 February, 1932, against the city of Raleigh for recovery of permanent damages to plaintiffs' lands by reason of the city of Raleigh emptying its raw sewage into Walnut Creek adjacent to plaintiffs' lands. The facts substantially, are as follows: Walnut Creek is the natural drainage for all that portion of the city south of Hillsboro Street and New Bern Avenue including the various State institutions west of said city. The Holleman Road, State Highway No. 10, where the same crosses this creek, about half a mile south of the present city limits, is the western boundary of plaintiffs' land and Walnut Creek for almost a mile is the northern boundary of plaintiffs' land. The city of Raleigh, under chapter 207, Private Laws of 1889, was authorized to establish a system of sewerage. The early part of 1890, the city established the Walnut Creek system. This system had two outfalls into Walnut Creek. One of these was about 300 yards below the pumping station, which pumps the city water supply from Walnut Creek, and west of the said highway No. 10. This was known as the southwestern outfall. Another outfall into said creek was east of the intersection of said highway and Walnut Creek. In 1910, the city built an impounding reservoir on Walnut Creek above the reservoir at the pumping station and in 1923, another impounding reservoir called Lake Johnson was built still further up Walnut Creek. The waterworks and sewer system were extended, revised and the outfall in Walnut Creek enlarged in 1923. Many new sewer connections were made between 1918 and 1923 and in the latter year the outfall just east of the intersection of said highway and Walnut Creek, then a 12-inch main, was found too small and the main divided and a larger additional outfall constructed emptying into the creek further east also opposite plaintiffs' lands. The sewer lines from State College, penitentiary, State Hospital and blind institutions have been connected to these sewer lines in 1922 and 1923. In 1917, the plaintiffs bought at a land sale a 94-acre tract on Walnut Creek and in February, 1926, purchased 60.8 acres lying between the first tract and the highway No. 10, making about 155 acres of contiguous land, all part of the same original tract, and bounded by said highway on the west and Walnut Creek on the north. At the time of plaintiffs' first purchase, 1917, the city had one main emptying raw sewage into Walnut Creek at a point

just east of the intersection of the highway, Route 10, and Walnut Creek. This main has been continuously used by the city for said purpose.

When plaintiffs bought the first tract in 1917, one sewer main then emptied into Walnut Creek just east of the highway and just above this tract, but the sewage was not then noticeable and did not interfere with the use of said land. Plaintiffs were in business as undertakers, had 12 head of horses and bought the tract largely on account of the good meadow. They farmed it from 1917 to 1926, cut hay in the meadow, hauled sand from the creek and sold it to the city. The place had one house on it and plaintiffs built another four-room house, a couple of tobacco barns and a packhouse. About 1926, as automobiles had displaced horses in plaintiffs' business and the plaintiffs bought the additional 60.8 acres adjacent on west to said 94 acres and converted the whole 155-acre plantation into a dairy. For this purpose plaintiffs erected a building, built a silo and concrete dam on a stream tributary to Walnut Creek at a total cost of between $3,500 and $4,000. That at the time of this installation, about 1926-27, the sewage condition in the creek was not noticeably bad, but soon thereafter the water slackened off in the creek, it became very sluggish, principally all the water that was flowing would be coming out of the sewer pipes and excrement, toilet paper and whatever goes through a sewer would bank up in the stream all through the dry season, the filth about waist deep, then when rain or flood came, it would lift up this stuff and spread it out all over the meadow, leaving excrement, etc., on the land when water receded; that as this condition developed and grew worse, plaintiffs abandoned the pasture; that bacteria count in the milk became so high that plaintiffs fenced off the meadow to keep the cows out and subsequently had no land with grass on it and had to feed the cows almost entirely to run the dairy. That when plaintiffs acquired either of said tracts there was no artificial bank on the north side of the creek opposite plaintiffs' lands and the water coming under the bridge, highway No. 10, went largely over on the left side of the creek opposite plaintiffs' lands, but some time after plaintiffs bought the last tract the city trash wagons began to haul stuff and dump it on the north bank of the creek; this dumping was continued until a dike, was thereby built on the north bank of the creek wide enough for these trucks to run down and back until this dike extended down the creek from the bridge possibly 200 yards and as high above the creek as a man. The effect of this dike, which has been built up since 1927 and added to, was when the water in time of freshet shot under the bridge instead of going down on the left-hand side of the creek, threw every bit of it on plaintiffs' property, going over the whole of the meadow in time

of freshet. Thus water, sand and sewage from the creek went over plaintiffs' property, into the fresh streams, which crossed plaintiffs' lands, dammed them and caused the swamp to spread out on the other farm land of the plaintiffs and damaged that. That in the latter part of 1929, the condition having grown steadily worse, plaintiffs finally abandoned the dairy; that the stench created by the sewage became so bad that people could not live in the homes on the place, and since that condition existed the place has been rendered practically worthless; that some people have occupied the houses just to keep them from being burned; that since 1929, the place has become practically worthless and plaintiffs testified that in their opinion the damage amounted to between $18,000 and $20,000.

The defendants denied that plaintiffs had the right to recover and set up the following defenses: "VI. That defendant has dumped its sewage into said Walnut Creek, and that the overflow of said Walnut Creek has been the same for more than forty years; that defendant has acquired a prescriptive right to use said Walnut Creek and the lands within its overflow boundaries, by such use; and that defendant without waiving its right hereunder, specifically pleads said adverse use of said creek for nearly forty years, and for more than twenty years, in bar of plaintiffs' right to recover hereunder. VII. That if the plaintiffs have any claim or right of action against the defendant by reason of the matters and things alleged in the complaint, which is again expressly denied, that such claim or right of action matured more than two years prior to 9 November, 1931, the date on which the plaintiff presented his said alleged claim to the board of commissioners of the city of Raleigh, and such claim is accordingly forever barred by the provisions of section 442 of the Consolidated Statutes of North Carolina, and said section is expressly pleaded in bar of any recovery by the plaintiffs herein. VIII. That if the plaintiffs have any claim or cause of action on account of the matters and things alleged in the complaint, which is again expressly denied, that such claim or right of action, and the happening and infliction of the alleged injury to the property of the plaintiffs therein complained of, occurred more than ninety days prior to 9 November, 1931, the date of the filing by the plaintiffs of their alleged claim with the commissioners of the city of Raleigh, and the plaintiffs' right of action is accordingly barred by reason of the provisions of section 2, of Article XXII of the charter of the city of Raleigh (N. C. Private Laws of 1913, chapters 59 and 60, and acts amendatory thereof), which said section is expressly pleaded in bar of recovery of the plaintiffs. IX. That if the plaintiffs have any cause of action by reason of the matters and things alleged in the complaint, which is again expressly denied, that such cause of action accrued more

than three years next preceding the commencement of this action, and the said three-year statute of limitation is hereby expressly pleaded in bar of any recovery herein. X. That if the plaintiffs have any cause of action by reason of the matters and things alleged in the complaint, which is again expressly denied, that such cause of action accrued more than ten years next preceding the commencement of this action, and the said ten-year statute of limitation is hereby expressly pleaded in bar of any recovery herein."

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

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

2. Has the sewerage system, with mains emptying into Walnut Creek, been operated by the defendant openly, notoriously, uninterruptedly and adversely, and at all times substantially in the same condition, for more than twenty years next before the commencement of this action as alleged by the defendant? Answer: No.

3. Have the lands of the plaintiff been damaged by the maintenance and operation of said sewerage system as alleged in the complaint? Answer: No. Not since 13 February, 1929.

4. Is the plaintiffs' cause of action barred by the three-year statute of limitation as alleged in the answer? Answer: Yes, for all damages occurring prior to 13 February, 1929. (Answered by the court.)

5. What damages, if anything, are the plaintiffs entitled to recover of the defendant by reason of the operation and maintenance of said sewerage system? Answer: None."

The plaintiffs tendered the following issues: "(1) Are plaintiffs the owners of the land described in the complaint? (2) Has plaintiffs' land been damaged by the installation and maintenance of the defendants' sewer system as alleged in the complaint? (3) If so, what permanent damages are plaintiffs entitled to recover?" The court declined to submit the above issues; exception and assignment of error by plaintiffs. The court formulated the five issues above set forth and the plaintiffs in apt time objected and excepted and assigned error.

The exceptions and assignments of error made by plaintiffs and necessary facts will be set forth in the opinion.

Murray Allen and Briggs & West for plaintiffs.

J. M. Broughton and Charles U. Harris for defendants.

CLARKSON, J. The controversy succinctly is to the effect: (1) That defendant is emptying its sewage into Walnut Creek and started doing so early in 1890. (2) In 1910, the city built an impounding reservoir on

Walnut Creek above the reservoir at the pumping station, and in 1923 another impounding reservoir called Lake Johnson was built still further up Walnut Creek, and extracted the natural flow of water from Walnut Creek and turned it back in filth, through the sewer system. (3) The waterworks and sewer system were extended, revised and the outfall in Walnut Creek enlarged in 1922-23. (4) John Bray, who was commissioner of Public Works for the city of Raleigh for four years, the last year, 1923, a witness for the plaintiffs, testified, in part: "Of course, there were a great many houses built in the eastern, as well as over all the city as far as that goes, and that increased the capacity of the sewage. All of the State institutions having increased their numbers, including State College, which in 1911 was about nearly five hundred, and in 1929 about nine hundred and now about eleven hundred. And the penitentiary and the asylum, the blind institution have come in since then, all connected to sewer lines emptying into Walnut Creek. I couldn't tell you as of the year of 1929, how much the natural flow of the water in the creek had been diminished by these various changes, building and other things, but I think the sewage, increase capacity on the sewage, would be around thirty per cent. I might say between 1917 and 1929. Most of the increases in houses and population in the institutions took place in 1919 and 1929. The third sewer line above Lightner's land was put in in 1923. These institutions came in the sewer system about five years prior to that time."

(5) B. L. Crocker, a witness for defendant, who has been in the real estate business in Raleigh 20-odd years, testified, in part: "I have a fair knowledge of the general occupancy of property in the southeast section of the city. I should think four or five hundred houses have been vacant in the last four or five or six years. Even today there are many vacant houses. At one time, a lot of Negroes worked for R. G. Lassiter and those houses were built out there and they occupied them. Since then, the Negroes have gone elsewhere seeking employment. This condition of vacancy which I have described existed in that section of the city." (6) J. A. Whitman, director of the Utilities Division Department of Public Works, witness for defendant, and connected with the city in an engineering capacity since 1923, testified, in part: "In Raleigh, our per capita consumption of water from the filter plant runs about fifty-seven gallons; infiltration amounts to another ten gallons, with a total of sixty-seven gallons per capita at the present time. What I meant by my reference as to gallon for gallon was that you will eventually deposit the same amount into the sewer system as you consume. That is the experience generally from a long calculation. I have the record of the volume for 1926. The actual amount will daily average four and seven-tenths million gallons. In 1929, it averaged

about three million per day, that is, there was more than a million gallons less per day in 1929 than there was in 1926. The records indicate that the actual dumpage into Walnut Creek was less in 1929 than it was in 1926. There has been a gradual decrease ever since 1926, up to the present time." (7) It was in evidence and contended by defendant: "That at the time that plaintiff purchased the premises alleged to have been damaged, the sewage from the entire southern portion of the city of Raleigh was being dumped into said creek and the plaintiffs were and should have been advertent to that fact; that they knew of the construction or extension of the additional sewer line running east and west and made no objection thereto. That prior to the time the plaintiffs purchased said tract of land, former owners operated farms thereon and this is the first and only time any owners thereof have complained or alleged that said land was damaged or affected by the discharge of the said sewer into said creek."

Chapter 207, Private Laws of 1889, "An act to amend the charter of the city of Raleigh, North Carolina," section 3, subsection 1, in part is as follows: "They may also construct or contract for the construction of a system of sewerage for the city, and protect and regulate the same by adequate ordinances; and if it shall be necessary, in obtaining proper outlets for the said system, to extend the same beyond the corporate limits of the city, then in such case the board of aldermen shall have the power to so extend it, and both within and without the corporate limits to condemn land for the purposes of right of way, or other requirements of the system, the proceedings for such condemnation to be the same as those prescribed in chapter forty-nine, volume one of The Code." Similar power is given in chapter 59, Private Laws of 1913, "An act to incorporate the city of Raleigh and to repeal its present charter and all laws in conflict with this act."

The defendant set up the defense of an easement. In 20 R. C. L., sec. 114, p. 498, in part, it is said: "The rule is universally recognized that prescription or lapse of time cannot be relied on to establish a right to maintain a public nuisance." Part section 115, p. 499: "In the case of nuisances that are purely private in character, prescription is generally recognized as a good defense."

In regard to the question of easement, the court below, on the second issue submitted to the jury, correctly charged them: "In respect to this issue, however, gentlemen, and after considering the decisions of the Supreme Court applicable to the cases of this kind, I am of the opinion that issue will have to be answered in favor of the plaintiffs. I, therefore, direct you, gentlemen, that if you find the facts to be as testified by all of the witnesses, to answer the second issue 'No.'"

In *Cook v. Mebane*, 191 N. C., 1 (6): "The court's definition is the one generally accepted. 29 Cye., L. & P., p. 1152: 'The term "nuisance" means literally annoyance; anything which works hurt, inconvenience, or damage, or which essentially interferes with the enjoyment of life or property.'" *Hodgin v. Liberty*, 201 N. C., 658 (660-1); *Holton v. Oil Co.*, 201 N. C., 744 (747). In *Cook v. Mebane, supra*, at pp. 4-5, is the following: "As to polluting water, it was said in *Finger v. Spinning Co.*, 190 N. C., p. 78: 'The fact that this may call for the expenditure of large sums of money by defendants cannot be considered as justifying the continuance of a trespass upon or a nuisance to the lands of plaintiff by defendants. As said by *Chief Justice Clark*, in *Rhyne v. Mfg. Co., supra*, 182 N. C., 489: "Defendants must attain its ends, advance its interests, or serve its convenience by some method, whether in improving its sewerage system or otherwise, which shall be in accordance with the age-old maxim that a man must use his own property in such a way as not to injure the rights of others, *sic utere tuo, ut alienum non lædas.*"'"

"*Hoke, J.*, in *Donnell v. Greensboro*, 164 N. C., 334, speaking to the subject of sewage disposal, says: 'The decisions of this State are in approval of the principle that the owner can recover such damage for a wrong of this character, and that the right is not affected by the fact that the acts complained of were done in the exercise of governmental functions or by express municipal or legislative authority, the position being that the damage arising from the impaired value of the property is to be considered and dealt with to that extent as a "taking or appropriation," and brings the claim within the constitutional principle that a man's property may not be taken from him for the public benefit except upon compensation duly made.'" Citing numerous authorities.

Chapter 59, *supra*, Art. XXII, sections 1 and 2, requires certain notice to defendant city, which seems to have been done in accordance with the statutes, C. S., 442. *Peacock v. Greensboro*, 196 N. C., 412.

The contention of the defendants: "Is the action barred by the three-year statute of limitations? Sec. 405, N. C. Code, 1931 (Michie): 'Civil actions can only be commenced within the periods prescribed in this chapter, after the cause of action has accrued; except where in special cases a different limitation is prescribed by statute. The objection that the action was not commenced within the time limited can only be taken by answer.' Sec. 441, subsec. 3: 'For trespass upon real property. When the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not thereafter.' The question arises—What constitutes a continuing trespass, and what the original trespass?"

The principle is set forth in 37 C. J., "Limitations of Actions," part sec. 249, pp. 883-4: "Cases frequently arise where damages resulting from an act are continuing or recurring so that they cannot presently be ascertained or estimated so as to be presently recoverable in a single action. In such cases separate and successive actions may be brought to recover the damages as they accrue, and a judgment rendered in one of such actions for damages accrued up to the time when suit was brought is no bar to another action to recover damages accruing after the judgment. To cases of this character, the statute of limitations does not have the same rigid application as to cases where all the damages may be recovered in a single action, and the two main principles applying are as follows: Where continuing or recurring injury results from a wrongful act or from a condition wrongfully created and maintained, such as a continuing nuisance or trespass, there is not only a cause of action for the original wrong, arising when the wrong is committed, but separate and successive causes of action for the consequential damages arise as and when such damages are from time to time sustained; and therefore so long as the cause of the injury exists and the damages continue to occur plaintiff is not barred of a recovery for such damages as have accrued within the statutory period beyond the action, although a cause of action based solely on the original wrong may be barred, and this has been termed the general rule, to which the rule, where the injury is permanent, is an exception." *Perry v. R. R.*, 171 N. C., 38; *Teeter v. Telegraph Co.*, 172 N. C., 783; *Morrow v. Florence Mills*, 181 N. C., 423; *Anderson v. Waynesville*, 203 N. C., 37; *Gray v. High Point*, 203 N. C., 756.

In *Langley v. Hosiery Mills*, 194 N. C., 644 (646), is the following: "In a later case against the same defendant (*Webb v. Chemical Co.*, 170 N. C., 662), the plaintiff appealed, assigning for error the judge's refusal to submit an issue for permanent damages, and it was held that the case was not one of those in which, at the election of the plaintiff, such an issue must be submitted, *Hoke, J.*, remarking: 'In some cases on this subject, it has been held that, when one erects a substantial building or other structure of a permanent character on his own land which wrongfully invades the rights of an adjoining proprietor by the creation of a nuisance or trespass, the injured party may "accept or ratify the feature of permanency and sue at once for the entire damage." *Chicago Forge and Bolt Co. v. Sanche et al.*, 35 Ill. Ap., 174. But in cases strictly of private ownership, the weight of authority seems to be that separate actions must be brought for the continuing or recurrent wrong, and plaintiff can only recover damages to the time of action commenced. In this State, however, to the time of trial.'" Citing numerous authorities. "In cases of private ownership, an issue

for permanent damages may be submitted by consent of the parties. *Morrow v. Mills,* 181 N. C., 423." *Wharton v. Mfg. Co.,* 196 N. C., 719.

In the instant case, the plaintiffs elected to pray for permanent damages, which they had the right to do as the property was attempted to be taken by defendants for a public purpose. *Rhodes v. Durham,* 165 N. C., 679 (680). The court below charged the jury as follows: "Is the plaintiffs' cause of action barred by the three-year statute of limitation, as alleged in the answer? Gentlemen, it is my view of the law, and you, gentlemen, of course, will take the law from me—and if I am wrong, I can be overruled by the Supreme Court—but as I view the law of this case, the damages which the plaintiffs would be entitled to recover, if any, would be limited to what has occurred within the last three years prior to the beginning of this suit. In other words, gentlemen, they cannot maintain an action for damages against the city of Raleigh for any depreciation in the value of their lands due to any act upon the part of the city prior to three years before 13 February, 1932, which would be 13 February, 1929. This action was brought on 13 February, 1932, and the defendant having pleaded the statute of limitation, it is my duty to say to you, as I conceive the law to be, that the plaintiffs cannot recover any damages for anything that happened prior to 13 February, 1929. Therefore, gentlemen, I have answered this issue myself, or at least, I direct you to answer it. If you find the facts to be as testified to by all the witnesses you will answer that issue 'Yes,' for all damages accruing prior to 13 February, 1929.' "

We see no error, from the authorities cited, to this part of the charge to which plaintiffs except and assign error. The court below charged the jury as follows: "We now come to the last issue, or the fifth issue: What damages, if anything, are the plaintiffs entitled to recover of the defendant by reason of the operation and maintenance of said sewerage system? Now, gentlemen of the jury, let me impress this upon you.

It is the law, as I understand it, and for the purpose of this action, it is the law, that if you allow the plaintiffs any damages in this case it will only be such damages as were inflicted upon the lands since 13 February, 1929, up to the beginning of this action. That is, permanent damages. . . . The burden of this issue is upon the plaintiffs. They argue to you that they have been damaged during the years 1930, 1931, 1932, and 1933; that there has been an additional burden cast upon the lands by reason of the overflow of sewage during that period and that you ought, in good conscience, to allow them damages for the depreciation in the value of the land due to this additional burden. These are all questions to be resolved by you, gentlemen, and so, in

conclusion, remembering that the measure of damages is the difference in value between the lands prior to 13 February, 1929, and after the acts of trespass complained of on the part of the city. That is, gentlemen, you will estimate what was the fair market value of these lands prior to any act of trespass on the part of the city during the past three years. You will then estimate what the lands were worth after the acts complained of during the past three years prior to the institution of this action. You will deduct the latter figure from the former and the difference between the two would be your answer to this issue."

We think this charge substantially, the same as we approved in *Wagner v. Conover,* 200 N. C., 82 (85): "Permanent damage means whatever injury has been done to the place and will be done—that is, damages to its value. In other words, how much, if any, had this sewer system there damaged the place, and the way to get at the amount of damage, if you reach that is this: You will ascertain what the place would be worth if the sewer system was not there, and no pollution of the water by the defendant. Set that down in figures. Then ascertain what would be the market value of the land in its present condition—and set that down, and if that is less than the amount if the sewage were not there, then subtract the one from the other, and that would be your answer to the third issue, if you reach that issue." The court charged that it must be permanent damage—but did not define same as in the *Wagner case, supra.*

If plaintiffs wanted the charge more specific or in detail, on the different phases of the controversy and as to permanent damage, they should have presented prayers for instruction. We see no error in the issues submitted. They arose on the pleading and are determinative of the facts in dispute. It may have been better to have submitted an issue as to permanent damages, but the charge covered same. We can only consider here matters of law or legal inference. Art. IV, sec. 8, Constitution of North Carolina, in part: "Jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference."

The jurors are the triers of the facts, if on the record we differ, in their findings, we have no power to correct them. The brief of plaintiffs setting forth the wrong done them, however sympathetic we may be, was for the jury to consider, and not us. For the reasons given, we find in the judgment,

No error.

STATE v. JOE E. DALTON.

(Filed 2 May, 1934.)

1. Indictment A b—Grand jury drawn under prior act held properly constituted, later act being effective after date for selecting jury.

C. S., 2334, 2314, 2333, providing that grand juries for the counties affected should be chosen for six months at the first terms of court for the fall and spring terms, were made applicable to the county in question by Public Laws of 1931, chap. 131. Thereafter Public Laws of 1931, chap. 131, was repealed and C. S., 2334, was amended to provide that the grand juries for the county in question should be drawn at the spring term to serve for twelve months, Public Laws of 1933, chap. 92. The amendment went into effect in 1933 subsequent to the first spring term of the county in question and defendant was tried on an indictment returned by a grand jury chosen for the fall term under the act of 1931: *Held*, the indictment was returned by a duly constituted grand jury, and defendant's exception relating thereto cannot be sustained, the "spring term" referred to in the act of 1933 meaning the first spring term, and the amendment, therefore, not being effective for the year 1933.

2. Jury B d: Criminal Law L c—In absence of request for finding of facts it will be presumed that order is supported by proper findings.

Where defendant makes no request for a finding that the trial would likely be protracted, it will be presumed on appeal that the court's order for an alternate juror is supported by sufficient findings of fact.

3. Jury B d: C b—Act providing for alternate juror where it seems likely that trial will be protracted is constitutional.

The essential attributes of trial by jury guaranteed by Art. I, sec. 13, are the number of jurors, their impartiality and a unanimous verdict, and chap. 103, Public Laws of 1931, providing that the court may order the selection of an alternate juror in those cases which seem likely to be protracted, does not infringe upon the constitutional provisions, the alternate not being technically a juror until a member of the jury has died or been discharged and the alternate is made a juror by order of the court, and the alternate being selected in like manner with the regular jurors and having the same safeguards thrown around him and being given equal opportunities with them of hearing the case, and his presence not being prejudicial, and the verdict being finally returned by unanimous verdict of twelve good and lawful men.

4. Jury B d—

Where the court finds that one of the regular jurors was sick and incapacitated it is sufficient to support his order that the alternate juror selected in the case should serve as a juror.

5. Homicide G c—Held: foundations for admissibility of testimony of deceased's dying declarations were sufficiently laid.

Testimony that deceased had been shot and was in imminent danger of death and had repeatedly stated that she thought she was going to die,

and that she did die less than a week thereafter, is sufficient to support testimony of declarations made by her of circumstances directly attending the homicide and forming a part of the *res gestæ*, it not being necessary that declarant should die immediately after making such declarations, it being sufficient if declarant is in imminent danger of death, apprehends such danger, and that death ensue.

6. Same—

Testimony of dying declarations cannot be extended to declarations of acts antecedent and unrelated to the act causing death.

7. Criminal Law L c—

Where defendant has testified to conversations he had with deceased some time prior to the fatal shooting, the admission of testimony of declarations made by deceased relating to the same conversations will not be held prejudicial.

8. Same—

The inadvertent admission of incompetent evidence which does not in any view prejudice defendant will not be held sufficient ground for a new trial.

9. Homicide H c—Instruction in this case upon element of malice held not to contain reversible error.

In this prosecution for murder, defendant's exception to the charge of the court to the jury on the ground that it failed to instruct the jury that they must find that the element of malice existed in the mind of defendant at the time of the killing in order to convict him of murder in the first degree, is not sustained, it appearing from the record that the court fully and accurately charged the jury upon the element of malice immediately after instructing them upon the elements of premeditation and deliberation and charged them that it might be said to exist where there is an intentional and unlawful killing of a human being without lawful excuse or mitigating circumstances.

10. Criminal Law I g—

The correction by the court of an inadvertent statement of the testimony in his charge to the jury with proper instructions will not be held for error.

APPEAL by prisoner from *Schenck, J.*, at October Term, 1933, of HENDERSON. No error.

The prisoner was indicted for the murder of his wife, Zula Dalton, and from a sentence of death pronounced upon a verdict for murder in the first degree he appealed, assigning error.

There is evidence tending to show not only that the prisoner was given to the habitual use of liquor and drugs but that he was a man of immoral character. He had been arrested on sundry charges of crime, including liaison with a woman named Jones. His wife had refused to live with him. On Sunday, 28 May, 1933, she was at the home of Mrs.

H. K. Duncan, one block from Main Street in Hendersonville. In the afternoon Mrs. Duncan and Mrs. Dalton went to ride in the former's car, Mrs. Dalton driving. On the highway leading to Asheville at a place referred to as Strawberry's, about two miles from Hendersonville, the prisoner passed them in a car driven by George Whitaker. In a few minutes he and Whitaker returned to Strawberry's and in an interview with his wife he learned that she would probably never live with him again. In the car driven by Whitaker he returned to Hendersonville, bought a pistol from one man and cartridges from another under the false representation that he was required as an employee of the State Highway Commission to carry such a weapon.

Armed with the pistol, which was loaded and ready for use, he sought his wife at Mrs. Duncan's about seven o'clock in the evening. He went into the sitting room there, called his wife out, took her into the yard. "Just in a second" his wife was heard to exclaim, "Oh Joe, please quit that. Joe, please don't do that." A shot was fired; then "several rapid shots." Mrs. Duncan ran out screaming and saw the prisoner firing the shots. Mrs. Dalton fell to the ground, "stretched out as if dead," and the prisoner came up near her shoulder, fired the pistol, stepped off, put the weapon to his head, "snapped the gun and walked off." Mrs. Dalton was taken to a hospital and the attending physician found a wound at the base of the skull, one through the scapula of the right shoulder and another through the shoulder. She died on the following Sunday morning. The wound at the base of the brain caused her death.

The defense was insanity induced by continuous and excessive use of whiskey and morphine. The prisoner said he had bought the pistol to take his own life. He testified, "I do not remember going to the home of Mrs. Duncan on Barnwell Street or getting out of the car or knocking at the door or seeing Mrs. Roberts. In fact, I do not remember being there at all or asking my wife to go outside with me, or pulling out a pistol and shooting her, or going back to the car. I do not remember going to the county jail or entering the jail. I do not remember seeing those in jail heretofore named, to wit, Otis Powers, Ed Bishop, Zeb Corn, and others. The first thing I remember after leaving Strider's house was Monday morning. I discovered that I was in jail." There was evidence in contradiction.

Such additional facts as are necessary are referred to in the opinion.

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

Redden & Redden and R. L. Whitmire for prisoner.

ADAMS, J. Upon his arraignment the prisoner moved to quash the indictment on the ground of illegality in the organization of the grand jury, and excepted to the court's denial of his motion.

By an act ratified on 18 March, 1931, section 2334 of the Consolidated Statutes was made applicable to Henderson County. Public Laws, 1931, chap. 131. It was thereby provided that at the first fall and spring terms of the criminal courts grand juries should be drawn to serve respectively during the remaining fall and spring terms—that is, for a term of six months. A panel was to be drawn from the jury box at least twenty days before each regular or special term of the Superior Court and a grand jury was to be drawn except at terms which were special or confined to the trial of civil cases. C. S., 2314, 2333. In compliance with section 2314 a jury was drawn to serve at a term commencing on 9 October, 1933, and from these jurors was chosen a grand jury by whom the indictment in the present case was found and returned.

At the session of 1933 the General Assembly repealed chapter 131, Public Laws, 1931, and amended section 2334 by providing that a grand jury should be drawn at the spring term of the criminal court of Henderson to serve for twelve months. Public Laws, 1933, chap. 92. The phrase "spring term of the criminal court" obviously refers to the first spring term. The first spring term of 1933 for the trial of civil and criminal actions in Henderson County convened on 16 January. C. S., 1443. Chapter 92, *supra*, went into effect 2 March, 1933, and did not in any respect affect the organization of the grand jury that had previously been chosen. Nor did it have any relation to the grand jury which was constituted in the fall. Section 2334 provides that grand jurors chosen to serve for twelve months shall be drawn "at the spring term of the criminal court," the first spring term succeeding the enactment of chapter ninety-two. The prisoner's construction of these acts would result in the abolition of all courts held in Henderson County in the fall of 1933, and this evidently was not the intention of the General Assembly. In the denial of the motion to quash there was no error.

The second, third, and twenty-ninth exceptions are addressed to the selection of an "alternate" juror. The statute empowers the judge presiding in the Superior Court, when it appears that the trial is likely to be protracted, to direct, after the jury is impaneled, that an additional or alternate juror be selected, sworn, and seated near the jury and given equal opportunity to see and hear the proceedings. The alternate juror must be kept with the jury, must at all times attend upon the trial, and must obey all orders and admonitions given by the court to the jury; and if before submission of the case to the jury a juror dies or becomes incapacitated or disqualified, the alternate juror

by order of the judge shall become one of the jury and shall serve as if selected as an original juror. Public Laws, 1931, chap. 103.*

After the jury had been impaneled, G. D. Davis under an order of the court was drawn as alternate juror and was sworn and impaneled in like manner with the other jurors to serve, however, only in case of necessity. At the conclusion of the charge and before the jury had retired for deliberation, the court made the following entry: "It having been made to appear to the court that the juror Thomas Mabry is sick and incapacitated, the alternate juror, G. D. Davis, is placed in his stead."

Upon exceptions duly noted the prisoner assails this proceeding as unconstitutional and as unsupported by sufficient findings of fact. The latter assignment, we presume, has reference to the omission of a preliminary finding that the trial would likely be protracted. There was cause to believe that the trial would be protracted. It began on Wednesday and continued until the following Sunday; and as no request for such finding was made by the prisoner we must assume upon authoritative decisions that the order was based upon such facts as are essential to its support. *Commissioner of Revenue v. Realty Co.*, 204 N. C., 123; *S. v. Harris, ibid.*, 422; *Holcomb v. Holcomb*, 192 N. C., 504.

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*"Section 1. That in the trial in the Superior Court of any case, civil or criminal, when it appears to the judge presiding that the trial is likely to be protracted, upon direction of the judge after the jury has been duly impaneled and sworn, an additional or alternate juror shall be selected in the same manner as the regular jurors in said case were selected, but each party shall be entitled to two peremptory challenges as to such alternate juror; such additional or alternate juror shall likewise be sworn and seated near the jury, with equal opportunity for seeing and hearing the proceedings and shall attend at all times upon the trial with the jury and shall obey all orders and admonitions of the court to the jury and, when the jurors are ordered kept together in any case, said alternate juror shall be kept with them. Such additional or alternate juror shall be liable as a regular juror for failure to attend the trial or to obey any order or admonition of the court to the jury, shall receive the same compensation as other jurors, and except as hereinafter provided shall be discharged upon the final submission of the case to the jury. If before the final submission of the case to the jury a juror becomes incapacitated or disqualified he may be discharged by the judge, in which case, or if a juror dies, upon the order of the judge said additional or alternate juror shall become one of the jury and serve in all respects as though selected as an original juror.

Section 2. That all laws and clauses of laws in conflict with the provisions of this act are hereby repealed.

Section 3. That this act shall be in full force and effect from and after July first, one thousand nine hundred and thirty-one.

Ratified this 13 March, A.D. 1931." Pub. Laws, 1931, chap. 103.

It is argued that the proceeding is unconstitutional because the act of 1931, which provides for an alternate juror, is forbidden by the Declaration of Rights: "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court." Constitution, Art. I, sec. 13.

It is not questioned either that trial by jury is deeply rooted in our institutions or that the term "jury" as understood at common law and as used in the Constitution imports a body of twelve men duly summoned, sworn, and impaneled for the trial of issues joined between litigants, in a civil action or for the determination of facts adduced for and against the accused in a criminal case. *Whitehurst v. Davis,* 3 N. C., 113; *S. v. Scruggs,* 115 N. C., 805; *S. v. Rogers,* 162 N. C., 656; *S. v. Berry,* 190 N. C., 363. The trial proceeds in the presence and under the supervision of a judge authorized to instruct the jury in matters of law; and the word "convicted" as used in section 13 of the Declaration of Rights is qualified by the phrase "but by the unanimous verdict of a jury . . . in open court." Construing this section in *S. v. Alexander,* 76 N. C., 231, the Court said, "Nothing can be a conviction but the verdict of the jury." *Cf. Smith v. Thomas,* 149 N. C., 100; *S. v. Branner, ibid.,* 559; *S. v. Brinkley,* 193 N. C., 747. We are therefore confronted with the question whether the verdict establishing the prisoner's guilt was returned by a jury composed of twelve "good (or free) and lawful men"—*liberos et legales homines;* and in this inquiry the functions of the alternate juror are necessarily involved.

Under the former practice if a juror in a capital felony became incapacitated it was customary to discharge the entire panel and to try the case *de novo.* The act of 1931, *supra,* was designed to cure this evil, and if it preserves the essential attributes of trial by jury, number, impartiality, and unanimity (16 R. C. L., 181, sec. 2), it cannot be said to impair the common-law right as guaranteed by the Constitution.

As to the first element, the jury is composed of twelve men. The alternate technically becomes a juror only when upon an order made by the judge before final submission of the case to the jury he takes the place of a member of the original panel who has died, or who, having become disqualified or incapacitated, has been discharged from further service. From the beginning to the end of the trial the number never varies, and, by a jury of twelve men the verdict is declared.

It is not easy to perceive how the presence of the alternate could influence the reasoning of any juror to the prejudice of the accused. The twelve men by whom the verdict is returned have equal opportunities to hear and appraise the evidence and to receive instructions as to the law. The alternate, who is selected in like manner with the regular jurors and is required to attend at all times upon the trial,

is given equal opportunity to reach a definite, independent, and accurate conclusion. He is sworn, seated near the jury, and remains with the jurors when they are kept together. He is protected by every safeguard that surrounds the jury and insures an impartial verdict. By the uniform practice in the trial of capital felonies the jurors are warned to refrain from discussing the merits of the case until the testimony is closed and the charge of the court is concluded; whereupon, after retiring, they enter upon their deliberations. If before final submission of the case a vacancy results from the death or incapacity of a juror, the alternate by order of the court becomes one of the jury and serves in all respects as though selected as an original juror, and the essentials of a unanimous verdict of twelve men is thus preserved.

Our research has discovered only a few cases relating to the substitution of an alternate juror; but these cases either in express terms or by implication sustain legislation similar to the act of 1931 (chap. 103), which provides that in certain cases an alternate juror shall serve as though selected as an original juror. *People v. Peete,* 202 Pac. (Cal.), 51; *People v. Howard,* 289 Pac. (Cal.), 830; *ibid.,* 295 Pac. (Cal.), 333. The language of the Court in the first of these cases is appropriate here: "To hold under these circumstances that a defendant is deprived of the right to a trial by a jury of twelve simply because one of the twelve by whom the verdict is rendered may, throughout a part of the trial, have sat and listened to the evidence as an 'alternate' and not as a regular juror, would be to exalt mere form above substance. To so hold would be to leave untouched the vital springs of reality and grasp at the merest shadow of substance." We are of opinion, therefore that the act in question was not enacted in breach of the Declaration of Rights.

The objection to the court's finding in regard to the physical condition of the discharged juror is without merit. The alternate took the place of a juror who was "sick and incapacitated"—that is, deprived by reason of sickness of the power to perform the usual functions of a juror. The finding is in compliance with the requirement of the statute.

Several exceptions were taken to evidence tending to show the dying declarations of the deceased, all of which must be resolved against the prisoner. We cannot say that the foundation for the evidence was not laid. It is not necessary that the declarant should be in the very act of dying; it is enough if he be under the apprehension of impending dissolution, "when all motive for concealment or falsehood is presumed to be absent and the party is in a position as solemn as if an oath had been administered." *S. v. Tilghman,* 33 N. C., 513; *S. v. Franklin,* 192 N. C., 723; *S. v. Wallace,* 203 N. C., 284.

Immediately after she was shot the deceased said, "I believe I am dying"; "I don't believe I can live"; "I think I am going to die"; and

repeated the substance of these statements from time to time. She was in imminent danger of death, had apprehension of the fact, and death ensued. *S. v. Collins,* 189 N. C., 15. Her declaration of the circumstances directly attending the homicide and forming a part of the *res gestæ* was competent. *S. v. Shelton,* 47 N. C., 360. But such declarations cannot be extended to acts which were antecedent and unrelated to the act causing death. *S. v. Shelton, supra, S. v. Jefferson,* 125 N. C., 712. While two of the witnesses for the State testified that as a part of her dying declaration the deceased repeated a conversation between the prisoner and herself at Strawberry's in the afternoon preceding the firing of the fatal shot at seven o'clock in the evening, the prisoner was not prejudiced thereby for the reason that he testified even more minutely to the same conversation and the same circumstances.

There was evidence that a witness heard "something like somebody may be fussing" at the prisoner's home; that the witness informed a deputy sheriff; and that some days afterwards he saw the deceased and her eyes were dark. The inadvertent admission of this evidence is not sufficient cause for a new trial. The witness did not say that the deceased or the prisoner was at home on this occasion and did not assign any cause for the discolored eye. The testimony contains no definite statement of a single fact from which a natural and legitimate conclusion prejudicial to the prisoner may reasonably be drawn.

Certain other exceptions assail the charge on the ground that the court failed to instruct the jury that in order to convict the prisoner of murder in the first degree, it was necessary to establish the existence of malice in the mind of the prisoner at the time of the killing. These exceptions are untenable. The charge of the court with respect to the existence of malice express or implied was full and accurate. After instructing the jury with respect to the elements of deliberation and premeditation the court said, "Malice is express when a person wilfully, deliberately, and with a fixed purpose intentionally and unlawfully kills another. Malice is implied where an act dangerous to another is done so recklessly and wantonly as to evince depravity of mind and disregard of human life. Malice may arise either from ill-will or grudge. It may also be said to exist when there has been a wrongful, intentional and unlawful killing of a human being without lawful excuse or mitigating circumstances." The instruction is strictly in accord with numerous decisions of this Court. *S. v. Banks,* 143 N. C., 652; *S. v. Roberson,* 150 N. C., 837; *S. v. Brinkley,* 183 N. C., 720; *S. v. Steele,* 190 N. C., 506.

We find no language in the charge which is reasonably susceptible of the construction that the court expressed any opinion as to the guilt

or innocence of the prisoner in violation of law, as indicated in the 20th exception; and the correction of an inadvertent statement of the testimony in one respect, with proper instructions to the jury, was clearly within the province of the court. If the correction had not been made the prisoner would doubtless have made the failure the basis of a distinct exception.

The remaining exceptions are formal and require no separate discussion. We have examined each one of the exceptions entered during the trial and have found after an accurate inspection of the record no sufficient ground for granting a new trial.

The record abounds in evidence of the prisoner's wilful, deliberate, and premeditated purpose to take the life of the deceased—of his studied preparation for achieving the tragic event. He had the benefit of all the testimony adduced in his behalf tending to establish the defense of insanity. In this respect the instructions given the jury were full, clear, and accurate; but the jury declined to accept the pleaded defense. It is manifest that the prisoner has no adequate reason to complain of the charge. We find

No error.

KITCHEN LUMBER COMPANY v. TALLASSEE POWER COMPANY (NOW) CAROLINA ALUMINUM COMPANY.

(Filed 2 May, 1934.)

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

On a motion as of nonsuit all the evidence is to be considered in the light most favorable to plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom, and the motion will be overruled if there is any sufficient evidence favorable to plaintiff on the whole record to warrant a recovery. C. S., 567.

2. Waters and Water Courses C d—Evidence that defendant suddenly increased the flow of surface water to plaintiff's damage held sufficient.

Plaintiff maintained a bridge across a stream over which it hauled lumber on its tram road. Defendant maintained a power dam farther up the stream. In plaintiff's action to recover for the destruction of the bridge it introduced evidence that earlier in the morning the bridge was destroyed walking horses forded the stream, that later in the morning several witnesses heard a roaring along the stream and saw a large head of water coming down the stream, and that at the bridge the water rose rapidly and in a few minutes ran over the bridge, which was built a little above high water mark, carrying slabs, brush, etc., against the bridge and washing it out, and that there had been no rain since the evening of the day preceding. *Held*, the evidence was sufficient to be

submitted to the jury on the question of whether defendant suddenly increased the flow of surface water in the stream to plaintiff's damage, although defendant introduced testimony of its gate keeper at the dam that the gates at the dam had been gradually raised as made necessary by the rising waters in the defendant's lake, the fact in issue being subject to proof by circumstantial evidence.

3. Waters and Water Courses C e—Question of contributory negligence in causing damage from increase of surface water held for jury.

The evidence in this case that defendant's bridge had been built a little above high water mark, and that defendant had left no more logs and slabs along the stream bed than was customary in lumbering operations *is held* sufficient to justify the submission of the question of contributory negligence to the jury in plaintiff's action to recover for the destruction of its bridge which was washed out when a greatly increased flow of water along the stream piled up such debris against the bridge, overflowed it, and washed it out, and defendant's motion for judgment as of nonsuit on the ground of contributory negligence was properly refused.

4. Appeal and Error E b—

Where the charge of the lower court is not in the record it is presumed that the court correctly charged the law applicable to the facts.

5. Damages D b—Held: court erroneously excluded defendant's evidence on issue of damages and a new trial is awarded on the issue.

On the issue of damages resulting to plaintiff from the temporary loss of its bridge as a result of defendant's wrongful destruction of the bridge, plaintiff introduced evidence that the bridge afforded the only means by which plaintiff could haul its lumber from the land and introduced testimony of the amount of lumber usually hauled per day, the number of days necessary to reconstruct the bridge, its profit per thousand feet, and that it could not get all the lumber out within the time limits set in its contracts. The court excluded evidence offered by defendant in rebuttal that after plaintiff reconstructed the bridge, it stopped cutting timber several months prior to taking up its tram road, and that plaintiff, therefore, had opportunity to haul all its lumber. *Held*, the exclusion of the evidence constituted prejudicial error, and defendant is given a new trial upon the issues involving the damage sustained by reason of the temporary loss of the means for transporting the lumber.

APPEAL by defendant from *Alley, J.*, and a jury, at October-November Term, 1933, of SWAIN. No error on 1st and 2d issues. New trial on 3d issue.

This was an action brought by plaintiff against defendants, to recover damages: (1) For washing a bridge away. (2) For loss of timber that could not be marketed on account of the bridge being washed away. The defendant set up the plea of contributory negligence. The issues presented to the jury and their answer thereto was as follows: "(1) Was the plaintiff's bridge destroyed by the negligence of the defendant, as alleged in the complaint? Answer: Yes. (2) Did the plaintiff, by its own negligence, contribute to the destruction of said bridge, as alleged

in the answer? Answer: No. (3) Was plaintiff delayed by reason of the destruction of said bridge in the completion of its timber boundary on Deep Creek and Laurel Branch, as alleged in the complaint? Answer: Yes. (4) What damages, if any, is the plaintiff entitled to recover? (a) For the cost and expense of replacing the bridge in question? Answer: $1,800. (b) For profits lost by reason of the delay caused by the destruction of the bridge? Answer: $6,200."

The court below rendered judgment on the verdict. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

T. M. Jenkins, Edwards & Leatherwood and Moody & Moody for plaintiff.

S. W. Black, R. L. Phillips and R. L. Smith & Son for defendant.

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence, defendant made motions for judgment as in case of nonsuit, C. S., 567. The court below overruled these motions and in this we can see no error.

Is is too well settled in this jurisdiction to cite authorities that on motion to dismiss or judgment as in case of nonsuit, the evidence is to be taken in the light most favorable to plaintiff and he 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 or judgment as in case of nonsuit at the close of plaintiff's evidence and renewed by defendant after the introduction of his own evidence, does not confine the appeal to the plaintiff's evidence alone and a judgment will be sustained for plaintiff if there is any sufficient, competent evidence on the whole record to warrant plaintiff's recovery. The evidence favorable alone to plaintiff is considered. The competency, admissibility and sufficiency of evidence is for the court to determine, the weight, effect and credibility is for the jury.

The allegations in plaintiff's complaint, in part, are as follows: "That on the morning of 3 September, 1928, defendant negligently used and operated its said dam and water gates thereon in such a reckless and imprudent manner and caused and allowed a large, excessive, dangerous and destructive volume of water to be suddenly released and discharged from its said dam with such an excessive and terrific waterhead and current below the dam, filling the channel and covering the territory there below, carrying logs, timber and debris and waste with excessive volume and velocity and force which struck the plaintiff's aforesaid railroad bridge, destroying and washing the same away."

The defendant denied this allegation and set up contributory negligence in that: (1) It erected the railroad bridge across the Cheoah River, two or three feet or more below the high water mark. (2) Plaintiff cut logs on the Cheoah River above said bridge and tore down trees and allowed the trees, logs and laps to be in or near the river and at flood or high tide, were carried down the river and lodged against the bridge and the force of the stream against the debris caused the bridge to give way and wash out.

The principle of law involved in this controversy is thus stated in Coulson & Forbes on Waters and Land Drainage, 5th Ed., pp. 143 and 144: "The general principle regulating the liabilities of landowners, with regard to the escape and overflow of water, seems to be as follows: Where the owner of the land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief thereby accrues to his neighbor, he will not be liable for damages; but where for his own convenience, he diverts or interferes with the course of a stream, or where he brings upon his land, water which would not naturally have come upon it, even though in so doing, he acts without wilfulness or negligence, he will be liable for all direct and proximate damages, unless he can show that the escape of the water was caused by an agent beyond his control, or by a storm, which amounts to *vis major*, or the act of God, in the sense that it is practically, if not physically, impossible to resist it." *Kelly v. Lett,* 35 N. C., 50; *Comrs. v. Jennings,* 181 N. C., 393 (399); *Jackson v. Kearns,* 185 N. C., 417; *Winchester v. Byers,* 196 N. C., 383.

The jury answered the 1st and 2d issues in favor of plaintiff and assessed the damage at $1,800. The defendant contends that there was no sufficient competent evidence to support the finding of the jury on the 1st issue. We cannot so hold. The evidence on the part of plaintiff was to the effect that the defendant constructed a large concrete dam about 214 feet in height across the Cheoah River in Graham County, North Carolina, known as the "Santeetlah Dam." It closed said dam and obstructed and impounded the waters of the said Cheoah River and its tributaries and above, creating a lake or reservoir of water of great volume and magnitude which has a shore line of about 110 miles and covers an area of about 3,000 acres of land. In the construction of its said dam, the defendant undertook to install or place as a part thereof what it terms as water or flood gates, which gates are movable and can be raised or lowered, obstructing or releasing the waters from the said lake by such action.

There are eight gates on the "Santeetlah Dam," they are 12 feet high and 24 or 25 feet wide. These gates are raised or lowered by hand power, with a worm gear. It requires about 5 minutes to raise

one of the gates 12 inches. About 7½ miles below the dam on the Cheoah River, the plaintiff built a bridge about 12 or 14 feet above the ordinary tide in the river and ran trains over it to get lumber from its holdings. The river, at this bridge, is about 150 feet wide. The bridge was 156 feet long and was built 3½ to 7 feet above the high water mark and cost from $2,500 to $3,000. The following are some of the witnesses who testified, in part, for plaintiff. J. C. Crisp: "We went to the yard a short distance below Tapoco, and picked up the train and drove up to Barkers Creek bridge, and we got there between 7 and 8 o'clock. . . . We drove up to the bridge and set the train out on the main line. When we got to the bridge, we could see the water coming up rapidly, and in a few minutes the bridge went out. It broke from the opposite side of the river from where we were, and almost sprung the steel out from under the engine. When we got to the bridge, the water was around the stringers. It was about 2½ or 3 feet from the bottom of the stringers to the top of the bridge. The water rose from 2 to 3 feet in from 5 to 10 minutes, in my opinion: I could see it rising; we had been there only from 5 to 15 minutes before the water was running over the bridge and washed it out. There is no other lake or dam on any of the streams above that bridge other than the Santeetlah Dam. . . . It was not raining that morning. The streams above the dam were up some on Sunday evening, just an ordinary tide. It quit raining Sunday evening about 6 o'clock; if it rained any more during the night, I was asleep and didn't hear it. . . . There was one empty gondola on the bridge, near the east side. We pulled it off and it was right soon after we pulled off the car that the bridge went out. . . . The drift collected on the east side, it consisted of brush and such timber as will collect along any stream, where there is logging operation. . . . It was ready for operation in two weeks. When I came back, we worked continually loading logs, and shipped out 6 to 8 cars a day. A car would average 6,000 to 8,000 feet; our daily shipment was from 40,000 to 50,000 feet."

W. C. Farley: "We were there not over 20 minutes before the bridge went out. The water rose right now, it rose awful fast, it rose rapidly."

Luther Hamilton: "While we were there, the water went from the bottom of the stringers over the top of the stringers, in about 10 or 15 minutes. . . . After we got there it wasn't very long before the tide came along. We could tell by the drifts and the trestle timber and stringers and cross-ties. It was traveling at a pretty good speed."

Lee Herren: "I crossed the Cheoah River between the dam and the bridge, on Monday morning about 5 or 5:30 o'clock. I forded on horses—some forded and some went across in a boat—I rode one horse

and led another, each teamster did. That was about 5:30 on the Monday morning they said the bridge washed out. . . . We crossed about four or five miles below the dam. . . . The horses waded the river that morning, didn't swim."

Clarence Adams: "I know where the Santeetlah Dam is, and I also know the bridge of Kitchen Lumber Company across the Cheoah River below the dam. . . . On the first Monday in September, 1928, I observed a sudden rise in Cheoah River, I was something like 50 yards from the river. I first heard a noise, just a roaring. I and a man by the name of Stewart were working together, and one of us said something about the noise, I turned and looked up the river and saw coming down the shoal a head of water, it looked like a splash let loose, it all came together. It looked to me like when I saw it, it must have been three or four feet high, higher than the water just below it. It looked like it came rolling."

Will Stewart: "On the first Monday in September, 1928, I was working with Clarence Adams at the mouth of Yellow Creek, about 50 yards from the river. We heard a noise of the water coming down the Cheoah River, just a roaring noise; just a head of water coming rolling. It was coming pretty good speed. I don't know anything about the Kitchen bridge, I think it was about 4 miles below where we were working. . . . We saw that tide about 7:30, it was about 2 or 2½ feet high."

Loss Holland: "I heard a roaring in the Cheoah River that morning and looked and saw something like a splash of water coming down the river."

J. B. Buchanan: "There was no other practical way of getting this timber out of Barkers Creek and Bear Creek, except over the railroad. We were moving about 50,000 feet per day over the railroad trestle at the mouth of Barkers Creek when it washed out. . . . We began getting the timber for rebuilding the bridge the same day on Bear Creek and hauled it up to the bridge with the train. On Wednesday evening, a week after the trestle washed out, I let the supply train over there one night late, and the best I remember, we didn't put any logs over until Monday, two weeks after the bridge washed out. The best I can remember, during that time the weather was fine. We could have transported 50,000 feet per day over the bridge during these two weeks if the bridge had been there. . . . This bridge was washed out on 3 September, 1928, and we kept cutting and logging in that territory until 15 November, 1929."

E. S. Miller: "It cost us $2,153.44 to replace the bridge that washed out: I think that was a reasonable cost. . . . We lost about 12

days on account of the bridge being out. . . . Q. Mr. Miller, if you know, about what was it costing the Kitchen Lumber Company during the months of August and September, 1928, to ship this timber, everything that was done—cutting and delivering and shipping this timber—the average cost? Answer: $14.21 per thousand. . . . Q. What, if you know, was the average profits on that timber per thousand during these two months? Answer: The average selling price for August and September was $24.54. . . . Q. How much profit would that leave the Kitchen Lumber Company? Answer: The profit was $10.33. . . . Q. That covered the time the bridge was out? Answer: It did. . . . We had sufficient equipment and sufficient force to keep the trains running had the bridge not been washed away."

Ed Turbeyville, a witness for defendant, who was caretaker at Santeetlah Dam, testified to the heavy rainfall and also: "The water continued to rise and at 4 p.m. I raised this gate another foot. The total opening of the gates was 7 feet—4 feet on the first and 3 feet on the second. With this amount of gate opening, the water in the lake kept rising. I didn't raise the gates any more until midnight, Sunday night. At that time, the water was still rising and I raised this gate another two feet. This gave a total gate opening on both gates of 9 feet. I slept from midnight, Sunday night, until Monday morning. I saw the dam again at 6 a.m. central time Monday morning, 3 September. That would be 7 o'clock eastern standard time. At that time, the water had risen an additional twenty-five hundredths of a foot from 12 o'clock Sunday night. This additional water was going over the top of the gates that had not been raised. At 6 a.m. central time, I raised the gates an additional four feet. It took me 20 minutes to raise the gate. This gave a total opening of 13 feet on the three gates. This opening did not reduce the height of the water. At eight o'clock central time the gauge showed the water was standing still. There had been no fall. At 9 o'clock central time, I raised another gate four feet. That started pulling the dam. I have crossed the fords between the Santeetlah Dam and the Kitchen Lumber Company's bridge. I would say you would be lucky to ford with horses with two feet gate opening. At midnight Sunday night, there was nine feet of gate opening. The gates remained at that height until six o'clock central time, Monday morning (3 September)."

On cross-examination: "At 6 o'clock, Monday morning, I raised another gate four feet. I did not phone anybody to look out. I knew they were not going to get into that deep water. They might see the water coming. I don't know if they could hear it coming. When I raised the additional four feet, I phoned the operator at the power-

house at the Santeetlah plant and gave him the gate opening. . . . The lake was full and running over when I raised the gate four feet. It was running over the other gates."

The velocity of the water when it left defendant's dam and the time it took to reach plaintiff's bridge was for the jury to determine. A fact can be proved by both circumstantial and direct evidence. The evidence was sufficient to be submitted to the jury. The finding of the jury on the first and second issues cannot be disturbed. *In re Will of Bergeron,* 196 N. C., 649 (652). The charge of the able and learned judge in the court below is not in the record, the presumption is that he charged correctly the law applicable to the facts. The serious question that confronts us in the trial on the 3d issue and the assessment of damages for delay by reason of the destruction of the bridge, on the 4th issue. (b.)

The delay in rebuilding the bridge was 14 days—12 working days. The lumber hauled each day prior to the bridge washing away, according to plaintiff's witnesses, was about 40,000 to 50,000 feet at a profit of $10.33 a thousand feet. The jury has given the full amount of profit on a basis of about 50,000 feet a day, yet plaintiff had this, some 600,000 feet of lumber on hand. Plaintiff introduced evidence that in the time limits and contracts, it could not get its timber out. In *Johnson v. R. R.,* 140 N. C., 574, the principle is laid down: Where the profits lost by defendant's tortious conduct, proximately and naturally flow from his act and are reasonably definite and certain, they are recoverable; those which are speculative and contingent, are not.

The defendant contended that to rebut this evidence: "The court erred in refusing to allow defendant's witness, C. W. Hodge, to answer the question: 'When did you begin to take up the railroad, you remember?' Witness, if permitted to answer, would have stated: 'About the middle of April, 1930'; for that, the plaintiff had offered evidence that it quit work about the middle of November, 1929, this evidence being offered for the purpose of showing that plaintiff could have continued operating until the railroad was taken up and thus have removed all of its timber."

We think this exception and assignment of error is well taken. On the 1st and 2d issues, we find no error. On the 3d issue and the second part of the 4th issue (b), there must be a new trial.

No error on 1st and 2d issues.

New trial on 3d issue and second part of the 4th issue (b).

MANLEY REAVES v. CATAWBA MANUFACTURING AND ELECTRIC POWER COMPANY.

(Filed 2 May, 1934.)

1. Master and Servant A a: C a—Evidence held not to disclose emergency empowering employee to hire another for employer.

The evidence disclosed that plaintiff, when a boy of thirteen years of age, took dinner to his brother who was working for defendant in the construction of a house, that one of the carpenters dropped his hammer from the second floor and defendant's foreman asked plaintiff to hand the hammer back to the carpenter, that no ladder was built for access to the second floor, but that braces were nailed at the corners by which the carpenters climbed up and down, that plaintiff chose to climb up by a window, and in attempting to reach a joist over his head, slipped and fell to his injury. *Held*, no emergency existed sufficient to constitute plaintiff an employee and create the relation of master and servant, and plaintiff was a mere volunteer injured in the performance of a simple and ordinary task, and N. C. Code, 5032, has no application to the action.

2. Negligence A c—Held: evidence failed to show negligence on part of owner in respect to volunteer or trespasser on premises.

At the request of defendant's foreman, plaintiff, when a boy thirteen years of age, volunteered to hand a hammer to a carpenter working on the second floor of defendant's building. The evidence tended to show that there was no ladder between the first and second floors, but that the carpenters climbed on braces at the corners of the building, and that plaintiff chose to climb up at a window, and in attempting to catch a joist above his head, slipped and fell to his injury. *Held*, plaintiff occupied the position of volunteer or trespasser, and the evidence failed to show any defective condition or circumstances in which defendant was required to warn or instruct the plaintiff, and defendant cannot be held liable in damages for the injury, there being no legal basis for recovery.

APPEAL by plaintiff from *Stack, J.*, at February Term, 1934, of MECKLENBURG. Affirmed.

This is an action for actionable negligence brought by plaintiff against the defendant. The plaintiff's testimony was to the effect that he was injured some ten years ago—in October, 1924—when he was 13 years of age, he is now 23 years of age. His brother, Edgar, at the time he was hurt, was working for defendant as a brick mason. The defendant was building a frame dwelling-house. The plaintiff lived 3 or 4 miles away and on the day in question (and the only day he carried a lunch), he rode a horse and from his home, carried the lunch in some dishes in a bucket to his brother. He testified, in part: "I stayed there during lunch. Afterwards, I was getting ready after lunch to get the dishes up and went to tell my brother I was going home and the carpenter on top of the house dropped his hammer and he asked

me to get his hammer. Mr. Armstrong was the one that dropped the hammer and Mr. Black was the one that told me to take it up. Mr. Black was the foreman. . . . I started with the hammer. The house was frame and the rafters were raised. I started to climb up through a window and got up in the window and was climbing up to reach a joist to hand Mr. Armstrong the hammer and I slipped and fell, my hand slipped off the joist. That let me fall inside across a sleeper and broke my leg. That was the floor sleepers." By the court: "Was that window on the first floor, ground floor or second story? Answer: First floor. Q. How far had you climbed? Answer: 8 feet story. Q. Had you climbed 8 feet? Answer: Yes, climbed up to the second floor. There was no ladder there. There was no ladder afforded for any of them to go up on. I climbed up into the window, was catching up and climbed the post in the window frame. I climbed up in the window and was climbing over the window to reach up high enough to get him the hammer and as I caught the joist, I fell. I caught hold of a two by four, the framing. I climbed on the window frame and tried to get up to the top of the frame. I put my feet on the window frame and was going on up past it and holding to it. As I went up past it, I put my feet on top of it when I got up that high. I tried to go higher than that and got as high as I could, but I fell. My hand slipped off the top joist. That was a top joist that the rough framing rested on, up next to the roof. That was up at the top. I reckon I fell about eight feet. In climbing up there were no cross pieces across that way to put my feet on. I was in the act of taking the hammer up when I fell. I was handing it to him. I had one hand on the joist and the hammer in the other. I went to swing my hand with the hammer up through and it slipped and fell. . . . When I was told to go up on the house, I was preparing to go home. I had hitched my horse. I was about ten feet from the place where the hammer fell when I was told to take it up. Mr. Black said, 'Boy, take that hammer up to the carpenter.' "

Edgar Reaves testified, in part: "I was a brick mason on this job. I worked on this job at the time. Mr. Black employed me. He paid me $1.00 an hour. . . . When I got through dinner I went back to work. I don't know if anybody asked my brother to bring the hammer up. I did not hear it. I sent after a hammer myself by Mr. Armstrong. He was up on the building. . . . There was not any ladder there to get up on the house at that time. I went up at the corners with braces. Climbed up at the corner. They did not have any ladder there. That is the way they went up and down. I have worked on other buildings. I had been working at that time on buildings about ten years. They did not have any ladder at all at this place for you to get up, just go up on the corners. They put braces across another and you

stepped from one to the other and grabbed a joist and swung through. . . . . The window was about fifteen feet away from the corner where I went up. It could be seen from the window where I went up. The braces within that space were about 3½ feet apart. There were two braces. You stepped on them and grabbed a joist and pulled yourself up. As you stepped on this last brace, you would have to pull yourself through. You would do that by grabbing the overhead joist. It would be about 3½ or 4 feet from the last brace. I could not say whether my brother could have gotten up at that corner or not, taking into consideration the size of my brother at the time. On a building like that, they put a ladder up because you have to be going up and down."

On cross-examination: "Mr. Armstrong was working on the same side of the building. He was waiting on me. I told him to send me a hammer. . . . We was starting a stove flue and I told him to get me a hammer; he walked about 15 feet towards the house. It was not on the ground. The next thing I knowed, the boy had fallen. Mr. Armstrong and I both went down on the ground, but not before the boy fell. When we went up, they had cross pieces there at the corner for me to climb up on. And I went up that way. Mr. Armstrong went up that way too. The carpenters, anybody that had to go up would go up different ways; I did not watch all of them. That's what they were put there for."

The judgment of the court below is as follows: "This cause coming on to be heard before the undersigned, judge presiding, and a jury, at the 5 February, 1934, Regular Civil Term of Superior Court of Mecklenburg County, and the plaintiff having introduced evidence, and the court being of the opinion at the conclusion of the plaintiff's evidence that the plaintiff ought to be nonsuited: Now, therefore, upon motion of W. S. O'B. Robinson, Jr., attorney for the defendant, it is ordered, adjudged and decreed that the plaintiff be and he is hereby nonsuited, and that the costs of the action be taxed against the plaintiff. This 16 February, 1934. A. M. STACK, *Judge Presiding.*"

G. T. Carswell and Joe W. Ervin for plaintiff.
W. S. O'B. Robinson, Jr., and W. B. McGuire, Jr., for defendant.

CLARKSON, J. At the close of plaintiff's evidence the defendant made a motion for judgment as in case of nonsuit. C. S., 567. The court below granted motion and in this we can see no error. The interesting question arises on the record: What duty does the defendant owe to this volunteer boy 13 years of age? The general rule is thus laid down in Cooley on Torts, 4th Ed., Vol. 3, section 386, pp. 47 and 48: "One who voluntarily assists a servant at the latter's request does not, as a

general rule, become a servant of the master so as to impose upon the latter, the duties and liabilities of a master towards such volunteer, or so as to render the master liable to third persons injured by such volunteer's acts or negligence, while rendering such assistance. Such a volunteer assumes all the risks of the service upon which he enters and is only entitled to the protection due a trespasser. But if the servant has authority, express or implied, to employ assistants, the rule is otherwise, and the master is liable for the negligence of one employed by a servant who had authority to employ assistants though he had been forbidden to employ that particular person. Such implied authority might arise in case of some unforeseen emergency, which created a necessity for such assistance. And when a passenger is injured by the negligence of a volunteer, the master is liable, though the volunteer was called in by a servant without the knowledge or authority of the master, and the reason is that 'when the master obligates himself to transport a person from one place to another safely and properly, and to protect him from injury from any source that human judgment and foresight are capable of providing against, and the master intrusts the performance of the duty responsible for their acts, whether negligent or malicious, and they continue in the line of their employment until their relation with the master is dissolved. The specified duty of the employee in such case may be very limited, but the scope has assumed.' So also, some courts hold that where a master intrusts his servant with a dangerous instrumentality, such as an automobile, for use in his business, and such servant permits another to use it in such business, the master is liable for the negligence of such other in the use thereof," etc. Meacham on Agency, Vol. 1, 2d Ed., sec. 1658, p. 1250. Restatement of the Law (Agency), sec. 485, pp. 1134 and 1135. Burdick's Law of Torts, 4th Ed., "Harms that are not Torts," secs. 84, 85 and 86. 39 C. J., "Master and Servant," sec. 1459, pp. 1271-2; *Perkins v. Coal Co.*, 189 N. C., 602; *Fore v. Geary*, 191 N. C., 90; *Robinson v. Ivey and Company*, 193 N. C., 805 (812); *Booth and Flynn v. Price*, 183 Ark., 975; 76 A. L. R., 957; *Barrier v. Thomas & Howard Co.*, 205 N. C., 425.

Speaking of the duty of the master to the servant, in *Marks v. Cotton Mills*, 135 N. C., 287 (291), is the following: "When any injury to him results from one of the ordinary risks or perils of the service, it is the misfortune of the employee and he must bear the loss, it being *damnum absque injuria;* but the employer must take care that ordinary risks and perils of the employment are not increased by reason of any omission on his part to provide for the safety of his employees. To the extent that he fails in this plain duty, he must answer in damages to his employee for any injuries the latter may sustain which are proximately caused by his negligence."

The general principles of "Emergency Employees" is stated in 76 A. L. R., p. 971, citing authorities: "An emergency within the meaning of the rule must be a sudden and unexpected emergency. . . . If the servant requesting assistance can do the work himself, there is no emergency authorizing him to employ an assistant. . . . It has, however, been held that the bare fact that it is possible to proceed without the services of the person employed is not in itself determinative that there is no necessity for the employment. . . . Whether an emergency exists is ordinarily a question of fact for the jury. . . . While ordinarily the question is for the jury, the court can say whether the evidence is sufficient to support a finding that an emergency existed."

"In *Howard v. Oil Co.*, 174 N. C., 653, it is said: 'It is well recognized that, although the machinery and place of work may be all that is required, liability may, and frequently does, attach by reason of the negligent orders of a foreman, or boss, who stands towards the aggrieved party in the place of vice-principal.'" *Robinson v. Ivey and Co., supra*, p. 812. As to the duty and responsibilities to infants, see *Pettitt v. R. R.*, 186 N. C., 9; *Hoggard v. R. R.*, 194 N. C., 256.

In the present case, we have no factual situation which necessitates the master to warn or instruct the volunteer. The plaintiff was not suddenly exposed to any imminent danger in the unforeseen emergency. He, at the request of the foreman, undertook to carry the hammer in his own way in the performance of, not an unusual, but an ordinary and simple task. We are not dealing with a servant that the foreman had the right to discharge for nonperformance of a duty, and whose command, the servant was called upon to obey. The plaintiff was a volunteer. There seemed to be no unforeseen emergency. The foreman could have taken or pitched the hammer to the workman, or he could have come down for it. The plaintiff testified: "The carpenter on top of the house dropped his hammer and he asked me to get his hammer." Foreman Black "was the one that told me to take it up." It was an 8-foot story, Black said, "Boy, take that hammer up to the carpenter." Plaintiff's brother, Edgar Reaves, testified, "There was not any ladder there to get up on the house at that time, I went up at the corners with braces, climbed up at the corners. . . . That is the way they went up and down. . . . The braces within that space were about 3½ feet apart. There were two braces, you stepped on them and grabbed a joist and pulled yourself up. . . . That's what they were put there for." The window that plaintiff went up was about 15 feet from the way provided. There was nothing that was defective that caused plaintiff to fall. He selected his own way. "I started to climb up through a window and got up in the window and was climbing up to reach a

joist to hand Mr. Armstrong the hammer and I slipped and fell, my hand slipped off the joist." The thing that plaintiff undertook to do was not more dangerous than what any man or a 13-year-old boy is doing daily. The boy rode there on a horse and the climbing to hand the hammer up was perhaps no more dangerous than mounting the horse. The misfortune was that he slipped and fell. It is a matter of common knowledge and to the credit of our people that when called upon to help, the willingness in which they respond. The nature of the work called upon to perform may, in certain cases, entail liability on the foreman and *respondeat superior*. The boy's act was commendable and the accident unfortunate. In law, we cannot hold the defendant liable. In the realm of good morals, how far defendant should have helped repair the injury is beside our jurisdiction. N. C. Code, 1931 (Michie), sec. 5032, is not applicable to the facts in this case. We think the judgment of the court below should be

Affirmed.

MRS. ETTA FOSTER v. CITY OF CHARLOTTE.

(Filed 2 May, 1934.)

Municipal Corporations J b—Charter provisions requiring notice of claim of damages is condition precedent to right of action for personal injury.

Compliance with the requirements of the charter of a city that notice be given the board of aldermen within a specified time of the infliction of injury of any claim for damages for such injury is a condition precedent to bringing action against the city to recover such damages with the burden on plaintiff to allege and prove that the required notice had been given, and though incapacity, mental or physical, will excuse failure to give such notice, such failure will not be excused if plaintiff has reasonable opportunity to give such notice within the prescribed time.

APPEAL by plaintiff from a judgment of nonsuit by *Warlick, J.*, at January Term, 1934, of MECKLENBURG. Affirmed.

Plaintiff brought suit for damages for personal injury alleged to have been caused by the negligence of the defendant in failing to maintain one of its streets in proper repair. She alleged that on 15 March, 1931, while returning from her work on North Brevard Street in attempting to cross 17th Street on boards placed over an excavation she was thrown into the excavation and injured by reason of the negligent placing and defective condition of the boards.

The charter of the city of Charlotte contains the following provision: "No action for damages against said city of any character whatever, to either person or property, shall be instituted against said city unless

within six months after the happening or infliction of the injury complained of, the complainant, his executors or administrators, shall have given notice to the board of aldermen of said city of such injury in writing, stating in such notice the date and place of happening or infliction of such injury, the manner of such infliction, the character of the injury, and the amount of damages claimed therefor, but this shall not prevent any time of limitation prescribed by law from commencing to run at the date of happening or infliction of such injury or in any manner interfere with its running." Private Laws, 1911, chap. 251, sec. 15.

The summons was issued and the action begun on 14 October, 1932. At the close of the plaintiff's evidence the court dismissed the action as in case of nonsuit and the plaintiff excepted and appealed.

W. M. Hood and J. E. Meyer for appellant.
Bridgers & Orr and J. Edward Stukes for appellee.

PER CURIAM. There are a number of decisions of this Court to the effect that compliance with charter provisions similar to those above set out is a condition precedent to the institution of an action against a municipal corporation for the recovery of damages—the object of the provision being to give the municipal authorities timely opportunity to investigate claims while the evidence may be procured and preserved and to prevent fraud and imposition. *Cresler v. Asheville,* 134 N. C., 311; *Pender v. Salisbury,* 160 N. C., 363; *Hartsell v. Asheville,* 164 N. C., 193. Both allegations and proof of notice are necessary. *Pender v. Salisbury, supra.* The plaintiff neither alleged nor proved that she had given the required notice.

There is an exception to the rule if the claimant has been mentally or physically incapacitated to comply with the provisions of the charter. *Terrell v. Washington,* 158 N. C., 282. It is obvious in the present case that the plaintiff was not prevented from presenting her claim by reason of mental or physical incapacity between the time of the alleged injury and the institution of her action. There is evidence that her mental and physical condition was good, and she testified that she had declined to bring suit earlier because it would "have been of no use to sue if she recovered right away." Meantime she was not confined to her bed and had occasion from time to time to leave her home and consult with her physicians. In *Hartsell v. Asheville,* 166 N. C., 633, it was said all that is necessary is that there should be reasonable opportunity within the period intervening between the injury and the institution of the action in which the plaintiff would be able to give the required notice.

Affirmed.

ESSIE HIGDON WARD, ADMINISTRATRIX OF THE ESTATE OF NORVIN G. WARD, v. SOUTHERN RAILWAY COMPANY.

(Filed 23 May, 1934.)

1. Master and Servant E b—Contention that engineer could have prevented injury to brakeman after discovery of peril held not supported by evidence.

Where an engineer testifies that he could not have done anything to avoid the injury to the brakeman on his freight train after the discovery of the brakeman's peril from trespassers on the train, and there is no evidence to the contrary, the railroad company may not be held liable for the injury on the contention that the engineer should have jolted the cars, stopped the train, or blowed the whistle upon the discovery of the trespassers.

2. Same—Held: no injury to employees could have been anticipated from employer's alleged negligent custom and nonsuit was proper.

The evidence in this case was to the effect that plaintiff's intestate was a brakeman on defendant's railroad and that he was killed when struck by a piece of coal thrown from one of the cars by trespassers as he was inspecting the train in the line of his duty when the train was slowed down at a switch. There was evidence that thieves had habitually stolen coal from defendant's cars in this manner for a number of years, and plaintiff contended that defendant's negligence in permitting this larcenous custom was the proximate cause of intestate's death. There was no evidence that any employee had theretofore been injured by coal thrown from the cars in such manner: *Held*, no injury to employees could have been anticipated by defendant from such recurring acts of larceny by trespassers, and even conceding that defendant was negligent in failing to stop such custom, it cannot be held liable in damages to plaintiff, the rule of law applicable being that where unlawful acts of third persons intervene between defendant's negligence and the injury which was not intended by defendant and could not have been foreseen by it, the causal relation is broken and defendant is not liable.

CIVIL ACTION, before *McElroy, J.*, at October Term, 1933, of BUNCOMBE.

The evidence tended to show that Norvin G. Ward, plaintiff's intestate, was fatally injured about twelve o'clock noon, at Hendersonville, on or about 9 February, 1933. Ward was head brakeman on a freight train of defendant, and it was admitted that he was killed while engaged in interstate commerce. The story of his death, as told by the engineer, is substantially as follows: "Approaching Hendersonville, about one-half mile from the station, we left the main line and headed into the passing track. Mr. Ward threw the switch. He was riding on the engine all the way from Asheville. I moved along so he could get off and throw the switch without stopping. . . . He got off on the right-hand side, the side occupied by me as engineer. He then walked back just a little

way, stopped and was looking under the cars as I pulled by inspecting the train. . . . It was the duty of the brakeman to inspect the train at all times. . . . He was about four cars back from the engine and there was a big coal car loaded with large lumps of coal, loaded up high, and just about the time the coal car came up where Mr. Ward was there were three colored men came up from the opposite side and went to throwing coal off and about the third piece they threw off hit Mr. Ward. I didn't see the colored men climb up or until they came up on the top of the car. I first saw them on the car. They got up on the opposite side of the car from where Ward was standing. . . . When the coal hit Mr. Ward he fell just as quick as that coal hit him, right on the ground. I turned the engine over to the fireman, told him to pull in the clear, that a colored man had killed the brakeman. All three of the men on the car were throwing off coal, on the same side. . . . It looked like his skull was crushed." In response to question as to how long trespassers had been throwing coal off the train, the witness said: "They have been doing it ever since I have been on the railroad, that is about thirty-two years. . . . Throwing it off every time it would go slow enough for them to get upon it." In response to the question to the engineer as to whether he could have stopped the train or "jostled the cars" so as to prevent colored men from throwing coal from the train, he said: "It could not have been done. . . . I could not have helped it—had very little time. I didn't have time. The darkies had been stealing coal here. I had known it for thirty-two years. I never knew of anybody being hurt before that. Mr. Ward had been running on this line part of the time and he had been with the railroad a great while. He had been over on this line a good deal. I have had him as conductor over here. . . . Everybody knew that the darkies were stealing coal from the train." There was further evidence that the conductor was in the caboose at the time on the rear of the train, where his duty required him to be.

There was further evidence that the defendant company had done nothing to prevent thieves from boarding freight trains, when they were running slowly or standing still, and stealing coal therefrom during the last three or four years. There was also evidence that coal was frequently stolen over the entire system, and that at other points on the system special agents had been employed by the defendant in an attempt to apprehend the thieves.

At the conclusion of the evidence the trial judge sustained a motion of nonsuit and the plaintiff appealed.

Thomas L. Johnson, J. Bat Smathers and T. A. Uzzell, Jr., for plaintiff.

R. C. Kelly and Jones & Ward for defendant.

BROGDEN, J. Is a railroad company liable in damages for the killing of an employee by trespassers and thieves who come upon a freight train to steal coal therefrom?

The plaintiff plants the right of recovery upon two grounds: First, that the engineer of the train did not blow the whistle, stop the train or jostle the cars and thus prevent the thieves from climbing upon the train; second, that thieves had been stealing coal from the defendant and climbing upon its freight trains for such purposes for thirty years, and that the defendant had failed and neglected to take proper precaution to prevent the stealing of coal. The engineer testified that he did not have time to do anything to save plaintiff's intestate after the Negroes crawled upon the train and began to throw coal therefrom. There was no evidence to the contrary, and consequently this ground of liability disappears.

The basis for the second contention is that the defendant had negligently permitted and allowed thieves to steal its property, and that such negligent custom was the proximate cause of the death of plaintiff's intestate.

It is a familiar principle of law that if an employer permits a dangerous custom to exist in the operation of his business and acquiesces therein that he must answer in damages for all foreseeable consequences resulting therefrom. However, it would not ordinarily be supposed that a carrier would approve or acquiesce in the larceny of its property by thieves, and there is no evidence that the defendant invited or approved the various thefts. Moreover, there was no evidence that any other employee of the defendant had ever been injured by the acts of coal thieves, and consequently if such acts were dangerous, there was no notice of the previous hazard of personal injury to trainmen.

In the final analysis, the case presents an injury inflicted by the criminal act of a third person, and one in nowise connected with the operation of the train or the ordinary prosecution of the defendant's business.

Assuming, but not deciding, that the defendant was negligent in not taking proper precaution against the coal thieves, nevertheless the general rule of law is that if between the negligence and the injury there is the intervening crime or wilful and malicious act of a third person producing the injury but that such was not intended by the defendant, and could not have been reasonably foreseen by it, "the causal chain between the original negligence and accident is broken." *Burt v. Advertising Co.*, 28 N. E., 1; *Chancey v. R. R.*, 174 N. C., 351; *Green v. Atlanta & C. A. L. Ry. Co.*, 148 S. E., 633; *Green v. R. R.*, 279 U. S., 821, 73 L. Ed., 976; *Davis v. Green*, 260 U. S., 349; *St. Louis R. R. Co. v. Mills*, 271 U. S., 343, 70 L. Ed., 979; *Strong v. Granite Furniture Co.*, 294 Pac., 303, 78 A. L. R., 465, and annotation.

The plaintiff relies upon *Fletcher v. R. R.,* 168 U. S., 134, 42 L. Ed., 411. It is to be observed, however, that the *Fletcher case* involved injury inflicted by the railroad company by reason of negligent operation of a train which was entirely under its control. Consequently this case is not determinative.

Affirmed.

HERBERT B. NEWTON AND COMPANY v. WILSON FURNITURE MANUFACTURING COMPANY AND CAROLINA DISCOUNT CORPORATION.

(Filed 23 May, 1934.)

Courts A f—One Superior Court judge may not set aside as erroneous a judgment rendered by another judge at a former term.

Upon the trial of this action in the Superior Court the court granted plaintiff's motion for judgment on the pleadings. Thereafter, defendant made a motion before another Superior Court judge to vacate the judgment entered on the pleadings, and upon the hearing of an order to show cause judgment was entered setting aside the former judgment except for a part of the sum demanded by plaintiff and ordering trial upon the merits as to the remainder, which second judgment was entered on the ground that the first judgment was erroneous, the court specifically finding that the first judgment was not entered against defendant through surprise, mistake or excusable neglect: *Held,* the order setting aside the judgment is reversed, one judge of the Superior Court having no power to hear or review a judgment rendered at a former term by another Superior Court judge on the ground that such judgment is erroneous, the proper remedy being by appeal from the former judgment.

APPEAL by plaintiff from *Stack, J.,* heard at Chambers in Monroe, 29 December, 1933. From MOORE. Reversed.

This is an action brought by plaintiff against the defendants to recover $1,098.70 and interest from 15 August, 1932. At the regular term of the Superior Court of Moore County, North Carolina, held 29 September, 1933, after notice to the attorney of the defendant, Carolina Discount Corporation, the cause came on for hearing upon the motion of the plaintiff for judgment upon the pleadings before Judge Thomas J. Shaw.

The judgment of Judge Shaw is as follows: "And it appearing, upon motion of counsel for plaintiff for judgment on the pleadings in favor of the plaintiff that the defendants and each of them are liable to the plaintiff in the sum of $1,098.70 with interest at the rate of 6 per cent per annum from 15 August, 1932; It is therefore ordered, considered and adjudged that plaintiff recover of the defendants and each of them the sum of $1,098.70, with interest thereon from 15 August, 1932, until

paid, together with the costs of this action." That thereafter, and on 12 December, 1933, the defendant Carolina Discount Corporation filed its motion to vacate the judgment heretofore rendered against it by his Honor, Judge Shaw, and said motion is in words and figures as follows: . . . "Upon motion of Murdoch M. Johnson, Esq., and after reading the affidavits and exhibits herein, it is ordered that the plaintiff Herbert B. Newton and Company through its attorneys, Johnson & Johnson, do show cause, if any it has, before his Honor, A. M. Stack, judge, at his Chambers in Union County courthouse at Monroe, North Carolina, at 2:00 o'clock p.m. on 29 December, 1933, why the judgment heretofore made, entered and had in this cause be not canceled and stricken out; and plaintiff's attorneys are hereby required to have with them and present to the court at said hearing the original summons and complaint and answer herein.

"It is further ordered that, pending the hearing above set forth, the plaintiff, its attorneys, the sheriff of Moore County and all other officers and persons be and they are hereby restrained from proceeding in any manner against the property of the defendant Carolina Discount Corporation toward the collection of said judgment out of any of the assets of the said Carolina Discount Corporation. Let a copy of this order, the affidavits and exhibit be forthwith served on the plaintiff's attorneys, and plaintiff's attorneys are hereby required to serve on the attorney for the Carolina Discount Corporation, at least 4 days before the hearing, a copy of their return and any affidavits or other documents or evidence to be used by them at the hearing and he shall have the right to reply thereto at the hearing. The defendant will give injunction bond in the sum of $200.00 within 5 days from this 15 December, 1933. A. M. Stack, judge presiding, Carthage, N. C., December Term, 1933.

"And on 29 December, 1933, at Chambers in Monroe, N. C., before his Honor, A. M. Stack, judge, the cause came on for hearing, and after argument of counsel for plaintiff and the defendant, said A. M. Stack, judge, granted, made and entered the following order: This matter now comes on to be heard before me on motion of the defendant Carolina Discount Corporation, to vacate and set aside the judgment heretofore rendered herein by his Honor, Thomas J. Shaw, at the September Term, 1933, of the Superior Court for Moore County, the same having been granted and made on the pleadings in the cause. And after hearing Murdoch M. Johnson, Esq., attorney for the defendant, Carolina Discount Corporation and Frank W. McCluer, Jr., attorney for the plaintiff herein, and it appearing to the court as a fact, that the judgment was not taken against the defendants through their mistake, surprise or excusable neglect, and it appearing that the issues of fact are properly raised by the pleadings herein for all over $217.93; and it

appearing that the judgment against the defendant, Carolina Discount Corporation, is an erroneous judgment and was erroneously granted for more than $217.93.

"The court, therefore, in which it is joined by the defendant Carolina Discount Corporation, orders that said judgment be and the same is hereby vacated and set aside; except that it is ordered, considered and adjudged that plaintiff's judgment stand against the defendant Carolina Discount Corporation in the sum of $217.93, and except in that particular, the cause stands for trial on its merits. The plaintiff may call for a new execution for the aforesaid sum of $217.93. This 29 December, 1933."

Plaintiff made the following exceptions and assignments of error and appealed to the Supreme Court: To that portion of the order providing that the judgment be vacated as being erroneous, reading as follows: "And it appearing that said judgment against the defendant Carolina Discount Corporation is an erroneous judgment, and was erroneously granted for more than $217.93, the court therefore, in which it is joined by the defendant Carolina Discount Corporation, orders that said judgment be and the same is hereby vacated and set aside."

To that further portion of the order adjudging that, except for the sum of $217.93 the case should be tried upon its merits, reading as follows: "Orders that said judgment be and the same is hereby vacated and set aside; except that it is ordered, considered and adjudged that plaintiff's judgment stand against the defendant Carolina Discount Corporation in the sum of $217.93, and except in that particular, the cause stands for trial on its merits."

Johnson & Johnson for plaintiff, Herbert B. Newton and Company.
No counsel for defendant, Carolina Discount Corporation.

CLARKSON, J. This is a civil action tried at the September Term, 1933, of Moore Superior Court, before his Honor, Thomas J. Shaw, who rendered judgment in favor of the plaintiff and against the defendants, on the pleadings filed therein for the sum of $1,098.70 with interest. Thereafter at Chambers on 29 December, 1933, the defendant Carolina Discount Corporation at a hearing before his Honor, A. M. Stack, judge, moved to vacate the judgment rendered previously by Judge Shaw for the reason that said judgment was rendered against said defendant through its mistake, surprise and excusable neglect and for the further reason that said judgment was erroneously granted as to all sums in excess of $217.93. At said hearing his Honor, A. M. Stack, held erroneous the judgment previously rendered by Judge Shaw and vacated same in part, allowing plaintiff's judgment to stand for the sum of

$217.93 only, but his Honor, A. M. Stack, judge, found as a fact that plaintiff's judgment was not taken against the defendants through their excusable neglect, surprise or mistake and declined to vacate the judgment on that ground. We think the exceptions and assignments of error made by plaintiff must be sustained. In *Wellons v. Lassiter,* 200 N. C., 474 (477-478), is the following: "We think the judgment of Judge Small, if erroneous, the defendants should have appealed from same. This they did not do, and the judgment of Judge Lyon should be reversed. . . . 'Erroneous judgment' is one rendered according to course and practice of court, but contrary to law, upon mistaken view of law, or upon erroneous application of legal principles. *Finger v. Smith,* 191 N. C., 818. . . . In *Caldwell v. Caldwell,* 189 N. C., at p. 809, we find: 'A decision of one judge of the Superior Court is not reviewable by another judge. *Dockery v. Fairbanks,* 172 N. C., 529. The power of one judge of the Superior Court is equal to and coordinate with that of another. A judge holding succeeding terms of a Superior Court has no power to review a judgment rendered at a former term upon the ground that such judgment is erroneous.' *Phillips v. Ray,* 190 N. C., 152." For the reasons given, the judgment must be

Reversed.

B. F. HARGETT v. GEORGE S. LEE, JR., ET AL.

(Filed 23 May, 1934.)

1. Appeal and Error B b—

An appeal will be determined in accordance with the theory of trial in the lower court.

2. Limitation of Actions A c—

An action to avoid an instrument on the ground of fraud is barred after the elapse of three years from the accrual of the cause of action. C. S., 441(9).

3. Limitation of Actions B b—Action based on fraud accrues when facts are discovered or should have been discovered by due diligence.

An action to avoid an instrument for fraud accrues from the date the facts constituting the fraud are discovered, or the date they should have been discovered by due diligence, and after notice sufficient to put a reasonable man upon inquiry, plaintiff is chargeable with knowledge of all facts which a reasonable inquiry would have discovered, and where the evidence clearly shows that plaintiff, more than three years prior to instituting the action, had information of the facts constituting the fraud or notice sufficient to put him upon inquiry which would have discovered the facts, the motion of nonsuit of defendants pleading the statute is properly allowed.

HARGETT *v.* LEE.

4. Appeal and Error A f: Judgments F f—Appellants held entitled to appeal, and judgment in conflict with prior judgment in their favor held error.

This action was instituted to avoid plaintiff's deed for fraud. The grantee in the deed did not plead the statute of limitations, but other defendants, the trustee and *cestui que trust* in the grantee's deed of trust did plead the statute of limitations, and as to them a nonsuit was entered, the cause of action being barred by C. S., 441(9). Thereafter, upon notice to the trustee and *cestui que trust*, judgment was entered in plaintiff's favor against the grantee in the deed declaring plaintiff the owner of the lands in fee. From this judgment the trustee and *cestui que trust* appealed to the Supreme Court: *Held*, the appealing defendants were not appealing from the judgment of nonsuit in their favor, but from the judgment upon the verdict which adversely affected their interest, and under the facts of the case they had the right to appeal, C. S., 632, and the judgment upon the verdict being in conflict with the judgment of nonsuit, the judgment upon the verdict to the prejudice of the appealing defendants *is held* erroneous.

APPEALS by plaintiff and defendants from *Harding, J.*, at November Term, 1933, of MECKLENBURG.

Civil action to set aside contract and lease and deed for fraud, and to remove cloud upon plaintiff's title.

The record discloses:

1. That on 16 May, 1924, a contract to purchase or option to buy and lease land in Mecklenburg County appears to have been executed by plaintiff to defendants, L. S. Fowler and George S. Lee, Jr. It is alleged that this paper-writing, as it appears of record, is a forgery, or was secured by fraud, and is therefore void, one paper having been surreptitiously substituted for another.

2. It is further alleged that on 7 October, 1924, the said Fowler and Lee registered what purports to be a deed from plaintiff to the two defendants for the 414 acres of land in question.

3. Thereafter, the two defendants conveyed to A. R. Deese 190 acres of said land, which was later encumbered by two deeds of trust, executed by Deese and wife, one of which was to the First National Bank of Durham, trustee for the North Carolina Joint Stock Land Bank of Durham.

4. That the balance of said tract has been encumbered by two deeds of trust executed by Fowler and Lee and their wives.

5. That a judgment was taken against A. R. Deese by the Bank of Union, which purports to be a lien against the 190 acres of said land.

6. That Fowler has conveyed by deed all his alleged interest in the remaining land to Lee.

7. This action was instituted 2 April, 1930, to remove all these instruments as cloud upon plaintiff's title, it being alleged that the original contract and deed signed by plaintiff were procured by fraud.

8. Upon denial of the allegations in the complaint and pleas of the three-year statute of limitations, there was a judgment of nonsuit entered at the close of plaintiff's evidence as to all the defendants except L. S. Fowler, who did not plead the statute of limitations. Formal judgment of nonsuit appears in the record.

9. Issues were thereupon submitted to the jury and answered in favor of the plaintiff.

10. The plaintiff, after verdict, moved to amend the complaint to conform to the evidence by adding at the end of paragraph 2, the following:

"And defendants, Geo. S. Lee, Jr., and L. S. Fowler, in transacting with plaintiff the business matters mentioned in the complaint were acting as partners and trading under the firm name of L. S. Fowler and Company."

Motion allowed by the court in its discretion.

11. Before signing judgment, the court requested defendants in whose favor judgment of nonsuit had been entered to appear in court, which they did and objected to the judgment tendered by plaintiff, as it injuriously affects their interests.

12. Upon motion of plaintiff for judgment on the verdict, the court found that the judgment of nonsuit previously signed in the case was improvidently entered in part, in that, A. R. Deese and Arpie Deese were included therein when they had made no motion to nonsuit, not being represented by counsel who lodged the motion. The judgment of nonsuit was accordingly reformed to exclude A. R. Deese and Arpie Deese from its operation.

13. Judgment was thereupon entered declaring the plaintiff to be the owner in fee of the land in question, and ordering that an accounting be had between the plaintiff and L. S. Fowler, surviving partner of L. S. Fowler and Company, and taxing L. S. Fowler individually and as surviving partner of the firm of L. S. Fowler and Company and A. R. Deese and Arpie Deese with the costs of the action.

The North Carolina Joint Stock Land Bank of Durham and the receiver of the First National Bank of Durham, trustee, objected to the judgment tendered by plaintiff, and gave notice of appeal therefrom to the Supreme Court.

The plaintiff appeals from the judgment of nonsuit entered at the close of his evidence.

H. L. Taylor, J. C. Newell and Marvin L. Ritch for plaintiff.

Vann & Milliken for defendants North Carolina Joint Stock Land Bank of Durham and receiver of First National Bank of Durham, trustee.

STACY, C. J. The argument submitted by plaintiff on his appeal from the judgment of nonsuit treats the case as one in ejectment, but this is not the theory upon which it was tried in the court below. An appeal *ex necessitate* follows the theory of the trial. *Walker v. Burt,* 182 N. C., 325, 109 S. E., 43; *Holland v. Dulin, ante,* 211; *Shipp v. Stage Lines,* 192 N. C., 475, 135 S. E., 339.

In an action to avoid an instrument on the ground of fraud, *non est factum,* it is provided by C. S., 441, subsection 9, that suit shall be commenced within three years after the cause of action accrues; that is within three years after the discovery by the aggrieved party of the facts constituting the fraud, or when such facts, in the exercise of proper diligence, should have been discovered. *Taylor v. Edmunds,* 176 N. C., 325, 97 S. E., 42; *Little v. Bank,* 187 N. C., 1, 121 S. E., 185.

It clearly appears that plaintiff had information of the facts constituting the alleged fraud as early as January, 1925, certainly enough to put him on inquiry; and the rule is that such notice carries with it a presumption of knowledge of all a reasonable investigation would have disclosed. *R. R. v. Comrs.,* 188 N. C., 265, 124 S. E., 560; *Mills v. Kemp,* 196 N. C., 309, 145 S. E., 557. A party having notice must exercise ordinary care to ascertain the facts, and if he fail to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired, had he made the necessary effort to learn the truth of the matters affecting his interests. *Austin v. George,* 201 N. C., 380, 160 S. E., 364; *Wynn v. Grant,* 166 N. C., 39, 81 S. E., 949; *Ewbank v. Lyman,* 170 N. C., 505, 87 S. E., 348; *Sanderlin v. Cross,* 172 N. C., 234, 90 S. E., 213.

The action, therefore, was barred at the time of its institution; and judgment of nonsuit was properly entered in favor of the defendants pleading the statute of limitations and demurring to the evidence. *Drinkwater v. Tel. Co.,* 204 N. C., 224, 168 S. E., 410; *Tillery v. Lbr. Co.,* 172 N. C., 296, 90 S. E., 196.

Notwithstanding the judgment of nonsuit entered at the close of plaintiff's evidence in favor of the defendants pleading the statute of limitations and demurring to the evidence, the plaintiff was allowed to amend his complaint, after verdict (C. S., 547), and judgment was rendered thereon adversely affecting the rights of the appealing defendants.

Perhaps it is enough to say the judgment of nonsuit is in conflict with the judgment on the verdict in so far as the latter affects the rights of the appealing defendants. But plaintiff contends the defendants are in no position to appeal in the case (*Watts v. Lefler,* 194 N. C., 671, 140 S. E., 435), and, at the same time, asserts the final judgment is binding upon them. *Wooten v. Cunningham,* 171 N. C., 123, 88 S. E., 1.

As humorously stated on the argument, the judgment of nonsuit only provided that the appealing defendants "go without day," whereas, in view of plaintiff's subsequent activities, they should have asked that they "go without night also."

Ordinarily, a defendant who asks for no affirmative relief, is not the "party aggrieved" by a judgment of nonsuit within the meaning of C. S., 632. *Guy v. Ins. Co., ante,* 118. But it is not the judgment of nonsuit from which the defendants appeal. They appeal from the final judgment. Nor is this an ordinary case from a procedural standpoint. 3 C. J., 643.

There was error in the final judgment to the prejudice of the appealing defendants.

On plaintiff's appeal, affirmed.

On defendants' appeal, error.

H. C. RUTH, EMPLOYEE, v. CAROLINA CLEANERS, INCORPORATED, EMPLOYER, AND CENTURY INDEMNITY COMPANY, CARRIER.

(Filed 23 May, 1934.)

Master and Servant F d—Upon finding that award was entered contrary to law, Industrial Commission may set it aside and order hearing de novo.

Where the Industrial Commission finds that an award of a commissioner denying compensation was entered contrary to law, it has the authority to vacate the award and order that the claimant have a hearing *de novo*, the Commission having continuing jurisdiction within the limits prescribed by statute and authority to make its own records speak the truth in order to protect its decrees. In this case it was found that a commissioner entered the award upon the report of a deputy commissioner and that the provisions of section 58 of the act requiring a deputy commissioner to swear all witnesses and transmit all testimony to the Commission for its determination were not strictly complied with.

CIVIL ACTION, before *Harris, J.,* at December Term, 1933, of WAKE.

The claimant was employed by the Carolina Cleaners, Incorporated, as a presser and contended that he was injured in the course of his employment on or about 15 November, 1931. Claimant said: "I was pressing a suit and was trying to finish up and get off work on Sunday morning and get off duty, and I was rushing and the pedal slipped and twisted my ankle and it throwed me over on the pressing board." The claimant requested a hearing by the Industrial Commission on 19 August, 1932, and thereafter Commissioner Dorsett found the following facts:

1. "That the plaintiff gave no notice whatever to his employer of the alleged accident as having occurred on or about this date until sometime during March, 1932.

2. "That the employer's rights in this case have been seriously prejudiced by the failure of the plaintiff to give the employer the notice of this alleged accident.

3. "The Commissioner is unable to find from the evidence taken at the hearing that the plaintiff sustained the injury by accident that arose out of and in the course of the employment as alleged by the claimant."

Thereupon the claim for injury was denied.

Subsequently, on 26 June, 1933, the claimant made a motion before the Industrial Commission asserting in substance:

1. That by reason of excusable negligence of counsel evidence in support of his claim was not introduced at the hearing.

2. That the procedure followed in rendering and entering said judgment was irregular because the stenographic record taken at the hearing was not transcribed and was not, and is not of record in the cause.

3. That the hearing was conducted by a deputy commissioner, but that the findings of fact and award were written by one of the commissioners, "and his conclusion was reached from a pencil-written memorandum of a digest of the testimony written by the deputy commissioner, which said memorandum was highly prejudicial to the cause of plaintiff, and said memorandum was an erroneous conclusion of the testimony adduced upon trial."

4. That the defendant was permitted to introduce at the hearing a signed statement made by the claimant, which said statement was procured by the fraud and deceit of the carrier.

The defendants, answering the motion made by the plaintiff, denied the allegations of fraud and contended that upon "failure of claimant to enter an appeal from the said opinion and decision of Commissioner Dorsett to the full Commission, all rights of claimant to further prosecution of this claim became and were thereby barred."

The full Commission, after considering the motion and answer, declares:

"That in order that substantial justice may be done, and the purpose of the Compensation Act may be fully carried out in this case, and in order that the Commission may have a full disclosure of all testimony, the said judgment, in the exercise of sound discretion should be set aside and the case reheard."

"The evidence in this case was heard before E. W. Price, deputy commissioner, and the report of the evidence stenographically reported. It is admitted, however, at the time of the award by Commissioner Dorsett a transcription of the testimony had not been made and trans-

mitted to the commissioner, and it is admitted that upon request by counsel for the claimant sometime prior to 28 August, 1933, to examine the transcript of testimony that the stenographic notes had been misplaced and could not be found, but that they were later found and a transcript of said notes made and duly filed as a part of the record in this case.

"It has been the practice in numbers of cases before the Commission for a commissioner to determine a cause heard before a deputy commissioner upon having the stenographic notes read to the commissioner, and there is no criticism of Commissioner Dorsett for his action in this case, but the Commission's attention has been called to section 58 of the act which provides as follows:

" 'The Commission or any of its members shall hear the parties at issue and their representatives and witnesses, and shall determine together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with the record of the proceedings, and a copy of the award shall immediately be sent to the parties in dispute. The parties may be heard by a deputy, in which event he shall swear or cause the witnesses to be sworn, and shall transmit all testimony to the Commission for its determination and award.' "

"And the full Commission is of the opinion that the provisions of section 58 were not strictly complied with in this case and that, therefore, the award rendered herein was irregular, and the Commission, in the exercise of its discretion, hereby sets aside the award of Commissioner Dorsett to the end that the claimant may have a hearing *de novo.*"

From the foregoing order of the Industrial Commission, the defendants appealed to the Superior Court. After hearing the evidence and argument of counsel the trial judge was of the opinion that the ruling of the Industrial Commission setting aside the award should be affirmed, and thereupon ordered and adjudged "that this cause be remanded to the North Carolina Industrial Commission," etc.

From the foregoing judgment, the defendants appealed.

J. S. Griffin for plaintiff.
Willis Smith and John H. Anderson, Jr., for defendants.

BROGDEN, J. The Industrial Commission has within the limits prescribed by statute, continuing jurisdiction, and hence as an administrative agency, empowered to hear evidence and render awards thereon affecting the rights of workers, has and ought to have authority to make its own records speak the truth in order to protect its own decrees from mistake of material facts and the blight of fraud. *Industrial Commission v. Dell,* 135 N. E., 669, 34 A. L. R., 422.

The defendant relies upon *Concho Wash Sand Co. v. Worthing,* 26 Pac. (2d), 417; *In re Lavengie,* 117 N. E., 200; *Re Perkins' case,* 180 N. E., 142; *Putt v. Laher Ice Cream Co.,* 161 Atlantic, 622. An examination of these cases discloses that they are not determinative of the question involved in this appeal.

The full Commission finds and asserts that the award was not made in compliance with the provision of the statute, and manifestly the Commission is entitled to vacate an award which the Commission itself admits was entered contrary to law.

Affirmed.

STANLY BANK AND TRUST COMPANY ET AL. V. GURNEY P. HOOD, COMMISSIONER OF BANKS, AND ARTHUR P. HARRIS, JR., TRUSTEE.

(Filed 23 May, 1934.)

Banks and Banking H c: H a—Commissioner of Banks may be restrained from taking over assets and levying upon stock of bank which has assigned assets sufficient to pay creditors to another bank for liquidation.

A bank transferred and assigned all its assets to another bank under an agreement, approved by the Commissioner of Banks, that the latter bank should pay all depositors and creditors of the former. C. S., 217(k). Before the assignee bank had fully discharged the agreement it became insolvent and was taken over by the Commissioner of Banks: *Held,* upon a showing that the assets of the assignor bank are sufficient to pay in full all its depositors and creditors, the assignor bank, its depositors and creditors may restrain the Commissioner of Banks from taking possession of the assigned assets, and, pending the trial of the issue involving the value of the assigned assets, they may restrain the Commissioner of Banks from levying upon and collecting the statutory liability of the stockholders of the assignor bank, the Commissioner of Banks being subject to the equitable jurisdiction of the Superior courts, and the court's right to restrain him in proper cases not being affected by the provisions of C. S., 218.

STACY, C. J., dissents.

APPEAL by defendant, Gurney P. Hood, Commissioner of Banks, from *Stack, J.,* at Chambers, on 27 January, 1934. From STANLY. Affirmed.

This is an action to restrain the defendant, Gurney P. Hood, Commissioner of Banks, from taking into his possession the assets of the plaintiff, Stanly Bank and Trust Company, for liquidation, and from levying assessments on its stockholders on account of their statutory liability in the event of its insolvency, pending the liquidation of said

Bank and Trust Company by the defendant, Arthur P. Harris, Jr., trustee, pursuant to a judgment of the Superior Court of Stanly County.

The plaintiff is a corporation organized under the laws of this State. Prior to 3 February, 1931, the plaintiff was engaged in the general banking business at Albemarle, in Stanly County, North Carolina. On said day, it ceased to do such business, and is now in process of liquidation by the defendant, Arthur P. Harris, Jr., pursuant to a judgment rendered by Judge Harding in an action entitled, Stanly Bank and Trust Company *et al. v.* Page Trust Company *et al.*, and dated 20 June, 1933.

On 3 February, 1931, the Stanly Bank and Trust Company sold, transferred, assigned and conveyed all its assets to the Page Trust Company, a banking corporation engaged in business in this State, in consideration of the agreement of said Page Trust Company to pay and fully satisfy the claims of all the depositors and other creditors of the said Stanly Bank and Trust Company. After the Page Trust Company had taken over the assets of the Stanly Bank and Trust Company, and before it had paid and fully discharged the claims of all the depositors and other creditors of the Stanly Bank and Trust Company, in accordance with its contract, it became insolvent and ceased to do business. On or about 5 May, 1933, Gurney P. Hood, Commissioner of Banks, took possession of the Page Trust Company, because of its insolvency. At said date, there were in the possession of the Page Trust Company assets which it had acquired from the Stanly Bank and Trust Company, of the face value of over $200,000. The Page Trust Company had advanced for the payment of claims against the Stanly Bank and Trust Company, in excess of the amount which it had collected from said assets, the sum of $25,819.55. The balance due to depositors and other creditors of Stanly Bank and Trust Company, was about $61,000.

In an action instituted in the Superior Court of Stanly County, entitled, "Stanly Bank and Trust Company *v.* Page Trust Company *et al.*," a judgment was rendered by Judge Harding declaring that the Stanly Bank and Trust Company had a lien on the assets which the said company had transferred, assigned and conveyed to the Page Company, and which were then in the possession of Gurney P. Hood, Commissioner of Banks. A trustee was appointed by Judge Harding, and it was ordered that said assets be delivered to said trustee for collection, and distribution. The defendant, Arthur P. Harris, Jr., is now the trustee under said judgment, and is engaged in the performance of his duties as ordered by Judge Harding.

On 22 December, 1933, Gurney P. Hood, Commissioner of Banks, caused the following notice of possession to be filed in the office of the clerk of the Superior Court of Stanly County:

"NOTICE OF POSSESSION.

Under and by virtue of the authority of subsection 3, section 218(c), of the Consolidated Statutes, notice is hereby given that the Stanly Bank and Trust Company, a banking corporation organized and existing under and by virtue of the laws of the State of North Carolina, and until recently conducting a banking business in the town of Albemarle, Stanly County, State of North Carolina, is now by reason of the authority contained in section 218(c), Consolidated Statutes, in the possession of the Commissioner of Banks for the purpose of liquidation, and that possession of the said banking corporation was taken for the reason that said banking corporation is insolvent and unable to meet its obligations to depositors in the ordinary course of business."

Thereafter, on 2 January, 1934, this action was instituted by the plaintiffs to restrain the defendant, Gurney P. Hood, Commissioner of Banks, from taking possession of the assets of the plaintiff, Stanly Bank and Trust Company, and from levying assessments on its stockholders on account of their statutory liability in the event of its insolvency, pending the liquidation of said Bank and Trust Company by the defendant, Arthur P. Harris, Jr., trustee, pursuant to the judgment rendered by Judge Harding.

From judgment continuing a temporary restraining order to the final hearing, the defendant, Gurney P. Hood, Commissioner of Banks, appealed to the Supreme Court.

T. B. Mauney and R. L. Smith for plaintiffs.

Kenneth C. Royall, Allen Langston, W. L. Mann and C. I. Taylor for defendants.

CONNOR, J. Where, as in the instant case, a banking corporation, organized and doing business under the laws of this State, and for that reason subject to the jurisdiction of the Commissioner of Banks, has transferred, assigned and conveyed all its assets to another banking corporation, also organized and doing business under the laws of this State, in consideration of the agreement of the latter corporation to pay and fully discharge the claims of all the depositors and other creditors of the former corporation, and the Commissioner of Banks had consented to such transfer, assignment and conveyance (C. S., 217(k), *Corp. Com. v. Stockholders,* 199 N. C., 586, 153 S. E., 445), but thereafter, before the latter corporation has fully performed its agreement with the former corporation, files notice that he has taken into his possession the former corporation, under the provisions of C. S., 218(b), for purposes of liquidation, the said former corporation, its depositors, and stockholders may restrain the Commissioner of Banks

from taking into his possession the assets of the former corporation, which are then in the possession of the latter corporation, upon showing that said assets are sufficient in value for the payment in full of the claims of all its depositors and other creditors. Pending the trial of the issue involving the value of said assets, the Commissioner of Banks may also be restrained from levying and collecting assessments on the stockholders of the former corporation, because of their statutory liability.

The jurisdiction of the Superior courts of this State, in a proper case, to restrain the Commissioner of Banks, is not affected by the provisions of C. S., 218, providing for the liquidation of insolvent banking corporations organized and doing business under the laws of this State. The Commissioner of Banks is an administrative officer of the State, and in the performance of his duties as prescribed by statute, is subject to the jurisdiction of the Superior Courts, in the exercise of their equitable jurisdiction. There is no error in the judgment in the instant case. It is

Affirmed.

STACY, C. J., dissents.

ELLA J. MITCHELL v. W. F. MITCHELL

(Filed 23 May, 1934.)

1. Cancellation of Instruments A b—Allegations in this case held sufficient to show that promise amounted to a fraudulent misrepresentation.

While it is the general rule that mere promissory representations will not support an action for cancellation of an instrument for fraud, where the promise is a device to accomplish the fraud and is made by the promisor with the present intent of not complying therewith and the promisee rightfully relies thereon and is induced thereby to enter into the contract, it is a fraudulent misrepresentation sufficient to support an action for cancellation for fraud. In this case the demurrer admitted the allegations that the deed in question was executed in consideration of the grantee's promise to execute a lease for life to the grantor, and judgment sustaining the demurrer is reversed.

2. Same: Frauds, Statute of, E d—Statute of frauds will not prevent unwritten promise from being basis for action for cancellation.

The grantor in a deed sought to set it aside for fraud on the ground that the consideration for the deed was grantee's promise to execute a lease to the premises to the grantor for life which the grantee had refused to do. The grantee set up the statute of frauds, and the grantor admitted

the promise was *not* in writing. C. S., 988: *Held,* the relief sought was not to enforce the promise or to recover damages for its breach, and the mere fact that the promise to lease was not in writing is not a valid defense to the action for cancellation.

APPEAL by defendant from *Cranmer, J.,* at July Term, 1933, of PENDER. Reversed.

Plaintiff and defendant were married, each to the other, on 31 July, 1924, and thereafter lived together as husband and wife, at Scott's Hill, in Pender County, N. C., until about 14 July, 1930, when plaintiff left the home of the defendant and went to the city of Wilmington, where she has since resided. They are now living separate and apart from each other. This action was begun on 19 October, 1931.

It is alleged in the complaint that defendant has wrongfully failed and refused to provide an adequate support for the plaintiff. This allegation is denied in the answer filed by the defendant.

It is further alleged in the complaint that on 27 July, 1925, R. L. Foy and his wife, by deed which is duly recorded in the office of the register of deeds of Pender County, conveyed to the plaintiff and defendant, as tenants in common, a certain lot of land situate in Scott's Hill, N. C., and fully described in the complaint, and that thereafter, to wit, on 24 February, 1926, the defendant, by deed which is duly recorded in the office of the register of deeds of Pender County, conveyed to the plaintiff his undivided one-half interest in said lot of land. These allegations are admitted in the answer filed by the defendant.

It is further alleged in the complaint that the defendant is now in the wrongful possession of the said lot of land, and has wrongfully failed and refused to vacate the same. The defendant in his answer admits that he is in possession of said lot of land, and that he has failed and refused to vacate the same; he denies, however, that his possession of the said lot of land, and that his failure and refusal to vacate the same is wrongful. He alleges that the only consideration for the deed by which he conveyed to the plaintiff his undivided one-half interest in said lot of land, was the promise and agreement of the plaintiff that upon the execution of said deed by the defendant, the plaintiff would execute and deliver to the defendant a lease of said lot of land for his life, and that since the execution of said deed the plaintiff has failed and refused to execute and deliver said lease to him. The defendant further alleges in his answer that the plaintiff procured the execution by him of said deed by false and fraudulent representations that she would execute and deliver to him the lease as aforesaid, and that for this reason the deed is void. The plaintiff in her reply to the further answer of the defendant denied the allegations on which defendant prays that the said deed be adjudged void and canceled.

When the action was called for trial, the plaintiff demurred *ore tenus* to the further answer of the defendant in defense of plaintiff's right to recover possession of the lot of land described in the complaint, on the ground that it is not alleged in the answer that the promise or agreement of the plaintiff to execute and deliver to the plaintiff a lease for said lot of land, for his life, was in writing, and signed by the plaintiff. The defendant admitted that said promise or agreement as alleged in his answer was not in writing. The demurrer was sustained.

It was thereupon ordered and adjudged by the court, on the admissions in the answer, that the plaintiff is the owner and is entitled to the possession of the lot of land described in the complaint.

The defendant excepted to the judgment and appealed to the Supreme Court.

Kellum & Humphrey for plaintiff.
McNorton & McIntire for defendant.

CONNOR, J. In *Hinsdale v. Phillips,* 199 N. C., 563, 155 S. E., 238, it is said: "As a general rule, fraud as a ground for the rescission of contracts, cannot be predicated upon promissory representations, because a promise to perform an act in the future is not in legal sense a representation. Fraud, however, may be predicated upon the nonperformance of a promise, when it is shown that the promise was merely a device to accomplish the fraud. A promise not honestly made, because the promisor at the time had no intent to perform it, where the promisee rightfully relied upon the promise, and was induced thereby to enter into the contract, is not only a false, but also a fraudulent representation, for which the promisee, upon its nonperformance, is ordinarily entitled to a rescission of the contract. These principles have been recognized and applied by this Court in *Shoffner v. Thompson,* 197 N. C., 667, 150 S. E., 195; *McNair v. Finance Co.,* 191 N. C., 710, 135 S. E., 90; *Bank v. Yelverton,* 185 N. C., 314, 117 S. E., 299; *Pritchard v. Dailey,* 168 N. C., 330, 84 S. E., 392; *Hill v. Gettys,* 135 N. C., 373, 47 S. E., 449, and in many other cases cited in the opinions in these cases."

These principles are applicable in the instant case, notwithstanding the promise of the plaintiff, as alleged in the answer, to execute and deliver to the defendant a lease for the land described in the complaint, was not in writing. C. S., 988, *Investment Co. v. Zindel,* 198 N. C., 109, 150 S. E., 704. The defendant is not seeking to enforce the promise, or to recover damages for its nonperformance by the plaintiff. He alleges in his answer that the promise was false and fraudulent, and in

effect that at the time the plaintiff made the promise and thereby induced him to execute the deed under which she claims, she did not intend to perform it. If this allegation is sustained at the trial, the defendant will be entitled to a decree that his deed is void, and that it be canceled. In *Taylor v. Edmunds,* 176 N. C., 325, 97 S. E., 42, it is said: "The mere fact that a grantor who can read and write signs a deed does not necessarily conclude him from showing, as between himself and the grantee, that he was induced to sign by fraud on the part of the grantee, or that he was deceived and thrown off his guard by the grantee's false statements and assurances designedly made at the time and reasonably relied on by him." The judgment is

Reversed.

IN RE PETITION OF T. H. EDWARDS.

(Filed 23 May, 1934.)

Highways A b—Question of discontinuance of neighborhood public road must be presented by special proceeding before the clerk.

The question of the discontinuance of a road which is not taken over by the State as a part of the county road system, Public Laws of 1931, chap. 145, and which is not a cartway, church road, or mill road, but is a neighborhood public road within the meaning of Public Laws of 1933, chap. 302, must be determined by a special proceeding instituted before the clerk, and where the question has been presented by petition to the board of county commissioners the judgment of the Superior Court on appeal dismissing the petition is correct, but that part of the judgment providing that the road shall remain open is erroneous and will be stricken out on further appeal to the Supreme Court.

CLARKSON, J., concurring in result.

APPEAL by petitioner from *Schenck, J.,* at August Term, 1933, of YANCEY. Modified and affirmed.

R. W. Wilson for appellant.
Watson & Fouts for appellee.

ADAMS, J. T. H. Edwards filed a petition with the board of commissioners of Yancey County requesting that part of an old public road on his land be closed. Several citizens certified that the road was not needed or used by the public. The commissioners made an order that the road be abandoned. An adjoining landowner appealed to the Superior

Court and Judge Schenck found certain facts, dismissed the proceeding, and ordered that the road remain open for public use. The petitioner appealed.

In 1931 the General Assembly enacted additional legislation relating to the highway system and to the maintenance of the public roads of the State. Pub. Laws 1931, ch. 145. It was provided in section 7 of this act that after 1 July, 1931, the exclusive control, management, and responsibility for all public roads in the several counties should be vested in the State Highway Commission and that the place of county, district, and township road commissioners should be abolished. All roads composing the several county road systems were to be mapped on or before the first day of May, 1931, and at the courthouse door in each county a map was to be posted showing all roads making up the county road system. All these roads to which no objection was made were to constitute the county road system for the respective counties. The State Highway Commission was authorized to change the maps at any time before they were posted so as to include any roads that did not appear on the printed maps. Only those appearing on the maps were to be taken over by the Highway Commission. Section 11. The petition referred to in section 14 is applicable only to a road in the county road system.

Article 13, chapter 70, of the Consolidated Statutes deals with cartways, church roads, mill roads, and like easements. This article was amended by chapter 448, Public Laws 1931, by which it is provided that the establishment, alteration, or discontinuance of any of these easements shall be determined by a special proceeding instituted before the clerk of the Superior Court of the county in which the property affected is situated. By chapter 302, Public Laws 1933, this act (ch. 448), was amended by the insertion of section 3838½, which is as follows: "That all those portions of the public road system of the State which have not been taken over and placed under maintenance or which have been abandoned by the State Highway Commission, but which remain open and in general use by the public, and all those roads that have been laid out, constructed, or reconstructed with unemployment relief funds under the supervision of the Department of Public Welfare, are hereby declared to be neighborhood public roads, and they shall be subject to all of the provisions of this act with respect to the alteration, extension, or discontinuance thereof, and any interested citizen is authorized to institute such proceeding."

The road described in the petition is not on the map posted in Yancey and is not included in the "county road system" taken over by the State Highway Commission; nor is it a cartway, church road, or mill road. It is a neighborhood road within the meaning of the quoted act, and the question of its discontinuance must be determined by a special proceeding instituted before the clerk.

As the board of county commissioners had no jurisdiction the judgment dismissing the petition is affirmed, but the clause providing that the road shall remain open should be stricken out.*

Modified and affirmed.

CLARKSON, J. Concurring in result: W. C. Edwards claims a vested right and easement on the highway in controversy. This private easement or vested right that he contends he owns over this highway, he has a right to have kept open for his private use under his vested right and easement. As said in *Davis v. Alexander,* 202 N. C., 130 (131-2), citing numerous authorities: "The law applicable to this action is well stated in 2 Elliott, Roads and Streets (4th Ed.), part sec. 1172, at p. 1668: 'Once a highway always a highway,' is an old maxim of the common law to which we have often referred, and so far as concerns the rights of abutters, or others occupying a similar position, who have lawfully and in good faith invested money or obtained property interests in the just expectation of the continued existence of the highway, the maxim still holds good. Not even the legislature can take away such rights without compensation. Such, at least, is the rule which seems to us to be supported by the better reason and the weight of authority, although there is much apparent conflict as to the doctrine when applied to the vacation of highways."

In the main opinion, it is said: "But the clause providing that the road shall remain open, shall be stricken out." This refers to the road being a public highway. W. C. Edwards would have a vested right or easement in the road as a private highway.

IN RE WILL OF ISABELLA KELLY.

(Filed 23 May, 1934.)

Wills C e—Evidence held sufficient for jury on question of whether testatrix requested attesting witnesses to sign the paper-writing.

The evidence in this caveat proceeding was to the effect that the subscribing witnesses, at the request of the chief beneficiary under the will, took the paper to the testatrix at her home where she was confined to her bed by sickness, that the will was read to her, and that in response to a question as to whether she understood it she nodded her head affirmatively, and that she touched the pen, making her mark, after being shown

*This opinion was written in accordance with the Court's decision and adopted and filed, by order of the Court, after *Justice Adams'* death. 23 May, 1934. *Brogden, J.*

the line for her name, and that she could see the blank lines for the names of the attesting witnesses, and that thereafter the attesting witnesses signed the attesting clause in her presence: *Held*, the evidence was sufficient to be submitted to the jury on the issue of due attestation, it being for the jury to determine whether the testatrix impliedly requested the attesting witnesses to attest the will, an implied request being sufficient. C. S., 4131.

APPEAL by propounders from *Stack, J.*, September Term, 1933, of MOORE.

Issue of *devisavit vel non*, raised by a caveat to the will of Isabella Jane Kelly, late of Moore County, based upon alleged want of due attestation, etc.

The paper-writing propounded as the last will and testament of the alleged testatrix is signed in her name by her mark and witnessed by John M. Black and Jesse B. McKenzie with the usual attestation clause: "Signed, sealed, published and declared by the said Isabella Jane Kelly to be her last will and testament in the presence of us, who, at her request, and in her presence, do subscribe our names as witnesses thereto."

It is in evidence that Kenneth Caddell, the chief beneficiary under the supposed will, requested the two witnesses to take the paper-writing, which had evidently been prepared by an attorney, to the home of the testatrix and witness her execution and publication thereof. This they did. The will was read to the testatrix, who was in bed, sick at the time, and she was asked if she understood it. She assented by nodding her head, and then touched the pen after being shown the line for her name. The two witnesses signed in her presence. Both testified, on cross-examination, that there was no specific request on the part of the alleged testatrix at the time that they witness her will.

Upon this evidence, the court directed a verdict in favor of the caveators, being of opinion that the attestation was not sufficient.

The propounders appeal, assigning errors.

U. L. Spence for propounders.

Samuel R. Hoyle, W. R. Clegg and L. B. Clegg for caveators.

STACY, C. J. Viewing the evidence in its most favorable light for the defeated parties, the established rule on a directed verdict (*In re Will of Deyton*, 177 N. C., 494, 90 S. E., 424), we are of opinion that it is sufficient to carry the case to the jury on the issue of due attestation.

It is true, the decisions are to the effect that the subscribing witnesses to a will, in some responsible way, should be requested to witness its execution. *In re Herring's Will*, 152 N. C., 258, 67 S. E., 570. This may be implied from the circumstances and the conduct of the testator.

Burney v. Allen, 125 N. C., 314, 34 S. E., 500. Or it may be shown that another was commissioned to make the request. *In re Herring's Will, supra.* It is not necessary that the testator spell it out in so many words. *Allison v. Allison,* 46 Ill., 61, 92 Am. Dec., 237. A constructive request is sometimes considered the equivalent of an actual request. 28 R. C. L., 127; *Lane v. Lane,* 125 Ga., 386, 114 Am. St. Rep., 207, and note. As a testator, who is not able or does not choose to write a holograph will, is obliged by the law to depend upon witnesses, he should be allowed to select them in his own way. *Graham v. Graham.* 32 N. C., 219. Indeed, except by implication, the statute, C. S., 4131, is silent on the point.

"Generally, the witnesses are not required to subscribe the will at the express request of the testator. He need not formally request the witness to attest his will as the request may be implied from his acts and from the circumstances attending the execution of the will. Thus, a request will be implied from the testator's asking that the witness be summoned to attest the will, or by his acquiescence in a request by another that the will be signed by the witness." Thompson on Wills, 449; *In re Will of Deyton, supra.*

There is no direct testimony that Kenneth Caddell was commissioned by the testatrix to secure witnesses to her will—though this might be inferred—but it would seem to be a reasonable inference that she herself impliedly requested them to attest it. The will was read to her; she understood its meaning, and assented to its execution (*Lee v. Parker,* 171 N. C., 144); she was shown the line where her name was to appear; beneath this were the spaces for the names of the subscribing witnesses; she could see that they were signing the same paper which she had signed as her will. *Graham v. Graham, supra.*

The law makes two subscribing witnesses to a will indispensable to its formal execution. But its validity does not depend solely upon the testimony of the subscribing witnesses. If their memory fail, so that they forget the attestation, or they be so wanting in integrity as wilfully to deny it, the will ought not to be lost, but its due execution and attestation should be found on other credible evidence. And so the law provides. *Bell v. Clark,* 31 N. C., 239; *Peck v. Cary,* 27 N. Y., 9, 84 Am. Dec., 220, and note.

Of course, we do not mean to say the supposed will was well attested—only that the evidence is sufficient to submit the question to the jury. The twelve may find either way. The credibility of the evidence is for them.

New trial.

STANLEY WINBORNE, UTILITIES COMMISSIONER, v. J. D. MACKEY AND S. W. MACKEY.

(Filed 23 May, 1934.)

Bus Companies C a—Factors determining whether operator of motor vehicle for hire must obtain franchise.

A person transporting persons or property by motor vehicle for hire between cities and towns as a business, accepting all persons for transportation who properly present themselves, must obtain the franchise required by N. C. Code, 2613(k) (1), unless he comes within the exceptions specifically pointed out in the statute, regardless whether or not any other person or corporation holds a valid franchise covering that section of highway, while persons operating motor vehicles for hire without regard to fixed *termini* are required to obtain only the "for hire" license prescribed by N. C. Code, 7880(96). In this case it appeared that one of the defendant's *termini* was an incorporated city or town, and the case is remanded for a specific finding as to whether the other terminus is a town, the defendant not being required to obtain a franchise unless both *termini* are cities or towns.

CIVIL ACTION, before *Alley, J.*, at September Term, 1933, of HAYWOOD.

This action was brought to restrain the defendants from operating motor vehicles over and along North Carolina State Highway No. 10 to Enka and return, for the purpose of transporting passengers and property for compensation without procuring a franchise certificate as provided by section 2613(l), Michie's Code of 1931. At the hearing various affidavits were offered tending to show that the defendants operate three or more passenger cars or busses and transport passengers from day to day from Canton, Clyde, and intervening points to Enka and return. No facts were found by the judge, but in cases of the present type the Supreme Court can find the facts. *Hill v. Skinner*, 169 N. C., 405, 86 S. E., 351; *Sanders v. Ins. Co.*, 183 N. C., 66, 110 S. E., 597. The affidavits tend to show that the defendants are engaged in the business of operating busses or motor vehicles for compensation between fixed *termini*. While no definite schedule is disclosed, nevertheless, the affidavits tend to show continuous business on various days within approximate periods of time.

The defendants admit that they have carried persons from Canton to the plant of the American Enka Corporation in Buncombe County, but that the persons so carried are employees of the Enka Corporation. They further admit that they have not procured a franchise, but that they have paid "for hire" license prescribed by C. S., 7880(96).

After hearing the evidence, judgment was entered as follows:

"The court is of opinion and finds that there is no valid outstanding franchise for the transportation of passengers by motor vehicles for compensation over Highway No. 10 between Asheville and Clyde, North Carolina, and, therefore, said highway is open to persons carrying on the business of transporting persons for compensation by motor vehicle under the provisions of the Revenue Act levying license taxes therefor. That the business conducted and the services rendered by respondents do not fall within the terms of the statute (sections 2 and 3, chapter 136, Public Laws of 1927; sections 2613(k) and 2613(l), Michie's Code, 1931), requiring certain persons engaged in the transportation of persons and property for compensation over public highways by motor vehicle to apply for and obtain permission so to do from the Corporation Commission of North Carolina. That the business carried on by the respondents is excepted from the above mentioned statutes and is governed by the terms of section 165, chapter 427, Public Laws of 1931; section 7880(96) Michie's Code, 1931. That respondents have paid to the Revenue Department of the State of North Carolina the license taxes required of them under the last mentioned statutes for the calendar year 1933, and have received from the Commissioner of Revenue "for hire" license tags for the privilege of engaging in the business carried on by them. It is therefore . . . ordered, adjudged and decreed that the rule to show cause be vacated and discharged."

From the foregoing judgment the complainant appealed.

Attorney-General Brummitt, Assistant Attorney-General Bruton and N. A. Townsend for complainant.

Cansler & Cansler of counsel for complainant.

Bourne, Parker, Bernard & DuBose for appellees.

BROGDEN, J. Does section 2613(k), Michie's Code of 1931, or section 7880(96), apply to the business carried on by the respondents?

Section 2613(k) provides in substance that "no . . . person . . . shall operate over the public highways in this State any motor vehicle . . . for the transportation of persons or property between cities, or between towns, or between cities and towns for compensation, except in accordance with the provisions of this act," etc. Section 2613(l) of Michie's Code provides that every . . . person . . . before operating any motor vehicle upon the public highway of this State for the transportation of persons or property for compensation . . . shall apply to the Commission and obtain a franchise certificate authorizing such operation," etc. Section 7880(96) provides in substance that "every person . . . engaged in the business of keeping

passenger automobiles or other passenger motor vehicles for hire and for transportation of persons for compensation, shall first apply for and obtain from the Commissioner of Revenue a "for hire" license for the privilege of engaging in such business," etc.

Consequently it is manifest that if a person transports by motor vehicle persons or property for compensation "between cities, or between towns or between cities and towns," he must procure a franchise certificate. But if such person operates a motor vehicle for hire without regard to fixed *termini,* then such person is not required to procure a franchise certificate. Of course, there are certain exceptions specified in section 2613(k), such as "casual trip," carrying "dairy products" or school students; or "motor vehicles used exclusively in carrying United States mail," etc.

The defendants, upon the facts set out in the record, are not in a position to claim the benefit of any of the exceptions, because such facts tend to show that they are engaged in carrying passengers for compensation indiscriminately and in the pursuit of a business enterprise. If the defendants are operating busses between cities and towns for compensation and carry such passengers as may present themselves for passage, then they must procure the certificate. If they do not so carry passengers between fixed *termini,* then the "for hire" license authorizes such type of business. The ultimate inquiry, therefore, is whether the defendants transport passengers as aforesaid between cities and towns. There is ample evidence that they do transport passengers between Canton, Clyde, and Enka, but there is no evidence that Enka is a town or city. If Enka is a town or a city, the evidence in the record would require the procuring of a franchise certificate. If "Enka" is not a town or a city, then the defendants are operators for hire and no franchise certificate is necessary.

This Court cannot find whether "Enka" is a town or a city. The defendants assert that it is not incorporated and no act of incorporation has been called to our attention. Hence the Court cannot take judicial notice of whether it is a town or a city. Consequently, the cause is remanded to the Superior Court of Haywood County for specific finding of fact as to whether Enka is a town or a city.

Whether or not any other person or corporation holds a valid franchise over Highway No. 10 between Asheville and Clyde is not deemed material to this controversy.

Remanded.

STANLEY WINBORNE, UTILITIES COMMISSIONER, v. HARLEY BROWNING.

(Filed 23 May, 1934.)

Bus Companies C a—Franchise is required unless vehicle is used exclusively for mail regardless of whether route is covered by another franchise.

A person transporting persons or property by motor vehicle for hire as a business between fixed *termini* which are cities or towns is required to obtain the franchise prescribed by N. C. Code, 2613(k) (1), regardless of whether any other persons or corporation has a valid franchise for carrying persons or property over the same section of highway, and such operation does not come within the exception relating to U. S. mail, N. C. Code, 2613(k), unless the motor vehicle is used exclusively for transporting mail.

CIVIL ACTION, before *Alley, J.*, at September Term, 1933, of HAYWOOD.

This action was instituted by the Attorney-General on behalf of the Corporation Commission of North Carolina, and thereafter Stanley Winborne, Utilities Commissioner, was substituted as the plaintiff, to restrain the defendant from operating motor vehicles from Asheville to Bryson City and return and along Route 10. It was alleged that sections 2 and 3 of chapter 136 of the Public Laws of 1927, now being sections 2613(k) and 2613(l), Michie's Code of 1931, prohibited any person from operating a motor vehicle or vehicles for the transportation of persons or property between cities and towns for compensation without securing a franchise certificate as provided by statute. And it was further alleged that the defendant failed and refused to secure such franchise certificate and persisted in carrying passengers and property for compensation between Asheville and Bryson City over and along Highway No. 10, maintaining an approximate schedule between said points over and along said highway. Numerous affidavits were offered by the plaintiff, tending to show that the defendant was a mail carrier and operated motor vehicles, carrying for compensation passengers and property continuously between Asheville, Sylva, Bryson City, Canton, and other points, over and along Highway No. 10, and that such business had been conducted by the defendant for approximately one year, without procuring a franchise certificate as provided by section 2613(1), Michie's Code of 1931, *supra.*

The defendant filed no answer and at the hearing the following judgment was rendered: "That after hearing the pleadings read, the evidence and argument of counsel, and duly considering the same, the court is of opinion and finds that there is no valid outstanding franchise for the transportation of passengers by motor vehicle for compensation over Highway Number 10 between Asheville and Bryson City, and therefore,

said highway is open to persons carrying on the business of transporting persons for compensation by motor vehicle under the provisions of the Revenue Act levying license taxes therefor. That the business conducted and the services rendered by the respondent does not fall within the terms of the statute (sections 2 and 3, chapter 136, Public Laws, 1927, sections 2613(k) and 2613(l), (Michie's Code of 1931), requiring certain persons engaged in the transportation of persons and property for compensation over public highways by motor vehicle to apply for and obtain permission so to do from the Corporation Commission of North Carolina. That the business carried on by the respondent is excepted from the above mentioned statutes and is governed by the terms of section 165, chapter 427, Public Laws, 1931, section 7880(96), Michie's Code, 1931. That the respondent has paid to the Revenue Department of the State of North Carolina the license taxes required of him under the last mentioned statute for the calendar year 1933, and has received from the Commissioner of Revenue 'for hire' license tags for the privilege of engaging in the business carried on by him."

From the foregoing judgment the plaintiff appealed.

Attorney-General Brummitt, Assistant Attorney-General Bruton and N. A. Townsend for complainant.

Cansler & Cansler of counsel.

No counsel for respondent.

BROGDEN, J. Do sections 2613(k) and 2613(l), Michie's Code of 1931, or section 7880(96), apply to the business carried on by the respondent?

The identical question involved in this appeal has been considered in *Winborne, Utilities Comr., v. Mackey, ante,* 554. All the evidence offered at the hearing tended to show that the respondent operated motor vehicles, transporting passengers and property for compensation, and as a business between cities and towns along Highway No. 10. Consequently he is not protected by section 7880(96), as heretofore pointed out in the *Mackey case.* However, the evidence also discloses that the respondent carries the United States mail and he asserts that he is saved by an exception contained in section 2613(k), *supra,* which declares that "motor vehicles used exclusively in carrying the United States mail" are not required to secure a franchise certificate. The United States mail is property. *Searight v. Stokes,* 3 Howard, 151, 11 L. Ed., 537; *In re Debbs,* 158 U. S., 583, 39 L. Ed., 1102; *Pakas v. U. S.,* 240 Fed., 350. Consequently, unless the statute had exempted motor vehicles used for carrying mail, mail carriers would have been compelled to secure a franchise certificate for the obvious reason that

they were transporting property for compensation along the highways of this State. Furthermore, the motor vehicles operated by the defendant are not "used exclusively in carrying United States mail," because all the evidence disclosed that such vehicles so carrying the mail also carried passengers and took property for compensation and in the pursuit of a business enterprise. Therefore, the defendant is required to secure a franchise certificate if he desires to continue the business disclosed by the proof.

Reversed.

STANLEY WINBORNE, UTILITIES COMMISSIONER, v. AUSTIN SUTTON.

(Filed 23 May, 1934.)

Bus Companies C a—Franchise is required unless vehicle is used exclusively for mail regardless of whether route is covered by another franchise.

The requirement of a franchise for the operation of motor vehicles for hire between fixed *termini* which are cities or towns, N. C. Code, 2613(k) (1), is not affected by the fact that no other person or corporation has a valid franchise covering the same section of highway, nor does the exception relating to U. S. mail apply unless the motor vehicle is used exclusively for carrying mail.

CIVIL ACTION, before *Alley, J.*, at September Term, 1933, of JACKSON.

The Corporation Commission of North Carolina, through the Attorney-General, instituted an action in the Superior Court to restrain the defendant from operating motor vehicles from Dillsboro to Franklin, and from Franklin to Dillsboro, over and along State Highway No. 285 for the transportation of passengers and property for compensation without obtaining a franchise certificate as provided by section 2613(1), Michie's Code of 1931. The evidence tended to show that the defendant has a contract to carry United States mail from Franklin to Sylva, North Carolina, and that he is engaged in the business of carrying passengers for hire on the mail car as a business between said towns, maintaining an approximate schedule of trips.

At the hearing the following judgment was entered:

"That after hearing the pleadings read, the evidence and argument of counsel, and duly considering the same, the court is of opinion and finds that there is no valid outstanding franchise for the transportation of passengers by motor vehicle for compensation over highway number . . . between Franklin and Dillsboro, and, therefore, said highway is open to persons carrying on the business of transporting persons for compensation by motor vehicle under the provisions of the Revenue Act levying license taxes therefor.

"That the business conducted and the services rendered by the respondent does not fall within the terms of the statute (sections 2 and 3, chapter 136, Public Laws, 1927, sections 2613(k) and 2613(l), Michie's Code, 1931), requiring certain persons engaged in the transportation of persons and property for compensation over public highways by motor vehicle to apply for and obtain permission so to do from the Corporation Commission of North Carolina.

"That the business carried on by the respondent is excepted from the above mentioned statutes and is governed by the terms of section 165, chapter 427, Public Laws, 1931, section 7880(96), Michie's Code, 1931.

"That the respondent has paid to the Revenue Department of the State of North Carolina the license taxes required of him under the last mentioned statute for the calendar year 1933, and has received from the Commissioner of Revenue 'for hire' license tags for the privilege of engaging in the business carried on by him.

"It is, therefore, on motion of attorneys for respondent, ordered, adjudged and decreed that the rule to show cause be vacated and discharged.

"It is further ordered and adjudged that the complainant pay the costs to be taxed by the clerk of this court."

From the foregoing judgment the plaintiff appealed.

Attorney-General Brummitt, Assistant Attorney-General Bruton and N. A. Townsend for plaintiff.

Cansler & Cansler for complainant.

No counsel for defendant.

BROGDEN, J. This case involves the same questions of law heretofore presented and decided in *Winborne, Utilities Comr., v. Mackey, ante,* 554, and *Winborne, Utilities Comr., v. Browning, ante,* 557. Consequently, upon authority of said cases the judgment is

Reversed.

G. C. EFIRD AND MARY EFIRD v. O. J. SIKES AND G. H. MORTON.

(Filed 23 May, 1934.)

Limitation of Actions B b—Held: fiduciary relationship existed between parties, and statute did not begin to run until demand and refusal.

Defendants, as plaintiffs' attorneys, negotiated certain notes executed by plaintiffs to a bank, received the proceeds and disbursed a part thereof in payment of plaintiff's debts as directed by plaintiffs, but failed to account to plaintiffs for the balance. Plaintiffs instituted this action

to recover the balance due more than three years after defendants had obtained the funds, and defendants pleaded the three-year statute of limitation, C. S., 441(1). It appeared that the action was instituted within three years from the date plaintiffs demanded settlement: *Held*, the action was not barred, there being a fiduciary relationship between the parties, and the statute not beginning to run until after demand and refusal.

APPEAL by plaintiffs from *Sink, J.*, at February Term, 1934, of STANLY. Reversed.

This is an action to recover the balance due by defendants to the plaintiffs, on an accounting for the proceeds of certain notes negotiated by the defendants, as attorneys for the plaintiffs, on or about 17 January, 1929. The action was begun on 7 April, 1932. The defendants relied for their defense on their plea that the action was barred by the three-year statute of limitations.

The evidence offered by the plaintiffs tended to show that on 17 January, 1929, the plaintiffs executed and delivered to the defendants, who are attorneys at law, two notes, one for the sum of $2,000, payable to the order of the First National Bank of Albemarle, N. C., and the other for the sum of $500.00, payable to the order of the defendants. Both notes were secured by a deed of trust, which was executed by the plaintiffs to the defendant, O. J. Sikes, as trustee. The defendants negotiated both notes to the First National Bank of Albemarle, N. C., and received from said bank, as attorneys for the plaintiff, the sum of $2,500. As directed by the plaintiffs, the defendants applied the sum of $1,875 to the payment of certain debts due by the plaintiffs. They have not accounted to the plaintiffs for the balance of the proceeds of said notes. No demand for such accounting was made by the plaintiffs, until the commencement of this action.

At the close of the evidence for the plaintiffs, the defendants moved for judgment as of nonsuit. The motion was allowed.

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

Bogle & Bogle for plaintiffs.

D. D. Smith and R. L. Smith & Sons for defendants.

CONNOR, J. The defendants offered no evidence at the trial of this action, but relied on their contention that it appeared from the evidence offered by the plaintiffs, that more than three years had elapsed since the cause of action accrued, and for that reason, the action was barred by the statute of limitations. C. S., 441(1). The evidence, however, showed that the defendants received the proceeds of the notes executed

by the plaintiffs, and delivered to them, as attorneys for the plaintiffs, and that the action was commenced within three years from the date on which the plaintiffs demanded a settlement.

It is well settled that where a fiduciary relation exists between the parties, with respect to money due by one to the other, the statute of limitations does not begin to run until a demand and refusal. *Egerton v. Logan,* 81 N. C., 172. See McIntosh N. C. Prac. & Pro., p. 130, and cases cited in support of the text to that effect. There was error in the judgment. For that reason, the judgment is

Reversed.

FRED SMITH v. S. E. HAUSER AND COMPANY, ET AL.

(Filed 23 May, 1934.)

Master and Servant F i—The findings of the full Commission on appeal from the hearing commissioner are conclusive upon appeal to the courts.

In this case the full Commission on appeal reversed the award of the hearing commissioner allowing compensation, and found, upon supporting evidence, that the accident resulting in the death of the employee did not arise out of and in the course of his employment. On appeal to the Superior Court, judgment was entered reversing the award of the full Commission and reinstating the award of the hearing commissioner: *Held,* the findings of fact by the full Commission were binding on the Superior Court, and the award of the full Commission denying compensation should have been sustained.

APPEAL by defendants from *Clement, J.,* at February Term, 1934, of DAVIDSON.

Proceeding under Workmen's Compensation Act to determine liability of defendants to next of kin of Fred Smith, Jr., deceased employee.

The hearing commissioner found the following facts:

"The deceased, Fred Smith, Jr., age 14, was employed by the S. E. Hauser Company at its grocery store in Lexington, North Carolina, for the purpose of delivering small orders on a bicycle, and he was sometimes used to help get up orders in the store.

"On 8 June, 1933, at about 1:30 o'clock in the afternoon, the deceased went upstairs over the store of the S. E. Hauser Company where he was joined by a fellow-employee, Perley Floyd. The two boys entered a private bedroom which was located above the store of S. E. Hauser and Company. The deceased sat down on one end of a cot and his fellow-employee, Perley Floyd, sat down on the other end of the cot. The deceased picked up a magazine and while reading it, his fellow-employee,

Perley Floyd, picked up a shot gun and in handling the gun it accidentally discharged, resulting in the death of the deceased, Fred Smith, Jr."

Upon these facts, the hearing commissioner awarded compensation to the father and mother of the deceased.

On appeal to the full Commission, compensation was denied on the additional finding that the bedroom in question was not a part of the premises of the grocery store, but was used solely as a private bedroom, and that the deceased with his companion had stepped aside and abandoned temporarily his employment, in pursuit of his own pleasure or fancy.

On appeal to the Superior Court, the decision and award of the full Commission was reversed, and the decision and award of the hearing commissioner reinstated and affirmed.

Defendants appeal, assigning errors.

Don A. Walser and D. L. Pickard for plaintiff.

King & King, J. A. Cannon, Jr., and Carver V. Williams for defendants.

STACY, C. J. It is provided in section 60 of the Workmen's Compensation Act, chap. 120, Public Laws, 1929, that the award of the Commission "shall be conclusive and binding as to all questions of fact." *Reed v. Lavender Bros., post,* 898, 172 S. E., 877; *Chambers v. Oil Co.,* 199 N. C., 28, 153 S. E., 594. Therefore, the facts found by the full Commission are binding on the courts, unless the evidence is insufficient to support the findings. *Dependents of Thompson v. Funeral Home,* 205 N. C., 801; *Dependents of Poole v. Sigman,* 202 N. C., 172, 162 S. E., 198.

"It is well settled that if there is any competent evidence to support the findings of fact of the Industrial Commission, although this Court may disagree with such findings, this Court will sustain the findings of fact made by the Commission"—*Clarkson, J.,* in *Kenan v. Motor Co.,* 203 N. C., 108, 164 S. E., 729. *Clark v. Woolen Mills,* 204 N. C., 529, 168 S. E., 816; *Massey v. Board of Education,* 204 N. C., 193, 167 S. E., 695.

The evidence supports the findings of the full Commission that plaintiff's intestate was not injured by accident arising out of and in the course of his employment, hence it is not for the courts to say otherwise. *Reed v. Lavender Bros., supra; Johnson v. Bagging Co.,* 203 N. C., 579, 166 S. E., 586.

The court erred, therefore, in reversing the award of the full Commission and reinstating the award of the hearing commissioner.

Error.

S. W. RUARK ET AL. V. VIRGINIA TRUST COMPANY.

(Filed 23 May, 1934.)

Process B d—Held: defendant corporation was doing business in this State for purpose of service of process under C. S., 1137.

A foreign banking corporation without process agent in this State, which is named as trustee in a number of deeds of trust on properties in this State, forecloses them upon default, and sends its agents here for the purpose of investigating and looking after the properties in its capacity as trustee, does business in the State for the purpose of service of process on it under C. S., 1137, by service on the Secretary of State, "doing business in this State" as used in the statute meaning engaging in, carrying on, or exercising in this State some of the functions for which it was created.

APPEAL by defendant from *Harris, J.*, at December Term, 1933, of WAKE.

Service of summons was made by leaving copy with the Secretary of State and having him mail same to the president of the Virginia Trust Company, it being alleged that the defendant, a foreign corporation, has property or is doing business in this State without complying with the provisions of C. S., 1137.

The defendant, through its counsel, entered a special appearance and moved to dismiss the action for want of proper service.

Upon the hearing of this motion, the clerk found the following facts:

1. That the defendant is a foreign corporation, without process agent in this State, and is engaged in conducting a general banking, trust and fiduciary business at Richmond, Va.

2. That during the period from 1927 to 1933, the defendant was named as trustee in more than 100 deeds of trust creating liens on property situate in Wake and Franklin counties, North Carolina; that under said deeds of trust the defendant was vested with title to the properties described therein, authorized to take possession thereof, collect rents, and foreclose in case of default, etc.

3. That the defendant has exercised the power of sale in a number of said deeds of trust, reported same to the clerk of the Superior Court, and sent its agents into the State for the purpose of investigating and looking after said properties in its capacity as trustee.

4. That the defendant was and is engaged in a trust and fiduciary business in this State in the manner aforesaid.

5. That the defendant has property in this State consisting of certain dividends in the hands of plaintiffs.

Upon these, the facts chiefly pertinent, the motion to dismiss for want of proper service was overruled. Defendant appeals, assigning error.

Robert Ruark for plaintiffs.
Thos. W. Ruffin for defendant.

STACY, C. J. It is provided by C. S., 1137 that every corporation, domestic or foreign, having property or doing business in this State, shall have a process officer or agent in the State upon whom service can be had in all actions or proceedings against it. It is further provided that upon failure to name such process officer or agent, service may be had upon the corporation by leaving a true copy of the process with the Secretary of State, who is required to mail the same to the proper officer of the corporation. And in case of a foreign corporation having property or doing business in this State without appointing a process officer or agent as required by this section, we have held that valid service of process may be had upon such corporation by leaving copy thereof with the Secretary of State, as well as by service upon officers and agents of such corporation under the general provisions of C. S., 483. *Lunceford v. Association,* 190 N. C., 314, 129 S. E., 805; *Steele v. Tel. Co., ante,* 220.

It is conceded that the Virginia Trust Company, a foreign corporation and defendant herein, has no process officer or agent in this State upon whom service of process may be had. The question then occurs: Is the defendant doing business in this State, or does it have property here, so as to render it amenable to process under the provisions of C. S., 1137?

A similar fact situation appeared in the case of *Reich v. Mortgage Corporation,* 204 N. C., 790, 168 S. E., 814, where the ruling "that the defendant owns property and is doing business in this State" was upheld as a matter of course. The same conclusion seems to be well supported in the instant case. *Railway v. Alexander,* 227 U. S., 218; *R. R. v. Cobb,* 190 N. C., 375, 129 S. E., 828; *Currie v. Mining Co.,* 157 N. C., 209, 72 S. E., 980.

The expression "doing business in this State," as used in C. S., 1137, means engaging in, carrying on, or exercising, in this State, some of the things, or some of the functions, for which the corporation was created. 14 C. J., 1270.

The cases of *Commercial Trust v. Gaines,* 193 N. C., 233, 136 S. E., 609, and *Timber Co. v. Ins. Co.,* 192 N. C., 115, 133 S. E., 424, cited and relied upon by appellant, are easily distinguishable. The ruling will be upheld.

Affirmed.

GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. CITIZENS BANK OF FARMVILLE, AND B. B. MASSAGEE, LIQUIDATING AGENT FOR THE CITIZENS BANK, v. MRS. SARAH DARDEN, EXECUTRIX OF J. H. DARDEN, DECEASED.

(Filed 23 May, 1934.)

Executors and Administrators D f: Banks and Banking H a—

The statutory liability on bank stock does not constitute a priority for payment out of the assets of the estate of a deceased stockholder. C. S., 219(a), C. S., 93.

CIVIL ACTION, before *Harris, J.*, at September Term, 1933, of PITT.

The agreed facts are substantially as follows: J. H. Darden died, owning at the time of his death, 20½ shares of capital stock of the Citizens Bank of the par value of $100.00 each, and the defendant, Mrs. Sarah Darden, is the duly qualified executrix appointed in his will. After Darden's death the Citizens Bank of Farmville became insolvent and passed into the custody of the Commissioner of Banks on 8 December, 1930, as provided by law. This action was commenced on 24 September, 1932, to recover the sum of $2,050 with interest, from the estate of the decedent by virtue of his liability as a stockholder in said insolvent bank. The plaintiff contends that the stockholders' liability constitutes a priority of payment from the assets of the estate. The defendant executrix contends that said liability is an ordinary claim to be paid in accordance with the provisions of C. S., 93.

The trial judge ruled that the plaintiff was entitled to recover judgment against the estate for the sum of $2,050 with interest, "to be prorated with all other liabilities of said estate of the same class."

From the foregoing judgment plaintiff appealed.

R. T. Martin for plaintiff.
Harding & Lee for defendant.

BROGDEN, J. The liability of stockholders of insolvent banks is prescribed by C. S., 219(a). It has been held that this liability is contractual. *Corp. Com. v. Bank,* 192 N. C., 366. The statute creates no preference for such a liability and none results from the application of the pertinent principles of equity. Therefore, the judge ruled correctly.

Affirmed.

HARRIET DIX-DOWNING v. H. J. WHITE.

(Filed 23 May, 1934.)

1. Trial D a—

Nonsuit under C. S., 567, is permissible only on demurrer to the evidence, and not on demurrer to the complaint or motion for judgment on the pleadings.

2. Judgments L a—

Upon a plea of estoppel by judgment, it is error for the court, simply upon the reading of the pleadings, to dismiss the action, *Batson v. Laundry, ante,* 371.

APPEAL by plaintiff from *Cranmer, J.,* at January Term, 1934, of BLADEN.

Civil action in ejectment and to remove cloud on title.

Plaintiff alleges that she is the owner in fee and entitled to the immediate possession of two tracts of land in Bladen County (describing them); that the defendant is in possession thereof and wrongfully withholds said lands from plaintiff under a spurious claim of title; wherefore plaintiff demands possession, accounting for rents, damages and removal of defendant's claim as cloud on title.

The defendant denies the allegations of the complaint and pleads estoppel by judgment.

The judgment recites that "after reading the pleadings, the defendant, through his attorney, moved for judgment as of nonsuit under the Hinsdale Act," which motion was allowed and the action "dismissed as in case of nonsuit."

Plaintiff appeals, assigning errors.

A. M. Moore for plaintiff.
No counsel appearing for defendant.

STACY, C. J. Nonsuit under the Hinsdale Act, C. S., 567, is permissible only on demurrer to the evidence, and not on demurrer to the complaint or motion for judgment on the pleadings. *Riley v. Stone,* 169 N. C., 421, 86 S. E., 348.

The record shows no demurrer to the complaint. *Seawell v. Cole,* 194 N. C., 546, 140 S. E., 85.

Nor was it according to precedent, simply upon reading the pleadings, to dismiss the action on the defendant's plea of estoppel. *Batson v. Laundry, ante,* 371.

Reversed.

STATE v. JAMES DALLAS HAMLET, ALIAS JAMES DALLAS TEACHEY.

(Filed 23 May, 1934.)

Criminal Law L a—

Where defendant, convicted of a capital felony, fails to prosecute his appeal, a motion by the Attorney-General to docket and dismiss will be allowed where no error appears on the face of the record.

MOTION by State to docket and dismiss appeal.

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

STACY, C. J. At the January Term, 1934, Duplin Superior Court, the defendant herein, James Dallas Hamlet, alias James Dallas Teachey, was tried upon an indictment charging him with burglary in the first degree, C. S., 4232, which resulted in a conviction and sentence of death. From the judgment thus entered, the prisoner gave notice of appeal to the Supreme Court, and was allowed thirty days within which to make out and serve statement of case on appeal, and the solicitor was given thirty days thereafter to prepare and file exceptions or countercase, but nothing has been done towards perfecting the appeal. No bond was required. *S. v. Stafford,* 203 N. C., 601, 166 S. E., 734.

The prisoner having failed to prosecute his appeal, or to comply with the rules governing such procedure, the motion of the Attorney-General to docket and dismiss must be allowed (*S. v. Johnson,* 205 N. C., 610; *S. v. Rector,* 203 N. C., 9, 164 S. E., 339), but this we do only after an examination of the record to see that no error appears on the face thereof, as the life of the prisoner is involved. *S. v. Goldston,* 201 N. C., 89, 158 S. E., 926; *S. v. Ward,* 180 N. C., 693, 104 S. E., 531.

No error appears on the face of the record. *S. v. Edney,* 202 N. C., 706, 164 S. E., 23.

Appeal dismissed.

CABELL MCNEELY v. CAROLINA ASBESTOS COMPANY.

(Filed 23 May, 1934.)

1. Master and Servant F b—Definition of "occupational disease."

An occupational disease, which is outside the scope of the Workmen's Compensation Act, is a disease which is incidental to the employment and foreseeable as an ordinary and natural result thereof, and pulmonary asbestosis caused by the inhalation of dust for a period of five months by an employee of an asbestos factory, which is directly attributable to the active negligence of the employer in failing to provide a dusting or

suction system such as is ordinarily provided in such factories for the safety of employees, *is held* not an occupational disease, the disease being attributable to the active negligence of the employer in failing to provide a reasonably safe place to work, and not being a usual incident of the employment since it does not result to employees in such occupations when due care for their safety is exercised by their employers.

2. Same—Injury by accident is one produced without design or expectation of the workman.

While the Compensation Act covers only injuries to employees by accident arising out of and in the course of their employment, the word "accident" will be construed in its wide and practical sense to give effect to the intent of the act, and an injury produced by inhaling asbestos dust for a period of five months is an accidental injury within the terms of the Compensation Act when such injury is not foreseen or expected and is attributable to the active negligence of the employer in failing to provide proper dusting or suction systems ordinarily provided in such work, the test being not the amount of time taken to produce the injury but whether it was produced by unexpected and unforeseen, and therefore, accidental means.

3. Master and Servant F a—Held: plaintiff's remedy was under Compensation Act, and nonsuit was properly granted in action at common law.

The allegations and evidence in this action for damages at common law are held to show that the injury in suit was caused by an accident arising out of and in the course of plaintiff's employment, and plaintiff and defendant employer being bound by the provisions of the Workmen's Compensation Act, defendant's motion as of nonsuit was properly granted, plaintiff's remedy under the Compensation Act being exclusive of all other remedies. N. C. Code, 8081(r).

CLARKSON, J., dissenting.

CIVIL ACTION, before *Sink, J.*, at October Term, 1933, of MECKLENBURG.

This is a common-law action for damages. Plaintiff alleged that he was employed by the defendant as a spinner and worked from December, 1929, until March, 1931. He further alleged that the room in which he worked, was improperly ventilated, and that the atmosphere therein was impregnated with fine asbestos dust, and that such dust was permitted to accumulate by reason of the negligent failure of defendant to provide a dust system or suction system, or to take any other precaution for the protection of the health of an employee, and that by reason of such negligence the inhalation of such dust impaired and destroyed his health, resulting in pulmonary asbestosis. He further alleged that such injuries were proximately caused by the negligence of defendant to furnish a safe place to work or to warn and instruct as to the hazards of breathing asbestos dust, etc.

The defendant denied the allegation of negligence and asserted that both the plaintiff and the defendant "were operating under the North Carolina Workmen's Compensation Act, and that the rights and remedies conferred by said act . . . are exclusive of all other rights and remedies." The defendant further pleaded contributory negligence, assumption of risk, and the statute of limitations.

The evidence for plaintiff tended to show that he had been working for the defendant for about fifteen months, and that his duties required him to work in a room filled with asbestos dust and which was poorly ventilated. There was further evidence that other asbestos plants had suction or dusting systems to prevent injury to employees. The plaintiff testified that he had worked at one asbestos plant in Charlotte for about eleven years, and that "when he entered the employment of the Carolina Asbestos Company the condition of my health was good. I did not quit work then, but worked until I gave out. . . . At the time I quit I was not able to work. . . . I felt like my chest had thirty or forty pounds of weight on it. I did not want to move. . . . I got to coughing so bad in the mornings when I would get up that I would cough anywhere from fifteen to thirty minutes. . . . The first ten months I worked for the Carolina Asbestos Company I never lost a day. The plant ran so many different grades of asbestos during the time I worked there I really don't know the names of the grades. . . . When I threw it in the machine smoke would fly from the dust. . . . A lot of times it got so dusty it would settle on the electric bulbs."

A physician examined as a witness for plaintiff, testified that plaintiff was suffering with pulmonary asbestosis.

At the conclusion of the evidence for the plaintiff, the trial judge sustained a motion of nonsuit and the plaintiff appealed.

B. S. Whiting and J. L. DeLaney for plaintiff.
John M. Robinson and Hunter M. Jones for defendant.

BROGDEN, J. (1) Is pulmonary asbestosis produced by the inhalation of asbestos dust by an employee during a period of five or six months an "injury by accident arising out of and in the course of the employment," within the purview of the North Carolina Workmen's Compensation Law?

(2) Can such employee, so injured, maintain a civil action for damages, upon allegation and proof that such injury was produced by the negligence of the employer?

Both parties to the controversy are presumed to have accepted the North Carolina Workmen's Compensation Act and consequently bound

by its terms. Moreover, the evidence disclosed that at all times the defendant had in its employ more than five employees, so that the jurisdictional question is not involved. C. S., 8081(k).

C. S., 8081(l), provides 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 it results naturally and unavoidably from the accident."

C. S., 8081(r), provides that "the rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this chapter respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, parents, dependents or next of kin, as against employer at common law or otherwise, on account of such injury, loss of service or death," etc.

The evidence tended to show that the plaintiff entered the employment of the defendant about December, 1930, and stopped work on account of disability in March, 1932, which constitutes a period of approximately fifteen months. The plaintiff testified: "I did not have any trouble of this kind prior to the time I went to work for the Carolina Asbestos Company. The first ten months I worked there I never lost a day." Consequently, the "injury" asserted by the plaintiff began and progressively produced disability within a period of approximately five months. Plaintiff said: "I never paid so much attention to it until the belt came off the machine I was operating one day and I went up on the ladder and tried to put it back, and I almost fainted up on the ladder. I came down off the ladder and sat down a few minutes until I got over it and went and told the boys to have the belt put on for me."

Upon the foregoing facts and pertinent provisions of the compensation law the plaintiff contends that he is suffering from what is generally denominated in compensation cases, "an occupational disease," and that such disease is not compensable, and, therefore, his sole remedy consists in a common-law action for damages. The legal basis for the contention is that the Compensation Act applies to "injury by accident arising out of and in the course of the employment," and as an occupational disease develops slowly and progressively, such cannot be deemed to be an "injury by accident."

The defendant contended that the injury to plaintiff was either compensable, or, if not compensable, he was precluded from bringing a common-law action for damages by virtue of C. S., 8081(r), *supra*, and therefore in either event was not entitled to recover.

The term "occupational disease" has been variously defined and interpreted in judicial decisions and text-books. Schneider in Workman's

Compensation Law, Vol. 1 (2 ed.), p. 644, said: "A disease contracted in the usual and ordinary course of events, which from the common experience of humanity is known to be incidental to a particular employment, is an occupational disease, and not within the contemplation of the Workmen's Compensation Law." Elaboration of the definition is found in *Gay v. Hocking Coal Co.*, 169 N. W., 360. The Court said: "An 'occupational disease' suffered by a servant or employe, if it means anything as distinguished from a disease caused or superinduced by an actionable wrong or injury, is neither more nor less than a disease which is the usual incident or result of the particular employment in which the workman is engaged, as distinguished from one which is caused or brought about by the employer's failure in his duty to furnish him a safe place to work. If the employer fails to provide a reasonably safe place to work, or fails to observe the specific requirements of the statute with respect thereto, and as a result of such neglect the employe is injured, the liability of such employer cannot be avoided by calling such injury an 'occupational disease,' or by showing that disease of that nature is often the accompaniment or result of such employment, even when all due care has been exercised by the employer."

These definitions have been widely quoted and have been generally accepted by courts and textwriters as correct. Assuming their correctness and applying them to the facts in the case at bar, it is obvious that the plaintiff was not injured by means of an "occupational disease." The plaintiff testified that he had worked at an asbestos plant in Charlotte for about eleven years prior to his employment with the defendant without suffering any ill effects from the work. He alleged in his complaint and offered evidence tending to show that his injury was produced and proximately caused by the negligence of defendant in that it maintained no dusting or suction system such as was approved and in general use in other asbestos plants. Consequently, his allegation and proof both established the fact that his injury was caused by the negligence of the employer, and hence was not "the usual incident or result of the particular employment in which the workman is engaged." That is to say, the injury was not produced by the inherent nature of the work itself and classifiable as an occupational disease, but was produced by the active negligence of the employer and his failure to exercise reasonable care.

However, the plaintiff further asserts that his injury was produced gradually and progressively through a period of five months, and hence was not an "injury by accident arising out of and in the course of the employment," and that the compensation statute covers only such accidental injuries, and, therefore, as the injury complained of is not accidental, he is entitled to maintain a common-law action for damages

as the sole remedy open to him. The inquiry then shifts to the question as to whether the injury was accidental within the meaning of the Compensation Act, and hence compensable. The term "accident" was defined by this Court in *Conrad v. Foundry Co.*, 198 N. C., 723. The Court said: "The word 'accident,' as used here, has been defined as an unlooked for and untoward event which is not expected or designed by the person who suffers the injury." The Court further said: "In construing the word 'accident' as used in the Compensation Act we must remember that we are not administering the law of negligence. Under that law an employee can recover damages only when the injury is attributable to the employer's want of due care; but the act under consideration contains elements of a mutual concession between the employer and the employee by which the question of negligence is eliminated. Both had suffered under the old system, the employer by heavy judgments, . . . the employee through old defenses or exhaustion in wasteful litigation. Both wanted peace. The master in exchange for limited liability was willing to pay on some claims in the future where in the past there had been no liability at all. The servant was willing not only to give up trial by jury, but to accept far less than he had often won in court, provided he was sure to get the small sum without having to fight for it." Consequently, it is obvious that the word must not be used in its restricted and technical sense, but in a wider and practical sense necessary to give workable effect to the proper and just administration of the compensation law. Variable definitions have been given by the courts to the words "injury by accident," "accidental injury," etc., and the applications of such definitions to given cases or states of fact have resulted in a divergence of concept and interpretation which cannot be harmonized or brought into unison. Indeed, a study of a host of cases produces the conclusion that the lines of interpretation must be treated as parallel. In note 90 of the Workmen's Compensation Law, *supra*, page 643, dozens of cases are assembled. See, also, 62 A. L. R., 1458, and annotation; 19 A. L. R., 112; 23 A. L. R., 335; 6 A. L. R., 1466; 29 A. L. R., 691.

Well reasoned cases proceeding upon opposite theories are *Jones v. Rinehart & Dennis Co.*, 168 S. E., 482; *Victory Sparkler & Specialty Co. v. Francks*, 128 Atlantic, 635, and *Sullivan v. Ins. Co.*, 164 N. E., 457. The West Virginia Court in the *Jones case, supra*, held that a disease contracted by an employee was not compensable unless directly attributable to a definite, isolated and fortuitous occurrence, and that in such cases the injured party could maintain a common-law action for damages irrespective of the Workmen's Compensation Act. The Maryland Court in *Victory Sparkler case, supra*, said: "In this case, the occupation of the girl as an employee in a department of a manufac-

tory of fireworks was simply a condition of her injury, whose cause was the definite negligence charged against the employer. The most that is warranted to be inferred from the allegations of fact in the declaration is that the phosphorus poisoning alleged was the gradual result of the negligence of the employer. As this negligence was a breach of duty to her, it was not to be foreseen or expected by the worker as something which would occur in the course of her employment. The fact that she continued at her place of labor, in the doing of her common and regular task, makes it clear that the phosphorus poisoning happened without her design or expectation, and so her injury was accidental. . . . It was by chance that employer did not use due care, and by chance that the vapor of phosphorus was where its noxious foreign particles could be inhaled by the girl. It was by chance that the inspired air carried these particles into her system, sickening her, and causing a necrosis of the jaw after fortuitously finding a lesion. The injury thus inflicted upon her body was accidental by every test of the word, and its accidental nature is not lost by calling the consequential results a disease. Nor can the fundamentally accidental nature of the injury be altered by the consideration that the infection was gradual throughout an indefinite period, as this simply implies a slow development of the malady, or that, instead of a single accidental injury, there was a succession or series of accidental injuries culminating in the same consequential results."

It seems to be generally conceded that, if an employee should suddenly inhale a volume of air laden with poison or other destructive agencies, producing injury immediately or within a short period of time, such injury would be deemed to be accidental or "injury by accident," but it does not seem that the time element should be paramount or controlling. *Cabe v. Parker-Graham-Sexton, Inc.*, 202 N. C., 176. If so, the courts are forced into the field of speculation in an effort to determine what is a reasonable time or what standard of time shall be adopted in determining the rights of the parties. Moreover, it would not seem that the unexpected, unforeseen, and, therefore, accidental inhalation of deleterious matter could be deprived of its accidental quality by the mere consideration of whether it took five days or five months to produce the same result.

An examination of the Workmen's Compensation Act of North Carolina discloses many uses of the expression "injured employee" without the qualifying words "accident" or "by accident." So that, unless we attempt to whittle down or enlarge words or undertake to put big threads through the eyes of little needles, it would seem manifest that our act did not undertake to limit compensation to cases where the injury was begun and completed within narrow limits of time, but that it

used the expression "injury by accident" in its common sense every-day conception as referring to an injury produced without the design or expectation of the workman. Indeed, section 13 of the act declares: "No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee or by the wilful intention of the employee to injure or kill himself or another." Manifestly, all other accidental injuries, not specifically withdrawn from the benefits of the act, should be logically deemed to fall within its purview.

Upon a consideration of the whole subject, we are of the opinion that the injury alleged in the complaint was compensable, and that the ruling of the trial judge was correct.

Affirmed.

CLARKSON, J., dissents.

RUBY MELVIN LOVE v. QUEEN CITY LINES, INCORPORATED, AND QUEEN CITY COACH COMPANY.

(Filed 23 May, 1934.)

1. Master and Servant D a—In this action by third person against master, evidence of relationship of master and servant held insufficient.

Plaintiff instituted this action against two bus companies having State franchises, N. C. Code, 2613(1), 2621(29) (a), to recover for injuries sustained by her while riding as a passenger in a public bus. Plaintiff's evidence was to the effect that at the time of the injury she was riding on a bus operated by one of the companies over a route covered solely by its franchise, and the only evidence connecting the other company with the operation of the bus was the fact that plaintiff was riding on a transfer issued by it. The second company moved for judgment as of nonsuit on the ground that there was no sufficient evidence of its ownership or operation of the bus, and introduced testimony that transfers of the first company were exhausted and that transfers of movant were used only until transfers of the first company should be available, and renewed its motion of nonsuit: *Held*, the evidence was insufficient to be submitted to the jury on the issue of the second company's liability, and its motion of nonsuit should have been allowed.

2. Bus Companies A c—Evidence of negligence of bus company, proximately causing injury to plaintiff, held sufficient for jury.

Evidence that defendant's bus was late on its fixed schedule and was traveling at an excessive rate of speed in order to make up time, N. C. Code, 2621(45) (a), 2621(46), with evidence permitting an inference that its brakes were defective and that otherwise it could have been stopped before it left the road, *is held* sufficient to be submitted to the jury on the issue of negligence in an action by a passenger to recover for injuries sustained by her when the bus left the hard surface, ran two hundred yards before it ran off the road and was wrecked.

3. Same—Degree of care required of bus companies as common carriers.

While bus companies are not insurers of the safety of their passengers, as common carriers they are held to high degree of care for their safety, and the court's instruction in this case is held without reversible error upon exception and appeal by defendant bus company.

4. New Trial B g—In this case the record disclosed that movant failed to exercise due diligence to obtain the evidence in time for trial.

The trial court's refusal of defendant's motion for a new trial for newly discovered evidence *is held* within its sound discretion under the facts of this case, it appearing that defendant had not exercised due diligence to obtain the evidence relied upon on the motion in time to present same at the trial. The grounds for a new trial for newly discovered evidence are discussed by *Mr. Justice Clarkson.*

5. Supersedeas A d—

The trial court's order that appellant file supersedeas bond with another surety upon its finding that the surety upon the first bond was not sufficient *is held* without error. N. C. Code, 650.

APPEAL by defendants from *Hill, J.,* and a jury, at October Special Term, 1933, of MECKLENBURG. Affirmed as to Queen City Coach Company. Reversed as to Queen City Lines, Incorporated.

This is an action for actionable negligence, brought by plaintiff against defendants, alleging damage. The issues submitted to the jury and their answers thereto were as follows:

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

2. Was plaintiff injured by the negligence of the defendant, Queen City Lines, Incorporated, as alleged in the complaint? Answer: Yes.

3. What damage, if any, is plaintiff entitled to recover? Answer: $7,000."

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

Hiram P. Whitacre, John M. Robinson and Hunter M. Jones for plaintiff.

J. Laurence Jones and J. L. DeLaney for defendants.

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence, the defendants made motions for judgment as in case of nonsuit. C. S., 567. We think the court below correct in refusing the motion as to the defendant, Queen City Coach Company, but not so as to Queen City Lines, Incorporated. The learned judge in the court below submitted to the jury, second issue, "Was plaintiff injured by the negligence of the defendant, Queen City Lines, Incorporated, as alleged in the complaint?" This issue was premised that there was

sufficient, competent evidence to be submitted to the jury that at the time of the injury to plaintiff, the Queen City Lines, Incorporated, was jointly interested with the Queen City Coach Company, in the ownership and operation of the bus in which plaintiff was riding, when the bus ran off the road, which caused the injury to plaintiff. From the evidence, we do not think there was more than a scintilla of evidence and not sufficient to be submitted to the jury as to the liability of the Queen City Lines, Incorporated. The Queen City Lines, Incorporated, and the Queen City Coach Company were two separate corporations, operating under the provisions of the North Carolina Motor Vehicle Act, regulating the operation of motor vehicles for transportation of passengers for hire on the highways of the State. The plaintiff was injured near Wadesboro on a bus operated by the Queen City Coach Company, over a route between Charlotte and Wilmington, under franchise granted by the State to the Queen City Coach Company. The Queen City Lines, Incorporated, had no such franchise over this route, but over other routes in the State. The plaintiff did not get on the bus at the station in Charlotte, but it stopped for her at Hawthorne Lane and Seventh Street. She was enroute to St. Pauls to attend the funeral of her brother-in-law and to reach there, had to go to Lumberton over the line of the Queen City Coach Company. The only circumstance worth considering, in the evidence to raise a suspicion, that the corporations were jointly interested, was the pink ticket marked, "Queen City Lines, Incorporated, No. 2856," given her by the operator of the bus, when she got on the bus and paid for a round-trip ticket. This suspicious circumstance and how the bus operator happened to have the "pink ticket" was fully explained by all the witnesses. The operator of the bus testified: "The Queen City Coach Company had run out of transfers at that time and I was using Queen City Lines transfers until the Coach Company got theirs in. The forms are the same. The only thing to distinguish the difference would be the name of the company."

Without going further into this aspect, we may say that from a careful reading of the record, we do not think there is any sufficient, direct or circumstantial evidence at the time of the injury complained of by plaintiff, to connect the Queen City Lines, Incorporated, with the operation of the Queen City Coach Company route, which alone had a franchise to operate under, from Charlotte to Wilmington, North Carolina.

N. C. Code of 1931 (Michie) (1933 Supplement), 2613(1): "Every corporation or person, their lessees, trustees, or receivers, before operating any motor vehicle upon the public highways of the State for the transportation of persons or property for compensation, within the purview of this act, shall apply to the commission and obtain a franchise

certificate authorizing such operation, and such franchise certificate shall be secured in the manner following," etc.

N. C. Code of 1931 (Michie) (1933 Supplement), 2621(29) (a): "There shall be paid to the Department of Revenue annually, as of the first day of January, for the registration and licensing of passenger vehicles, fees according to the following classifications and schedules: (1) Franchise Bus Carriers.—Passenger motor vehicles operating under a franchise certificate issued by the Corporation Commission under chapter fifty of the Public Laws of one thousand nine hundred and twenty-five, and amendments thereto, for operation on the public highways of this State between fixed *termini* or over a regular route for the transportation of persons or property for compensation, shall be classified as 'franchise bus carriers.'"

The facts in this action differ from those in *Myers v. Kirk*, 192 N. C., 700. We think the court below should have sustained the motions for judgment as in case of nonsuit against the Queen City Lines, Incorporated, and rightly overruled same as to the Queen City Coach Company. The evidence on the part of the plaintiff was to the effect that the bus she was riding in had a fixed schedule and it left Charlotte the morning of 6 February, 1933, behind time, between 15 and 20 minutes late and at the time of the wreck, was going fifty miles an hour. It could be inferred from the evidence that the brakes were defective and if they had not been, the bus driver could have stopped the bus after leaving the hard surface, in a short distance, but it went the space of two hundred yards before it ran off the road and was wrecked. There was other evidence indicating negligence. N. C. Code, 1931 (Michie), section 2621(45) (a), is 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 2621(102)."

Section 2621(46), is as follows: "Any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than is reasonable and proper, 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 in no event at a rate of speed greater than forty-five miles per hour," etc.

The court below charged fully and correctly, as to negligence, proximate cause and damage, gave the contentions of the parties with care and the law applicable to the facts. Cyc. of Automobile Law (Huddy,

9th ed.), 5-6, sec. 161, pp. 309, 310, and 311, is as follows: "Common carriers are bound to exercise a high degree of care for the safety of their passengers, or, as sometimes expressed, the highest degree of care. However, a carrier of passengers does not insure their safety. While the operator of a public automobile is obligated to exercise a high degree of care, he is not charged with the necessity, either of possessing superhuman powers of anticipation or of exercising such powers in a threatened emergency."

In *Lambeth v. R. R.*, 66 N. C., 494 (498), it is said: "The policy of the law which is ever solicitous for the protection of human life, requires common carriers who have charge of the safety of passengers to use a high degree of care to guard against probable injury."

In *Overcash v. Electric Co.*, 144 N. C., 572 (577), citing numerous authorities: "This Court has uniformly held, and in that respect it is in harmony with other courts and approved text-writers, that a derailment of a railway train raises a presumption or makes a prima facie case of negligence—that is, a presumption that there is a defective construction or condition of the car, or the track, or the mode of operation." . . . At p. 579: "When a common carrier undertakes to carry passengers, the law imposes upon it, the duty of exercising the highest practicable degree of care, to provide safe modes of transportation and to keep them in good and safe condition."

The defendants' prayers of instruction given by the court below was perhaps stronger than it was entitled to. The motion of defendants for new trial for newly discovered evidence, we do not think can be sustained. In *Johnson v. R. R.*, 163 N. C., 431 (453 and 4), the principle is laid down as follows, citing numerous authorities: "Applications of this kind, as we have held, should be carefully scrutinized and cautiously examined, and the burden is upon the applicant to rebut the presumption that the verdict is correct and there has been a lack of due diligence. 14 Am. and Eng. Enc. and Pr., 790. We require, as prerequisite to the granting of such motions, that it shall appear by the affidavit: (1) That the witness will give the newly discovered evidence: (2) that it is probably true; (3) that it is competent, material, and relevant; (4) that due diligence has been used and the means employed, or that there has been no laches, in procuring the testimony at the trial; (5) that it is not merely cumulative; (6) that it does not tend only to contradict a former witness or to impeach or discredit him; (7) that it is of such a nature as to show that on another trial, a different result will probably be reached and that the right will prevail."

We think at least the prerequisite is lacking in this case, (4) *supra*, "That due diligence has been used and the means employed, or that there has been no laches, in procuring the testimony at the trial." The

plaintiff contended that her injury in her back came from the wreck. Plaintiff, prior to the trial, submitted herself to a complete searching examination by physicians selected by defendants. After the verdict, defendants based their motion for a new trial on the ground that the injury came from previous trouble in her back, that they had not discovered until after the trial. Without detailing the evidence, the plaintiff after the motion, had an examination of herself made by Dr. A. Wylie Moore, an eminent physician whose affidavit, in part is as follows: "The affiant further states he has made a thorough examination of the plaintiff's back for the purpose of ascertaining the condition of the right lumbar-sacral joint, and the right sacro iliac joint, and the cause of an abnormal condition existing therein." While it is true, as a general proposition, that a focus of infection in any part of the body (principally in the tonsils) can cause arthritis, it is my opinion in this case, based upon a thorough examination of the patient, that the condition in the plaintiff's lumbar and sacro iliac joints is not due to, or caused by, any inflammation of the cervix which she may have had. As above stated, such inflammation must have been of a mild character. Certainly no infection of any kind could possibly have caused the luxation of the sacro iliac joint which I find in the plaintiff. This luxation of the joint could only be caused by an extreme excursion of the components of the joint. Further, in reference to the arthritis, it is my opinion that if this had been due to focal infection, in all probability it would have invaded other joints of the body. It is my opinion, therefore, that the cause of the abnormal condition in the two joints of the plaintiff's back is due to some external force distorting or straining these joints."

Plaintiff had a prior automobile accident and brought an action to recover damages, some years before, but from the affidavits in the record, the injury from this action, was not alleged to be in her back. It was further contended by defendants that the plaintiff had been treated by Dr. Oren Moore for a chronic pelvic infection. The plaintiff testified, in regard to this: "That at the time of this submitting to said examination, the affiant told Dr. Wishart that she had been treated by Dr. Oren Moore and Dr. J. L. Ranson: that Dr. Moore did not ask her about every ailment she had ever had, and did not request a complete medical history; that the affiant did not mention the minor pelvic inflammation heretofore referred to, because of the fact that it had been of minor character and of temporary duration, and the plaintiff had recovered from it; and because of the further fact, that it never occurred to the plaintiff that such condition had anything whatever to do with the condition in which she found herself after the wreck; that the affiant had no intention, or purpose whatever to conceal, either from the

defendants, or from the doctors any information in reference to that condition, but on the contrary, she answered all questions put to her fully, frankly and truthfully."

The court below made the following order: "This case coming on to be heard before his Honor, Frank S. Hill, judge presiding, at the Special Term of Mecklenburg Superior Court, beginning 30 October, 1933, upon the motion duly filed herein by the defendants on 10 November, 1933, to set aside the judgment, heretofore entered herein, upon the ground of newly discovered evidence; and said motion of the defendants being heard during the same term of court at which said judgment was entered; and the plaintiff and the defendants having offered affidavits upon said hearings; and the court having duly considered said affidavits, and having heard argument of counsel:

"Now, therefore, it is hereby considered, ordered and decreed that the said motion of the defendants, be, and it hereby is, overruled."

We think under the facts and circumstances of this case, the matter was in the sound discretion of the court below. *S. v. Lea,* 203 N. C., 316. The last contention of defendant: "That the court erred in finding that the surety on the supersedeas bond referred to in the record, is not sufficient surety and requiring the defendant to file a supersedeas bond with another surety."

N. C. Code, 1931 (Michie), section 650, in part, is as follows: "If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment unless a written undertaking is executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal. Whenever it is satisfactorily made to appear to the court that since the execution of the undertaking the sureties have become insolvent, the court may, by rule or order, require the appellant to execute, file and serve a new undertaking, as above. In case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring it, the appeal may, on motion to the court, be dismissed with cost. . . . The perfecting of an appeal by giving the undertaking mentioned in this section stays proceedings in the court below upon the judgment appealed from," etc.

The appeal to this Court was not dismissed. For the reasons given, the judgment must be reversed as to Queen City Lines, Incorporated, and the judgment as to the Queen City Coach Company

Affirmed.

EASTON HIGHFILL, BY HIS NEXT FRIEND, W. T. LOVING, *v.* WASHINGTON MILLS COMPANY.

(Filed 23 May, 1934.)

1. Master and Servant C b—Evidence held for jury on question of master's negligent failure to provide a safe place to work.

Plaintiff's evidence was to the effect that as a "doffer boy" in defendant's mill he was required to push a box on rollers filled with spindles rapidly along an aisle between rows of machines, there being a clearance of about six inches on either side of the box, that it was necessary for him to bend over to push the box and that the box obstructed his vision near the floor, and that while pushing the box he hit a lever of one of the machines which was allowed to protrude into the aisle near the floor for an inch and a half, which resulted in the injury in suit, and that if the lever had been in its proper place it would not have so obstructed the aisle: *Held*, the evidence was properly submitted to the jury on the question of the master's failure to use due diligence to provide a safe place to work, the rule of law being that although the employer is not an insurer of the safety of his employees he is required to exercise due care to provide a safe place to work, which duty includes reasonable inspection, and whether a defect would have been discovered by reasonable inspection is ordinarily a question for the jury.

2. Master and Servant C g—Question of servant's contributory negligence held for jury under facts of this case.

The evidence in this case was to the effect that plaintiff employee was required to push a box on rollers rapidly along an aisle between two rows of machines and was injured when the box struck a lever of a machine which protruded into the aisle near the floor for an inch and a half, and that in pushing the box it was necessary for plaintiff to bend over, and the box obstructed his vision near the floor: *Held*, the question of whether plaintiff employee was guilty of contributory negligence in failing to see the obstruction was properly submitted to the jury.

3. Appeal and Error E b—

Where the charge of the court is not in the record it will be presumed on appeal that the charge was without error.

APPEAL by defendant from *Sink, J.*, at October Term, 1933, of GUILFORD. Affirmed.

This is an action for actionable negligence brought by plaintiff against defendant, alleging damage. The plaintiff, by his next friend, in his complaint alleges: "That in November, 1928, and some time prior thereto, the plaintiff was employed by the Mayo Mills, owned and operated by the defendant company in Mayodan, North Carolina, as a 'doffer boy'; that his duties as a 'doffer boy' consisted of doffing a side of spindles from the spinning machine, that is to say that when the spindles had been filled up and were ready to be displaced by empty spindles, and after the side or row of spindles had been stopped it

was the duty of the plaintiff to remove the spindles from the spinning machine and put them in a basket of an approximate size of three feet by five feet by fourteen inches and remove said spindles to a place designated by his foreman, Raymond Coleman; that the said spindle or bobbin basket was operated on rollers and after removing the spindles or bobbins, the plaintiff was required to roll the bobbin basket away from the machine down an aisle between two rows of machines at a rapid rate of speed, it being important that the spindles or bobbins be removed and replaced as quickly as possible so that the production of thread might not be slowed up or impeded, and so that the thread might be available for the next process of manufacture as soon as possible; that on ..... November, 1928, the plaintiff was in the performance of his duties as a 'doffer boy' and after having removed the bobbins and filled the bobbin basket with said bobbins was pushing the same away from the machine and down an aisle between a row of machines at a rapid rate of speed, and as he had been instructed to do by his superiors, when the front of the said bobbin basket struck a lever or part of a machine, which had been permitted to project out from a machine and into and partly across the aisle through which the plaintiff had been ordered to push the said bobbin basket at a rapid rate of speed; that at the time the bobbin basket struck the said lever or part of the machine the plaintiff was going at a rapid rate of speed and suddenly striking an obstacle caused the bobbin basket to stop suddenly and overturn, throwing the plaintiff head first over said bobbin basket and into and against one of the spinning machines to the side of the aisle, breaking and crushing the plaintiff's right leg between the ankle and knee."

The defendant denied the allegations of the complaint and pleaded assumption of risk and contributory negligence. The case was tried at the 5 December, 1932, term of the municipal court of the city of High Point, North Carolina, before his Honor, Lewis E. Teague, judge presiding, and a jury, and resulted in a judgment for the plaintiff and against the defendant, in the sum of $1,500 as set out in the record, from which the defendant appealed to the Superior Court of Guilford County, North Carolina. The judgment of the Superior Court of Guilford County, North Carolina, affirmed the judgment of the lower court, and from said judgment of the Superior Court of Guilford County, North Carolina, set out in the record, the defendant excepted and appealed to the Supreme Court of North Carolina.

The issues submitted to the jury in the municipal court and their answers thereto, are as follows:

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

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

3. What damages, if any, is the plaintiff, Easton Highfill, entitled to recover of the defendant? Answer: $1,500."

The defendant made numerous exceptions and assignments of error. The material ones and necessary facts will be set forth.

J. C. Sedberry and Thomas Turner, Jr., for plaintiff.
R. M. Robinson for defendant.

CLARKSON, J. The plaintiff was a "doffer boy" about 15 years of age, working for defendant, when the injury for which this action is instituted occurred. He testified, in part, as follows: "A doffer gets bobbins they put on a spindle and when they get full you have to take them off and replace them with empty bobbins and carry the full ones to the winding room so they can be wound. It was my job to take them off as doffer and put them in a box. A wooden box had a place at each end to put the bobbins in, and in the middle you put the empty box to doff in. You slide the box off and put another on and go back and doff again. . . . When the box is filled, it is carried to the winding room. I had to run with it to keep it from running over. The box was on rollers and was moved by pushing it. Pushing it, I took it from the spinning room to the thread room, down an alley with machines on each side of it. There was about six inches clearance on each side of the box, I guess. In taking the box from the spinning frame into the thread room, I was required to go at a fast rate of speed. The boss man, Howard Perguson, and Raymond Coleman, who was section foreman, required this. He said 'Keep a move on you and not let them run over.' Howard Perguson, boss man of the spinning room, said for us to keep on moving and not let them run over. It was necessary for us to run to get it down there and back before one run over, you know, the thread run over top bobbin on another one. We were doffing and we started down the alley with the doff box and having to run, and there was a rocker there, a piece of iron what they call a rocker that carries the travois up and down on the spinning frame so it can wind. The doff box hit that rocker and threw me over in it and fractured my leg. . . . The rocker is supposed to be turned in straight, but this was out of line out in the aisle. When it is turned in straight it is not out of the way. On this occasion, it was projecting out about an inch or an inch and a half. That is what I struck. It threw me in the doff box. . . . I had to run. There were 16 machines and they filled up the spindles so fast that I had to run to get down there and back. . . . You could see it after I hit it. I couldn't see it before, you

couldn't see that and everything else going down the alley. It would be impossible to see it while running because there was so many along there. The bottom was close to the floor. The rocker was sticking out. It was twisted out of line and the bottom of it was close to the floor and the truck hit it. I couldn't see it. You would be going with the box. You must be looking straight in front of you. . . . The basket is a wooden structure. . . . The whole thing is about a foot and a half or two feet high all along the length of it. It is about four feet long. The sides and front are solid plank. I pushed it from behind. You get one hand on the bobbin box and push the other on that way so you can guide it. You have to bend over and run along behind. It has little ordinary wooden wheels. The rocker that I hit was something like 8 inches off the floor. The box slid sideways. If it slides sideways into the frame and the rocker is not out, it will not hurt anything. Where the side is smooth and nothing for it to come in contact with, it doesn't hurt, but the rocker sticking out is what stops you."

The question presented: "Was there sufficient evidence of negligence on the part of the defendant to be submitted to the jury, and if so, did plaintiff's own evidence establish his contributory negligence?" We think there was sufficient evidence to be submitted to the jury on the question of negligence and the question of contributory negligence on the part of plaintiff was properly submitted to the jury. In *Boswell v. Hosiery Mills,* 191 N. C., 549 (555), speaking to the subject: "The master is not an insurer. The duty of the master is set forth in *Riggs v. Mfg. Co.,* 190 N. C., p. 258, as follows: 'That the employer of labor, in the exercise of reasonable care, must provide for his employees a safe place to do their work and supply them with machinery, implements and appliances safe and suitable for the work in which they are engaged, and to keep such implements, etc., in safe condition as far as this can be done by the exercise of proper care and supervision.' The employer failing in this duty renders himself liable to an employee who may sustain injuries as the proximate result of his negligence."

The employer must know of the defect, or be negligent in not discovering it and making the needed repairs. *West v. Tanning Co.,* 154 N. C., 44; *Reid v. Rees,* 155 N. C., 230; *Cozzins v. Chair Co.,* 165 N. C., 364; *Wright v. Thompson,* 171 N. C., 91; *Nixon v. Oil Mill,* 174 N. C., 730.

In 18 R. C. L., "Master and Servant," section 95, pp. 593, 594, 595, is the following: "Although the doctrine has met with some opposition, the courts have generally held that an employer owes to his employees, a duty to make safe the place where they are required to perform their services, failing in which, he renders himself liable to an employee who may sustain injuries as the proximate result of his neglect. In this respect as in others, the employer is not liable as an insurer, but is bound only to the exercise of ordinary or reasonable care, the degree

depending upon the dangers attending the employment, and the standard being the care exercised by prudent employers under similar circumstances. This duty of the employer is affirmative and continuing, and it cannot be delegated to another so as to relieve the employer of liability in case of nonperformance. The dangers to which the employer's duty extends are all such as are latent and concealed, and hence beyond the knowledge of the employee. To discover such dangers, the employer must make proper tests and inspections, and after ascertaining their existence, he must as a rule, give the employee warning thereof. The employee may assume that the employer has discharged this duty, and no obligation rests upon him to make inspections with a view to discovering latent perils. Whether in any particular case, the employer has discharged his duty in this respect is ordinarily a question for the jury's determination."

3 LaBatt's Master and Servant (2d ed.), Employers Liability, part section 1032 (132): at p. 2731: "How long a defect must have existed before a master can be charged with knowledge of it is primarily a question of fact for the jury, to be determined with reference to the character of the instrumentality, the difficulty of discovering the conditions constituting the defect, and the master's opportunities for observation, due account being taken of the nature and extent of the obligations which the law imposes on him with respect to regular periodical inspections in the case of the particular instrumentality."

In the case of *Hood v. Mitchell*, 204 N. C., 130 (135), this Court said: "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."

The evidence succinctly was to the effect that plaintiff "doffer boy" was about 15 years old. He had to take the bobbins that were "full" and put them in a wooden box and carry them to the "winding room." The box was on rollers and was moved by pushing down an alley or aisle, with machines on each side. Plaintiff testified: "In taking the box from the spinning frame into the thread room, I was required to go at a fast rate of speed. The boss man, Howard Perguson, and Raymond Coleman, who was section foreman, required this. He said, 'Keep a move on you and not let them run over.'"

When performing this duty, the doff box struck a rocker projecting in the alley or aisle about an inch or an inch and a half and he was injured. The evidence was to the effect that "there was about 6 inches clearance on each side of the box." We think under the facts and circumstances of this case, the question of negligence and contributory negligence was for the jury to determine. The charge of the judge

in the municipal court is not in the record. The presumption of the law is that he charged fully, the law applicable to the facts on every phase of the case. The attorneys for litigants had able and exhaustive briefs, but we do not think it necessary to go further into detail. For the reasons given, the judgment of the court below is

Affirmed.

H. B. SMITH, ADMINISTRATOR OF B. C. PRICE, v. W. B. HAUGHTON AND M. L. BOLICK, AND THE STEELCOTE MANUFACTURING COMPANY, INCORPORATED.

(Filed 23 May, 1934.)

1. Appearance A a—Under facts of this case defendant's appearance held special and not general.

In this action to recover for injuries sustained in an automobile collision one of the defendants was a nonresident and was served with summons under the provisions of N. C. Code, 491(a). The nonresident made a special appearance and moved to dismiss the action as to it for lack of jurisdiction on the ground that it was a nonresident, had no place of business in this State, and did not own or operate the automobile which caused the injury and that those in control of the car at the time of the injury were performing no duties connected with the interest or business of movant, and that the attempted service was void: *Held*, the appearance was special and not general, the movant not intending to go into the merits of the action, but merely into the facts necessary for service under the statute, and it being settled that a defendant may make a special appearance to move to dismiss for want of jurisdiction.

2. Process B e—Evidence held insufficient to support finding that automobile was under direction or control of nonresident for purpose of service.

In this action to recover damages sustained in an automobile collision, it appeared from the answers of the resident defendants that the automobile was owned by one of them and driven by the other, and that the owner was an agent of the nonresident defendant, but it nowhere appeared that the stranger was operating the car upon the nonresident's business, and the admissions in the resident defendants' answers were the only evidence in the record on the question: *Held*, the evidence was insufficient to support a finding that the automobile was operated under the "control or direction, express or implied" of the nonresident defendant, and attempted service upon the nonresident under N. C. Code, 491(a), was void, and its motion to dismiss for want of jurisdiction should have been allowed.

APPEAL by defendant, Steelcote Manufacturing Company, from *Stack, J.*, at December Term, 1933, of UNION. Reversed.

This is an action brought by plaintiff against defendant for actionable negligence alleging damage arising out of an automobile collision. The

defendants, W. B. Haughton and M. L. Bolick answered the plaintiff's complaint and denied negligence and set up plea of contributory negligence. They also set up cross-actions and counterclaims for actionable negligence against plaintiff's intestate alleging damage. The defendant, Steelcote Manufacturing Company, a nonresident corporation, entered a special appearance and moved to dismiss the action as to it, for lack of jurisdiction on the grounds that they had no place of business in North Carolina and did not own or operate the automobile which caused the injury to plaintiff's intestate and that the defendants, Haughton and Bolick, at the time of the automobile collision were performing no duties connected with the interest or business of this defendant, and that the attempted service of process was defective and void.

The necessary facts will be set forth in the opinion.

Sikes and Blakeney and Vann and Milliken for plaintiff.
J. Laurence Jones and J. L. DeLaney for defendants.

CLARKSON, J. From the evidence appearing in the record, we think the special appearance of Steelcote Manufacturing Company, a foreign corporation, to dismiss the action as to want of jurisdiction, should have been granted. We do not think the special appearance taking the language and intent of the motion, could be construed as a general appearance. N. C. Code, 1931 (Michie), section 511: "Grounds for—The defendant may demur to the complaint when it appears upon the face thereof, either that: (1) The court has no jurisdiction of the person of the defendant, or of the subject of the action," etc.

In *Motor Co. v. Reaves,* 184 N. C., 260, cited by plaintiff, the defendant in that case, demurred under the above section. In *Reel v. Boyd,* 195 N. C., 273 (274): "An appearance for the purpose of filing a demurrer to the complaint is a voluntary, general appearance, and the court in which the action was brought thereby acquires jurisdiction of the defendant." *Buncombe County v. Penland, ante,* 299 (304).

The right to dismiss an action for want of jurisdiction by entering a special appearance for the purpose is imbedded in our procedure and we do not think in this action, that the special appearance of defendant, Steelcote Manufacturing Company, went or was intended to go to the merits of the controversy and became a general appearance. The learned and able judge who heard the case did not bottom his order on the ground that the defendant corporation entered a general appearance.

The order is as follows: "This cause coming on to be heard before his Honor, A. M. Stack, resident judge of the Thirteenth Judicial District, on appeal from order of O. L. Richardson, clerk of the Superior Court of Union County, refusing to strike out service of process on

the defendant Steelcote Manufacturing Company, and being heard, on affidavits filed by defendant and upon verified complaint and answer of W. B. Haughton and Steelcote Manufacturing Company, Incorporated, the court finds the following facts: That the said Steelcote Manufacturing Company was at the time alleged in the complaint doing business in the State of North Carolina, but is and was at such time a foreign corporation; that the said Steelcote Company was not domesticated in the State of North Carolina and maintained no office in the State; that the automobile referred to in the complaint was operated for and on behalf of and under the control of the said Steelcote Manufacturing Company. Wherefore, the special appearance entered by the said Steelcote Manufacturing Company is dismissed and the said defendant Steelcote Manufacturing Company is required to file answer to the complaint of the plaintiff."

We think that the above order is not supported by the record evidence. (1) From the fourth paragraph of the answer of the codefendant, M. L. Bolick, is the following: "It is admitted that at about midnight on 23 March, 1933, this defendant was engaged in the operation of a Cadillac automobile, which, as he is informed and believes, *was the property of the defendant, W. B. Haughton,* and at said time said automobile was being operated by this answering defendant at the request of the defendant, W. B. Haughton, who at said time was personally present in said automobile with this defendant, and the two said defendants during said trip were engaged in the consideration of a matter of business *which was of material interest to them and to the employer of the said defendant Haughton.*"

Section 2 of the answer of the codefendant, W. B. Haughton: "It is admitted that this defendant is a nonresident of the State of North Carolina. It is also admitted that at the time of the collision hereinafter referred to *this defendant was the owner of a certain automobile,* which, as defendant is informed and believes, has been taken in attachment proceedings by the plaintiff herein and which is detained in the State of North Carolina."

Section 3b of the answer of the codefendant, W. B. Haughton: "Answering the allegations of paragraph three-b, it is denied that the death of plaintiff's intestate was caused by any negligent act or omissions on the part of any of the defendants. It is not denied that the Steelcote Manufacturing Company is a Corporation having its principal place of business in the city of St. Louis, *and that this defendant is an agent and representative of said company.*"

Section 4 of the answer of the codefendant, W. B. Haughton: "Answering the allegations of paragraph 4, it is admitted that this defendant, in company with the defendant, M. L. Bolick, on or about 23 March, 1933, made a trip in this defendant's automobile from

Raleigh, N. C., to Louisburg, N. C., and return, and *that during the said trip business matters of mutual interest to the defendants herein were discussed.*"

N. C. Code, 1931 (Michie), sec. 491(a), is as follows: "The acceptance by a nonresident of the rights and privileges conferred by the laws now or hereafter in force in this State permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such nonresident on the public highways of this State, or the operation by such nonresident of a motor vehicle on the public highways of the State other than as so permitted or regulated, shall be deemed equivalent to the appointment by such nonresident of the Commissioner of Revenue, or of his successor in office, to be his true and lawful attorney upon whom may be served all summonses or other lawful process in any action or proceeding against him, growing out of any accident or collision in which said nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on such public highway of this State, and said acceptance or operation shall be a signification of his agreement that any such process against him shall be of the same legal force and vitality as if served on him personally. Service of such process shall be made by leaving a copy thereof with a fee of one dollar, in the hands of said Commissioner of Revenue, or in his office, and such service shall be sufficient service upon the said nonresident: *Provided,* that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff or the Commissioner of Revenue to the defendant and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the summons or other process and filed with said summons, complaint and other papers in the cause. The court in which the action is pending shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action."

The above quotations from the answers of the codefendants is the only evidence in regard to the defendant, Steelcote Manufacturing Company, a nonresident corporation, "operation of a motor vehicle on the public highways of the State. . . . Said nonresident may be involved by reason of the operation by him, for him or under his control or direction express or implied." In fact, the answer of W. B. Haughton was to the effect that he was the owner of the automobile. M. L. Bolick, at the time of the collision, in his answer says, that he was engaged in the operation of the automobile. We think it is mere conjecture from all the evidence that the nonresident defendant corporation was in any way connected with the automobile owned by Haughton, in the collision, driven by Bolick—or that Haughton, while using the automobile with

Bolick, was an agent of the nonresident corporation on whom there could be service of summons under the above statute. Bolick, a stranger, was operating the automobile at the time of the collision. The automobile was the property of W. B. Haughton, it was being operated by Bolick, a passenger, with Haughton, at the request of Haughton. We do not think there is any sufficient evidence that said W. B. Haughton's own automobile was operated by him under the "control or direction, express or implied" of the defendant, Steelcote Manufacturing Company. Haughton, in his answer, said that he was "an agent and representative of said company" (Steelcote Manufacturing Company). The automobile was Haughton's and there is no evidence that he was about his master's business and so that the principle of *respondeat superior* would apply, in fact, it was being operated by Bolick who had no connection with the Steelcote Manufacturing Company. The constitutionality of the act in question is well settled by this Court and the United States Supreme Court. *Ashley v. Brown,* 198 N. C., 369; *Bigham v. Foor,* 201 N. C., 14; Cyc. of Automobile Law (Huddy, 9th ed.), 15-16, sec. 85, p. 156.

We do not think it necessary from the view we take of this case, to consider the other question of plaintiff involved on this appeal: "Is the defect complained of in the service, or proof of service of process, such as can be remedied by amendment?" In Cyc. of Automobile Law, *supra,* sec. 84, is the following: "One seeking to claim the benefit of substituted service, must show full and substantial compliance with the provisions of the statute in that regard." For the reasons given, the judgment of the court below must be

Reversed.

C. D. KENNY COMPANY, ARMOUR AND COMPANY AND EFIRD'S DEPARTMENT STORE, WHO SUE HEREIN ON BEHALF OF THEMSELVES AND ALL OTHER CREDITORS OF THE HINTON HOTEL COMPANY WHO MAY DESIRE TO COME IN AND SHARE IN THE BENEFITS OF THIS CREDITOR'S BILL, v. HINTON HOTEL COMPANY.

(Filed 23 May, 1934.)

1. Creditors' Bill D b—Held: order for sale of property should have required that sale be reported to court for confirmation or rejection.

Certain creditors of a hotel company filed a creditors' bill against it, and in the proceedings temporary receivers were appointed who were later made permanent receivers. Thereafter the holders of a prior, registered deed of trust against the hotel property filed a petition to be allowed to sell the property under the terms of the deed of trust as

though receivers had not been appointed. The court allowed the petition and ordered the property sold by petitioners under the deed of trust, and retained the cause for further orders: *Held*, the court's order should have required petitioners to report the sale to the court for confirmation or rejection in accordance with whether the price bid at the sale was adequate and equitable, and to this end the order is modified and affirmed, the court having the power in its equitable jurisdiction and under chapter 275, Public Laws of 1933, to reject the sale if the price bid should be inadequate or would result in irreparable damage to the creditors or stockholders, and it is immaterial whether the appearance of petitioners was general or special.

2. Creditors' Bill D a—Under facts of this case it is held proper for the receivers to rent the property pending sale and confirmation.

Where in a creditors' bill the property of the debtor is ordered sold by the court and the sale is required to be reported to it for confirmation or rejection in accordance with whether the bid at the sale is adequate and equitable, the receivers appointed in the cause may, with the consent of the holders of a first lien upon the property, rent the same pending the sale and confirmation, and hold the rents therefrom to be distributed in accordance with the rights of the parties, it appearing that such action is urgent in view of the fact that the property is suitable solely as a summer resort and that the season in which it can be operated is near in point of time.

3. Appeal and Error A d—Order in this case held to affect substantial right and was appealable.

An order in this case that the holders of a first lien upon the property of a debtor should be allowed to sell the property under their registered deed of trust although a creditors' bill had been filed and permanent receivers appointed for the property, and retaining the cause for further orders, *is held* to affect a substantial right and was appealable.

APPEAL by plaintiffs from *Cranmer, J.*, at November Term, 1933, of NEW HANOVER. Modified and affirmed.

This is a creditor's bill filed by plaintiffs against the defendant on 27 October, 1933. The prayer is as follows: "(1) That this honorable court appoint a receiver to take custody and control of all the property of the defendant and preserve the same for the benefit of all the creditors. (2) That the said receiver be empowered to insure the said property for a sum sufficient at least to protect all the creditors. (3) For such other and further relief in the premises as the nature and equity of this case may require and to this honorable court may seem meet." Temporary receivers were appointed.

On 18 November, 1933, the temporary receivers were made permanent. J. N. Bryant and George H. Howell, trustee, held a first deed of trust on all of defendant's real and personal property, in the sum of $15,000 and interest, less certain installments paid. This deed of trust to secure the indebtedness was duly recorded in the register of

deeds office of New Hanover County, in Book 219 at p. 412. Two quarterly payments have been made on the indebtedness, of $225.00 each. Taxes on defendant's property to the county of New Hanover and the town of Wrightsville Beach, have not been paid for several years. J. N. Bryant has had to pay the insurance on the property. On 6 November, 1933, Bryant and Howell, trustee, filed a petition in the cause and the prayer is as follows: "Wherefore your petitioners pray the court that it make an order authorizing and permitting your petitioners to appeal specially herein for that purpose alone in securing an order and having the court allowing your petitioners to proceed with the foreclosure of the deed of trust mentioned in this cause, and for such other relief as your petitioners may be entitled to and as to this honorable court shall seem meet and proper."

Several affidavits are in the record as to the worth of the property in controversy. One thinks that it is worth "at least the sum of $50,000"—another, that it is "assessed for taxation for over $50,000"—another affidavit is to the effect that a bonus of $750.00 was charged for the loan of $15,000. The following order was made by Judge Cranmer, on 18 November, 1933: "This cause coming on to be heard upon the petition of J. N. Bryant and George H. Howell, trustee, asking the court to allow them to enter a special appearance herein without becoming parties hereto, and to further allow them, or either of them, to sell the lands, premises and property described in the deed of trust made by the Hinton Hotel Company to George H. Howell, trustee, dated 1 June, A.D. 1931, and registered in the office of register of deeds of New Hanover County in Book No. 219, at page 412, *et seq.*, by through and under the terms of the said deed of trust and under the power of sale therein granted, and in aid of the collection of the indebtedness secured thereby, the same as though and with like effect as if receivers of the Hinton Hotel Company had not been appointed by the court, and being heard, and the court being of the opinion that the motion of the petitioners should be granted. Let the trustee pay the sum of three thousand dollars into this court upon sale of the property, the title to said sum to be hereafter adjudicated.

"It is therefore ordered by the court that the petitioners be, and they are hereby allowed to so appear specially without becoming parties hereto, and permission is hereby granted to the petitioners and both of them to proceed to advertise and sell the lands and premises and property described in the deed of trust heretofore mentioned under, by, through and pursuant to the terms of the said deed of trust. And this cause is retained for further orders."

To the foregoing order, plaintiffs and defendant except and appeal to the Supreme Court. J. N. Bryant and George H. Howell, trustee,

assign no error. The plaintiff's creditors appeal to the Supreme Court and assign as error: "(1) That his Honor was in error in deciding that the petitioner, J. N. Bryant, had the right to file a special appearance and in holding that the said appearance was not a general appearance. (2) That the order appointing receivers took from the petitioning creditors, Bryant and Howell, trustee, the right to foreclose under the power of sale in a mortgage or deed of trust, and the same devolved upon the receivers. (3) That the order was irregular and void, because having made in law a general appearance, and the affidavits showing there was an equity of redemption of value, the court could not and ought not to have signed the order authorizing the trustee to proceed to sell the property. (4) That the fact that he directs the trustee to pay into court the sum of three thousand dollars necessarily shows that the petitioners, Bryant and Howell, trustee, were parties to the creditors' proceeding, subject to the orders of the court therein made, and the power of foreclosure by a trustee was suspended until there could be or should be an adjudication of the petitioner's debt, which was disputed by a number of the creditors, and the amount of the said debt should have been ascertained before foreclosure, so as to permit the creditors to ascertain the amount necessary to be paid for the property. All of which is respectfully submitted."

John D. Bellamy, Woodus Kellum, William M. Bellamy and Emmett H. Bellamy for appellants.

Bryan & Campbell for petitioners.

CLARKSON, J. From the facts appearing on this record, we think it immaterial to decide whether the petition of J. N. Bryant and George H. Howell, trustee, was a special or general appearance. *Buncombe County v. Penland, ante,* 299 (304). The defendant corporation was in the hands of receivers. Bryant and Howell, trustee, filed a petition in the cause praying that they be permitted to appear specially for the purpose alone, of securing an order to proceed to foreclose the deed in trust securing the $15,000 and interest less payments already made. *Pelletier v. Lumber Co.,* 123 N. C., 596 (600); *Bolich v. Ins. Co.,* 202 N. C., 789 (792); *Blades v. Hood, Comr.,* 203 N. C., 56 (59); see concurring opinion of *Clark, J.,* in *Pelletier case, supra; Leak v. Armfield,* 187 N. C., 625.

The court below granted the petition of Bryant and Howell, trustee. It further ordered the trustee to pay the sum of $3,000 into court and upon sale of the property, the title to said sum to be hereafter adjudicated. The order further provided "And this cause be retained for further orders." The sole question presented was the order as to the

sale of the property, under the deed of trust. Bryant and Howell, trustee, appeared in the receivership action and it makes no difference if the appearance is special or general and petitioned for a sale of the property, when this was granted it was incumbent that Bryant and Howell, trustee, report to the court the sale for confirmation or rejection and if the price was inequitable, inadequate and would result in irreparable damage, the court in its equitable jurisdiction has the right to order resale so that the property shall bring a conscionable price. In *Woltz v. Safe Deposit Co., ante,* 239: The constitutionality of chapter 275, Public Laws of 1933, entitled, "An act to regulate the sale of real property upon the foreclosure of mortgages or deeds of trust," is upheld and the reasons given therefor. *Whitaker v. Chase, ante,* 335; *Hopkins v. Swain, ante,* 439. Until final confirmation of the sale of the property made by Bryant and Howell, trustee, the receivers may—with the consent of Bryant and Howell, rent the property and the fund arising out of rental, held to discharge the liens on the property or paid ultimately to the parties entitled thereto, under the decree of the court. This course can be pursued, as it is contended on the argument, that the hotel property is a summer resort hotel and there is urgency in the matter. If the procedure is not followed as herein indicated, under the facts and circumstances of this case, the beneficent provisions of chapter 275, Public Laws of North Carolina, 1933, will be nullified and the equitable arm of the court paralyzed. Hon. John D. Bellamy, one of the nestors of the Wilmington bar, on the argument in this Court eloquently portrayed how the equities of the creditors and the Hotel Company would be wiped out—if equity did not step in and give relief. The stockholders consisted of nearly 100 citizens of Wilmington, who paid in nearly $100,000. The general unsecured creditors amounted to $2,700. The taxes unpaid, $3,100. As said, the land when sold under the Bryant and Howell, trustee, deed of trust for the $15,000 and interest and insurance advanced, less installments paid, should be reported to the court so that it can be determined if the price is not inequitable, inadequate and would not result in irreparable damage. Courts of equity, irrespective of the statute of 1933, have the inherent right to pursue the course as herein indicated. We think that the order affected a substantial right and an appeal was proper. In accordance with this decision, the judgment of the court below is

Modified and affirmed.

J. A. BRADY, ADMINISTRATOR OF THOMAS TURNER, DECEASED, v. STANDARD OIL COMPANY OF NEW JERSEY, AND G. P. PRITCHARD, TRADING AND DOING BUSINESS AS GARLAND LAKE DAIRY.

(Filed 23 May, 1934.)

1. Electricity A a—

The seller of an electric appliance may not be held liable for an injury caused by a short circuit in the appliance in its later use when the seller is not charged with the duty of inspecting and maintaining the equipment.

2. Master and Servant C a—

Where an employee uses a certain appliance in direct disobedience of positive instruction by the employer, the employer may not be held liable for injury to the employee resulting from the use of the appliance.

CIVIL ACTION, before *Moore, Special Judge,* at October Special Term, 1933, of RANDOLPH.

This is an action for wrongful death. The evidence tended to show that the deceased, Thomas Turner, was employed by the defendant, Pritchard, trading as Garland Lake Dairy. He was employed to milk cows, clean up the barn, wash bottles, etc. He was not a general employee. The defendant, Standard Oil Company, turned over to the defendant Pritchard a Flit Machine, which is an appliance operated by electric current, containing a fluid designed to kill flies.

On 27 July, 1932, the deceased was found dead with the Flit Machine in his hand. There was evidence that there was a short circuit in the appliance, and while the current was not more than 118 or 119 volts ordinarily, that plaintiff's clothing was wet and he was standing on a wet floor.

The undisputed evidence was to the effect that the deceased Turner had been ordered and instructed not to use this machine. There was no evidence that the deceased had ever used the machine or appliance prior to the day of his death.

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

I. C. Moser for plaintiff.
J. A. Spence and H. M. Robins for Standard Oil Company.
Cox & Prevette for G. T. Pritchard.

PER CURIAM. The evidence disclosed that the defendant, Standard Oil Company, was not charged with the duty of inspecting and maintaining the appliance causing the death of plaintiff's intestate. Therefore, the judgment as to it is supported by *Merritt v. Power Co.,*

205 N. C., 259, and *Bradshaw v. Power Co.*, 205 N. C., 850. The evidence further showed that the deceased at the time of his death was using the appliance in direct disobedience of positive instruction given by the employer. Consequently, the judgment in favor of the defendant Pritchard is sustained by familiar principles heretofore applied in *Burnett v. Roanoke Mills Co.*, 152 N. C., 35, 67 S. E., 30; *Smith v. R. R.*, 147 N. C., 603, 61 S. E., 575.

Affirmed.

P. S. CECIL v. PLEASANT GROVE METHODIST PROTESTANT CHURCH AND J. R. BEASLY, TRUSTEE.

(Filed 23 May, 1934.)

Wills E h—

Application and refusal is a prerequisite to the right to maintain an action against a trustee under a will to force the trustee to give plaintiff financial assistance upon allegations that plaintiff was in circumstances in which the will directed the trustee to give him such assistance.

APPEAL by plaintiff from *Shaw, J.*, at April Term, 1934, of DAVIDSON. Affirmed.

After the jury had been empaneled for the trial of this action, and the pleadings read, the defendants demurred *ore tenus* to the complaint on the ground that the facts stated therein are not sufficient to constitute a cause of action.

The demurrer was sustained, and the action dismissed. The plaintiff appealed to the Supreme Court.

E. A. Wright and Don A. Walser for plaintiff.
Gold, McAnnally & Gold and Spruill & Olive for defendants.

PER CURIAM. J. B. Cecil, by his last will and testament, which was duly probated and recorded in the office of the clerk of the Superior Court of Davidson County on 18 March, 1901, devised and bequeathed certain property, real and personal, to the defendant, Pleasant Grove Methodist Protestant Church. The said will contains the following words: "If any of our kinfolks should come to want through misfortune I want them to have some assistance, but if they come to want by dissipation, none."

The plaintiff is a nephew of the testator. He alleges in his complaint that through misfortune and not because of dissipation, he is now in need of financial assistance, and prays judgment that defendants be

ordered by the court to provide such assistance for him out of the income of the property devised and bequeathed by the testator and now in the possession of the defendants. It is not alleged in the complaint that plaintiff before the commencement of this action, applied to the defendants for assistance and that defendants arbitrarily refused the same. In the absence of such application and refusal, the plaintiff cannot maintain this action. See *Carter v. Young,* 193 N. C., 678, 137 S. E., 875. The judgment is

Affirmed.

STATE v. GORDON CURRIE, JAKE NELMS, JR., JESSE WILLIS AND RUSSELL SPOONER.

(Filed 23 May, 1934.)

1. Criminal Law L d—Indictment is necessary part of record in criminal cases.

On appeal the indictment is a necessary part of the record proper in criminal cases, and a statement in the record signed by the solicitor and defendant's counsel that the indictment had disappeared from the papers but that a proper indictment was in the record at the time of trial cannot supply the deficiency, it being necessary that defendant apply to the Superior Court for an order that a copy be supplied if the indictment is lost.

2. Same—

Assignments of error should include the exceptions on which they are founded, and it is not sufficient if they merely refer to the exceptions as they appear in the case on appeal.

APPEAL by defendants from *Cranmer, J.,* at November Term, 1933, of NEW HANOVER. Dismissed.

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

L. Clayton Grant and W. L. Farmer for defendants.

PER CURIAM. This is a criminal action tried in the Superior Court of New Hanover County. The defendants were convicted by the jury and appealed to this Court from the judgment of said court. The record proper filed in this Court is fatally defective, for the reason (1) that no indictment appears therein; and (2) that the assignments of error appearing in the case on appeal are not in compliance with the rules of this Court.

There is a statement in the record, signed by the Solicitor for the State and counsel for defendants, to the effect that since the trial of

the action, the papers in the case have disappeared from the office of the clerk of the Superior Court, and cannot be found, but that an indictment in due form charging the defendants with conspiracy and robbery was in the record at the time of the trial. This statement is not sufficient. It was the duty of the defendants to see that the indictment appeared in the record, or if lost, to apply to the Superior Court for an order that a copy be supplied. See *S. v. McDraughon,* 168 N. C., 131, 83 S. E., 181.

The assignments of error are defective for the reason that they do not include the exceptions on which they are founded. It is not sufficient merely to refer to the exceptions as they appear in the case on appeal. Rule 19(3).

The appeal is dismissed on the authority of *Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126.

Dismissed.

WILLIE GREENWAY, DECEASED, ELLEN MOORE GREENWAY, WIDOW, v. RIVERSIDE MANUFACTURING COMPANY, EMPLOYER, AND LUMBERMEN'S MUTUAL CASUALTY COMPANY.

(Filed 20 June, 1934.)

Master and Servant F e—Evidence held to support finding that deceased was in employ of company obtaining insurance and was covered by policy.

There was evidence before the Industrial Commission to the effect that a company had obtained compensation insurance from defendant insurer, and that it thereafter wrote insurer to include in the policy insurance for "S., logging contractor, who is logging for us. His average payroll averages $65.00"; that insurer complied with the request and was paid the premiums for the additional insurance, and that deceased was injured while driving S's truck, hauling logs to the company, which injury subsequently resulted in his death, and that the insurer recognized the deceased as an employee of the company by making a contract during his lifetime to pay him a certain sum per week, and by making a like contract with his widow after his death. There was also evidence that at the time of his injury deceased was hauling logs to another company. *Held,* as against the appealing insurer there was some evidence to support the finding of the Industrial Commission that the deceased was an employee of the company obtaining the insurance and was covered by the policy, and as insurer had received premiums based in part on the weekly wage deceased had earned, it is not in a position to complain, and may not assert that S. was an independent contractor.

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

CIVIL ACTION, before *Parker, J.,* at December Term, 1933, of NORTHAMPTON.

Willie Greenway was employed by W. H. Spivey to haul logs. Spivey had a contract with the defendant, Riverside Manufacturing Company, to deliver logs to said defendant and was to be paid by the thousand. He said: "When I loaded on their trucks I got eight dollars per thousand and when I delivered it to the mill on my truck I got eleven dollars per thousand." Willie Greenway was hauling a load of pine logs upon a truck owned by Spivey and was injured by one of the logs, resulting in his death. The injury occurred on 12 December, 1931, and death followed in March, 1932. Prior to 20 November, 1931, Spivey had no compensation insurance. At the first hearing he testified: "My compensation insurance had been canceled at that time, and I was bumming around, working a day here and a day there, and sometimes two or three days at a time. Sometimes I would go and buy some lumber already out and haul it. . . . I was in a hurry and went to see Mr. Brown of the Riverside Manufacturing Company, the manager there, and I went to Norfolk to see a man about some insurance also, and he said he couldn't take it unless I had a ten-thousand-dollar payroll a year. I came back and it was suggested to me that I might get the Riverside Manufacturing Company to take care of my logging operations while I was clearing this tract of timber." On 20 November, 1931, the Riverside Manufacturing Company, wrote a letter to the defendant, Lumbermen's Mutual Casualty Company, using the following language: "We want you to include in our policy workmen's compensation insurance for W. H. Spivey, logging contractor, who is logging for us. His payroll averages $65.00 per week," etc. Thereafter the defendant carrier covered the operations of Spivey for the Riverside Manufacturing Company and Spivey paid various sums set out in the record to the Riverside Manufacturing Company as premiums for such coverage.

The history of the case is contained in the opinion of Matt H. Allen, chairman of the Industrial Commission, which is as follows:

"Hearing before Allen, chairman, at Halifax, N. C., 8 December, 1932. Plaintiff represented by V. D. Strickland, attorney, Rich Square, N. C. Defendants by Fred P. Parker, Jr., attorney at law, Goldsboro, N. C.

"This case was first heard before Commissioner Dorsett at Halifax, North Carolina, on 29 September, 1932, and before any findings of fact or award, the defendant, Lumbermen's Mutual Casualty Company, filed with the Commission a petition to reopen the case upon the grounds that the agreement entered into for the payment of compensation was entered into under mutual mistake of all the parties concerned and that the plaintiff was paid compensation by the carrier under a misapprehension of the facts. Commissioner Dorsett ordered that the case be reopened

and heard upon the questions presented in the petition and thereupon the matter was heard on 8 December, 1932, at Halifax, before the undersigned commissioner.

"It appeared from the evidence that the claimant was injured on 12 December, 1931, receiving a dislocated shoulder and several fractures of the ribs on the right side and a fractured dorsal vertebra, resulting in paralysis of the lower limbs; that on 21 January, 1932, the defendants, Riverside Manufacturing Company and Lumbermen's Mutual Casualty Company, entered into a written agreement for compensation with the claimant by the terms of which it was agreed that he should be paid $7.00 per week, beginning 12 December, 1931, and to continue until further order of the Commission; that on 30 March, 1932, the deceased employee, Willie Greenway, died, leaving as his sole dependents Ellen Moore Greenway, wife, William Detroit Greenway and Ella Frances Greenway, minor children, and that the defendants, Riverside Manufacturing Company and Lumbermen's Mutual Casualty Company, on 9 April, 1932, entered into an agreement for compensation for death with the widow, Ellen Moore Greenway, by the terms of which she was to receive for herself and her two minor children $7.00 per week for the period provided in the act; that on or about 9 July, 1932, the defendant, Lumbermen's Mutual Casualty, requested permission of the Industrial Commission to stop payments of compensation to Ellen Moore Greenway in order that an investigation might be made as to other dependents and thereafter the matter was set down for hearing on 22 July, 1932, but was continued and finally heard before Commissioner Dorsett on 29 September, 1932. On 6 October, 1932, and after the hearing before Commissioner Dorsett, the defendant, through its attorney, requested that the Commission withhold its decision in this case until he could have an opportunity to make further investigation as to whether or not the truck upon which the deceased, Willie Greenway, was injured was covered by the insurance carrier at the time of the injury, which question had not been theretofore raised.

"Upon the hearing before the undersigned commissioner there was no sufficient evidence of mutual mistake or fraud to justify the setting aside of the agreements entered into between the parties. The burden was upon the defendant which alleged the fraud or mutual mistake to establish such fraud or mutual mistake by at least a preponderance of evidence which this commissioner finds was not done and upon consideration of all of the evidence the commissioner finds as a fact:

"1. That the deceased Willie Greenway at the time of his accident and injury which resulted in death was in the employ of the Riverside Manufacturing Company.

"2. That the defendants, Riverside Manufacturing Company and Lumbermen's Mutual Casualty Company entered into an agreement for

the payment of compensation with the deceased Willie Greenway before his death and after his death entered into another agreement for compensation with his widow.

"3. That Ellen Moore Greenway, widow, William Detroit Greenway and Ella Frances Greenway, minor children, were the sole and only dependents of the deceased Willie Greenway, who died on 30 March, 1932, as a result of the accident received on 12 December, 1931, while in the employ of the defendant, Riverside Manufacturing Company.

"4. That the accident on 12 December, 1931, which resulted in death on 30 March, 1932, arose out of and in the course of his employment.

"5. That at the time of the accident the deceased Willie Greenway was receiving an average weekly wage of $9.65 per week.

"It is thereupon ordered that an award issue providing for the payment of compensation to Ellen Moore Greenway, widow, William Detroit Greenway, minor, and Ella Frances Greenway, minor child, at the rate of $7.00 per week for a period of 350 weeks, plus burial expenses not to exceed $200.00, together with all hospital and medical bills incurred during the period between 12 December, 1931, and 30 March, 1932, together with the costs of this action. Matt H. Allen, chairman."

Thereupon there was an appeal to the full Commission. This tribunal adopted and approved the findings of fact and conclusions of law in the Allen opinion, and affirmed the award.

Upon appeal to the Superior Court the trial judge was "of opinion, and so holds, that there is no sufficient evidence in the record to support the finding of the Commission, that the deceased, Willie Greenway, at the time of his accident and injury, which resulted in death, was in the employ of the Riverside Manufacturing Company. Therefore, it is ordered, considered and adjudged by the court that the award by the North Carolina Industrial Commission against the defendant, Lumbermen's Mutual Casualty Company be, and the same is hereby reversed, set aside and vacated," etc.

From the judgment so rendered, the claimants appealed.

V. D. Strickland for plaintiff.

Ruark & Ruark for Lumbermen's Mutual Casualty Company.

BROGDEN, J. Motion was made to dismiss the appeal upon the ground that the affidavit and orders did not comply with the statute regulating pauper appeals. However, a certificate from the clerk, under date of 15 March, 1934, discloses compliance with the statute and the motion to dismiss is denied.

The right of plaintiffs to assert their claim is not challenged in this Court; nor is it disputed that Willie Greenway was injured in the course of his employment. The carrier insists that Spivey was an inde-

pendent contractor and that the load of logs, which occasioned the injury and subsequent death of the deceased, was to be delivered to the Camp Manufacturing Company, and hence, at the time of his injury, he was in the employ of said concern. The opinions of the hearing commissioner and of the full Commission discloses a positive and unequivocal finding of the fact that at the time of his injury, Willie Greenway "was in the employ of the Riverside Manufacturing Company."

Therefore, the sole question involved in this appeal is whether there is any competent evidence tending to support such finding.

The defendant carrier covered Willie Greenway under a policy written and delivered to the Riverside Manufacturing Company. It received pay for assuming the risk of his injury or death in the course of his employment. It had assumed such risk by virtue of the letter of 20 November, from the Riverside Manufacturing Company. In this letter the said Manufacturing Company referred to Spivey as a "logging contractor, who is logging for us." Spivey testified at the first hearing that the load of logs occasioning the injury to the deceased was to be delivered to the Camp Manufacturing Company, but at a subsequent hearing he said: "This particular log came off my own land. It was my individual land Greenway was hauling from when he got hurt. You asked me if the logs were going to the Camp Manufacturing Company. Right at that time, on the spur of the moment, I thought they were. . . . After I was on the stand at Halifax I went back to my home and figured up where it was cut, the loads, and began to think about it, and I remembered that I did have some logs left. . . . I know they did not go to the Camp Manufacturing Company. . . . I remember where I piled the logs and remembered the day I moved them over to the Riverside Manufacturing Company."

Hence there is competent evidence that at the time of his injury the deceased was hauling logs to the Riverside Manufacturing Company plant and was at that instant covered by a policy of insurance written by the defendant carrier as an employee of the said Riverside Manufacturing Company. Certainly, as against the defendant carrier, the sole appellant in the Superior Court, these facts constitute some competent evidence of employment by the Riverside Manufacturing Company. Nor is this all. On 21 January, 1932, during the lifetime of deceased, the defendant carrier entered into a written agreement with him to pay $7.00 per week, and after his death the defendant carrier entered into an agreement with his widow, Ellen Moore Greenway, to pay to her and her minor children $7.00 per week. While there was allegation of fraud contained in an affidavit attached to a petition to the Industrial Commission to set aside the award, no evidence of fraud or mutual mistake so far as the claimants are concerned, was offered at any of the hearings.

In the final analysis the entire record produces a situation substantially as follows: The carrier admitted that Willie Greenway was an employee of the Riverside Manufacturing Company when it undertook to cover him with a policy of insurance and received for such coverage the stipulated payments. The carrier further recognized Willie Greenway as an employee of the Riverside Manufacturing Company in his lifetime by making a contract with him to pay $7.00 per week. The defendant carrier further recognized Willie Greenway as an employee of the Riverside Manufacturing Company by making an agreement after his death with his dependents to pay said $7.00 per week. This Court, speaking through *Reeves v. Parker-Graham-Sexton, Inc.*, 199 N. C., 236, 154 S. E., 66, declared: "The defendant, Travelers Insurance Company, having been paid the premium by defendant, Parker-Graham-Sexton, Incorporated, employer, to pay compensation in death cases where there are no dependents, as in the present case, is hardly in a position to complain." See *Jones v. Trust Co., ante,* 214.

The Court is of the opinion that the judgment vacating the award of the Industrial Commission, was improvidently entered.

Reversed.

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

DEAN HAMMOND, IN BEHALF OF HIMSELF AND OTHER PERSONS REFERRED TO IN THE COMPLAINT, v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, AND A. M. ELLIOTT, IN BEHALF OF HIMSELF AND THE OTHER PERSONS REFERRED TO IN THE COMPLAINT, v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, AND A. G. BROWN, IN BEHALF OF HIMSELF AND THE OTHER PERSONS REFERRED TO IN THE COMPLAINT, v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION.

(Filed 20 June, 1934.)

1. Taxation A a—Held: city could borrow money to pay judgments for teachers' salaries in anticipation of collection of taxes levied therefor.

A city, under Legislative authority, voted to establish and maintain by taxation a system of public schools in the city. A number of years after the city school system had been in operation the city failed to pay in full the salaries due teachers, janitors and others employed in the city schools, and the teachers and other employees obtained valid judgments against the city for the amounts due them on salaries for the year in question. The city had validly levied for that purpose taxes sufficient to pay the salaries in full, and it admitted sufficient sums were collectible and would be collected from the levy to pay the salaries, but contended

that it was without power to borrow money to pay the judgments for the salaries on the ground that such payment was not for a necessary purpose. Const., Art. VII, sec. 7. *Held*, the levy of the taxes had been approved by the qualified voters of the city, and the city had the authority to borrow money to pay the judgments in anticipation of the collection of the taxes validity levied for that purpose, N. C. Code, 2933.

2. Mandamus A b—Held: plaintiffs had present, clear, legal right to compel performance by city of legal duty, and mandamus was proper.

Held, mandamus will lie in a suit by teachers and others employed in the city school system to compel a city to borrow money to pay valid subsisting judgments obtained by plaintiffs for their salaries, it being admitted that the city had sufficient credit to borrow the sums necessary, and that sufficient sums were collectible and would be collected from the taxes levied for that purpose, and it being determined as a matter of law that the city had authority to borrow sums for the purpose of paying the judgments.

APPEAL by defendant from *Sink, J.*, at 16 April Special Term, 1934, of MECKLENBURG. Affirmed.

The judgment and writ of mandamus in the court below is as follows: "These causes coming on to be heard before his Honor, H. Hoyle Sink, judge presiding at the 16 April, 1934, Special Term of Mecklenburg Superior Court, upon the petitions in said causes for a writ of mandamus, and the three causes above named having been consolidated for the purpose of this hearing by consent; and the defendant, pursuant to order dated 16 April, 1934, signed by the court in each of the above entitled cases, having produced a statement of uncollected school taxes, and the court having heard said consolidated causes upon the petitions therein for a mandamus; and it being admitted by all parties that the judgments referred to in the complaints in the first two sections above entitled were rendered upon obligations of the defendant for parts of the salaries of the plaintiffs in said actions as school teachers in the public schools of the city of Charlotte for the school year 1932-1933; and that the judgment referred to in the complaint in the action of A. G. Brown *et al.*, against the city of Charlotte, was rendered upon obligations of the defendant for salaries of the plaintiffs in said action as janitors and maids employed in the operation of the said schools for said term; and that said public schools were operated during said term under charter provisions of the city of Charlotte duly adopted by a vote of the people providing for the establishment and maintenance by taxation in said city of said schools; and it is further admitted, pursuant to said charter provisions, and within the limits adopted by a vote of the people, taxes have already been levied in sufficient amount to pay said obligations upon which said three judgments were rendered; and it further appearing to the court from the statement produced in

court by the defendant that the defendant admits that, after making allowance for all uncollectible taxes, there remain uncollected school taxes which are collectible levied under said charter provisions adopted by a vote of the people sufficient to pay the said three judgments; and it further appearing to the court that the defendant, upon admissions made in open court, has credit available to enable it to pay said judgments, and is willing to avail itself of said credit for said purpose, provided it is legally authorized to borrow money to pay said judgments, but that the defendant declines to pay said judgments solely upon the grounds that said judgments are not for necessary expenses of the defendant, and that the defendant has no legal authority to borrow money with which to pay said judgments.

"The court thereupon makes the following findings of fact: (1) That the plaintiffs in the case of Dean Hammond *et al. v.* City of Charlotte, have a valid judgment against the defendant in the sum of $35,032.25, docketed in Judgment Book 4, No. 1514, in the office of the clerk of the Superior Court of Mecklenburg County, and that said judgment bears interest from the date it was docketed, and that said judgment remains unpaid. That said judgment was obtained upon obligations of the defendant for salaries of the plaintiffs in said suit as teachers in the public schools of the city of Charlotte for the school year 1932-1933. (2) That the plaintiffs in the case of A. M. Elliott *et al. v.* City of Charlotte, have a valid judgment against the defendant in the sum of $51,881.77, docketed in Judgment Book 4, No. 1462, in the office of the clerk of the Superior Court of Mecklenburg County, and that said judgment bears interest from the date it was docketed, and that said judgment remains unpaid. That said judgment was obtained upon obligations of the defendant for salaries of the plaintiffs in said action as superintendents, business manager, members of the medical staff, supervisors, teachers and principals employed in the city schools of the city of Charlotte for the school year 1932-1933. (3) That the plaintiffs in the suit of A. G. Brown *et al. v.* City of Charlotte, have a valid judgment against the defendant, in the sum of $3,188.86, docketed in Judgment Book 4, No. 1464, in the office of the clerk of the Superior Court of Mecklenburg County, and that said judgment bears interest from the date it was docketed, and that said judgment remains unpaid. That said judgment was obtained upon obligations of the defendant for salaries of the plaintiffs in said action as janitors, firemen and maids employed in the schools of the city of Charlotte for the school year 1932-1933. (4) That sufficient taxes which are collectible, have already been levied to pay all of said judgments, and that said taxes were authorized by vote of the people of the defendant city, and that the schools of the city of Charlotte, at the time the plaintiffs in each

of said actions were employed, and at the time they rendered their services, were maintained, and the plaintiffs were employed therein, in the capacities hereinbefore mentioned under charter provisions adopted by a vote of the people. (5) That the defendant, city of Charlotte, upon its admission in open court, has credit available to enable it to pay said judgments, and is willing to avail itself of said credit for said purpose, provided it is legally authorized to borrow money to pay said judgments but declines to pay said judgments solely upon the grounds that said judgments are not for necessary expenses of the defendant, and that the defendant has no legal authority to borrow money with which to pay said judgments. (6) The court further finds, both as a matter of fact and of law, that, under the conditions existing at the time the plaintiffs were employed and performed the services upon which said judgments were obtained, the expense of their employment constituted a necessary expense of the city of Charlotte.

"Upon the facts hereinbefore set out, and the additional facts alleged in the complaints, and admitted in the answers, as appears of record, the court is of the opinion that the defendant, the city of Charlotte, has authority, under section 2933 of the Consolidated Statutes, to pledge its general credit and to borrow money for the purpose of paying said judgments, and that it has such power whether the obligations upon which said judgments rest were incurred for necessary expenses or not, but that the fact that they were incurred for a necessary expense is, in the opinion of the court, an additional ground, and the court is further of the opinion that the plaintiffs are entitled to a writ of mandamus directing the payment of said judgments. It is thereupon considered and adjudged as follows: (1) That the city of Charlotte has the power to borrow money and to pledge its general credit for the purpose of paying the judgments hereinbefore referred to. (2) That the said city of Charlotte, a municipal corporation, is hereby ordered and directed to pay promptly the judgments referred to in the complaints, and hereinbefore referred to, together with the interest thereon. (3) That the defendant pay the costs of the actions to be taxed by the clerk.

H. HOYLE SINK, *Judge Presiding.*"

To the finding of the court that the defendant has legal authority and power to borrow money with which to pay the judgments against it, the defendant, in apt time, and to the signing of the judgment and writ of mandamus, the defendant in apt time, excepted, assigned errors and appealed to the Supreme Court.

John M. Robinson and Hunter M. Jones for plaintiff.
Bridges & Orr for defendant.

CLARKSON, J. In the case of *Hammond v. City of Charlotte,* the plaintiff recovered judgment against the city of Charlotte for $35,032.25. In the *Elliott case,* for $51,881.77; in the *Brown case* for $3,188.86, a total recovery of $90,102.88. In the *Hammond case, supra,* 205 N. C., 469, the defendant city of Charlotte appealed to this Court, we affirmed the judgment appealed from, as a valid and binding obligation of the city of Charlotte. The plaintiffs were employed by the school commissioners as principals, teachers and in other capacities for the year 1932-1933, in conformance with the school law. The plaintiffs have performed their duty and rendered the services required of them. The city of Charlotte levied a school tax of 25.75 cents on the 100 dollars of property to pay the plaintiffs. The defendant contends that it cannot contract any debt, pledge its faith or lend its credit or pay from its general funds, school teachers' and other employees' salaries, although reduced to judgment, and taxes lawfully levied therefor have not been fully collected, but are ample in amount to pay the same when collected. On the facts and circumstances of this case, we cannot so hold. Under legislative authority submitting the question to a vote of the people on the first Monday in June, 1880, a majority of the qualified voters of the city of Charlotte, 816 voters—all with a single exception—voted in favor of the measure to establish and maintain by taxation a system of graded schools in the city of Charlotte. In the case of *Norment v. Charlotte,* 85 N. C., 387, this action of the voters was sustained. Norment brought an injunctive proceeding to restrain the collection of the tax which this Court denied. The school commissioners met and organized 16 January, 1882, and the graded schools of the city of Charlotte were opened. On 2 January, 1893, the qualified voters of the city of Charlotte voted an increase of school tax 20 cents on the hundred dollars on property and 60 cents on poll.

Under the Code of the city of Charlotte (1931), "Public Schools," sec. 91, is the following: "That the city council of the city of Charlotte shall levy an annual tax for the support and maintenance of said system of public schools in the city of Charlotte, which annual tax shall not exceed thirty cents on the hundred dollars valuation of property and ninety cents on the poll."

The defendant admitted: "It is true that under section 206, chapter 342, Private Laws of 1907, the defendant had the power as follows: 'That the board of aldermen of the city of Charlotte shall levy an annual tax for the support and maintenance of said system of public schools in the city of Charlotte, which annual tax shall not exceed thirty cents on the one hundred dollars valuation of property and ninety cents on the poll.'

This authority was also given by a vote of the qualified voters under Private Laws (Extra Session) of 1913. The defendant relies on Article VII, section 7, of the Constitution, which provides as follows: "7. *No debt or loan except by a majority of voters.*—No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

The court below found as a fact: "That sufficient taxes which are collectible, have already been levied to pay all of said judgments, and that said taxes were authorized by vote of the people of the defendant city, and that the schools of the city of Charlotte, at the time the plaintiffs in each of said actions were employed, and at the time they rendered their services, were maintained, and the plaintiffs were employed therein, in the capacities hereinbefore mentioned under charter provision adopted by a vote of the people. . . . The expenses of their employment constituted a necessary expense of the city of Charlotte."

The findings of fact are clearly sustained by the evidence in the record and there can be no question under the well settled law that the plaintiff's judgments are a valid, binding obligation of the city of Charlotte. N. C. Code, 1931 (Michie), section 2933, in part, is as follows: "For the purpose of paying a judgment recovered against a municipality or paying the principal or interest of bonds due or to become due within two months and not otherwise adequately provided for, a municipality may borrow money in anticipation of the receipt of either the revenues of the fiscal year in which the money is borrowed or the revenues of the next succeeding fiscal year," etc.

Part of the judgment in the court below is as follows: "Upon the facts hereinbefore set out, and the additional facts alleged in the complaint, and admitted in the answers, as appears of record, the court is of the opinion that the defendant, the city of Charlotte, has authority, under section 2933 of the Consolidated Statutes, to pledge its general credit and to borrow money for the purpose of paying said judgments, and that it has such power whether the obligations upon which said judgments rest were incurred for necessary expense or not, but that the fact that they were incurred for a necessary expense is, in the opinion of the court, an additional ground, and the court is further of the opinion that the plaintiffs are entitled to a writ of mandamus directing the payment of said judgments."

In McQuillin Municipal Corporations, Vol. 5, part section 2354, page 993, speaking to the subject, we find: "Requiring an election to incur an indebtedness does not necessitate an election, after a vote in favor of incurring the indebtedness to determine whether bonds shall be issued."

In *Bolich v. Winston-Salem,* 202 N. C., 786 (788): "A municipal corporation does not contract a debt, within the meaning of section 7 of Article VII of the Constitution of this State, when under statutory authority it issues bonds to refund bonds which at the date of the issuance of the refunding bonds are valid and enforceable obligations of the corporation. 44 C. J., 1132."

The present action is one of mandamus, the issuance of the writ is proper when a party has a present, clear, legal right and it lies to compel a party to do that which it is the duty to do without it. *Umstead v. Board of Elections,* 192 N. C., 139 (142). In the present case, the plaintiffs have a present, clear legal right and mandamus lies to compel the defendant to perform its duty and pay the plaintiffs the judgments recovered against defendant.

The salaries of these teachers and others are long past due. This Court has held that the judgments obtained by plaintiffs are binding and valid obligations of the city of Charlotte and the city must pay these judgments and should do so speedily. No class of our citizens have greater responsibilities and duties to perform than our school teachers—to them are committed the children of the State, after they leave the home, for training, guidance and direction. The burden is great and it is a matter of common knowledge that they have borne it with commendable patience and fortitude. They are mostly bread winners and the payment of their reduced salaries is naturally a great hindrance to efficiency and peace of mind—so important in training the young. How can they pay for their daily bread if they are not paid? "The labourer is worthy of his hire."

The judgments and writs of mandamus in the court below are fully supported by the well settled law of this State. The judgment of the court below is

Affirmed.

NORTH CAROLINA JOINT STOCK LAND BANK OF DURHAM v. J. L. KERR AND HIS WIFE, SADIE A. KERR, AND OTHERS.

(Filed 20 June, 1934.)

1. Venue A a—Action held not to involve realty and was properly brought in county in which corporate plaintiff maintained principal office.

An action in the nature of an accounting by a corporate plaintiff against individual defendants residing in another county in this State, in which plaintiff seeks judgment on certain notes secured by a deed of trust executed by two of the defendants, and to have the indebtedness thus alleged credited with the amount of a judgment against plaintiff

obtained by the makers of the notes, and to restrain execution on the judgment and to set aside the assignment of the judgment by the makers of the notes to the other defendants, is properly brought in the county in which the corporate plaintiff maintains its principal office. C. S., 469.

2. Venue A d—Action to have judgment credited on debt due by defendant to plaintiff judgment debtor, and to restrain issuance of execution need not be brought in county in which judgment was rendered.

Plaintiff brought action praying judgment against two of defendants on notes executed by them and to restrain issuance of execution on a judgment against it obtained by one of the makers, and to have the amount of the judgment credited on the indebtedness due plaintiff, and to have the assignment of the judgment to the other defendants set aside, alleging that the judgment creditor was indebted to plaintiff on the notes in a sum in excess of the amount of the judgment and that he was insolvent, and that the assignees of the judgment knew the facts when the judgment was assigned. *Held*, plaintiff does not seek to restrain execution on the ground that the judgment was void, or seek to attack the validity of the judgment, and the defendant's contention that plaintiff's remedy was by motion in the original cause is untenable, and the Superior Court of the county in which plaintiff maintains its principal office has jurisdiction although the judgment against plaintiff was rendered in the Superior Court of another county.

3. Pleadings D b—Demurrer on grounds of misjoinder of parties and causes held properly overruled.

An action against the makers of notes for judgment in the amount thereof and to have a judgment obtained by one of the makers against the payee credited on the amount due on the notes, and against the assignees of the judgment and the sheriff to set aside the assignment and restrain execution on the judgment is not subject to demurrer for misjoinder of parties and causes, the principal relief sought being against the makers, and the relief sought against the other defendants being incidental thereto, and all defendants being necessary parties, C. S., 456.

4. Execution E a—Judgment debtor held entitled to restrain execution upon allegations that judgment creditor is insolvent and is indebted to him in sum in excess of judgment, and that assignment of judgment was in bad faith and not for value.

Where a judgment creditor is indebted to the judgment debtor upon notes in a sum in excess of the judgment, and the judgment creditor is insolvent, and has assigned the judgment to third persons, the judgment debtor is entitled to have execution on the judgment restrained to the hearing in his suit to recover upon the notes and to have the judgment credited on the amount due him and to set aside the assignment of the judgment upon allegations that the parties had knowledge of the facts and that the assignment was in bad faith and not for value, the judgment debtor being entitled to the relief sought if the assignment is declared void and set aside.

APPEAL by defendants from *Sinclair, J.*, at Chambers, in the city of Durham, on 10 April, 1934. From DURHAM. Affirmed.

This action was begun in the Superior Court of Durham County, by summons issued on 10 November, 1933.

The plaintiff is a corporation organized and doing business under the act of the Congress of the United States, with its principal office in the city of Durham, Durham County, North Carolina. The defendants are residents of Sampson County, North Carolina.

It is alleged in the complaint that on or about 28 May, 1933, the defendants, J. L. Kerr and his wife, Sadie A. Kerr, for value received, executed and delivered to the plaintiff their promissory note for the sum of $8,500, which is now past due; that said note was not paid at its maturity; and that there is now due to the plaintiff by the said defendants on said note the sum of $7,896.84, with interest from 1 June, 1929.

It is further alleged in the complaint that on or about 5 December, 1925, the defendants, J. L. Kerr and his wife, Sadie A. Kerr, for value received, executed and delivered to the plaintiff their promissory note for the sum of $5,000, which is now past due; that said note was not paid at its maturity; and that there is now due to the plaintiff by the said defendants on said note the sum of $4,372.08, with interest from 1 January, 1930.

It is further alleged in the complaint that at divers times, at the request of the defendants, J. L. Kerr and his wife, Sadie A. Kerr, the plaintiffs advanced for said defendants the aggregate sum of $172.30, for the payment of premiums on policies of insurance, and also the aggregate sum of $241.08, for the payment of certain taxes, which sums the said defendants agreed to pay to the plaintiff; that said defendants have failed and refused to pay said sums to the plaintiff; and that said sums are now due to the plaintiff by the said defendants.

It is further alleged in the complaint that the defendant, J. L. Kerr, has collected certain sums aggregating $300.08, which were due to the plaintiff as rents; and that said defendant has failed and refused to pay or account for said sums to the plaintiff.

It is further alleged in the complaint that in an action begun and pending in the Superior Court of Sampson County, entitled, "J. L. Kerr *v.* North Carolina Joint Stock Land Bank of Durham," on 5 June, 1933, the defendant, J. L. Kerr, recovered a judgment against the plaintiff for the sum of $2,667.50, with interest from 1 February, 1931, and for the sum of $500.34, with interest from 1 June, 1932; that said judgment was by default final, because of the failure of the plaintiff to file an answer to the complaint within the time required by statute; and that plaintiff's motion that said judgment be set aside because of its excusable neglect to file said answer within said time was denied. See *Kerr v. Bank,* 205 N. C., 410. That at the time said

judgment by default final was rendered in favor of the defendant, J. L. Kerr, and against the plaintiff, the said defendant was indebted to the plaintiff, as appears from the allegations of the complaint, in a sum largely in excess of the amount of said judgment.

It is further alleged in the complaint that after the said judgment by default final was rendered and after plaintiff's motion that the same be set aside was denied, the defendant, J. L. Kerr, attempted to assign the same to his attorneys, the defendants, Geo. E. Butler, and Algernon Butler, and his brother, the defendant, James S. Kerr; that said assignment was not made in good faith, for value, or without notice on the part of the said assignees of the purpose of the defendant, J. L. Kerr, by said assignment, to bar the plaintiff of its right, legal or equitable, to have said judgment applied as a payment on the indebtedness of the said defendant, J. L. Kerr, to the plaintiff; and that said defendants, Geo. E. Butler, Algernon Butler and James S. Kerr, are not purchasers for value, and without notice of said judgment.

It is further alleged in the complaint that on or about 28 November, 1933, the defendant, J. L. Kerr, or the defendants, Geo. E. Butler, Algernon Butler and James S. Kerr, as assignees of said judgment, caused an execution to be issued by the clerk of the Superior Court of Sampson County on said judgment to the defendant, L. C. Parker, sheriff of Sampson County, and that said sheriff, under said execution, has levied on eight tracts of land, situate in Sampson County, and owned by the plaintiff, containing several hundred acres, and has advertised said tracts of land for sale at the courthouse door in the town of Clinton, on 1 January, 1934, to satisfy said execution.

It is further alleged in the complaint that the defendant, J. L. Kerr, is insolvent, and that if the lands owned by the plaintiff are sold by the defendant, L. C. Parker, sheriff of Sampson County, to satisfy the execution now in his hands, the plaintiff will suffer irreparable injury.

On the facts alleged in the complaint, the plaintiff prays judgment:

1. That the plaintiff recover of the defendants, J. L. Kerr, and his wife, Sadie A. Kerr, the amount of their indebtedness to the plaintiff, as alleged in the complaint in this action;

2. That the assignment of the judgment recovered by the defendant, J. L. Kerr, against the plaintiff in the Superior Court of Sampson County to the defendants, Geo. E. Butler, Algernon Butler and James S. Kerr, be declared void, and set aside;

3. That the defendant, L. C. Parker, sheriff of Sampson County, be restrained and enjoined from selling the lands of the plaintiff in Sampson County, under execution issued on said judgment;

4. That the amount of said judgment be applied as a payment on the judgment in this action against the defendants, J. L. Kerr, and his wife, Sadie A. Kerr, and that plaintiff have such other and further relief as it may be entitled to.

The action was heard on a demurrer to the complaint filed by the defendants on the ground (1) that the Superior Court of Durham County is without jurisdiction to enjoin the sale of land under execution issued on the judgment recovered in the Superior Court of Sampson County; (2) that there is a misjoinder in the complaint of both parties and causes of action; and (3) that the facts stated in the complaint are not sufficient to constitute a cause of action against the defendants, Geo. E. Butler, Algernon Butler, James S. Kerr, and L. C. Parker, sheriff of Sampson County.

At the hearing, the plaintiff suffered a voluntary nonsuit as to its cause of action against the defendant, J. L. Kerr, for money collected by the said defendant and due plaintiff as rents.

The demurrer was overruled; a temporary restraining order was continued to the final hearing; and the defendants appealed to the Supreme Court.

Bryant & Jones for plaintiff.
Butler & Butler for defendants.

CONNOR, J. This is an action to recover of the defendants, J. L. Kerr, and his wife, Sadie A. Kerr, the amount of their indebtedness to the plaintiff, as alleged in the complaint, and to have the amount of the judgment which the defendant, J. L. Kerr, has recovered of the plaintiff in the Superior Court of Sampson County applied as a payment on the judgment in this action. In order that it may have the relief prayed for with respect to said judgment, the plaintiff prays that the assignment of the judgment by the defendant, J. L. Kerr, to the defendants, Geo. E. Butler, Algernon Butler and James S. Kerr, be declared void and set aside, and that the defendant, L. C. Parker, sheriff of Sampson County, be restrained and enjoined from selling under execution on said judgment, its lands in Sampson County. The action is in the nature of an action for an accounting, and was begun and was pending in the Superior Court of Durham County, when the judgment overruling the demurrer, and containing the temporary restraining order was rendered.

The plaintiff is a corporation, organized and doing business under the laws of the United States, with its principal office in the city of Durham, in Durham County, North Carolina. The defendants are citizens of this State, and residents of Sampson County. Durham

County is the proper venue for the trial of the action (C. S., 469, *Mortgage Co. v. Long,* 205 N. C., 533, 172 S. E., 209, *Smith-Douglass Co. v. Honeycutt,* 204 N. C., 219, 167 S. E., 810), and the Superior Court of said county has jurisdiction of the action, certainly, as to the defendants, J. L. Kerr and his wife, Sadie A. Kerr.

The plaintiff does not in its complaint attack the judgment which the defendant, J. L. Kerr, has recovered against it in the Superior Court of Sampson County, or attempt to impeach its validity. It concedes that said judgment is conclusive and is not subject to any defense which it may have had the right to interpose in the action in which it was rendered. The principle that the validity of a judgment may be challenged by a party to the action in which it was rendered, and that an execution to enforce such judgment may be recalled or set aside, only by a motion in the action in which the judgment was rendered, and not by an independent action, is not applicable in the instant case. The principle is applicable only where the party against whom the judgment was rendered, seeks to attack the judgment on the ground that on the facts alleged, the judgment is void or voidable. The contention of the defendants that the Superior Court of Durham County was without jurisdiction of this action cannot be sustained.

Nor can the contention of the defendants that there is a misjoinder in the complaint of parties and causes of action, be sustained. The principal relief sought in the action by the plaintiff is against the defendant, J. L. Kerr and his wife, Sadie A. Kerr. The relief sought against the other defendants is but incidental to the relief sought against their codefendants, and may be had in this action. All the defendants are proper and necessary parties to the action. C. S., 456.

This is an action for an accounting between the plaintiff and the defendant, J. L. Kerr, who has a judgment against the plaintiff, which he is seeking to enforce by execution. In view of the insolvency of the said defendant, the plaintiff is entitled to have the amount of said judgment, if the assignment is declared void and set aside, applied as a payment on the indebtedness of said defendant to the plaintiff, and to that end to have the defendants restrained and enjoined until the final hearing from collecting the judgment by execution. The facts alleged in the complaint are sufficient to constitute a cause of action. See *Wright v. Mooney,* 28 N. C., 23; *Noble v. Howard,* 3 N. C., 14; *Odom v. Attaway* (Ga.), 157 S. E., 871, 15 C. J., 1145, section 597. There is no error in the judgment. It is

Affirmed.

WILLIAM S. LAMBERT v. CHARLES CARONNA.

(Filed 20 June, 1934.)

1. Appeal and Error F b—

An exception to the admission of certain testimony in this case held waived by admission of other testimony by the witness on the same subject without objection.

2. Evidence K a—Nonexpert may testify from observation that shoulders of road were wide enough to park car and as to direction of skid marks.

The admission of testimony of a witness in response to questions by the court to the effect that in witness's opinion the shoulders of the road at the scene of the accident were sufficiently wide to park a car on, and that the skid marks on the highway pointed towards defendant's car, and as to the position of the car when struck as indicated by the skid marks, is held not error, it being competent for a nonexpert witness to testify from observation as to facts observed and inferences therefrom which are so usual and natural, or instinctive as to accord with general experience.

3. Automobiles C e—Flat tire will not excuse parking of car on hard surface where shoulders of road are sufficiently wide.

The charge of the court upon the law prohibiting the parking of cars upon the hard surface of a highway where the shoulders of the road are sufficiently wide, N. C. Code, 2621(66) (a), will not be held for error for the failure to instruct the jury upon the provision in subsection (c) of the act exempting from its operation cases where a car is disabled in such a manner as to make it impossible to avoid parking it temporarily on the hard surface, where the defendant's only evidence in excuse of such parking was that he had a flat tire, such evidence being insufficient to bring defendant within the exception.

4. Same—Parking on highway in violation of statute is negligence and contributory negligence in failing to avoid collision held for jury.

The parking of a car on the hard surface of a highway at night without a tail light in violation of N. C. Code, 2621(66); (89) (a); (94), proximately causing personal injury to plaintiff and damage to his car when the car plaintiff was driving collided with the rear of defendant's parked car, is sufficient to sustain the jury's affirmative answer upon the issue of actionable negligence, and the question of defendant's contributory negligence in failing to see the parked car under the circumstances in time to have avoided the collision, was also properly submitted to the jury.

5. Appeal and Error F b—

Defendant's exception and assignment of error to the court's charge on the issue of damages held fatally defective as a "broadside" exception in failing to specifically point out the matter complained of.

6. Appeal and Error J e—

The court's charge to the jury in this case held not to contain reversible or prejudicial error warranting a new trial, the charge being construed as a whole.

7. Trial G d—

An affidavit in regard to what a juror said in the jury room while discussing the case is held incompetent to impeach the verdict under the rule that jurors may not impeach their own verdict.

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

APPEAL by defendant from *Sinclair, J.*, and a jury, at October Term, 1933, of CUMBERLAND. No error.

This is an action brought by plaintiff against defendant for actionable negligence alleging damage. The defendant denied negligence and set up a counterclaim for actionable negligence against plaintiff alleging damage.

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

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

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

3. What amount, if any, is plaintiff entitled to recover of the defendant? Answer: $5,000.

4. Was defendant injured through the negligence of the plaintiff, as alleged in the answer? Answer: No.

5. Did defendant, by his own negligence, contribute to his own injury, as alleged in the reply? Answer: Yes.

6. What amount, if any, is defendant entitled to recover of the plaintiff? Answer: ....."

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

Dye & Clark for plaintiff.

Downing & Downing and W. E. Kindley for defendant.

CLARKSON, J. The evidence on the part of plaintiff was to the effect that he was a sergeant in the United States Army and had been in the Army for over a quarter of a century. At the time of the injury complained of, he was 59 years of age. On 31 March, 1933, he was on his way from Fayetteville to Fort Bragg between 10 and 11 o'clock at night, driving at a moderate rate of speed, a Chrysler car, 1930 model. There was quite a bit of traffic as it was pay day. He had to tip his

lights frequently to keep from blinding people. Close to the Non-commissioned Officers Club, he had just met a car and was going down a straight incline of the road, had to tip his lights down and on that account was very careful. He was on the right-hand side of the concrete highway (18 feet wide), the rear end of a car loomed up right in front of him, it appeared to be stopped, he was close to it, taking his foot off the accelerator, he tried to throw the car over, but he did not have time until he was almost upon it, and his car struck the rear end of the car and knocked it a considerable distance. His left knee was injured and his head went forward and knocked the windshield out and gave him a severe lick on the head and cut his nose. He was knocked into a kind of daze. It was very dark, he saw no lights on the parked car, just the back of the car loomed in front of his headlights. The car that he struck appeared to him "right square on the hard surface." He was not driving over 30 or 35 miles an hour, "was driving slowly and carefully," was not in a hurry and had driven a car about 12 years. His car was seriously damaged and his estimate as to the amount of damage was $250.00. He remained in the hospital from 31 March, to 4 May.

As to his injury, plaintiff testified, in part: "I can walk fairly good but can't take up a double time, as we call it in the Army. If I have to hurry and take up double time, I can't do that. I have done no mounted duty and was excused from mounted duty. . . . We were to go out on range and I was detailed to go out and I mounted a gentle horse, but it was rather difficult to pull myself up with that leg, but ordinarily I can walk fairly well. It takes spells of popping. It pops every time I bend my knee. . . . My duties require me to ride a horse in any mounted organization. Have been in the present mounted organization that I am now in, since March, 1922. I have to reënlist the 12th of next April before I can be retired. To reënlist, I have to undergo a physical examination."

The testimony of plaintiff as to the fact that he had to reënlist the 12th of April before he could be retired and to reënlist, he had to undergo a physical examination was unobjected to by defendant. The subsequent testimony along the same line, explanatory to the above, was objected to by defendant and assignments of error duly made. We do not think that they can be sustained.

We do not think that the evidence objected to is materially different from that unobjected to. In *Shelton v. R. R.*, 193 N. C., 670 (674), it is said: "It is thoroughly established in this State that if incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been given in other parts of the examination without objection, the benefit of the exception is ordinarily lost." *Nance v.*

Fertilizer Co., 200 N. C., 702 (708); *Bateman v. Brooks*, 204 N. C., 176 (185).

Corporal Henry E. Welch, a witness for plaintiff, testified, in part: "The skid marks showed that the right wheels of the Pontiac (defendant's car) were sitting about an inch to the left of the right-side of the hard surface road on the pavement."

Major Philander C. Riley, a witness for plaintiff, testified, in part: "The car was sitting at 10 feet from the side of the road and looked as if it had been violently struck in the rear. The skid marks that I saw were about 18 inches to two feet long. They were heavy skid marks." Questions by the court: "Q. Were they tire marks upon the hard surface? Answer: I took them for such. Q. Would the marks indicate that all four wheels or all four parts of the wheels were on the hard surface? Answer: I would judge all four wheels, sir. The first skid mark I would judge, was about 10 inches from the east edge of the hard surface, there were two parallel skid marks, about 5 feet apart. The western skid mark was about 5 feet, 10 inches from the eastern side of the road. They were parallel marks about 5 feet apart. Q. Did those skid marks point toward or away from the car you saw that had been wrecked? Answer: I would say that they pointed towards the car, I judge. Question by the court: Q. What do you mean when you say you judge, do you mean that is your opinion? Answer: Yes, sir. Statement by witness, will say: In my opinion it was in the direction in which the car was headed. I observed the shoulders of the road at that point. Without any doubt they were wide enough to drive a car on and get all four wheels completely off without any drop to the side. I would say that they were approximately 8 feet wide."

To the foregoing questions and answers, the defendant objected and assigned errors. We do not think that they can be sustained. In *Kepley v. Kirk*, 191 N. C., 690 (694), we find: "The witness knew the road and was familiar with the conditions and could state the facts from personal observation. '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, citing numerous North Carolina cases."

In *Willis v. New Bern*, 191 N. C., 507 (514), citing numerous authorities it is said: "In addition, a nonexpert witness who has observed a place, can from his observation and acquaintance, testify as to such matters of fact depending on his ordinary powers of observation."

N. C. Code, 1931 (Michie), section 2621(66) (a) and (c) are as follows: "(a) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main

traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off the paved or improved or main traveled portion of such highway: *Provided,* in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway, opposite such standing vehicle shall be left for free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of two hundred (200) feet in both directions upon such highway: *Provided, further,* that in no event shall any person park or leave standing any vehicle whether attended or unattended upon any highway bridge."

"(c) The provisions of this section shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position."

The court below charged the law fully as set forth under (a) *supra.* Defendant contends that the court below omitted to charge the law under (c). We see no error in the exclusion of (c) in the charge. The entire evidence of defendant was that he had a "flat tire," a "puncture." The tire was deflated and it was necessary for him to stop, in so doing, he should have complied with the rule of the road (a), *supra,* the evidence in no way brought him under the provisions of (c). No one testified the Pontiac was disabled in any manner except by a flat tire, or that it could not have been stopped so as to leave fifteen unobstructed feet for the passage of the Chrysler. The defense below was that 15 or more feet were in fact left clear on the hard surface. But this defense the jury ignored by the verdict.

N. C. Code, 1931 (Michie), 2621(89) (a), is as follows: "(a) When vehicles must be equipped. Every vehicle upon a highway within this State during the period from a half hour after sunset to a half hour before sunrise and at any other time when there is not sufficient light to render clearly discernible any person on the highway at a distance of two hundred feet ahead, shall be equipped with lighted front and rear lamps as in this section respectively required for different classes of vehicles and subject to exemption with reference to lights on parked vehicles as declared in section 2621(94)."

Section 2621(94), is as follows: "Whenever a vehicle is parked or stopped upon a highway whether attended or unattended during the times mentioned in section 2621(89), there shall be displayed upon such vehicle one or more lamps projecting a white light visible under normal atmospheric conditions from a distance of five hundred feet

to the front of such vehicle and projecting a red light visible under like conditions from a distance of five hundred feet to the rear, except that local authorities may provide by ordinance that no lights need be displayed upon any such vehicles when parked in accordance with local ordinances upon a highway where there is sufficient light to reveal any person within a distance of two hundred feet upon such highways."

The evidence on the part of plaintiff was to the effect that defendant had no tail light burning. In *Williams v. Express Lines,* 198 N. C., 193 (193-4), it is held: "Evidence tending to show that the plaintiff's automobile collided with defendant's truck parked partly across the highway on a dark night without a tail light in violation of statute, causing personal injury to the plaintiff and damage to his car, is sufficient to sustain an affirmative answer upon the issue of defendant's actionable negligence.

"Contributory negligence of the plaintiff will not be held to bar recovery as a matter of law when an inference in his favor is permissible from the evidence, and in this case where the defendant had parked its car on a dark night upon the side of the highway without a tail light, and there is a reasonable inference that under the existing conditions the plaintiff could not have seen the truck in time to have avoided the injury, in the exercise of ordinary care, the question of contributory negligence upon the issue is for the determination of the jury."

On the issue of damage, we think the exceptions and assignments of error a "broadside." In *Rawls v. Lupton,* 193 N. C., 428 (430), it is said: "In *Gwaltney v. Assurance Society,* 132 N. C., p. 930 (rehearing denied, 134 N. C., 552), construing this statute, this Court said: 'Each exception to the charge is required by the statute (The Code, sec. 550, now C. S., 643), to be stated separately in articles 'numbered,' and no exception should contain more than one proposition, else it is not 'specific,' and must be disregarded.'

"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," citing a wealth of authorities.

In *S. v. Bitting, post,* 798, *Stacy, C. J.,* again calls the profession's attention to the *Rawls case, supra.* Taking the charge as a whole, based on the evidence, if error, we do not think it such reversible or prejudicial error that would warrant a new trial.

The affidavit in regard to what was overheard—as to what a juror said in the jury room discussing the case, was incompetent to impeach

the verdict. *Baker v. Winslow*, 184 N. C., 1 (9), it is said: "In effect, allow jurors to impeach their own verdict, which they cannot do." *Lumber Co. v. Lumber Co.*, 187 N. C., 417 (418); *Campbell v. R. R.*, 201 N. C., 102 (108). In the judgment of the court below, we find

No error.

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

ANDERSON CHAMBERLAIN v. HOME SECURITY LIFE INSURANCE COMPANY.

(Filed 20 June, 1934.)

1. Appeal and Error J g—Consideration of issue based on cause of action abandoned during trial held not necessary to decision of appeal.

Where plaintiff alleges two causes of action, but apparently abandons the second and fails to tender an issue as to damages thereon and the court fails to submit such issue to the jury, the answer of the jury to a prior issue based exclusively on matters pertaining to the cause of action abandoned need not be considered in deciding the questions involved in the appeal.

2. Courts A a—Sum demanded in good faith held to exceed two hundred dollars and Superior Court has jurisdiction.

Plaintiff brought this action in the Superior Court, alleging that he had three policies of insurance issued by defendant insurer on different dates, that he tendered insurer's agent, while the policies were in force, the amount due on premiums in arrears, and that insurer refused to accept the sum tendered and canceled each of the policies because plaintiff refused to pay premiums in arrears due on a policy issued by the insurer to plaintiff's wife, and that such cancellation was wrongful, wilful, wanton and malicious. Plaintiff demanded damages in the sum of $168.20, the amount paid by him as premiums on the policies, together with $500.00 punitive damages. Plaintiff did not tender an issue as to punitive damages nor did the court submit such issue. Defendant insurer demurred to the complaint on the ground that the cause of action was within the exclusive jurisdiction of a justice of the peace. *Held*, the demurrer was properly overruled, the simultaneous cancellation of the three policies constituting a single cause of action, and the sums demanded as actual and punitive damages being different elements of damage accruing from the single cause of action, and it being impossible to determine as a matter of law that the demand for punitive damages was not made in good faith.

3. Insurance H d—Measure of damages for wrongful cancellation of policy.

In an action to recover against insurer for its wrongful cancellation of a policy of insurance plaintiff may recover the sums paid by him

as premiums on the policy if he so elects, or in proper cases he may recover the value of the policy at the date of cancellation, or the sum presently required to obtain like protection for plaintiff.

4. Appeal and Error J e—

Exceptions to the court's charge in this case are not sustained, it appearing that appellant was not prejudiced by the instructions given.

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

APPEAL by defendant from *Stack, J.*, at February Term, 1934, of GASTON. No error.

This is an action to recover damages for the wrongful, wilful, wanton and malicious cancellation by the defendant of three policies of insurance on the life of the plaintiff issued to him by the defendant, and also to recover on one of said policies for a disability resulting from an injury to plaintiff's hand.

In his complaint, the plaintiff alleges that from the issuance of said policies to their cancellation, he paid to the defendant the sum of $168.20, as premiums on said policies; and that he is entitled to recover the said sum as his actual damages resulting from the cancellation of said policies by the defendant. He also alleges that in addition to his actual damages, he is entitled to recover of the defendant the sum of $500.00, as punitive damages, for the reason that the cancellation of said policies by the defendant was not only wrongful and unlawful, but also wilful, wanton and malicious.

He further alleges that while said policies were in force, he suffered a disability, resulting from an injury to his hand, and that by the terms of one of said policies, he is entitled to recover of the defendant on account of said disability the sum of $6.00.

In its answer, the defendant admits the issuance and cancellation of said policies of insurance, and the payment by the plaintiff as premiums on said policies, prior to their cancellation, of the sum of $168.20; it denies, however, that the cancellation of said policies was wrongful and unlawful, or wilful, wanton and malicious; it also denies that it is liable to plaintiff for the disability resulting from an injury to his hand, as alleged in the complaint. It prays judgment that the plaintiff recover nothing by his action, and that it recover its costs.

At the trial, the evidence for the plaintiff tended to show that the defendant issued to the plaintiff three policies of insurance on his life, one dated 14 April, 1924; one dated 18 February, 1924; and one dated 30 November, 1931; that the premiums on said policies were payable weekly, the total amount of said premiums being seventy cents per week; and that some time in March, 1933, the defendant, over the protest of the plaintiff and without his consent, canceled all of said

policies. At the date of such cancellation, the plaintiff paid to the agent of the defendant the sum of $1.75, which sum was sufficient to pay the premiums then in arrears, and to keep the said policies in force.

There was evidence tending to show that the defendant had issued to the wife of the plaintiff policies of insurance on her life, and that the premiums on said policies were in arrears in March, 1933; and that the agent of the defendant refused to accept from the plaintiff the sum required to pay the premiums then in arrears on the policies issued to him, unless plaintiff also paid the premiums then in arrears on the policies issued to his wife. The plaintiff testified that the agent of the defendant refused to apply the sum of $1.75, which he had paid to said agent, in payment of the premiums on his policies, but returned said sum to plaintiff, and canceled his policies, as well as the policies on the life of his wife. Because of his advanced age and physical infirmities, plaintiff has been unable to procure other policies on his life.

There was also evidence tending to show that while the policies issued to the plaintiff by the defendant were in force, plaintiff suffered an injury, which caused a disability which was covered by one of said policies; and that defendant wrongfully refused to furnish to the plaintiff blanks on which he was required by the terms of said policy to make proof of his loss. The amount which plaintiff was entitled to recover on account of such disability was $6.00.

There was also evidence tending to show that the total amount of the premiums paid by the plaintiff to the defendant on said policies, prior to their cancellation was $168.20.

At the close of the evidence for the plaintiff, the defendant demurred *ore tenus* to the complaint, on the ground that the Superior Court was without jurisdiction of the action, for that the amount involved was less than $200.00. The demurrer was overruled, and defendant excepted.

The evidence offered by the defendant tended to show that the cancellation of the policies on the life of the plaintiff was not wrongful or unlawful, but was in accord with the terms and provisions of said policies, and was at the request of the plaintiff, who had advised defendant that he was unable to pay the premiums in arrears at the date of said cancellation.

No issue involving punitive damages was tendered by the plaintiff or submitted by the court. The issues submitted to the jury were as follows:

"1. Did the defendant wrongfully refuse to give the plaintiff the form for proof of claim for injury to his hand, as alleged in the complaint? Answer: .....

2. Did the plaintiff on ..... March, 1933, pay or tender to defendant's agent the sum of $1.75, which would bring plaintiff's policies within the grace period of said policies? Answer: .....

3. Did the defendant wrongfully cancel or suspend the policies of the plaintiff as alleged in the complaint? Answer: .....

4. Did the plaintiff pay the premiums on his policies as provided in said policies, for his benefit and protection, in the approximate sum of $168.00? Answer: .....

5. What amount, if any, is plaintiff entitled to recover of the defendant? Answer: ....."

In its charge to the jury, the court stated the contentions of both the plaintiff and defendant with respect to each of the first four issues and fully instructed the jury with respect to the law applicable to each of said issues. The court then instructed the jury with respect to the 5th issue, as follows:

"If you answer each of the first four issues, 'Yes,' in favor of the plaintiff, then the court instructs the jury to answer the 5th issue, '$168.20'; but if you answer the said issues 'No,' or any one of them 'No,' you will answer the 5th issue, 'Nothing.' The defendant excepted to this instruction.

After the court had concluded its charge, but before the jury had retired, counsel for defendant stated to the court, in the presence of the jury, that defendant contended that its agent did not refuse to allow plaintiff to pay premiums on one or any number of the policies, but that it refused to accept the sum of $1.75, as the full amount due as premiums on all the policies. The court then said to the jury:

"Yes, gentlemen, the defendant contends that, and offered evidence to support that contention. If you find with them, you will answer at least some of these issues in the negative." The defendant excepted to this instruction.

The jury answered each of the first issues, 'Yes," and the 5th issue, "$168.20."

From judgment that plaintiff recover of the defendant the sum of $168.20, together with the costs of the action, the defendant appealed to the Supreme Court.

W. H. Sanders for plaintiff.
Bulwinkle & Dolley for defendant.

CONNOR, J. Two causes of action are alleged in the complaint in this action. On the first cause of action, the plaintiff seeks to recover damages, both actual and punitive, for the wrongful, wilful, wanton and malicious cancellation of the policies of insurance on his life issued to him by the defendant. On the second cause of action, he seeks to recover the amount of his claim for a disability resulting from an injury to his hand, which was covered by one of said policies. The second

cause of action was apparently abandoned by the plaintiff at the trial. No issue was tendered by the plaintiff or submitted by the court, involving the amount, if any, which the plaintiff was entitled to recover of the defendant on his second cause of action. For that reason, the affirmative answer to the first issue need not be considered in deciding the questions involved in this appeal. In effect, the plaintiff suffered a nonsuit on his second cause of action.

The first cause of action alleged in the complaint is founded on contract. It is alleged in the complaint that the defendant breached its contracts with the plaintiff, as evidenced by the three policies of insurance which were issued to the plaintiff by the defendant, by its wrongful, wilful, wanton and malicious cancellation of said policies. The facts alleged in the complaint are sufficient to constitute a single cause of action. The three policies of insurance were canceled by the defendant simultaneously. But one cause of action is alleged in the complaint as arising out of the cancellation of the policies. For purposes of jurisdiction, the fact that three policies of insurance, all issued by defendant to plaintiff, but at different dates, and for different amounts, were canceled, is immaterial. *McGowan v. Ins. Co.*, 141 N. C., 367, 54 S. E., 287.

As his damages accruing on his first cause of action, the plaintiff demands judgment that he recover of the defendant (1) the sum of $168.20, this being the amount which he had paid to the defendant as premiums on his policies prior to their cancellation; and (2) the sum of $500.00, this being the amount which he alleges he is entitled to recover as punitive damages. These sums constitute different elements of the damages which accrued from a single cause of action. See *Thompson v. Express Co.*, 144 N. C., 389, 57 S. E., 18, and *Hall v. Telegraph Co.*, 139 N. C., 369, 52 S. E., 50.

In *Braswell v. Ins. Co.*, 75 N. C., 8, which was an action to recover damages for the wrongful cancellation of a policy of insurance on the life of the plaintiff, it was held that where plaintiff elected to demand as his damages the amount paid by him as premiums on his policy, prior to its wrongful cancellation, he could recover such amount as money had and received by the defendant for his use. The judgment for such amount was affirmed.

This principle, when invoked by the plaintiff in an action to recover damages for the wrongful cancellation of a policy of insurance, was approved in *Garland v. Ins. Co.*, 179 N. C., 67, 101 S. E., 616. In that case it was held, however, that in a proper case the plaintiff was entitled to recover the value of the policy at the time it was wrongfully canceled, or the amount which would enable him to procure another policy affording him the same protection as that which he had under the policy which was wrongfully canceled.

It cannot be held as a matter of law that on the facts alleged in the complaint in the instant case, the plaintiff was limited in his recovery for the cancellation of his policies to the amount paid by him as premiums on said policies, prior to their cancellation, and that his allegation that he was entitled to recover punitive damages was not in good faith.

It has been uniformly held by this Court that in actions on contract, the amount demanded in good faith in the complaint is determinative of the jurisdiction of the action. Where such amount exceeds $200.00, the Superior Court has original jurisdiction. *Martin v. Goode,* 111 N. C., 288, 16 S. E., 232. There was no error in the refusal of the court to sustain the demurrer *ore tenus* to the complaint, on the ground that the Superior Court was without jurisdiction of this action.

There was no error in the instruction of the court to the jury, both in the charge and after the conclusion of the charge, that if the jury should answer either of the first four issues in the affirmative, they should answer the 5th issue "$168.20"; but that if they should answer either of said issues in the negative, they should answer the 5th issue, "Nothing." It does not appear that the defendant was prejudiced by this instruction.

We find no error in the trial of the action. The judgment is affirmed.

No error.

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

EX PARTE MRS. ELLA YEOMANS QUICK, GUARDIAN OF MADGE L. YEOMANS, JAMES E. YEOMANS, LILLIE J. YEOMANS, AND GUSSIE YEOMANS, MINORS.

(Filed 20 June, 1934.)

Removal of Causes C c — Proceeding held not to be action at law or suit in equity within meaning of Federal Act regulating removal of causes.

A guardian filed petition with the clerk of the Superior Court to be allowed to mortgage lands of her wards to obtain money to improve the estate under the provisions of N. C. Code, 2180. The clerk entered an order allowing the petition, which was approved by the judge of the court, and the guardian borrowed the money and executed the mortgage to secure the notes given therefor. Upon becoming of age the wards filed a petition to set aside the order and cancel the mortgage solely on the grounds that the order was not made in strict compliance with the

provisions of the statute. The respondent mortgagee filed a petition to remove the proceeding to the United States District Court upon allegations of diversity of citizenship and that more than $3,000 is involved in the proceeding. *Held*, the motion for removal was properly overruled, the proceeding not being a suit of a civil nature, at law or equity, within the meaning of the Federal Act regulating removal of causes.

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

APPEAL by respondent, Federal Land Bank of Columbia, from *Cranmer, J.*, at January Term, 1934, of HOKE. Affirmed.

The above entitled special proceeding was begun before the clerk of the Superior Court of Hoke County on 8 November, 1919. By an order entered in said proceeding, and duly signed by the clerk and approved by the judge of said court, the petitioner, Mrs. Ella Yeomans Quick, guardian, was authorized and empowered to borrow from the Federal Land Bank of Columbia the sum of $5,000, to be expended by her in the improvement of lands in Hoke County, owned by her wards, subject to her life estate, and to secure the payment of said sum by a mortgage on said lands to the Federal Land Bank of Columbia. Pursuant to said order, the money was borrowed and the mortgage was executed and duly recorded in Hoke County.

On 12 December, 1933, Madge L. Yeomans, James E. Yeomans, Lillie J. Yeomans and Gussie Yeomans, each of whom had become of age in the meantime, filed a petition in said proceeding, in which on the facts alleged therein, they prayed that said order be declared void and set aside, and that said mortgage be canceled. Summons was issued in said proceeding and duly served on the Federal Land Bank of Columbia, requiring said bank to appear before the clerk of the Superior Court of Hoke County, on or before 20 January, 1934, and answer or demur to the petition.

Before the time for filing its answer or demurring to the petition had expired, the Federal Land Bank of Columbia filed its petition for the removal of the cause from the Superior Court of Hoke County to the District Court of the United States for the Middle District of North Carolina, for trial. This petition was accompanied by bond as required by statute, and was as follows:

"To the Honorable, the Superior Court of Hoke County, North Carolina:

Your petitioner, the Federal Land Bank of Columbia, respondent named in the above entitled cause, respectfully represents:

1. That your petitioner, the Federal Land Bank of Columbia, was at and prior to the time of the commencement of this suit, and has been since and is now a corporation created, organized and existing under and by virtue of an act of the Congress of the United States of

America, approved 17 July, 1916, and entitled "The Federal Farm Loan Act," with its principal place of business in the city of Columbia, county of Richland, State of South Carolina.

2. That the petitioners in the above named suit are residents and citizens of the county of Hoke, State of North Carolina.

3. That the above entitled suit is of a civil nature and that the amount in controversy therein exceeds the sum of $3,000, exclusive of interest and costs, reference being had to the petition therein, from which it appears that the cause of action therein set forth is for the cancellation of a mortgage to the Federal Land Bank of Columbia, which mortgage is in the sum of $5,000, and for the avoidance of a lien to the Federal Land Bank of Columbia on the property conveyed by said mortgage, and your petitioner alleges that the indebtedness to it secured by said mortgage and the value of said land therein conveyed and at the time of the commencement of said suit and still does exceed the sum of $3,000, exclusive of interest and costs.

4. That the above entitled suit is of a civil nature in equity, arising under the laws of the United States of America, in that your petitioner, the Federal Land Bank of Columbia, is a corporation chartered, organized and existing under an act of Congress, as aforesaid, and that the government of the United States of America is the owner of more than one-half of its capital stock; that the subscription by the United States Government to stock in the Federal Land Bank of Columbia, the respondent, was made by the Secretary of the Treasury of the United States of America in behalf of the United States of America pursuant to an act of Congress approved 23 January, 1932; that by reason of the ownership of the stock of the Federal Land Bank of Columbia by the United States of America, the said controversy can be fully and completely determined as between the said parties in the United States District Court for the Middle District of North Carolina only, and that your petitioner desires to remove the above entitled civil suit to the United States District Court for the Middle District of North Carolina.

5. That the time within which your petitioner is required by the laws of this State and rules of this court to answer or plead to the petition in the above entitled suit has not yet expired.

6. That your petitioner files herewith a good and sufficient bond in compliance with the acts of Congress in such cases made and provided, and conditioned as the law directs that it will within the time required by law file a certified copy of the record in the above entitled suit in the said District Court of the United States for the Middle District of North Carolina, and for the payment of all costs which may be awarded by said court if the said court should determine that the above entitled suit was improperly or wrongfully removed thereto.

Wherefore, your petitioner, the Federal Land Bank of Columbia, respondent in the above entitled cause, prays that this court proceed no further herein except to order the removal of the above entitled civil suit to the District Court of the United States for the Middle District of North Carolina, accept the bond herewith submitted and direct a transcript of the record to be made and certified as by law provided."

Upon the hearing of said petition, judgment was rendered as follows:

"This cause coming on to be heard before the undersigned judge holding the January Term of Superior Court for said county and State, and after due consideration of the petition of the corporate defendant to remove the above cause, this court is of the opinion that no proper grounds have been shown for a removal, and that the matters can be duly adjudicated in this court.

It is therefore, on motion of John Newitt and Ray S. Farris, attorneys for the petitioners, ordered, adjudged and decreed that the motion of the corporate defendant be, and it hereby is overruled, and the corporate defendant is hereby ordered to answer the petition filed in the above cause within thirty days hereafter."

From this judgment, the respondent appealed to the Supreme Court.

John Newitt and Ray Farris for petitioners.
G. B. Rowland and I. M. Bailey for respondent.

CONNOR, J. It is provided by statute in this State that "on application of the guardian by petition, verified by oath, to the Superior Court, showing that the interest of the ward would be materially promoted by the sale or mortgage of any part of his estate, real or personal, the proceeding shall be conducted as in other cases of special proceedings; and the truth of the matters alleged being ascertained by satisfactory proof, a decree may thereupon be made that a sale or mortgage be had by such person, in such way, and on such terms as may be most advantageous to the interest of the ward; but no sale or mortgage shall be made until approved by the judge of the court, nor shall the same be valid, nor any conveyance of title made unless confirmed and directed by the judge and the proceeds of the sale or mortgage shall be exclusively applied and secured to such purposes, and on such trusts as the judge shall specify. The guardian may not mortgage the property of his ward for a term of years in excess of the time fixed by the court in its decree." N. C. Code of 1931 (Michie), sec. 2180.

The petitioners allege in the petition filed by them in the above entitled proceeding that the order or decree made therein, authorizing and empowering their guardian to borrow money from the Federal Land Bank of Columbia, and to secure the payment of the same by a

mortgage on their lands to said bank, was not made in strict compliance with the provisions of the statute, and that for that reason the said order or decree is invalid. They do not allege that the said order or decree or that the mortgage executed pursuant thereto, was procured by fraud, or entered or executed by mistake or accident. They do not rely upon any principle of equity for the relief prayed for, but on the facts alleged in their petition, they pray that the order or decree be declared void and set aside, and that the mortgage be canceled. The proceeding was pending on said petition, at the time the petition for removal was filed by the respondent.

This is not an action at law or a suit in equity, within the provisions of the act of Congress, providing for the removal in certain cases of any suit of a civil nature, at law or in equity, from a State Court to the District Court of the United States. Jud. Code, section 28, as amended. See *Barrow v. Hunton,* 99 U. S., 80, 25 L. Ed., 407.

The judgment in the instant case is affirmed on the authority of the cited case, which has been generally followed by both State and Federal courts.

Affirmed.

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

GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. THE BANK OF PENDER; L. P. HARRELL, LIQUIDATING AGENT FOR THE BANK OF PENDER, AND JULIAN HAMILTON, ASSISTANT LIQUIDATING AGENT FOR THE BANK OF PENDER, v. GEORGE L. PADDISON.

(Filed 20 June, 1934.)

1. Banks and Banking H a—Fraudulent misrepresentations of president inducing purchase of stock from bank held defense to statutory liability.

In proceedings after the insolvency of a bank to enforce the statutory liability against an owner of its stock the stockholder alleged that he purchased the stock from the bank and that he relied upon and was induced to make the purchase by reason of the fraudulent misrepresentations of the president of the bank as to the bank's financial condition, that he had no means of determining the truth or falsity of the president's statements, and that he did not discover their falsity until after the bank was placed in the statutory receiver's hands. *Held,* the president of the bank had authority to make the contract for the bank for the sale of the stock, and the allegations were sufficient to constitute a defense to defendant's statutory liability, and judgment on the pleadings against defendant is erroneous.

2. Limitation of Actions B b—Statute does not run until fraud is discovered or should have been discovered by due diligence.

In this proceeding against defendant to enforce the statutory liability on bank stock owned by him, defendant alleged that he purchased the stock from the bank and was induced to make the purchase by the false and fraudulent misrepresentations of the bank's president. *Held*, whether the defense was barred by the statute of limitations under the facts of the case, N. C. Code, 441(9) is held for the jury, the statute beginning to run only from the discovery of the fraud or when it should have been discovered in the exercise of ordinary care.

CONNOR, J., dissents.

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

APPEAL by defendant from *Cranmer, J.*, at October Term, 1933, of PENDER. Reversed.

The facts as alleged by defendant are to the effect that the defendant, George L. Paddison, is a native of North Carolina, but a citizen of Montana, and lives without the State. He visits relatives and friends at Burgaw, North Carolina, periodically. For many years prior to 1928, and from that date until the Bank of Pender closed, George L. Paddison had on deposit with the Bank of Pender, Burgaw, North Carolina, $1,534.25. On 29 December, 1928, C. C. Branch, president of the Bank of Pender, approached the defendant and stated that the bank owned fourteen (14) shares of its own stock, and asked the defendant to purchase the same, stating, in response to questions by the defendant, that the bank was making more than sufficient money to pay a twelve per cent dividend annually, that the bank was in first-class condition and the book value of the stock was more than two to one, that the bank had no bad paper, only a few slow loans amounting to a few hundred dollars which were collectible, that all loans were adequately secured or endorsed, that the value of the securities had not depreciated below the amount of the loans, that the bank owned no real estate other than the banking house, that the investments of the bank, were worth par or better, and that the bank had suffered no losses. These representations were untrue, but believing them to be true and relying upon them, the defendant purchased the fourteen (14) shares of stock, and they were transferred to him on 28 January, 1929. The defendant contended that he had no way to determine the truthfulness of these statements other than the statements made to him by the president of the bank, and relied and acted upon them. The Bank of Pender closed on 7 January, 1932. The defendant returned to North Carolina in August, 1932, and then discovered for the first time that the representations which had been made to him were false and untrue at the time they were made, and are now false and untrue. The defendant was served with sum-

mons in this action during his visit, and filed the answer set out in the record of this case.

The defendant tendered the following issues: "(1) Was the sale of fourteen shares of stock to the defendant, George L. Paddison, procured by the false and fraudulent representations of C. C. Branch, president of the Bank of Pender, acting for said bank? Answer: ..... (2) If so, did the defendant afterwards exercise due care and diligence in discovering the fraud and repudiating the contract of purchase? Answer: ....." To the submission of the foregoing issues, the plaintiffs objected and moved the court for judgment on the pleadings and admissions. The court declined to submit said issues and the defendant excepted and assigned error. On motion of the plaintiffs for judgment, the court ruled that the defense set up by the defendant, alleging that he was induced to purchase said stock through the fraudulent misrepresentations of the president of the bank was not available in this action and sustained the plaintiffs' motion, and the defendant excepted and assigned error.

The judgment of the court below is as follows: "This cause coming on for hearing before his Honor, E. H. Cranmer, judge holding courts in the Eighth Judicial District, and a jury; upon the reading of the pleadings and submission of the issues, the defendant having admitted at the time of the transfer of the fourteen shares of stock by the defendant, George L. Paddison, to Hugh Overstreet, Jr., referred to in the pleadings, that Hugh Overstreet, Jr., was at said time, and at the time of the institution of this suit, a minor under the age of twenty-one years, and the court being of the opinion, and so holding as a matter of law, that such transfer of said stock did not relieve the defendant of his liability and that the defense of fraud, as pleaded by the defendant, is not available to him as a defense in this cause, and so holding as a matter of law: It is, therefore, upon motion of R. G. Johnson and Kellum & Humphrey, plaintiffs' attorneys, considered, ordered, adjudged and decreed that judgment be, and the same is, hereby rendered in favor of the plaintiffs and against the defendant in the sum of $1,400, with interest thereon at the rate of six per centum per annum from 6 January, 1932, until paid. It further appearing to the court that at the time of the institution of this suit, a warrant of attachment issued out of this court and that the sheriff of Pender County attached the lands described in the warrant of attachment of record and the deposit in the name of said defendant, as in said warrant of attachment set out, and also at which time, an attachment bond of record was executed by the plaintiffs. It is further adjudged and decreed that the attachment bond executed for and on behalf of the plaintiffs be discharged; that said lands and said deposit account be, and the same are hereby condemned to be sold by C. D. Humphrey, who is appointed a com-

missioner of this court to sell said lands, or so much thereof as may be necessary, to satisfy the judgment herein rendered, after due advertisement as provided by law, who shall credit the net proceeds arising from such sale, or such amount thereof as may be necessary, on account of the judgment herein rendered in favor of the plaintiffs to pay said judgment in full, and report all of his acts and doings to this court. It is further ordered, adjudged and decreed that all dividends arising from said deposit account shall be credited on account of said judgment, unless and until said judgment is paid in full; and that judgment is rendered against the defendant for the costs of this action, to be taxed by the clerk of this court, such costs to be paid from the proceeds from said deposit or the sale of said lands, including the costs of the sale of said lands, before crediting any amount on the judgment herein rendered."

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

R. G. Johnson and Kellum & Humphrey for plaintiffs.
Clifton L. Moore and J. O. Carr for defendant.

CLARKSON, J. The question involved: May the defendant, alleged owner of capital stock in a defunct State bank, in an action by the Commissioner of Banks to recover of the defendant the amount of his statutory liability as such stockholder, avail himself of the defense that he was induced to purchase said stock by the false and fraudulent representations of the condition of the bank by its president? We think, under the facts and circumstances of this case, that there was sufficient competent facts alleged by defendant on the record, to be submitted to the jury on the question involved.

The defendant, as a defense, alleged and set up actionable fraud on the part of the president of the bank, in the purchase of the stock. Whatever may be the English decisions and some of the American decisions, this Court has held that actionable fraud, if shown, is a good defense. In *Chamberlain v. Trogden,* 148 N. C., 139 (140-141), speaking to the subject, citing numerous authorities, is the following: "There is some conflict of authority as to the right of a subscriber to rescind his subscription or maintain a defense to his obligation therefor on the ground of fraud, after the corporation has become insolvent and its affairs have passed into the possession and control of a receiver or the bankruptcy court, or other method of general adjustment, primarily for the benefit of creditors. The English cases and some courts in this country have held that, under conditions indicated, it is no longer open to the subscriber to maintain such a defense. These English decisions, however, are said to be based to some extent on the construction given

to certain legislation on the subject, and the weight of authority in this country seems to establish that, under exceptional circumstances, the subscriber may avail himself of the position suggested even after insolvency. . . . All of the authorities, however, are to the effect that, in order to do so, the subscriber must act with promptness and due diligence, both in ascertaining the fraud and taking steps to repudiate his obligation." The president of the bank had authority to make the alleged contract. *Warren v. Bottling Co.*, 204 N. C., 288 (290).

This whole matter is thoroughly discussed in *Hood v. Martin*, 203 N. C., 620, citing the *Chamberlain case, supra*. The period prescribed for the commencement of action, N. C. Code, 1931 (Michie), section 441, in part: "Within three years an action—(1) Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections. . . . (9) For relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

The statute runs from the discovery of the fraud or when it should have been discovered in the exercise of ordinary care. In the present case, we think the facts on the record, sufficient to be submitted to the jury on the issues tendered by defendant.

The question of the transfer of the stock to Hugh Overstreet, Jr., a minor, is abandoned on this appeal by the defendant. See *In re Trust Co.*, 203 N. C., 238; *Early v. Richardson*, 280 U. S., 496, found on page 658 of 69 A. L. R., annotation, in part, on page 684. For the reasons given, the judgment of the court below is

Reversed.

CONNOR, J., dissents.

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

CARL WILSON AND OTHERS v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA.

(Filed 20 June, 1934.)

Insurance H a — Provision that insurer should give five days notice before canceling policy held for benefit of insured and binding on insurer.

Defendant insurer sent written notice of the cancellation of a policy of fire insurance containing the standard mortgagee clause to the mortgagee protected thereby, the insurer having the right to cancel the policy at its

option according to the terms of the policy by giving insured five days written notice of cancellation. All the evidence showed that insurer desired to cancel the policy and proceeded to do so under its terms without the consent of plaintiff mortgagee, and there was evidence that loss covered by the policy occurred within five days from the date plaintiff received defendant's written notice of cancellation, and that plaintiff, in compliance with insurer's request in the notice of cancellation, mailed the policy to insurer during the five-day period, but before he had knowledge of the occurrence of the fire. *Held*, the provision for five days notice before cancellation was for the protection of plaintiff, and insurer could not effect cancellation until the expiration of five days from the receipt of the written notice by plaintiff, and whether plaintiff intended to waive this provision and did waive it by returning the policy as requested was for the determination of the jury, and insurer's motion as of nonsuit was properly denied.

APPEAL by defendant from *Shaw, Emergency Judge,* at January Term, 1934, of SURRY. No error.

This is an action to recover the loss suffered by the plaintiff, Carl Wilson, resulting from the destruction by fire of a dwelling-house located on a farm in Surry County, North Carolina, and covered by a policy of fire insurance issued by the defendant.

The policy was issued to the plaintiff, Eugene Chilton, the owner of the farm on which the dwelling-house was located. It was agreed that any loss or damage covered by the policy should be payable to the plaintiff, Carl Wilson, mortgagee, as his interest might appear. The policy was issued on 26 March, 1929, and according to its terms expired five years after its date, to wit: 26 March, 1934. The dwelling-house covered by the policy was destroyed by a fire which occurred between 11:30 a.m., and 12 o'clock, noon, on 7 December, 1931. The amount due on the note secured by the mortgage from Eugene Chilton to Carl Wilson, at the date of the fire, was $1,000, with interest from 19 December, 1929.

On 2 December, 1931, the defendant sent to the plaintiff, Carl Wilson, by mail, from its home office in Pittsburgh, Pa., a notice as follows:

"CANCELLATION NOTICE TO OWNER.

Carl Wilson, Pittsburgh, Pa., 2 December, 1931.
Pilot Mountain, N. C.

Dear Sir: The National Union Fire Insurance Company, of Pittsburgh, Pa., notifies you that it hereby cancels its policy No. 305, issued to you, covering on farm property situated at 5 M. from Westfield, said cancellation to take effect five days from receipt hereof, in accordance with its conditions, upon the expiration of which five days the said policy becomes null and void without further notice.

On demand we will refund $3.65 and unpaid note $24.00, being the full amount of unearned premium on said policy for the unexpired term thereof, and we hereby request that you return the policy to the company.

Yours truly,
National Union Fire Insurance Company."

This notice was received by the plaintiff, Carl Wilson, at Pilot Mountain, N. C., through the mail, on Saturday, 5 December, 1931. On Monday morning 7 December, 1931, the plaintiff showed the notice to F. W. Lawson, of Pilot Mountain, N. C., and requested the said Lawson, who had issued the policy, as the local agent of the defendant, to advise him what he should do. F. W. Lawson advised the plaintiff that he was no longer the agent of the defendant, but suggested that plaintiff call on Welch Bowman, a fire insurance agent at Pilot Mountain, N. C., and get Mr. Bowman to write another policy for plaintiff. The plaintiff accompanied by F. W. Lawson, called at the office of Welch Bowman, and upon ascertaining that the said Bowman would write him a policy to take the place of the policy issued by the defendant, requested him to do so. The plaintiff showed the notice which he had received from the defendant to Mr. Bowman, who thereupon placed the policy issued by the defendant in an envelope addressed to the defendant, at Pittsburgh, Pa., and handed the same to the plaintiff, who thereafter, about 11 o'clock a.m., on 7 December, 1931, deposited the envelope, containing the policy, in the post office at Pilot Mountain, N. C. A few days thereafter, the plaintiff received from Mr. Bowman, through the mail, a policy of insurance covering the dwelling-house. This policy, according to its terms, became effective at 12 o'clock, noon, on 7 December, 1931.

The dwelling-house covered by the policy of insurance issued by the defendant was destroyed by a fire which occurred between 11:30 a.m. and 12 o'clock, noon, on 7 December, 1931. The plaintiff first heard of the fire on 15 December, 1931, and then notified Mr. Bowman who advised him that the policy issued by him did not become effective until after the dwelling-house had been destroyed by fire. Plaintiff thereafter received a letter from the defendant as follows:

"Carl Wilson, 16 December, 1931.
Pilot Mountain, N. C.

Dear Sir: Supplementing our registered letter cancellation notice, dated 2 December, we are attaching hereto our voucher No. 29457 for $3.65, which represents the unearned premium due to cancellation of this policy, along with your canceled note for $24.00.

Very truly yours, Auditor."

Plaintiff offered evidence tending to show that the cash value of the dwelling-house covered by the policy, at the time of the fire was $1,200, and that the amount due to plaintiff as mortgagee, at the time of the trial, was $900.00.

The issues submitted to the jury were answered as follows:

"1. Was the dwelling-house described in the complaint destroyed by fire, as alleged in the complaint? Answer: Yes.

2. Was the policy of fire insurance referred to and described in the complaint in force and effect at the time of the fire as alleged in the complaint? Answer: Yes.

3. What was the actual cash value of the building destroyed by fire at the time of the fire? Answer: $1,200.

4. What amount, if any, was the plaintiff, Eugene Chilton, indebted to the plaintiff, Carl Wilson, on the note secured by deed of trust on the property described in the complaint, at the time of the fire? Answer: $1,000, with interest from 19 December, 1931.

5. What amount, if any, are the plaintiffs entitled to recover of the defendant? Answer: Carl Wilson entitled to recover $900.00, and Eugene Chilton nothing."

From judgment that the plaintiff, Carl Wilson, recover of the defendant the sum of $900.00, and the costs of the action, the defendant appealed to the Supreme Court.

W. R. Badgett for plaintiffs.

Smith, Wharton & Hudgins and Folger & Folger for defendant.

CONNOR, J. It is conceded that the defendant is liable under the policy sued on in this action for the loss suffered by the plaintiff, Carl Wilson, as the result of the destruction by fire of the dwelling-house covered by the policy unless, as contended by the defendant, the policy was canceled prior to the fire.

The policy sued on is in the form of the Standard Fire Insurance Policy of the State of North Carolina. C. S., 6437. It is provided therein that "this policy will be canceled at any time at the request of the insured, in which case the company shall upon demand and surrender of the policy refund the excess of paid premium above the customary short rate for the expired time. The policy may be canceled at any time by the company by giving to the insured five days written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess if not tendered shall be refunded on demand. Notice of cancellation must state that the excess premium (if not tendered) will be refunded on demand."

There was no evidence tending to show that the plaintiff requested the defendant to cancel the policy prior to the fire, as he had the right to do, under the provisions of the policy. All the evidence showed that the plaintiff wished the policy to remain in force until its expiration according to its terms. Immediately upon his receipt of the notice that defendant would cancel the policy at the expiration of five days, without his consent, as it had a right to do, under the policy, he applied for a new policy to take the place of the policy issued by the defendant for his protection.

All the evidence shows that the defendant desired to cancel the policy, and proceeded to do so in accordance with its provisions, without the consent of the plaintiff. The cancellation by the defendant did not and could not under the provisions of the policy take effect until the expiration of five days from the receipt of the written notice by the plaintiff. This provision of the policy was manifestly for the protection of the plaintiff. *Dawson v. Ins. Co.*, 192 N. C., 312, 135 S. E., 34. Whether or not the plaintiff intended to waive this provision and did waive it, when he returned the policy to the defendant, by mail, as he was requested to do, was a question for the jury. There was no error in the refusal of the trial court to allow defendant's motion for judgment as of nonsuit.

We have examined defendant's assignments of error based upon exceptions to the admission of evidence tending to show the cash value of the dwelling-house at the date of the fire, and to instructions of the court to the jury. These assignments of error cannot be sustained. We find no error in the trial. The judgment is affirmed.

No error.

UNITED STATES FIDELITY AND GUARANTY COMPANY v. GURNEY P. HOOD, COMMISSIONER OF BANKS.

(Filed 20 June, 1934.)

Banks and Banking H c—Amount for which insurer may prove claim where other collateral is sold and proceeds paid county on its deposit.

A county's deposit in a bank was secured by State bonds and indemnity bonds written by plaintiff insurer. N. C. Code, 1334(70). After the bank became insolvent the State bonds were sold at the request of insurer, and the county received the proceeds thereof, and the insurer paid the county the balance due on its deposit, and the county assigned to the insurer its claim against the bank in the total amount of the deposit at the time of insolvency. Insurer brought this action to compel the

liquidating agent to allow proof of its subrogated claim for the total county deposit at date of the bank's insolvency without deducting the amount received from the sale of the State bonds, claiming it was entitled to pro rata dividends on the total deposit until such dividends plus the amount received from the sale of the State bonds equaled the amount of the county's deposit. *Held*, the insurer was entitled to prove its subrogated claim only for the amount of the deposit less the proceeds from the sale of the State bonds, the sum it actually paid the county. *Milling Co. v. Stevenson*, 161 N. C., 510, distinguished by the fact that in that case the collateral was held and not sold and applied to the debt.

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

APPEAL by plaintiff from *Shaw, Emergency Judge,* at Chambers, April, 1934. From DURHAM. Affirmed.

The agreed statement of facts: The plaintiff and defendant agree that the facts pertaining to the above entitled action and based upon the allegations set out in the complaint and answer filed herein are as follows: (1) That the allegations set out in paragraphs Nos. 1, 2, 3, 4, and 6 of the complaint filed herein are true. (2) That previous to and on 4 January, 1932 (the date the Merchants Bank of Durham, N. C., was taken over for the purpose of liquidation by the defendant G. P. Hood, North Carolina Commissioner of Banks) the county of Durham, through its treasurer, was a depositor at the Merchants Bank; that on 4 January, 1932, the county of Durham had on deposit in the Merchants Bank of Durham, N. C., the sum of $43,950.48; that to secure this deposit, as provided by law (C. S., section .....) the bank had deposited with an associate, North Carolina State bonds in the sum of $29,000; that to further protect said deposit, the bank secured two indemnity bonds from the plaintiff in the total amount of $27,500; that a copy of each of the said indemnity bonds are attached to the plaintiff's complaint filed herein, marked Exhibits "A" and "B." (3) That shortly after the Merchants Bank of Durham, N. C., closed on 4 January, 1932, an agent, official or representative of the plaintiff, with authority to act, called on the officials of Durham County, which included the manager of Durham County, and insisted that the county of Durham immediately sell the said North Carolina State bonds, having a par value of $29,000, as the plaintiff contended the said county of Durham had a right to do (and which it did) in order to ascertain the exact amount due by the plaintiff, the United States Fidelity and Guaranty Company, to the county of Durham under the said indemnity bonds above referred to; that the county of Durham, through its officials, on 29 January, 1932, sold the said North Carolina State bonds of the par value of $29,000 for the sum of $26,353.57 and credited the same on the deposit of $43,950.48 which the county of Durham had deposited with the said Merchants Bank of Durham, N. C., at the

time it closed, leaving a balance due the county of Durham on said deposit, for which the plaintiff was liable to said county of Durham, in the sum of $17,596.91, which amount of $17,596.91 the plaintiff paid to the county of Durham on ..... May, 1932. (4) That on 12 May, 1932, the plaintiff, after paying the county of Durham the amount of $17,596.91, in fulfillment of its obligations on its said bonds, took from the county of Durham a receipt and assignment of its claim against the liquidating agent of the said the Merchants Bank of Durham, N. C., a copy of which receipt and assignment is attached to the complaint filed herein and marked Exhibit "C." (5) That notice of said assignment was given to the liquidating agent of the Merchants Bank on ..... May, 1932; that previous to and on 6 June, 1932, the liquidating agent of the Merchants Bank, as well as attorneys for said liquidating agent, advised R. P. Reade, Esq., attorney for the county of Durham, that neither the county of Durham nor the United States Fidelity and Guaranty Company, was entitled to and would not be allowed to file its claim for the sum of $43,950.48, but was entitled and would be allowed to file its claim for the amount of $17,596.91, the amount of the deposit less the amount for which the said North Carolina State bonds purchased by said bank and held as part security for the deposit of said county were sold. (6) That the Merchants Bank of Durham, N. C., got the county of Durham to pay one-half of the premiums for said two indemnity bonds above referred to: The Merchants Bank of Durham, N. C., and the county of Durham paying $30.00 each on the indemnity bond for $10,000, and the Merchants Bank of Durham, N. C., and the county of Durham paid $52.50 each as the premium on the indemnity bond for $17,500. (7) That the county of Durham on 18 March, 1932, within the time allowed for filing claims, undertook to file a claim with the liquidating agent of the Merchants Bank for the sum of $43,950.48. This the 28 April, 1934, Fuller, Reade & Fuller, attorneys for plaintiff. Brawley & Gantt, attorneys for defendant."

This action was brought by the plaintiff as assignee of Durham County to compel the defendants to allow said claim for $43,950.48. Upon the agreed statement of facts set out in the record, his Honor, Thomas J. Shaw, judge presiding over the Superior Court of Durham County, held that plaintiff as assignee of Durham County is entitled to prove its claim for only $17,596.91.

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

Fuller, Reade & Fuller for plaintiff.
Brawley & Gantt for defendant.

CLARKSON, J. The question: Has the plaintiff, as assignee of Durham County, a secured depositor creditor of the Merchants Bank of Durham, North Carolina, the right to receive dividends on $43,950.48, the total amount of its claim as it stood, at the time the bank was closed because of insolvency? We think not, under the facts and circumstances of this case.

N. C. Code, 1931 (Michie), sec. 1334(70), in part, is as follows: "The board of commissioners is hereby authorized and empowered to select and designate annually, by recorded resolution, some bank or banks or trust company in this State as an official depository of the funds of the county, and the county commissioners shall require of such depository North Carolina State Bonds and/or United States Government Bonds or a bond in some surety company authorized to do business in North Carolina in an amount sufficient to protect such deposits, but in no event not less than the average daily bank balance of the county for the preceding year; but the board may at any time require an additional bond in its discretion. *Provided*, that a bank giving North Carolina State Bonds and/or United States Government Bonds as security for county funds may deposit said bonds with another bank which has been approved by the Corporation Commission as a depository bank, said bonds to be held for the benefit of the county and subject to the order of the board of county commissioners of said county."

In accordance with the above statute, the Merchants Bank of Durham, N. C., had deposited with another bank, North Carolina State bonds in the sum of $29,000 and further to protect said deposit, secured two indemnity bonds in plaintiffs' company, totaling $27,500. The plaintiff insisted that these bonds be sold by the county of Durham to ascertain what was due on the indemnity bonds given by plaintiff. The bonds were sold for $26,353.57 and the proceeds credited on the deposit of $43,950.48, leaving a balance of $17,596.91, which plaintiff paid to Durham County.

The plaintiff contends that it was entitled from the insolvent bank, the prorata on $43,950.48, irrespective of the amount realized from the sale of the State bonds. To sustain its contention it cites *Winston v. Biggs*, 117 N. C., 206; *Bank v. Flippen*, 158 N. C., 334; *Milling Co. v. Stevenson*, 161 N. C., 510; *Bank v. Jarrett*, 195 N. C., 798. We do not think the construction plaintiff puts on these cases are applicable to the facts on this record.

We find that it is said in *Bank v. Flippen, supra*, pp. 335-6: "When such dividends, added to any sums collected by the creditor from collateral, shall have paid the debt in full, then dividends of course must cease, and the uncollected collateral delivered to the receiver. . . .

In *Merrill v. Bank,* 173 U. S., 131, the Supreme Court of the United States holds that 'A secured creditor of an insolvent bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals or collections made therefrom, after such declaration, subject always to the proviso that dividends must cease when, from them and from collaterals realized, the claim has been paid in full.' "

In *Milling Co. v. Stevenson, supra,* p. 513: "The receiver is not entitled to any securities in the hands of the appellant, the Home Savings Bank, until the bank has received full payment of its claims for $1,750 filed with the receiver. The bank is entitled to prorate with other creditors on the basis of $1,750, and then apply the proceeds of all collaterals in its hands to payment of the balance of its claim, unless the collaterals shall amount to more than the balance due. *Bank v. Flippen,* 158 N. C., 334, and cases cited." We think the facts in this case come more within the principle.

In *Bank v. Alexander,* 85 N. C., 352 (353): "On 30 November, 1877, the principal debtors made an assignment for the benefit of their creditors, from the proceeds of which the plaintiff has received and applied to the notes a payment of 66 per cent of the amount due. The plaintiff now proposes to prove against the testator's estate, the full amount of the notes without deduction of the sum paid, and claims to share upon the basis of an unreduced debt in the prorata distribution of the fund in the hands of the executor." Held that the payment extinguished the debt *pro tanto.*

In *Chemical Co. v. Edwards,* 136 N. C., 73: "Insolvency—Where a debtor holds certain notes as the property of the creditor, to be applied on his debt when collected, any amount collected on the notes is part payment of the debt and the debtor shares in the funds belonging to the administrator only in proportion to the balance of the debt due."

In the present action, the agreed statement of facts, number three *supra,* shows that these North Carolina State bonds were sold at the request of plaintiff and credited on the $43,950.48 deposit, so that plaintiff could ascertain the balance due on the indemnity bonds. This balance $17,596.91 was paid by plaintiff and for this amount, it can file its claim. When plaintiff took the assignment on 12 May, 1932, there was due only $17,596.91. Under the facts and circumstances of this case, it cannot prove for $43,950.48 although the claim for that amount was assigned to it. The bonds were sold and the credit made at plaintiff's solicitation. The plaintiff is subrogated to the amount it voluntarily paid out after it had the bonds sold and credited on the deposit. The bonds were sold and brought less than par, they were sold at plaintiff's insistence and it cannot now contend that it is subrogated to the full

amount of the deposit in the insolvent bank. After plaintiff's conduct in having the bonds sold and credited on the county of Durham deposit, it is too late now to contend that it is subrogated to the original deposit of the county of Durham in the insolvent bank.

It will be noted that in the cases cited by plaintiff, the creditor held the collateral and in case of insolvency had the right to prove for the full amount of the debt before exhausting other collateral held. This is not the factual situation in the present case. Durham County held as collateral or security for the deposit (1) $29,000 N. C. State bonds, (2) $27,500 indemnity bonds of plaintiff. This is the distinguishing feature between the cases cited by plaintiff and the present case. For the reasons given, the judgment of the court below is

Affirmed.

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

STATE OF NORTH CAROLINA v. W. M. SASSEEN AND E. D. KINARD.

(Filed 20 June, 1934.)

Municipal Corporations H d: Constitutional Law G a—Ordinance requiring operators of motor vehicles for hire to furnish policies of liability insurance or cash or securities held unconstitutional.

A municipal ordinance requiring all operators of passenger motor vehicles for hire within the city to deposit with the treasurer of the city policies of liability insurance in responsible companies authorized to do business in the State in a stipulated amount for each car operated, or cash or securities in the sum required, *is held* void as being in contravention of Const., Art. I, sec. 7, prohibiting separate or exclusive emoluments, but in consideration of public service, and Const., Art. I, sec. 31, interdicting perpetuities and monopolies, in that the ordinance fails to provide that the security required might be furnished by one or more solvent individual sureties. Whether the ordinance is void as being in contravention of the general law or policy of the State as declared in chapter 116, Public Laws of 1931, *held* not necessary to a decision of the appeal.

APPEAL by the State of North Carolina from special verdict and judgment, *Sinclair, J.*, at Special April Term, 1934, of MECKLENBURG. Affirmed.

"Special verdict and judgment of Judge Sinclair: In the above entitled action, the jury returns the following special verdict. (1) That on 27 October, 1933, the city of Charlotte adopted the following ordinance: An ordinance to regulate the operation of cabs, taxi-cabs, and for-hire

cars and to protect the public from injury and damage resulting from negligence in the operation of said cabs, taxi-cabs or for-hire cars on the streets of the city of Charlotte. Be it ordained by the council of the city of Charlotte.

"Section one: No person, firm or corporation shall operate, or cause to be operated, upon the streets of the city of Charlotte, any cabs, taxi-cabs, U-Drive-It, or for-hire car or automobile unless (a) said person, firm or corporation shall have filed with the treasurer of the city of Charlotte, a policy or policies of liability insurance with a reliable and responsible company authorized to do business in the State of North Carolina, in form to be approved by the city attorney, indemnifying the licensee as to each cab, taxi-cab, 'U-Drive-It' or for-hire car or automobile in the sum of five thousand dollars ($5,000) for injury to one person, or ten thousand dollars ($10,000) for injury to more than one person, and one thousand dollars ($1,000) property damage, in any one action for which said driver or owner of cab, taxi-cab, 'U-Drive-It' or for-hire car or automobile may be held liable. (B) In lieu of such insurance policy or policies, said person, firm or corporation may deposit like amounts with the treasurer of the city of Charlotte, in cash, or securities to be approved by the city manager, indemnifying persons who may be injured, or whose property may be damaged by the negligent operation of such cabs, taxi-cabs, 'U-Drive-It' or for-hire cars or automobiles upon condition that action may be brought thereon by any person for the amount of such damage to the full amount of such cash and/or securities deposited. (C) The expiration or cancellation of any policy or policies of liability insurance, or the withdrawal of any cash and/or securities deposited as herein provided, shall deprive any person, firm or corporation of the right to continue further the operation of any cab, taxi-cab, 'U-Drive-It,' or for-hire car or automobile upon the streets of the city of Charlotte.

"Section two. Any person, firm or corporation violating this ordinance shall upon conviction be fined fifty dollars ($50.00) or imprisoned for not more than thirty days, and each day any section of this ordinance shall be violated shall be and constitute a separate and distinct offense.

"Section three. That all ordinances or parts of ordinances in conflict herewith be and the same are hereby repealed.

"Section four. Read, approved and adopted and declared to be an ordinance of the city of Charlotte, this 27 October, 1933, effective ten days after its first publication. Approved as to form: Bridges and Orr, city attorneys.

"(2) That on 5 April, 1934, the ordinance hereinbefore set out was in effect. (3) That on 5 April, 1934, the defendants, W. M. Sasseen

and R. D. Kinard, operated a taxi-cab for hire upon the streets of the city of Charlotte in violation of the terms and provisions of said ordinance, in that the said defendants operated said taxi-cab for hire without filing with the treasurer of the city of Charlotte, a policy of liability insurance with a reliable and responsible company authorized to do business in the State of North Carolina in form to be approved by the city attorney and without in lieu thereof depositing securities as provided in section B of said ordinance. (4) That the defendants have operated taxi-cabs for hire in the city of Charlotte for 3 years; that on 5 April, 1934, at which time said defendants were arrested, charged with the violation of the ordinance hereinbefore set forth, said defendants were operating a certain taxi-cab for hire under a license duly issued by the Commissioner of Revenue of the State of North Carolina under and pursuant to the provisions of the Consolidated Statutes, sections 2613(15) to 2621(149), both inclusive, known as the *Motor Vehicle Act*. (5) That the defendants have complied with all the provisions of the laws of the State of North Carolina entitling them to operate taxi-cabs for hire in the city of Charlotte. (6) That they have met all the requirements of the city of Charlotte entitling them to operate taxi-cabs for hire in the city of Charlotte other than complying with the ordinance of the city of Charlotte, hereinbefore set forth. If, upon these facts, the court be of the opinion that the defendants are guilty, the jury so finds; otherwise, not guilty. Upon the above findings of facts by the jury, the court adjudges the defendants not guilty. From the special verdict of not guilty, the State appeals to the Supreme Court."

The only exception and assignment of error made by the State, is that the court erred in adjudging the defendants not guilty upon the facts set out in the special verdict of the jury.

Attorney-General Brummitt, Assistant Attorney-General Seawell, Bridges & Orr and Robert A. Wellons for State of North Carolina.

Carswell & Ervin, J. L. DeLaney and Goebel Porter for defendants, W. M. Sasseen and R. D. Kinard.

CLARKSON, J. We think there is no error in the court below finding the defendants "not guilty" on the special verdict. In the special verdict is the following part of the ordinance of the city of Charlotte, N. C.: "(A) Said person, firm or corporation shall have filed with the treasurer of the city of Charlotte, a policy or policies of liability insurance with a reliable and responsible company authorized to do business in the State of North Carolina, in form to be approved by the city attorney, indemnifying the licensee as to each cab, taxi-cab, 'U-Drive-It' or for-hire

car or automobile in the sum of five thousand dollars ($5,000) for injury to one person, or ten thousand dollars ($10,000) for injury to more than one person, and one thousand dollars ($1,000) property damage, in any one action for which said driver or owner of cab, taxi-cab, 'U-Drive-It' or for-hire car or automobile may be held liable. (B) In lieu of such insurance policy or policies, said person, firm or corporation may deposit like amounts with the treasurer of the city of Charlotte in cash, or securities to be approved by the city manager, indemnifying persons who may be injured, or whose property may be damaged by the negligent operation of such cabs, taxi-cabs, 'U-Drive-It' or for-hire cars or automobiles upon condition that action may be brought thereon by any person for the amount of such damage to the full amount of such cash and/or securities deposited."

Under the above, the defendants are limited to (1) "A policy or policies of liability insurance." (2) In lieu of the policy or policies of liability insurance, "cash or securities." The ordinance, *expressio unius exclusio alterius,* omits a bond by a solvent personal surety or sureties. It is a matter of common knowledge that a liability policy in an insurance indemnity company is almost prohibitive, few companies write them. Cash or liquidated securities for so large a sum makes it hard measure and almost impossible to comply with the ordinance by the average taxi-cab owner or owners. We are not discussing the policy of the ordinance in reference to protecting persons or property injured through negligence, but to the legality of the ordinance as adopted. In the Constitution of North Carolina, Article I, section 7, is the following: "No man or set of men are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services." Section 31, is as follows: "Perpetuities and monopolies are contrary to the genius of a free state and ought not be allowed." Section 29, is as follows: "A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." The act, as written, has a tendency to create a monopoly and turn the business over to a privileged class without allowing personal surety or sureties, which was, until recent years, the kind of bond usually required and given. A statute applicable to Buncombe County, North Carolina, involving the same principle, was held void in *Plott v. Ferguson,* 202 N. C., 446. See *Flemming v. Asheville,* 203 N. C., 810; *S. c.,* 205 N. C., 765; In the *Plott case, supra,* at page 451, it is said: "The passage of laws not of uniform operation, the granting of special privilege and the like, are ordinarily contrary to our constitutional limitations. Equal protection of the law and the protection of equal laws are fundamental."

It is contended by defendants that the ordinance contravenes: "The general law and the policy of the State, as declared by chapter 116,

Public Laws of 1931, entitled 'An act to promote safe driving on the highways and to force the collection of judgments against irresponsible drivers of motor vehicles.'" It is well settled that an ordinance is invalid if it antagonizes the State law, *supra*, on the subject. *S. v. Stallings*, 189 N. C., 104. The synopsis of the State law, *supra*: "Failure of any automobile owner or operator to pay *tort* judgment within 30 days after final rendition authorizes suspension of driver's license and registration certificates. . . . Certified transcript. . . . Period of suspension. . . . Ability to respond in damages. . . . Clerk of Superior Court to forward transcripts to Commissioner of Revenue."

Under the circumstances narrated in the act, provision is made for bond of a surety company, "or a bond with at least two individual sureties," etc. This indicates the legislative intent as to giving individual sureties in certain cases, omitted from the ordinance in question. We are not now called upon to decide whether the ordinance in question antagonizes the State law and whether the State law covers the entire field. "The power conferred upon the municipal body is presumed to be insubordination to a public law regulating the same matter for the entire State unless a clear intent to the contrary is manifest." *S. v. Langston*, 88 N. C., 692 (694); *S. v. Freshwater*, 183 N. C., 762.

It is found in the special verdict: "That the defendants have complied with all the provisions of the laws of the State of North Carolina entitling them to operate taxi-cabs for hire in the city of Charlotte. That they have met all the requirements of the city of Charlotte entitling them to operate taxi-cabs for hire in the city of Charlotte other than complying with the ordinance of the city of Charlotte hereinbefore set forth." We see no error in the judgment of the court below, the judgment is therefore

Affirmed.

B. M. SIBLEY, TRUSTEE, v. R. WALTER TOWNSEND, W. M. LINDSAY AND D. S. TOWNSEND, RALPH TOWNSEND, KATHLEEN T. FIRESTONE, RUTH TOWNSEND, AND L. M. TOWNSEND, ADDITIONAL PARTIES DEFENDANT.

(Filed 20 June, 1934.)

1. Life Estates D a—Estate of life tenant is forfeited one year from sale of land for taxes where he fails to pay taxes or redeem land.

By the express terms of the statute, C. S., 7982, a life tenant forfeits his interest in lands to the remaindermen when he fails and refuses to pay taxes thereon and suffers the lands to be sold for taxes and fails to redeem same within one year from such sale, and plaintiff's contention that the estate of the life tenant is not forfeited until the tax-sale certificate is foreclosed and the land sold by a commissioner is untenable.

2. Execution B d—Where life tenant's interest is forfeited for failure to pay taxes deed under execution against him conveys no title.

The deed of the sheriff to a purchaser of land at an execution sale under judgment is void where the judgment debtor had only a life estate in the land which estate he had forfeited by failing to pay taxes and suffering the land to be sold therefor and failing to redeem same within one year after such sale, the fee-simple title to the land being in the remaindermen from that date.

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

APPEAL by plaintiff from *Sinclair, J.*, at December Term, 1933, of ROBESON. Affirmed.

The following is the agreed statement of facts: "D. S. Townsend, Ralph Townsend, Kathleen T. Firestone, L. M. Townsend and Ruth Townsend, through their counsel, McLean & Stacy, come into court and make themselves parties defendant to this action and adopt the answer herein filed by R. Walter Townsend and W. M. Lindsay, defendants. Plaintiff and defendants waive a jury trial in this cause and agree to submit to the court for its judgment thereon the following agreed facts: (1) That defendant, R. Walter Townsend, derived whatever interest he may have in the lands described in the complaint under and by virtue of Item 5 of the last will and testament of Richard Townsend, registered in Book of Wills No. 4, page 310, office of the clerk of the Superior Court of Robeson County; said item five devises the land in question to R. W. Townsend 'to have and to hold the same in trust for the use and benefit of himself and wife for life and then to all of his children, 'those both after my death as well as those before in fee simple but none of this property is to be subject or liable for the debts of said R. W. Townsend.' (2) That D. S. Townsend, Ralph Townsend, Kathleen T. Firestone, L. M. Townsend, and Ruth Townsend are all the children of R. Walter Townsend; that the wife of R. Walter Townsend is dead. (3) That on 13 October, 1931, K. M. Biggs secured a judgment against R. Walter Townsend for $147.81, which said judgment is docketed in the office of the clerk of the Superior Court of Robeson County, in Book U, page 119; that thereafter execution was issued on said judgment, the homestead of R. Walter Townsend was allotted in the lands referred to in the complaint and the excess thereof sold by P. S. Kornegay, sheriff of Robeson County, under the execution of the judgment above referred to; that thereafter the sheriff of Robeson County executed a deed for said excess, to B. M. Sibley, trustee, which is recorded in the office of the register of deeds of Robeson County, in Book 8-H, page 342. (4) That defendant, R. Walter Townsend, acting as agent of the remaindermen who claim the life estate, leased the said land to the defendant, W. M. Lindsay, for the year 1933, and took therefor a rent note in the sum of $325.00.

(5) That defendant, R. Walter Townsend, failed to pay the taxes due upon said lands for the year 1930, and subsequent years; that the said lands were sold at public auction for the 1930 taxes due thereon by P. S. Kornegay, sheriff of Robeson County, on 2 November, 1931, and bid in by Robeson County, and on said date of sale the certificate of sale was issued by the sheriff of Robeson County to Robeson County for said lands sold for nonpayment of 1930 taxes due thereon; that the said lands were sold for the 1930 taxes due thereon by reason of the neglect and refusal of R. Walter Townsend to pay the taxes due thereon; that the said defendant, R. Walter Townsend, failed to redeem the same within one year after such sale, and has never redeemed said lands, nor paid any taxes due thereon subsequent to the taxes for the year 1929. If, upon the foregoing facts, the court should be of the opinion that plaintiff is entitled to recover anything whatever in this action, it will so adjudge, and, if, upon the foregoing facts, the court is of the opinion that defendant, R. W. Townsend, has forfeited his interest in said lands, because of the nonpayment of taxes, as provided for in section 7982, Consolidated Statutes of North Carolina, then it will render judgment in accordance with the rights of defendants. W. H. Humphrey, Jr., attorney for plaintiff. McLean & Stacy, attorneys for defendants."

The court below rendered the following judgment: "This cause coming on to be heard and being heard at this December Term, 1933, of the Superior Court of Robeson County, before his Honor, N. A. Sinclair, judge presiding, upon an agreed statement of facts, both plaintiff and defendants having waived trial by jury and agreed that the court might consider the facts agreed upon between the parties and declare the law applicable thereto. After consideration of the facts, as agreed to between the parties, the court is of the opinion that the life estate of R. Walter Townsend in the lands described in the complaint fell in for the nonpayment of 1930 taxes due upon said lands, the sale of the same by the sheriff of Robeson County on 13 October, 1931, and the neglect and refusal of defendant, R. Walter Townsend, to pay the taxes due on said lands and his failure to redeem the same within one year after such sale, as provided by section 7982, Consolidated Statutes of North Carolina, and that the remaindermen are now the owners in fee simple of said lands. Whereupon, it is ordered, adjudged and decreed that R. Walter Townsend has no interest in the lands described in the complaint; that the attempted sale of his interest therein by the sheriff of Robeson County under execution and the deed executed by the sheriff of Robeson County to plaintiff is a nullity and void and the register of deeds of Robeson County will so indicate upon the margin of said deed that the same is void by virtue of this judgment. The clerk of the Superior Court will certify this judgment to the

register of deeds of Robeson County to the end that she may record the same in her office. Let plaintiff pay the cost of this action."

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

W. H. Humphrey, Jr., and James R. Nance for plaintiff.
McLean & Stacy for defendants.

CLARKSON, J. The question involved: Did R. Walter Townsend forfeit his life estate in the lands referred to in the complaint by reason of his failure to redeem said lands within twelve months after they had been sold for taxes, as provided in section 7982, Consolidated Statutes? We think so.

C. S., 7982, is as follows: "Every person shall be liable for the taxes assessed or charged upon the property or estate, real or personal, or which he is tenant for life. If any tenant for life of real estate shall suffer the same to be sold for taxes by reason of his neglect or refusal to pay the taxes thereon, and shall fail to redeem the same within one year after such sale, he shall thereby forfeit his life estate to the remainderman or reversioner. The remainderman or reversioner may redeem such lands, in the manner that is provided for the redemption of other lands. Moreover, such remainderman or reversioner shall have the right to recover of such tenant for life, all damages sustained by reason of such neglect or refusal on the part of such tenant for life. If any tenant for life of personal property suffer the same to be sold for taxes by reason of any default of his, he shall be liable in damages to the remainderman or reversioner."

It is contended by plaintiff that the estate of the life tenant is not forfeited in the land until the tax sale certificate is foreclosed by court and the land sold by a commissioner. We cannot so hold. The statute, *supra,* in clear language says: "If any tenant for life of real estate shall suffer the same to be sold for taxes by reason of his neglect or refusal to pay the taxes thereon, and shall fail to redeem the same within one year after such sale, he shall thereby forfeit his life estate to the remainderman or reversioner." The agreed statement of facts says: "That defendant, R. Walter Townsend, failed to pay the taxes due upon said lands for the year 1930 and subsequent years; that the said lands were sold at public auction for the 1930 taxes due thereon by P. S. Kornegay, sheriff of Robeson County, on 2 November, 1931, and bid in by Robeson County, and on said date of sale the certificate of sale was issued by the sheriff of Robeson County to Robeson County for said lands sold for the nonpayment of 1930 taxes due thereon by reason of the neglect and refusal of R. Walter Townsend to pay the taxes due thereon; that the said defendant, R. Walter Townsend, failed to redeem the same within

one year after such sale, and has never redeemed said lands, nor paid any taxes due thereon subsequent to the taxes for the year 1929."

The life tenant was entitled to the rents and profits of the land. We do not think the statute *supra* in language or intent means that the life tenant can for years until foreclosure of a tax lien, keep the rents and profits each year and not pay the tax and claim under the statute there was no forfeiture. In *Smith v. Miller,* 158 N. C., 98 (103): "The law evidently means, that if the life tenant does not pay, and thereby exposes the land to sale, he may intervene and prevent a sale by paying the tax, and for the same reason that he can redeem from a tax sale already made."

In *Logan v. Griffith,* 205 N. C., 580 (582), it is said: "The applicable statutes create a lien for purchasers at tax sales, and also prescribe the procedure for enforcing said lien. 'Foreclosure' is the process provided for turning the lien into money."

In *Bryan v. Bryan, ante,* 464 (465), it is said: "The defendant advances the proposition that the plaintiff must settle the unpaid taxes before he can maintain an action to declare the life estate forfeited. We find no such prerequisite either in the statute or in the decisions of this Court. The statute is specific: The life tenant forfeits his estate to the remainderman or reversioner when he suffers it to be sold for taxes by reason of his neglect or refusal to pay the taxes and to redeem the property within a year after the sale. C. S., 7982. The remainderman's payment of the taxes due by the life tenant, is not a condition antecedent to the institution of his action for forfeiture. The necessity of protecting the remainderman or reversioner is obvious."

In some cases, this may be a hard rule, but it is the law as written and we must adhere to it. For the reasons given, the judgment of the court below is

Affirmed.

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

IDA BONAPARTE v. FRATERNAL FUNERAL HOME, CLARK S. BROWN, MANAGER, AND CLARK S. BROWN, INDIVIDUALLY.

(Filed 20 June, 1934.)

1. Dead Bodies A a—Wife has right to possession of dead body of husband and may recover punitive damages for its wrongful detention.

A wife has a right paramount to all other persons for the possession of her deceased husband's body, and where an undertaker, over the protest of the wife, holds the dead body of the husband and thereafter

embalms the same without the consent or approval of the wife, and upon demand of the wife, refuses to deliver the body until fees for personal services and embalming are paid, the wife may recover punitive damages for such detention.

2. Dead Bodies B c—

The arbitrary withholding of the dead body of her husband from a widow, as security for charges for personal services rendered by an undertaker and fees for embalming the body, is an unlawful act.

3. Appeal and Error D a: New Trial C b—

While an appeal to the Supreme Court is pending the trial court is without jurisdiction to hear a motion for a new trial for newly discovered evidence.

CIVIL ACTION, before *Hill, Special Judge,* at February Term, 1934, of FORSYTH.

On the night of 28 April, 1933, Cleveland Bonaparte was shot by a police officer. An ambulance was called to take him to the hospital and he died about the time the ambulance reached there. The plaintiff is the wife of the deceased and instituted this action to recover compensatory and punitive damages from the defendants for the unlawful and wrongful detention and mutilation of the body of her husband.

Plaintiff said: "On the night of 28 April, 1933, I was at my home. I saw Brack Dulin that evening about an hour and a half or two hours after the death of my husband. He came there and asked me for the body and said they had gotten it from the hospital and asked for the body, and I said, 'No, I want Mr. Fitch to have the body,' and I said, 'You all turn it over to Mr. Fitch.' I told them to not bother the body until I got down there or either I would send Mr. Fitch for the body. . . . He asked me if he should tack up crepe and I told him no, that Mr. Fitch would tack up crepe when he got there, and Dulin went out there and was going to tack it up anyhow, and Mrs. Johnson came out there and begged him not to and he took it down. . . . Later on that evening I went to the funeral home and made demand for the body of my husband to Mr. Brown—Clark S. Brown. . . . Mr. Brown told me he was working on the body embalming the body, and I said: 'I sent word down here for you not to bother the body until I came down here,' and he said, 'Well I'm working on the body and you can't get it.' I asked him twice for the body, and then they took me and put me in the car. I was so worried I just had broken down and they just took me out. . . . Robert E. Fitch was in there with me and came out to the car and talked to me later. Fitch got the body out about twelve o'clock or it may have been later than that. Before I got the body I had to pay Clark S. Brown $50.00 and I have a receipt for

the $50.00. Before I went to the funeral home I was in bed. While I was there I was so nervous and weak I couldn't hardly talk. After that my condition got worse. I never gave them any orders to embalm the body or to keep it, but they said they had orders to embalm the body but didn't say who gave them the orders. I had told Dulin not to do anything to the body except to turn it over to the Fitch Undertaking Company. I was at the place of business of Clark S. Brown and the Fraternal Funeral Home for an hour or a little over, trying to get the body. . . . When they got me home they had to put me to bed and tried to get a doctor, but it was so late they didn't get one until the next morning. . . . I did not see the body of my husband on that night. I asked at the Fraternal Funeral Home if I could see him and they said no, they were working on him. It was Clark Brown that told me that. I told him not to do anything else to the body but turn it over to Mr. Fitch. I don't know what the fifty dollars that I paid was for, but I was willing to pay five dollars for what they had done, going to the hospital and getting the body and taking it back to his place. I wanted Fitch Undertaking Company to look after the body of my husband because that was his request; he always said he wanted Mr. Fitch to have his body if he died first."

Fitch testified that he was manager of the Fitch Funeral Home and that he was called to the home of the plaintiff and requested to take charge of her husband's body. He said: "I went with Mrs. Bonaparte to Mr. Brown's office at the Fraternal Funeral Home. . . . When I went there with Mrs. Bonaparte that night it was for the purpose of getting her husband's body. . . . Brown told Mrs. Bonaparte the charges were $50.00, and I told her she would have to get it up. . . . She asked Brown who gave him orders to embalm her husband and he told her that it was his custom to go ahead and embalm bodies when they come in if the family is here. We always get the consent of the family before we do it if the family is reachable. . . . The regular price for embalming is $25.00. The ambulance charge or removal charge is $5.00. . . . I did not have $50.00 with me, but I returned with $50.00 in about forty-five minutes and paid it to Dulin for the embalming of Mr. Bonaparte. I paid it at the request of Mrs. Bonaparte. As a result of paying the $50.00 he turned the body over to us. . . . When we went to see Clark Brown that night he discussed the matter in a business-like way with me. Told me as soon as he was paid for his services he would release the body. . . . He was as cordial and nice to me as a man could be. . . . I am a competitor of Brown. I have gotten bodies from other funeral homes and paid them for the embalming."

The defendant testified that he carried the deceased to the Memorial Hospital and that when the physician pronounced him dead he took the body to his funeral home. He testified that "when I returned to the funeral home I sent one of my representatives over to the home of the deceased where I had received the body. He returned shortly and told me that the lady was in a tantrum, that she was very nervous and they didn't permit her to be seen. I jumped in my automobile and ran over there myself and when I reached the scene it was dark at the time, and a stout colored lady, a dark lady who resembled that lady right there, came to the door and said not to disturb Ida Bonaparte, that she was very nervous and couldn't be seen, and she said to take the body and do what I thought was necessary with it and she would be up to see me tomorrow morning. I then came back to the establishment and commenced embalming the body and did embalm it. Later that night Ida Bonaparte came into my place of business and told me she wanted Mr. Fitch to handle the job to bury her husband. . . . I told her my charges were $50.00, told her I had embalmed the body and rendered personal services, that I had removed the body from the City Memorial Hospital and had used personal service by sending a representative to her place to service her with door badge denoting a death in the home."

The following issues were submitted to the jury:

1. "Did the defendants wrongfully and unlawfully withhold from the plaintiff possession of the body of her deceased husband, as alleged in the complaint?"

2. "What actual or compensatory damages, if any, is the plaintiff entitled to recover of the defendants?"

3. "What punitive damages, if any, is the plaintiff entitled to recover of the defendants?"

The jury answered the first issue "Yes"; the second issue "$45.00," and the third issue "$400.00."

From judgment upon the verdict the defendants appealed.

Williams & Bright for plaintiff.

Hosea V. Price and W. Avery Jones for defendants.

BROGDEN, J. An undertaker, over the protest of the surviving wife, holds the dead body of the husband and thereafter embalms the same without the consent or approval of the wife, and upon demand of the wife, refuses to deliver the body until the fees are paid. Can such wife, upon such facts, recover punitive damages?

It was stated in the oral argument that the background of the case disclosed the business rivalry of competitive undertakers for posses-

sion of the body of the deceased. It was said of old that "Michael, the archangel, when contending with the devil, he disputed about the body of Moses," though the record does not disclose whether such contentions arose over the possession of the body for burial. Jude 9.

Our decisions upon the question involved are to the effect that the surviving wife has a property right or *quasi* property right in and to the body of her dead husband, which is paramount to the claim of any other person. Moreover, it is accepted law that she may recover punitive damages for the mutilation or unlawful detention of the body by a third party if such conduct is wilful, wanton, reckless or unlawful. Manifestly, the arbitrary withholding of the dead body of her husband from a widow, as a security for a debt, or for services rendered, is an unlawful act, even though courteously done. The Supreme Court of Washington spoke upon the subject in *Gadsbury v. Bleitz,* 233 Pac., 299. The Court said: "But we think that the holding of the body after the time for its cremation has passed, and claiming to hold it as a guaranty or as security for the payment of some indebtedness, is making a misuse of the body, just the same as its mutilation or improper burial. The misuse in one case may be greater in degree, but nevertheless it is a misuse." While the State of Washington has a statute prohibiting the detention of a dead body for debt, nevertheless the decision was not grounded exclusively upon the statute.

In the present case the evidence offered by the plaintiff tended to show that the widow, in deep distress from nervous shock, was compelled to wait an hour or two in the dead of the night to haggle and barter for the body of her husband. These facts invoke the principles of law heretofore applied in *Kyles v. R. R.,* 147 N. C., 394, 61 S. E., 278; *Floyd v. R. R.,* 167 N. C., 55, 83 S. E., 12. See, also, *Stephenson v. Duke University,* 202 N. C., 624, 163 S. E., 684; *Boyle v. Chandler,* 138 Atlantic, 273.

After giving notice of appeal to the Supreme Court, the defendants filed a motion for a new trial upon newly discovered evidence at the next term of the Superior Court, before such appeal had been heard. Judge Alley dismissed the motion for such new trial and such ruling is approved. *S. v. Edwards,* 205 N. C., 661. The same motion was made in this Court, but the record filed does not warrant the award of a new trial.

Affirmed.

J. E. ETHERIDGE v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 20 June, 1934.)

1. Master and Servant C b—Evidence of Master's failure to exercise due diligence to furnish reasonable tools held for jury.

The evidence tended to show that plaintiff was employed to scrape a bridge preparatory to painting it, that he was given a steel scraper, that he had asked for goggles to protect his eyes and was promised same, but that they were never furnished, that goggles were furnished by another employer for employees doing similar work, and that while scraping the bridge the employee was injured by a piece of rust which flew in his eye. *Held*, the evidence was sufficient to be submitted to the jury under the principle that in case of simple tools the employer may be held liable if the injury is caused by a lack of such tools, and injury could have been reasonably foreseen from the failure to furnish same.

2. Evidence D h—Testimony of other occurrence held incompetent, the required identity of circumstance and proximity of time being lacking.

Plaintiff employee was injured when a piece of rust flew in his eye while he was cleaning a bridge with a steel scraper preparatory to painting it. Over defendant's objection testimony of another employee was admitted to the effect that he was injured when hit by a steel scraper about a quarter of an inch thick while cleaning steel above his head preparatory to painting same. *Held*, the testimony objected to should have been excluded, the occurrence testified to by the witness not being related to the occurrence causing the injury in suit either by the required substantial identity of circumstance or proximity of time.

3. Appeal and Error J g—

Exceptions to the charge of the lower court are not considered on this appeal as a new trial is awarded for error in the admission of evidence.

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

CIVIL ACTION, before *Moore, Special Judge,* at October Term, 1933, of HALIFAX.

Plaintiff alleged and offered evidence tending to show that on 12 February, 1931, he was in the employment of the defendant as a steel bridge painter. It appeared that the plaintiff first entered the employment of the defendant in 1925, and was an experienced workman.

The narrative of the injury as detailed by the plaintiff is substantially as follows: "I was working at Castle Hayne . . . under T. E. Thornton. . . . I was cleaning a bridge, preparing to paint it, working with a steel scraper about four inches wide and ten inches long. Mr. T. E. Thornton furnished me the scraper. Mr. Thornton was the foreman. I was doing the work in accordance with his instructions as to how to do it. . . . The passenger train had dumped some garbage on the side of the bridge and I got down to clean it to

prepare it for painting and a piece of rust flew and hit me in the eye. I crawled up on the guard-rail and told the boys. I wiped the piece of rust out of my eye. . . . I got down and continued to work until the 15th, and I went to Fayetteville to see an eye specialist and couldn't see one and got some medicine from a drug store. . . . Prior to the time I was hurt I asked my foreman for goggles and he said he would get them for me as soon as he could. After he had promised me these goggles I worked there, I thought I would get the goggles and I kept on at work. It was two or three weeks after he had promised to furnish me with these goggles before I was hurt. Something like that. . . . The steel particle flew in my left eye. I have no ability to see out of that eye. . . . I had the scraper hitting the steel like this and the rust hit me in the eye. It had accumulated from the garbage that came from the passenger train and when I hit it the rust hit me in the eye. There is no difference between steel particle and a piece of rust only steel is a little harder than rust. I have had very serious physical pain on account of the injury to my eye." On cross-examination the plaintiff testified: "I asked for goggles twice in 1927 and in 1928. From 1928 to 1931 I did not ask him for goggles any more because I couldn't get them when I asked for them. I didn't know I was not going to get them when I asked for them, but I thought it. . . . I reckon I had gotten dust in my eye twenty-five times prior to 1921. . . . I got it in there practically every day or two. . . . There was no defect in this steel scraper. . . . The piece that flew in my eye was not off of the scraper. It was a piece of rust and the scraper was not rusty. . . . Mr. Thornton gave us the tools and told us what to do, told us to clean the rust to paint the bridge when we went to work that morning, went there and showed us how to do it. . . . At the time of my injury the Seaboard Air Line Railway furnished goggles to men engaged in similar work. . . . I worked in 1928, 1929, 1930, and up until 12 February, 1931, upon the promise that he would give me the goggles. I thought he would get them."

A witness for plaintiff, named Robert Keeter, was asked by counsel for plaintiff if he had suffered an injury while cleaning steel preparatory to painting. He answered: "I was standing on the scaffold board beating over my head. I was hurt in Weldon with a scraper and in Richmond with a hammer." (Q.) "How were you hurt in Weldon?" (A.) "With plain piece of steel about a quarter of an inch thick. Mr. Thornton furnished me that steel. Working with that steel scraper in that way I was working and as I was directed to do the work if I had had goggles, the steel or rust could not have gotten in my eye."

The defendant objected to all the foregoing testimony and moved to strike out the answers. The evidence was admitted and defendant excepted.

The following issues were submitted to the jury:

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

2. "Did the plaintiff assume the risk of his injuries?"

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

The jury answered the first issue "Yes"; the second issue "No," and the third issue "$1,500."

From judgment upon the verdict the defendant appealed.

No counsel for plaintiff.

Thos. W. Davis, Dunn & Johnson and Spruill & Spruill for defendant.

BROGDEN, J. (1) What duty does the law impose upon an employer with respect to furnishing particular tools or appliances to a workman in performing particular types of work?

(2) Was the evidence of certain injuries sustained by the witness Keeter, competent?

This case is built upon the theory that it was the duty of the defendant in the exercise of ordinary care to furnish goggles to the plaintiff. The leading goggle cases in this State are: *Whitt v. Rand,* 187 N. C., 805, 123 S. E., 84; *Jefferson v. Raleigh,* 194 N. C., 479, 140 S. E., 76. The facts in *Whitt v. Rand, supra,* are almost identical with those in the present case. The standard of duty in such cases was stated as follows: "A perusal of our decisions on the subject will show that in order for liability to attach, in case of simple, everyday tools, it must appear, among other things that the injury has resulted from a lack of such tools or defects therein which the employer is required to remedy, in the proper and reasonable discharge of his duties, and that the lack or defect complained of and made the basis of the charge is of a kind from which some appreciable and substantial injury may be reasonably expected to occur." In the *Jefferson case* the legal standard of liability was expressed in these words: "So, in the present case, if a lighter hammer or hack-saw, or goggles to protect the eyes of the workman, should have been provided in the exercise of that prevision which the law requires, or if a person of ordinary prudence could reasonably foresee or anticipate that injury would likely flow from the method employed, the defendant would be liable."

Therefore, the court is of the opinion that the trial judge properly submitted the issue of negligence to the jury.

The second question of law involved, presents the familiar principle of the competency of evidence of similar injuries or occurrences. Obviously, in a broad and practical sense it is the duty of trial courts to

try one case at the time. For this reason the law has built a hedge or fence designed to exclude, except under proper and pertinent circumstances, the "lugging in" of extraneous and collateral matters. The limitation of the competency of such evidence is clearly stated in *Perry v. Bottling Co.*, 196 N. C., 690, 146 S. E., 805, as follows: "Evidence of similar occurrences is admitted where it appears that all the essential physical conditions on the two occasions were identical; for under such circumstances the observed uniformity of nature raises an inference that like causes will produce like results, even though there may be some dissimilarity of conditions in respect to a matter which cannot reasonably be expected to have affected the result." See, also, *Perry v. Bottling Co.*, 196 N. C., 175, 145 S. E., 14; *Broadway v. Grimes*, 204 N. C., 623, 169 S. E., 194. The same limitation is stated in *Conrad v. Shuford*, 174 N. C., 719, 94 S. E., 424, in which the Court said: "But we base the relevancy of this testimony upon the ground that the conditions and circumstances were substantially the same and the two occurrences were separated only by a very brief interval of time," etc. The testimony of witness Keeter discloses neither the substantial identity of circumstances nor proximity of time which the law contemplates, and consequently such testimony should have been excluded.

There are certain exceptions to the charge, but as a new trial must be awarded it is deemed inadvisable to undertake to anticipate the course of a future hearing.

New trial.

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

STATE v. BEAUFORT KELLY, ALIAS BUFUS KELLY, AND FLORIDA BULLOCK.

(Filed 20 June, 1934.)

1. Kidnapping C b—Life sentence is not mandatory upon conviction of kidnapping under ch. 542, Laws of 1933.

The effect of chapter 542, Public Laws of 1933, repealing C. S., 4221, relating to the crime of kidnapping, is to increase, within the discretion of court, the maximum punishment for the crime from twenty years to life, and not to make a life term mandatory upon conviction, the intent of the statute to this effect being shown by the use of the word "punishable" in prescribing the sentence.

STATE *v.* KELLY.

2. Criminal Law L e—Judgment entered under erroneous belief that court had no discretion to impose smaller sentence is set aside and the case remanded.

Where the trial court in sentencing a defendant convicted of kidnapping, imposes a life term under his judgment that the statute makes such punishment mandatory upon conviction of the crime, while in fact the statute allows the court to impose a less severe sentence in its discretion, and it appears that the court, but for the mistake as to his discretionary powers, would have imposed a less severe sentence, the judgment will be set aside and the action remanded for a judgment imposing a sentence within the sound discretion of the court.

3. Criminal Law L d—Statement of case on appeal must be prepared in accordance with rules in order for exceptions to be considered.

Where statement of case on appeal is not prepared in accordance with the rules, but the case is remanded for error of the judgment in imposing sentence, upon imposition of proper judgment by the trial court the defendants may again appeal, but a proper statement of case on appeal must then be prepared in accordance with the rules in order for their exceptions to be considered upon such subsequent appeal.

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

APPEAL by defendants from *Parker, J.*, at October Term, 1933, of VANCE. Remanded for judgment in accordance with opinion.

The defendants were tried on an indictment which was returned by the grand jury, and which is as follows:

"Superior Court.—October Term, 1933.

State of North Carolina.—Vance County.

The jurors for the State, upon their oath, present that Beaufort Kelly, alias Bufus Kelly, and Florida Bullock, late of Vance County, on 23 August, in the year of Our Lord, 1933, with force and arms, at and in the county aforesaid, unlawfully, wilfully and feloniously, forcibly and fraudulently, did kidnap Mary Lena Van Dyke, a female child sixteen years of age, contrary to the statute in such case made and provided, and against the peace and dignity of the State.

And the jurors aforesaid, upon oath aforesaid, do further present that said Beaufort Kelly, alias Bufus Kelly, and said Florida Bullock, afterwards, to wit: on the day and year aforesaid, at and in the county aforesaid, unlawfully, wilfully and feloniously, did assault, beat and wound the said Mary Lena Van Dyke, a female child sixteen years of age, with deadly weapons, to wit: a pistol, a knife, and a club, and did then and there inflict serious and permanent injuries, not resulting in death, to the person of the said Mary Lena Van Dyke, to wit: cutting a deep gash on her left arm and left leg, making it necessary to take four stitches in her arm, and striking her on the stomach with a club,

or some heavy, blunt instrument, knocking her down and rendering her unconscious for a period of several hours, causing her to suffer great pain for two weeks or more—they and each of them, the said Beaufort Kelly, alias Bufus Kelly, and said Florida Bullock then and there being male persons above the age of eighteen years, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

After a motion by the defendant, Beaufort Kelly, alias Bufus Kelly, challenging the validity of the indictment, and a motion by said defendant for a change of venue, had been denied by the court, each of the defendants entered a plea of "Not Guilty" to the indictment, and evidence was offered by both the State and the defendants. All the evidence was submitted by the court to the jury. There was a verdict that each defendant is guilty upon both counts in the indictment. Judgment was rendered as follows:

"The court is of opinion that life imprisonment is too drastic and severe as a punishment for the facts of this case. Yet, the court understands the law enacted by the 1933 General Assembly to be such that it has no discretion, and it is the duty of the court to follow the expressed will and desire of the people as enacted into law by their representatives in the General Assembly.

As to the first count in the bill of indictment, the judgment of the court is that Beaufort Kelly, alias Bufus Kelly, be imprisoned in the Central Prison at Raleigh for life, to be assigned to do public work under the direction of the State Highway and Public Works Commission.

As to the first count in the bill of indictment, the judgment of the court is that Florida Bullock be imprisoned in the Central Prison at Raleigh, for life, to be assigned to do public work under the direction of the State Highway and Public Works Commission.

As to the second count in the bill of indictment charging an assault with a deadly weapon, the judgment of the court is that Beaufort Kelly, alias Bufus Kelly, be imprisoned in the county jail for a term of two years, to be assigned to do public work under the direction of the State Highway and Public Works Commission. Sentence in this case to run concurrently with the sentence pronounced in the first count as to kidnapping.

As to the second count in the bill of indictment, the judgment of the court is that Florida Bullock be imprisoned in the county jail for a term of two years, to be assigned to do public work under the direction of the State Highway and Public Works Commission. Sentence in this case to run concurrently with the sentence pronounced in the first count as to kidnapping."

From this judgment, both defendants appealed to the Supreme Court.

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

M. Hugh Thompson and C. J. Gales for defendant Kelly.

M. C. Pearce for defendant Bullock.

CONNOR, J. Chapter 542, Public Laws of North Carolina, 1933, is as follows:

"Section 1. That it shall be unlawful for any person, firm or corporation, or any individual, male or female, or its or their agents, to kidnap or cause to be kidnapped any human being, or to demand a ransom of any person, firm or corporation, male or female, to be paid on account of kidnapping, or to hold any human being for ransom; *Provided, however,* that this act shall not apply to a father or mother for taking into their custody their own child.

Section 2. That any person, or their agent, violating or causing to be violated any provision of this act shall be guilty of a felony, and upon conviction therefor shall be punishable by imprisonment for life.

Section 3. That any firm or corporation violating or causing to be violated through their agent or agents, any of the provisions of this act, and upon being found guilty, shall be liable to the injured party suing therefor, the sum of twenty-five thousand dollars ($25,000) and shall forfeit its or their charter and right to do business in the State of North Carolina.

Section 4. That all laws and clauses of laws in conflict with the provisions of this act are hereby repealed.

Section 5. That this act shall be in full force and effect from and after its ratification."

This statute was ratified on 15 May, 1933, and repeals C. S., 4221, which was as follows:

"Section 4221. If any person shall forcibly or fraudulently kidnap any person, he shall be guilty of a felony, and upon conviction may be punished in the discretion of the court, not exceeding twenty years in the State's prison."

The effect of chapter 542, Public Laws, 1933, is to increase the maximum term of imprisonment which the court may in its discretion impose upon a person who has been convicted of kidnapping in this State. The word "punishable" as used in section 2 of the act indicates the intention of the General Assembly to leave the term of imprisonment in the discretion of the court, and to increase the maximum term of imprisonment upon a conviction of kidnapping in this State from twenty years to life.

The learned and just judge who presided at the trial of this action was of the opinion that he had no discretion as to the term of imprison-

ment which he was required by the statute to impose upon the defendants in this action upon their conviction of kidnapping, as charged in the first count of the indictment. In this, he was in error. But for this error, it is clear that he would not have rendered a judgment which imposed a sentence which he thought was too drastic and severe, in view of all the facts shown by the evidence for the State. The judgment is reversed and set aside, and the action remanded to the Superior Court of Vance County in order that a judgment imposing a sentence within the sound judicial discretion of said court may be rendered. From such judgment, the defendants may, if they are so advised, appeal to this Court. On such appeal, assignments of error duly made in accordance with the rules of this Court will be considered and questions of law thereby presented decided.

The cases on appeal now on file in this Court have not been prepared in accordance with the rules of this Court, and will not be considered on a subsequent appeal in this action. If the defendants shall appeal from the judgment which will be rendered in accordance with this opinion, a statement of the case on appeal must be prepared in accordance with the rules of this Court. Otherwise assignments of error on such appeal will not be considered.

Remanded.

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

CITY OF HIGH POINT, A MUNICIPAL CORPORATION, v. C. E. BROWN, C. E. DIFFENDALE AND WIFE, LIDA D. DIFFENDALE, R. G. HENDRIX AND WIFE, MATTIE HENDRIX, ET AL.

(Filed 20 June, 1934.)

1. Municipal Corporations G d—Purchaser of land with statutory lien for street assessments held not entitled to attack assessment.

A levy of assessments against the land in question was made after notice to the owner as required by statute, and the owner took no appeal therefrom. Thereafter the owner sold the land to defendant who seeks to attack the validity of the assessment in an action by the city to enforce same. *Held*, the assessments constituted a lien against the land itself, and the purchaser took the land *cum onere*, and the assessments not being void, the purchaser has no legal status to attack the assessments for irregularities.

2. Same—

The presumption is in favor of the validity of proceedings under which assessments against property for public improvements are made.

3. Same—

Where a party has no legal status to attack the validity of assessments for public improvements against property purchased by him, the exclusion of testimony offered by him to attack the validity of the petition and assessment roll is proper.

4. Same: Courts B b: Constitutional Law E b—Municipal Court of City of High Point has jurisdiction of action to enforce street assessments.

The municipal court of the city of High Point is given jurisdiction of actions to enforce assessments for public improvements against property situated within the city by chapter 150, Public-Local Laws of 1933, and chapter 132, Public-Local Laws of 1933, repealing the provisions of chapter 131, Public-Local Laws of 1931, that such actions should be instituted in the Superior Court, and the change of the procedure for enforcing the assessments is constitutional, there being no vested right in procedure for the enforcement or defense of rights.

APPEAL by the defendant, R. G. Hendrix, from *Clement, J.*, at 16 April Term, 1934, of GUILFORD. Affirmed.

The action was to enforce a street assessment lien tried before Lewis E. Teague, judge presiding at the regular March Term, 1934, of the High Point Municipal Court, a jury trial having been waived. The findings of fact and the opinion are some twelve pages of the record and we may say, show an infinite capacity for painstaking. The concluding part of the opinion is as follows: "The court being of the opinion that section 9, chapter 56, Public Laws of 1915, as amended, imposed upon the defendants the duty, if dissatisfied with the assessment levied against their property, to give notice of appeal within ten days after the confirmation of the assessment roll, to the Superior Court as provided in said section 9, chapter 56, Public Laws of 1915, as amended, and not by the defense as set out in the answer of the defendant, H. G. Hendrix, in the case at bar; the court likewise being of the opinion that if there were any irregularities in the levying of the assessment against the property of the defendant, R. G. Hendrix, that such irregularities were cured and validated by the curative acts as set forth in the facts found by the court; and the court also being of the opinion that the High Point Municipal Court has jurisdiction over the subject-matter of this action and the person of the defendants; therefore, it is ordered and adjudged by the court that the plaintiff, city of High Point, has a lien against the property hereinafter described, for the sum of $727.77, with interest thereon from 1 July, 1931, and all costs in connection with this action, superior to all other liens and encumbrances against the property which may now or hereafter exist; that the High Point Municipal Court has jurisdiction of the subject-matter of this action and over the person of the defendants; that the property which is the subject of this lien

and against which this judgment is described is as follows: Lot 50 of the plat of College Terrace, recorded in Plat Book 6, page 131, register of deeds office, Guilford County, North Carolina."

An appeal was taken by defendant, R. G. Hendrix, from the judgment of the High Point Municipal Court to the Superior Court. The judgment of the court below is as follows: "This cause coming on to be heard, and being heard before his Honor, John H. Clement, judge presiding at the 16 April Term of Guilford County Superior Court, upon an appeal from the High Point Municipal Court, therefore: It is considered, ordered and adjudged that the judgment of the High Point Municipal Court be, and the same is hereby affirmed. This 18 April, 1934. J. H. CLEMENT, *Judge Presiding.*"

The defendant, R. G. Hendrix, made several exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

Grover H. Jones for plaintiff, City of High Point.
Walser & Casey for defendant, R. G. Hendrix.

CLARKSON, J. The appealing defendant, R. G. Hendrix, at the close of plaintiff's evidence and at the close of all the evidence made motions in the High Point Municipal Court, for judgment as in case of nonsuit. C. S., 567. The High Point Municipal Court overruled these motions and the court below sustained these rulings and in this we can see no error.

A finding of fact is as follows: "That the defendants, C. E. Diffendale and wife, Lida D. Diffendale, were the owners of the land hereinafter described at the time of the making of the said local improvement on Montlieu Avenue; that subsequent to the completion of the said improvement and on 3 October, 1928, the defendants, R. G. Hendrix and wife, Mattie Hendrix, purchased the said land from the defendants, C. E. Diffendale and wife, Lida D. Diffendale; that the defendant, Mattie Hendrix, has died since the institution of this action and the defendant, R. G. Hendrix, is the sole owner of the said property; that the said property herein referred to is in the city limits of the city of High Point abutting 150 feet on the west side of Montlieu Avenue between Circle Drive and the city limits of said city, which may be described with more particularity as follows: Lot 50 of the plat of College Terrace, recorded in plat Book 6, page 131, register of deeds office, Guilford County, North Carolina."

In *Statesville v. Jenkins,* 199 N. C., 159 (163), is the following: "An assessment made upon adjoining land for a street improvement by a

town is a charge upon the land constituting a lien superior to all others, C. S., 2713, and not enforceable against the personalty or other lands of the owner, and when the owner of land has been thus assessed, payable in installments, C. S., 2716, and he subsequently dies, it is not a debt of the deceased payable by his personal representative, but a charge against the land itself. The provisions of C. S., 93, as to the order of payment of debts of the deceased has no application. *Caravan v. Barnett,* 197 N. C., p. 511. The rights of the plaintiff are governed by the statute which makes the assessment."

The record discloses that the street assessment was against the property of C. E. Diffedel (Diffendale): "Montlieu Avenue—C. E. Diffedel; paving frontage, 150; cost per foot, $2.49; paving assessment, $373.50; curb assessment, $135.00; driveway assessment, ...; total, $508.50; engineering interest and incidentals, $25.43; total assessment, $533.93."

The record also discloses that notice was given: "You are hereby notified that the paving assessments have been computed for the local improvement on Montlieu Avenue and the assessment roll has, by order of the city council, been deposited in the office of the city manager in the city hall for inspection of abutting property owners and interested parties until Tuesday, 5 July, 1927, at 8:00 p.m., when the city council will meet at the municipal building for the purpose of hearing allegations concerning same."

Diffendale took no appeal from this assessment. He had notice, it became a statutory lien upon the property for the street assessment, a judgment *in rem. High Point v. Clinard,* 204 N. C., 149 (151). If dissatisfied with the street assessment, Diffendale should have appealed. *Vester v. Nashville,* 190 N. C., 265; *Wake Forest v. Holding, ante,* 425.

The presumption is in favor of the regularity of proceedings under which public improvements authorized by the General Assembly have been made. *Gallimore v. Thomasville,* 191 N. C., 648. The appealing defendant, R. G. Hendrix, when he purchased the property, there was a statutory lien on it, for the street assessment, and he took it *cum onere.* The assessment was not void as in *Charlotte v. Brown,* 165 N. C., 435, and like cases. This appealing defendant has no legal status to attack this assessment, it is *res judicata.* The defendant tendered to the court a witness, S. O. Schaub, who owned property in the same assessment district, for the purpose of attacking the petition and the assessment roll. This evidence was excluded and properly so. If there was any irregularity it was for the owner, Diffendale, to object and appeal, but in not doing so, the street assessment was binding on him and the appealing defendant, the subsequent purchaser of the lot.

Another contention presented by the appealing defendant is to the effect that this action cannot be prosecuted in the High Point Municipal Court. This contention cannot be sustained.

Chapter 150, Public-Local Laws, 1933, entitled "An act to amend chapter 131, Public-Local Laws, 1931, relating to special assessments levied by the city of High Point," validated and confirmed the bringing of this action in the High Point Municipal Court and repealed that portion of chapter 131, Public-Local Laws of 1931, providing that it should be the duty of the city council to cause actions to be instituted in the Superior Court. Thus eliminating any question of the right of the plaintiff to try this action in the High Point Municipal Court. Also by chapter 132, Public-Local Laws, 1933, entitled, "An act to amend chapter 569, Public-Local Laws of 1931, as amended relating to the municipal court of the city of High Point," likewise validates the bringing of this action in the High Point Municipal Court. Plaintiff contends that the Legislature of 1933 had a right to validate the bringing of this action in the High Point Municipal Court, citing *Sumner v. Miller,* 64 N. C., 688; *Bost v. Cabarrus County,* 152 N. C., 531; *Waddill v. Masten,* 172 N. C., 582; *Gallimore v. Thomasville,* 191 N. C., 648. We think the contention correct.

In *Martin v. Vanlaningham,* 189 N. C., 656 (658), the principle is laid down as follows: "'No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights, where a new statute deals with procedure only, prima facie it applies to all actions—those which have accrued or are pending, and future actions.' 2 Lewis' Edition Southerland Statutory Construction, p. 1226." *Bateman v. Sterrett,* 201 N. C., 59 (61). For the reasons given, the judgment of the court below is

Affirmed.

EDDIE STROUD AND OTHERS, NEXT OF KIN AND DISTRIBUTEES OF THE ESTATE OF PHILLIP STROUD, DECEASED, v. W. E. STROUD AND THOMAS W. STROUD, ADMINISTRATORS OF PHILLIP STROUD, DECEASED, AND ÆTNA CASUALTY AND SURETY COMPANY.

(Filed 20 June, 1934.)

1. Executors and Administrators K b—

Executors and administrators, as well as guardians, are not insurers of the assets of estates committed to their custody and care.

2. Executors and Administrators K c—Administrators held not liable for failure to collect certificates of deposit before insolvency of bank.

Evidence that administrators of an estate received, as part of the assets, certain certificates of deposit bearing four per cent interest, issued by several banks to their intestate, that distributees of the estate requested the administrators to collect on the certificates of deposit and deposit the

proceeds in a safety deposit box because they feared the banks issuing the certificates might become insolvent, that their apprehension was based solely upon the alleged fact that other banks in other cities in the State had become insolvent, without any evidence that the administrators had any reason to apprehend the failure of the banks which intestate had selected as depositories other than the failure of banks in other cities, and that the banks issuing the certificates of deposit remained open for business continuously from the date of intestate's death until they closed and were placed in the statutory receiver's hands about four months thereafter, *is held* insufficient to show negligence on the part of the administrators in failing to collect the certificates of deposit, and neither they nor the surety on their bond may be held liable for the loss resulting therefrom.

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

APPEAL by plaintiffs from *Grady, J.*, at November Term, 1933, of LENOIR. Affirmed.

The plaintiffs in this action are next of kin and distributees of the estate of Phillip Stroud, who died intestate, in Lenoir County, North Carolina, on 10 December, 1930.

The defendants, W. E. Stroud and Thomas W. Stroud, brothers of Phillip Stroud, and also next of kin and distributees of his estate, were duly appointed as his administrators by the clerk of the Superior Court of Lenoir County, and having first filed bond as required by statute, with the defendant Ætna Casualty and Surety Company, as surety, duly qualified as such administrators on 16 December, 1930.

Among the assets belonging to the estate of Phillip Stroud, deceased, which came into the hands of the defendant administrators, were certain certificates of deposit issued to Phillip Stroud, from time to time, (1) by the National Bank of Kinston, N. C., aggregating the sum of $4,186.57; (2) by the First National Bank of Kinston, N. C., aggregating the sum of $4,492.34; and (3) by the Farmers and Merchants Bank of Kinston, N. C., aggregating the sum of $11,941.04. Each of these certificates of deposit was payable to the order of Phillip Stroud; the amount of each certificate bore interest from its date at 4 per cent per annum; the deposit was not subject to check, but was payable to the holder of the certificate. Each issuing bank reserved the right to require from the holder of the certificate thirty days notice of his purpose to withdraw the deposit for which the certificate was issued.

No notice was given by the defendant administrators to either of said banks of their purpose to withdraw the amounts of said deposits. The said defendants kept the said certificates of deposit, and have not collected the same.

The National Bank of Kinston closed its doors and ceased to do business on 21 April, 1931, because of its insolvency at that date. Its

assets are now in process of liquidation. A dividend of only 10 per cent has been paid on the claims of its creditors, including the claim of the defendant administrators. The assets of said bank are not sufficient in amount to pay said claims in full.

The First National Bank of Kinston also closed its doors and ceased to do business on 21 April, 1931, because of its insolvency at that date. Its assets are now in process of liquidation. A dividend of only 9 per cent has been paid on the claims of its creditors, including the claim of the defendant administrators. The assets of said bank are not sufficient in amount to pay said claims in full.

The Farmers and Merchants Bank of Kinston closed its doors and ceased to do business on 29 April, 1931, because of its insolvency on that date. Its assets are now in process of liquidation. A dividend of only 5 per cent has been paid on the claims of its creditors, including the claim of the defendant administrators. The assets of said bank are not sufficient in amount to pay said claims in full.

This action was begun on 19 January, 1933, to recover of the defendant administrators and the surety on their bond, the amount of the loss, which plaintiffs, as next of kin and distributees of the estate of Phillip Stroud, have suffered on account of the failure of said defendants to collect the full amounts of said certificates of deposit. It is alleged in the complaint that said loss was caused by the negligence of the defendant administrators in failing to collect from said banks prior to their closing, the amounts of said certificates of deposit. The defendants deny that such failure was due to any negligence on their part.

There was evidence at the trial tending to show that after the defendant administrators had qualified, and had taken said certificates of deposit into their possession as assets of the estate of their intestate, certain of the plaintiffs had, from time to time, insisted that said defendants collect the said certificates of deposit and deposit the amounts collected in a safety deposit box. These plaintiffs testified that because other banks in this State and elsewhere had closed their doors and ceased to do business after the death of Phillip Stroud, they were apprehensive that the banks in Kinston would do likewise. There was no evidence tending to show that these plaintiffs had any other ground for their apprehension than the conditions then prevailing in this State and elsewhere, with respect to banks. Each of the banks whose certificates of deposit were held by the defendants as assets of the estate of their intestate, continued in business from the death of Phillip Stroud, on 10 December, 1930, to the date of its closing in April, 1931. There was no evidence tending to show that the defendant administrators had any reason to suspect that either of said banks was insolvent, prior to the date of its closing.

At the close of the evidence for the plaintiffs, the defendants moved for judgment as of nonsuit, on the ground that there was no evidence tending to show that the loss which plaintiffs had suffered by reason of the failure of the defendant administrators to collect the amounts of said certificates of deposit, was caused by the negligence of said defendants. The motion was allowed and plaintiffs duly excepted.

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

Shaw & Jones and Wallace & White for plaintiffs.

Rouse & Rouse, W. G. Stroud and Carr, Poisson & James for defendants.

CONNOR, J. It is well settled as the law of this State and elsewhere that neither an executor, an administrator nor a guardian is an insurer of the assets of the estate committed to his custody and care. In *Deberry v. Ivey,* 55 N. C., 370, it is said: "An executor, like other trustees, is not an insurer, nor to be held liable as such in taking care of the assets which come into his hands, nor in collecting them. He is answerable only for that *crassa negligentia,* or gross neglect, which evidences bad faith. The estates of deceased persons are deeply concerned in the existence of such a principle. If an executor was put into the position of an insurer—answerable for any neglect, however slight—unprotected by an honest endeavor to perform his duties, honest and reasonable men would rarely be found willing to incur the responsibility; and those only would incur it who calculated possible gain and loss." See *Thigpen v. Trust Co.,* 203 N. C., 291, 165 S. E., 720.

This principle is applicable to the facts as shown by all the evidence at the trial of this action. There was no evidence tending to show that the defendants were negligent in failing to collect the certificates of deposit which were issued to their intestate, and which came into their possession as assets of his estate. The amount of each certificate bore interest at the rate of four per cent per annum; each certificate was issued by a bank which had been selected by the deceased as a depository and which was open for business continuously from his death until it closed at the end of about four months. During this time, the defendant administrators had no notice that either of said banks was unsound, or would probably be forced to close its doors, because of its insolvency. The fact that other banks had closed and ceased to do business was not sufficient to put defendants on notice that the banks in Kinston were in an unsound condition, prior to their closing, if such was the fact.

The loss suffered by the plaintiffs in the instant case is one of the casualties of business, and must be borne by them, just as similar losses have been and must be borne by many others. There is no principle of law which upon the facts shown by all the evidence imposes this loss upon the defendant administrators or the surety on their bond. There is no error in the judgment dismissing the action as of nonsuit.

Affirmed.

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

MRS. ANNIE P. HOWELL v. C. S. HOWELL.

(Filed 20 June, 1934.)

Divorce E c—Decree of absolute divorce on ground of separation held not to affect prior order for alimony without divorce.

In the wife's suit against her husband for alimony without divorce under C. S., 1667, an order was entered granting her a stipulated sum monthly. Later the order was modified by a reduction in the amount of the monthly payments, to continue until further order of the court, from which order neither party appealed. Thereafter the husband obtained a decree for absolute divorce upon the grounds of two years separation in a suit instituted in another county, which decree of absolute divorce specifically provided that it was entered without prejudice to the wife's pending action for alimony without divorce. *Held*, the decree for absolute divorce did not affect the order for alimony entered in the wife's action, N. C. Code, 1663, expressly providing that a decree for absolute divorce on the ground of ten years separation should not destroy the wife's right to alimony, and the act of 1933, N. C. Code, 1659(a), permitting divorce after two year's separation being construed in *pari materia* with sec. 1663.

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

APPEAL by defendant from *Grady, J.*, at February Term, 1934, of WAKE. Affirmed.

The findings of fact and the judgment of the court below is as follows: "This cause coming on for hearing upon motion by the plaintiff, that the defendant be attached for contempt for failing to obey certain orders and decrees heretofore entered in this cause, in that he had failed to pay to the plaintiff moneys ordered paid under a decree of Judge N. A. Sinclair rendered on 24 December, 1932. The defendant denied that he was liable to the plaintiff in any sum whatever because of the fact that heretofore, and since the rendition of said judgment

by Judge Sinclair, he has been divorced from his wife, all of which will hereinafter appear. The court finds the following facts: On 3 February, 1930, Judge F. A. Daniels entered an order in this action reciting that: 'It is, therefore, by consent, ordered that the said C. S. Howell pay to the plaintiff the sum of $50.00 as counsel fees and $75.00 per month, beginning on 12 February, 1930, until the further order of the court,' which judgment is made a part of this finding of facts. On 24 December, 1932, upon motion of the defendant for a modification of said order, the payments of $75.00 per month were reduced to $50.00 per month, beginning with the month of December, 1932, and to continue until the further order of the court, which order was signed by Judge N. A. Sinclair, presiding in Wake County, to which there was no appeal and no exception entered.

"At the July-August Term, 1933, of the Superior Court of Chatham County, in an action entitled: Chas. S. Howell against Pearl D. Howell, being the identical parties to this action, the same being an action for divorce brought by the present defendant against the present plaintiff on the ground of two years separation, in which an answer was filed by Mrs. Howell, the present plaintiff, admitting that the parties had lived separate and apart since 14 October, 1929, but further alleging that Chas. S. Howell was responsible for and the cause of said separation, and referring to the action in the Superior Court of Wake County and to the orders and decrees entered in said action. Upon issues submitted upon the pleadings, judgment was rendered as follows: 'This cause coming on to be heard before his Honor, Frank A. Daniels, judge presiding, and a jury, and the following issues having been submitted to the jury: (1) Has the plaintiff been a resident of Chatham County for more than six months and a resident of North Carolina for more than one year prior to the date of the commencement of this action? Answer: Yes. (2) Was the plaintiff married to the defendant, as alleged in the complaint? Answer: Yes. (3) Has the plaintiff and the defendant been living separate and apart for more than two years prior to the date of the institution of this action, continuously? Answer: Yes. And the jury having answered each of the three issues, Yes; it is now, therefore, upon motion of the plaintiff, considered, ordered, adjudged and decreed that the plaintiff, Charlie S. Howell, be, and he is hereby granted an absolute divorce from the defendant, and the bonds of defendant are hereby dissolved; however, this judgment is entered without prejudice to the action pending in the Superior Court of Wake County, North Carolina, entitled: "Mrs. Pearl D. Howell *v.* C. S. Howell," and all orders heretofore made in said action pending in the Superior Court of Wake County shall not be affected by this judgment. FRANK A. DANIELS, *Judge Presiding.*"

"It will be observed that in said judgment it is provided that the same is entered without prejudice to the action pending in the Superior Court of Wake County, North Carolina, entitled: 'Mrs. Pearl D. Howell against C. S. Howell,' and all orders heretofore made in said action pending in the Superior Court of Wake County shall not be affected by this judgment. The complaint, answer, issues, and judgment in said action prosecuted in Chatham County by Charles S. Howell against his wife, Pearl D. Howell, are made a part of these findings of fact and it is ordered that copies of the same be made a part of the record and case on appeal. Upon the foregoing findings of fact, the court is of the opinion that the orders entered in this cause in the Superior Court of Wake County have not been disturbed by the action in Chatham County but are still in full force and effect, and it is, therefore, ordered that the defendant pay to the plaintiff the amounts of money which he is now due and owing to her under and by virtue of the order of Judge N. A. Sinclair, and that in default of payment of the same he be arrested and committed to jail until he has complied with this order. Done in open court at Raleigh after argument of counsel for the plaintiff and the defendant, this 2 February, 1934.

HENRY A. GRADY, *Judge Presiding.*"

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

R. L. McMillan for plaintiff.
J. S. Griffin for defendant.

CLARKSON, J. The question involved: Does the decree of absolute divorce in C. S. Howell's action in Chatham County upon the ground of two years separation impair or destroy Mrs. Howell's right to receive alimony under a judgment and decree in Mrs. Howell's action in Wake County rendered before the commencement of the proceeding for absolute divorce on the grounds of separation, the divorce decree reciting that it does not? We think not.

N. C. Code, 1931 (Michie), sec. 1663, is as follows: "After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine, and either party may marry again unless otherwise provided by law: *Provided,* that no judgment of divorce shall render illegitimate any children *in esse,* or begotten of the body of the wife during coverture; and, *Provided further, that a decree of absolute divorce upon the ground of separation for ten successive years as provided in section 1659 shall not impair or destroy the*

right of the wife to receive alimony under any judgment or decree of the court rendered before the commencement of the proceeding for absolute divorce." (Italics ours.)

1933 Supplement to the North Carolina Code of 1931 (Michie), section 1659(a), is as follows: "Divorce after separation of two years on application of either party.—Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of either party, if and when there has been a separation of husband and wife, either under deed of separation or otherwise, and they have lived separate and apart for two years, and the plaintiff in the suit for divorce has resided in the State for a period of one year. This section shall be in addition to other acts and not construed as repealing other laws on the subject of divorces. 1931, chapter 72, 1933, chapter 163."

We think that section 1659(a), *supra,* automatically reduces the time from ten to two years, in section 1663, *supra,* the two are cognate statutes dealing with similar questions and are to be construed *in pari materia.* In the present case, the judgment on 3 February, 1930, by Judge Daniels recites "by consent" and "until the further order of the court." This was modified by Judge Sinclair on 24 December, 1932. The judgment in the Chatham County action of the defendant against plaintiff, granting him a divorce on the ground of separation, before Judge Daniels, July-August Term, 1933, distinctly says: "This judgment is entered without prejudice to the action pending in the Superior Court of Wake County, North Carolina, entitled: 'Mrs. Pearl. D. Howell *v.* C. S. Howell,' and all orders heretofore made in said action pending in the Superior Court of Wake County shall not be affected by this judgment."

It will be noted that plaintiff did not except to the reduction of the monthly allowance in the judgment signed by Judge Sinclair in the present case. The judgment in the present action of Judge Sinclair, remains in full force and effect. *Lentz v. Lentz,* 193 N. C., 742; *Kizer v. Kizer,* 203 N. C., 428; *Walker v. Walker,* 204 N. C., 210; *Smithdeal v. Smithdeal, ante,* 397. For the reasons given, the judgment of the court below is

Affirmed.

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

TEMPIE G. PLACE, ADMINISTRATRIX OF J. E. PLACE, v. R. H. PLACE, J. L. PLACE, ET AL.

(Filed 20 June, 1934.)

1. Judgments M a—Question litigated and not form of issues held to determine effect of judgment.

A widow, executrix of her husband's estate, instituted proceedings to recover from the estate the proceeds of sale of land formerly held by her and her husband by entireties, which sale was made by her husband and the proceeds thereof in his possession at the time of his death, the widow claiming that the right of survivorship attached to the funds. Judgment was entered that she recover the sum demanded. Thereafter the widow instituted a proceeding to have lands sold to make assets to pay the judgment. *Held*, the real question litigated and not the issues upon which the judgment was entered is determinative of whether the judgment was solely against the proceeds of sale or a general claim against the estate to satisfy which lands of the estate may be sold.

2. Executors and Administrators D d—Funds held to have come into hands of executrix as trustee and beneficiary had election to follow funds or assert general claim against estate.

A widow, executrix of her husband's estate, instituted special proceedings against the other heirs and distributees of the estate to recover from the estate the proceeds of sale of lands formerly held by the widow and husband by entireties, the proceeds of sale being in the husband's possession at the date of his death, and the widow claiming that the right of survivorship attached to the funds. Judgment was entered in her favor upon a simple issue of indebtedness and the judgment stipulated that the sale of assets was not necessary to pay the claim. *Held*, the proceeds of the sale came into her hands as executrix as trustee for herself as the rightful beneficiary, and were sufficient to furnish the basis for a creditor's claim and an action in assumpsit, and submission of the issues in the action indicated that she had elected to bring her action *in indebitatus assumpsit* for money had and received, and the judgment constituted a general claim against the estate for payment of which she was entitled to institute the proceedings to sell land to make assets, a *cestui que trust* having the right, in his election, to proceed against the trustee personally rather than seek to trace the funds.

3. Judgments L b: Executors and Administrators E a—Judgment that lands need not be sold to make assets held interlocutory and not to bar proceeding for sale of lands upon insufficiency of personalty.

A judgment against an estate on a general claim is conclusive as to the amount of the claim, but the adjudication that the personalty is sufficient to pay same and that it is not necessary to sell land to make assets for its payment is an interlocutory judgment and will not bar a subsequent proceeding to sell lands to make assets for its payment where the personalty, by reason of subsequent losses, is insufficient to pay the judgment.

PLACE *v.* PLACE.

SPECIAL proceeding instituted before the clerk and transferred to civil issue docket and tried before *Sinclair, J.*, at February Term, 1934, of DURHAM. Reversed.

The petitioner is the widow and administratrix of J. E. Place, deceased, who died 19 February, 1929, and left surviving him collateral heirs, who are the respondents in this proceeding.

In a special proceeding instituted 1 June, 1929, and transferred to the civil issue docket and tried before Judge Daniels, at September Term, 1931, judgment was awarded the petitioner for the sum of $2,750 to be paid by the administratrix, and it was therein further adjudged that there was no necessity to sell real estate to make assets to pay this sum. This judgment was based upon the petitioner's right of survivorship in the proceeds of a sale of certain real estate of which she and her husband were seized by the entireties. At the time of his death these proceeds were deposited in a bank to the credit of J. E. Place.

This proceeding was instituted by the petitioner on 7 July, 1932, as the administratrix of J. E. Place, against his heirs at law to have real estate sold to make assets to satisfy the judgment obtained in 1931. The respondents reply that the claim of the petitioner was never against the estate of J. E. Place, but only upon the fund which represented the sale price of the land held by him and his wife by entirety.

From the judgment of Judge Daniels, notice of appeal to the Supreme Court was given by the respondents, which prevented the administratrix from paying the judgment from the assets then in her hands; and before the respondents had abandoned said appeal the assets in the hands of the administratrix had diminished in value, through bank failures and otherwise, to the extent that they were insufficient to pay said judgment, there being only $812.50 available for that purpose, which amount was paid on said judgment, thereby reducing the amount due thereon to $1,937.50.

From the judgment of the court that she take nothing by her action, the petitioner appealed to the Supreme Court.

R. O. Everett and E. L. Culbreth for petitioner.
Brawley & Gantt and Yarborough & Yarborough for respondents.

SCHENCK, J. The court below held "That the form of the issues submitted to the jury in the other action is not conclusive, but that the court should look to the real question litigated and decided as shown by the pleadings, evidence and charge of the court." In this conclusion of his Honor we concur.

The court further held "That the claim of Tempie G. Place in said action was not a creditor's claim against the estate of J. E. Place, but

was a claim against the fund representing the proceeds of the sale of the house and lot held by entireties, to which she claimed the right of survivorship still attached, and that she, and not the estate, must bear any loss resulting from the failure of the bank in which said fund was deposited." In this conclusion we think his Honor erred. When J. E. Place died with the proceeds of the sale of land held by the entireties in his possession, these proceeds passed to his estate and were held by his estate as trustee for the survivor, namely, his wife, Tempie G. Place; and when his wife qualified as his administratrix these proceeds came into her hands as trustee for the rightful beneficiary thereof. These proceeds furnished a basis for a creditor's claim, and for an action in assumpsit, in favor of the beneficiary thereof, namely, Tempie G. Place, against the trustee, namely, Tempie G. Place, administratrix of the estate of J. E. Place, deceased. We conclude from the facts in this proceeding that the proceeding in which Judge Daniels rendered judgment was in the nature of an action of *indebitatus assumpsit* for a claim against the estate of J. E. Place, deceased, and not, as held by his Honor, "a claim against the fund representing the proceeds of the sale of the house and lot held by entireties." It will be noted that the issue submitted by Judge Daniels was not whether the plaintiff was the owner of and entitled to a claim against any particular fund or proceeds of any particular sale, but was one of simple indebtedness, being in the following language: "In what sum, if any, is the estate of J. E. Place indebted to Tempie G. Place?" The answer of $2,750 to this issue would seem to support judgment for a debt, rather than for a claim against a fund representing the proceeds of a sale. Likewise the submission of the second issue as to the sufficiency of the personal property to satisfy the obligations of the estate indicates that the court was acting upon the theory that the action was one for debt and creditor's claim, as the question of such sufficiency would not have arisen if the purpose had been to impress a claim upon a particular fund.

"If the *cestui que trust* is unable to trace the trust fund . . . *or if he elects not to do so,* he may proceed against the trustee personally." Perry on Trusts and Trustees, par. 843, pp. 1438-1439.

In an interesting discussion of the various counts in action of *assumpsit,* we find the following: "The count of *indebitatus assumpsit,* the most comprehensive one of all, in which it was alleged that the defendant was indebted to the plaintiff in a certain sum of money; *as for real property sold* or used and occupied, or for personal property sold; or for personal services rendered; or for money loaned or paid and expended to defendant's use; or for *money paid to and received by defendant to plaintiff's use;* all of which was incurred in some way at his special instance and request; and that being so indebted, the defendant promised in consideration thereof to pay the plaintiff the said

money. 1 Chit. Pl., 341; Saund. Pl. & Ev., 139. Of the *indebitatus* counts, those relating to transactions based on the payment or receipt of money were called the money counts; as money lent to defendant; money paid and expended for his use; and *money had and received by defendant to plaintiff's use.*" 5 C. J., 1381, footnote 10(a).

The court below held "That the said Tempie G. Place is estopped by the verdict and judgment in the said former action in which it is declared that the personal assets of the estate are sufficient to pay its obligations and the costs of administration. . . ." In thus holding we think his Honor erred. In the judgment rendered in 1931 a definite indebtedness is declared and such judgment is final as to the amount. The further adjudication therein, based upon the second issue submitted, that the personal property was sufficient to satisfy the obligations of the estate was interlocutory. *Williams v. McFadyen,* 145 N. C., 156. This latter adjudication was of necessity interlocutory, since the sufficiency of personal property to pay debts does not become determinative of the question as to whether land may be sold to make assets until the time for paying the obligations of the estate arrives.

"Where the personal property, although originally sufficient for the payment of debts, has become insufficient after the death of the testator, by reason of depreciation or losses for which neither the personal representatives nor creditors are responsible, the real estate may be sold." 24 C. J., 553.

We conclude that the petitioner is entitled to have the land of the estate of J. E. Place, deceased, sold to make assets to pay the balance due on her judgment, namely, $1,937.50. This action is remanded to the Superior Court of Durham County, that judgment may be entered in accordance with this opinion.

Reversed.

WALTER BABBS v. HOMER L. EURY.

(Filed 20 June, 1934.)

1. Automobiles C e—More securely fastening red light carried on rear of vehicle in addition to regular lights held not "repair."

The stopping of a truck on the hard-surface portion of a highway in order to more securely fasten a red light carried by the truck in addition to the regular tail lights upon its rear is not a stopping of the truck on the highway to repair such vehicle, and evidence disclosing such action by plaintiff does not warrant the granting of defendant's motion as of nonsuit for contributory negligence on the ground that the evidence showed a violation by plaintiff of section 10 of the ordinances of the State Highway Commission prohibiting the repairing of a motor vehicle upon the highway.

2. Same—Evidence held not to disclose violation, as matter of law, of regulations relating to parking vehicles on highway.

Evidence disclosing that plaintiff stopped his truck upon a portion of the hard surface of the highway at a place where the highway was straight and where the lights of a filling station shone, that the lights on the truck, including the required tail lights, were burning, and that about fifteen feet of hard surface highway was open for the passage of cars to the left of the truck, and that the truck was not stopped for the purpose of repairing same *is held* not to show the violation by plaintiff of any statute designed for the preservation and protection of life or limb, sections 10 and 11 of the ordinances of the State Highway Commission, N. C. Code, 2621(72), and defendant's motion as of nonsuit on the ground that defendant's evidence disclosed contributory negligence as a matter of law was properly refused.

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

CIVIL ACTION, before *Warlick, J.*, at January Special Term, 1934, of MECKLENBURG.

The plaintiff alleged and offered evidence tending to show that on or about 10 February, 1933, he was an employee of the Highway Commission and was assisting in the operation of a truck on the Concord-Charlotte Highway known as No. 15, running through Newell. The highway was covered with snow and sleet, and the plaintiff and another employee named Curtis Long had attached a snow plow to the front of the truck in order to remove sleet and snow. At about seven o'clock at night they stopped the truck in front of Newell's store. The plaintiff said: "When Mr. Long stopped the truck I got out on the right-hand side away from the highway. . . . When the truck stopped it was about two-thirds off the hard surface to the right. The hard surface there is eighteen feet wide. The truck is about five and one-half feet wide. . . . The road is straight there about one-half mile in each direction. . . . Mr. Long stopped the truck to fix one of the lights. This light was not one that was bought on the truck. It was an extra red light we carry when we drag snow. It was on behind right over the stop light. Two lights on the rear of the truck were burning. . . . The lights on the rear of the truck when it stopped were burning. The red lantern which we were going to fix had been jumping up and down. It had a red globe that gave a red light. . . . I was standing right behind the truck. I was on the hard surface. I was standing about two feet back of the lights. I saw a car coming from Charlotte going toward Concord. I saw the car that hit the truck before it got to me. Mr. Long said, 'Look out, they are going to hit you.' The lights at the filling station were burning. My truck was right opposite the filling station. There were about fifteen lights there. . . . We stopped in front of the filling station because we could

see better. We had plenty of light there and everybody else could see. . . . There was about six feet of hard surface on the right side between the parked truck and the center of the pavement. There was nine feet of hard surface to the left of the center of the pavement. . . . The car knocked the truck forty-five or fifty feet I reckon. . . . At the time this car hit the truck I didn't see any car coming from Concord toward Charlotte in sight. I could see down the highway a half mile. The car hit me. It hit me on the hip here. It broke my hip. It knocked me down the road there. . . . My opinion is that the speed the car was making was fifty-five or sixty miles. I didn't get up when it knocked me down. I couldn't. . . . Mr. Eury, the defendant, was the one who hit me. He came to the hospital to see me. I can't hardly remember what he told me, I was suffering so. We had stopped just about two minutes. Mr. Long had come to the store to get a string or something to tie the lantern with. He came back without one and we decided to fasten it down with a little old chain we had there." There was other evidence corroborating the testimony of plaintiff.

The defendant testified that at the time of the accident he was traveling between thirty and thirty-five miles per hour. He said: "I did not see any lights on the truck as I approached it. When I approached the truck I was, I guess, thirty-five or forty feet from it, and at that time I didn't see any lights. I never saw any lights on the truck before the collision. . . . The truck was on the pavement. As near as I could tell all of it was on the pavement. On the left side of the truck on the pavement a car was approaching me, coming from toward Concord. It looked like that car was about the same distance I was from the truck. I didn't have time to go by it. . . . I applied my brakes. I didn't attempt to turn my car in either direction. If I had turned to the left, I would have hit the car coming. If I had pulled to the right, I would have hit whatever was standing at the right of the truck. I did not see Babbs until after he was hit." The defendant offered in evidence sections ten and eleven of the ordinance of the State Highway Commission, which are as follows: "Section 10. It shall be unlawful to repair any motor vehicle upon the used or traveled portion of any State Highway." "Section 11. It shall be unlawful to leave any vehicle or other obstruction whatsoever, standing upon a State Highway at night, either on the traveled portion thereof or on the shoulders, unless the same shall be protected by lights making it plainly visible; and in no event shall such vehicle be left standing upon the highway for a period longer than ten (10) hours."

The court submitted issues of negligence, contributory negligence and damages. These issues were answered in favor of the plaintiff and the verdict awarded damages in the sum of $6,500.

From judgment upon the verdict the defendant appealed.

A. M. Butler, G. T. Carswell and Joe W. Ervin for plaintiff.
C. H. Gover and Wm. T. Covington, Jr., for defendant.

BROGDEN, J. The defendant asserted that the motion for nonsuit should have been granted for the reason that the evidence of the plaintiff disclosed that at the time of his injury he was undertaking "to repair" a truck on the highway in violation of section 10 of the ordinances of the Highway Commission. The plaintiff asserts that the mere tying of a red lantern on the rear of a truck is not a work of "repair." The textbooks and decided cases have usually construed the term "repair" to mean restoration to original condition as nearly as possible. Manifestly, in the ordinary transactions of life the word "repair" presupposes a defect, imperfection or deterioration in the truck. The plaintiff undertook to more securely fasten a red lantern, which, of course, involved no idea of defect.

In reference to swinging gates, this Court has held that "a change is not a repair." *Knight v. Foster,* 163 N. C., 329.

Consequently, there is no evidence that the plaintiff at the time of his injury was violating any statute designed for the preservation and protection of life or limb. See C. S., Michie's Code, 1931, 2621(72).

There are other exceptions to the charge and to the failure to give requested instructions, but a careful examination of the record does not produce the conclusion that error was committed in applying the law to the facts. Indeed, the cause presents in its essential aspects, only controverted issues of fact, and such issues have been brought to rest by the verdict of the jury.

Affirmed.

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

STATE v. GEORGE KEATON.

(Filed 20 June, 1934.)

1. Criminal Law I l—Duty of court to submit question of guilt of less degree of the crime charged.

Where it is permissible under the bill of indictment to convict a defendant of a less degree of the same crime, and there is evidence to support a milder verdict, defendant is entitled to have the different views arising on the evidence presented to the jury under a proper charge, and where there are three degrees of the crime, error in failing to submit the question of guilt of the smallest degree of the crime is not cured by a verdict convicting defendant of the greatest degree of the offense charged. C. S., 4640.

2. Homicide A a—Elements of and distinction between degrees of homicide.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation; murder in the second degree is the unlawful killing of a human being with malice, the distinguishing difference between this degree of the crime and murder in the first degree being the absence of premeditation and deliberation or of either one of these elements; and manslaughter is the unlawful killing of a human being, the distinguishing difference between this degree of the crime and murder in the second degree being the absence of malice.

3. Homicide G b—Intentional killing with deadly weapon raises the presumptions that the killing was unlawful and done with malice.

The intentional killing of a human being with a deadly weapon raises the presumptions that the killing was unlawful and was done with malice, constituting murder in the second degree, and since the elements of premeditation and deliberation are not presumed from such killing, the elements of premeditation and deliberation must be established by the State and found by the jury to constitute such killing murder in the first degree.

4. Homicide B a—Statutory provisions relating to murder in the first degree.

It is provided by C. S., 4200, that a murder perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or any other kind of wilful, deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony shall be deemed murder in the first degree, punishable by death.

5. Homicide G b—Burden is on defendant to rebut presumptions arising from intentional killing with deadly weapon.

Where it is admitted or shown by the evidence that defendant intentionally killed another with a deadly weapon, the burden is upon defendant to rebut the presumptions arising therefrom by establishing to the satisfaction of the jury legal provocation which will rebut the presumption of malice and thus reduce the crime to manslaughter or excuse it altogether on the ground of self-defense, unavoidable accident or misadventure.

6. Homicide H c—Held: there was no evidence that crime was manslaughter and refusal to submit question of this lesser degree was not error.

The evidence in this case tended to show that defendant intentionally shot and killed his sweetheart with a pistol, evidently as a result of a lovers' quarrel. Defendant interposed the defense of insanity resulting from syphilis, but introduced no evidence of legal provocation or matters in mitigation of the offense. *Held*, in the absence of evidence tending to rebut the presumptions arising from the intentional killing with a deadly weapon that the killing was unlawful, and done with malice, there was no evidence of defendant's guilt of manslaughter, and it was not error for the court to fail to submit the question of defendant's guilt of manslaughter to the jury.

STATE *v.* KEATON.

APPEAL by defendant from *Alley, J.,* at March Term, 1934, of FORSYTH.

Criminal prosecution tried upon indictment charging the defendant with the murder of one Annie Thigpen.

The record discloses that on the afternoon of 19 January, 1933, the defendant shot and killed Annie Thigpen, his sweetheart, as she was walking with two companions on her way home from school, because, he said, "she had made his life miserable." Evidently a lovers' quarrel, which ended tragically. The homicide, which is not denied, was without legal excuse or provocation, and there were no mitigating circumstances. The defense interposed by the defendant was that of mental irresponsibility, or insanity, resulting from syphilis in the third or tertiary stage, which "affects every organ in the body, including the brain," according to one of the physicians. The evidence tending to support the defendant's plea was submitted to the jury and rejected or found to be unsatisfactory.

Verdict: Guilty of murder in the first degree.

Judgment: Death by electrocution.

The defendant appeals, assigning errors.

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

Manly, Hendren & Womble and William Graves for defendant.

STACY, C. J. This is the same case that was before us at the last term, opinion filed 10 January, 1934, and reported in 205 N. C., 607. A new trial was granted on the first appeal for error in the exclusion of evidence. The case has been tried again with the same result as on the first trial, to wit, a capital verdict and sentence of death.

The prisoner now complains that the trial court failed to instruct the jury on the issue of manslaughter and limited them in their deliberations to one of three verdicts, to wit: murder in the first degree, murder in the second degree, and not guilty. *S. v. Merrick,* 171 N. C., 788, 88 S. E., 501.

The rule undoubtedly is, that when it is permissible under the bill, as here, to convict the defendant of "a less degree of the same crime," C. S., 4640, and there is evidence tending to support a milder verdict, the case presents a situation where the defendant is entitled to have the different views presented to the jury under a proper charge, and an error in this respect is not cured by a verdict convicting the defendant of a higher offense charged in the bill of indictment, for in such event, it cannot be known whether the jury would have convicted of a less degree of the same crime if the different views, arising on the evidence,

had been correctly presented in the court's charge. *S. v. Lee, ante,* 472, 174 S. E., 288; *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187; *S. v. Lutterloh,* 188 N. C., 412, 124 S. E., 752; *S. v. Robinson,* 188 N. C., 784, 125 S. E., 617; *S. v. Williams,* 185 N. C., 685, 116 S. E., 736.

But the facts of the instant case do not call for the application of this rule, so far as the issue of manslaughter is concerned, as the record is barren of any evidence of manslaughter. *S. v. Myers,* 202 N. C., 351, 162 S. E., 764; *S. v. Sterling,* 200 N. C., 18, 156 S. E., 96; *S. v. Newsome, supra; S. v. Spivey,* 151 N. C., 676, 65 S. E., 995. The homicide was intentional and it was committed with a deadly weapon under circumstances which suggest no cause, excuse, or justification. This is, at least, murder in the second degree. *S. v. Bailey,* 205 N. C., 255, 171 S. E., 81; *S. v. Robinson, supra.*

There are three degrees of an unlawful homicide: (1) murder in the first degree, which is the unlawful killing of a human being with malice and with premeditation and deliberation; (2) murder in the second degree, which is the unlawful killing of a human being with malice, but without premeditation and deliberation; and (3) manslaughter, which is the unlawful killing of a human being without malice and without premeditation and deliberation. *S. v. Benson,* 183 N. C., 795, 111 S. E., 869.

The presence in the one case of premeditation and deliberation and the absence in the other of one or both of these elements is the distinguishing difference between murder in the first degree and murder in the second degree. *S. v. Miller,* 197 N. C., 445, 149 S. E., 590. The presence in the one case and the absence in the other of the element of malice is the distinguishing difference between murder in the second degree and manslaughter. *S. v. Robinson, supra.*

An unlawful killing is manslaughter. An unlawful killing with malice is murder in the second degree. An unlawful killing with malice and with premeditation and deliberation is murder in the first degree. *S. v. Banks,* 143 N. C., 652, 57 S. E., 174.

Where it is admitted or established by the evidence, as it is here, that the defendant intentionally killed the deceased with a deadly weapon, the law raises two—and only two—presumptions against him: first, that the killing was unlawful; second, that it was done with malice; and an unlawful killing with malice is murder in the second degree. *S. v. Bailey, supra; S. v. Miller, supra; S. v. Walker,* 193 N. C., 489, 137 S. E., 429; *S. v. Fowler,* 151 N. C., 731, 66 S. E., 567. The additional elements of premeditation and deliberation, necessary to constitute the capital offense, are not presumed from a killing with a deadly weapon. These must be established beyond a reasonable doubt, and found by the jury, before a verdict of murder in the first degree

can be rendered against the defendant. *S. v. Thomas,* 118 N. C., 1113, 24 S. E., 431. It is provided by C. S., 4200, that a murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree, punishable by death, and all other kinds of murder shall be deemed murder in the second degree, punishable by imprisonment in the State's prison. *S. v. Banks,* 143 N. C., 652, 57 S. E., 174; *S. v. Newsome, supra.*

If a defendant who has intentionally killed another with a deadly weapon would rebut the presumption arising from such showing or admission, he must establish to the satisfaction of the jury (*S. v. Willis,* 63 N. C., 26), the legal provocation which will take from the crime the element of malice and thus reduce it to manslaughter, or which will excuse it altogether on the ground of self-defense, unavoidable accident or misadventure. *S. v. Gregory,* 203 N. C., 528, 166 S. E., 387; *S. v. Eldridge,* 197 N. C., 626, 150 S. E., 125; *S. v. Pasour,* 183 N. C., 793, 111 S. E., 779; *S. v. Brinkley,* 183 N. C., 720, 110 S. E., 783.

In *S. v. Quick,* 150 N. C., 820, 64 S. E., 168, it was said that when an intentional killing is admitted or established, the law presumes malice from the use of a deadly weapon, and the defendant is guilty of murder in the second degree, unless he can satisfy the jury of the truth of facts which justify his act or mitigate it to manslaughter. "The burden is on the defendant to establish such facts to the satisfaction of the jury, unless they arise out of the evidence against him." *S. v. Banks,* 204 N. C., 233, 167 S. E., 851; *S. v. Cox,* 153 N. C., 638, 69 S. E., 419.

In the instant case, there is no evidence of mitigation or provocation sufficient to reduce the offense to manslaughter. *S. v. Robinson, supra.* Hence, it was proper to withhold this issue from the jury's consideration. *S. v. Ferrell,* 205 N. C., 640; *S. v. Jackson,* 199 N. C., 321, 154 S. E., 402.

The remaining exceptions have been carefully considered and found wanting in sufficiency to warrant a new trial. Indeed, with the defendant's plea of insanity rejected by the jury, there is little he could hope to accomplish, even if granted another hearing. The verdict and judgment will be upheld.

No error.

B. E. DEHOFF ET AL. v. C. G. BLACK ET AL.

(Filed 20 June, 1934.)

1. Judgments D b—Effect of judgment by default and inquiry.

A judgment by default and inquiry establishes a right of action of the kind properly pleaded in the complaint, and determines the right of plaintiff to recover at least nominal damages and costs, and precludes defendant from offering evidence on the execution of the inquiry to show that plaintiff has no right of action. C. S., 596.

2. Same—Judgment by default and inquiry in auto-collision case does not preclude defendant from showing how the accident took place.

A judgment by default and inquiry in an action to recover damages sustained by plaintiff resulting from the collision of two trucks on a public highway, one of which trucks was owned by plaintiff, will not preclude defendants from introducing evidence on the execution of the inquiry tending to show how the collision occurred and that the accident was the result of the negligence of plaintiff's driver, the evidence not being related to the issue of contributory negligence, but being competent on the question of the amount of damages sustained by plaintiff as a proximate result of defendants' negligence, plaintiff being entitled to recover over and above nominal damages only damages sustained as a proximate result of defendants' negligence.

3. Same—Judgment by default and inquiry precludes defendants from showing relationship between them as affecting liability.

Plaintiff obtained a judgment by default and inquiry against defendants in his action against them to recover damages resulting from a collision between two trucks, one of which was owned by plaintiff. Plaintiff alleged that the other truck was driven by one of defendants, operated by another, and owned by the third defendant. *Held*, upon the execution of the inquiry, the alleged operator or lessee of the truck was precluded by the judgment by default and inquiry from introducing evidence that he was in no way connected with truck causing plaintiff's damage, either as lessee or otherwise, such evidence relating only to the question of liability which was conclusively established by the judgment by default and inquiry.

CONNOR, J., dissents.

APPEAL by defendants from *Shaw, Emergency Judge,* at January Term, 1934, of SURRY.

Civil action to recover damages for alleged negligent injury to plaintiff's truck.

Summons and copy of complaint were served on the defendants 4 April, 1931.

It is alleged in the complaint that on the morning of 31 March, 1931, on Highway No. 1, near South Hill, Va., a truck owned by the

defendant, C. G. Black, operated by the defendant, K. & S. Trucking Company, and driven by C. W. Silver, who was also accompanied by Hunter Black, brother of the owner of the truck, negligently ran into and completely demolished a truck owned by the plaintiff and operated at the time by its employee, F. M. Akins; and that both defendants are liable to plaintiff for the damages sustained.

On 25 May, 1931, judgment by default and inquiry was entered against the defendants for want of an answer; motion thereafter to set it aside for excusable neglect overruled; and at the January Term, 1934, said inquiry was executed before a jury, the damages being assessed at $400.

Upon the execution of the inquiry, the defendants sought to show how the collision occurred; that it was really due to the conduct of F. M. Akins, driver of plaintiff's truck; and that the defendant, K. & S. Trucking Company, was in no way connected with C. G. Black's truck as lessee or otherwise. All this proffered testimony was excluded as irrelevant and immaterial on the issue of damages. The appeal presents the question of the competency of this evidence.

From judgment on the verdict, the defendants appeal, assigning errors.

W. M. Allen and A. D. Folger for plaintiff.
H. O. Woltz and R. A. Freeman for defendants.

STACY, C. J. What is the effect of a judgment by default and inquiry? The answer is threefold:

1. It establishes a right of action of the kind properly pleaded in the complaint. *Bowie v. Tucker, ante,* 56; *Strickland v. Shearon,* 193 N. C., 599, 137 S. E., 803; *Mitchell v. Ahoskie,* 190 N. C., 235, 129 S. E., 626; *Beard v. Sovereign Lodge,* 184 N. C., 154, 113 S. E., 661; *Armstrong v. Asbury,* 170 N. C., 160, 86 S. E., 1038; *Allen v. McPherson,* 168 N. C., 435, 84 S. E., 766; *Banks v. Mfg. Co.,* 108 N. C., 282, 12 S. E., 741; 34 C. J., 173-175. See, also, dissenting opinion of *Connor, J.,* in *Junge v. MacKnight,* 135 N. C., 105, 47 S. E., 452, later declared to be the law on petition to rehear, 137 N. C., 285, 49 S. E., 474.

2. It determines the right of the plaintiff to recover at least nominal damages and costs. *Foster v. Hyman,* 197 N. C., 189, 148 S. E., 36; *Hill v. Hotel Co.,* 188 N. C., 586, 125 S. E., 266; *Blow v. Joyner,* 156 N. C., 140, 72 S. E., 319; *Plumbing Co. v. Hotel Co.,* 168 N. C., 577, 84 S. E., 1008; *Patrick v. Dunn,* 162 N. C., 19, 77 S. E., 995.

3. It precludes the defendant from offering any evidence, on the execution of the inquiry, to show that the plaintiff has no right of

action. *Mitchell v. Express Co.*, 178 N. C., 235, 100 S. E., 307; *Hollifield v. Tel. Co.*, 172 N. C., 714, 90 S. E., 996; *Lee v. Knapp*, 90 N. C., 171; *Garrard v. Dollar*, 49 N. C., 176; 15 R. C. L., 667.

A judgment by default final as authorized by C. S., 595, is different in effect and result from a judgment by default and inquiry as authorized by C. S., 596. *Gillam v. Cherry*, 192 N. C., 195, 134 S. E., 423. The former establishes the allegations of the complaint and concludes by way of estoppel, while the latter "establishes a right of action in the plaintiff of the kind stated in the complaint" (*Blow v. Joyner, supra*), the precise character and extent of which remain to be determined by a hearing in damages and final judgment thereon. *Osborn v. Leach*, 133 N. C., 427, 45 S. E., 783; 2 Black on Judgments, sec. 697.

Thus, in *Stockton v. Mining Co.*, 144 N. C., 595, 57 S. E., 335, it was said that a judgment by default and inquiry, in an action for fraud and deceit, did not establish the truthfulness of the allegations of fraud, which still remained to be proved, but merely the fact that the plaintiff was entitled to recover at least nominal damages and costs on the cause of action set out in the complaint and foreclosed a hearing only upon the existence of the right of action.

Likewise, in *Blow v. Joyner, supra*, the following discriminating statement appears: "The authorities are very generally to the effect that where a complaint has been properly filed showing a right of action for unliquidated damages, a judgment by default and inquiry establishes plaintiff's right of action and that he is entitled at least to nominal damages. *Osborn v. Leach*, 133 N. C., 428; 2 Black on Judgments, sec. 698; 23 Cyc., 752; 6 Enc. Pl. and Pr., 127. And in this State it is further held that such a judgment concludes on all issuable facts properly pleaded and that evidence in bar of plaintiff's right of action is not admissible on the inquiry as to damages. *McLeod v. Nimocks*, 122 N. C., 438; *Lee v. Knapp*, 90 N. C., 171; *Parker v. House*, 66 N. C., 374; *Parker v. Smith*, 64 N. C., 291; *Garrard v. Dollar*, 49 N. C., 175. In *McLeod v. Nimocks* it is said: 'The judgment by default and inquiry, the defendant having said nothing in answer to plaintiff's complaint, was conclusive that the plaintiff had a cause of action against the defendant of the nature declared in the complaint, and would be entitled to nominal damages without any proof.' The statement sometimes made that a judgment of this kind 'merely admits a cause of action, while the precise character of the cause of action and the extent of defendant's liability remains to be determined,' simply means, as stated, that a judgment by default and inquiry establishes a right of action in plaintiff of the kind stated in the complaint and entitling plaintiff to nominal damages, but that the facts and attendant circum-

stances giving character to the transaction and relevant as tending to fix the *quantum* of damages, must be shown, and in this sense only is the statement in question approved in *Osborn v. Leach, supra.*"

"There are two kinds of judgments by default—one final, the other interlocutory. In actions *sounding in damages* the interlocutory judgment, which is rendered for want of an answer, is an admission or confession of the cause of action; and there follows a writ of inquiry by means of which the damages are to be assessed."—*Montgomery, J.*, in *Junge v. MacKnight,* 137 N. C., 285, 49 S. E., 474.

Applying the principles gleaned from the authorities to the facts of the instant case, it would seem that the evidence tending to show how the injury occurred is competent, not for the purpose of exculpating the defendants from liability, but to establish the amount of damages properly assessable upon the inquiry. *Strickland v. Shearon, supra; Graves v. Cameron,* 161 N. C., 549, 77 S. E., 841; *Mfg. Co. v. McQueen,* 189 N. C., 311, 127 S. E., 246.

A simple illustration may serve to make clear its competency: A. and B., each driving a truck or automobile, approach from opposite directions upon the highway. B. is slightly over the center of the road. A. decides to teach him a lesson by taking his front wheel off. This he does with consequent injury to himself. A. sues B. and obtains a judgment by default and inquiry for want of an answer. Upon the execution of the inquiry, B. offers to show how the collision occurred, not to escape his liability of a penny and the costs established by the judgment, but to show that A.'s damage, over and above the amount fixed by the default judgment, was the result of a self-inflicted injury (not contributory negligence) and the proper measure of damages. *S. v. Eldridge,* 197 N. C., 626, 150 S. E., 125; *Const. Co. v. R. R.,* 184 N. C., 179, 113 S. E., 672. In a tort action for unliquidated damages, the amount recoverable is the sum necessary to compensate the plaintiff for the injury sustained as a proximate result of defendant's negligence or wrong. *Hurt v. Power Co.,* 194 N. C., 696, 140 S. E., 730.

On the other hand, the evidence offered to show the relation between the defendants, which goes only to the question of liability, was properly excluded.

New trial.

CONNOR, J., dissents.

F. M. AKINS v. C. G. BLACK ET AL.

(Filed 20 June, 1934.)

APPEAL by defendants from *Shaw, Emergency Judge,* at January Term, 1934, of SURRY.

Civil action to recover damages for an alleged negligent injury.

There was a judgment by default and inquiry entered against the defendants for want of an answer; motion thereafter to set it aside for excusable neglect overruled; and at the January Term, 1934, said inquiry was executed before a jury, the damages being assessed at $1,000.

From judgment on the verdict, the defendants appeal, assigning errors.

W. M. Allen and A. D. Folger for plaintiff.

H. O. Woltz and R. A. Freeman for defendants.

PER CURIAM. The facts and rulings in this case are identical with those appearing in the companion case of *DeHoff v. Black, ante,* 687. and a like result must follow here.

New trial.

CONNOR, J., dissents.

STATE v. HAYNES WILCOX.

(Filed 20 June, 1934.)

Criminal Law G j—Weight and credibility to be given testimony of defendant testifying in own behalf.

A defendant in a criminal action was made competent to testify in his own behalf by chapter 110, Public Laws of 1881 (N. C. Code, 1799), and while the interpretations of the statute require his testimony to be scrutinized, it is the province of the jury to determine from his demeanor and the attending circumstances the weight which they will accord his testimony, and a charge of the court that "the law presumes" that he is naturally laboring under the temptation to testify to whatever he thinks may be necessary to clear himself and that the jury should take into consideration what a conviction would mean to defendant, etc., *is held* to impose a burden and cast a shadow upon his testimony greater than the law requires and to constitute reversible error.

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

STATE *v.* WILCOX.

CRIMINAL ACTION, before *Sinclair, J.*, at December Term, 1933, of ROBESON.

A warrant was issued for the defendant in the recorder's court of Lumberton, charging him with possessing and transporting liquor. Upon conviction in the recorder's court he appealed to the Superior Court and was again convicted. The evidence for the State tended to show that the defendant Wilcox had a half-gallon of liquor in his car and that the back seat was wet and smelled like liquor, and that some hay in the car was also wet and carried the odor of whiskey.

The defendant was a witness in his own behalf and testified that some colored men got into his car with his consent to ride to town, and that if any whiskey was in the car it belonged to these men.

The jury found the defendant guilty of possession and from judgment assigning him to work upon the public roads for a period of six months, he appealed.

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

E. J. and L. J. Britt and McLean & Stacy for defendant.

BROGDEN, J. If a defendant in a criminal action voluntarily testifies in his own behalf, does the law "presume when a man is being tried for crime, that he is naturally laboring under a temptation to testify to whatever he thinks may be necessary to clear himself of the charge," and in scrutinizing his testimony in order to determine its credibility and weight, must the jury take "into consideration what a conviction would mean to him and the temptation under which he labors to swear to whatever he thinks is necessary to clear himself?"

The trial judge charged the jury as follows:

"Another rule of law it is your duty to apply in this case as you do in all criminal cases, that is, that you are to scrutinize the evidence of the defendant before accepting his evidence as true. The law says it is the duty of a jury in a criminal case to scrutinize the evidence of a defendant and all his close relations before accepting his evidence as true. There is reason for that, just as you will find reason for everything in the law if you take the trouble to inquire into it. The law is founded upon common sense and human experience, for that reason the law presumes that men's natures are weak and subject to temptation, and the law presumes when a man is being tried for crime that he is naturally laboring under a temptation to testify to whatever he thinks may be necessary to clear himself of the charge. For that reason it becomes your duty to scrutinize the evidence of the defendant, taking into consideration what a conviction would mean to him and the temptation under which he labors to swear to whatever he thinks is necessary

to clear himself. It is to his interest in the case and his temptation to try to avoid a verdict against himself. If, after scrutinizing the testimony of defendant, taking into consideration the temptation under which he labors, natural wish to clear himself of the charge, and then find his testimony is true, it would be your duty to give it the same weight as you would give a disinterested witness."

The common law regarded the testimony of a defendant in criminal actions as incompetent upon the theory, among others, that the frailty of human nature and the overpowering desire for freedom would ordinarily induce a person charged with crime, if permitted to testify, to swear falsely. It could not conceive of a person "that sweareth to his own hurt and changeth not." Psalms 15:4. This idea of excluding the testimony of defendants in criminal actions prevailed in this State until 1881, when the Legislature enacted chapter 110, Public Laws of 1881, now C. S., 1799, Michie's Code. This statute was first construed by the Supreme Court in *S. v. Efler,* 85 N. C., 585. The Court said: "The statute of 1881, chap. 110, sec. 2, provides that in the trial of all indictments against persons charged with the commission of crimes in the several courts of the State, the person charged shall 'at his own request, but not otherwise,' *be a competent witness,* and the question is as to the effect upon the rights of a defendant who sees proper to avail himself of the privilege. In declaring him to be 'a competent witness' we understand the statute to mean that he shall occupy the same position with any other witness, be under the same obligation to tell the truth, entitled to the same privileges, receive the same protection, and equally liable to be impeached or discredited. Unless willing to become a witness, he is invested with a presumption of innocence such as the law makes in favor of every person accused of crime, and evidence cannot be offered to impeach his character unless he voluntarily puts it in issue. But by availing himself of the statute he assumes the position of a witness and subjects himself to all the disadvantages of that position, and his credibility is to be weighed and tested as that of any other witness." This Court, speaking through *S. v. Thomas,* 98 N. C., 599, 4 S. E., 518, said: "A person charged with crime may, 'at his own request but not otherwise' become a witness on his own behalf upon the trial, and his failure to claim the privilege and offer his own testimony, is not permitted to become the subject of comment to his prejudice by counsel for the prosecution. He is, when he chooses to testify, bound to disclose all he knows, whether criminating or disparaging to himself, as does an ordinary witness when testifying on matters of which he might claim the privilege of being silent, binds himself to tell the whole truth and all that he knows of the transaction, to part of which only he has testified." See, also, *S. v. Spurling,* 118 N. C., 1250, 24 S. E., 533; *S. v. Traylor,* 121 N. C., 674, 28 S. E., 493; *S. v. O'Neal,* 187

N. C., 22, 120 S. E., 817. The accepted standard for measuring the testimony of a defendant is prescribed in *S. v. Lee,* 121 N. C., 544, 28 S. E., 552, and is as follows: "The law regards with suspicion the testimony of near relations, interested parties, and those testifying in their own behalf. It is the province of the jury to consider and decide the weight due to such testimony, and, as a general rule in deciding on the credit of witnesses on both sides, they ought to look to the deportment of the witnesses, their capacity and opportunity to testify in relation to the transaction, and the relation in which the witness stands to the party; that such evidence must be taken with some degree of allowances and should not be given the weight of the evidence of disinterested witnesses, but the rule does not reject or necessarily impeach it; and if, from the testimony, or from it and the other facts and circumstances in the case, the jury believe that such witnesses have sworn the truth, then they are entitled to as full credit as any other witness."

Manifestly, the inadvertent use of the expression "the law presumes," etc., imposed a burden and cast a shadow upon the testimony of the defendant, which is not warranted by the interpretation of the statute heretofore given by the courts. See *Dunbar v. State,* 85 A. L. R., p. 523, *et seq.*

New trial.

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

STATE v. HAYNES WILCOX.

(Filed 20 June, 1934.)

Criminal Law G j—Weight and credibility to be given testimony of defendant testifying in own behalf.

It is error for the trial court to instruct the jury to scrutinize the testimony of a defendant testifying in his own behalf in a criminal prosecution, without thereafter instructing them that if they find the witness worthy of belief they should give as full credit to his testimony as any other witness, notwithstanding his interest.

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

CRIMINAL ACTION, before *Sinclair, J.,* at November Term, 1933, of ROBESON.

The defendant was indicted for assaulting Mrs. Council Wilcox and Elbert Cox with a deadly weapon, "to wit, a shotgun and pistol, with intent to kill said Mrs. Council Wilcox and Elbert Cox and did inflict

serious injury," etc. The evidence tended to show that on the night of 16 October, 1932, the defendant and several others went to the house of his brother Council Wilcox. There were two women in the party and there was evidence that the visitors were drinking and proceeded to make the home a "rough house." Thereupon Council Wilcox ordered the party to "clear out." Out in the yard Council and his brother, the defendant, Haynes, according to the record, "knocked a lick or two with our fists." The evidence further tended to show that the defendant, Haynes Wilcox, left the premises and returned with a companion, all fully armed, and that they began to "shoot up" the house of Council Wilcox, wounding Mrs. Wilcox and another.

The defendant, as a witness for himself, denied that he did the shooting and there was sharp conflict in the evidence as to whether the shooting was done by the defendant. The defendant was convicted and sentenced to work on the roads for a period of eighteen months, and from such judgment he appealed.

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

E. J. and L. J. Britt and McLean & Stacy for defendant.

BROGDEN, J. The trial judge charged the jury as follows: "There is a law it is your duty to apply in this case as you do in all criminal cases. It is your duty to scrutinize the evidence of defendant before accepting his evidence as true. The reason for that is, the law is founded upon human experience and common sense. The law recognizes that human nature is weak and subject to temptations, and, therefore, the law presumes that when a man is being tried for crime he is laboring under the temptation to do whatever he thinks is necessary to clear himself. For that reason the law makes it your duty to scrutinize the evidence of defendant before accepting his testimony as true."

The defendant excepted to the foregoing instruction. Such exception is sustained upon authority of *S. v. Ray,* 195 N. C., 619, 143 S. E., 143. In that case the Court said: "It has been held in a number of cases that where a defendant, in the trial of a criminal prosecution, testifies in his own behalf, it is error for the trial court to instruct the jury to scrutinize his testimony and to receive it with grains of allowance, because of his interest in the verdict, without adding that if they find the witness worthy of belief they should give as full credit to his testimony as any other witness, notwithstanding his interest."

New trial.

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

STATE v. GEORGE WHITFIELD.

(Filed 20 June, 1934.)

1. Constitutional Law F c—Right of confrontation includes right to fair opportunity to prepare case.

The constitutional right of a defendant in a criminal prosecution to confront his accusers and adverse witnesses with other testimony, Const., Art. I, sec. 11, includes the right to a fair opportunity to prepare and present his defense, which right must be accorded him not only in form, but in substance as well.

2. Criminal Law H c—

A motion for a continuance is addressed to the sound discretion of the trial court, and its ruling thereon is not subject to review on appeal, except in case of manifest abuse.

3. Constitutional Law F c: Criminal Law H c—Refusal of motion for continuance held not to deny accused's right of confrontation.

Defendant in this prosecution for rape was assigned counsel by the court. Two days after counsel had been assigned the case was called for trial, and defendant's attorneys asked for a continuance in order to prepare his defense. The motion was refused and defendant excepted. The controversy reduced itself to a question of veracity between defendant and the prosecutrix, there being no other witnesses to the crime. *Held*, upon the facts, it is impossible to determine on appeal that the refusal of the motion for continuance denied defendant his constitutional right of confrontation, and his exception to the refusal of the motion is not sustained.

4. Criminal Law L c—

In the absence of a clear showing of error an exception must be overruled on appeal.

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

APPEAL by defendant from *Shaw, Emergency Judge,* at October Term, 1933, of GUILFORD.

Criminal prosecution tried upon an indictment charging the defendant with rape.

It is established by the State's evidence that on the morning of 3 October, 1933, the prisoner, who had been out the night before attending a dance, appeared at the home of the prosecuting witness, 511 Hinton's Alley, Greensboro, N. C., about an hour after her husband had left for his work at the Pomona Cotton Mill. The prosecuting witness was alone in the house at the time with the exception of her 15-months-old baby. She did not know the prisoner and had never seen him before. The prisoner, speaking to her from the front porch, said he had come to bring her husband a bottle of whiskey. On being informed that her

husband was at work and would not be back before three o'clock, the prisoner broke open the screen door, approached the prosecuting witness with an open knife in his hand, threatened to kill her if she made an outcry, knocked her baby out of her arms, choked her, threw her to the floor, and ravished her, forcibly and against her will. The prisoner then made his escape and was apprehended about a week later.

The prisoner, testifying in his own behalf, said that he was a bootlegger; that he had been in the home of the prosecuting witness a number of times to deliver home brew and whiskey; that on the morning in question she began quarreling with him about making her husband drunk; that he entered the house on her invitation: "I was standing beside the cot. Just as she walked by me she kinder pushed me over on the cot, unbeknownst to me, and so I fell back against the window and pulled the shade down, and the shade fell on my head"; that the prosecuting witness had a knife and was threatening to kill him; that he grabbed her arm and choked her in self-defense: "I draws her up to me and shoves her back against the wall; she falls and starts to hollering; I opens the door, takes a running start and jumps over the fence, and goes across the field; I hears her hollering: 'Arrest that man.'"

The prisoner further testified that he went on an extended tour, traveling by train and truck, first to Alexandria, Baltimore and Philadelphia and then to Boston; that he returned as soon as he thought the threat of mob violence was over.

The prisoner was arraigned on 23 October, and counsel duly appointed to represent him. His trial was set for 25 October. Upon the call of the case, counsel moved for a continuance on the ground that they had not had time to prepare the defense. Motion overruled; exception.

Verdict: Guilty of rape.

Judgment: Death by electrocution.

The prisoner appeals, assigning errors.

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

Block & Rockwell for defendant.

STACY, C. J. Did the refusal of the trial court to grant the prisoner's motion for a continuance impinge upon his constitutional right of confrontation? All the assignments of error, properly made, revolve around this one question.

The rule undoubtedly is, that the right of confrontation carries with it, not only the right to face one's "accusers and witnesses with other testimony" (sec. 11, Bill of Rights), but also the opportunity fairly to

present one's defense. *S. v. Ross,* 193 N. C., 25, 136 S. E., 193; *S. v. Hartsfield,* 188 N. C., 357, 124 S. E., 629. A right observed according to form, but at variance with substance, is a right denied. *S. v. Garner,* 203 N. C., 361, 166 S. E., 180; *S. v. Hightower,* 187 N. C., 300, 121 S. E., 616; *S. v. Hardy,* 189 N. C., 799, 128 S. E., 152.

Speaking to the subject in *Powell v. Alabama,* 287 U. S., 45, it was said by the Court of final authority that "in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."

That a reasonable time for the preparation of a defendant's case should be allowed counsel appointed by the court to defend him commends itself, not only as a rule of reason, but also as a rule of law, and is so established by the decisions. Annotation, 84 A. L. R., 544.

On the other hand, it is equally well established in this jurisdiction that a motion for a continuance is addressed to the sound discretion of the trial court, and its ruling thereon is not subject to review on appeal, except in case of manifest abuse. *S. v. Lea,* 203 N. C., 13, 164 S. E., 737; *S. v. Banks,* 204 N. C., 233, 167 S. E., 851; *S. v. Garner, supra; In re Bank,* 202 N. C., 251, 162 S. E., 568; *S. v. Rhodes,* 202 N. C., 101, 161 S. E., 722; *S. v. Sauls,* 190 N. C., 810, 130 S. E., 848; *S. v. Riley,* 188 N. C., 72, 123 S. E., 303.

In the instant case, the alleged crime was committed on 3 October; the prisoner was apprehended about a week later, and duly indicted at the October Term of court; he was arraigned on 23 October, and counsel appointed to represent him; his trial was set for 25 October. The facts were simple and the controversy reduced itself to a question of veracity between the prosecuting witness and the prisoner. There were no other witnesses to the crime. We cannot say, as a matter of law, that in ruling the defendant to trial, the court took from him his constitutional right of confrontation. *S. v. Rodman,* 188 N. C., 720, 125 S. E., 486; *S. v. Burnett,* 184 N. C., 783, 115 S. E., 57; *S. v. Henderson,* 180 N. C., 735, 105 S. E., 339; *S. v. Sultan,* 142 N. C., 569, 54 S. E., 841; *S. v. Dewey,* 139 N. C., 556, 51 S. E., 937. In the absence of a clear showing of error, the exceptions must be overruled. *S. v. Garner, supra.*

No error.

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

ERNEST W. MOORE AND HIS WIFE, KATHLEEN JAMES MOORE, v. J. M. SHORE.

(Filed 20 June, 1934.)

1. Deeds and Conveyances C g: Frauds, Statute of, B a—Rights created by restrictive covenants in deeds are in nature of easements.

Where land in a development is sold by deeds containing certain restrictive covenants, the rights of purchasers of lots therein in respect to the covenants contained in another purchaser's deed is in the nature of an easement, and their contracts and agreements in respect to such rights are subject to the provisions of the statute of frauds, C. S., 988, and it would seem that ordinarily their easement in such other purchaser's lot may not be released by them by parol agreement.

2. Appeal and Error B b—Appeal will be decided in accordance with theory of trial in the lower court.

Whether plaintiffs' verbal release of their easements over defendant's land, created by restrictive covenants in defendant's deed, could be enforced as debated upon the argument, *held* not necessarily determinative of the appeal in view of the fact that defendant's answer relied upon equitable estoppel against plaintiffs and not a release of the easements.

3. Deeds and Conveyances C g: Estoppel C a—Owners of dominant tenements may be estopped from asserting easements over servient tenement.

Plaintiffs, the purchasers of lots in a development by deeds containing certain restrictions, brought action against defendant, an owner of another lot in the development, to enjoin defendant from violating the restrictive covenant in his deed by building a filling station on his lot. Defendant filed answer alleging that plaintiffs, prior to the time he purchased the lot, had agreed verbally to permit him to construct a filling station on the lot if he bought same, that in reliance on their agreement he had purchased the lot, and had paid the purchase price and had expended funds for the construction of the filling station, with knowledge of plaintiffs, and that plaintiffs were thereby estopped from maintaining their action to enforce the restrictions. *Held*, the issues relating to the estoppel pleaded should have been submitted to the jury, and judgment on the admissions in the pleadings permanently restraining defendant from erecting the filling station is held erroneous.

APPEAL by defendant from *Alley, J.*, at March Term, 1934, of FORSYTH. Reversed.

This is an action to restrain the defendant from erecting and operating a filling station on a lot of land owned by him in violation of certain restrictive covenants contained in the deeds under which the defendant holds title to said lot, which were imposed upon the successive owners of said lot of land for the benefit of the owner of the lot of land now owned by the plaintiff, and of the owners of the other lots of land, which are included within a real estate development known

as the Shouse property. The plaintiffs and defendant derive title to their respective lots of land from a common source.

The action was begun and tried in the Forsyth County Court. At the trial, judgment was rendered on the admissions in the pleadings and on facts stipulated by the parties, restraining the defendant from erecting and operating a filling station on the lot of land owned by him, or from otherwise using said lot of land in violation of the restrictive covenants contained in the deeds under which he holds title to the same.

The defendant excepted to the judgment and appealed to the Superior Court of Forsyth County. The judgment of the county court was affirmed, and defendant appealed to the Supreme Court.

Parrish & Deal for plaintiffs.
R. Glenn Key for defendant.

CONNOR, J. It is conceded that on the facts admitted in the pleadings and stipulated by the parties, the plaintiffs are entitled to the relief prayed in this action (*Johnston v. Garrett,* 190 N. C., 835, 130 S. E., 835), unless the defense relied upon by the defendant is sustained.

In his answer, the defendant alleges that before he purchased the lot of land now owned by him, and before he began the erection of a filling station thereon, he secured the permission of the plaintiffs and of owners of other lots included in the Shouse development to erect and operate a filling station on said lot of land, in the event he purchased the same; that relying on the permission and agreement of the plaintiffs and of owners of the other lots of land, he purchased said lot of land, paying therefor the sum of $1,000; and that since he purchased the said lot of land, he has expended the sum of $200.00 for materials and labor for the erection of a filling station on said lot. He alleges that plaintiffs well knew that he had purchased the said lot of land for that purpose and with this knowledge acquiesced in such purchase and expenditures. He further alleges that plaintiffs are now and should be estopped from maintaining this action.

At the trial, it was admitted by the defendant that the contract and agreement with the plaintiffs alleged in his answer was verbal, and not in writing, signed by the plaintiffs or either of them.

The right of the plaintiffs by virtue of the restrictive covenants contained in the deeds under which the defendant holds title to the lot of land now owned by him, with respect to said lot of land, is an easement, or in the nature of an easement (*Davis v. Robinson,* 189 N. C., 589, 127 S. E., 697), and is therefore an interest in land. For that reason, contracts with reference to such right are subject to the

provisions of the statute of frauds. C. S., 988. *Combs v. Brickhouse,* 201 N. C., 366, 160 S. E., 355.

The question debated on the argument of this appeal, however, to wit, whether a verbal release of an easement can be enforced—is not necessarily determinative of this appeal. The defendant relies upon the facts alleged in his answer, not as a legal release of the easement, but as an equitable estoppel on the plaintiffs to maintain this action.

In *Combs v. Brickhouse, supra,* the rule that an easement cannot ordinarily be extinguished or released by a mere unexecuted parol agreement (19 C. J., 949), is recognized and approved. It was held, however, in that case that an easement may be abandoned by the owner of the dominant tenement by unequivocal acts showing a clear intention to abandon and terminate the right, and that such owner may be estopped to assert the right by his conduct relied on by the owner of the servient tenement. The rule that a parol agreement between the owners of the dominant and servient tenements may operate to extinguish an easement where such agreement has been acted upon by the owner of the servient tenement, was applied in that case. This is a just rule, and in proper cases will be applied to prevent injustice. 19 C. J., 949, and cases cited in support of text.

There was error in the judgment in the instant case. The issues raised by the pleadings should be submitted to a jury. To that end, the judgment is

Reversed.

H. G. PERRY v. JOE T. PULLEY.

(Filed 20 June, 1934.)

1. Courts A e—Superior Court's jurisdiction upon appeal from justice of the peace is entirely derivative.

Upon appeal from a judgment of a justice of the peace the jurisdiction of the Superior Court is entirely derivative, and where the justice of the peace has no jurisdiction the Superior Court can acquire none by amendment or by *remittitur* for the excess over the jurisdiction of the justice of the peace.

2. Same—Justice had no jurisdiction of defendant's counterclaim and Superior Court could not acquire jurisdiction thereof by remittitur.

Plaintiff instituted action in claim and delivery on a chattel mortgage in a court of a justice of the peace. Judgment was rendered for plaintiff and defendant appealed to the Superior Court. The defendant set up a counterclaim for $924.34, claiming he had overpaid plaintiff in that sum, and the Superior Court, upon its finding that the action involved a long account between the parties, referred same to a referee. The referee found that defendant had overpaid plaintiff as contended by defendant,

and that defendant was entitled to recover of plaintiff the sum of $472.15, and that judgment should be entered for defendant against plaintiff in the sum of $200.00. The trial court affirmed the referee's report and entered judgment in accordance therewith. *Held*, the justice of the peace had no jurisdiction of the counterclaim, defendant having failed to aptly make a *remittitur* in the justice's court of all in excess of $200.00 including the value of the property claimed by plaintiff, N. C. Code, 1475, and the Superior Court on appeal could obtain no jurisdiction over the counterclaim by *remittitur* or amendment, and judgment should have been entered that defendant go without day and recover his costs, including the referee's allowance and expenses taxed against plaintiff in the judgment of the Superior Court. C. S., 1244(6).

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

APPEAL by plaintiff from *Harris, J.*, at 3 January Term, 1934, of WAKE. Reversed.

The only exception and assignment of error made by plaintiff on his appeal, was to the judgment as signed by the court below.

Gulley & Gulley for plaintiff.
Clem B. Holding for defendant.

CLARKSON, J. We gather from the record that on 2 December, 1932, plaintiff instituted claim and delivery proceedings in a justice of the peace court against the defendant, for the possession of certain personal property set forth in a chattel mortgage. The defendant sets up a counterclaim against the action of the plaintiff, alleging that he had overpaid his account to the plaintiff, in the sum of $924.34.

The plaintiff and defendant were landlord and tenant. The record discloses that the original return of notice of appeal has been lost. The brief of plaintiff states that the value of the property in controversy, was $45.00. The defendant appealed to the Superior Court from the judgment of the justice of the peace in favor of plaintiff. We gather from the record that plaintiff's cause of action was in the jurisdiction of the justice of the peace and we take this for granted on the record. The record discloses that the "issue of fact requires the examination of a long account on either side" and the court below on its own motion, referred the matter to J. L. Emanuel, Esq. N. C. Code, 1931 (Michie), sec. 573; *Texas Co. v. Phillips, ante*, 355.

The referee found the facts and made his conclusions of law. The court below overruled plaintiff's exceptions to the referee's report and gave judgment for defendant as appears in the record. There was sufficient competent evidence for the court below to sustain the findings of fact by the referee and this is ordinarily conclusive on this Court. The first question involved is in reference to the referee's conclusions

of law, approved and confirmed by the court below, as follows: "That the plaintiff is not entitled to the possession of the property set forth in the claim and delivery proceedings for that the chattel mortgage and note secured by said property has been fully satisfied and paid. That the defendant is entitled to recover of the plaintiff the sum of $472.15, under and by virtue of his counterclaim, and that judgment should be rendered herein in favor of the defendant as against the plaintiff in the sum of $200.00, with interest thereon from 16 December, 1931, until paid. That the property of the defendant should be released from the undertaking furnished and that the defendant go hence without day."

On this record, we cannot sustain the conclusion of law "that judgment should be rendered herein in favor of the defendant as against the plaintiff in the sum of $200.00, with interest." N. C. Code, 1931 (Michie), sec. 1475, is as follows: "Where it appears, in any action brought before a justice, that the principal sum demanded exceeds two hundred dollars, the justice shall dismiss the action and render a judgment against the plaintiff for the costs, unless the plaintiff shall remit the excess of principal, above two hundred dollars, with the interest on said excess, and shall, at the time of filing his complaint, direct the justice to make this entry: 'The plaintiff, in this action, forgives and remits to the defendant so much of the principal of this claim as is in excess of two hundred dollars, together with the interest on said excess.'" The jurisdiction of the Superior Court in appeals from justices of the peace is entirely derivative, and if the justice had no jurisdiction in the action, as it was before him, the Superior Court can derive none by amendment. So, where a counterclaim, filed to an action brought before a justice, amounted to more than $200.00, the want of jurisdiction could not be cured by entering a *remittitur* for the excess in the Superior Court. *Ijames v. McClamroch,* 92 N. C., 362; *Cheese Co. v. Pipkin,* 155 N. C., 394.

In *Hall v. Artis,* 186 N. C., 105 (106), citing numerous authorities, it is said: "There is a general rule, frequently approved in our decisions, that if an inferior court or tribunal has no jurisdiction of a cause, an appeal from its decision, confers no jurisdiction upon the appellate court." The application of this rule is not unlimited, as shown in the authorities cited in the *Hall case, supra,* but they do not apply to this case.

In *Cheese Co., supra,* speaking to the subject, at p. 401, is the following: "Defendant having pleaded and the verdict having established a counterclaim in his favor of $210.00, and the plaintiff's claim being for a lesser sum, said defendant is entitled to have judgment entered that he go without day and recover costs. *Unitype Co. v. Ashcraft, ante,*

63. He is not entitled to a judgment for the excess, for that would be to uphold the justice's jurisdiction in excess of the constitutional provision, but, to the amount required to defeat plaintiff's demand, to wit, $199.00, such court has jurisdiction and may award relief by rendering judgment that defendant go without day. For the reasons stated, we are of the opinion that the judgment of the Superior Court must be reversed, and it is so ordered."

The referee had no power to reduce the amount to $200.00, and remit the balance over. In the judgment of the court below, is the following: "It is further, ordered and adjudged that J. L. Emanuel, referee, be and he hereby is allowed the sum of $15.00 for expenses and the sum of $50.00, allowance as referee, to be paid by plaintiff."

The plaintiff excepted and assigned error to the judgment of the court below which made this allowance. The court below, of its own motion, had the power to refer the case and did refer it. C. S., 1244(6), is as follows: "Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court: (6) The compensation of referees and commissioners to take depositions." *Ritchie v. Ritchie,* 192 N. C., 538.

The defendant is entitled to have judgment entered that he go without day and recover the cost, including the referee's. For the reasons given, the judgment of the court below is

Reversed.

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

ROSA ALLEN v. AMERICAN COTTON MILLS, INCORPORATED.

(Filed 20 June, 1934.)

Master and Servant F a: Pleadings D c—Jurisdiction of Industrial Commission must appear from complaint to be available on demurrer.

Where in an action at common law by an employee against an employer it does not appear from the face of the complaint that defendant employed more than five employees in its business, a demurrer upon the ground that the plaintiff's exclusive remedy was under the Compensation Act is properly overruled. N. C. Code, 8081(u).

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

CIVIL ACTION, before *Stack, J.,* at March Term, 1934, of GASTON.

This is an action for damages for personal injury. Plaintiff alleged that the defendant was the owner of a village in fee "and that it

maintained said village in connection with and for the convenience of itself in carrying out its schedule of manufacture and that it maintained same for such purposes for the convenience of its employees for ingress, egress and regress to and from its manufacturing plant, and that at the specific time of the injury to the plaintiff herein had through its vice principal specifically invited this plaintiff to go and was being at said time directed as to just where she should walk at said time." Plaintiff further alleged that the defendant upon its said premises and through said village maintained a pathway for the use of employees and had permitted the town of Bessemer City to construct an unguarded and unlighted manhole in or near the edge of said pathway and had negligently permitted iron stakes to be driven about said manhole in such close proximity to the pathway as to render the same "extremely dangerous." Plaintiff further alleged that at about 12:15 a.m., "while the plaintiff was being escorted along said pathway by one Roy Phillips, vice principal of defendant, while in the discharge of his duties under his employment with the defendant, . . . following a long and well established custom of waking and starting the employees to work at the hour of about 12:15 Sunday night, and was specifically directed by said Roy Phillips and invited to follow said pathway at said time . . . suddenly came upon said manhole, stumbling into said stake and inflicting injuries." These injuries so inflicted were alleged to be serious and permanent.

The defendant demurred to the complaint, alleging "that it is a presumption that the plaintiff and the defendant have accepted the provisions of the Workmen's Compensation Act and are bound by the same. . . . That the rights and remedies provided by said Workmen's Compensation Act are exclusive, . . . and the present action is not one of the remedies provided by said act, and the plaintiff cannot maintain the same." It was further stated in the demurrer that "it does not affirmatively appear from the complaint that the defendant employed over twenty-five laborers in its mill or factory, or that any number of employees or laborers are employed therein," etc.

The trial judge overruled the demurrer and the defendant appealed.

J. L. Hamme and S. J. Durham for plaintiff.
A. C. Jones and P. C. Froneberger for defendant.

BROGDEN, J. The demurrer was properly overruled. The identical point involved in this case was decided in *Hanks v. Utilities Co.*, 204 N. C., 155. The Court said: "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."

The briefs debate the question as to whether the plaintiff was injured in the course of her employment. If the Workmen's Compensation Act applies, that question must be determined in the first instance by the Industrial Commission. See *Thompson v. Funeral Home,* 205 N. C., 801.

Affirmed.

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

SHERMAN E. LONG v. ANNA W. LONG.

(Filed 20 June, 1934.)

Divorce A d: D a: Constitutional Law B a—Divorce is entirely statutory, and either party may bring action for divorce for separation.

In a husband's suit for divorce on the ground of two years separation it appeared that he had married defendant under threat of prosecution for seduction, and that several months thereafter plaintiff and defendant entered a separation agreement, the agreement reciting the payment of $325.00 by plaintiff to defendant. The jury found the jurisdictional facts and that plaintiff and defendant had lived separate and apart from each other for more than two years, but that plaintiff was not the injured party. The trial court entered judgment on the verdict that plaintiff was not entitled to divorce, the court being of the opinion that the statute allowing either party to sue for divorce upon two years separation was unconstitutional in so far as it allowed plaintiff to take advantage of his own wrong and defeat the property rights defendant might have in his estate. *Held,* plaintiff was entitled to a decree of divorce upon the verdict, N. C. Code, 1659(a), divorce being exclusively statutory, and the General Assembly having the power to enact the statute, Const., Art. II, sec. 10.

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

CIVIL ACTION, before *Barnhill, J.,* at December Term, 1933, of WILSON.

On 26 October, 1933, the plaintiff instituted an action for the purpose of securing an absolute divorce from the defendant, his wife. It was alleged that the parties were married on 14 March, 1929, "and lived separate and apart since said marriage." That all property rights existing because of said marriage have been settled and said agreement recorded in the register of deeds office in Orange County, North Carolina, in Book 93, pages 89 and 90." It was further alleged that the plaintiff and the defendant had lived separate and apart for more than two years. The summons was personally served but no answer was filed by the defendant.

The trial judge submitted the following issues:

1. Were the plaintiff and the defendant duly married as alleged?

2. Have the plaintiff and the defendant lived separate and apart for two years next preceding the filing of the complaint?

3. Has the plaintiff been a resident of the State of North Carolina for one year next preceding the filing of complaint?

4. Is the plaintiff the party injured?

The jury answered the first three issues "Yes," and the fourth issue "No."

Thereupon the following judgment was entered:

"This is an action for divorce instituted by the plaintiff, a resident of Person County, against the defendant, a resident of Durham County, in the Wilson County Superior Court. The cause comes on to be heard before the undersigned judge and a jury, and being heard, the jury answered the issues as will appear of record. The plaintiff having testified that he married the defendant under threat of prosecution for seduction, he at the time being the father of the defendant's unborn child, and that after the marriage he refused to live with the defendant and did not provide her with any home or otherwise make provision for her to live with him, the jury answered the fourth issue, No, the court being of the opinion that the statute which gives either party the right to sue for a divorce upon two years separation is invalid and unconstitutional insofar as it gives the person who commits the wrong the right to take advantage of his own wrong and thereby sever the marital contract and defeat the defendant of any property right she may have in the plaintiff's estate, orders and adjudges that the relief prayed for by the plaintiff be and the same is hereby denied.

"It is further ordered and adjudged that the marriage contract between the plaintiff and defendant is still a valid, subsisting contract.

"It is further ordered and adjudged that the plaintiff pay the costs of this action."

It appears that on 4 June, 1929, the plaintiff and the defendant entered into a separation agreement. The agreement declares that the parties were married on 14 March, 1929, but have not lived together

as man and wife, and that "it is mutually agreeable that they shall live separate and apart from the other," etc. The agreement further recites the payment of the sum of $325.00 to the defendant by the plaintiff.

From the foregoing judgment the plaintiff appealed.

B. I. Satterfield for plaintiff.
No counsel for defendant.

BROGDEN, J. In order to secure an absolute divorce upon the ground of two years separation as provided in C. S. (Michie's Code, 1931), 1659(a), and chapter 163, Public Laws of 1933, must the applicant for such divorce be "the injured party?"

The Constitution of North Carolina in Article II, section 10, provides: "The General Assembly shall have power to pass general laws regulating divorce and alimony, but shall not have power to grant a divorce or secure alimony in any individual case." This clause is the only limitation imposed upon the power of the General Assembly with reference to divorce. Consequently, it is obvious that the jurisdiction of the Superior Court in regard to granting divorces is exclusively statutory. See *Saunderson v. Saunderson,* 195 N. C., 169, 141 S. E., 572; *Smithdeal v. Smithdeal, ante,* 397; 9 N. C. Law Review, page 368. Chapter 163, Public Laws of 1933, is an independent act of the General Assembly providing in substance that "marriage may be dissolved . . . on application of either party," etc. The statute gives and the statute takes away.

Hence upon the verdict of the jury the plaintiff was entitled to a decree of absolute divorce.

Reversed.

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

ERIC LEGGETT v. CRAMERTON MILLS, INCORPORATED, AND MARYLAND CASUALTY COMPANY.

(Filed 20 June, 1934.)

1. Master and Servant F b—Evidence held sufficient to support finding that injury did not arise from accident in course of employment.

In a hearing under the Compensation Act claimant, suffering from hernia, testified that he was pulling back a warp, or large spool of thread, when he felt a burning sensation in his side, that he had been doing this work for seventeen years, but that at the time his position

might have caused an unusual strain. A physician testified that the hernia was recent, and that it was possible that it was caused by the strain testified to by the claimant, but that he could not testify that the particular strain testified to caused the hernia. *Held*, there was sufficient competent evidence to support the finding of the Industrial Commission that the injury was not caused by accident in the course of claimant's employment, although there was evidence to the contrary.

2. Master and Servant F i—

The findings of fact of the Industrial Commission upon conflicting, competent evidence are conclusive upon appeal.

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

CIVIL ACTION, before *Harding, J.*, at September Term, 1933, of GASTON.

The facts tended to show that on or about 25 November, 1932, the claimant was employed by the defendant to work in a cotton mill. The claimant narrated his injury as follows: "I did have an accident on or about 25 November, while I was working in the Cramerton Mills. I was putting back a warp with the weights on each side to hold the warp in going too fast, to adjust it. . . . The warp is a great big spool of thread and I imagine it would weigh five or six hundred pounds. . . . The lever was full of weights and I don't remember how many big ones I had or how many little ones I had, but I had it on my knee pulling it. I was down like this you see pulling the warp back and it didn't pull any too easy. At that time I felt a burning down here on my left side. During the afternoon it got worse, and then my back began to hurt and I felt a great deal of pain in my back and there was a severe burning. . . . When I got hurt I had been doing this kind of work about seventeen years. I have been doing the same kind of work, pulling these beams, for seventeen years. We don't put weights underneath all the time. Sometimes we put weights underneath and sometimes we don't. . . . It is possible I was in a different strain. In moving the beam sometimes you can put a stock or bobbin under it to make it lighter, but this time I was working in a hurry. . . . I wasn't trying to lift it, I was pulling it, like a spool. I wasn't pulling a dead weight but rolling it over, so it would go easy. I didn't slip when I did this. I didn't fall. No part of the machine fell on me or struck me."

There was medical testimony to the effect that plaintiff had suffered a hernia. The physician was asked whether in his opinion the claimant could have suffered a hernia in the manner described. He said: "I will say it is possible. We may have some weakness there. . . . I would not say it did cause it. I do believe that the hernia was recent and was caused sometime probably within a day or two before I saw him, cer-

tainly within two days before I saw him, but as to this particular strain causing it I wouldn't say. I do think it was a recent hernia on account of the tenderness. It probably was the result of a strain as most hernias are."

Claim was filed with the Industrial Commission, and thereafter when the foregoing facts were developed at the hearing, the commissioner found: "From the evidence in the record compensation must be denied for a finding cannot be made, in the opinion of the commissioner, that the claimant sustained any injury by accident. The doctor who testified was unwilling to say under all the circumstances that he thought the alleged strain caused the hernia. Let an award issue denying compensation."

Upon appeal to the full Commission the order of the hearing commissioner was affirmed. The opinion of the full Commission stated: "In addition to the statement of the case set forth by Commissioner Dorsett, the evidence also shows that the plaintiff had been doing this class of work for approximately seventeen years. The nearest the plaintiff came to describing an accident is when he said: 'It is possible I was in an unusual strain.' The full Commission feels that this is not sufficient to classify the injury as being due to an accident."

Thereupon the claimant appealed to the Superior Court. The trial judge after hearing the evidence decreed "that the award of the North Carolina Industrial Commission herein be, and the same is hereby reversed, and it is further ordered and decreed that this cause be remanded to said North Carolina Industrial Commission and that an award be issued in accordance with the law and this judgment."

From the foregoing judgment the defendant appealed.

John A. Wilkins for plaintiff.
W. C. Ginter for defendant.

BROGDEN, J. There was evidence tending to show that the claimant had suffered an injury by accident in the course of his employment. There was evidence to the contrary. The Industrial Commission is a tribunal established by law to find the facts in the first instance. In the exercise of the power so delegated by statute it has found upon conflicting and competent evidence that the claimant was not injured by accident in the course of his employment. Consequently, upon this record, such finding is determinative. The accepted and established principle of law applicable was stated in *Greer v. Laundry,* 202 N. C., 729, 164 S. E., 116, as follows: "The conflicting evidence was considered by both Commissioner Dorsett and by the full Commission. The findings of fact made by Commissioner Dorsett and approved by the full

Commission, were conclusive and binding on the judge of the Superior Court." *Wimbish v. Detective Co.*, 202 N. C., 800, 164 S. E., 344. See *Mutual Liability Ins. Co. v. Savage*, 174 S. E., 363. Therefore, the trial judge improvidently ordered an award.

Reversed.

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

MRS. BERTIE SPAKE MOORE, WIDOW OF HARRY MOORE, DECEASED EMPLOYEE, v. SUMMERS DRUG COMPANY, EMPLOYER, AND GREAT AMERICAN INDEMNITY COMPANY, CARRIER.

(Filed 20 June, 1934.)

1. Evidence H f—Physician may testify as to symptoms related by patient upon examination of patient prior to his death.

In this hearing under the Compensation Act a physician testified that he had attended the injured employee immediately prior to his death and that the employee said he had first felt pain around his heart prior to the time of the injury made the basis of the claim. *Held*, the testimony of the declaration as to bodily feeling was competent, it being without the boundary of the hearsay rule.

2. Master and Servant F b—Evidence held sufficient to support finding that injury did not arise from accident in course of employment.

In this hearing under the Compensation Act there was evidence that deceased died from heart trouble, that immediately prior to the time he was stricken, deceased had helped move a trunk from one bus to another and that he was stricken with heart trouble while carrying a heavy box of medicine from the bus to his employer's drug store, with testimony of a physician who had attended deceased prior to his death that such exertion could have been a factor in causing the heart trouble, but that deceased had told him upon his examination of deceased prior to his death that he had first felt pain around his heart when he had come from the post office prior to moving the boxes. *Held*, there was sufficient, competent evidence to support the finding of the Industrial Commission that deceased's death was not caused by accident in the course of his employment, although the evidence would permit an inference to the contrary.

3. Master and Servant F i—

The findings of fact of the Industrial Commission upon conflicting, competent evidence are conclusive upon appeal.

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

CIVIL ACTION, before *Harding, J.*, at December Term, 1933, of GASTON.

The plaintiff, the widow of the deceased employee of the defendant, filed a claim with the Industrial Commission for compensation. The hearing commissioner found that Harry Moore, at the time of his death was employed by the defendant Drug Company. Pertinent excerpts from such findings are as follows:

"On 15 July, 1932, sometime past the middle of the afternoon, the northbound and the southbound buses met at Kings Mountain. There was a box to be transferred from one bus to another as well as a box of drugs to be carried from one of the buses to the drug store. The deceased, along with one of the bus drivers, helped transfer a box or trunk weighing about a hundred pounds from one bus to another, having some little trouble in getting the box on top of the bus to which it was transferred. After doing this the deceased picked up a box of drugs weighing about eighty-five pounds and carried the box several feet into the drug store. He began to feel bad shortly after doing this work and had a pain around his heart and couldn't breathe well. He received the attention of some of his fellow employees and later a doctor. Some few minutes after the doctor left the drug store the deceased was again seized with this trouble around his heart and with difficulty in breathing and died in the drug store. The doctor testified that the deceased, in his opinion, died of coronary thrombus and the physician, during his testimony, testified that the deceased made a statement to him before he died that he first felt pain about his heart and chest while he was returning from the post office. The evidence discloses that the deceased went to the post office before doing any of the work above referred to. . . . Only one doctor testified in the case and the doctor gave it as his opinion that it was possible for the work performed just prior to the death by the deceased could have played some part in the heart trouble that killed him. . . . In this case the commissioner, as much as he would like to award compensation to the wife and six-year-old child, is of the opinion that the burden has not been sustained. Compensation must therefore be denied and it is so ordered."

Upon appeal to the full Commission the said Commission declared as follows: "Upon the finding that the deceased did not sustain an injury by accident which arose out of and in the course of his employment on 15 July, 1932, and that the death of the deceased was the result of a diseased condition that did not result unavoidably from the accident, the full Commission directs that an award issue denying compensation and dismissing the case."

Thereupon the claimant appealed to the Superior Court. After hearing the evidence and the argument the trial judge decreed: "Therefore, the court finds that upon the record there is sufficient and competent

evidence to support the following findings: (1) That Harry Moore, deceased, was employed as pharmacist by the defendant, Summers Drug Company, on 15 July, 1932, at a salary of $35.00 per week; (2) That the deceased, Harry Moore, sustained an injury by accident which arose out of and in the course of his employment on 15 July, 1932; (3) That Harry Moore, deceased, died on said date and his death was the result of said accidental injury; (4) That his widow, Mrs. Bertie Spake Moore, and one child, age six years, are the dependents. . . . On the foregoing findings an award shall issue from the North Carolina Industrial Commission to the effect that Harry Moore, deceased, sustained an injury by accident which arose out of and in the course of his employment on 15 July, 1932, and that the death of the deceased resulted unavoidably from the accident and that the defendants shall pay to the dependents the compensation to which they are entitled under the law. It is now, therefore, ordered and adjudged that the findings of fact and conclusions of law and the decision and award based thereon, of the North Carolina Industrial Commission be overruled, and said findings of fact and conclusions of law, the decision and award, aforesaid, are hereby overruled, reversed and set aside," etc.

From the foregoing judgment, the defendants appealed.

E. A. Harrill for plaintiff.
Emery B. Denny for defendants.

BROGDEN, J. The claimant contended that the death of the employee was caused and brought about by strain and over-exertion in attempting to assist the bus driver in handling a heavy box, and while in the course of his employment. The defendant contended that the death was caused by heart disease. There was evidence that the deceased had returned from the post office immediately preceding the effort to lift the heavy box. When the physician arrived and questioned the deceased as to his symptoms, he stated that "he first noticed the pain in his chest while coming from the post office." This statement was competent for the reason that it was a declaration as to bodily feeling, and hence without the boundary of the hearsay rule. *Bryant v. Construction Co.*, 197 N. C., 639, 150 S. E., 122.

Therefore, it is obvious that more than one inference of fact could be drawn from the evidence. It has been held with unbroken uniformity that the findings of fact by the Industrial Commission from conflicting evidence, are conclusive upon appeal to the Superior Court. One of the recent utterances upon the subject is found in *Kenan v. Motor Co.*, 203 N. C., 108, 164 S. E., 729, in which the Court said: "It is well settled that if there is any competent evidence to support the findings

of fact of the Industrial Commission, although this Court may disagree with such findings, this Court will sustain the findings of fact made by the Commission," etc. *Aycock v. Cooper,* 202 N. C., 500, 163 S. E., 569; *Greer v. Laundry,* 202 N. C., 729, 164 S. E., 116; *Leggett v. Cramerton Mills, ante,* 708; *Smith v. Hauser and Co., ante,* 562.

Reversed.

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

IN THE MATTER OF J. P. DEWEY, AN ALLEGED LUNATIC.

(Filed 20 June, 1934.)

Insane Persons A c—Superior Court held to have acquired jurisdiction although clerk's order of commitment was without warrant of law.

Petitioner's wife filed an affidavit with the clerk stating that petitioner was insane. Thereupon the clerk examined certain witnesses, and issued a warrant of commitment, directing that petitioner be confined in the State Hospital. Petitioner then filed his petition before the clerk attacking the order, and praying that the cause be reinstated on the docket and the order of commitment stricken out. The clerk denied the petition, but found that the order of commitment, as contended by petitioner, had been entered without notice to petitioner and without summoning a jury to pass upon petitioner's lunacy, and that petitioner had no knowledge of the entry of the order. The petitioner appealed to the judge of the Superior Court, who entered judgment remanding the cause to the clerk for a hearing as required by law. *Held,* the petitioner's contention that, upon appeal to the Superior Court, the order of commitment should have been declared null and void and that he should have been discharged, cannot be sustained, since the wife's affidavit filed in accordance with C. S., 2285, conferred jurisdiction upon the clerk, and although the clerk's order of commitment was without warrant of law, the Superior Court obtained jurisdiction upon appeal from the denial of his motion before the clerk to strike out the order, which motion expressly requested that the cause "be reinstated upon the docket," and the judgment is affirmed.

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

CIVIL ACTION, before *Clement, J.,* at February Term, 1934, of DAVIDSON.

On 14 April, 1933, Mrs. J. P. Dewey made an affidavit before the clerk of the Superior Court of Davidson County, stating that J. P. Dewey was insane. Thereupon the clerk examined certain witnesses and issued a warrant of commitment, directing that Dewey be confined in the State Hospital. Thereafter, on 10 October, 1933, Dewey filed a petition before the clerk of the Superior Court alleging that the said

lunacy proceedings and order made by the clerk were entered "without notice to this petitioner, and without the clerk of the Superior Court issuing an order commanding the sheriff to summon a jury of twelve men to inquire into the state of mind or condition of your petitioner. . . . Nor did your petitioner have any knowledge or information that any proceedings had been or were undertaken concerning his competency and fitness to manage his own affairs. . . . That your petitioner in July, 1933, after being informed of the purported proceedings, and that said purported order declaring him a lunatic had been entered, appeared before the clerk of the Superior Court of Davidson County and requested that said order be stricken from the record," etc. The petitioner further prayed "that this cause be reinstated upon the docket; that the purported petition be dismissed and that there be an order entered striking from the records of this court the purported order," etc.

The clerk of the Superior Court heard the petition and found as a fact "that no notice was served upon the petitioner; that no order was made demanding the sheriff to summon a jury, nor was any jury summoned, organized or sworn to pass upon the state of mind and condition of the petitioner; that the petitioner did not have any knowledge of the entry of the judgment as appears of record and set out in the petition."

Thereupon the clerk denied the motion of petitioner and he appealed to the Superior Court.

After hearing the cause in the Superior Court the trial judge decreed as follows: "This cause coming on to be heard . . . upon petition to dismiss and strike from the records the judgment of insanity against J. P. Dewey and appeal from E. C. Byerly, clerk of the Superior Court, and it appearing to the court that the same should be remanded to the clerk of the Superior Court for further hearing:

"Now, therefore, it is ordered and adjudged that this action be and it is hereby remanded to the clerk of the Superior Court of Davidson County to convene or hold a hearing of the idiocy, inebriecy or lunacy of J. P. Dewey as he is required by law," etc.

From the foregoing judgment the petitioner appealed.

Leland Stanford and Bourne, Parker, Bernard & DuBose for petitioner.

BROGDEN, J. The petitioner apparently takes the position that the order of the clerk confining him in the State Hospital should be declared null and void and that he be discharged. This contention cannot be maintained. The affidavit filed in accordance with C. S., 2285, conferred jurisdiction upon the clerk. However, as the order of the clerk was

made in direct violation of the provision of said statute, such order was without warrant of law. Nevertheless the petitioner made a motion in the cause expressly requesting that the cause "be reinstated upon the docket," and upon the failure of the clerk to strike out the original order, he appealed to the judge of the Superior Court. Consequently, the matter was before the judge and he had the power to deal with it. A similar situation is disclosed by *In re Anderson,* 132 N. C., 243, 43 S. E., 649. The Court said: "Although the proceedings originally had before the clerk were a nullity for the reasons already pointed out, yet when the matter got into the Superior Court by appeal, that court then acquired jurisdiction." In the later case of *Bank v. Leverette,* 187 N. C., 743, 123 S. E., 68, the broad declaration of the law in the *Anderson case, supra,* was adverted to and harmonized. Both of said cases, however, are in full support of the judgment entered by the trial judge and his ruling is affirmed.

Affirmed.

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

CINCINNATI COFFIN COMPANY v. W. E. YOPP, SR.

(Filed 20 June, 1934.)

Courts A f: Judgments K f—Superior Court has jurisdiction to hear motion attacking order of another judge for irregularity.

Petitioner, trustee in bankruptcy, made a motion in the cause to be allowed to intervene as a party plaintiff and to attack proceedings in receivership in the cause, alleging that the receiver had sold assets of defendant to his son-in-law, who had in turn sold the assets to a corporation controlled by defendant and his near relatives, organized for the purpose of holding same in order to hinder and defeat the trustee in bankruptcy and creditors represented by him, that the receiver had sold and settled the estate prior to the expiration time for filing claims, and before petitioner had opportunity to be heard, and that the orders appointing the receiver, making the receivership permanent and discharging the receiver and releasing his bond were irregular. The trial court denied the petition on the ground that it had no jurisdiction to set aside an order made in the cause during term by another judge of the Superior Court. *Held,* the petitioner was entitled to attack the orders for irrgularity by motion in the cause, and the case is remanded for hearing upon his motion.

THIS is a motion made upon petition in the cause filed before *Cranmer, J.,* in the case of Cincinnati Coffin Company *et al. v.* W. E. Yopp, Sr., *et al.,* at the October Term, 1933, of New Hanover County,

by H. Edmund Rogers, trustee in bankruptcy of W. E. Yopp, Sr., to be allowed to intervene as a party plaintiff and to have Walter E. Yopp, Incorporated, made a party defendant, and to direct said corporation to turn over to the petitioner the assets of W. E. Yopp, Sr., bankrupt, in its possession, and to restrain said corporation from disposing of said assets.

Motion denied and petition dismissed; and petitioner excepted and appealed. Reversed.

McNorton & McIntire for appellant.
Stevens & Burgwyn for appellee.

SCHENCK, J. The record is a voluminous one and there is but one exception contained therein, namely, to the signing of the judgment denying the motion and dismissing the petition. In his petition the trustee in bankruptcy of W. E. Yopp, Sr., alleges that appointment of a receiver of W. E. Yopp, Sr., was irregular, and that the receiver took over and sold the assets of the defendant and obtained his discharge as such receiver, all before the time fixed by the court for filing claims had elapsed; and further alleges that Judge Harris was "misled and deceived, and erred in signing the order outside of the district in which the action was pending making the receivership . . . permanent"; and that Judge Devin was "deceived and misled into signing the final order discharging the receiver and releasing his bond . . . "; and that the institution of this action by the plaintiff, the procuring of the appointment of a receiver, the sale by the receiver for an inadequate consideration of the assets of the defendant to his son-in-law, and the procuring of the discharge of the receiver, in the space of only thirteen days, and, within a few more days, the sale by the son-in-law of such assets to Walter E. Yopp, Incorporated, a newly organized corporation owned and controlled by the defendant and his near relatives and business associates, was all done with the sole purpose and intent to hinder and defeat the creditors of W. E. Yopp, Sr., by placing his assets beyond the process of the courts in hands of a corporation organized for that purpose. The petition further alleges that this scheme was begun, continued and ended in such a short space of time that the petitioner, or the creditors of W. E. Yopp, Sr., whom he now represents, were deprived of all opportunity to be heard before the judgment discharging the receiver and his bond was entered. While it appears that this cause came on to be heard "upon notice upon Walter E. Yopp, Incorporated, to show cause why it should not be made a party defendant . . . ," it does not appear that this corporation filed any reply to the petition; but even if it be presumed that it denied all the allegations of irregu-

larities and fraud, we think his Honor was in error in reaching the conclusion set forth in his judgment that "the court . . . has no authority to set aside an order that was made more than six months ago during term time, by another judge of the Superior Court, where no exceptions have been taken to the orders" and therefore adjudging "that Walter E. Yopp, Incorporated, is not a necessary party to this action, and is at liberty to operate its business without interference from the petitioner or the creditors of . . . W. E. Yopp, Sr."

The petitioner was entitled, as a matter of law, to be heard upon his motion in this cause to vacate the judgment for the irregularities set forth in the petition, and his Honor's judgment denied him this right.

"An irregular judgment is one rendered contrary to the course and practice of the court, and if the defect is not such as to show that the court has no jurisdiction over the subject-matter or over the person, the judgment is not void, but will stand until a proper proceeding has been brought to set it aside. . . . To set aside a judgment for irregularity it is necessary to make a motion in the cause before the court which rendered the judgment, with notice to the other party; the objection cannot be made by appeal, or an independent action, or by collateral attacks. The time for such motion is not limited to one year after the judgment is rendered, but it must be made by the party affected and within a reasonable time to show that he has been diligent to protect his rights." McIntosh, N. C. Prac. & Proc., par. 353, pp. 736, 737, and cases there cited.

This case is remanded to the Superior Court of New Hanover County, that the petitioner may be heard upon his motion in accordance with this opinion.

Reversed.

D. R. REESE v. F. H. CLARK.

(Filed 20 June, 1934.)

1. Assault A c—Employee may use force appearing reasonably necessary in self-defense against striker trespassing upon property.

The evidence tended to show that plaintiff, with a multitude of people, went to the mill in which defendant was employed, climbed upon the boiler and blew the whistle to get the employees therein to join plaintiff and other employees of another mill in a strike, and that thereupon defendant threw acid upon plaintiff, resulting in the injury in suit. The trial court submitted issues of whether plaintiff was a trespasser, placing the burden of proof thereon upon defendant, whether defendant assaulted plaintiff, whether the assault was malicious, and issues of compensatory

and punitive damages, and instructed the jury that if defendant used more force than to him appeared reasonably necessary in self-defense against plaintiff, even if he were a trespasser, defendant would be guilty of assault. *Held*, the issues arose upon the pleadings and evidence and an exception thereto is not sustained, and the instruction relating to self-defense was without error.

2. Appeal and Error F a: Trial E f—

Exceptions in the statement of the contentions of a party will not be considered on appeal when such exceptions were not taken at the trial.

3. Appeal and Error J g—

Where the answers of the jury to the first two issues determine the rights of the parties, discussion of the subsequent issues and the charge relative thereto becomes unnecessary.

APPEAL by plaintiff from *Sink, J.*, at October Term, 1933, of GUILFORD. No error.

On 18 July, 1932, the defendant was an employee of and was working at the plant of the Melrose Hosiery Mill, in High Point. There is evidence tending to show that the plaintiff left the mill where he was working and with a multitude of people went to the mill where the defendant was working, and climbed over the fence of the Melrose Hosiery Mill, and crawled upon the boiler and blew the whistle to get the hands to stop work and join him and others in a strike; and there is evidence further tending to show that the defendant, who was working about the engine and boiler room of the Melrose Hosiery Mill, in an effort to protect himself from the threatening and menacing attitude of the plaintiff, and those accompanying him, threw acid upon the plaintiff, thereby causing him some injury.

The issues submitted were as follows:

1. Did the plaintiff, without attaining a lawful permit make entry into the lands and tenements of the Melrose Hosiery Mill with strong hands and with a multitude of people in a forceful manner in violation of the laws of the State of North Carolina? (C. S., 4300.) Answer: .....

2. Did the defendant assault the plaintiff? Answer: .....

3. If so, was such assault wanton and malicious? Answer: .....

4. What compensatory damage, if any, is the plaintiff entitled to recover from the defendant? Answer: .....

5. What punitive damage, if any, is the plaintiff entitled to recover from the defendant? Answer: .....

The jury answered the first issue Yes, and the second issue No, and left the third, fourth and fifth issues unanswered.

From judgment for the defendant, the plaintiff appealed to the Supreme Court, assigning errors.

Garland B. Daniel, S. G. Daniel and King & King for appellant.

Gold, McAnally & Gold, Frazier & Frazier and T. W. Albertson for appellee.

SCHENCK, J. The plaintiff objected to the issues submitted, more particularly to the first. We think these issues clearly arise upon the pleadings in this case. Without objection the court omitted a statement or review of the evidence, but did in a clear and correct manner state the contentions of the parties and "declare and explain" the law arising on the evidence. The trial judge charged the jury as to the law of trespass and properly placed the burden of proof upon the defendant on the first issue and the jury answered in the affirmative, thereby finding that the plaintiff was a trespasser. The court upon the second issue explained the law of assault, correctly charging as to the right of the defendant of self-defense as against trespassers; and carefully explained to the jury that if the defendant by throwing the acid used more force than appeared to him reasonably necessary, or for any other purpose than protecting himself, even if the plaintiff was a trespasser, the defendant would be guilty of an assault. The jury answered this issue in the negative.

The plaintiff in this case is in practically the same position as the prosecutor occupied in *S. v. Goode,* 130 N. C., 651, where the Court, on page 655, said: "Whether the force used by the defendant was excessive is matter for a jury. Indeed, if this evidence is to be believed, the prosecutor was a law-breaker, and is himself in jeopardy of the judgment for his violence and his defiant disregard of the rights of the defendant."

We think the plaintiff's prayer for special instructions are untenable. The exceptions to the charge are largely to the statement of the defendant's contentions and were not taken at the trial, and therefore cannot be considered here. *Mfg. Co. v. Building Co.,* 177 N. C., 103. And aside from this we see no error in the exceptions.

The jury having answered the first and second issues in favor of the defendant, any discussion of the subsequent issues and charge relative thereto becomes unnecessary. The verdict and judgment will be upheld.

No error.

CHARLES F. CONNOR v. DR. C. A. HAYWORTH AND DR. W. F. COLE.

(Filed 20 June, 1934.)

1. Physicians and Surgeons C b—Evidence held insufficient to be submitted to jury in this action for malpractice.

Plaintiff's evidence was to the effect that his leg was broken both below and above the knee, the bone protruding from the flesh at the break below the knee, that he was attended by defendant physicians, who treated him for the break below the knee, but who failed to treat the break above the knee, that he suffered a great amount of pain, and that he did not recover so that he could put any weight on the leg. *Held*, defendants' motions as of nonsuit were properly allowed, injury and suffering alone being insufficient to warrant a recovery in the absence of evidence that defendants did not possess the requisite degree of skill or that they failed to use such skill in the treatment of plaintiff.

2. Costs A d—Order allowing fees to ten expert witnesses against plaintiff taxed with costs held not erroneous.

In this action for malpractice defendant physicians subpœnaed ten physicians as witnesses. A nonsuit was correctly entered at the close of plaintiff's evidence and defendants' witnesses were not sworn or tendered. The court found that all the physicians were experts and allowed them a stipulated fee to be taxed as a part of the costs against plaintiff. Plaintiff excepted to the order on the ground that the party taxed with costs shall not be obligated to pay for more than two witnesses to prove a single fact, N. C. Code, 1275. *Held*, the exception cannot be sustained, the court having discretionary authority under N. C. Code, 3893, to allow expert witnesses compensation and mileage, and plaintiff's remedy being to move to retax the costs.

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

CIVIL ACTION, before *Daniels, J.*, at October-November Term, 1933, of LEE.

Plaintiff alleged and offered evidence tending to show that on 6 December, 1929, while working in a mine at the bottom of the shaft, a long slab or rock fell upon him, inflicting serious and permanent injury in that his thigh was broken, and in addition, he suffered a compound fracture of both bones of the lower leg. A few minutes after he was injured he was carried to the Memorial Hospital at Asheboro, which was operated by the defendant, C. A. Hayworth. Plaintiff said: "Dr. Lambert was Dr. Hayworth's assistant. I did not see Dr. Hayworth then. It was the next morning after I got there before I saw Dr. Hayworth. Before I saw Dr. Hayworth Dr. Lambert put this bone back in the leg. . . . My left leg was broken above the knee, and also, below the knee. The bone that was broken above the knee did not stick out of the flesh, but the bone below the knee was sticking out

of the flesh. I did not receive any other treatment from the time I reached the hospital and the time I saw Dr. Hayworth next morning. . . . He did not give me any treatment at that time, just looked at the leg and said it was a bad looking job. Later on in the day I saw Dr. Lambert about nine o'clock. He didn't do anything more than dress the wound here. . . . They changed the gauzes on it and washed it with alcohol. They didn't attempt to reduce the fracture or give any treatment above the knee. They gave me one hypodermic when I arrived at the hospital. They didn't give me any hypodermic next morning. . . . On that second day I didn't receive any treatment by either one of the doctors. . . . They did the usual thing. They dressed the wound below the knee. They didn't at that time administer any treatment or make any examination of my leg above the knee. That was all that was done on the third day. . . . My back and leg was hurting and I hurt all over. I told Dr. Hayworth about it. He didn't give me any hypodermic treatment at that time. He came down pretty early the fourth morning raising sand because I made a racket that night on account of my leg hurting so bad. He came around and said he didn't mean to have any such damn racket around there. I told him why I made the noise. I told him I asked for a hypodermic or something to ease the pain, and he said, 'I want you to understand I'm running this place here and not you.' . . . On the fourth day they just dressed this place and put some sandbags against this here. The purpose of the sandbag I suppose was to keep the leg from working about. The sandbag was placed on each side of the knee up here. . . . On the fifth night he did not administer any treatment, only asked me how I was feeling. . . . He didn't make any examination of my upper leg or lower leg at that time. That day the gauze was changed here as usual and washed with alcohol and painted with mercurochrome. . . . On the eighth day Dr. Cole, Dr. Hayworth and Dr. Lambert came in the room around nine o'clock prepared to set the leg. . . . Dr. Cole suggested that they put me on a regular hospital bed and put my head where my feet ought to be so they could elevate this leg, and also suggested they use a different rig from what Dr. Hayworth had planned to use. . . . So Dr. Cole went ahead and set the limb. . . . They hung three weights to it. . . . The weights were window weights about 1½ inches in diameter and I would say fourteen inches long. . . . I would say those three weights weighed about fourteen pounds. . . . I was not given any hypodermic treatment that day or at any other time. There was nothing more done than Dr. Lambert dressed this place every day and occasionally those weights would pull off, this tape would pull loose from perspiration and so on. The weights were attached to my leg by adhesive tape.

. . . The weights came off my foot seven or eight times. They would stay off from five to fifteen hours. . . . This scar also was caused by the adhesive tape pulling off and the hole was to the bone. Before it formed a scab when the tape came off the flesh pulled off with it and after the scab formed, the scab pulled off with it."

The above excerpt from plaintiff's testimony is typical of a volume of testimony to the same general effect.

Plaintiff testified further that he left the hospital about 12 February and was immediately taken to a hospital in Sanford to be treated by Dr. Scott at the Scott Hospital, where plaintiff remained for about nine weeks. Dr. Scott was dead at the time of the trial, and the plaintiff testified that he could not put any weight on his leg and that he had suffered serious injury, caused and brought about by the negligence and malpractice of the defendants in the treatment administered by them at the hospital in Asheboro.

The defendant Hayworth filed an answer alleging in general terms that the plaintiff had sustained a painful and serious injury, and that at the time he was brought to the hospital the wounds were filled with dirt and mud and that he had given to the plaintiff his best judgment and skill in the treatment of his injuries. He further alleged that he had called in his codefendant, Dr. Cole, an eminent surgeon, and that both physicians had exercised their best skill and judgment in treating the plaintiff. Dr. Cole filed an answer stating that he did not have sufficient knowledge or information to form a belief as to whether Dr. Hayworth was a physician in Asheboro. This seems to have been an inadvertence as he alleges that he was called into consultation by Dr. C. A. Hayworth, and after such consultation "gave his opinion based upon his best judgment as to the best manner and method of treating the plaintiff, and this defendant had no further connection with the case and was not further consulted about the plaintiff."

The defendants offered no evidence and there was no medical testimony in behalf of the plaintiff.

At the conclusion of evidence of plaintiff the trial judge sustained a motion of nonsuit and the plaintiff appealed.

K. R. Hoyle and E. L. Gavin for plaintiff.
U. L. Spence for Dr. Hayworth,
Oates & Herring for Dr. Cole.

BROGDEN, J. It was said in *Pendergraft v. Royster,* 203 N. C., 384, 166 S. E., 285, that "The general rule is to the effect that there is in malpractice actions no presumption of negligence from error of judgment in the diagnosis by a doctor of the patient's illness, or in the

treatment prescribed in the failure to successfully effect a remedy or to accomplish as good results as some one else might have done. A doctor is neither a warrantor of cures nor an insurer."

The evidence discloses that the plaintiff sustained terrible injuries and doubtless suffered great pain and discomfort, but injury and suffering alone are not sufficient to constitute a cause of action for malpractice in the absence of evidence tending to show that the physician did not possess the requisite degree of skill or that he failed tc use such skill in the treatment of the patient.

The defendant had duly subpœnaed ten physicians as witnesses. These witnesses were not sworn or tendered for the reason that a judgment of nonsuit was entered. However, the trial judge found that all of the witnesses were experts and allowed each of them a fee of $20.00 per day "for two days attendance fees as expert witnesses to be taxed as a part of the cost of the case." The plaintiff excepted to the order upon the ground that "the party cast shall not be obligated to pay for more than two witnesses to prove a single fact." C. S. (Michie's Code, 1931), 1275. This exception is not sustained. C. S. (Michie's Code, 1931), 3893, empowers the trial judge to allow expert witnesses "such compensation and mileage as the court may in its discretion order." See *Chadwick v. Ins. Co.,* 158 N. C., 380, 74 S. E., 115. The judgment decreed that the plaintiff "pay the costs of the action, to be taxed by the clerk of the Superior Court." Obviously the remedy available to plaintiff is to lodge a motion to retax the cost.

Affirmed.

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

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA v. ALLEN A. HUNT.

(Filed 20 June, 1934.)

Deeds and Conveyances A d—Failure to name grantee in granting clause held not fatal.

The failure to name the grantee in the granting clause in a deed and the reference to the *feme* grantee "to the said party of the second part, his heirs and assigns, to her only use and behoof forever" in the *habendum is held* not to invalidate the deed, the deed being regular in all other respects, and the grantee being properly identified in the premises.

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

INSURANCE CO. *v.* HUNT.

CIVIL ACTION, before *Cranmer, J.*, at February Term, 1934, of ROBESON.

On 23 December, 1914, John Dial executed and delivered a deed in the following words: "This deed, made this 23 December, 1914, John Dial, of Robeson County and State of North Carolina, of the first part, and Polly Dial, of Robeson County and State of North Carolina, of the second part;

Witnesseth: That the said party of the first part, in consideration of five hundred dollars to him paid by said party of the second part, the receipt of which is hereby acknowledged, ha.... bargained and sold and by these presents doth bargain, sell and convey to said..... and her heirs and assigns, a certain tract or parcel of land in Back Swamp Township, Robeson County." (The land was properly described.)

"To have and to hold the aforesaid tract and all privileges and appurtenances thereto belonging, to the said party of the second part, his heirs and assigns, to her only use and behoof forever. And the said party of the first part covenant that he is seized of said premises in fee, and has right to convey the same in fee simple, that the same are free and clear from all encumbrances, and that he will warrant and defend the said title to the same against the lawful claims of all persons whomsoever.

In testimony whereof, the said John Dial has hereunto set his hand and seal the day and year above written. John (his mark) Dial. (Seal.)"

Polly Dial, the grantee in said deed executed and delivered to the plaintiff a deed of trust on the land for the purpose of securing a note which became due and payable on 1 November, 1931. Default occurred in the payment of the indebtedness and the land was duly and properly sold at public auction in accordance with the terms of the deed of trust, and the plaintiff became the purchaser and received a trustee's deed for the property on 22 July, 1932. Thereafter on 5 December, 1933, the defendant agreed in writing to purchase the land from the plaintiff and the plaintiff agreed to convey to the defendant for a stipulated sum, but when the plaintiff tendered a proper deed the defendant refused to accept the title and to pay for the land upon the ground that the deed from John Dial to Polly Dial was defective in that the name of the grantee did not properly appear therein.

The trial judge held that the deed conveyed a fee-simple title to Polly Dial and "that the Prudential Insurance Company of America is now the owner of said lands in fee simple, and the deed tendered the defendant by plaintiff on 2 January, 1934, would convey a fee-simple

title to said land to the defendant Allen A. Hunt. It is further ordered that the defendant be required to take the property and pay the purchase price as stipulated."

From the judgment so rendered the defendant appealed.

McLean & Stacy for plaintiff.
Robert E. Lee and W. Osborne Lee for defendant.

BROGDEN, J. The judgment rendered is fully supported by *Brown v. Brown,* 168 N. C., 4, 84 S. E., 25; *Yates v. Ins. Co.,* 173 N. C., 473, 92 S. E., 356, and *Boyd v. Campbell,* 192 N. C., 398, 135 S. E., 121. In the *Boyd case, supra,* the Court said: "Whatever the former doctrine may have been the courts do not now regard with favor the application of such technical rules as will defeat the obvious intention of the parties to a deed, it being an elementary rule of construction that their intention as expressed in the deed shall prevail unless it is repugnant to the terms of the grant or is in conflict with some canon of construction or some settled rule of law."

Affirmed.

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

STATE v. THOMAS KLUTTZ AND OTIS RORIE.

(Filed 20 June, 1934.)

1. Husband and Wife B e—Wife held not competent to testify against husband in this prosecution for felonious burning.

One of defendants was charged with having feloniously set fire to a dwelling-house, C. S., 4245, and the other defendant with having feloniously procured the first defendant to commit the crime. C. S., 4175. The wife of the second defendant was permitted to testify in corroboration of another witness as to the origin of the fire and to further testify as to matters tending to incriminate her husband. *Held,* the wife was not competent to testify against her husband in the prosecution, and the admission of her testimony entitles him to a new trial. C. S., 1802.

2. Criminal Law G e—Testimony held incompetent under the hearsay rule.

Defendant was charged with having feloniously set fire to a dwelling-house. C. S., 4175. A deputy Insurance Commissioner testified that the sheriff said that defendant said he had set fire to the house, although the witness's written memorandum made at the time omitted any reference to the statement. This testimony was not in corroboration of the

sheriff, who testified at the trial. *Held,* the testimony was incompetent as hearsay, it not being in corroboration of, or tending to impeach the testimony of the sheriff.

3. Same: Evidence H a—Definition of hearsay evidence.

Hearsay evidence is evidence which depends for its probative force, in whole or in part, upon the competency and credibility of some person other than the witness, and is incompetent, except for well recognized exceptions to the rule, since the declarant does not speak under the sanction of an oath and is not subject to cross-examination, and a defendant in a criminal prosecution is entitled to have the essential facts proved in his presence by witnesses duly sworn and qualified.

4. Same—Statements alleged to have been made by a witness are incompetent when they do not impeach or corroborate him.

As a general rule statements alleged to have been made by a witness to which he does not testify, are incompetent as hearsay unless they tend to impeach or corroborate him, hearsay evidence being incompetent to establish any fact which is susceptible to proof by testimony of the witness speaking of his own knowledge.

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

APPEAL by defendants from *Stack, J.,* at September Term, 1933, of ANSON.

Criminal prosecution tried upon indictment charging the defendant, Thomas Kluttz, the owner of a dwelling-house, with having feloniously procured his codefendant, Otis Rorie, to burn said dwelling-house, contrary to the provisions of C. S., 4175; and also charging the defendant, Otis Rorie, with having feloniously set fire to and burned said dwelling-house, contrary to the provisions of C. S., 4275.

The evidence on behalf of the State tends to show the guilt of both defendants as charged in the bill of indictment. Fayola Kluttz, 20-year-old daughter of the defendant, Thomas Kluttz, testified to the *corpus delicti* and to circumstances sufficient to establish the guilt of Otis Rorie. There was other evidence tending to connect Thomas Kluttz with the felony as an accessory before the fact.

Over objection, the wife of Thomas Kluttz, as a witness for the State, was allowed to corroborate all that her daughter had said in regard to the origin of the fire; and further: "Tom had moved everything out of the house. I am not mad with Rorie. Tom Kluttz is the one. . . . I am not pleased with Tom. . . . Before Tom and I separated, he offered to make me a deed to the house that was burned on condition that I sign the separation deed."

W. A. Scott, State Deputy Insurance Commissioner, a witness for the State, was allowed to testify, over objection, to a conversation he had with deputy sheriff W. C. Mangum as follows: "Mangum said that Rorie said he got the kerosene oil and that he carried it up to the

Kluttz place and set the house on fire. I wrote down Mr. Mangum's statement." Cross-examination: "My recollection is that Mr. Mangum told me that Rorie said he set fire to the house, but that is not in the statement of Mr. Mangum."

Verdict: Guilty as to both defendants.

Judgment: Three years on the roads as to both defendants and in addition the defendant Kluttz to pay a fine of $100 and all the costs.

The defendants appeal, assigning errors.

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

Robinson, Pruette & Caudle and McLendon and Covington for defendants.

STACY, C. J., after stating the case: The wife of the defendant Kluttz was not competent to give evidence against her husband, in a prosecution like the present, C. S., 1802, and it was error as to him to permit her to do so. *S. v. Ashwell,* 193 N. C., 399, 137 S. E., 174; *S. v. Reid,* 178 N. C., 745, 101 S. E., 104; *S. v. Raby,* 121 N. C., 682, 28 S. E., 490; *S. v. Harbison,* 94 N. C., 885. See, also, *S. v. Spivey,* 151 N. C., 678, 65 S. E., 995, and *S. v. Cox,* 150 N. C., 846, 64 S. E., 199.

It was also error, which entitles the defendant Rorie to a new trial, to permit the witness Scott to testify that Mangum said Rorie said he set the house on fire. This was hearsay and did not corroborate Mangum who testified at the trial. Evidence is termed hearsay when its probative force depends in whole or in part upon the competency and credibility of some person other than the witness from whom the information is sought; and such evidence, with certain recognized exceptions not presently applicable, is uniformly held to be incompetent, the declarant not having spoken under the sanction of an oath and not having submitted to cross-examination. *S. v. Lassiter,* 191 N. C., 210, 131 S. E., 577; *S. v. Collins,* 189 N. C., 15, 126 S. E., 98; *S. v. Setzer,* 198 N. C., 663, 153 S. E., 118; *S. v. Simmons,* 198 N. C., 599, 152 S. E., 774; *S. v. Springs,* 184 N. C., 768, 114 S. E., 851; *S. v. Church,* 192 N. C., 658, 135 S. E., 769; *S. v. Lane,* 166 N. C., 333, 81 S. E., 620; *Young v. Stewart,* 191 N. C., 297, 131 S. E., 735; *Chandler v. Jones,* 173 N. C., 427, 92 S. E., 145; *King v. Bynum,* 137 N. C., 491, 49 S. E., 955; *Smith v. Moore,* 149 N. C., 185, 62 S. E., 892.

Hearsay evidence is incompetent to establish any specific fact, which, in its nature, is susceptible of being proved by witnesses who speak from their own knowledge. *S. v. Haynes,* 71 N. C., 79. It is a general principle in the law of evidence that the gravamen of an indictment,

or complaint, sought to be shown against a party, ought to be proved in his presence by witnesses duly sworn and qualified to tell the truth. *Satterwhite v. Hicks,* 44 N. C., 105.

Animadverting on the subject in *Mima Queen & Child v. Hepburn,* 11 U. S., 290, *Chief Justice Marshall,* delivering the opinion of the Court, said: "It was very justly observed by a great judge that 'all questions upon the rules of evidence are of vast importance to all orders and degrees of men: our lives, our liberty, and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded.'

"One of these rules is, that 'hearsay' evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case, is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible.

"To this rule there are some exceptions which are said to be as old as the rule itself. These are cases of *pedigree,* of *prescription* of *custom,* and in some cases of *boundary.* There are also matters of general and public history which may be received without that full proof which is necessary for the establishment of a private fact."

This case affords a striking illustration of the wisdom of the rule which excludes hearsay. Mangum as a witness for the State did not quote Rorie as saying he set the house on fire, but Scott testifies this is what Mangum told him Rorie said, though the written memorandum made at the time omits any reference to this quotation. Evidently another case of "The Three Black Crows." (John Byron.)

The general rule is, that statements alleged to have been made by a witness, which neither corroborate nor impeach him and about which he does not testify while on the stand, are inadmissible as hearsay. *Bradley v. R. R.,* 126 N. C., 735, 36 S. E., 181; *Hardister v. Richardson,* 169 N. C., 186, 85 S. E., 304; *Nowell v. Basnight,* 185 N. C., 142, 116 S. E., 87. Both defendants are entitled to a new trial. It is so ordered.

New trial.

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

W. S. WINDSOR, ADMINISTRATOR OF THE ESTATE OF JOHN MCVAY, v. FANNY MCVAY, UNMARRIED, ET AL.

(Filed 20 June, 1934.)

Courts A d—Docketing fee of two dollars is not required in appeal from clerk of Superior Court to the judge thereof.

Where an appeal is taken from an order of the clerk of the Superior Court to the judge thereof, C. S., 633, 635, the judge has jurisdiction by mandate of C. S., 637, and no "docketing" in a technical sense is involved, and C. S., 7880(88), requiring a tax of two dollars for "docketing" an appeal from a lower court in the Superior Court does not apply, nor is the clerk a "lower court" to the Superior Court with respect to appeals, and the judge acquires jurisdiction without the payment of the tax.

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

CIVIL ACTION, before *Alley, J.*, at February Term, 1934, of ROCKINGHAM.

The defendants made a motion before the clerk of the Superior Court to set aside an order of sale to make assets and to vacate the letters of administration issued to the plaintiff. The clerk refused to vacate said letters and the defendants appealed to the judge. When the cause was heard by the judge the plaintiff moved to dismiss the appeal upon the ground that the two-dollar docketing tax required by statute had not been paid. The trial judge found that the tax had not been paid and decreed "that the said appeal was, therefore, not properly docketed and not properly in the Superior Court, it is now, therefore, ordered, adjudged . . . that the appeal . . . from said judgment be dismissed," etc.

From the foregoing judgment the defendants appealed.

Glidewell & Gwyn and P. T. Stiers for plaintiff.
Sharp & Sharp for defendants.

BROGDEN, J. This is a two-dollar case raising the question as to whether the clerk of the Superior Court is a "lower court" within the purview of C. S., 7880(88), Michie's Code, 1931.

This statute provides that upon "docketing an appeal from a lower court in the Superior Court, the plaintiff or appellant shall pay a tax of two dollars," etc.

The Constitution of this State empowers the General Assembly to allot and distribute the residue of judicial power among the constitutional courts or those "which may be established by law," and "provide also a proper system of appeals," etc. Hence the right of appeal is a constitutional right. Can the General Assembly tax this right?

Moreover the Constitution specifies the subjects of taxation. Is the right of appeal included within these subjects?

These might be considered ponderous constitutional questions thrown into the judicial hopper by two dollars. The various Law Reviews, if so minded, might elucidate these matters with formidable learning.

However, for present purposes it is only necessary to navigate shallower waters.

The statute C. S., 7880(88), imposes a tax of two dollars upon "docketing" an appeal from a "lower court."

C. S., 633, provides an appeal from the clerk to the judge, and C. S., 635, provides that the clerk shall prepare the papers and shall "send such statement . . . by mail or otherwise to the judge," etc. When the judge receives the papers, in any manner, he "has jurisdiction," by mandate of C. S., 637. No "docketing" in a technical sense is involved in the process and hence no tax is demandable.

Furthermore, the clerk is not a "lower court" to the Superior Court with respect to appeals. While he has original jurisdiction in some matters and in the decision thereof may be considered a separate tribunal, nevertheless, all his power is delegated by virtue of his office as clerk of the Superior Court. See *In re Estate of Wright,* 200 N. C., 620, 158 S. E., 192; *Hardy v. Turnage,* 204 N. C., 538, 168 S. E., 823.

A clear statement of the law is made by McIntosh in North Carolina Practice & Procedure, page 63, section 65, as follows: "The clerk of the Superior Court has two distinct functions, and appeals may be taken from his action in either case. As clerk of the court, he keeps the records of the court, issues writs, passes upon questions of pleading and practice, and in certain cases may render judgments; and in all such cases, which are properly pending in the Superior Court, his action as a subordinate officer of the court is subject to review by the judge.

"As a department of the Superior Court, the clerk has jurisdiction to hear and determine certain cases which do not come before the judge in the first instance, such as matters of probate and special proceedings; and it became necessary to determine whether the appellate jurisdiction in such cases was derivative, as in appeals from other courts. . . . To prevent the confusion thus arising in different departments of the same court, it was enacted in 1887 that, when any case begun before the clerk is, 'for any ground whatever,' sent before the judge, he may proceed to hear and determine all matters in controversy, or may, in his discretion, remand the case to the clerk. By reason of this statute, it is held that the appellate jurisdiction is not derivative in any case, even when the clerk had no jurisdiction, but the case is still in the same court for review and for such other action as may be necessary."

Reversed.

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

L. M. MILLER, EXECUTOR OF THE ESTATE OF J. H. MILLER, DECEASED, v. MRS. EUGENIA SHORE AND HUSBAND, WALTER A. SHORE; WILLIAM F. MILLER AND WIFE, LUCY MILLER; MRS. BERTIE MILLER, L. M. MILLER AND WIFE, MAUDE E. MILLER; MRS. EMMA E. MILLER, HEIRS OF J. H. MILLER, AND JOHN J. INGLE, TRUSTEE, AND DR. E. F. STRICKLAND.

(Filed 20 June, 1934.)

Mortgages H b—Executor may not restrain foreclosure of mortgage on testator's land pending sale of land to make assets.

An executor may not restrain the foreclosure of a deed of trust executed by his testator prior to his death upon the executor's petition for sale of the lands to make assets, when by the terms of the deed of trust the trustee is authorized to advertise and sell the lands, the right of the trustee to sell the lands being contractual, and the sale by the trustee being subject to the provisions of chapter 275, Public Laws of 1933.

APPEAL from *Hill, J.*, at 16 April Term, 1934, of FORSYTH. Reversed.

Part of the judgment of the court below is as follows: "It is further considered, ordered, and adjudged by this court that the said John J. Ingle, trustee, and the said Dr. E. F. Strickland, their servants, agents and employees, be and they are hereby enjoined and restrained from selling, or offering for sale, the real estate described in the petition under the deeds of trust executed by J. H. Miller and wife, Emma E. Miller, to John J. Ingle, trustee for Dr. E. F. Strickland, and recorded in the office of the register of deeds of Forsyth County, North Carolina, in Book No. 256, of deeds of trust, at page 2, and Book No. 296, of deeds of trust, at page 164."

The only material exception and assignment of error made by defendants, John J. Ingle, trustee, and E. F. Strickland, is the signing of the judgment by the court below. The material facts will be set forth in the opinion.

W. T. Wilson for plaintiff, L. M. Miller, executor.

Ingle & Rucker for defendants, John J. Ingle, trustee, and E. F. Strickland.

CLARKSON, J. The material facts are as follows: On 25 January, 1929, the plaintiff's testator and his wife borrowed $5,000 from the defendant Strickland and executed a deed of trust conveying 123 acres of farm land to the defendant Ingle to secure the payment of the loan one year after date. The deed of trust was duly recorded. The testator died on 17 May, 1933, leaving a will devising the farm lands to his children, among whom is L. M. Miller, the plaintiff and executor of the will. Payments aggregating $450 are all the defendant Strickland has received since the date of the loan. The last payment made by the

testator was a payment of $200, made on 20 April, 1931. The plaintiff, his son and now executor of his will, made four payments of $25.00 each during the period from the first payment on 7 November, 1932, to the last payment on 27 March, 1933. The debt, with accrued interest, as of 15 September, 1933, was $5,871.67. Trustee Ingle, on 3 December, 1933, began to advertise the lands for sale at foreclosure on 2 January, 1934. On 29 December, 1933, the executor filed a petition with the clerk of the Superior Court for authority to sell the lands for assets to pay debts, and prayed for an order restraining the defendants Ingle and Strickland from selling the lands at foreclosure. Such an order was issued on that day by the clerk and made permanent by the clerk on 19 February, 1934. On appeal to the judge of the Superior Court, the court signed and entered the judgment as appears of record.

We think it immaterial to consider what discretionary powers the court below had on appeal to the Superior Court. The obligation secured by deed of trust was a contract between the parties.

In *Leak v. Armfield,* 187 N. C., 625 (628), speaking to the subject, this Court said: "It nowhere appears in the record that Chase Boren consented to the procedure in which she was made a party or waived any right. This being so, from the facts found by the court below as a matter of law, we think that the restraining order ought not to have been granted. If subsequent judgment creditors or litigants over the equity of redemption could 'tie up' a first mortgage and effect its terms, it would seriously impair a legal contract. It may be 'hard measure' to sell, but this is universally so. The mortgagee has a right to have her contract enforced under the plain terms of the mortgage. To hold otherwise would practically nullify the present system of mortgages and deeds in trust on land, so generally used to secure indebtedness and seriously hamper business. Those interested in the equity of redemption have the right of paying off the first lien when due. We can see no equitable ingredient in the facts of this case. The mortgage is not a 'scrap of paper.' It is a legal contract that the parties are bound by. The courts under their equitable jurisdiction, where the amount is due and ascertained—no fraud or mistake, etc., alleged—have no power to impair the solemn instrument directly or indirectly by nullifying the plain provisions by restraining the sale to be made under the terms of the mortgage."

The trustee, when he sells, has to do so in accordance with C. S., 2591. The statute, Public Laws, 1933, chapter 275, is applicable and held constitutional in *Woltz v. Safe Deposit Co., ante,* 239; *Alexander v. Boyd,* 204 N. C., 103; *Whitaker v. Chase, ante,* 335; *Hopkins v. Swain, ante,* 439. For the reasons given, the judgment of the court below is

Reversed.

CARRIE GORDON v. JOHN FREDLE AND DOCK VAUGHN.

(Filed 20 June, 1934.)

Limitation of Actions B b—Ignorance that defendants were authors of slander does not affect running of statute of limitations.

An action for slander begun more than six months after the publication of the alleged defamatory words is barred by the statute of limitations, C. S., 444, the right of action accruing from the date of publication, regardless of the fact that it is begun within six months from the discovery by plaintiff that defendants were the authors thereof.

APPEAL by plaintiff from *Shaw, Emergency Judge,* at January Term, 1934, of SURRY. Affirmed.

This is an action to recover damages for slander. The defendants, in their answer, deny the allegation in the complaint that they published the defamatory words as alleged therein, and plead the six months statute of limitations.

The evidence for the plaintiff tended to show that during the year 1923 or 1924, the defendant, Dock Vaughn, at the request of the defendant, John Fredle, wrote and addressed to the husband of the plaintiff, letters containing the defamatory words alleged in the complaint; and that these letters were received by the husband of the plaintiff through the mail. The letters were anonymous and were read to the plaintiff and her husband, who are unable to read, by their son. The plaintiff was deeply distressed when her son read the defamatory words contained in the letters, and was greatly humiliated by the false charge made against her. She did not discover that the defendants were the authors of the letters received by her husband, until some time in December, 1928. This action was begun on 29 February, 1929.

At the close of the evidence for the plaintiff, upon the intimation of the court, that on the facts shown by all the evidence, he would instruct the jury that the action having been begun more than six months after the cause of action alleged in the complaint accrued, was barred by the statute of limitations.

The plaintiff excepted, submitted to a judgment of nonsuit and appealed to the Supreme Court.

E. C. Bivens and Carter & Carter for plaintiff.
Folger & Folger and W. R. Badgett for defendants.

CONNOR, J. The cause of action alleged in the complaint accrued at the date of the publication of the defamatory words, which the plaintiff contends are actionable *per se.* 37 C. J., 17; 17 R. C. L., 372.

All the evidence shows that the said defamatory words were published in 1923 or 1924, and that the action was begun on 19 February, 1929. The action was not begun within six months after the cause of action accrued, and for that reason is barred by the statute of limitations. C. S., 444.

It is immaterial that the action was begun within six months after the plaintiff discovered that defendants were the authors of the letters containing the defamatory words. *Blount v. Parker,* 78 N. C., 128, *Fox v. Wilson,* 48 N. C., 486. There is no provision in the statute that an action for slander can be maintained if begun within six months from the date of the discovery by the plaintiff that the defendant was the author of the slander, where the slanderous words were uttered or published more than six months prior to the commencement of the action. There was no error in the judgment of nonsuit. The judgment is

Affirmed.

STATE v. WILLIE CROCKETT.

(Filed 20 June, 1934.)

Criminal Law L e—

The jury's verdict on controverted issues of fact in this prosecution for murder is upheld, there being no error in the trial of the cause or in the charge of the trial court to the jury.

APPEAL by defendant from *Clement, J.,* at December Term, 1933, of FORSYTH.

Criminal prosecution tried upon indictment charging the defendant with the murder of one Patsy Crockett.

Verdict: Guilty of murder in the first degree.

Judgment: Death by electrocution.

The defendant appeals, assigning errors.

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

Mangum Turner for defendant.

STACY, C. J. There is evidence on behalf of the State tending to show that on 29 August, 1933, the defendant shot and killed his wife, Patsy Crockett, under circumstances indicative of a mind fatally bent on mischief and a heart devoid of social duties. The defendant and his wife had been separated for some time, the latter having gone to live with her mother. On the day of the homicide, the deceased was ironing in the dining room of her mother's house when the defendant appeared

on the porch and demanded that she come out. Upon her refusal to obey this command, the defendant shot her three times. The deceased ran over to the home of a neighbor, where she was pursued by the defendant and there shot the fourth time. She was horribly wounded, and later died from the effects thereof.

The defendant, on the other hand, testified that the deceased stabbed him with an ice pick; that he found a strange man with her who tried to burn him with an iron; and that his wife got a gun and he was trying to take this from her when she was shot. He had no recollection of pursuing her across the street.

The case was submitted to the jury under a full and ample charge. Two exceptions were entered to the exclusion of evidence. One was later abandoned and the other cannot be sustained. Several exceptions were also taken to the charge, but a careful perusal of it leaves us with the impression that they are without substantial merit. In short, while a very important one, the case presented little more than controverted issues of fact, and was tried without error by a careful and painstaking judge. The verdict and judgment will be upheld.

No error.

STATE v. J. CLYDE RAY.

(Filed 20 June, 1934.)

1. Criminal Law L d—Service of objections and exceptions to defendant's statement of case must be made within time to be availing.

Where defendant duly serves his statement of case on appeal the service by the solicitor of exceptions and objections thereto after the expiration of ten days renders the service of such exceptions and objections nugatory in the absence of an extension of time or waiver, C. S., 643, and defendant's statement becomes the statement of case on appeal.

2. Same—Duty of court to find facts where controversy exists as to time for service of exceptions to case on appeal.

Where there is a controversy as to whether exceptions to defendant's statement of case on appeal were served within the time fixed or allowed, or service within such time waived, it is the duty of the trial court to find the facts, hear motions and enter appropriate orders.

3. Embezzlement B c—Admission in evidence of pleadings in civil actions against defendant in prosecution for embezzlement held error.

In a prosecution for embezzlement the admission in evidence over defendant's objection of pleadings in civil actions against defendant, involving the funds he is alleged to have embezzled, is erroneous. C. S., 533.

APPEAL by defendant from *Devin, J.*, at December Term, 1933, of ORANGE.

STATE *v.* RAY.

Criminal prosecution tried upon indictment charging the defendant with embezzlement.

Verdict: "Guilty thereof in the manner and form as charged in the bill of indictment."

Judgment: Imprisonment in the State's prison for a term of three years.

Defendant appeals, assigning errors.

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

L. P. McLendon and S. M. Gattis for defendant.

STACY, C. J. The trial was held at the December Term, 1933, of Orange Superior Court, which convened 11 December. An appeal was prayed and notice duly given. Within fifteen days thereafter, to wit, on 23 December, the defendant made out and served his statement of case on appeal. On 6 January following, the solicitor prepared and served exceptions or objections to the defendant's statement. This was too late in the absence of any extension or waiver of time. C. S., 643. None appears of record. Hence the defendant's statement became the statement of case on appeal. *S. v. Humphrey,* 186 N. C., 533, 120 S. E., 85; *S. v. Price,* 110 N. C., 599, 15 S. E., 116; *Texas Co. v. Fuel Co.,* 199 N. C., 492, 154 S. E., 829; *Barrus v. R. R.,* 121 N. C., 504, 28 S. E., 187; *Carter v. Bryant,* 199 N. C., 704, 155 S. E., 602.

Objections to appellant's statement of case on appeal, not served within the time fixed by statute (10 days after service of appellant's case), by order of court, or by agreement of counsel, may be disregarded as unavailing or nugatory. *Smith v. Smith,* 199 N. C., 463, 154 S. E., 737; *Cummings v. Hoffman,* 113 N. C., 267, 18 S. E., 170.

Of course, where there is a controversy as to whether the exceptions were served within the time fixed or allowed, or service within such time waived, it is the duty of the trial court to find the facts, hear motions and enter appropriate orders thereon. *Smith v. Smith, supra; Holloman v. Holloman,* 172 N. C., 835, 90 S. E., 10; *Barrus v. R. R., supra.* But here, there are no controverted facts. *Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126.

It appears in appellant's statement of case on appeal that certain pleadings in civil actions brought against the defendant, involving the funds he is alleged to have embezzled, were offered in evidence, over objection, as proof of the facts admitted or alleged therein. This was in violation of the statute, C. S., 533, and entitles the defendant to a new trial. *S. v. Dula,* 204 N. C., 535. It is so ordered.

New trial.

STATE v. CLYDE FERRELL.

(Filed 20 June, 1934.)

1. Criminal Law L e—No appeal lies from discretionary determination of motion for new trial for newly discovered evidence.

No appeal lies from the discretionary ruling of the trial court denying a motion for a new trial for newly discovered evidence, and especially is this true of a motion therefor in a criminal action at the next succeeding term of the Superior Court after affirmance of the judgment by the Supreme Court, since motions for a new trial for newly discovered evidence in criminal cases may not be made in the Supreme Court.

2. Criminal Law L b—

Application for order allowing defendant to appeal *in forma pauperis* held improvidently entered under authority of *Powell v. Moore*, 204 N. C., 654.

APPEAL by defendant from *Small, J.*, at February Term, 1934, of DURHAM.

At the March Term, 1933, Durham Superior Court, the defendant in the above entitled cause was tried upon an indictment charging him, and two others, with the murder of one Thaddeus Tilley, which resulted in a conviction and sentence of death. The defendant appealed to the Supreme Court. The judgment was affirmed in an opinion filed 10 January, 1934. *S. v. Ferrell,* 205 N. C., 640.

At the next succeeding term of Durham Superior Court following affirmance of the judgment on appeal, the defendant lodged a motion for a new trial on the ground of newly discovered evidence under authority of *S. v. Casey,* 201 N. C., 620, 161 S. E., 81, and *S. v. Starnes,* 97 N. C., 423, 2 S. E., 447. The motion was duly considered and denied.

From this ruling the defendant gave notice of appeal and was allowed to prosecute the same *in forma pauperis.*

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

L. P. McLendon, W. S. Lockhart, A. A. McDonald and M. M. Leggett for defendant.

STACY, C. J. We have held in a number of cases that no appeal lies to this Court from a discretionary determination of an application for a new trial on the ground of newly discovered evidence. *S. v. Edwards,* 205 N. C., 661; *S. v. Riddle and Huffman,* 205 N. C., 591; *S. v. Lea,* 203 N. C., 316, 166 S. E., 292; *S. v. Shipman,* 203 N. C., 325, 166 S. E., 298; *S. v. Davis,* 203 N. C., 327, 166 S. E., 297; *S. v. Rhodes,*

203 N. C., 329, 166 S. E., 299; *S. v. Moore,* 202 N. C., 841, 163 S. E., 700; *S. v. Griffin,* 202 N. C., 517, 163 S. E., 457; *S. v. Cox,* 202 N. C., 378, 162 S. E., 907; *S. v. Lambert,* 93 N. C., 618; *Crane v. Carswell,* 204 N. C., 571, 169 S. E., 160; *Carson v. Dellinger,* 90 N. C., 226; *Holmes v. Godwin,* 69 N. C., 467; *Vest v. Cooper,* 68 N. C., 131. Especially is this so in criminal cases where such applications are not originally entertained in the appellate court. *S. v. Casey,* 201 N. C., 620, 161 S. E., 81.

It also seems that the order allowing the movant, or petitioner, to appeal *in forma pauperis* was improvidently granted. *Powell v. Moore,* 204 N. C., 654, 169 S. E., 281.

Appeal dismissed.

STATE v. J. W. HOLLINGSWORTH.

(Filed 20 June, 1934.)

1. Attorney and Client E a—

A judgment of disbarment entered at the instance of defendant upon his plea of *nolo contendere* to a charge of false pretense is not erroneous.

2. Attorney and Client E c—Judgment of disbarment entered according to usual practice upon plea of nolo contendere is not irregular.

A judgment of disbarment duly entered and certified to the Supreme Court upon defendant's plea of *nolo contendere* to a charge of false pretense and his agreement to surrender his law license, C. S., 205, as amended by chapter 134, Public Laws of 1927, upon which judgment the Supreme Court enters an order of disbarment, is not irregular, it having been entered according to the usual course and practice of the court at the instance of the defendant.

3. Same: Judgments K f—Remedy to correct judgment is by motion in the cause if irregular and by appeal if erroneous.

Where a judgment of disbarment is entered according to the usual course and practice of the court upon defendant's plea of *nolo contendere* to a charge of false pretense and his agreement to surrender his license, the Superior Court is without jurisdiction to hear a motion thereafter made to modify the judgment and recommend to the Supreme Court that defendant be reinstated on the ground that a plea of *nolo contendere* is not a confession of crime in open court, the judgment not being irregular, and defendant's remedy if the judgment be conceded erroneous, being by appeal or *certiorari.*

4. Attorney and Client E c—

The North Carolina State Bar is given authority by chapter 210, Public Laws of 1933, to deal with the admission to practice, discipline and disbarment of attorneys.

STATE *v.* HOLLINGSWORTH.

APPEAL by movant from *Alley, J.*, at February Term, 1934, of FORSYTH.

Motion in the cause to correct and modify judgment of disbarment and to recommend to the Supreme Court that defendant be reinstated as an attorney at law.

The facts are these:

1. At the January Term, 1926, Forsyth Superior Court, the defendant was tried on indictment charging him with false pretense, C. S., 4277, and convicted. On appeal, a new trial was ordered for error in requiring the defendant to produce certain private papers which were used in evidence against him, opinion filed 21 April, 1926, and reported in 191 N. C., 595, 132 S. E., 667.

2. Thereafter, at the July Term, 1927, the defendant entered a plea of *nolo contendere* to the charge preferred against him in the bill of indictment and agreed to surrender his law license. Judgment of disbarment was entered and certified to the clerk of the Supreme Court agreeably to the provisions of C. S., 205, as amended by chapter 134, Public Laws, 1927, then in force. Order of disbarment was thereupon entered in this Court 21 December, 1927.

3. The present motion was made at the February Term, 1934, Forsyth Superior Court, following the decision in *In re Stiers,* 204 N. C., 48, 167 S. E., 382, in which it was held that "a plea of *nolo contendere* does not amount to a 'conviction or confession in open court' of a felony," within the meaning of the disbarment statute.

4. The court held that it was without power to grant the prayer of the petitioner.

The movant appeals, assigning error.

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

L. F. Klutz for defendant.

STACY, C. J. Even if it be conceded that the original order of disbarment was erroneous in view of the decision in *In re Stiers,* 204 N. C., 48, 167 S. E., 382, which it is not as it was entered at the instance of the defendant and by his procurement, still the court was without authority to set it aside on motion made in the cause at the February Term, 1934. *Duffer v. Brunson,* 188 N. C., 789, 125 S. E., 619. The remedy for correcting an erroneous judgment is by appeal or *certiorari. Wellons v. Lassiter,* 200 N. C., 474, 157 S. E., 434; *Finger v. Smith,* 191 N. C., 818, 133 S. E., 186; *Moore v. Packer,* 174 N. C., 665, 94 S. E., 449.

There was nothing irregular about the judgment as it was entered according to the usual course and practice of the court, and at the instance of the defendant. *Finger v. Smith, supra.*

Furthermore, since the disbarment of movant, the North Carolina State Bar has been organized pursuant to chapter 210, Public Laws, 1933, with authority to deal with admission to practice, discipline and disbarment of attorneys. 205 N. C., 853, *et seq.*

Affirmed.

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

(Filed 20 June, 1934.)

1. Appeal and Error C b—Clerk has no authority to settle case on appeal even though appellant fails to request settlement by judge within required time.

While it is provided by statute, C. S., 644, that if appellant delays longer than fifteen days after service of objections and exceptions by appellee to his statement of case on appeal, and there is no agreement for an extension of time, the exceptions filed by appellee shall be allowed, the clerk has no authority to find the fact of such delay, nor to settle the case upon the admission of such fact, it being required that the case on appeal in such instance be settled in an approved manner by agreement of counsel or by the judge.

2. Appeal and Error E a—"Case on appeal" is not necessary part of record.

The failure to have a "case on appeal" will not ordinarily work a dismissal even in cases requiring it, even if no error appears on the face of the record.

3. Same—Where necessary parts of record proper are not sent up the appeal will be dismissed.

Where nothing but a purported "case on appeal" is sent up, and the entire record proper is omitted, and it does not appear from the transcript that an action was instituted, proceedings had, and an appealable judgment rendered, and that an appeal therefrom was taken, the appeal will be dismissed.

APPEAL by plaintiffs from *Clement, J.,* in Chambers at Jefferson, 20 October, 1933. From ASHE.

Motion to retax costs. Motion allowed in part and overruled in part. Plaintiffs appeal.

Joseph M. Prevette and George P. Pell for plaintiffs.

T. C. Bowie for defendants.

STACY, C. J. The judgment from which the plaintiffs appeal was signed 20 October, 1933. Plaintiffs were allowed fifteen days within which to make out and serve statement of case on appeal, and defendants given fifteen days thereafter to prepare and file exceptions or countercase. Plaintiffs served their statement 2 November; and defendants filed exceptions thereto 10 November. The clerk certifies that as appellants delayed longer than fifteen days, after service of defendants' exceptions, to request the judge to settle the case on appeal, "in accordance with law, I am making up this case on appeal by inserting defendants' exceptions, however, the second exception of the defendants states that the case on appeal should contain the written motion made by the plaintiffs at the July Term, 1933 . . . I certify that no such written motion was ever filed by the plaintiffs and therefore cannot be included in the case on appeal."

The "case on appeal," therefore, has not been settled in any approved way, either by agreement of counsel or by the judge. *S. v. Ray ante,* 736. We are not aware of the practice which permits the clerk of the Superior Court to settle cases on appeal to this Court, when the parties do not agree. *Carter v. Bryant,* 199 N. C., 704, 155 S. E., 602. True, it is provided by C. S., 644 that if the appellant delay longer than fifteen days, after service of appellee's exceptions or countercase, without any agreement as to extension of time, "to request the judge to settle the case on appeal, . . . then the exceptions filed by the respondent shall be allowed, or the countercase served by him shall constitute the case on appeal." But this does not authorize the clerk to find the fact of such delay, nor to settle the case upon admission of such fact. *Smith v. Smith,* 199 N. C., 463, 154 S. E., 737; *Holloman v. Holloman,* 172 N. C., 835, 90 S. E., 10.

Ordinarily, the failure to have a "case on appeal," even in cases requiring it, would not *ipso facto* work a dismissal. *Roberts v. Bus Co.,* 198 N. C., 779, 153 S. E., 398. *Non constat* that there may not be errors on the face of the record proper. *Wallace v. Salisbury,* 147 N. C., 58, 60 S. E., 713. But in the instant case nothing but the purported "case on appeal" has been sent up, and the entire record proper has been omitted. Some of the orders may appear in the purported statement of case on appeal, but "for the Supreme Court to acquire jurisdiction, it must appear in the transcript of the record that an action was instituted, that proceedings were had and a judgment rendered from which an appeal could be taken, and that an appeal was taken from such judgment." *S. v. Stafford,* 203 N. C., 601, 166 S. E., 734; *Spence v. Tapscott,* 92 N. C., 576.

Speaking to the subject in *Walton v. McKesson,* 101 N. C., 428, 7 S. E., 566, *Merrimon, J.,* delivering the opinion of the Court, said:

"The Court ordinarily sees, and has knowledge of its jurisdiction in a particular case, only by and from what appears in the record. It is this, and what thus appears in it, that establishes the jurisdiction of this Court and puts it in efficient relation and connection with the court below, as to the appeal and whatever may be embraced by it."

The appeal will be dismissed on authority of *Payne v. Brown,* 205 N. C., 785; *Duplin Co. v. Teachey,* 204 N. C., 783, 168 S. E., 509; *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.

STATE v. W. T. SHORE.

(Filed 20 June, 1934.)

1. Criminal Law E e—

Pleas in abatement, being dilatory pleas, are not favored.

2. Criminal Law D d—Indictment held to charge embezzlement in county of prosecution, and defendant's plea in abatement was properly denied.

An indictment charging that defendant did feloniously embezzle certain certificates of deposit in the county in which the prosecution is instituted *is held* not subject to defendant's plea in abatement on the ground that the certificates of deposit were issued by a bank in another county and that such other county was the proper venue of the prosecution, since the indictment charges the embezzlement of the certificates of deposit and not the proceeds of the certificates. C. S., 4606.

APPEAL by defendant from *Alley, J.,* at January Term, 1934, of FORSYTH.

Indictments for embezzlement charging that the defendant, as agent of Mrs. Maude B. Trotman, guardian, did, on 16 June, 1932, and again on 17 October, 1932, in Forsyth County, "feloniously embezzle and convert to his own use, and did take, make away with and secrete, with intent to embezzle and fraudulently convert to his own use" a certain certificate of deposit of $50,000 (issued by a Charlotte bank), contrary to the provisions of C. S., 4268.

The defendant filed a plea in abatement to each bill and moved for *quashal* or dismissal on the ground that Forsyth County was not the proper venue, but that whatever was done in connection with said certificates of deposit took place in Mecklenburg County, and not elsewhere.

Upon the hearing of these pleas, the court found, *inter alia,* upon the affidavits submitted, that "the two certificates of deposit described in the bills of indictment in these causes were removed from the safety deposit box by W. T. Shore and Mrs. Maude B. Trotman, guardian, endorsed by her and delivered to the defendant, W. T. Shore, in Winston-Salem, Forsyth County, North Carolina."

By consent, it was stipulated that the court's findings of fact should be used solely for the purpose of passing upon the pleas in abatement.

The court refused to sustain the defendant's pleas in abatement and held him for trial in Forsyth County.

From this ruling, the defendant appeals, assigning error.

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

E. T. Cansler, N. A. Townsend and John C. Wallace for defendant.

STACY, C. J. The pleas in abatement were properly denied. *S. v. Carter,* 126 N. C., 1011, 35 S. E., 591.

We are not now concerned with whether the State can make out its case, or with the guilt or innocence of the accused, but only with the question of venue. C. S., 4606. "Pleas in abatement, being dilatory pleas, are not favored at common law or under The Code"—*Walker, J.,* in *Emry v. Chappell,* 148 N. C., 327, 62 S. E., 411.

It is charged in each bill that in violation of C. S., 4268, the defendant, as agent, etc., did, in Forsyth County, on the date mentioned, feloniously embezzle the certificate of deposit described therein, with intent fraudulently to convert the same to his own use. *S. v. Oliver,* 186 N. C., 329, 119 S. E., 370; *S. v. Allen,* 107 N. C., 805, 11 S. E., 1016. The charge is not that the defendant embezzled the proceeds of said certificates, but that he embezzled the certificates themselves as condemned by the statute. *S. v. McDonald,* 133 N. C., 680, 45 S. E., 582.

The case of *S. v. Mitchell,* 202 N. C., 439, 163 S. E., 581, cited and relied upon by appellant, was decided on other facts and is easily distinguishable.

Upon the record, the defendant is subject to trial on the indictments in Forsyth County. 9 R. C. L., 1293; Annotation L. R. A., 1918E, 744.

Affirmed.

STATE v. L. C. DULA.

(Filed 20 June, 1934.)

1. **Embezzlement B a—Proof of embezzlement of sum less than amount charged in indictment does not constitute variance.**

   In a prosecution for embezzlement the failure of proof of embezzlement of the whole sum charged in the bill of indictment does not constitute a fatal variance between allegation and proof where there is proof of embezzlement of a sum less than that charged in the indictment. C. S., 4620.

2. **Embezzlement B c—Evidence of settlement with third person held incompetent in absence of evidence of authorization or ratification by prosecuting witness.**

   In a prosecution for embezzlement evidence that defendant had settled with the prosecuting witness by payment to another is properly excluded in the absence of evidence that such other person was the agent for the prosecuting witness, or that the prosecuting witness had authorized or ratified settlement in this manner, the excluded evidence being incompetent to show want of fraudulent intent, or for any other purpose.

APPEAL by defendant from *Clement, J.*, at December Term, 1933, of FORSYTH. No error.

This is a criminal action in which the defendant was convicted of the embezzlement of the sum of $2,860, which he had collected as the consignee and agent of the Lester Piano Company. C. S., 4268.

From judgment that he be confined in the State's prison for a term of not less than two or more than four years, at hard labor, the defendant appealed to the Supreme Court.

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

Slawter & Wall for defendant.

CONNOR, J. We find no error in the trial of this action. The contention of the defendant that there was a fatal variance between the allegations of the indictment and the proof at the trial, because the evidence failed to show that the defendant had received the sum of $2,860, from the sale of pianos consigned to him by the Lester Piano Company, as alleged in the indictment, cannot be sustained. There was evidence that defendant had sold or disposed of the pianos, and had received in cash certain sums less in amount than $2,860, and that he had converted said sums to his own use. C. S., 4620. 31 C. J., 840, sec. 451.

The testimony of witnesses offered by the defendant to show that he had settled with the Lester Piano Company, by payment of the sum of

$1,850 to one George Irvin, was properly excluded as evidence. There was no evidence tending to show that George Irvin was the agent of the Lester Piano Company, or that the Lester Piano Company had authorized or ratified a settlement of its claim against the defendant by George Irvin. The testimony excluded by the judge was not competent as evidence to show a want of fraudulent intent, or for any other purpose. See *S. v. Summers,* 141 N. C., 841, 53 S. E., 856.

The evidence was properly submitted to the jury under instructions to which the defendant did not except. The judgment is affirmed.

No error.

ESSIE McDONALD v. U. A. ZIMMERMAN.

(Filed 20 June, 1934.)

Pleadings I a—Refusal to allow motion to strike out will not be held for error where allegations are not wholly irrelevant.

In this civil action for wrongful conversion, the refusal of a motion to strike out certain paragraphs of the complaint tending to show the course of dealings between defendant and his agent is not held for error, since the allegations are not wholly irrelevant and it is assumed on appeal that the trial court will not allow such allegations to be made the basis for the introduction of evidence irrelevant to the cause of action stated.

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

CIVIL ACTION, before *Harding, J.,* at November Term, 1933, of MECKLENBURG.

Plaintiff alleged that she was the owner of a 4½ per cent North Carolina bond, payable to bearer, which had been entrusted by her to one Leonore W. Seay for sale, and that the said Seay had wrongfully converted said bond and applied the proceeds thereof to the use and benefit of the defendant. It was further alleged in substance that Leonore W. Seay was the agent of defendant and that they had been engaged in various check kiting transactions in purchases and sales on the stock market. The defendant made a motion in apt time to strike out paragraphs 1, 2, 3, 4, and 5 of the complaint for the reason that they were irrelevant and immaterial, and involved transactions not connected with the cause of action asserted by the plaintiff.

The trial judge overruled the motion to strike out and the defendant appealed.

Thaddeus A. Adams and J. Louis Carter for plaintiff.
John Newitt and Ray S. Farris for defendant.

BROGDEN, J. It is accepted law that facts and transactions which have no vital relation to the cause of action alleged, ought not to be scrambled in a complaint. However, mere scenery and stage decoration contained in a pleading do not warrant the conclusion that such may form the basis for the introduction of incompetent evidence at the trial. It is to be assumed that the trial judge will confine the evidence to the cause of action set up. Consequently it cannot be held, as a matter of law, that the allegations in the present complaint purporting to disclose the course of dealing between the defendant and his agent, Seay, are wholly irrelevant and harmful. See *Pemberton v. Greensboro*, 203 N. C., 514, 166 S. E., 396.

Affirmed.

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

STATE v. JAMES BROWN.

(Filed 20 June, 1934.)

Criminal Law L a—

Where defendant, convicted of a capital felony, fails to make out and serve his statement of case on appeal within the time allowed, his right to do so is lost, and the appeal will be dismissed upon motion of the Attorney-General where no error appears on the face of the record proper.

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

MOTION by State to docket and dismiss appeal.

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

STACY, C. J. At the March Term, 1934, Forsyth Superior Court, the defendant herein, James Brown, was tried upon an indictment charging him with burglary in the first degree, C. S., 4232, which resulted in a conviction and sentence of death. From the judgment thus entered, the prisoner gave notice of appeal to the Supreme Court, and was allowed thirty days within which to make out and serve statement of case on appeal, and the solicitor was given twenty days thereafter to prepare and file exceptions or countercase, but nothing has been done towards perfecting the appeal, and the time for serving statement of case on appeal has now expired. No bond was required as the prisoner

was granted the privilege of appealing *in forma pauperis. S. v. Stafford,* 203 N. C., 601, 166 S. E., 734.

The prisoner having failed to make out and serve his statement of case on appeal within the time allowed has lost the right to do so, and the motion of the Attorney-General to docket and dismiss must be allowed (*S. v. Johnson,* 205 N. C., 610), but this we do only after an examination of the record to see that no error appears on the face thereof, as the life of the prisoner is involved. *S. v. Goldston,* 201 N. C., 89, 158 S. E., 926.

No error appears on the face of the record. *S. v. Edney,* 202 N. C., 706, 164 S. E., 23; *S. v. Hamlet, ante,* 568.

Appeal dismissed.

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

GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL., BANK OF SUMMERFIELD, v. HOWARD SIMPSON AND NATIONAL SURETY COMPANY, HARRY N. LEVEY, ANCILLARY RECEIVER, AND GEORGE S. VAN SCHAICK, REHABILITATOR.

(Filed 20 June, 1934.)

1. Contracts B a: Principal and Surety A b—

General laws in force at the time of the execution of a contract become a part thereof as though expressly incorporated in its terms, and a surety bond may not limit the surety's liability contrary to statutory provisions relating thereto.

2. Same—

The courts will generally adopt the construction given a contract by the parties thereto before differences arise thereunder.

3. Principal and Surety B d—Each renewal of bank cashier's bond held to constitute separate contract under facts of this case.

The cashier of a bank was elected for the term of one year by the bank's board of directors, and required to furnish bond in the penal sum of $10,000 in accordance with its by-laws. The cashier was reëlected for a term of one year each successive year until the bank's insolvency, and the board of directors required that he should give bond, and determined the penal sum thereof by resolution adopted each separate year, but the penal sum required was not altered. Upon taking office the cashier gave the required bond in defendant surety company, the period of the bond being indeterminate, and each year thereafter the bond was renewed, the bank paying the initial premium and the yearly renewal premiums. Nine years thereafter defendant surety company executed a superseding bond with substantially the same provisions, but containing a rider which

stipulated that the surety's liability should not be cumulative and should not exceed the penal sum of the "bond or bonds" superseded. The superseding bond was renewed in like manner for four successive years. Before the expiration of one year from the date the original bond was executed chapter 4, section 61, Public Laws of 1921, went into effect, providing that active officers and employees of banks, before entering upon their duties, should give bond. (Amended by chapter 18, Extra Session, 1921; chapter 47, Public Laws of 1927) (N. C. Code, 221(m). After the closing of the bank it was discovered that the cashier had embezzled $20,000, the amount embezzled in no one year exceeding $10,000. *Held*, construing the bonds together with the statutes applicable and the words "bond or bonds" contained in the rider, each and every renewal of the bond and the payment of the premium thereon constituted a separate and independent contract, and the surety is liable in the sum of $20,000, and the provision in the rider that its liability should be limited to $10,000 is void as being against public policy, it being contrary to the statutory provisions.

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

APPEAL by defendants from *Sink, J.*, at October Term, 1933, of GUILFORD. Affirmed.

The following agreement is in the record: "It is hereby stipulated and agreed by and between the attorneys for plaintiff and the attorney for the National Surety Company, George S. Van Schaick, rehabilitator, and Harry N. Levey, ancillary receiver, the only defendant who answered in the above entitled case, that a jury trial is hereby expressly waived; that the following are the material and pertinent facts to be found by the court, and that the court may render judgment upon the admissions in the pleadings and the facts herein agreed upon, to wit: (1) That George S. Van Schaick, superintendent of insurance of the State of New York, was on 29 April, 1933, duly appointed rehabilitator for the defendant, National Surety Company, by the Supreme Court of the State of New York; that said George S. Van Schaick, rehabilitator as aforesaid, voluntarily makes himself a party defendant in this action and adopts the answer of the National Surety Company heretofore filed in this cause. (2) That on or about 12 May, 1933, Harry N. Levey, a resident and citizen of Guilford County, North Carolina, was duly and regularly appointed ancillary receiver for North Carolina for the defendant, National Surety Company; that said Harry N. Levey, ancillary receiver as aforesaid, voluntarily makes himself a party defendant in this action and adopts the answer of the National Surety Company heretofore filed in this cause. (3) That the Bank of Summerfield is a North Carolina banking corporation chartered on 19 December, 1919. (4) That at a meeting of the stockholders of the Bank of Summerfield, duly and regularly held on 20 March, 1920, by-laws were unanimously adopted containing, among others, the following pro-

visions: 'Section 14. The officers of said bank shall be a president, vice-president, cashier, and also such other officers as may be required from time to time for the prompt dispatch and orderly conduct of its business, which said officers shall be elected by the directors annually, and said officers may act as such without ceasing to be members of the board of directors. The cashier shall, *ex officio,* be secretary of the bank. The officers, except the cashier, shall hold their offices for the term for which they are elected, and until their successors are elected and qualified, and the cashier and the other appointed officers shall hold their offices during the pleasure of the board of directors.'

'Section 19. The bonds of the officers shall be fixed by the board of directors each year at their first meeting after their elections. The said bonds shall be approved by the board of directors, and the said board shall also have the power and discretion of fixing the bonds of the clerk, bookkeepers, and other subordinate officers connected with the bank.' (5) That at a meeting of the board of directors of the Bank of Summerfield duly and regularly held on 6 January, 1920, Howard Simpson was elected cashier for the term of one year. (6) That at the regular annual meeting of the board of directors held each year thereafter, including the year of 1931, Howard Simpson was each and every year duly elected cashier of the Bank of Summerfield for the term of one year. (7) That at each and every regular annual meeting of the board of directors the question of the cashier's bond was fully considered, the amount thereof fixed at $10,000, and upon each and every election of the said Howard Simpson as cashier, he was ordered to give bond in the sum of $10,000; that no actual notice thereof was given to the defendant, National Surety Company. (8) That the Bank of Summerfield did not open for business until on or about 22 July, 1920, at which time bond was furnished by the said Howard Simpson, as cashier, in the sum of $10,000, with National Surety Company as surety thereon, said bond bearing date of 22 July, 1920, and a copy being attac[illegible] to and made a part of this stipulation. (9) That thereafter premi[illegible] as paid each and every year by the Bank of Summerfield on the aforesaid bond dated 22 July, 1920, to and including the year 1928. (10) That on 27 April, 1929, Howard Simpson furnished the Bank of Summerfield with bond in the sum of $10,000, with National Surety Company as surety thereon, said bond bearing date of 27 April, 1929, and a copy being attached to and made a part of this stipulation. (11) That upon the execution of the aforesaid bond dated 27 April, 1929, a 'rider' was executed, accepted by the Bank of Summerfield, and attached to said bond, a copy of said 'rider' being attached to and made a part of this stipulation. (12) That on 23 June, 1931, Gurney P. Hood, Commissioner of Banks, took possession of the Bank of Summerfield, after

which time it was ascertained that Howard Simpson had embezzled funds in excess of $20,000. (13) That full notice of said embezzlement was given and proof of loss thereafter furnished to the National Surety Company, in complete compliance with the terms of the aforesaid bonds. (14) That from 22 July, 1920, to 22 March, 1929, the embezzlement of Howard Simpson amounted to $8,000; that from 22 March, 1929, to 22 March, 1930, the embezzlement of Howard Simpson amounted to $2,000; and that from 22 March, 1930, to 20 June, 1931, the embezzlement of Howard Simpson amounted to $10,000.

"It is further stipulated and agreed that if the court shall decide as a matter of law that the bond executed on 22 July, 1920, together with each renewal thereof, and the bond and rider executed on 27 April, 1929, and each and every renewal thereof, constitutes one continuous contract and bond with a single liability limiting loss occurring during the entire period to $10,000, then and in that event the judgment of said court shall fix plaintiff's recovery at said sum of $10,000, but if the court shall fail to hold said bonds and their respective renewals to be one continuous bond and contract, then and in that event it is stipulated and agreed that plaintiff's recovery shall be fixed at the sum of $20,000 and the cost of the action. It is further stipulated and agreed that this stipulation relates only to the facts and that the parties hereto may appeal to the Supreme Court from any conclusions or rulings of law by the court on the facts hereinbefore agreed to. This 11 October, 1933. Shuping & Hampton, attorneys for plaintiff. Kenneth M. Brim, attorney for defendants."

Exhibit "A" dated 22 July, 1920, the material parts for the consideration of this appeal: "The National Surety Company (surety), in consideration of the premium of ..... dollars ($ .....), payable on 24 July during each and every year that this bond shall continue in force, hereby agrees to make good within sixty (60) days after satisfactory proof thereof to Bank of Summerfield, Summerfield, North Carolina, employer any loss not exceeding $10,000, which the employer may sustain by reason of any act of personal dishonesty, forgery, theft, larceny, embezzlement, wrongful conversion or abstraction on the part of Howard Simpson, employee, in any position in the employer's service, committed after 24 July, 1920, and before the termination of this bond. . . . Any claim against the surety hereunder must be duly presented to the surety company within six (6) months after the date of the termination of the surety's liability hereunder for any reason, and no action or proceeding shall be brought hereunder unless begun within two (2) years after the employer shall have given notice of such claim. None of the provisions of this bond shall be altered or waived, except in writing, under seal, by the surety, executed by its president or a vice-

president, attested by its secretary or an assistant secretary. Signed, sealed and dated this 22 July, 1920."

Exhibit "B," dated 27 April, 1929, the material parts for the consideration of this appeal: "Know all men by these presents, that the National Surety Company of New York, N. Y., as surety (hereinafter called surety) does hereby agree to pay unto Bank of Summerfield, Summerfield, North Carolina (hereinafter called employer), within ninety days after presentation of proof of loss, as hereinafter provided, the amount of any loss not exceeding ten thousand and no/100 dollars, which the employer may sustain in respect of any moneys, funds, securities or other personal property of the employer, or for which the employer may be responsible, through any act of fraud, dishonesty, larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction or misapplication, or any other dishonest or criminal act or omission committed by Howard Simpson (hereinafter called the employee), acting alone or in collusion with others, while in any position in the continuous employ of the employer, after 12 o'clock noon of 22 March, 1929, but before the employer shall become aware of any default on the part of the employee, and discovered before the expiration of three years from the termination of such employment or cancellation of this bond, whichever may first happen."

"Superseded suretyship rider. (Attachable when our own or another company's bond or bonds are superseded.) Rider to be attached to Fidelity Bond No. R-188418, executed by the National Surety Company (hereinafter called 'company'), effective 22 March, 1929, in favor of Bank of Summerfield, Summerfield, North Carolina (hereinafter called 'employer'), and covering Howard Simpson. Whereas, the employer has been carrying a fidelity bond or bonds as follows: Bond No. 1531757, Howard Simpson, cashier, Bank of Summerfield, amount $10,000, dated 24 July, 1920; and whereas, said bond or bonds have been canceled, allowed to expire, or have terminated and have been superseded by the bond to which this rider is attached (hereinafter called 'superseding bond') as of the effective date thereof. Now, therefore, it is hereby understood and agreed: (1) The superseding bond shall be construed to cover any loss that would have been recoverable under any such superseded bond had it continued in force, if such loss be discovered after the period of limitation provided in the superseded bond and before the expiration of the time fixed in the superseding bond for the discovery of losses thereunder. (2) Any such loss shall be adjusted by the company upon the terms, conditions and limitations of said superseded bond, but nothing herein contained or in the superseding bond shall be construed to render the company liable for a larger amount than would have been recoverable under such superseded bond. (3)

Should a loss occur which is covered partly by a superseded bond and partly by the superseding bond, the amount recoverable from the company shall not exceed that which would have been recoverable under the terms of the superseded bond, plus the amount recoverable under the terms of the superseding bond for the period not covered by the bond superseded, provided always that the liability of the company will not be cumulative or exceed the largest single amount applicable to the employee causing the loss as fixed by either the superseded or the superseding bond. In witness whereof, the company has caused this instrument to be signed by its president and attested by its secretary and countersigned by an authorized representative, this 27 April, 1929. National Surety Company—B. A. W. St. John, president. Attest: Herbert J. Hewitt, secretary, countersigned by William N. Smith. (Seal.) The foregoing is agreed to and accepted by Bank of Summerfield, Summerfield, North Carolina. By G. S. Miles, president, employer."

The judgment of the court below is as follows: "This cause coming on to be heard, and being heard before his Honor, H. Hoyle Sink, judge presiding at the civil term of Guilford County Superior Court, beginning 30 October, 1933, upon the stipulation and agreed statement of facts in the record, and the court being of the opinion that the plaintiff is entitled to recover of the defendant, National Surety Company, George S. Van Schaick, rehabilitator, and Harry N. Levey, ancillary receiver, the sum of $20,000 and the cost of this action. It is now, therefore, ordered, adjudged and decreed that the plaintiff recover of the defendants, National Surety Company, George S. Van Schaick, rehabilitator, and Harry N. Levey, ancillary receiver, the sum of $20,000 and the cost of this action to be taxed by the clerk. This 12 December, 1933."

Defendants, appellants, excepted to and assign as error the decision of the court that plaintiff was entitled to recover an amount in excess of the penalty of the bond. Appellants excepted to and assign as error the failure of the court to hold that plaintiff could not recover in excess of the penalty of the bond, to wit, $10,000. Appellants excepted to and assign as error the signing of the judgment set out in the record, and appeal to the Supreme Court.

Shuping & Hampton for plaintiff.
Kenneth M. Brim for defendants.

CLARKSON, J. The question involved: When a bond which guarantees the fidelity of a bank cashier and guarantees the bank against loss by reason of embezzlement, etc., of said cashier, is executed for an in-

definite term and thereafter is kept in force by the payment of annual premiums, does the fact that said cashier was elected at the time said bond was executed for a term of one year and was thereafter reëlected each year for a like term, and was required at each reëlection to give bond, all of which was expressly directed by the by-laws of said bank and in conformity with the statutes requiring the officer to give bond, constitute said bond one continuous transaction or is each and every renewal thereof a separate and distinct bond? We think under the facts and circumstances of this case, that each and every renewal thereof is a separate and distinct bond or independent contract.

From the agreed statement of facts, it will be seen that the by-laws of the Bank of Summerfield provided in section 14 thereof that the cashier of the Bank of Summerfield "shall be elected by the directors annually," with the further proviso that "the officers, except the cashier, shall hold their offices for the term for which they are elected and until their successors are elected and qualified, and the cashier and the other appointed officers shall hold their offices during the pleasure of the board of directors." It further appears from said statement of facts that the by-laws of said Bank of Summerfield provided in section 19 that "the bonds of the officers shall be fixed by the board of directors each year at their first meeting after their election." It appears likewise from the statement of facts that Howard Simpson was elected cashier of the Bank of Summerfield on 6 January, 1920, for the term of one year, and was reëlected at the regular annual meeting of the board of directors of the Bank of Summerfield each and every year thereafter until and including the year 1931. It further appears that at each and every annual meeting of the board of directors the question of the bond of the defendant, Howard Simpson, as cashier, was fully considered the amount fixed at $10,000 at each and every annual meeting and at each and every annual meeting upon the reëlection of the defendant, Howard Simpson as cashier, he was ordered to give bond in the sum of $10,000. It further appears from said statement of facts that though the defendant, Howard Simpson, was first elected on 6 January, 1920, that the bank did not open for business until about 22 July, 1920, at which time he gave bond for the sum of $10,000 with the defendant, National Surety Company as surety, said bond bearing date of 22 July, 1920 and being set forth in the record; that thereafter premium was paid each and every year by the Bank of Summerfield on the aforesaid bond to and including the year 1928; that on or about 27 April, 1929, following the annual reëlection of the defendant, Howard Simpson, as cashier of the Bank of Summerfield and the order of the board of directors of said bank for him to give bond in the sum of $10,000, that said Howard Simpson furnished bond in the sum of

$10,000 with the defendant, National Surety Company, as surety thereon, which said bond bears date of 27 April, 1929, and is set forth in the record; that upon the execution of the aforesaid bond bearing date of 27 April, 1929, a "superseded suretyship rider" was executed and accepted by the bank, which said rider recited the execution of both of the above referred to bonds and attempted to limit loss recoverable or covered by said bonds; that upon the reëlection of the defendant, Howard Simpson, each year after 27 April, 1929, and the order of the board of directors for the defendant, Howard Simpson, to give bond as cashier in the sum of $10,000, said Bank of Summerfield paid the premium on said bond to and including the year 1931. It further appears from said statement of facts that the plaintiff took possession of said Bank of Summerfield on 23 June, 1931, after which it was found the defendant, Howard Simpson, had embezzled funds of the Bank of Summerfield as follows: from 22 July, 1920, to 22 March, 1929, $8,000; from 22 March, 1929, to 22 March, 1930, $2,000; and from 22 March, 1930, to 30 June, 1931, $10,000; that full notice of said embezzlement was furnished the defendant, National Surety Company, and thereafter proof of loss was likewise furnished in complete compliance with the terms of said bonds. In addition to the statement of facts heretofore referred to there is the further statement of facts limiting the case to the sole question of whether or not under the facts in this case, the defendant, National Surety Company, is surety on one continuous contract or bond from 22 July, 1920, to and including 23 June, 1931, the day on which plaintiff took possession of the Bank of Summerfield as Commissioner of Banks, with a single and sole liability of $10,000, it being expressly stipulated and agreed that if the defendant is in fact surety on one continuous contract that its liability is only $10,000, but if not on one continuous contract, then its liability shall be $20,000. The court below held on the facts, that the bond was not one continuous contract and that plaintiff was entitled to recover. We think this holding correct.

The first bond was issued by defendant surety company, for $10,000, 22 July, 1920, and the premium was paid for one year. Thereafter, the General Assembly passed this act: Public Laws of 1921, chap. 4, sec. 61, ratified 18 February, 1921, before the year expired, which is as follows: "*Officers and employees shall give bond. The active officers and employees of any bank, before entering upon their duties, shall give bond to the bank* in a bonding company authorized to do business in North Carolina *in the amount to be required by the directors,* and to the satisfaction of the Corporation Commission. Such bonds shall be conditioned that such officer or employee shall faithfully discharge the duties imposed upon him by the directors, by-laws or by the law of the land, and that

such bonding company shall hold harmless the bank in which the officer or employee is employed, against any loss to said bank caused by said officer's or employee's unfaithfulness or negligence. The Corporation Commission or directors of such bank, may require an increase of the amount of such bond whenever they may deem it necessary. *If injured by the breach of any bond given hereunder, the bank so injured may put the same in suit and recover such damages as it may have sustained.*" (Italics ours.)

This act was amended by chapter 18, Extra Session, 1921, as follows: "That section sixty-one of chapter four of Public Laws of one thousand nine hundred and twenty-one, be amended by striking out all after the word 'directors,' line five, down to and including the word 'negligence,' in line eleven, and inserting in lieu thereof the following: 'in such form as may be prescribed or approved by the Corporation Commission.'" This act was ratified 15 December, 1921. Public Laws of 1927, chapter 47, section 11, is as follows: "That section sixty-one, chapter four, Public Laws of one thousand nine hundred and twenty-one, as amended, being section two hundred and twenty-one (m), Consolidated Statutes, be and the same is hereby amended to read as follows: '*Officers and employees shall give bond. The active officers and employees of any bank before entering upon their duties shall give bond to the bank* in a bonding company, authorized to do business in North Carolina, *in the amount required by the directors* and upon such form as may be approved by the Corporation Commission, same to be paid by bank. Such bond shall be conditioned that such officer or employee shall faithfully discharge all the duties imposed upon him by the directors, by the by-laws of the bank, or by the law of the land, and such duties as may be incident thereto, and such bond shall provide that such bonding company shall hold harmless the bank in which the officer or employee is employed against any loss to said bank caused by said officers' or employees' violation of any duty so imposed. The Corporation Commission or directors of such bank may require an increase of the amount of such bond whenever they may deem it necessary. *If injured by the breach of any bond given hereunder, the bank so injured may put the same in suit and recover such damages as it may have sustained and the provisions of this section shall be considered a part of the provision of the bond, whether included or not.*'" (Italics ours.)

N. C. Code, 1931 (Michie), section 221(m), is as follows: "*Officers and employees shall give bond.—The active officers and employees of any bank before entering upon their duties shall give bond to the bank* in a bonding company authorized to do business in North Carolina, *in the amount required by the directors* and upon such form as may be approved by the Commissioner of Banks, the premium for same to be

paid by the bank. The Commissioner of Banks or directors of such bank may require an increase of the amount of such bond whenever they may deem it necessary. *If injured by the breach of any bond given hereunder, the bank so injured may put the same in suit and recover such damages as it may have sustained.*" (Italics ours.)

The above section is the same as passed by the General Assembly of 1929. Public Laws, 1929, chapter 72, section 2, with the exception that "Commissioner of Banks" is substituted for "Corporation Commission."

It is well settled that general laws of a State in force at time of execution and performance of a contract become a part thereof and enter into and form a part of it, as if they were referred to or incorporated in its terms. *Van Hoffman v. Quincy,* 4 Wallace 535 (550), 18 L. Ed., 403 (408); *Farmers and Merchants Bank of Monroe, North Carolina, v. Federal Reserve Bank of Richmond, Va.,* 262 U. S., 649 (660); 67 L. Ed., 1157 (1164); *O'Kelly v. Williams,* 84 N. C., 281 (285); *Graves v. Howard,* 159 N. C., 594; *House v. Parker,* 181 N. C., 40 (42); *Ryan v. Reynolds,* 190 N. C., 563 (565); *Hughes v. Lassiter,* 193 N. C., 651 (657); *Monger v. Lutterloh,* 195 N. C., 274 (279); *Headen v. Insurance Co., ante,* 270 (272); *Steele v. Insurance Co.,* 196 N. C., 408 (411); Page on Contracts, 2d edition, section 2048; 6 R. C. L., "Contracts," section 243.

The statute, *supra,* Public Laws, 1921, chapter 4, section 61, says "officers and employees shall give bond. . . . Before entering upon their duties. . . . In the amount required by the directors." This provision stands mandatory in all the changes of the statutes bearing on the subject. In the agreed statement of facts, it is set forth that each year, the board of directors of the Bank of Summerfield, elected Howard Simpson as cashier for a term of one year. The bond was fixed for each year, at $10,000 and the premiums on the $10,000 bond paid to defendant National Surety Company each year. In the case of public officers, not requiring bond in accordance with the statute, we said in *Moffitt v. Davis,* 205 N. C., 565 (570): "Public officials entrusted in so important a matter as this mandatory statute, we find from the weight of authority, are held individually liable to any one injured by their wilful failure or neglect of duty. To hold otherwise would put a premium on inefficiency and neglect." The bank directors were careful to comply with the statute and elected the cashier each year and required a $10,000 bond and the premium each year was paid on same.

It may be noted that in the "rider," it is recited "whereas the employer has been carrying a fidelity *bond or bonds* as follows: Bond No. 1531757, Howard Simpson, cashier, Bank of Summerfield, amount $10,000, dated 22 July, 1920, and whereas said *bond or bonds* have been

canceled, allowed to expire or have terminated," etc. This language indicates that each renewal was an independent contract. The Surety Company seems to have put this construction on the transactions. Courts will generally adopt the party's construction of the contract. *S. v. Bank,* 193 N. C., 524 (527); *Pick v. Hotel Co.,* 197 N. C., 110 (113).

We think the statutes entered into and formed part of the bond. The first $10,000 bond was signed 22 July, 1920, and was for one year. Before the year expired, the statute, *supra,* was passed, which the Surety Company was bound to take notice of. The General Assembly required of the officer such as a cashier, to give bond in the amount to be required by the directors, this provision at once entered into and formed part of the bond. But, it is contended by defendant that the rider of the contract to the bond of 27 April, 1929, had this in it: "Should a loss occur which is covered partly by a superseded bond and partly by the superseding bond, the amount recoverable from the company shall not exceed that which would have been recoverable under the terms of the superseded bond, plus the amount recoverable under the terms of the superseding bond for the period not covered by the bond superseded, provided always that the liability of the company will not be cumulative or exceed the largest single amount applicable to the employee causing the loss as fixed by either the superseded or the superseding bond."

We do not think the Surety Company could, by contract, destroy the beneficent provisions of the statutes. In *Brick Co. v. Gentry,* 191 N. C., 636 (640), it is said: "It was held in *Ingold's case* (*Ingold v. Hickory,* 178 N. C., 614), and rightly so, we think, that where a bond was given in compliance with the requirements of the statute, the surety might not, in such case, restrict its liability to suit contrary to the statutory provision, for this would be to uphold a stipulation directly opposed to the public policy of the State, and thus enable the parties, by private agreement, to set the statute at naught in direct violation of its terms. And here, if it did not clearly appear, from the terms of the bond, that it was not given in view of the requirements of the statute for the protection of the plaintiffs and to insure the faithful performance of the contract as it relates to them, we should be disposed to hold the stipulation, restricting the surety's liability to suit, void as being contrary to the public policy of the State as expressed in the statute."

Taking all the facts agreed to and the acts of the General Assembly referred to, we think that each and every renewal and the payment of the premium on same constituted a separate, distinct and independent contract. The Surety Company could not, contrary to the statute, make the provision in the rider, it received the premium each year on a

$10,000 bond "that the liability of the company will not be cumulative or exceed the largest single amount applicable to the employee causing the loss as fixed by either the superseded or the superseding bond." On the other attitudes of the case, the decisions are woefully in conflict. We desire to set forth what was said in *Ætna Casualty & Surety Co. v. Commercial State Bank of Rantoul, Ill.*, 13 Fed. (2d Series), 474 (475-6): "Contracts of insurance guaranteeing honesty and fidelity are made for the purpose of furnishing, for an adequate compensation, indemnity to the insured, and should therefore be liberally construed to accomplish the purpose for which they are made." Citing numerous authorities. . . . "Here defendant paid an annual premium for insurance. Under plaintiff's theory, if there were a loss of $10,000, the first year, not discovered until the end of the three years' period, then, though defendant had paid premiums for the second and third years, it would have no protection for those years, no insurance, for the reason that the penalty of the bond would be completely exhausted by the first year's losses and nothing would remain to cover losses in the second and third years. In such case, the second and third years' premiums would be paid by defendant for nothing whatever. No sane man would say that this was the intention of defendant, and the court is most loathe to believe that it was the intent of plaintiff, a widely known insurance company, dependent upon the good will and esteem of the public and its customers for its commercial welfare, so to frame its contract of indemnity as to extract premiums from the insured without giving anything in return. Brief indeed would be its life of business prosperity and public esteem, were it known that it would be guilty of such a game of 'heads I win, tails you lose.' Rather than impute to it such an abhorrent suggestion of lack of commercial integrity and fair dealing, the court prefers to find as he believes the facts clearly indicate, that each year's premium was to buy one year's insurance of $10,000, but that the three years' premium bought insurance of only $3,333⅓, per year." *U. S. Fidelity & Guaranty Co. of Baltimore v. Crown Cork & Seal Co. of Baltimore City,* 125 Atlantic Reporter, p. 818 (820).

The case of *Jacksonville v. Bryant,* 196 N. C., 721, is easily distinguished from the present case. In that case, there was no ambiguity. The language of the contract was clear and explicit. For the reasons given, the judgment of the court below is

Affirmed.

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

PARKER RAND v. HOME INSURANCE COMPANY.

(Filed 20 June, 1934.)

1. Insurance J b—Under facts of this case policy was not forfeited for failure to pay balance of premium due under extension agreement, insured having become totally and permanently disabled within terms of policy and thereby rendered incapable of making payment.

Insured in a policy of life insurance carrying disability benefits paid a part of the premium due 10 October, 1930, and obtained an agreement for extension of time for payment of the balance due until 10 July, 1931. Insured introduced evidence that in April, 1931, he was suddenly stricken with arthritis of the third lumbar vertebra, which caused him excruciating pain and that his physician kept him constantly under the influence of opiates, and that by reason of pain and opiates he was totally incapable of transacting any business of any kind and did not realize he had any insurance, and that this condition continued until after the expiration of the extension agreement for the payment of premium, that during this period he received no notice from insurer of premium due, and that a few days after the expiration of the extension agreement his physician asked his wife if he had any disability insurance, whereupon his wife found the policy and immediately thereafter caused notice of disability to be furnished insurer. The jury found that insured, by reason of disability, was unable to pay the premium or to give notice of disability; *Held*, under the facts and circumstances of this case the policy was not forfeited for failure to pay the balance due on the premium under the extension agreement, and upon the jury's affirmative answer to the issue of permanent and total disability judgment for insured for the amount of disability benefits due under the policy less the amount due on the premium is upheld.

2. Insurance P b—Admission in evidence of similar policy upon which insurer was paying benefits held not prejudicial.

In this action on a disability clause in a policy of life insurance, the admission in evidence of another policy issued by insurer upon the same insured, which contained provisions in all respects similar to the policy in suit, and upon which insurer was paying benefits, *is held* to show a circumstance in the nature of an admission and not to constitute prejudicial error.

3. Trial F a—

The refusal to submit issues tendered by a party will not be held for error when the issues submitted present for the determination of the jury the law arising upon the facts in accordance with the decisions of the Supreme Court.

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

APPEAL by defendant from *Cranmer, J.*, and a jury, at March Term, 1933, of WAKE. No error.

This is an action instituted by the plaintiff against the defendant to recover disability benefits provided for in two policies of insurance

theretofore issued to him and for the waiver of the premiums under said policies during his disability. The evidence of the plaintiff, is to the effect that on 28 April, 1925, defendant issued to plaintiff its policy of insurance upon his life in the sum of $5,000, the same being policy No. 309013, and thereafter, on 29 September, 1926, the defendant issued unto plaintiff another policy of insurance upon his life in the sum of $5,000, being policy No. 328166. Attached to and forming a part of said policies of insurance were contracts providing for total and permanent disability benefits and a waiver of the payment of premiums during such disability. The premium on the first policy was due on 10 October, and on the second policy on 12 October, 1930. These premiums were extended by the defendant and on 23 January, 1931, the defendant extended the payment of the balance of the premium due under the first policy until 10 July, 1931, and on the second policy until 12 July, 1931, in consideration of a stipulated payment at that time. At the time of the extension agreement the defendant executed and delivered unto the plaintiff its receipt and agreement, in which it provided that in case said policy of insurance terminates by death before the expiration of the extension the balance of the full annual premium will be charged against the policy or should it terminate from any other cause, a pro rata premium will be charged against any benefits that may accrue thereunder. The evidence is further to the effect that during the life of the two policies of insurance and beginning sometime the latter part of March, the plaintiff suffered a severe and serious attack of destructive arthritis of the third lumbar vertebra, which is an infectious process or eating away of the vertebra, which is the backbone; that he suffered a great deal of pain and agony and was continuously thereafter under the influence of powerful narcotics in an effort to alleviate his suffering, and during all of said time was totally incapacitated and unable to carry on or to transact any business; that he was suffering unbearable pain, confined to his bed wrapped in blankets, using electric pads and other devices to alleviate his sufferings. That the disease had affected his mind to such an extent he was not able to carry on any business and did not see any mail or papers; that he did not realize he had any insurance on his life; that this had never crossed his mind until Dr. Dewar mentioned the matter to his wife about 27 July; that he was totally unable to carry on any matters of business or to realize that he had a policy of disability insurance, and this condition existed throughout the entire period until about 27 July, and about seventeen days after the due date of the extended premium. During all this period of time he received no notice from the defendant that any premium on his policies of insurance was due, and it was not until 27 or 28 July, that the attention of his wife was called to any insurance when it was suggested by Dr. Dewar to her that if plaintiff had any disability in-

surance he should be drawing the insurance as he had been totally disabled for more than ninety days, and on that day she notified Mr. Rand, a relative of plaintiff and an attorney, who resides at Wilson, to come down and give the defendant notice of the mental and physical condition of plaintiff, which he did, and since that date, the plaintiff has continued to suffer to such an extent that he is unable to engage in any occupation or perform any work for compensation or profit. The disability provided that after one full annual premium shall have been paid under the policies and before default in the payment of any subsequent premium or installment thereof, if due proof shall be furnished the company at its home office in the city of New York that the insured has become totally and permanently disabled before the anniversary of the policy on which his age at nearest birthday is sixty. "(1) To waive the payment of annual premiums which may fall due under the said policy and under this contract during the continuance of such disability, commencing with the premium due on the anniversary of the policy next succeeding the date of receipt of such due proof. (2) To pay to the insured a monthly income of one per centum of the face amount of the policy during the continuance of such disability, the first income payment to become due on the first day of the calendar month following the date of receipt of such due proof."

The judgment of the court below, reciting the issues and their answers thereto, is as follows: "This cause coming on to be heard at this the third March Term, 1933, of the Superior Court of Wake County, and being heard before his Honor, E. H. Cranmer, and a jury and the following issues having been submitted to the jury in the first cause of action, to wit: (1) Has plaintiff had since 1 April, 1931, any impairment of body or mind which continues to render it impossible for him to follow any occupation or perform any work for compensation or profit? (2) If so, is such disability permanent as defined in said policy? (3) If he became so disabled prior to 10 July, 1931, was he incapable of and unable to make payment of premiums and to furnish proof of disability as required by the terms of the policy? And the jury having answered each of said issues, 'Yes' and counsel representing plaintiff and defendant having agreed that a fourth issue reading as follows, to wit: (4) What amount, if any, is defendant indebted to plaintiff by reason of his first cause of action? Should be answered by the court if the other issues should be answered 'Yes': '$50.00 per month beginning with the first day of August, 1931, and continuing through the first day of October, 1932, with interest on each monthly payment from its due date, until paid at the rate of 6 per cent per annum, less $90.00, being balance of premium due on the insurance policy, subject of this controversy, from 10 October, 1930, until 10 October, 1931. By consent the fourth issue submitted to the jury was

eliminated. And counsel representing plaintiff and defendant having further agreed that the two causes of action sued on are identical and that the same and identical issues were raised in the said second cause of action, that therefore the court should answer the issues in the second cause of action in accordance with the answers to the issues in the first cause of action. Now, therefore, it is hereupon ordered, adjudged and decreed: (1) That plaintiff have and recover of the defendant by reason of his first cause of action the sum of $50.00 per month from the first day of August, 1931, to and until the third day of October, 1932, with interest on each monthly payment from its due date until paid at the rate of six per cent per annum. (2) That the defendant subtract and deduct from the amount due the plaintiff the sum of $90.00, it being the balance due by the plaintiff to the defendant for premium on insurance policy and disability, contract, the subject of this action, from 10 October, 1930, to 10 October, 1931. (3) That the plaintiff have and recover of the defendant on the second cause of action, the sum of $50.00 per month from the first day of August, 1931, to and until the third day of October, 1932, with interest on each payment from its due date until paid at the rate of 6 per cent per annum. (4) That the defendant subtract and deduct from the amount due the plaintiff, the sum of $90.00, same being the balance due by the plaintiff to the defendant for the premiums on the policy of insurance, subject of this action, from the 21st day of October, 1930, to the 12th day of October, 1931. (5) That the cost of this action be and the same is hereby taxed against the defendant."

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

Jones & Brassfield for plaintiff.
Winston & Tucker and Murray Allen for defendant.

CLARKSON, J. The defendant introduced no evidence and at the close of plaintiff's evidence, made a motion in the court below for judgment as in case of nonsuit. C. S., 567. The court below overruled this motion and in this we can see no error.

The question involved: For a consideration, the premium due under the first policy was extended by defendant until 10 July, 1931, and on the second policy to 12 July, 1931. About 1 April, 1931, a little over three months before the above premiums were due, the plaintiff had a mental and physical breakdown, which continued until after the premiums were due and continued to a great extent to the trial of the cause and his disability was permanent. Notice the latter part of July, 1931, was given the defendant company of plaintiff's disability. Under the

terms of the policy, was there a forfeiture? We think not. The jury found that the impairment of body and mind was and continued since 1 April, 1931, and he became so disabled prior to the time the premiums were due in July and he was unable to make payments of premiums, etc. The evidence on the part of plaintiff as to his mental and physical breakdown was plenary to sustain the verdict and plaintiff's evidence was to the effect that he was a farmer about 40 years old. He had carried the first policy since 28 April, 1925, and the second since 29 September, 1926. Numa Turner, a witness for plaintiff, testified, in part: "I have known Parker practically all of his life. I know his general character; it is excellent. . . . Prior to March and April, 1931, he had the appearance of being as strong and robust as any person you ever saw, and I know personally that he was one of the hardest working men, if not the hardest working man I ever saw in my life. He always worked. He hasn't been able to do anything since that time."

On the early morning of March, 1931, about 2:30 a.m., the plaintiff was taken "violently ill." Plaintiff testified, in part: "I was suffering terrible pains beginning in my back and going all the way down my legs, causing knots to form in my thigh and in my leg. It was almost unbearable pain. . . . I've suffered intense pain from that day until now. . . . I wasn't able to do anything. I couldn't put my shoes on. I was hardly able to walk. I was suffering such intense pain. I was under the influence of some narcotic the whole time from the first of March on. . . . From the time I saw Dr. Dewar here in April to the 10th day of July, I was getting worse all the time. I was suffering more. I was not able to sleep. I was continuing to have to take narcotics. . . . I took narcotics from March until now, under the direction of doctors. I don't exactly know how much. . . . I happen to know the narcotics I took up to July consisted of morphine, luminal, codein, aspirin and papin. My condition after I saw Dr. Dewar became worse. About the middle of July or the latter part of June, or the first of July, they put me in a cast. The latter part of June and in July I was attended by Dr. Buffalo from Garner. . . . During the months of June and July I was suffering almost unbearable pain. They had me wrapped up in blankets, electric pads and other devices to try to keep me from suffering so. I was confined to my bed during that period of time all the time. I was unable to carry on. The disease, or suffering which I had, affected my mind to such an extent that I wasn't able to carry on any business. I didn't see any of the mail or papers. . . . From that time up to the present time I have been unable to do anything. Well in the latter part of July, I was in such terrible condition that my wife phoned Dr. Dewar to come down to see me down to my home. Dr. Dewar came down. I don't know

the exact date, but I think it was the 26th or 27th of July, or something like that. Dr. Dewar came down and examined me. I was suffering terribly. He gave me a hypodermic of morphine that night while he was there and he asked me or asked my wife in my presence—he was not talking to me—but asked her in my presence if I had any insurance. She told him I did, but that she didn't know anything about the policy. He told her 'You had better look them up and see if they carry any disability clause.' Up to that time, the 27th or 28th of July, I had not received any notices from the insurance company of the due date of my premiums. The condition of my mind was such from my suffering that I did not realize I had any insurance on my life. It had never crossed my mind until Dr. Dewar mentioned it, the night he was there. . . . During that time I was suffering intensely, almost unbearable pain, so that sweat was popping out on me like a mule in May. I was not able to carry on any business transactions of any nature. . . . In the latter part of September he brought me to Raleigh and took my tonsils out. Later they extracted my upper teeth. On the first of December, Dr. Dewar and Dr. Hugh Thompson put a plaster cast on me from my hips to my neck down at the Rex Hospital. . . . I was then removed to my home with a plaster cast on me. It stayed on me for three months. During that time, I wasn't able to move. I was at home in bed. I was confined to my bed over that period of time. . . . They took the cast off 1 March, 1932. From 1 March, 1932, up to the present time, I have been gradually getting worse. . . . I now have to take something to sleep. I am unable to sleep unless I take some narcotic. In fact, now, I am still taking codein, luminal, and aspirin in capsules. When I am without the codein, luminal and aspirin, I can't go to sleep, I hurt so bad. I toss from side to side when I go to bed. That condition exists up to now. I have not been able since the latter part of February, 1931, to perform any kind of work for profit. I have not made one cent of money. . . . I have not been able to do any work of any nature since March, 1931. That condition has continued with me throughout this entire period of time. I have not received any compensation of any kind for any work performed by me during that period of time. I am not now able to perform any kind of work."

Dr. William B. Dewar testified, in part: "I made another X-ray of him. Dr. Thompson, whom I had see him, after we had found a destructive arthritis of the third lumbar vertebra, and I agreed that he had this destructive arthritis of that vertebra. It is an infectious process, or eating away, of one of the vertebræ, which is the backbone, not in the sense that the whole thing is destroyed. Only a small portion of it is destroyed."

Mrs. J. J. McMahon, testified, in part: "It really seemed to me that he had grown worse. I think his mental condition was worse because his pain was growing worse all the time. At that time, 4 July, 1931, he was not able to carry on any business of any kind. When I was here, he was not able to read a newspaper, nor was he able to carry on a connected conversation. He was not able to carry on any business in April and May, when I was here. I was just here for the 4th of July. I was home again in August. I came especially to see him. He was suffering at that time just as much as he had been previously."

Miss Sarah Rand, a graduate nurse, testified, in part: "Opiates were administered to him every four hours and some times more than that; at night especially; we would have to give him at least a half grain of morphine to relieve him at times. He was suffering so he didn't pay any attention to anything. He couldn't talk to me on any subject; not even about his condition. He did not attend to any business matters while I was there from 16 June through the summer. I was there from 1 July through 12 July. He did not attend to any business matters over that period. Q. Do you have an opinion as to whether he had sufficient mental ability to attend to any business matters over that period? That is from 1 July through 12 July? Answer: Yes, sir. Q. In your opinion, Miss Rand, did he over that period from 1 July through 12 July have sufficient mental capacity to transact his business in connection with the farm and in connection with his affairs there about his place and to know what he was about? Answer: No. He was taking opiates, narcotics, morphine, codein every four hours over the period of time from 1 July to 12 July, he took it all the time I was there. Q. Do you have an opinion satisfactory to yourself as to what his mental condition was over that period of time? Answer: He was suffering such intense pain he could not discuss anything and when he took hypodermics he was in no condition to discuss any business matters or anything around the home of any kind or about the family. He was confined to his bed continuously from 1 July to 12 July."

Mrs. Parker Rand testified, in part: "During the months of June and July, up to 10 July and 12 July, my husband's condition wasn't normal. It was not normal, I should say. His mind was distraught by the fact that he was in terrible pain; also when he wasn't suffering such excruciating pain it had to be deadened by the narcotics and consequently the narcotics affected his mind. He was in that condition all during July. . . . I did not know that he had any health insurance. During the interval of time when he was there in bed, as I stated just now, he was not in any condition to transact any business of any kind, he couldn't read a newspaper intelligently. He could not read his mail. I did not allow him to have his mail. He was not able to transact any business from 1 July to 13 July."

The condition of plaintiff seems to have been worse than Job, the example of patience, "smote Job with sore boils from the sole of his foot unto his crown." Job, chapter 2, part verse 7. Job's affliction was physical—plaintiff's affliction was mental and physical. The defendant contends that under the terms of the policy, the premiums due on 10 and 12 October were not paid, therefore the policy was null and void and of no effect. We cannot so hold, under the facts and circumstances of this case.

Under sufficient, competent evidence the issues were answered "Yes," in plaintiff's favor. In the judgment is the following: "And counsel representing plaintiff and defendant having further agreed that the two causes of action sued on are identical and that the same and identical issues were raised in the said second cause of action, that therefore the court should answer the issues in the second cause of action in accordance with the answers to the issues in the first cause of action."

The decisions on the question in controversy, in the different states, are conflicting, but we think it is settled in this State by the humanitarian decision written by the *Chief Justice* in *Rhyne v. Insurance Co.*, 196 N. C., 717 (719): "But we are content to place our decision on the broad ground that, notwithstanding the literal meaning of the words used, unless clearly negatived, a stipulation in an insurance policy requiring notice, should be read with an exception reasonably saving the rights of the assured from forfeiture when due to no fault of his own, he is totally incapacitated from acting in the matter. That which cannot fairly be said to have been in the minds of the parties, at the time of the making of the contract, should be held as excluded from its terms. *Comstock v. Fraternal Accident Association*, 116 Wis., 382, 93 N. W., 22. The primary purpose of all insurance is to insure, or to provide for indemnity, and it should be remembered that, if the letter killeth, the spirit giveth life. *Allgood v. Insurance Co.*, 186 N. C., 415, 119 S. E., 561; *Grabbs v. Insurance Co.*, 125 N. C., 389, 34 S. E., 503."

The *Rhyne case* was before this Court again, 199 N. C., 419. The same principle was laid down, that failure to give immediate notice of disability will not work forfeiture where insured is incapable of giving such notice.

In *Mewborn v. Assurance Corp.*, 198 N. C., 156, and in *Nelson v. Insurance Co.*, 199 N. C., 443, the *Rhyne case* was cited with approval, by a unanimous Court. In the *Nelson case, supra*, at page 447, we said: "In 2 C. S., under insurance, subchapter 5, accident and health insurance, C. S., 6479, dealing with standard provisions in policy under subsec. 5, is the following: *'Failure to give notice within the time provided in this policy shall not invalidate any claim, if it shall be shown not to have been reasonably possible to give such notice and that notice*

was given as soon as was reasonably possible.' (Italics ours.) It will be noted that under the standard provisions in policies, where time limit is fixed, yet the General Assembly realizing that a hard and fast rule should not always be applied, put in the above provision to meet varying contingencies that might arise."

The defendant contends that the court below committed error in permitting plaintiff to introduce in evidence policy No. 335782, issued on 14 May, 1927, and to testify with regard to the payment of benefits under this policy. We cannot so hold. The policy in question was similar in all respects to the two policies of insurance, the subject of this action, and the disability contracts attached were in all respects similar except what is contained in a letter of 23 January, 1931, which we do not think sufficiently material to affect the situation. We think that this was a circumstance and some evidence in the nature of an admission. The facts to establish defendants' liability were practically the same under all the policies. At least it was not such prejudicial error that would call for a new trial. The defendant contends that the court below committed error in refusing to submit issues tendered by the defendant and the issues as submitted. We cannot so hold. The issues submitted were framed to cover the decisions of this Court as before set forth. The defendant introduced no evidence and we think the court below charged the law applicable to the facts fully as required by C. S., 564. For the reasons given, we find

No error.

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

F. L. FRY, ADMINISTRATOR OF THE ESTATE OF MRS. MARTHA E. WILLIAMS, F. L. FRY, ADMINISTRATOR OF THE ESTATE OF MRS. MOLLIE E. FRY, AND F. L. FRY, INDIVIDUALLY, SUING ON BEHALF OF HIMSELF AS SUCH ADMINISTRATOR AND INDIVIDUALLY, AND ON BEHALF OF ALL OTHER STOCKHOLDERS OF POMONA MILLS, INCORPORATED, WHO MAY COME IN AND MAKE THEMSELVES PARTIES TO THIS CAUSE, *v.* POMONA MILLS, INCORPORATED, NORMAN A. BOREN, RECEIVER, J. E. LATHAM, P. C. RUCKER, C. W. CAUSEY, J. C. WATKINS, G. O. HUNTER AND FIELDING L. FRY.

(Filed 20 June, 1934.)

1. Reference A a—Trial court may order a compulsory reference upon finding that action involves a long account.

Where the trial court finds that the action involves a long account between the parties he may order a compulsory reference, N. C. Code, 573(1), and what constitutes a "long account" must be determined upon

the facts of each particular case, it not being necessary that the action be for an accounting, it being sufficient if a long account is directly and not merely collaterally involved in the action.

2. Pleadings A a: Parties C a—Causes of action which may be joined and joinder of parties necessary to determination of controversy.

Legal and equitable causes of action, arising out of *tort* and *ex contractu*, may be united in the same complaint where they arise out of the same transaction or series of transactions forming a connected whole, N. C. Code, 507(1), and to the end that the controversy may be determined in one action, the court may order the joinder of necessary parties, N. C. Code, 460.

3. Reference A a—Order of compulsory reference of one of causes stated in the complaint is upheld under the facts of this case.

Where several causes of action arising out of the same transaction or series of transactions are properly joined in the complaint, the court may not ordinarily order that one of them be referred to a referee, but under the facts and circumstances of this case the court's order of compulsory reference of one of the causes of action is upheld, it appearing that the action involves a long account and that the controversy is so involved that it could not be readily presented to a jury, and that the action referred involved only the parties named in the order, and the statute, N. C. Code, 573(1), being liberally construed to afford the salutary procedure therein provided.

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

APPEAL by all the defendants except Hunter, from *Clement, J.*, at 19 March Civil Term, 1934, of GUILFORD. Affirmed.

This is a civil action pending in the Superior Court of Guilford County, summons therein having been issued and complaint having been filed on 13 April, 1933. In the original action the only defendant was Pomona Mills, Incorporated. In that action, the summons and pleadings in which are set out in the record, for reasons stated in the complaint therein, Norman A. Boren, Esq., was duly appointed receiver of said Pomona Mills, Incorporated, and since ..... April, 1933, has been and now is in charge of said Pomona Mills, Incorporated, as such receiver. On or about 29 November, 1933, L. C. Vaughan, J. A. Roland, Mrs. J. A. Roland, Meyer Sternberger, Mrs. Nora McCracken, John W. Summers and Cecil Gant, alleging themselves to be preferred stockholders of said Pomona Mills, Incorporated, filed their petition in the original action, which petition is set out in the record, praying leave to come in and make themselves parties to said original cause and praying that J. E. Latham, P. C. Rucker, C. W. Causey, J. C. Watkins, G. O. Hunter and Fielding L. Fry, be made parties defendant, along with said Pomona Mills, Incorporated, and Norman A. Boren, receiver, in said original action. Thereupon the resident judge of the Twelfth Judicial District, made and entered in said original action, an order

allowing the petitioners to come into said action and make themselves parties plaintiff thereto and state their cause of action against said Pomona Mills, Incorporated, and Norman A. Boren, receiver thereof, and requiring that summons be issued to said J. E. Latham, P. C. Rucker, C. W. Causey, J. C. Watkins, G. O. Hunter and Fielding L. Fry to the end that they be made parties defendant. Accordingly summons was issued to the additional parties and was served upon all of them except G. O. Hunter, and those served were accordingly set down as additional parties defendant in the original action.

Thereupon petitioners L. C. Vaughan, J. A. Roland, Mrs. J. A. Roland, Meyer Sternberger, Mrs. Nora McCracken, John W. Summers and Cecil Gant, preferred stockholders, filed their complaint entitled as in the original action with the addition of Norman A. Boren, receiver, J. E. Latham, P. C. Rucker, C. W. Causey, J. C. Watkins, G. O. Hunter and Fielding L. Fry as parties defendant, which complaint setting out three alleged causes of action, appears in the record. Thereafter and in due time, Norman A. Boren, receiver, filed his separate answer to said complaint and J. E. Latham, P. C. Rucker, C. W. Causey, J. C. Watkins and Fielding L. Fry filed their answer thereto, which answer is set out in the record. On 2 October, 1933, Hunter Manufacturing and Commission Company commenced a civil action in the Superior Court of Guilford County against Norman A. Boren, receiver for Pomona Mills, Incorporated, and on said date filed its complaint. Thereafter and in due time, said Norman A. Boren, receiver, filed his answer to the complaint of Hunter Manufacturing and Commission Company setting up, among other things, counterclaims against said Hunter Manufacturing and Commission Company. Later and in due time, said Hunter Manufacturing and Commission Company replied in part to said counterclaims and demurred in part thereto. The demurrer of said Hunter Manufacturing and Commission Company was heard at March Term, 1934, of said court, and was overruled. At March Term, 1934, of said court, the intervening petitioners or plaintiffs L. C. Vaughan, J. A. Roland, Mrs. J. A. Roland, Meyer Sternberger, Mrs. Nora McCracken, John W. Summers and Cecil Gant through their counsel moved the court that their intervention or the action instituted by them by leave of the court as aforesaid against Pomona Mills, Incorporated, Norman A. Boren, receiver, J. E. Latham, P. C. Rucker, C. W. Causey, J. C. Watkins, G. O. Hunter and Fielding L. Fry be referred to a referee for trial. To this motion, defendant Norman A. Boren, receiver, through his counsel, and defendants, J. E. Latham, P. C. Rucker, C. W. Causey, J. C. Watkins and Fielding L. Fry, excepted and assigned error. To said order, defendant Norman A. Boren, receiver for Pomona Mills, Incorporated, excepted and assigned error,

demanding a trial by jury of the issues raised upon the pleadings. To the order so signed as aforesaid, defendants, J. E. Latham, P. C. Rucker, J. C. Watkins, C. W. Causey and Fielding L. Fry excepted.

The order of reference is as follows: "This cause being heard, and it appearing to the court that the trial of this part of the action entitled L. C. Vaughan, J. A. Roland, Mrs. J. A. Roland, Meyer Sternberger, Mrs. Nora McCracken, John W. Summers, and Cecil Gant, preferred stockholders, *v.* Pomona Mills, Incorporated; Norman A. Boren, receiver; J. E. Latham, P. C. Rucker, C. W. Causey, J. C. Watkins, G. O. Hunter, and Fielding L. Fry, requires the examination of several long accounts; that the complexity of the pleadings and the number of parties precludes the possibility of a proper and fair representation of the matters at issue to a jury and that it is a proper case for reference, it is ordered that this action, or the part thereof involving the action between the preferred stockholders as plaintiffs and the receiver and the directors of the Pomona Mills, Incorporated, as defendants, be and it is hereby referred to Henry M. Robins, Esq., of Asheboro, North Carolina, for hearing and the said referee shall proceed to hear the evidence, and find the facts therefrom, state his conclusions of law, and make his report to this court as required by law. The said referee shall fix the time for hearing, notify the parties thereof, determine the matter, and make his report to this court without unnecessary delay. This 30 March, 1934."

From the foregoing order, the defendants, J. E. Latham, P. C. Rucker, J. C. Watkins, C. W. Causey and Fielding L. Fry, except and assign, among other errors, the pendency of the civil action entitled Hunter Manufacturing and Commission Company *v.* Norman A. Boren, receiver, for Pomona Mills, Incorporated, pending in this court, and from said order, the said defendants appeal to the Supreme Court in open court. From the foregoing order, the defendant, Norman A. Boren, receiver for the Pomona Mills, Incorporated, excepts and assigns error and demands a trial by jury on the issues raised upon the pleadings and gives notice of appeal to the Supreme Court, in open court.

Sapp & Sapp for appllees.

Hobgood & MacClamroch for appellants, Latham, Rucker, Causey, Watkins and Fry.

Brooks, McLendon & Holderness for appellant, Norman A. Boren, receiver.

CLARKSON, J. In the order of reference is the following: "This cause being heard, and it appearing to the court that the trial of this part of the action entitled L. C. Vaughan, J. A. Roland, Mrs. J. A. Roland,

Meyer Sternberger, Mrs. Nora McCracken, John W. Summers, and Cecil Gant, preferred stockholders, *v.* Pomona Mills, Incorporated; Norman A. Boren, receiver; J. E. Latham, P. C. Rucker, C. W. Causey, J. C. Watkins, G. O. Hunter and Fielding L. Fry, requires the examination of several long accounts; that the complexity of the pleadings and the number of parties precludes the possibility of a proper and fair representation of the matters at issue to a jury and that it is a proper case for reference."

To the above reference, the parties before mentioned excepted, assigned errors and appealed to this Court. We think the reference proper under the facts and circumstances of this case. The Pomona Mills, Incorporated, was duly placed in the hands of a receiver, Norman A. Boren. The order of reference affects solely parties to the action. N. C. Code, 1931 (Michie), section 460, in part is as follows: "The court either between the terms, or at a regular term, according to the nature of the controversy may determine any controversy before it, when it can be done without prejudice to the right of others, but when a complete determination of the controversy cannot be made without the presence of other parties, the court must cause them to be brought in," etc.

Under an order not appealed from, the defendants, J. E. Latham, P. C. Rucker, C. W. Causey, J. C. Watkins, G. O. Hunter and Fielding L. Fry, were made parties to the original action; complaint was duly filed and the defendants above named, with one exception, filed answer to same. Answer was also filed by Norman A. Boren, receiver.

N. C. Code, 1931 (Michie), section 507, in part is as follows: "The plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, where they all arise out of: (1) The same transaction, or transactions connected with the same subject of action." The general rule which may be deduced from the decisions is that, if the causes of action be not entirely distinct and unconnected, if they arise out of one and the same transaction, or a series of transactions forming one dealing and all tending to one end, if one connected story can be told of the whole—they may be joined in order to determine the whole controversy in one action. *Trust Co. v. Pierce,* 195 N. C., 717; *Shaffer v. Bank,* 201 N. C., 415; *Craven County v. Investment Co.,* 201 N. C., 523. An action arising upon a contract united in the same complaint with one arising *in tort* is not a misjoinder, and a demurrer thereto will not be sustained "where they arise out of the same transaction or are connected with the same subject of action." *Hawk v. Lumber Co.,* 145 N. C., 48.

In *Craven County v. Investment Co.,* 201 N. C., 523 (530), *supra,* we find: "The motion to strike out certain allegations is based upon

the contention that the complaint sets out two causes of action which are distinct and unrelated, one in contract, another *in tort*. It is insisted that the cause stated in the first nineteen paragraphs is *ex contractu* and that the cause stated in the remaining paragraphs is *ex delicto*, and that the two cannot properly be united in one action. True, at common law there could be no such joinder. *Logan v. Wallis* 76 N. C., 416; *Doughty v. R. R.*, 78 N. C., 22. But under the reformed procedure it is held as a general proposition that several causes may be united if they arise out of the same transaction or a transaction connected with the same subject of action, whether legal or equitable, whether in contract or *in tort*. *Cook v. Smith*, 119 N. C., 350; *Daniels v. Fowler*, 120 N. C., 14; *Reynolds v. R. R.*, 136 N. C., 345; *Hawk v. Lumber Co.*, 145 N. C., 47; *Worth v. Trust Co.*, 152 N. C., 242."

In *Texas Co. v. Phillips, ante*, 355 (357-8), we have recently written on the subject of reference, and will repeat: "N. C. Code, 1931 (Michie), section 573, in part is as follows: 'Where the parties do not consent, the court may, upon the application of either or of its own motion, direct a reference in the following cases: (1) Where the trial of an issue of fact requires the examination of a long account on either side, in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein.' The pleading of plaintiff and the answer of the defendant, indicated 'the examination of a long account on either side.' The defendant set up no plea in bar. *Lumber Co. v. Pemberton*, 188 N. C., 532. In *Bank v. Evans*, 191 N. C., 535 (539), is the following: 'It is generally agreed that the civil issue dockets of the State are greatly congested by reason of the overwhelming increase in business incident to the progress and expansion of commercial and industrial activities, and for this reason, it is perhaps, not amiss to be reminded of the practical wisdom contained in an utterance by *Faircloth, C. J.*, in *Jones v. Beaman*, 117 N. C., 259: "Our statutes relating to trials by referees serve a useful purpose, and must be liberally construed. They aid and simplify the work which would otherwise fall upon the court and jury, and often expedite the litigation and save the parties from trouble and expensive trials, and are a saving in time to witnesses and attorneys." ' " Citing numerous authorities. *Bank v. McCormick*, 192 N. C., 42.

Facts succinctly stated are as follows: This action by Fry on behalf of all other stockholders of Pomona Mills, Incorporated, upon which the receiver was appointed for Pomona Mills, Incorporated, and the preferred stockholders intervened in the action on their behalf, made the directors of Pomona Mills, Incorporated, parties defendant and set up three causes of action. Their action is based upon the contract contained in the certificate of stock and the charter of the corporation.

The charter provides for the retirement of the preferred stock by the creation of a sinking fund established from the surplus or profit of the corporation. *The first cause of action* is one for the purpose of establishing the sinking fund as being among the assets of the corporation in the hands of the receiver and to recover from the sinking fund either the entire amount due these preferred stockholders or their proportionate part thereof. *The second cause of action* is against the directors on behalf of the receiver for their negligence, misapplication of corporate assets, and mismanagement of the corporation over a period of ten years. From the recovery of the amount sought on behalf of the receiver, to wit: $800,000 it is sought to establish an augmentation of the sinking fund to the amount of $33,000 covering the years 1928, 1929, 1930, 1931, and 1932, when no contribution was made to the sinking fund in accordance with the contract with the directors, to wit: the preferred stockholders. There then follows the same demand for a recovery of the sinking fund to be applied to the payment of the entire stock of these preferred stockholders or their proportionate part. *The third cause of action* is on behalf of the preferred stockholders directly against the directors by reason of the same allegations of negligence, misapplication of assets, and mismanagement of the corporation, as alleged in the second cause of action, the recovery on behalf of the preferred stockholders being directly from the directors and being the balance of the amount not realized from the first and second causes of action.

The defendants, J. E. Latham, P. C. Rucker, C. W. Causey, J. C. Watkins, and Fielding L. Fry, contend in their brief: "From failure after diligent effort on their part to find any North Carolina case expressly defining 'long account,' counsel conclude that there is no such case."

Speaking to the subject in 53 C. J., in part, section 21(2), pp. 687-8, we find: "Although there is authority to the contrary, all the issues of fact in the action need not relate to an account to authorize a reference of the action. And an action, in order to be referable as involving a long account, need not necessarily be an action based on an account or an action for an accounting. Where the principal issues presented are questions of law not involving nor involved in an accounting, the whole case should not be referred to a referee to hear and determine the issues. But in order to authorize a reference of the entire action, the account must be directly and not merely collaterally or incidentally involved; in other words, the account must be the primary or immediate object of the action, or the substantial subject of the issue."

N. C. Practice and Procedure in Civil Cases (McIntosh), page 562: "In cases involving complicated accounts, the reference is analogous to

the old equity practice in a reference to the master, the report to be made to the court and finally disposed of on exceptions. The parties are entitled to a jury trial upon issues of fact, but the jury cannot investigate and settle the items in such accounts, and a reference is necessary. What is a 'long account,' so as to justify a compulsory reference, is not easily defined and must depend upon the circumstances of each case, but where the transactions are simple, and the calculation may be easily made a compulsory reference should not be ordered."

In *Mfg. Co. v. Horn,* 203 N. C., 732 (733), it is said: "There is no statutory or judicial definition of a 'long account.' Indeed, the expression is perhaps less complicated than any definition thereof. Obviously a correct conclusion as to whether an account was 'long' would depend upon the facts and circumstances of a given case. The tendency of Appellate Courts generally is to construe liberally the reference statute, and the Court is of the opinion that the account in controversy was correctly classified by the trial judge."

Black's Law Dictionary (3d edition), page 1130, citing numerous authorities: "Long account: An account involving numerous separate items or charges, on one side or both, or the statement of various complex transactions, such as a court of equity will refer to a master or commissioner or a court of law to a referee under the codes of procedure."

The splitting of these causes of action by reference is not ordinarily allowable. In C. J., *supra,* section 24(c), is the following: "Where several causes of action are joined in the complaint and only one or several, but not all, are referable, plaintiff is not entitled to an order of compulsory reference. But a reference may be ordered where several alleged causes of action are set forth, but in reality there is but one cause of action which is referable. Moreover where a referable action in contract is consolidated with a *tort* action, which is nonreferable under the rule hereinafter stated, and the *tort* action is barred by reason of the statute of limitations, the contract action may be referred."

Under a liberal construction *supra* given to section 573(1), we think under the facts and circumstances of this case, that the court below properly referred the matter. The practice and procedure is thus stated in *Pritchett v. Supply Co.,* 153 N. C., 344 (345-6): "A party may object to a reference, if there is a plea in bar, and appeal at once, if he is so minded, or he may rely upon his objection by reserving his exception, and appeal from the final judgment. This is a convenient practice or procedure, because if the case goes on and the party who has excepted succeeds finally, by the decision of the referee or the verdict of the jury, his exception to the reference becomes immaterial, and the result shows that no appeal was really necessary to protect his right. He could appeal

when the order of reference was made, but was not bound to do so at that time. The practice in this respect has been settled. *Kerr v. Hicks*, 131 N. C., 92; *Jones v. Wooten*, 137 N. C., 421; *Austin v. Stewart*, 126 N. C., 525."

The able brief of defendants was persuasive, but not convincing under the liberal construction this Court has given to joinder of causes of action and references under the statute. The order or judgment of the court below is

Affirmed.

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

MRS. C. V. TYNER v. DR. C. V. TYNER.

(Filed 20 June, 1934.)

1. Divorce F a—In an action for divorce the court has jurisdiction before or after final judgment to award custody of minor children.

Upon the institution of an action for divorce from bed and board the court acquires jurisdiction of the minor children of the parties which is not divested by a consent judgment on the issue of divorce entered in the cause with the approval of the court, especially where such consent judgment expressly provides that either party might thereafter make a motion in the cause for the custody of the children, the court having the power in an action for divorce, either absolute or from bed and board, before or after final judgment, to enter orders respecting the care and custody of the children, C. S., 1664.

2. Divorce F b: Appeal and Error J c—Exceptions held to have become immaterial upon judgment that husband have custody of children.

Upon the hearing of a motion for the custody of the minor children in an action for divorce from bed and board, exceptions to the court's holding that a consent judgment entered in the cause determined the claim of the wife against the husband for the maintenance of the children, and to the court's finding that the wife was able to provide for the children at such times as they might visit her, become immaterial where the court awards the custody of the children to the husband.

3. Same: Appeal and Error J c—Court's findings upon conflicting evidence are conclusive on appeal.

The court's findings upon a motion for the custody of the minor children in an action for divorce from bed and board that the husband was a fit, suitable and proper person for the care and custody of the children and his finding that it was to the best interest of the children that he be given their custody, and his failure to find that the wife was a fit, suitable and proper person for their custody, will not be disturbed on appeal where such findings are based upon conflicting evidence, the findings of the court, when supported by evidence, being conclusive.

4. Divorce F c—Judgment awarding custody of children to father held proper upon facts found by the court.

The father has a prior right to the custody of his minor children against his wife and third persons, which right is subject to the paramount consideration of the welfare of the children, and where upon a motion for the custody of the minor children in an action for divorce the court finds that the father is a proper person for their care and custody, and that it is to the best interest of the children that he be given their custody, and fails to find that the wife is a suitable person for their custody, the court's judgment that the husband be awarded their custody is proper, and further provision in the judgment that the wife should be allowed to visit and associate with the children, and have them visit her subject to the husband's right to their care and custody is approved upon the court's finding that the wife is a woman of good character, and a proper and suitable person for the children to know and associate with.

CLARKSON, J., concurring.

STACY, C. J., and BROGDEN, J., dissenting.

MOTION in the cause by plaintiff to have determined the custody and maintenance of her two minor children, before *Alley, J.*, at February Term, 1934, of ROCKINGHAM. Affirmed.

This action was instituted by the plaintiff for a divorce *a mensa et thoro*, for custody of her two children and for maintenance for herself and children. The parties to this action entered into a consent judgment on 18 December, 1933, before Judge Clement, which contained the following provisions: "That this judgment shall not affect the right of the parties hereto in respect to the custody of their children but shall operate as a final determination of all matters in the pleadings except the custody of said children, and either party to this action may, upon notice to the other or to counsel for the other, by motion in the cause herein have the custody of said children determined at any time without prejudice on account of this judgment." After notice, and in accord with the foregoing provision of the judgment and the statute, the plaintiff lodged this motion, which came on to be heard by Judge Alley, then holding the courts of the Eleventh District, who, after hearing a large number of affidavits and privately examining the children themselves, found the facts, declared the law, and signed judgment awarding the custody of the children to the defendant. Plaintiff excepted and appealed.

Sharpe & Sharpe and Harry L. Fagge for appellant.

Brown & Trotter, Glidewell & Gwyn and Varser, McIntyre & Henry for appellee.

SCHENCK, J. The appellant makes six assignments of error which we will discuss *seriatim*.

"1. That his Honor erred in signing the judgment set out in the record." In plaintiff's brief she takes the position that the court was without jurisdiction in this action to determine the custody of the children. We think this untenable. The plaintiff instituted this action under C. S., 1664, which provides that in actions for divorce, either absolute or from bed and board, the judge both before and after final judgment may make orders respecting the care and custody of children. The court acquired jurisdiction of the children upon the institution of this action, and was not divested thereof by the consent judgment, and especially is this so since the very judgment itself provides that "either party to this action may . . . by motion in the cause herein have the custody of said children determined at any time without prejudice on account of this judgment."

"2. That his Honor erred in holding that the consent judgment entered into between the parties was a full settlement of any claim which the plaintiff may have against the defendant for maintenance for any child or children which might be awarded to the plaintiff temporarily or otherwise." We are inclined to the opinion that his Honor's construction of the contract between the parties, evidenced and sanctioned by the consent judgment, is a correct one, but since the custody of the children was not awarded to the plaintiff the question presented becomes immaterial.

"3. That his Honor erred in finding as a fact that Dr. Tyner is a capable, fit, and suitable person to have the custody, care, maintenance, and education of his minor children." While there is evidence to the contrary, there is an abundance of evidence to sustain the finding of fact of which the plaintiff in this assignment complains.

"4. That his Honor erred in failing to find as a fact that Mrs. Tyner is a fit, suitable and proper person to have the custody, care, and education of her minor children." While there is much evidence tending to show that Mrs. Tyner was a proper person to have the custody and care of her children, there was evidence to the contrary, and his Honor, upon careful consideration of all the evidence, viewed with its local coloring, failed to find that she was such a person, and went only so far as to find: "That the plaintiff, Mrs. C. V. Tyner, is also a woman of good character and reputation; that she is a fit, suitable and proper person for said children to know and associate with, and the court further finds as a fact that they be permitted to know and to associate with their mother."

"5. That his Honor erred in finding that Mrs. Tyner is able to provide for and maintain said children during such times as they may visit her and be in her custody." Since the plaintiff would not be required to provide for or maintain the children during such time as

they may "visit" her, and since the custody of the children has not been awarded her, the question raised by this assignment likewise becomes immaterial.

"6 That his Honor erred in finding that it is to the best interest of said two minor children that their custody and care and education be awarded to their father, Dr. Tyner." There is much evidence to sustain this finding, and much to the contrary. The conscientious judge heard it all, took it under advisement for many days and nights, interviewed privately the children themselves, and doubtless after much travail, made this finding, which was the crucial one in the case.

"The findings of fact by the court, there being evidence on both sides, is binding and conclusive on appeal." *Shoof v. Frost,* 127 N. C., 307; *Daugherty v. Comrs.,* 183 N. C., 152; *In re Hamilton,* 182 N. C., 44.

Upon the findings of fact that the defendant was a proper person to have the custody of the children, and that it was to the best interest of the children that he have such custody, the court properly concluded and adjudged that the defendant was entitled to the custody of the two minor children; especially was this so in view of the failure of the court to find that the plaintiff was a proper party to have such custody, and of the general and common-law rule that the father has the prior right of custody. We are glad, however, that the court softened the rigor of its judgment by providing that the mother is to have the right to visit her children and to have access to their place of abode, and to associate with them so long as she does not attempt to take them from the State beyond the jurisdiction of its courts.

In determining the custody of children, their welfare is the paramount consideration. Even parental love must yield to the claims of another, if, after due judicial investigation, it is found that the best interest of the children is subserved thereby.

The law applicable to this case is clearly stated in the often cited case of *Newsome v. Bunch,* 144 N. C., 15, where *Walker, J.,* says: "The father is, in the first instance, entitled to the custody of his child. But this rule of the common law has more recently been relaxed and it has been said that where the custody of children is the subject of dispute between different claimants, the legal rights of parents and guardians will be respected by the courts as being founded in nature and wisdom, and essential to the virtue and happiness of society; still, the welfare of the infants themselves is the polar star by which the courts are to be guided to a right conclusion, and, therefore, they may, within certain limits, exercise a sound discretion for the benefit of the child, and in some cases will order it into the custody of a third person for good and sufficient reasons. *In re Lewis,* 88 N. C., 31; Hurd on *Habeas*

Corpus, 528 and 529; Tyler on Infancy, 276 and 277; Schouler on Domestic Relations, sec. 428; 2 Kent's Com., 205. But as a general rule, and at the common law, the father has the paramount right to the control and custody of his children, as against the world; this right springing necessarily from and being incident to the father's duty to provide for their protection, maintenance and education. 21 A. & E. Enc., 1036; 1 Blackstone (Sharswood), 452, and note 10, where the authorities are collected. This right of the father continues to exist until the child is enfranchised by arriving at years of discretion, 'When the empire of the father gives place to the empire of reason.' 1 Blk., 452."

In *Patrick v. Bryan*, 202 N. C., 62, we find: "In Peck, Domestic Relations, 3d ed. (1930), chapter 18, p. 371, section 30, it is said: 'The father has at common law an unquestioned right of custody and control over his minor children as against the mother, and still more clearly as against any third person.'" This rule, though it may at times be a harsh one, has been mollified only when the best interest of the children required it.

One cannot read the record in this case without being impressed with the tragic problem that is presented, and the well-nigh insurmountable barriers to its satisfactory solution. When father and mother cannot agree who shall have the care and nurture of those who are bone of their bone and flesh of their flesh, a grave responsibility is cast upon the court when it is called upon to make the determination. It is apparent that the judgment in this case was made only after careful and painstaking investigation and examination, and if it calls for sacrifices by the plaintiff she must be reminded that the court was compelled to deal with the facts as it found them and that "its foundation is the law of the land, which, as well as the moral law, oftentimes requires such offerings to be made." *In re D'Anna*, 117 N. C., 462. The judgment is

Affirmed.

CLARKSON, J. I concur in the able and clearly written opinion of *Mr. Justice Schenck*. The unfortunate separation between husband and wife, who have children and the custody, care, maintenance and education is a much perplexed problem of the courts.

Soloman, the wisest man, had to decide between two women, over the custody of a child and was able to do so with much wisdom. When parents separate and can't agree as to the custody, care, maintenance and education of their children, this matter is frequently brought into the courts to determine, as in the present case. The findings of fact in the courts below are ordinarily conclusive on this Court and rightly so.

The court below sees those most vitally interested, examines the evidence and is in a better position to render justice on all the facts.

In the present case, the court below heard 43 affidavits on behalf of plaintiff, and 48 on behalf of defendant, conferred privately with the two boys whom the father and mother were contending over. In the judgment of the court below is the following: "Whereupon, upon a full and careful consideration of the pleadings, affidavits and evidence introduced, the oral arguments of counsel and the briefs filed for both the plaintiff and the defendant, it is therefore, considered, ordered, adjudged and decreed by the court that the custody, care, maintenance and the education of the said Kenneth Tyner and Hugh Tyner be, and they are hereby awarded to their father, Dr. C. V. Tyner, subject, however, to the right of their mother, Mrs. C. V. Tyner, to visit said children wherever they may be within the State of North Carolina, and wherever she may desire, within said State, and to that end, it is adjudged, decreed, and ordered that she shall have the right of ingress, egress and regress to the home or place of abode of the defendant, Dr. C. V. Tyner, wherever the same and said children may be, from time to time. That said minor children shall likewise be privileged, and it is hereby adjudged that they shall have the right from time to time to visit their said mother, Mrs. C. V. Tyner, in the home of the said Mrs. C. V. Tyner, or such other place as she, the said Mrs. C. V. Tyner, may reside within the State of North Carolina, provided however, and it is so adjudged that the said Mrs. C. V. Tyner shall not at any time be permitted to carry said children, or either of them, at any time they may visit her or otherwise, out of the State of North Carolina or beyond the jurisdiction of its courts. That at all times the rights of the plaintiff, Mrs. C. V. Tyner, to visit the said children and to have them visit her as aforesaid, shall be subject to the superior rights of their father, Dr. C. V. Tyner, to the custody of said children as provided and adjudged in this order and decree."

Judge Alley, a most human judge, who heard this case in the court below, in his judgment, says that "over a period of several days and nights, made a careful study of the pleadings filed in said cause and a large number of affidavits filed in said cause by both parties. That the cause was argued at length by several counsels representing both the plaintiff and defendant; that after reading and studying the pleadings and affidavits, and after considering arguments of counsel, the court took said minor children into his room at the hotel in private conference, when and where he discussed with said children their attitude toward both of their said parents, and after a full consideration of the pleadings, affidavits and arguments of counsel."

The court below found the facts—this was in its sound discretion and conclusive on this Court. In the conclusion of law, I think they are bottomed on the well settled opinions of this Court.

STACY, C. J., and BROGDEN, J., dissenting: A mother, who is "of good character . . . a fit, suitable and proper person for (her) said (minor) children to know and associate with . . . able to provide for and maintain said children during such times as they may visit her," ought not to be deprived by the law of all right to their custody or keeping. The privilege of visitation, under the facts of this record, would seem to be inadequate as a substitute for such right. It would apparently do no injustice to anyone to give to the plaintiff the right to the custody of her children for a part of the time. *Clegg v. Clegg,* 186 N. C., 28, 118 S. E., 824.

BAKER-CAMMACK TEXTILE CORPORATION v. GURNEY P. HOOD, COMMISSIONER OF BANKS OF THE STATE OF NORTH CAROLINA, AND E. C. McLEAN, AGENT AND CONSERVATOR OF NORTH CAROLINA BANK AND TRUST COMPANY.

(Filed 20 June, 1934.)

1. Banks and Banking C c: Bills and Notes D d—Bank of deposit held collecting agent for checks drawn on foreign banks.

Under a valid emergency statute a bank restricted withdrawals of deposits to five per cent of the depositors' balances on the preceding day and thereafter accepted deposits without restrictions as to withdrawals. On the day before the bank invoked the emergency statute a depositor deposited checks drawn on foreign banks, using the bank's deposit slip which expressly stipulated that the bank accepted the checks as collecting agent and that the checks were credited to the depositor subject to final payment in cash or solvent credits. The bank had theretofore allowed the depositor to check against uncollected items, but the depositor was solvent and the bank had always charged returned checks to the depositor's account. *Held,* in respect to the checks drawn on foreign banks the bank of deposit was collecting agent only, and the relationship of debtor and creditor did not exist until the foreign checks had actually been collected and the deposit of such checks was not made until that time.

2. Estoppel C a—Acts of plaintiff held not to have resulted in loss to adverse claimants, and plaintiff was not estopped.

Under a valid emergency statute a bank restricted withdrawals of deposits to five per cent of the depositors' balances on the preceding day and accepted deposits thereafter without restrictions as to withdrawals.

A depositor of checks drawn on foreign banks demanded the five per cent on the whole balance credited to him, although he knew that some of the checks had not been collected. Thereafter, the depositor tendered the bank the five per cent withdrawn by him on checks that were uncollected at the time the emergency statute was invoked, and claimed the total amount thereafter collected on such checks as a preference in the bank's assets upon its later receivership upon the ground that as to such checks the deposit was not made until the checks were collected, at which time the bank was operating on an unrestricted basis. *Held*, the depositor was not estopped by his withdrawal of the five per cent on the whole balance credited to him from asserting his claim for the full amount of the checks later collected, since his act in so withdrawing the five per cent resulted in no loss to the bank and did not prejudice the rights of general depositors and creditors of the bank.

3. Banks and Banking H e—Deposit made after bank had resumed business on unrestricted basis after invoking emergency restrictions on withdrawals entitles depositor to a preference.

Under a valid emergency statute a bank restricted withdrawals of deposits, and thereafter accepted deposits without restrictions as to withdrawals. After it had resumed business and was accepting deposits without restrictions it collected from foreign banks certain checks a depositor had previously deposited with it as collecting agent. Thereafter it was placed in the hands of the statutory receiver for liquidation. *Held*, the depositor was entitled to a preference in its assets for the amount so deposited by him while it was receiving deposits on an unrestricted basis, the emergency statute constituting such deposits deposits in the nature of a trust fund.

APPEAL by defendant from *Shaw, Emergency Judge*, at January Term, 1934, of ALAMANCE. Affirmed.

"The parties hereto, acting by and through their attorneys of record, do hereby agree that this case shall be submitted to the court, without a jury, upon the record, and upon the following statement of facts, which is hereby approved and agreed to, to wit:

1. The plaintiff is a manufacturing corporation, organized and existing under the laws of the State of Louisiana, but has its principal office and place of business in the city of Graham, Alamance County, North Carolina.

2. The North Carolina Bank and Trust Company (hereinafter referred to as the bank) is a banking corporation, organized and existing under the laws of the State of North Carolina; the defendant Gurney P. Hood is Commissioner of Banks of the State of North Carolina, and the defendant E. C. McLean is agent and conservator in charge of the liquidation of the North Carolina Bank and Trust Company, as hereinafter set out.

3. Upon opening for business on 3 March, 1933, the bank limited withdrawals by any depositor to five per cent of the depositor's balance

as shown by the books of the bank at the close of its business on the previous day. At a later hour on 3 March, 1933, and after the enactment of chapter 103, of the 1933 Public Laws of North Carolina, pursuant to the terms and provisions of said act, the bank voluntarily subjected itself to the orders and control of Gurney P. Hood, Commissioner of Banks of the State of North Carolina. Under an order thereafter issued by Gurney P. Hood, Commissioner of Banks as aforesaid, with the approval of the Governor of North Carolina, the bank was authorized to and did indefinitely extend and postpone all payments to both time and demand depositors (other than fully secured depositors and claims preferred by law) in excess of five per cent (5%) of the actual collected balances due and owing such depositors at the close of business on 2 March, 1933. The same order provided that the bank might thereafter receive any deposits, and that the new deposits received by it on or after 3 March, 1933, should not under any circumstances be subjected to any limitations as to payment or withdrawal.

4. For a long time prior to 3 March, 1933, the plaintiff had carried a checking account in the commercial department of the bank. At various times on and immediately prior to 3 March, 1933, the plaintiff deposited with the bank certain checks. Each of said deposits was evidenced by and made upon a deposit slip, the form and words of which are attached as Exhibit 'A.' There is also attached as Exhibit 'B,' a statement showing the drawer of each of the checks above mentioned, the amount thereof, the date on which same was deposited, the name of the drawee bank, the name of the bank to which same was sent by the bank for credit to its account therein, the date of payment by the drawee bank, and the date on which the proceeds therefrom were paid to the bank, or finally credited to its account in its correspondent bank. Each of said correspondent banks is now and was at all times herein mentioned amply solvent.

5. Upon the checks received from the plaintiff for deposit the bank required the plaintiff's endorsement. At the end of each day, the amount of checks deposited by the plaintiff on that day was credited to its account, and was thereupon immediately subject to withdrawal by the plaintiff. It was not the custom of the bank to advise or notify the plaintiff at any time of the fact that it had actually collected a check so handled, but in the event such a check was not paid, the bank would return it to the plaintiff, charge the amount thereof against the plaintiff's account, and notify the plaintiff accordingly.

6. The plaintiff is now and was at all times herein mentioned amply solvent, which fact was known to the bank. There was no contract or agreement between the plaintiff and the bank in connection with said deposits and account, except as shown by the facts herein set out, and ex-

cept such, if any, as may be implied therefrom, or implied by law. The amount to the credit of the plaintiff's account, in the bank at the close of business on 2 March, 1933, was $8,447.72, five per cent of which was thereafter withdrawn by the plaintiff at a time when it knew of the restriction which had been placed on its account, and also knew that at least several of the checks included within said $8,447.72 had not been collected. In addition to the checks listed on the statement hereto attached as Exhibit 'B' said $8,447.72 included checks and drafts totaling $3,079.42, which were deposited in the manner hereinbefore set out, but which, subsequent to 3 March, 1933, were returned unpaid to the bank, and then returned by the bank to the plaintiff, and the amounts of which were charged against the plaintiff's restricted account. The plaintiff has tendered to the defendants five per cent of the uncollected items, totaling $3,079.42, and five per cent of the items collected on or after 3 March, 1933.

7. On 20 May, 1933, Gurney P. Hood, Commissioner of Banks of the State of North Carolina, took possession of the bank and all of its assets and business for the purpose of liquidation, such possession was taken and has been retained by him in the manner provided by law, and E. C. McLean is the duly appointed, qualified, and acting agent and conservator in charge of the liquidation of the bank. The plaintiff made demand upon the defendants and each of them for the payment, as a preferred claim, of the balance of the proceeds derived from the checks listed on the statement hereto attached as Exhibit 'B,' but the defendants refused to pay the same, or any part thereof, and denied that the plaintiff is entitled to any preference in the distribution of the assets of the bank. Approved and consented to, this 29 January, 1934. John S. Thomas, attorney for plaintiff. Brooks, McLendon & Holderness, attorneys for defendants."

"Exhibit 'A,' deposited with North Carolina Bank and Trust Company, subject to the following regulations: In receiving items for deposit or collection, this bank acts only as depositor's collecting agent, and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits. This bank will not be liable for default or negligence of its duly selected correspondents, nor for losses in transit, and each correspondent so selected shall not be liable except for its own negligence. This bank, or its correspondents, may send items, directly or indirectly, to any bank, including the payor, and accept its draft or credit as conditional payment in lieu of cash; it may charge back any item at any time before final payment, whether returned or not, also any item drawn on this bank not good at close of business on day deposited.

Burlington, N. C., ..., 193....

	Dollars	Cents
Currency		
Silver		
Gold		
Checks, as follows:		
Total $		

See that all checks and drafts are endorsed."

Exhibit "B," list of items deposited by Baker-Carmack Textile Corporation, for sake of brevity, are not set forth.

The judgment of the court below is as follows: "This cause coming on to be tried at the January Term, 1934, of the Superior Court of Alamance County, before his Honor, Thomas J. Shaw, emergency judge, assigned to and holding said court, upon motion, E. C. McLean was substituted as a party defendant in lieu of I. B. Grainger as agent and conservator of the North Carolina Bank and Trust Company. Thereupon, by agreement of the parties, this cause was submitted to the court, without a jury, upon the record and an agreed statement of facts, and the court, after consideration thereof and after hearing arguments of counsel, being of the following opinion, to wit: That because of the terms of the regulations printed on the deposit tickets upon which the plaintiff made its deposits of checks in the North Carolina Bank and Trust Company, such deposits were deposits for collection, creating the relation of principal and agent between the plaintiff and the bank pending payment of said checks in cash or solvent credits; that upon the payment of said checks by the drawee bank and the proceeds therefrom being finally credited to the account of the North Carolina Bank and Trust Company in one of its solvent correspondent banks, said relation of principal and agent terminated and the relation of debtor and creditor was created; that the plaintiff is entitled to a preferred claim against the assets of the North Carolina Bank and Trust Company in the amount of $173.93, representing the aggregate amount of the items collected by the North Carolina Bank and Trust Company on or after 3 March, 1933, to wit, $399.32, less the five per cent thereof

($19.96) which the plaintiff has already received, and also less the five per cent of $3,079.42 ($153.97), which the plaintiff received on items deposited prior to 3 March, 1933, which were returned unpaid, and that the plaintiff is not estopped to claim said preference because of its withdrawal of five per cent of its 2 March, 1933, book balance, as set out in the agreed statement of facts. It is therefore ordered, adjudged, and decreed that the plaintiff have and recover of the defendants, as a preferred claim against the assets of the North Carolina Bank and Trust Company, the sum of $173.93, and that the defendants pay the costs of this action. It having been agreed by the attorneys for the parties hereto that judgment might be rendered out of term, this judgment is so signed, and the judgment heretofore signed in this cause is vacated and declared null and void."

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

John S. Thomas for plaintiff.
Brooks, McLendon & Holderness for defendants.

CLARKSON, J. The judgment of the court below, that "plaintiff have and recover of the defendants, as a preferred claim against the assets of the North Carolina Bank and Trust Company, the sum of $173.93," must be sustained. Under chapter 103, Public Laws of 1933, the North Carolina Bank and Trust Company limited withdrawals by any depositor, to five per cent of deposits at the close of business on 2 March, 1933. The plaintiff was solvent and its checking account at that time was $8,447.72—five per cent of which was withdrawn in accordance with the restriction. On this appeal, the only items now in controversy are the following: $42.50 check drawn on First National Bank of Arcadia, La.; $225.00 check drawn on First National Bank of Appleton, Wis.; $87.27 check drawn on Anglo-American National Bank of San Francisco, and $44.55 check drawn on Central Bank and Trust Company of Peoria, Ill., totaling $399.32, less five per cent on items of deposit as set forth below in the judgment, leaving $173.93. These items were collected by the bank after it had ceased to operate, except upon a restricted basis and after the plaintiff had withdrawn five per cent of its prerestricted book balance, but before the Commissioner of Banks took possession of the bank for the purpose of liquidation.

The judgment of the court below, in part, is as follows: "That the plaintiff is entitled to a preferred claim against the assets of the North Carolina Bank and Trust Company in the amount of $173.93, representing the aggregate amount of the items collected by the North Carolina Bank and Trust Company on or after 3 March, 1933, to wit,

$399.32, less the five per cent thereof ($19.96) which plaintiff has already received, and also less the five per cent of $3,079.42 ($153.97), which the plaintiff received on items deposited prior to 3 March, 1933, which were returned unpaid, and that the plaintiff is not estopped to claim said preference because of its withdrawal of five per cent of its 2 March, 1933, book balance, as set out in the agreed statement of facts."

The full amount to the credit of the plaintiff's account, $8,447.72, in the bank at the close of business on 2 March, 1933, had not been collected. In addition to the checks listed on the statement hereto attached as Exhibit "B," said $8,447.72 included checks and drafts totaling $3,079.42, which were deposited, but which, subsequent to 3 March, 1933, were returned unpaid to the bank, and then returned by the bank to the plaintiff, and the amounts of which were charged against the plaintiff's restricted account. The plaintiff has tendered to the defendants five per cent of the uncollected items, totaling $3,079.42, and five per cent of the items collected on or after 3 March, 1933.

When the checks and drafts were deposited by plaintiff, the following was in the contract, made with the North Carolina Bank and Trust Company, in part: "In receiving items for deposit or collection, this bank acts only as depositor's collecting agent, and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits. . . . It may charge back any item at any time before final payment, whether returned or not, also any item drawn on this bank not good at close of business on day deposited."

The first question involved: Did the checks deposited in the bank under the facts as agreed upon, become the property of the bank, or, pending collection, were they held by the bank as agent for the plaintiff? We think they were held by the bank as agent for the plaintiff. We think under all the facts and circumstances of this case, that the bank by express contract was an agent for collection, the contract in clear language so states. In *Worth Co. v. Feed Co.*, 172 N. C., 335 (342), citing numerous authorities, this Court said: "The rule prevails with us, and it is supported by the weight of authority elsewhere, that if a bank discounts a paper and places the amount, less the discount, to the credit of the indorser, with the right to check on it, and reserves the right to charge back the amount if the paper is not paid, by express agreement or one implied from the course of dealing, and not by reason of liability on the indorsement, the bank is an agent for collection and not a purchaser." *Temple v. La Berge*, 184 N. C., 252; *Sterling Mills v. Milling Co.*, 184 N. C., 461; *Bank v. Rochamora*, 193 N. C., 1; *Denton v. Milling Co.*, 205 N. C., 77; 42 A. L. R., p. 494.

The North Carolina Bank and Trust Company, after its restriction at the close of business on 2 March, 1933, collected the checks in controversy. If these checks had been deposited after the restriction, the proceeds would have been plaintiffs'. The order provided "that the bank might thereafter receive any deposits and that the new deposits received by it on or after 3 March, 1933, should not under any circumstances, be subject to any limitations as to payment or withdrawal." The bank after the restriction, collected the checks for plaintiff and on its check or demand, the agent bank was bound to pay the plaintiff. The bank had not purchased them, but took them to collect them like any other agent, and on demand the agent bank was bound to pay the plaintiff. The defendants have refused to pay the proceeds of these checks which belonged to plaintiff. The court below properly held that they were preferred claims against the assets of the bank.

The second question involved: Is a depositor in a bank in process of liquidation who withdrew from the bank five per cent of its book balance at a time when it knew that the bank had limited withdrawals to five per cent of its depositors' actual collected balances, and also knew that several of the items included within its book balance had not been collected, estopped as against the other creditors of the bank from thereafter claiming that certain of the items were not actually collected until a later date? We think not, under the facts and circumstances of this case.

The plaintiff was carrying a checking account with the North Carolina Bank and Trust Company for their mutual benefit. No interest was paid plaintiff on its daily balances. The bank required plaintiff's endorsement and allowed it to check on the deposits, but it was not the custom of the bank to notify plaintiff when the checks so handled were actually collected, but in the event that such checks were not paid, the bank would return them to the plaintiff and charge the amount against the plaintiff's account and notify the plaintiff accordingly. The plaintiff was solvent and this was known to the bank. The whole matter was *in fieri*. It would be indeed hard measure to say plaintiff was estopped and be held to any strict accountability when he, under the circumstances here narrated, the bank going on a restricted basis, in these hard times, could only withdraw five per cent on $100.00 and this done by a legislative act and without his consent. The plaintiff tendered back the five per cent to defendants.

In 10 R. C. L., "Estoppel," at page 697-8, section 25, is the following: "The final element of an equitable estoppel is that the person claiming it must have been misled into such action that he will suffer injury if the estoppel is not declared. That is, the person setting up the estoppel must have been induced to alter his position, in such a way that he

will be injured if the other person is not held to the representation or attitude on which the estoppel is predicated. Furthermore, an equitable estoppel cannot arise except when justice to the rights of others demands. It was never intended to work a positive gain to a party. Its whole office is to protect him from a loss which, but for the estoppel, he could not escape. Consequently, the estoppel should be limited to what may be necessary to put the parties in the same relative position which they would have occupied if the predicate of the estoppel had never existed." *Trust Co. v. Wyatt,* 191 N. C., 133 (136): In *Meyer v. Reaves,* 193 N. C., 172 (178), speaking to the subject: "'Where a person has, with knowledge of the facts, acted or conducted himself in a particular manner, or asserted a particular claim, title, or right, he cannot afterwards assume a position inconsistent with such act, claim, or conduct to the prejudice of another.' 16 Cyc., p. 785; *Holloman v. R. R.,* 172 N. C., 376; *Cook v. Sink,* 190 N. C., at p. 626. See *Freeman v. Ramsay,* 189 N. C., 790; 21 C. J., p. 1202." *Thomas v. Conyers,* 198 N. C., 229 (234). We do not think under the facts and circumstances of this case, plaintiff is estopped.

The third question involved: Where such checks were deposited in a bank as agent for collection, which availed itself of the privileges of chapter 103, of the 1933 Public Laws of North Carolina, between depositing of the checks for collection and the collection of the checks, and after the collection of the checks, the bank was taken over by the Commissioner of Banks for the purpose of liquidation, is the plaintiff entitled to a preferential claim against the assets of the bank? We think so.

Before the transactions in controversy took place, the bank was not on a restricted basis and was not in liquidation. The restriction subsequently "tied up" these checks and did away with the contract between the plaintiff and the North Carolina Bank and Trust Company. It took them as agents for collection and when collected, plaintiff was entitled to the proceeds and under the peculiar factual situation, defendants cannot now contend that when collected, the principle of debtor and creditor would prevail. The peculiar legislation contrary to plaintiff's agreement fixed it so that plaintiff could not get this fund collected by the North Carolina Bank and Trust Company, as its agent. The factual situation and agreement distinguishes this case from those cited by defendants. The North Carolina Bank and Trust Company collected the checks as plaintiff's agent and the fund under the facts and circumstances of this case, was a trust fund and when the Commissioner of Banks took over the North Carolina Bank and Trust Company, it took it *cum onere.* For the reasons given, the judgment of the court below is

Affirmed.

JAMES D. IPOCK, BY HIS GENERAL GUARDIAN, MRS. IDA IPOCK; MRS. IDA IPOCK, INDIVIDUALLY AND AS GUARDIAN OF NANNIE LANE IPOCK AND JAMES D. IPOCK, *v.* NORTH CAROLINA JOINT STOCK LAND BANK OF DURHAM.

(Filed 20 June, 1934.)

1. Guardian and Ward D c: Judges A b—Emergency judge not holding court may not approve clerk's order authorizing guardian to mortgage land.

An emergency judge has *no* power to approve and confirm an order of the clerk for the sale or mortgage of lands by a guardian when such emergency judge is not holding court in the county, the statute, C. S., 2180, prescribing that the "judge of the court" shall approve such order, and Art. IV, sec. 11, of the Constitution prescribing that special and emergency judges shall have the power and authority of regular judges in the courts which they are appointed to hold, and this result is not affected by the provisions of N. C. Code of 1931, sec. 766(b).

2. Guardian and Ward D c: Judgments G b—Court's approval nunc pro tunc of clerk's order authorizing guardian to mortgage lands is upheld.

An executrix and guardian applied to the clerk for an order to mortgage lands of her wards in order to pay pressing debts of the estate and prevent imminent suit by creditors to sell the lands to make assets. The clerk, under statutory authority, found the essential facts and duly issued the order prayed for. Pursuant to the order, the guardian executed the mortgage, obtained the loan and used the proceeds to pay debts of the estate. Thereafter the mortgagee, upon default, foreclosed the mortgage, bid in the property, and the guardian instituted this action to restrain the mortgagee, as purchaser at the sale, from selling the lands, upon the ground that the clerk's order authorizing the guardian to mortgage the lands was void in that it had not been properly approved by a judge of the Superior Court, C. S., 2180. There was no suggestion of fraud, overreaching, undue advantage or other inequitable element, or that the wards' estates had not received the full benefit of the loan. *Held*, under the circumstances the order would doubtless have been approved by a regular judge had it been presented to him, and under the facts the trial court had the power to approve the order *nunc pro tunc*, although the order had been made approximately nine years before.

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

CIVIL ACTION, before *Grady, J.*, at November Term, 1933, of LENOIR.

It was agreed by counsel that the trial judge could find the facts and render judgment. The pertinent facts so found, may be summarized as follows:

1. Samuel W. Ipock died in 1920, leaving a last will and testament by which he devised certain land to his widow, Ida Ipock, for life, with remainder in fee to his two children, Nannie Lane Ipock and James D.

Ipock. Ida Ipock qualified as executrix, and also as guardian of Nannie Lane Ipock and James D. Ipock. At the time of his death Samuel W. Ipock was indebted to various persons in the approximate sum of $42,000.

2. On 13 December, 1924, a special proceeding was duly instituted in the office of the clerk of the Superior Court of Lenoir County by Ida Ipock, executrix and individually and as guardian for her wards, Nannie Lane Ipock and James D. Ipock, alleging in her petition, that the outstanding indebtedness against the estate was $22,000, and that there were no personal assets with which to pay said indebtedness. It was further alleged that creditors of the estate were demanding payment and threatening to institute suit for the purpose of subjecting the lands of decedent for sale for assets, and that in order to save the lands for her wards the guardian and executrix had negotiated a loan from the defendant in the sum of $22,000, which was to be secured by a deed of trust upon the lands described in the will of testator.

3. The clerk of the Superior Court, after considering the petition and the facts set forth therein, found as a fact that it was necessary for the plaintiffs to borrow said sum of $22,000 from the defendant and that, as said loan covered a long period of time, it was for the best interest of said minors that said loan be made and a deed of trust executed to secure the payment thereof. Thereupon, the clerk entered an order directing and empowering Ida Ipock as executrix, guardian and individually, to convey said land in trust and to complete said loan. Samuel W. Ipock, a son of the deceased, who was then of age, joined in the conveyance. This order of the clerk was approved by Honorable O. H. Allen, emergency judge of the State of North Carolina, residing at Kinston, N. C., on 13 December, 1924. Thereupon, pursuant to said special proceeding, a deed of trust was duly executed to the First National Trust Company, trustee, to secure said sum of $22,000, and the proceeds of the loan paid to the executrix and guardian.

4. On 17 February, 1926, a petition was duly filed before the clerk of the Superior Court, entitled: In the matter of Ida Ipock, guardian for Nannie Lane Ipock and James D. Ipock, and Ida Ipock, executrix of S. W. Ipock estate, *ex parte*. This petition recited the death of S. W. Ipock, the probate of his will, the qualification of the executrix, and the age of the minors. In article seven of the petition it was alleged that a special proceeding had theretofore been instituted in the Superior Court before the clerk for the purpose of borrowing from the North Carolina Joint Stock Land Bank the sum of $22,000, and that pursuant to an order made in said cause the plaintiff had borrowed from said Land Bank the said sum of $22,000 and had duly executed a deed of

trust securing the payment of said indebtedness. Said petition further demanded a partition of the lands covered by said deed of trust and that "these petitioners respectfully request the court in its order in this partition proceeding to charge the lands to be obtained by S. W. Ipock with one-third of said indebtedness to the North Carolina Joint Stock Land Bank of Durham, and to charge the land of the other petitioners to the balance thereof, and in the event that either of the parties shall fail to pay his or her proportionate part of the said indebtedness as it may mature, that in such event the other parties may have the right to pay the same, and such amounts as may be paid out for the benefit of others on said indebtedness in order to keep said mortgage from being foreclosed shall be and constitute a lien against the lands of the parties so defaulting until the same shall have been fully repaid."

5. Upon this petition an order of partition was duly made on 17 February, 1926, by the clerk of the Superior Court, and this order was duly approved by Honorable W. M. Bond, judge holding the courts of Lenoir County.

6. On 29 February, 1928, a petition was filed by the guardian in the Superior Court, alleging that annual payments on the loan of $22,000, held by the defendant, had been paid by the guardian out of the funds in her hands and from revenue derived from the farm, and she prayed that she might be permitted to use said funds for the benefit of said minors in paying said installments to the defendant. Upon this petition the clerk of the Superior Court duly made an order as prayed for and the proceeding was approved by Honorable E. H. Cranmer, judge holding the courts in Lenoir County on 2 March, 1928.

7. On 30 November, 1928, a petition was filed in the office of the clerk of the Superior Court of Lenoir County, entitled: In the matter of Nannie Lane Ipock and James D. Ipock, individually, *ex parte*. This petition alleged that the board of education of Lenoir County was desirous of purchasing a certain lot of land, but that same was covered by the mortgage to the defendant, and that the defendant had agreed to accept the purchase price and apply on its indebtedness. Whereupon, the clerk of the Superior Court entered an order on 22 November, 1928, appointing a commissioner to sell a certain lot of land to the board of education, which sale was consummated, and the net proceeds of the sale, amounting to $285.66, was duly paid to the defendant to be credited upon the indebtedness and $66.84 of the purchase price was paid to Mrs. Ida Ipock, guardian. This proceeding was duly approved by Henry A. Grady, resident judge of the Sixth Judicial District, on 23 November, 1928.

8. On 18 December, 1929, another petition was filed by the guardian, referring to the mortgage held by the defendant for $22,000, and ask-

ing for permission to execute and deliver five notes, aggregating $2,000 to J. R. Harvey and payable over a period of five years, and to secure the same by a deed of trust upon the land "subject, however, to the mortgage indebtedness due to the North Carolina Joint Stock Land Bank of Durham, North Carolina." Thereupon, the clerk of the Superior Court duly made an order as prayed for and the proceeding was approved by Henry A. Grady, resident judge of the Sixth Judicial District, on 21 December, 1929.

9. Default was made in the payment of the $22,000 indebtedness held by the defendant and on 16 January, 1932, the deed of trust was foreclosed and the lands therein described, purchased by the defendant at the sale and a deed duly executed to it for said premises. Since the purchase of said land by the defendant it undertook to sell the same and was offering the same for sale on 4 October, 1932, when the plaintiffs brought this action to restrain the sale, alleging that the defendant is not the owner of the land, but that the title to the same is now in Nannie Lane Ipock and James D. Ipock.

10. Paragraph six of the findings of fact and judgment is as follows: "While there is no allegation in the complaint in respect to said special proceeding, when the same was offered in evidence, the court inquired of counsel for the plaintiffs why the same was not binding upon them; and it was then stated to be the contention of the plaintiffs that the order of the clerk in said proceeding, was void because the same had not been signed and approved by a judge who was authorized to approve the same under the laws of North Carolina; it was further stated by counsel for the plaintiffs that they did not charge any fraud in the filing and prosecution of said proceeding, but that they earnestly contended that the court, even with the approval of a proper judge, had no right to direct a conveyance of the lands belonging to the minor petitioners under the circumstances then existing."

11. Paragraph 12 of the judgment and findings of fact, subsection (b), is as follows: "It was admitted upon the hearing that in order for the plaintiffs to prevail in this proceeding, it would be necessary to attack the special proceeding in the Superior Court of Lenoir County, under which the deed of trust to the First National Trust Company, trustee, securing said $22,000, was executed, and it was admitted that if said proceeding was valid and regular, and binding upon the plaintiffs, that they could not recover in this action.

"It was asserted that the approval of the order of the clerk by Judge Allen, an emergency judge, who was not holding the courts of Lenoir County at that time, was void and of no effect, and the court is of that opinion; it was also contended that the Superior Court had no right

or authority in law to subject the lands of the minor petitioners to a lien in favor of the Joint Stock Land Bank under said special proceeding.

"The court is of the opinion that the approval of said order by Judge O. H. Allen was a nullity; but this is an original action in the Superior Court, brought on the equity side of the docket, and the purpose of this action must, of necessity, be to attack the judgment rendered by the clerk and approved by Judge Allen. Said proceeding was instituted regularly in the Superior Court and the order of the clerk permitted said loan to be made, and it is evident that the court had jurisdiction both of the parties and of the subject-matter of the proceeding. Therefore, said order of J. T. Heath, clerk of the Superior Court, cannot be collaterally attacked in an independent action; but the only redress that plaintiffs could possibly have, if any, would be by motion in the original proceeding.

. . . "And the court is further of the opinion that the subsequent orders and decrees of the Superior Court of Lenoir County, referred to in the foregoing findings of fact, in all of which said loan and deed of trust are specifically referred to and acquiesced in, which orders were approved in one instance by Judge W. M. Bond, presiding at Kinston, N. C., and in all of the others by the resident judge of the Sixth Judicial District, that such approvals are tantamount in law and in equity to an approval, ratification and affirmance of the judgment of J. T. Heath, clerk of the Superior Court, rendered in the original proceeding, which was inadvertently approved by Honorable O. H. Allen, an emergency judge; and if such is not the law, the court is of the opinion that the defendant, being an innocent purchaser, and having loaned moneys to the plaintiffs to pay the debts of their testator, which could have been enforced against the lands in question, that said order, so approved by Judge Allen, ought now to be approved by the court, and the court does ratify and confirm the same, *nunc pro tunc;* for to act otherwise would, in the opinion of the court, permit a palpable injustice to be perpetrated upon the defendant."

From judgment dissolving the injunction upon the foregoing facts, plaintiffs appealed.

Rouse & Rouse for plaintiffs.
W. G. Mordecai and Wallace & White for defendant.

BROGDEN, J. 1. Did Judge O. H. Allen, an emergency judge, not holding court in Lenoir County, have the power on 13 December, 1924, to approve and confirm the order of the clerk, made on the same date,

authorizing and directing the guardian and executrix to borrow the sum of $22,000 from the defendant and execute and deliver a valid deed of trust securing said indebtedness?

2. Did Judge Henry A. Grady, judge presiding and holding the courts of Lenoir, have the power to approve the said order made by Heath, clerk, on 13 December, 1924, *nunc pro tunc*, on 23 November, 1933?

C. S., 2180, provides that "the judge of the court" shall approve special proceedings instituted for the sale or mortgage of lands by a guardian. For such purpose of approval, "who is the judge of the court?" Article IV, section 11, of the Constitution of North Carolina provides that "the General Assembly may by general laws provide for the selection of special or emergency judges to hold the Superior Courts of any county, or district, when the judge assigned thereto, by reason of sickness, disability, or other cause, is unable to attend and hold said court, and when no other judge is available to hold the same. Such special or emergency judges shall have the power and authority of regular judges of the Superior Courts, in the courts which they are so appointed to hold; and the General Assembly shall provide for their reasonable compensation."

Therefore, it is manifest that the power of special and emergency judges is defined and bounded by the words "in the courts which they are so appointed to hold." Consequently as Judge O. H. Allen was not holding the court in Lenoir County on 13 December, 1924, he was without authority to approve the special proceeding. This phase of the case is expressly decided in *Greene v. Stadiem*, 197 N. C., 472.

The Court is not inadvertent to C. S., 766(b), Michie's Code of 1931. If it conflicts with the Constitution, of course it amounts to nothing; but granting that it does not conflict with the Constitution, it is not determinative in the decision of this case.

The second question of law involves the power of regular judges of the Superior Court to enter a *nunc pro tunc* judgment. In the case at bar such judgment was entered approximately nine years after the original judgment made by the clerk. However, in order to work out a solution of the legal problem presented, it is necessary to recapitulate the facts.

A guardian applies to the clerk of the Superior Court of a county for an order to mortgage the land of wards in order to secure money to pay off and discharge pressing indebtedness of the estate of the wards and to eliminate imminent litigation. The clerk of the Superior Court had the power to hear the petition, find the facts, and to conclude under the circumstances then existing whether the best interest of the wards

would be subserved by the conveyance of the property for the purpose of securing money to pay debts. In the exercise of such jurisdiction the clerk found the essential facts and duly made an order authorizing and directing the guardian to borrow the money and to execute the deed of trust. Pursuant to such order the guardian received $22,000 in money from the defendant, which was actually used and expended in discharging indebtedness for which the estate of the wards was liable.

There is no challenge to the truth of any of these facts; nor is there a suggestion of fraud, overreaching, undue advantage, or even the secret presence of any inequitable element in the transaction. Manifestly, under such circumstances, the approval of a regular judge of the Superior Court as a practical matter, would have doubtless been forthcoming.

The same facts were before the chancellor, Henry A. Grady, in November, 1933. The same facts were unchallenged. Neither, at that time, was there any suggestion of fraud or hint that the estate of the minors had not received the full measure of all benefits flowing from the transaction. Under these circumstances the Court is of the opinion, and so holds that the judgment *nunc pro tunc* was within the power of a chancellor. Indeed, the case of *Powell v. Fertilizer Co.,* 205 N. C., 311, is decisive. The original record in that case discloses that Sarah Powell in 1931 as guardian, filed a petition for authority to mortgage lands of the deceased, and that no supporting affidavits were offered and no formal hearing was had. The clerk made an order permitting the conveyance and twenty-one months thereafter Judge Daniels, duly holding the court of the county, entered an order as follows: "Approved this 10 November, 1932, *nunc pro tunc* as of the 10th day of March, 1931." The Court said: "The note and deed of trust were executed by the guardian pursuant to order of the clerk of the Superior Court, and before same was approved by the judge as required by C. S., 2180, but the judge's approval was later entered *nunc pro tunc.* This cured the defect."

The question of ratification arising from the several proceedings instituted by the plaintiffs expressly recognizing the existence and validity of the deed of trust of defendant, is debated in the briefs, but the view of the law as above set forth renders a decision on that point unnecessary.

Affirmed.

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

STATE v. EMANUEL BITTINGS, ALIAS SPICE BITTINGS.

(Filed 20 June, 1934.)

1. **Criminal Law L d—Assignments of error must be based upon exceptions and be discussed in briefs in order to present question on appeal.**

Assignments of error must be based upon exceptions duly taken in apt time during the trial and be discussed in appellant's brief in order for them to be considered on appeal, and these requirements are statutory, C. S., 643, as well as mandatory under the decisions, and where the assignments of error are not properly based upon exceptions aptly entered the case may be dismissed upon motion of the Attorney-General, but in the present appeal the assignments of error, although not properly presented, are considered because the life of the appellant is involved, and are found to be without merit.

2. **Same—**

Exceptions to the trial court's statement of the contention of the State must be brought to the court's attention by defendant in apt time for correction or the exceptions will be deemed waived.

3. **Criminal Law I g—Statement of contention of the State based upon flight of defendant held not erroneous.**

Where there is evidence that immediately after the time the crime was committed the defendant fled to other states it is proper for the State to contend that such flight was a circumstance indicating guilt, and the court's statement of such contention will not be held for error, the statement of the contention not being an undertaking by the court to state the law of flight.

4. **Criminal Law J a—**

A judgment in a criminal prosecution may be arrested on motion duly made when, and only when, some fatal error or defect appears on the face of the record.

5. **Homicide G e—Evidence of defendant's guilt of murder in the first degree held sufficient to be submitted to jury.**

Defendant admitted killing deceased intentionally with a deadly weapon, raising the presumption of an unlawful killing with malice, and the State's evidence of premeditation and deliberation, necessary to constitute murder in the first degree, is held sufficient to support the submission to the jury of the question of defendant's guilt of the capital felony.

APPEAL by defendant from *Devin, J.*, at January Term, 1934, of PERSON.

Criminal prosecution tried upon indictment charging the defendant with the murder of one T. M. Clayton.

The record discloses that on the morning of 7 September, 1933, the defendant, a tenant or share cropper, shot and killed his landlord under circumstances which the jury found to be murder in the first degree.

The evidence on behalf of the State tends to show that the defendant lived in a tenant house about fifty yards from the home of his landlord in Person County; that the two had cultivated some seven or eight acres of corn and tobacco that year on shares, each to get one-half of the crops, and the defendant to furnish himself; that a quantity of tobacco was in the barn on 7 September, which it was customary, on taking out of the barn, to put in the pack-house; that instead the defendant, with his two children, was putting the tobacco in his own house; that upon seeing what was being done, the landlord, accompanied by his wife, went to the home of the defendant and said: "Don't put that tobacco here in this house; there is no room in here; take every stick of it and carry it back to the pack-house"; that the defendant said something in reply, which the wife of the landlord could not understand, but in consequence of what was said, the landlord turned and remarked: "I have got no more to say" and started away from the house; that the defendant thereupon got his shotgun from over the door and shot the landlord, hitting him in the right side of the neck and killing him instantly.

It is also in evidence that throughout the cultivating season the defendant and the deceased discussed plans for working the crops; that when it was agreed, for example, that on tomorrow the tobacco should be primed, the defendant would disappear and stay away all day. "Spice seemed to think he was bound to make these trips; that he had to work for something to eat, he said. That would be his excuse." While not under contract to do so, the deceased told the defendant "he would give him some meat and bread, but after he found out the defendant was not trying to make anything, he refused to furnish him."

It is further in evidence that the deceased was unarmed at the time of the homicide; and that his wife called to the defendant not to shoot, just as he leveled his gun. The defendant immediately fled the vicinity, going first to Roanoke Rapids, then into Virginia, Pennsylvania, Ohio, and was finally arrested in Sharon, Pa.

The defendant took the stand in his own behalf and testified that he was to get half the tobacco and half the corn; that Mr. Clayton "wasn't able to furnish me rations, so I come over here to get Mr. Crowell, who promised he would furnish me bread to make a crop on. I raised a garden, corn, some cane and potatoes"; that on the morning of the homicide they were dividing the tobacco, the deceased not wanting the children of the defendant to handle his part: "I told him that my children might tear his up. He said he was going to the house and get his gun and stand there and watch them, he was not going to let them break his. . . . He had run them with his gun two or three

times when I was not there. I goes to the house, goes upstairs. The forty sticks were on the porch. I told the children to pass them on to the house to me and I would lay it upstairs and wait until Mr. Clayton got on better terms, and then I would move it out. Mr. Clayton come on the porch, knocked the little boy up against the house and stamped the tobacco out of his hand. He come running in the house crying, and my wife, she called me: 'You will have to come down here, he is down here fighting these children.' I came down and asked him to go way. So he wouldn't do it, he kept standing there fussing. I went on back in the house, upstairs. He was standing in front of the house. He called his wife: 'Sallie, come here. I want you to come here and hear the last words I tell the G—d—Negro before I blow his brains out.' He started in his pocket with his hands, and the gun was over my head. I took the gun, come down and shot him. No, sir, I never had any trouble with him before. He was standing in front of me when I shot him. . . . I didn't get mad with Mr. Clayton that morning. No need for me to get mad. I didn't have nowhere in God's world to put nothing but just in my house."

The defendant further testified that he went into the woods—not intending to seek refuge in flight—but when he saw in the Henderson paper that a mob was after him with guns and dogs, bloodhounds, he went away, intending to come home soon.

Verdict: Guilty of murder in the first degree.

Judgment: Death by electrocution.

The defendant appeals.

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

M. Hugh Thompson, C. J. Gates and Cecil A. McCoy for defendant.

STACY, C. J., after stating the case: If this were not a capital case, it would be necessary to affirm the judgment, on motion of the Attorney-General, for failure properly to present exceptive assignments of error. *S. v. Freeze,* 170 N. C., 710, 86 S. E., 1000; *S. v. Kelly, ante,* 660. In defense of counsel now appearing for the prisoner, however, it should be said they did not represent him at the trial or in the court below.

No exceptions were taken to the admission or exclusion of evidence and none properly to the charge. There was a formal motion to set aside the verdict and one in arrest of judgment, to which exceptions were entered, but otherwise the assignments of error are without exceptions to support them.

Speaking to a similar situation in *Boyer v. Jarrell,* 180 N. C., 479, 105 S. E., 9, the Court, quoting with approval from *Harrison v. Dill,* 169 N. C., 542, 86 S. E., 518, said: "The object of an assignment of error is not to create a new exception, which was not taken at the hearing, but to select from those which were taken such as the appellant then relies on after he has given more deliberate consideration to them than may have been possible during the progress of the trial or hearing. The assignment of error, therefore, must be based upon the exception duly taken at the time it was due in the orderly course of procedure, and should coincide with and not be more extensive than the exception itself. In other words, no assignment of error will be entertained which has not for its basis an exception taken in apt time."

Again, in *In re Will of Beard,* 202 N. C., 661, 163 S. E., 748, it was said: "The assignments of error are presumably based upon exceptions in the record, though they are neither brought foward nor specifically pointed out. *Merritt v. Dick,* 169 N. C., 244, 85 S. E., 2. This falls short of the requirements of Rule 19, sec. 3, of the Rules of Practice in the Supreme Court, 200 N. C., 824; *Rawls v. Lupton,* 193 N. C., 428, 137 S. E., 175. Only exceptive assignments of error are considered on appeal. *Dixon v. Osborne,* 201 N. C., 489; *Sanders v. Sanders,* 201 N. C., 350, 160 S. E., 289; *S. v. Freeze,* 170 N. C., 710, 86 S. E., 1000. The Constitution, Art. IV, sec. 8, empowers the Supreme Court 'to review on appeal any decision of the courts below, upon any matter of law or legal inference'; and this is to be presented in accordance with the mandatory rules of the Supreme Court. *Calvert v. Carstarphen,* 133 N. C., 25, 45 S. E., 353. The Court has not only found it necessary to adopt rules of practice, but equally necessary to enforce them and to enforce them uniformly. *Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126; *Byrd v. Southerland,* 186 N. C., 384, 119 S. E., 2.

"Furthermore, 'exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.' Rule 28; *Gray v. Cartwright,* 174 N. C., 49, 93 S. E., 432. The relation between appellants' brief and the record is discernible only after a voyage of discovery. *Sturtevant v. Cotton Mills,* 171 N. C., 119, 87 S. E., 992. For this, we are furnished no guides."

Likewise, in *Rawls v. Lupton,* 193 N. C., 428, 137 S. E., 175, and *Cecil v. Lumber Co.,* 197 N. C., 81, 147 S. E., 735, attention was called to the fact that these requirements are statutory, C. S., 643, as well as mandatory under numerous decisions of the Court. The Supreme Court on appeal exercises only appellate jurisdiction, and it is necessary that the errors alleged should be presented as the law directs. *S. v. Webster,* 121 N. C., 586, 28 S. E., 254.

Objections to the admission of incompetent evidence, or the exclusion of competent testimony, may be waived by failure to object in apt time. *S. v. Steen,* 185 N. C., 768, 117 S. E., 793. Similarly, other errors, not appearing on the face of the record proper, may be waived by failure to note objections or properly to assign errors and discuss them on brief. *Merritt v. Dick,* 169 N. C., 244, 85 S. E., 2.

In the present case, for instance, if the defendant wished to challenge the sufficiency of the evidence to show premeditation and deliberation beyond a reasonable doubt, as indicated on the argument, motion to nonsuit under C. S., 4643, on the capital charge, should have been lodged at the close of the State's case, exception noted, if overruled, and the motion renewed at the close of all the evidence, exception again noted, if overruled; and, in preparing the statement of case on appeal, an assignment of error should have been made based upon this second exception. *S. v. Lawrence,* 196 N. C., 562, 146 S. E., 395; *S. v. Sigmon,* 190 N. C., 687, 130 S. E., 854; *S. v. Killian,* 173 N. C., 792, 92 S. E., 499; *Nowell v. Basnight,* 185 N. C., 142, 116 S. E., 87; *Batson v. Laundry,* 202 N. C., 560, 163 S. E., 600; *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356. But no such exception and assignment of error appear on the record. In lieu of this, the defendant might have moved for a directed verdict on the capital charge, noted an exception, if overruled, and predicated an assignment of error upon this exception. But the record contains no such exception and assignment of error. The question therefore is not properly presented.

An attentive reading of the opinion in *Rawls v. Luptor, supra,* ought to acquaint appellants with the mechanics of taking exceptions, bringing them forward in the assignments of error, and preserving them by discussing them on brief, as required by Rules 19(3), 21 and 28 of the Rules of Practice in the Supreme Court, 200 N. C., 824-827-831. See, also, *S. v. Lea,* 203 N. C., 13, 164 S. E., 737; *Carter v. Bryant,* 199 N. C., 704, 155 S. E., 602, and *Riggan v. Harrison,* 203 N. C., 191, 165 S. E., 358.

But treating the assignments of error as supported by exceptions, they appear to be without merit. The court in charging the jury, and while stating the contentions of the State, said: " . . . that then his flight from the scene and his flight as far as Pennsylvania was a circumstance indicating, in recognition of the fact of his own guilt." This is assigned as error.

There are two reasons why the assignment cannot be sustained. In the first place, exceptions to the statement of contentions, not called to the attention of the judge at the time, so as to give him an opportunity to correct them, if erroneous, are treated as waived or ineffectual on

appeal. *S. v. Lea,* 203 N. C., 13, 164 S. E., 737; *S. v. Sloan,* 199 N. C., 598, 155 S. E., 258; *S. v. Steele,* 190 N. C., 506, 130 S. E., 308; *S. v. Parker,* 198 N. C., 629, 152 S. E., 890; *Mfg. Co. v. Building Co.,* 177 N. C., 103, 97 S. E., 718; *S. v. Little,* 174 N. C., 800, 94 S. E., 1; *S. v. Foster,* 172 N. C., 960, 90 S. E., 785. In the next place, the contention itself was legitimate. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604; *S. v. Mull,* 196 N. C., 351, 145 S. E., 677; *S. v. Lawrence,* 196 N. C., 562, 146 S. E., 395; *S. v. Stewart,* 189 N. C., 340, at p. 347, 127 S. E., 260; *S. v. Malonee,* 154 N. C., 200, 69 S. E., 786. The court was not undertaking to state the law of flight in giving the State's contention. *S. v. Mull, supra; S. v. Steele, supra.*

It is not perceived upon what theory error was committed in refusing to set aside the verdict or to arrest the judgment. A judgment in a criminal prosecution may be arrested, on motion duly made, when— and only when— some fatal error or defect appears on the face of the record. *S. v. McKnight,* 196 N. C., 259, 145 S. E., 281. The trial seems to have been conducted in strict conformity to the law, and with due regard for the rights of the defendant.

The intentional killing with a deadly weapon, admitted by the defendant, raised sufficient presumptions to establish an unlawful killing with malice, which is murder in the second degree, *S. v. Keaton ante,* 682, and the record contains ample evidence to support the finding of the additional elements of premeditation and deliberation necessary to constitute murder in the first degree. *S. v. Evans,* 198 N. C., 82, 150 S. E., 678; *S. v. Miller,* 197 N. C., 445, 149 S. E., 590; *S. v. Steele,* 190 N. C., 506, 130 S. E., 308; *S. v. Merrick,* 172 N. C., 870, 90 S. E., 257; *S. v. Cameron,* 166 N. C., 379, 81 S. E., 748; *S. v. McClure,* 166 N. C., 321, 81 S. E., 458; *S. v. Daniels,* 164 N. C., 464, 79 S. E., 953; *S. v. Exum,* 138 N. C., 599, 50 S. E., 283; *S. v. Thomas,* 118 N. C., 1113, 24 S. E., 431; *S. v. Norwood,* 115 N. C., 789, 20 S. E., 712.

The defendant's plea of self-defense was rejected by the jury. *S. v. Glenn,* 198 N. C., 79, 150 S. E., 663. It is observed that his wife and children were not called as witnesses in his behalf. It is not known whether they would have corroborated his testimony. This was a matter for his counsel to decide.

There is nothing appearing on the record which would warrant the Court in disturbing the verdict or the judgment. They will therefore be upheld.

No error.

C. M. PALMER, J. H. PALMER, AND M. V. PALMER, TRADING AND DOING BUSINESS AS PALMER STONE WORKS, v. GURNEY P. HOOD, COMMISSIONER OF BANKS, ON RELATION OF PAGE TRUST COMPANY.

(Filed 20 June, 1934.)

Banks and Banking H e—

The making of a deposit in a bank when same is insolvent to the knowledge of its officers does not entitle the depositor to a preference upon the bank's later receivership.

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

CIVIL ACTION, before *Sink, J.*, at April Term, 1934, of STANLY.

Plaintiff alleged that the Page Trust Company was a banking corporation, maintaining offices or branches within the State, and that on various days in February, 1933, and on the 1st, 2nd, and 3rd days of March, 1933, they had deposited various sums in said bank, aggregating $6,289.57.

Plaintiffs further alleged that at the time all of said deposits were made that said bank was hopelessly insolvent, and that the officers thereof knew of such insolvency at the time said deposits were received. It was further alleged that on 3 March, 1933, the bank closed and thereafter Gurney P. Hood, Commissioner of Banks, took charge of the assets thereof for the purpose of liquidation.

Upon the foregoing allegations the plaintiffs assert that said deposits constitute a preference. The defendant demurred to the complaint upon the ground that the facts stated did not constitute a preferred claim.

The demurrer was sustained and the plaintiffs appealed.

T. B. Mauney and R. L. Smith for plaintiffs.

C. I. Taylor and U. L. Spence for defendant.

PER CURIAM. Is a general depositor of funds in a bank, hopelessly insolvent at the time of making such deposits, entitled to a preference in the liquidation of said bank?

Preferences are usually created by statute or arise from the application of the trust fund theory. *In re Bank,* 204 N. C., 143, 167 S. E., 561. While there is abundant authority for the position asserted by the plaintiffs, this Court has consistently held that a general deposit such as disclosed by the present record, does not create a preference. Although there may be slight variations of fact, the case of *Mfg. Co. v. Hood,* 204 N. C., 349, 168 S. E., 523, and *Mfg. Co. v. Hood, ante,* 324, are determinative in principle.

Affirmed.

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

HOWARD MASON v. THE TEXAS COMPANY, INCORPORATED.

(Filed 11 July, 1934.)

1. Master and Servant D a: Principal and Agent C a—Burden is on injured third person to establish relationship of master and servant.

Where plaintiff seeks to hold defendant liable under the doctrine of *respondeat superior*, the burden is on plaintiff to establish, among other things, the existence of the relation of master and servant or of principal and agent between the defendant and the alleged wrongdoer, and where plaintiff introduces no competent evidence of such relationship plaintiff is not entitled to recover.

2. Same: Evidence H a—Plaintiff's testimony of agency held incompetent as hearsay.

Plaintiff, seeking to hold defendant liable under the doctrine of *respondeat superior*, testified that the alleged wrongdoer was working for defendant, but testified on cross-examination that he had been told that the alleged wrongdoer had a contract with defendant and was doing the work in question under such contract. *Held*, plaintiff's testimony of agency was incompetent as hearsay.

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

CIVIL ACTION, before *Frizzelle, J.*, at December Term, 1933, of CARTERET.

Plaintiff alleged and offered evidence tending to show that he was injured on Saturday evening, 1 August, 1931. The testimony disclosed that Dennis Mason operated a filling station at Atlantic, North Carolina, at which he sold products manufactured by the defendant. In connection with his business he owned a wharf at said point. This wharf was about eight feet above the water. There were eighty yards of pipe connected together, stretched along the wharf. The old pipe had been taken up and new pipe laid. It was lying about six or eight inches from the edge of the wharf. The plaintiff testified as follows: "There were six of us there getting our boats ready to go get our nets on. That was on Saturday evening. There was no danger there at all. We had all been working right around this dock for about forty years. We had been there turning our boats over Friday and Saturday and I had just got mine righted turning it over, when something struck me. I don't know whether I was knocked down or not. Something got me. It was that pipe, eighty yards of pipe, that he had left on the opposite side of the wharf. Mr. Chadwick had left it. He had been there to take up the old pipe and put down new. . . . Eighty yards of it was connected solidly together and it fell and struck me there. It left me in a bad condition. . . . I did not bring my boat in contact with the wharf. She was about five or six feet from the wharf. . . . I told

Mr. Hamilton the pipe had jumped off. I don't know how it got off. There was a boat started there at the time. I don't know who started the engine. I don't know whose boat it was unless it was Charlie Willis'. I don't know whether the pipe fell off when he started the boat or not. Something must have shook the pipe off. The pipe was inch and a half pipe." The evidence further disclosed that Dennis Mason, the owner of the wharf, upon which the pipe was lying, ran a store and sold gasoline, supplies and groceries. He was selling the Texas gasoline. He represented the Texas Company. A witness for plaintiff testified that "the pipe was somewhere between four and five inches from the edge of the wharf. Some parts of it were over the wharf. It had a crook in it." The plaintiff offered evidence that the pipe had been taken up and new pipe installed by a man named Chadwick. In order to connect Chadwick with the defendant the plaintiff was asked the following question by his counsel: "You say Mr. Chadwick was doing this work and left the pipe there? For whom was he doing the work?" Answer: "The Texas Company. They told me that the Texas Company gave it out on contract and he got the job. I was told that Mr. Chadwick had a contract with the Texas Company. I was told that at the time, he was a contractor to put the pipe down for the Texas Company."

The defendant in apt time objected to the question, but the objection was overruled.

The defendant offered in evidence the contract between the defendant, the Texas Company, and Dennis Mason, which was in writing, and said writing discloses that the defendant leased to said Dennis Mason certain equipment to be used by him on the premises for the storage and sale of petroleum products purchased solely from the defendant company; "but at all times is to remain the property of the company."

The defendant also offered in evidence the written contract between C. B. Chadwick and the Texas Company, dated 22 July, 1931, and in words and figures as follows: "I propose to install new 1¼" galvanized pipe line on Dennis Mason's Dock at Atlantic, N. C., furnishing all labor and material for the sum of $150.00 (700 ft. pipe). I guarantee this work to be of first class and will correct any defects arising within a period of thirty days after completion without cost to the Texas Company."

"Chadwick testified that in making the repairs on the wharf "I had complete control of the job and hired all labor and furnished all material. I had been through the job possibly three days when the accident happened. I left the old pipe between a foot and a foot and a half on the right side of the wharf as you go out." It also appeared in the testimony that C. T. Chadwick was the agent for the Texas Company at Beaufort and sold gas to Dennis Mason, the owner of the wharf,

and that C. B. Chadwick, the contractor who did the installation work, was a son of C. T. Chadwick.

The following issues were submitted to the jury:

1. "Was C. B. Chadwick an independent contractor as alleged in the answer?"

2. "Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?"

3. "Did the plaintiff, by his own negligence, contribute to his injury?"

4. "If so, what damage is the plaintiff entitled to recover from the defendant?"

The trial judge charged the jury upon the first issue as follows: "Now, gentlemen, the burden of that issue is upon the defendant to satisfy you upon the evidence and by its greater weight that C. B. Chadwick was an independent contractor in the performance of certain work contracted for as testified to by Mr. Chadwick himself and others in the trial of this case."

The jury answered the first issue "No," the second issue "Yes," the third issue "No," and the fourth issue "$500.00."

From judgment upon the verdict the defendant appealed.

Luther Hamilton for plaintiff.
Dunn & Dunn for defendant.

BROGDEN, J. "When it is sought to hold one responsible for the neglect or *tort* of another, under the doctrine of *respondeat superior,* at least three things must be made to appear, yea four, and, upon denial of liability, the plaintiff must offer 'some evidence which reasonably tends to prove every fact essential to his success.' . . . These are:

1. "That the plaintiff was injured by the negligence of the alleged wrongdoer.

2. "That the relation of master and servant, employer and employee, or principal and agent, existed between the one sought to be charged and the alleged *tort feasor.*

3. "That the neglect or wrong of the servant, employee, or agent, was done in the course of his employment or in the scope of his authority.

4. "That the servant, employee or agent, was engaged in the work of the master, employer, or principal, and was about the business of his superior, at the time of the injury." *Martin v. Bus Line,* 197 N. C., 720, 150 S. E., 501.

Applying the principles so clearly stated by the *Chief Justice* in the *Martin case, supra,* to the facts of the present record, it is manifest that the burden was upon the plaintiff to show that C. B. Chadwick

was the agent or employee of the defendant in leaving the pipe upon the wharf of Dennis Mason. The first issue was perhaps designed for the purpose of establishing such relationship. However, the plaintiff offered no evidence that C. B. Chadwick was the agent or employee of the defendant in doing the work. It is true that the plaintiff testified that Chadwick was doing the work for the defendant, but on re-cross examination as shown by the record, he said: "They told me that the Texas Company gave it out on contract and he got the job. I was told that Mr. Chadwick had a contract with the Texas Company. I was told that at the time, he was a contractor to put the pipe down for the Texas Company." Obviously, such evidence of agency was hearsay and should have been excluded. The defendant offered the written contract in evidence, and this contract, upon its face, in plain English discloses a relationship of independent contractor and not that of agency. Consequently, even if it be conceded that the instruction given the jury by the trial judge was correct as an abstract proposition of law, nevertheless there was no evidence that C. B. Chadwick was an agent or employee of the defendant. Hence, as the burden was upon the plaintiff to establish the agency, and having offered no evidence thereof, the defendant is entitled to a

New trial.

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

STATE ON THE RELATION OF THE ASSOCIATED COSMETOLOGISTS OF NORTH CAROLINA, INCORPORATED, v. ARTHUR T. RITCHIE AND L. L. SMITHEY.

(Filed 11 July, 1934.)

Public Officers D a—Relator in action to vacate public office must have some interest in the action, though he need not be contestant.

Relator, the Associated Cosmetologists of North Carolina, Incorporated, brought this action with the permission of the Attorney-General attacking defendants' rights to hold office on the Board of Cosmetic Art Examiners to which they were appointed by the Governor under the provisions of chapter 179, Public Laws of 1933, relator contending that defendants were not qualified to hold the office because they did not possess the express qualifications prescribed by the statute. The complaint did not allege that relator is a taxpayer of Wake County, or even of North Carolina, nor a voter of the State, nor that relator is affected by or interested in the Board of Cosmetic Art Examiners. *Held*, defendants' demurrers to the complaint were properly sustained, it being required that the relator in an action to vacate a public office have some interest in the action, though it is not required that he be a contestant for the office.

ASSOCIATED COSMETOLOGISTS *v.* RITCHIE.

CIVIL ACTION, before *Harris, J.*, at December Term, 1933, of WAKE.

The plaintiff procured permission from the Attorney-General, as required by law, to institute this action: The complaint is as follows:

"1. That the plaintiff is a corporation created, organized and existing under and by virtue of the laws of North Carolina, having its principal place of business in the city of Winston-Salem, N. C.; that said corporation is a nonstock and nonprofit corporation created for the purpose of furthering the best interests of the Cosmetologists of North Carolina in all lawful and proper ways, and particularly with respect to their rights and duties under and by virtue of chapter 179, Public Laws of 1933, hereinafter more particularly referred to, and that membership in said corporation is limited to Cosmetologists in the State of North Carolina.

"2. That the defendants, Arthur T. Ritchie and L. L. Smithey, are citizens of the State of North Carolina, and at the present time reside in the city of Raleigh.

"3. That the Legislature of North Carolina, at the session of 1933, passed an act to regulate the practice of cosmetic art in the State of North Carolina, said act being chapter 179, of the Public Laws of said session; that section 13 of said act provides for the appointment of a State Board of Cosmetic Art Examiners to consist of three persons, said section being in words and figures as follows:

'A board to be known as the State Board of Cosmetic Art Examiners is hereby established to consist of three members appointed by the Governor of the State. Each member shall be an experienced cosmetologist, who has followed the practice of cosmetic art for at least five years next preceding his or her appointment, in the State. The members of the first board appointed shall serve for three years, two years, and one year respectively, after appointment, and members appointed thereafter shall serve for three years. The Governor, at his option, may remove any member for good cause shown and appoint members to fill unexpired terms.'

"4. That under and by virtue of said act, and more particularly of section 13 thereof fully set out in the preceding paragraph, his Excellency, the Governor of the State of North Carolina, on or about the ..... day of July, 1933, appointed as members of said State Board of Cosmetic Art Examiners, Arthur Ritchie and L. L. Smithey, the defendants herein, and the said Arthur T. Ritchie and L. L. Smithey have attempted to qualify as members of said board and have entered upon the discharge of their official duties.

"5. That as this plaintiff is informed and believes and therefore alleges neither the said Arthur T. Ritchie nor L. L. Smithey are experienced cosmetologists who have followed the practice of the cosmetic

art for the last five years next preceding their appointment, in the State; that on the other hand, as this plaintiff is informed and believes, and therefore alleges, the said Arthur T. Ritchie and L. L. Smithey are totally ignorant of the cosmetic art and as a matter of fact are and have been for a number of years engaged in following the business of barbering.

"6. That as this plaintiff is informed and believes, and therefore alleges, the said Arthur T. Ritchie and L. L. Smithey are not qualified under the terms of said chapter 179, of the Public Laws of 1933, to act as members to the State Board of Cosmetic Art Examiners for the reason that they cannot comply with the provisions of said act and more particularly with those of section 13 of said act, and that their attempted appointment is null, void and of no effect.

"Wherefore, this plaintiff prays that the offices occupied by the said Arthur T. Ritchie and L. L. Smithey be declared vacant, and that the said Arthur T. Ritchie and L. L. Smithey be forthwith removed from membership on said Board of Cosmetic Art Examiners."

The defendants filed a demurrer as follows:

"1. For that the complaint does not state facts sufficient to constitute a cause of action against the defendants.

"2. For that the court in which the action is instituted has no jurisdiction to hear and determine this controversy.

"3. For that section 13, of chapter 179, of the Public Laws of 1933, provides for the method of removal of the members of the board created under said act and gives to the Governor of North Carolina the power at his option to remove for good cause shown any member of said board. The matters and things set forth in the complaint have already been presented to the Governor of North Carolina on a motion to remove the defendants for cause and the Governor has taken action on said motion and refused to remove the defendants.

"Wherefore, the defendants pray that this action be dismissed and that they recover their costs."

After hearing the argument it was "ordered and adjudged by the court that the demurrer be and the same is hereby sustained, and this action is dismissed." etc.

From the foregoing judgment the plaintiff appealed.

John W. Hinsdale and W. H. Sawyer for plaintiff.
Jones & Brassfield for defendants.

BROGDEN, J. Can the plaintiff maintain this action upon the allegations of the complaint?

This suit is instituted for the purpose of vacating an alleged office held by the defendants as members of the State Board of Cosmetic Art

Examiners as described in chapter 179, of the Public Laws of 1933. The gravamen of the action is that the defendants are not qualified to hold the office by virtue of the fact that they do not possess the express and unequivocal qualifications prescribed by statute, and this fact is admitted by the demurrer. Notwithstanding, the courts cannot hear a person who is not the party aggrieved and who has no interest in the subject-matter of the action.

What interest then, has the plaintiff in the subject-matter of this action?

It is alleged in the complaint that the plaintiff is a corporation of North Carolina with an office in Winston-Salem. It is not alleged that the plaintiff is a taxpayer of Wake County, or even of North Carolina, or a voter of the State. It does not appear upon the face of the complaint how the plaintiff corporation is affected by or interested in the Board of Cosmetic Art Examiners. While it is alleged generally in the complaint that membership in the plaintiff corporation is limited to cosmetologists, it does not appear that all cosmetologists are members nor as to how membership is acquired.

The right to maintain an action to vacate an office is not dependent upon the fact that the relator or plaintiff is entitled to the office or any of its emoluments. Nevertheless, a party cannot maintain a suit in which he has no interest. This idea was expressed in *Hines v. Vann,* 118 N. C., 3, as follows: "The defendant was entitled to have the allegation showing the relator's interest which would entitle him to maintain the action set out in the complaint so that, by proper denial or demurrer, the defendant could have the fact found by the jury or the ruling on the law reviewed by appeal. The relator is the real party plaintiff and the courts have never gone to the extent of permitting him to maintain an action in which he had no interest."

Again, it has been held in *Jones v. Riggs,* 154 N. C., 281, 70 S. E., 465, that "*quo warranto* as to an office can be brought upon leave of the Attorney-General by any citizen who is a qualified voter and taxpayer of a municipal corporation, or any jurisdiction over which the officer whose title is questioned exercises his duties and powers, though the relator is not himself a contestant for the office. But this is on the ground that he is a party in interest and has a direct interest in having the office occupied only by an officer who is entitled to it." To like effect is the statement of law in *Houghtalling v. Taylor,* 122 N. C., 141, 29 S. E., 101, as follows: "In such case the plaintiffs, having no direct personal interest in the action, must show that they have some public interest to be affected or that may be affected by the defendants being allowed to hold said office, that is, that they are residents and taxpayers in the county where the defendants are holding and exercising the office. This may seem to be a technical objection, but it is not. If this were

not the law, our best people, elected to office beyond all doubt, might be annoyed and vexed by persons from other counties or even from other states, who had not the slightest interest in the office or in the public good." The last utterance of the Court occurs in *Bouldin v. Davis*, 197 N. C., 731, 150 S. E., 507. The Court said: "A relator need not be a contestant for the office, but he must be a citizen and taxpayer within the jurisdiction over which an incumbent of the contested office exercises the functions prescribed by law." See, also, *Saunders v. Gatling*, 81 N. C., 298; *Ellison v. Raleigh*, 89 N. C., 125; *Foard v. Hall*, 111 N. C., 369, 16 S. E., 420.

Therefore, as the complaint does not disclose such interest as the law requires, in cases of this type, the ruling of the trial judge was correct.

Affirmed.

STATE v. AMOS JONES, EMORY BURNS, GUILFORD SEYMOUR, AND W. H. FRY.

(Filed 11 July, 1934.)

1. Constitutional Law F c: Criminal Law H c—Refusal of motion for continuance held not to deny accused's right of confrontation.

Appealing defendant was charged in a recorder's warrant with being an accessory after the fact and the other defendants with murder. About a month later a bill was submitted to the grand jury charging the other defendants with murder, and during the jury's consideration of the bill the name of the appealing defendant was inserted therein, and the bill charging all the defendants with murder was returned "a true bill" on Tuesday and defendants placed on trial the following day. Appealing defendant made a motion for a continuance in order to prepare his case, and the motion was refused. *Held*, it cannot be determined as a matter of law from all the facts that the refusal of the motion for continuance deprived defendant of his constitutional right of confrontation, and defendant's exception is not sustained.

2. Criminal Law C a: I g—Defendant held not entitled to instructions relating to innocent by-stander under evidence in this case.

The State's evidence, controverted by testimony of the appealing defendant, was to the effect that all three defendants, while hunting with guns, went upon deceased's lands, with animus, and that all three defendants actively engaged in an assault upon deceased, one or more of defendants retaining his gun, and that one of them fatally shot deceased. The appealing defendant requested instructions that his mere presence at the scene of the homicide would not make him guilty of aiding and abetting in the absence of conspiracy, if he gave no aid or encouragement at or before the commission of the crime, even though he knew the crime was to be committed and approved of its commission, if his approval was not communicated to the perpetrator, and that if three persons are charged with killing another, but not with conspiracy, the jury should acquit if they have a reasonable doubt as to which one

inflicted the injury. The requested instructions were refused and defendant excepted and appealed. *Held*, the exception cannot be sustained, for, although the requested instructions are correct as abstract principles of law, the State's evidence disclosed that defendants were acting in unison, making it immaterial which defendant actually fired the fatal shot, even though the bill of indictment did not charge conspiracy.

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

CRIMINAL ACTION, before *Sink, J.*, at January Term, 1934, of MOORE.

J. M. Rinehart was killed on or about 30 November, 1933. On the 1st day of December thereafter a warrant was issued by the clerk of the recorder's court charging Amos Jones, Emory Burns and Guilford Seymour with murdering Rinehart and charging that Fry aided and assisted Jones in escaping, and hence as accessory after the fact. Thereafter at the January Term, 1934, of the Superior Court the grand jury returned a true bill against the four defendants, charging them with the murder. The record shows the following: Jones and Burns were held by the coroner without bail and Fry was recognized by the coroner as a witness for the State. Subsequently a warrant was issued from the recorder's court of Moore County, charging Jones, Burns and Seymour with the murder and charging Fry with aiding and assisting Jones to escape. Thereafter at the January Term, 1934, while the said cause was pending in the recorder's court, the solicitor sent a bill to the grand jury, charging Jones, Burns and Seymour with the crime. While the bill was being considered by the grand jury the solicitor sent for the bill and inserted therein the name of defendant Fry, charging him jointly with the other defendants of the crime of murder. A true bill was returned into open court on Tuesday. As soon as the bill was returned into court counsel for Fry moved for a continuance "for the reason that his client was not included in the original warrant and investigation either before the coroner or the recorder's court in Moore County under a charge of murder . . . and this defendant was not placed under arrest and charged with the crime of murder until the indictment was found on the 2nd day of January Term of court. That defendant had not had an opportunity to prepare his case for trial under the charge of murder and his counsel was not prepared to properly represent his client and to defend him at the January Term of court; that he was taken by surprise in that his client was not included in the original bill sent to the grand jury, and that a bill of indictment charging the said W. H. Fry as an accessory after the fact was considered by the grand jury at said January Term of court and returned "not a true bill," and counsel for defendant, W. H. Fry, urged a continuance of the case in order to enable him to properly prepare the defense of his client."

The foregoing motion was denied.

The case was called for trial on Wednesday, the following day, and counsel for defendant renewed the motion and reasserted that he was "totally unprepared to meet the serious charge of a capital felony at this term of court, and that his client should be given a reasonable opportunity to prepare his defense . . . until the next term of court."

This motion was likewise denied.

The evidence tended to show that on Thanksgiving Day, 1933, Seymour, Jones, Burns and Fry were hunting. Some of the party procured whiskey, and there was evidence that Fry and Burns, and Jones particularly, were "high."

The defendant, Seymour, was used as a State's witness and testified in effect that soon after the party assembled Jones and Fry had a private conference. Shortly afterwards Fry and Jones said: "Let's go on across toward Rinehart's house. Fry suggested going that way." When the party approached Rinehart's premises, "Emory Burns bet Mr. Fry fifty cents he could shoot a pine off with one shot and he was shooting the pine and Mr. Rinehart came. . . . Some dogs barked up on the hill and some one of them says, 'Yonder's somebody,' and I looked around and said, 'I expect he's bird hunting,' and Mr. Fry said, 'It's Rinehart,' and Jones started . . . up that way and called Rinehart a pot gutted son of a bitch. . . . Mr. Rinehart said, 'What is the matter with you?' . . . Jones got hold of Rinehart's gun barrel and when he got up there he called Burns and said, 'Come on and help me whip him,' and Burns went on up there and raised his gun toward Rinehart and says, 'Drop your gun.' At that time Jones had hold of Mr. Rinehart's gun barrel and was backing him up the hill. Jones threw his gun down when he got hold of Mr. Rinehart's gun. When Burns raised his gun and pointed it at Mr. Rinehart and told him to drop his gun Mr. Rinehart didn't do anything and didn't say anything. . . . Fry had run up there. He had got up there with them and was in the bunch. He was scuffling around there. He (Rinehart) was killed in the scuffle with Jones and Fry. I don't know that he had his hands on anybody. It was all of them mixed up. They were in a tussle there. When Burns went up there and drew his gun on him Fry run up there then. . . . He was right in there amongst them. . . . Mr. Rinehart was facing Amos Jones and he knocked him down. . . . Amos Jones fell and when he did somebody shot him (Rinehart). When the shot was fired Fry and Burns were close to him. . . . Mr. Fry was standing pretty close to him. I guess he was in four feet of Rinehart. . . . Fry didn't say anything. When Jones was knocked down Burns and Fry were both there; they had followed up there the fifteen or twenty feet. . . . I don't think

Burns ever got in the scuffle." There was evidence that Fry "threw his gun down . . . before he got to them." Fry, Jones and Burns left the body of the dead man "cursing" as they walked away. There was also evidence that immediately after the fatal shot was fired Jones accused Burns of shooting the deceased and Burns denied it, "but Mr. Fry did not open his mouth." There was evidence that Fry had stated previous to the killing that he was mad with the deceased and had said to State's witness, "I don't like the durn scoundrel." There was further evidence that after Rinehart was slain that Fry referred to him in vile language. The State offered evidence that "when the scuffle started with the deceased Fry came up and said to the deceased, 'Stop—drop your gun or I will make you do it,' something like that."

Fry testified at the trial that when he saw his companions about to assault the deceased he ran up and attempted to prevent the killing and did all in his power as a peace-maker to avert the unfortunate tragedy. The defendant Fry in apt time properly requested the following instructions: (1) "That the mere presence of the defendant Fry at the place and time of the homicide, and without giving aid or encouragement at or before the commission of the homicide, and without prior conspiracy, although with knowledge that the crime is to be committed, and even with approval of its commission, if that approval is not communicated to the perpetrator, does not constitute aiding and abetting." (2) "That when three persons are charged with killing another, but not with conspiracy, the jury shall acquit if they have a reasonable doubt as to which one inflicted the injury."

The trial judge declined to give either of the foregoing instructions and the defendant excepted.

The jury convicted Burns, Jones and Fry of murder in the second degree, and from judgment sentencing each of them to substantial terms in the State's prison, the defendant Fry appealed.

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

R. E. Denny and Jones & Brassfield for defendant.

BROGDEN, J. Four assignments of error are discussed in the brief of appellant. These assignments relate (a) to the refusal of the trial judge to continue the case; (b) to the refusal to submit the special instructions requested by the defendant.

The accepted and long prevailing rule governing the law of continuance has been recently stated in *S. v. Garner,* 203 N. C., 361, 166 S. E., 180, as follows: "While, ordinarily, this is a matter resting in the sound discretion of the trial court, nevertheless, it should be remembered that defendants have a constitutional right of confrontation, which can-

not lawfully be taken from them, and this includes the right of a fair opportunity to face 'the accusers and witnesses with other testimony.' . . . But the record is barren of any affidavits, or evidence tending to show a denial of this right. . . . In the absence of a clear showing, the exception must be overruled. The burden is on appellants to show error, and they must make it appear clearly, as the presumption is against them."

While the judicial machinery moved rapidly in this case, it cannot be said as a matter of law, that the mere fact that a defendant is indicted for a capital felony on Tuesday and placed on trial on the following day, is in itself such unseemly haste as to work a denial of constitutional rights.

The special instructions prayed by the defendant were taken from *S. v. Powell,* 168 N. C., 139, 83 S. E., 310; *S. v. Goode,* 132 N. C., 982, 43 S. E., 502. These instructions are correct as abstract propositions of law. However, the evidence for the State discloses that the defendant was "hunting with the pack." Moreover, the testimony for the State tended to show that the three defendants on trial actively engaged and participated in the assault upon the deceased or the "scuffle" which terminated in the death of Rinehart. Consequently, they were acting in unison.

Instructions of a similar nature were requested by the defendant and denied in *S. v. Rideout,* 189 N. C., 156, 126 S. E., 500. In discussing the applicability of the principles of law involved, the Court said: "If the jury found from the evidence, as their verdict indicates they did, that one of the defendants shot Alex Hedgepeth and thereby killed him with a gun and shells which both defendants had carried to the whiskey still with a common purpose, then it was for the jury to determine whether this act was so related to the unlawful act which the defendants had conspired to do as that the conspirator who did not fire the shot was equally as guilty as his conspirator who did fire the shot." The Court further quoting from *S. v. Finley,* 118 N. C., 1161, 24 S. E., 495, said: "The prayer in the abstract embraces a sound doctrine of law; but where a conspiracy or an agreement between two or more to do an unlawful act has been proved, and as a result and consequence therefrom a crime is committed, the rule is different, and it is altogether an immaterial matter which one of the actors actually commits the deed; they are all principals and all guilty of the offense." Furthermore, the original record in the *Rideout case* discloses that there was no allegation of conspiracy in the bill of indictment, but the same laid a charge of murder in the second degree against both defendants.

No error.

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

NELLIE A. HARRELL v. H. L. WELSTEAD ET AL.

(Filed 11 July, 1934.)

1. Process A d: Judgments K c—Default judgment upon process returnable to county other than one rendering judgment is void.

Summons was served on the corporate defendant requiring it to appear and answer in a county other than the county in which the action was instituted. Defendant mailed answer to the clerk of the county of trial, but it was received after expiration of time for filing. N. C. Code, 509. Judgment by default and inquiry was entered which was later executed, resulting in a verdict in plaintiff's favor. *Held*, the summons was fatally defective, and as the judgment was entered for want of an answer, defendant had made no appearance and the court had no jurisdiction of defendant, and the judgment is void, and should have been set aside on defendant's motion thereafter made to vacate same.

2. Appearance A b—Appearance after judgment will not validate a judgment which is void for want of proper process.

An appearance to vacate a judgment entered by default and inquiry will not validate such default judgment when it is void because rendered without service of process returnable to the proper county, it appearing that no appearance of any kind was made by the defendant before judgment.

3. Judgments K b—Neglect to file answer is attributable to defendant where he employs counsel licensed to practice only in another state.

A joint answer by the individual and corporate defendant was prepared by an attorney of another State and mailed to the clerk of the trial court, but was not received by him until time for filing answer had expired, N. C. Code, 509. Judgment by default and inquiry was entered, and the individual defendant who had been duly serviced with process, moved to vacate same for surprise and excusable neglect. *Held*, the individual defendant had entrusted his case to one not licensed to practice in this State, and employed no attorney regularly practicing in the courts of the county or the district, and his failure to answer is attributable to his own negligence, and his motion to vacate was properly refused.

APPEAL by defendants, H. L. Welstead and Standard Oil Company of New Jersey, from *Small, J.*, at September Term, 1933, of CURRITUCK.

Civil action to recover damages for an alleged negligent injury.

On 28 November, 1932, plaintiff was riding with her husband and their child in a Ford truck. They stopped at the filling station of the defendant, H. L. Welstead, in Currituck County to get some gasoline. Plaintiff's husband undertook to assist the defendant Welstead in filling the truck tank, when an explosion occurred, seriously injuring the plaintiff.

On 20 March, 1933, this suit was instituted by the simultaneous issuance of two summonses by the clerk of the Superior Court of Cur-

rituck County, one commanding the sheriff of Currituck County to summon H. L. Welstead and T. Smith Harrell, Jr., to appear before the said clerk at his office in Currituck within thirty days after service and answer the complaint, etc., which said summons was duly served 21 March, 1933, the other addressed to the sheriff of Pasquotank County, commanding him to summon the Standard Oil Company of New Jersey "to appear before the clerk of the Superior Court for the county of Pasquotank at his office in Elizabeth City within thirty (30) days after the day of service hereof, and answer the complaint, which has been filed in the office of the said clerk of the Superior Court of said county, a copy of which is served herewith." Service was made by sheriff of Pasquotank County 22 March, 1933, and returned to the clerk of Currituck County. Verified complaint was filed and copies duly served with the summonses.

On 17 April, 1933, plaintiff's husband, T. Smith Harrell, Jr., filed a demurrer to the complaint, which was sustained.

Joint answer of H. L. Welstead and Standard Oil Company of New Jersey was prepared by S. Burnell Bragg, attorney of Norfolk, Va., verified by H. L. Welstead 12 April, 1933, sent by said attorney to C. M. Byers, manager of the defendant Oil Company at Charlotte, N. C., verified by said manager and mailed from Charlotte to the clerk of the Superior Court of Currituck County, 17 April, 1933, in time to have reached the clerk in the regular course of the mail before expiration of time for filing. The said answer, but no copy, was received by the clerk of the Superior Court of Currituck County when he called for his mail 22 April, 1933. The clerk at first marked this answer "Filed 4/22/33, R. P. Midgett, C. S. C.," but later erased the word "Filed" and inserted in lieu thereof the word "Rec'd." Time for answering had expired when received by the clerk.

On 1 May, 1933, judgment by default and inquiry, for want of an answer, was entered against H. L. Welstead and Standard Oil Company of New Jersey.

Said defendants, on 8 July thereafter, made a motion to set aside the judgment by default and inquiry on the grounds of irregularity, excusable neglect, and as a matter of right. This motion was denied, though it was found that said defendants "have a meritorious defense to the cause of action set up in the complaint." Exception.

The inquiry was executed at the September Term, 1933, Currituck Superior Court, which resulted in a verdict and judgment of $10,000 for the plaintiff. Defendants appeal, assigning errors.

M. B. Simpson and McMullan & McMullan for plaintiff.

Thompson & Wilson, S. Burnell Bragg and Pou & Pou for defendants.

STACY, C. J. If it be conceded that the answer of the defendants was not properly filed (Michie's Code, sec. 509), or was not filed in time, then the judgment by default and inquiry is void as to the corporate defendant, for said defendant had never been summoned to appear in Currituck County. Its summons was to appear before the clerk of the Superior Court of Pasquotank County and answer the complaint filed in his office. Therefore, unless the corporate defendant had come in by answer, it was not in court at all, and the judgment is without warrant of law as to it. *Bank v. Wilson,* 80 N. C., 200. By the same token or reason that the answer is excluded, the judgment is rendered ineffectual as against the nonappearing defendant. "Jurisdiction of the party, obtained by the court in some way allowed by law, is essential to enable the court to give a valid judgment against him"—*Merrimon, J.,* in *Stancill v. Gay,* 92 N. C., 462.

A default judgment rendered against a defendant in an action where he has never been served with process returnable to the proper county, nor appeared in person or by attorney, is not simply voidable, but void, and will be set aside on motion. *Fowler v. Fowler,* 190 N. C., 536, 130 S. E., 315; *Clark v. Homes,* 189 N. C., 703, 128 S. E., 20; *Moore v. Packer,* 174 N. C., 665, 94 S. E., 449; *Ins. Co. v. Scott,* 136 N. C., 157, 48 S. E., 581; *Condry v. Cheshire,* 88 N. C., 375; *Doyle v. Brown,* 72 N. C., 393.

Speaking of the effect of a judgment rendered against a defendant who had never been served with summons, in *McKee v. Angel,* 90 N. C., 60, *Ashe, J.,* delivering the opinion of the Court, said:

"Judgments are either irregular, erroneous or void. Irregular judgments are such as are entered contrary to the course and practice of the court. An erroneous judgment is one that is rendered contrary to law.

"A void judgment is one which has only the semblance of a judgment, as if rendered by a court having no jurisdiction, or against a person who has had no notice to defend his rights. *Stallings v. Gully,* 48 N. C., 344; *Armstrong v. Harshaw,* 12 N. C., 187; *Jennings v. Stafford,* 23 N. C., 404.

"Erroneous and irregular judgments cannot be collaterally impeached, but stand until they are reversed or set aside. *Jennings v. Stafford, supra.* But a void judgment is no judgment, and may always be treated as a nullity."

A nullity is a nullity, and out of nothing nothing comes. *Ex nihilo nihil fit* is one maxim that admits of no exceptions. *Chemical Co. v. Turner,* 190 N. C., 471, 130 S. E., 154.

Nor did the corporate defendant's appearance by motion to vacate said judgment give life to that which was then a nullity. Such appearance put the corporate defendant in court, but only as a defendant with the right to answer to the merits, and not for the purpose of

validating a judgment previously entered cutting off such right. *Motor Co. v. Reaves,* 184 N. C., 260, 114 S. E., 175; *Michigan Central R. R. v. Mix,* 278 U. S., 492; 15 R. C. L., 700.

In *Lowman v. Ballard,* 168 N. C., 16, 84 S. E., 21, where service of summons was sought to be had by sheriff reading summons to defendant over telephone, it was held that judgment entered in the cause should be set aside on motion and defendant allowed to answer.

The motion of the corporate defendant to vacate the judgment by default and inquiry should have been allowed.

Indeed, it may be doubted whether a contrary holding would stand the test of due process. *Hassler v. Shaw,* 271 U. S., 195; *McDonald v. Mabee,* 243 U. S., 90; *Harkness v. Hyde,* 98 U. S., 476; *Markham v. Carver,* 188 N. C., 615, 125 S. E., 409; *Burton v. Smith,* 191 N. C., 599, 132 S. E., 605. "The essential elements of due process of law are notice and opportunity to defend." *Simon v. Craft,* 182 U. S., 427; *Daniels v. Homer,* 139 N. C., 219, 51 S. E., 992. No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party"—*Mr. Justice Gray* in *Scott v. McNeal,* 154 U. S., 34. Compare *Kauffman v. Wootters,* 138 U. S., 285; *York v. Texas,* 137 U. S., 15.

At one time in England the denial of due process was humorously styled Lydford Law, derived from Lydford, a village in Devonshire. A burlesque copy of verse on this town begins:

"I oft have heard of Lydford Law,
How in the morn they hang and draw,
And sit in judgment after."

See Introduction Scott's Minstrelsy of the Scottish Border.

The one fatal circumstance, which is not to be overlooked, is, that no appearance of any kind was made by the corporate defendant *before judgment* cutting off its right to be heard on the merits. It was pointed out in *York v. Texas,* 137 U. S., 15 (two *Justices* dissenting), that the mere rendition of a judgment, pursuant to a Texas statute, did not deprive a defendant of his property without due process of law, since he was thereafter at liberty to enjoin its execution; that only by execution of the judgment, and not by its rendition, was the defendant's property liable to be taken. But we are unwilling to say, in the absence of statute governing the matter, that a judgment by default and inquiry, admittedly void as to the corporate defendant for want of service or waiver of summons, is made alive against said defendant simply by motion to set it aside.

With respect to the individual defendant who was duly served with summons, it appears that he entrusted his case to one who is neither

a licensed nor a practicing attorney in this State, and employed no one who regularly practices in the courts of Currituck County, or of the First Judicial District, hence it would seem that his failure to answer must be attributed to his own negligence. *Pailin v. Cedar Works*, 193 N. C., 256, 136 S. E., 635; *Stallings v. Spruill*, 176 N. C., 121, 96 S. E., 890.

Error.

IN THE MATTER OF THE BANK OF AYDEN.

(Filed 11 July, 1934.)

Banks and Banking H h—Order that equal dividends on unproven and tardily proven claims be paid to clerk for distribution after hearings, entered to permit receiver to file final report, held without error.

An order of the Superior Court entered so that the Commissioner of Banks as statutory receiver for an insolvent bank might complete the liquidation of the bank and file his final account, all assets of the bank having been liquidated, which provides that the Commissioner of Banks should first pay all proper expenses of liquidation and then declare, out of the funds then remaining, a pro rata dividend among all depositors and creditors of the bank recognized by it at the time of its closing and that the dividends to creditors recognized by the bank but who had not filed claims, and dividends to creditors who had filed claims after expiration of the time be made to equal the dividends previously or subsequently declared on aptly proven claims, but that such dividends on unproven and tardily proven claims should be paid to the clerk of the Superior Court who should hold same for three months, after advertisement, for hearing and decision of conflicting contentions of creditors and depositors, and so that the University's asserted right under chapter 546, Public Laws of 1933, to unclaimed dividends then remaining might be heard, *is held* without error.

APPEAL by Gurney P. Hood, Commissioner of Banks, from *Daniels, J.*, at February Term, 1934, of PITT. Affirmed.

The above entitled cause, now pending in the Superior Court of Pitt County, was heard on the petition of Gurney P. Hood, Commissioner of Banks, for an order advising and instructing him with respect to the payment of dividends out of the assets of the Bank of Ayden, an insolvent banking corporation, now in his hands for liquidation, to the creditors and depositors of said bank.

The University of North Carolina was permitted to intervene in the cause, and to file a petition, setting out its contentions with respect to unclaimed dividends, if there shall be any, under the provisions of chapter 546, Public Laws of North Carolina, 1933.

The Bank of Ayden closed its doors and ceased to do business on 30 November, 1927, because of its insolvency. All of the assets of

said bank came into the possession of the Corporation Commission of North Carolina, and subsequently into the possession of the petitioner, Gurney P. Hood, Commissioner of Banks, as the statutory successor of said Corporation Commission, for liquidation as provided by statute. The said assets have been fully liquidated, and after the payment of the costs and expenses incurred in the liquidation, and of dividends to creditors and depositors of the bank, there is now in the hands of the petitioner, the sum of $4,129.58, for distribution to creditors and depositors of said bank, according to their respective rights.

Notice was given as provided by statute to all creditors and depositors of the Bank of Ayden that each of them was required to prove and file his claim against said bank, within ninety days after 2 January, 1928. Pursuant to this notice, claims aggregating the sum of $165,057.26 were proven and filed before the expiration of said ninety days. A dividend of 10 per cent was declared and paid out of the assets of said bank, on these claims. Thereafter, unsecured claims aggregating the sum of $1,438.79, and secured claims aggregating the sum of $16,700.26, were proven and filed. A second dividend of 10 per cent was then declared and paid out of the assets of said bank on all claims against said bank, both those proven and filed before, and those proven and filed after the expiration of said ninety days. This dividend, together with the sums realized from the sale of the securities, was sufficient to pay and did pay in full the secured claims against said bank. Thus, creditors and depositors who proved and filed their claims before the expiration of the ninety days have been paid out of the assets of said bank, 20 per cent of their claims, while creditors and depositors who proved and filed their claims, after the expiration of said ninety days, have been paid out of said assets only 10 per cent of their claims.

The total indebtedness of the Bank of Ayden to creditors and depositors, who have neither proved, nor filed their claims against said bank, amounts to $5,365.35. This indebtedness was recognized by said bank at the time it closed its doors and ceased to do business. No dividend has been declared or paid on the amount of this indebtedness.

The proceeds of the liquidation of the assets of the Bank of Ayden are not and will not be sufficient to pay in full the claims of its creditors and depositors.

On these facts alleged in the petition of Gurney P. Hood, Commissioner of Banks, and admitted in the petition of the University of North Carolina, it was ordered by the court:

"1. That Gurney P. Hood, Commissioner of Banks and statutory receiver of the Bank of Ayden, be and he is hereby authorized and directed:

(a) To file in the office of the clerk of the Superior Court of Pitt County at Greenville a list showing all liabilities of the Bank of Ayden admitted as such before the bank closed but for which no claimant has filed claim;

(b) To pay any expense of liquidation heretofore approved by the court as such, and to present a statement of any other expense for approval, and to pay the same when and if approved; to prepare and file his final account showing the balance available for distribution to creditors, such distribution to be made in accordance with the instructions of the court in the following paragraphs;

(c) To pay to the clerk of the Superior Court of Pitt County the first dividend of 10 per cent which has not yet been paid to the creditors listed in Exhibit 'A,' attached to the petition of Gurney P. Hood, Commissioner of Banks (these are the creditors who proved and filed their claims after the expiration of ninety days from 2 January, 1928), and a 20 per cent dividend on the bank's liability to those depositors and other creditors who have not filed their claims, but liability for which was recognized by the bank before it closed.

(d) To distribute any balance then remaining pro rata to all the creditors of the bank not yet satisfied whether such creditors have filed claim or not, but where any such creditors have not filed their claim the pro rata payments are not to be made to them but to the clerk of the Superior Court of Pitt County.

(e) To cause to be published once each week for four weeks in a newspaper published in Pitt County, a notice to creditors owning balances in said Bank of Ayden which were recognized as a valid liability by such bank before it closed, but for which no claim has been filed, that a list of such creditors is filed in the office of the clerk of the Superior Court of Pitt County at Greenville, that a fund is being paid to the clerk of the Superior Court of Pitt County representing the pro rata dividends of such claims, that the clerk of the Superior Court will hold this fund for a period of three months from the time of the filing of the final report in this matter, and calling upon such creditors to take such action in the premises as they may be advised.

(f) Then to proceed to file the final report to the court provided in subsection 18, section 218(c), of Consolidated Statutes as amended."

The petitioner, Gurney P. Hood, Commissioner of Banks, excepted to the foregoing order, and appealed therefrom to the Supreme Court.

C. I. Taylor and Blount & James for Gurney P. Hood, Commissioner of Banks.

Attorney-General Brummitt and Assistant Attorney-General Seawell and M. S. Breckenridge for University of North Carolina.

CONNOR, J. We find no error in the order of Judge Daniels, in this cause.

The effect of the order is to authorize and direct the Commissioner of Banks, in order that he may complete the liquidation of the Bank of Ayden, and file his final account as its statutory receiver, and thereby be discharged of all liability as such receiver, after paying all the costs and expenses of the liquidation, to declare a dividend out of the assets then remaining in his hands, on the claims of all the creditors and depositors of said bank, without regard to the fact that some of said claims have not been proven and filed, and without regard to the further fact that some of said claims were proven and filed prior to, and others subsequent to the expiration of the time fixed by the notice for the presentation of claims. It is ordered, however, that these dividends shall not be paid to such creditors and depositors, but to the clerk of the Superior Court of Pitt County, who is directed to hold said dividends for a period of three months. During this period conflicting contentions of creditors and depositors may be heard and decided. At the expiration of the period of three months, if there shall be in the office of the clerk of the Superior Court any unclaimed dividends, the contention of the University of North Carolina, with respect to its rights to such dividends, under chapter 546, Public Laws, 1933, may be heard and decided. The order is

Affirmed.

IN THE MATTER OF FRED J. GUERIN.

(Filed 11 July, 1934.)

Extradition B a—Presence in demanding state on date crime is alleged to have been committed is sufficient to support finding that prisoner is a fugitive from justice of the demanding state.

Where a person arrested upon the warrant of the Governor of this State for extradition, contests the validity of the extradiction proceedings solely on the ground that on the date of his arrest he was not a fugitive from justice of the demanding State, and all the evidence is to the effect that he was in the demanding state on the date the crime is alleged to have been committed, and the court so finds, the trial court's finding that on the date of his arrest he was a fugitive from justice of the demanding state is correct, and the refusal of his petition for *habeas corpus* is upheld. In this case petitioner was charged with abandonment and nonsupport of his wife, and the crime was alleged to have been committed on the day petitioner left the demanding state and came to North Carolina.

BROGDEN, J., dissenting.

IN RE GUERIN.

THIS cause was heard on the return to a writ of *certiorari* issued by the Supreme Court of North Carolina, on the application of Fred J. Guerin, as a substitute for an appeal by him from an order made in the cause by *Sink, J.*, at Chambers, in the city of Greensboro, N. C., on 10 November, 1933. From GUILFORD.

The applicant, Fred J. Guerin, was arrested and held in custody by the chief of police of the city of High Point, N. C., under and by virtue of an extradition warrant issued by the Governor of North Carolina, on 13 October, 1933. The warrant was issued at the request of the Governor of Virginia, who certified to the Governor of North Carolina that the said Fred J. Guerin was charged in a criminal warrant issued by the judge of the Juvenile and Domestic Relations Court of Henry County, Virginia, on 11 October, 1933, with the crime of desertion and nonsupport of his wife, in said county and State, "on the ..... day of ....., 1933."

After his arrest, and while he was held in custody by the chief of police of the city of High Point, the said Fred J. Guerin applied to the Honorable J. Hoyle Sink, judge of the Superior Court for the 12th Judicial District of North Carolina, for a writ of *habeas corpus*. In his petition for said writ, he denied that he is a fugitive from the justice of the State of Virginia, and specifically alleged that he was not in said State at the date of the alleged crime, but that at said date he was in the State of North Carolina.

At the hearing of the petition for a writ of *habeas corpus*, the petitioner requested the judge to order the attorney for the State of Virginia to file a bill of particulars, showing the date on which it was alleged that he had deserted his wife in the State of Virginia. In response to this request, the said attorney filed a paper-writing in the proceeding in which it is alleged that the crime charged in the warrant was committed on 5 July, 1933. The petitioner then introduced as evidence a warrant issued by the judge of the Juvenile and Domestic Relations Court of Henry County, Virginia, dated 18 September, 1933, for the arrest of Fred J. Guerin on the charge that on ..... day of September, 1933, the said Fred J. Guerin unlawfully and intentionally deserted his wife, Gertrude Guerin, and thereafter failed and refused to support her. All the evidence at said hearing showed that the petitioner, Fred J. Guerin, was in the State of Virginia on 5 July, 1933; that he left said State and came to the State of North Carolina, on said day; and that he has been in the State of North Carolina continuously from and since said date.

Judge Sink found from all the evidence at the hearing of the petition for a writ of *habeas corpus*, (1) that the petitioner, Fred J. Guerin, is now duly and regularly charged in the State of Virginia with the

crime of desertion and nonsupport of his wife in Henry County, said State; (2) that at the time of his arrest under the warrant of extradition issued by the Governor of North Carolina, at the request of the Governor of Virginia, the said Fred J. Guerin was a fugitive from the justice of the State of Virginia; and (3) that the said Fred J. Guerin is now in the lawful custody of the respondent, the chief of police of the city of High Point.

On these findings of fact, the petition for a writ of *habeas corpus* was denied. The petitioner excepted, and thereafter applied to the Supreme Court for a writ of *certiorari,* as a substitute for an appeal by him from the order of Judge Sink denying his petition for a writ of *habeas corpus,* C. S., 630. The application was allowed.

Duke & Bridges for petitioner.

W. R. Broaddus, Jr., and Jno. W. Carter, Jr., for Commonwealth of Virginia.

CONNOR, J. It is well settled by authorities in this and other jurisdictions that where a person who has been arrested and is held in custody under an extradition warrant issued by the Governor of the State in which he was arrested, applies to a judge of said State for a writ of *habeas corpus,* on the ground that his arrest and detention is unlawful, and at the hearing of his application, admits that he is the person named in the warrant, and that he is properly charged with an extraditable crime in the demanding state, the only question to be determined by the judge is whether at the date of his arrest he was a fugitive from the justice of the demanding state. If the evidence shows that he was in the demanding state at the date on which it is alleged that the crime was committed, and the judge so finds, there is no error in an order denying his petition for a writ of *habeas corpus* on the ground, solely, as in the instant case, that the petitioner was not a fugitive from justice, at the date of his arrest. See *In re Bailey,* 203 N. C., 362, 166 S. E., 165. In accordance with this principle, the order in the instant case must be

Affirmed.

BROGDEN, J., dissenting: The uncontroverted, and, therefore, admitted facts disclose that on 5 July, 1933, the respondent was tried by a court of competent jurisdiction of Virginia for the desertion and abandonment of his wife, in an action entitled Commonwealth *v.* Fred J. Guerin. The judgment rendered declares that "the court . . . being of opinion that the defendant has not deserted and abandoned his wife, doth order that he be required to furnish a suitable home of his choice for his said

wife and support her to the best of his ability and station in life in his said home," etc. After said judgment was rendered the defendant immediately left Virginia, on the same day and returned to his home in North Carolina. It is neither alleged nor contended that he has ever been in the State of Virginia since said date and since his acquittal.

Consequently, the question of law presented by the record is as follows: Does an acquittal of a defendant by a court of competent jurisdiction of the demanding state, of the very crime charged in an extradition proceeding and on the very day the crime is alleged therein to have been committed; constitute fleeing the justice or evading the process and punishment of the demanding state? The problem may be otherwise stated as follows: Is presence in the courts of the demanding state on the date the crime is committed to answer and defend the very crime alleged, resulting in acquittal; "such presence in the demanding state" as to warrant extradition for the identical crime upon a subsequent warrant?

The decision in this case rests exclusively upon the formula "presence in the demanding state at the time the crime is alleged to have been committed." While all of us doubtless worship the formulas of the law and bow down before them, nevertheless, it seems to me that such formulas ought to yield to admitted facts and qualifying circumstances; otherwise we ducktrack words without reference to practical situations.

CECIL M. FOREHAND v. EDENTON FARMERS COMPANY.

(Filed 11 July, 1934.)

1. Chattel Mortgages A b—

A chattel mortgage on "fifteen mules . . . all now in my possession" is held void for indefiniteness of description, it appearing that the mortgagee at the time of the execution of the mortgage had more than fifteen mules in his possession.

2. Landlord and Tenant D g—Lessor held not entitled to mules purchased by lessee although lease required surrender of same number of mules.

Plaintiff leased certain lands together with eleven mules used in cultivating same, the contract providing that at the expiration of the term the lessee should return the "personal property in as good condition as it now is, or its equivalent in kind." Five mules died or were disposed of by the lessee, but the lessee bought five other mules prior to the termination of the lease. The five mules subsequently purchased by the lessee were sold and the proceeds of sale were in the hands of a creditor of the lessee at the time of the submission of this controversy without action. *Held,* in the absence of an agreed fact that the lessee had pur-

chased the five mules as agent of the lessor, or had purchased them with the intention of replacing the lessor's mules with them, the lessor had no title to the five mules so as to be able to maintain a suit for the proceeds of the sale of the mules.

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

CIVIL ACTION, before *Moore, Special Judge,* at February Term, 1934, of HERTFORD.

This is a controversy without action. The agreed facts pertinent to a decision of the case are as follows: The plaintiff, Cecil M. Forehand, owned a farm in Northampton County known as the Princeton farm. On 1 January, 1923, said owner leased the farm to A. M. Forehand, and also certain personal property including eleven mules, which were then on the farm and apparently used in its cultivation. The written lease provided that: (1) "It is understood and agreed between the parties that the personal property listed in the inventory hereto attached and made a part hereof is included in the said lease and that upon the termination of said lease A. M. Forehand is to return the said personal property in as good condition as it now is, or its equivalent in kind," etc.

(2) On 1 August, 1931, A. M. Forehand was indebted to the defendant and on said date executed a note and chattel mortgage to said defendant to secure said indebtedness, conveying among other articles of personal property, "fifteen mules and one mare, all now in my possession." This mortgage was duly recorded in Northampton County on 5 November, 1931, and in Chowan County where the mortgagor resided on 9 November, 1933. "The said A. M. Forehand at the time of the execution of said mortgage, was in possession of more than fifteen mules, including mules in his possession on his farms in Chowan County but had in his possession only thirteen mules on the Princeton farm and none elsewhere in Northampton County, but had had fifteen mules on the Princeton farm shortly before, two having died."

(3) The aforesaid rental agreement was terminated at the end of the year 1933, and at this time there were twelve mules and one mare left on the Princeton farm. "Six of these mules and the farming implements which were originally the property of the plaintiff and included in the inventory above referred to were taken back by the plaintiff. The other six mules . . . were not included in the inventory, having been acquired and placed on the farm by A. M. Forehand since the execution of the rental agreement, and were taken and sold by the defendant under its mortgage. All mules placed on the farm by A. M. Forehand were used for the same purpose as the mules included in the original inventory."

(4) It was agreed by the defendant and the plaintiff that plaintiff would not object to the sale of the five mules in controversy, but he

claims the proceeds of the sale received by the defendant from the sale of said five mules, amounting to $308.00.

Upon the foregoing agreed facts the court was of the opinion "that the plaintiff, Cecil M. Forehand, is entitled to recover of defendant, Edenton Farmers Company, the proceeds of the sale of the five mules in controversy, said proceeds amounting to the sum of $308.00."

From the judgment so rendered the defendant appealed.

D. C. Barnes and W. D. Boone for plaintiff.
W. D. Pruden for defendant.

BROGDEN, J. The case is this: A man owns a farm and eleven mules. He leases the farm and the mules. The lease provides that upon its termination the lessee "is to return the said personal property in as good condition as it now is, or its equivalent in kind," etc. Five of the mules die before the termination of the lease or are otherwise disposed of by the lessee, but said lessee purchases five other mules which he uses upon the farm prior to the termination of the lease. Thereafter the lessee executes a mortgage to the defendant on "fifteen mules and one mare, all now in my possession," and at the time of the execution of such mortgage said lessee had more than fifteen mules in his possession, although not in the same county.

Upon the foregoing facts two questions of law arise:

(1) Was the mortgage of the mules to the defendant void for uncertainty of description?

(2) Does the plaintiff have such title to the five mules subsequently purchased by the lessee, as to maintain this action?

The parties agreed at the time the mortgage was executed that the mortgagor "was in possession of more than fifteen mules, including mules in his possession on his farm in Chowan County, but had in his possession only thirteen mules on the Princeton farm," etc. The description of the property in the mortgage does not identify or except it from the mass, and, therefore, this phase of the case falls within the principle heretofore announced in *Blakely v. Patrick*, 67 N. C., 40; *Atkinson v. Graves*, 91 N. C., 99; *McDaniel v. Allen*, 99 N. C., 135, 5 S. E., 737; *Moore v. Brady*, 125 N. C., 35, 34 S. E., 72.

The general proposition of law contained in the foregoing cases is expressed in *Atkinson v. Graves, supra*, as follows: "It is defective in the further particular that it does not designate and identify the property sought to be conveyed, so that it could be separated from other property of like kind raised by the mortgagor. . . . It is quite as uncertain, if not more so, as the mortgage of 'ten new buggies,' out of a lot of fifteen buggies, which was held to be void for uncertainty;

. . . or twenty sheep in a flock of one hundred; or ten head of cattle in a drove of fifty; or a thousand feet of saw-logs in a certain river, without further description to distinguish them from a much larger mass of logs belonging to the mortgagor in the same river, which is held to be void for uncertainty."

The defendant relies upon the case of *Dunkart v. Rineheart,* 89 N. C., 354, but it must be observed that the description of the trees involved in that case contained certain dimensions which tended to set them apart and mark them out from all other walnut trees on the land.

Nevertheless, it does not appear from the agreed facts that the five mules were purchased by A. M. Forehand as agent of the plaintiff in order to replace the five mules that died or were otherwise disposed of as required in the rental agreement. The parties merely stipulate that "the other six mules . . . having been acquired and placed on the farm by A. M. Forehand since the execution of the rental agreement," etc. Did A. M. Forehand acquire and place these mules on the farm in compliance with the terms of the rental agreement "to return the said personal property in as good condition as it now is, or its equivalent in kind?" Obviously, if A. M. Forehand bought six mules after the rental agreement, not as agent or on behalf of the plaintiff, or with the intention of replacing plaintiff's mules as "equivalent in kind," then the plaintiff would not have such title as to be able to maintain a suit for the proceeds of the sale of such mules. As the parties have agreed to the facts, this Court must take them as it finds them, and, as we interpret the record, it does not disclose that the plaintiff had title to these five mules, and, therefore, he cannot maintain the action.

Reversed.

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

STATE v. RALPH HENDERSON.

(Filed 11 July, 1934.)

1. Criminal Law I g—Refusal to submit material part of requested instructions on phase of case supported by evidence held error.

In this prosecution for seduction defendant contended, supported by evidence, that prosecutrix knew he was married and that he had not obtained a divorce, and that she knew he could not marry her until he had obtained a divorce. Defendant requested an instruction that the burden was on the State to prove beyond a reasonable doubt that the promise of marriage was absolute and not conditional upon defendant's

securing a divorce or any other condition. The trial court instructed the jury that the promise of marriage would have to be absolute and unconditional, and that a promise of marriage "if anything happened" was a conditional promise and would not support an indictment. *Held*, defendant was entitled to have the particular aspect of the case presented by the evidence submitted to the jury in every material part upon his request, and the charge as given failed to do so, and the refusal of the requested instructions entitles defendant to a new trial.

2. Same: Trial E e—Duty of trial court to submit requested instructions.

While the trial court is not required to give in exact language a requested instruction, he is required to give in substance every material part of a requested instruction upon a material aspect of the case which is supported by the evidence and relied upon at the trial.

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

CIVIL ACTION, before *Cranmer, J.*, at October Term, 1933, of PENDER.

The defendant was indicted for the seduction of Rodella Pierce. Upon conviction he was sentenced to prison for a term of four years. The evidence for the State tended to show that the prosecuting witness met the defendant a short time prior to April, 1932, and that the first carnal act occurred at her home in April, 1932. The witness said: "At the time he asked me to marry him, he asked me if I loved him good enough to drop the world behind me and go with him; forsake all others for him. . . . This conversation took place before I yielded to him. My baby was born dead, in July, 1933, and I discovered this condition in December, 1932, and told the defendant about it. . . . I had heard that he was a married man, but he told me his wife was dead. He told me he was just as free to go with me as anybody in the world. . . . I told him I was afraid. I had heard—I didn't exactly use those words, but it had the meaning, that I had heard he was married, and he said, 'I am just as free to go with you as anybody in this world is.' Right after I met him he told me that her mother had been notified that she was dead, that she died in Maryland, . . . and he told me he reckoned she was dead. . . . I said at the magistrate's court that I had heard that he was married, and that he had heard his wife was dead, but before then he had sued for a divorce and had it all paid for lacking a few dollars. He told me he had brought suit in Rosemary, and that he would have it as quick as he could finish paying for it, and could get the papers any time he wanted them. Certainly I know a man with a living wife could not get married unless he had a divorce. He told me he could get married at any time. He said there wasn't anything in the world to do only for the clerk of the court to sign the divorce papers. . . . He just told me he lacked a little of having his divorce and told me he was really intending to marry

me—that we would be married. . . . He said he could get his divorce any time he went after it. I knew he didn't have the papers. . . . He told me all he lacked was getting the clerk of the court to sign it. . . . I don't reckon it was complete without that. . . . I knew he didn't have the papers, but I thought his divorce was complete except that. I knew he couldn't marry until he got his papers. . . . I asked him did he think he had any right to go with me and he said he had just as much right and was just as free to go with me as anybody in the world was, and sometime after that he told me he had put in for a divorce and after he put in for a divorce that her mother had been notified that she died in Maryland and after she was notified she told him of it, but he had never looked it up nor seen whether she was dead or not; that he was going to finish paying for his divorce and we were going to be married. . . . I knew he had to get the papers before he would have his divorce." The prosecuting witness further testified that she had heard that the defendant had married again in June, 1933.

Four or five witnesses testified that the prosecuting witness was a girl of good character, and four or five witnesses testified that she was a girl of bad character. The constable, deputy sheriff, and three or four other witnesses testified that at the preliminary hearing the prosecuting witness had testified that defendant told her he was a married man, but that he "had put in for a divorce and had to go to Rosemary to finish paying for it."

From the judgment pronounced the defendant appealed.

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

Robert Grady Johnson and Rivers D. Johnson for defendant.

BROGDEN, J. The defendant, in writing and in apt time, requested the following instruction, to wit: "The court instructs the jury that to convict the defendant it is encumbent upon the State to satisfy the jury beyond a reasonable doubt that the promise to marry was absolute and not conditional upon his securing a divorce or any other condition." The trial judge in his general charge to the jury said: "Now, as to the promise of marriage, that is the second element. First, I instruct you that the promise must be unconditional; that is, there must be no condition attached to the promise. Now, to illustrate what I mean, if a woman yields herself to a man and testifies that he promised to marry her if anything happened, that would not be an unconditional promise. It would not be sufficient promise to support a bill of indictment."

The instruction given the jury by the trial judge was correct in itself and supported by many decisions. However, the defendant insists

that the case was tried upon the sole theory that the promise of marriage was conditioned upon securing a divorce, and that the prosecuting witness knew that there was no final judgment of divorce, and further knew that such judgment was necessary before a valid marriage could be consummated. Therefore, the defendant asserts that the special instruction tendered by his counsel, emphasizing the particular part that the divorce proceeding played in the case, was vital to his defense. The general instructions given the jury inadvertently overlooked this particular phase of the evidence.

The general rule of law pronounced in many cases in this jurisdiction is to the effect that the parties cannot require a trial judge to parrot prayers for instruction or to become a mere judicial phonograph for recording the exact and identical words of counsel. Nevertheless, "it is an equally well established rule that if a request is made for a specific instruction, which is correct in itself and supported by evidence, the court, while not required to adopt the precise language of the prayer, must give the instruction, at least in substance, and a mere general and abstract charge as to the law of the case will not be considered a sufficient compliance with this rule of law. . . . It would seem to follow from this rule, and to be inconsistent with it if we should not so hold, that if a special instruction is asked as to a particular aspect of the case presented by the evidence, it should be given by the court with substantial conformity to the prayer." *Baker v. R. R.*, 144 N. C., 36, 56 S. E., 553. See, also, *Savage v. Davis*, 131 N. C., 159, 42 S. E., 571; *Horne v. Power Co.*, 141 N. C., 50, 53 S. E., 658; *Parks v. Trust Co.*, 195 N. C., 453, 132 S. E., 473; *S. v. Lee*, 196 N. C., 714, 146 S. E., 858.

This Court has consistently held the view that if a party desires some special phase of a case that is material, supported by evidence and relied upon at the trial, submitted to the jury, he must, in apt time, present a proper special instruction. If he fails to do so, he cannot complain if such phase is not adverted to in the charge, which is otherwise correct. Consequently, if he presents such proper special instruction upon such particular phase, he has a right to insist that the trial judge shall submit every material part of it as written.

In the case at bar the defendant built his defense upon the theory that he was a married man, not divorced, and that the prosecuting witness knew it. Manifestly, the contention, presented by the special instruction that the promise of marriage was conditioned upon the divorce decree, was material and vital upon that particular phase of the case. Therefore, the Court is of the opinion that the defendant is entitled to a New trial.

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

W. J. SMITH, WHO SUES IN BEHALF OF HIMSELF AND ALL OTHER QUALIFIED ELECTORS OF THE TOWN OF CAROLINA BEACH, v. TOWN OF CAROLINA BEACH.

(Filed 11 July, 1934.)

1. Elections A b: Municipal Corporations D a—

A provision in the charter of a municipality limiting the right of suffrage in municipal elections to owners of real property within the town is unconstitutional. Art. VI of the Constitution of North Carolina.

2. Municipal Corporations D b—

Municipal officers elected under an unconstitutional charter provision restricting electors to owners of real property, but who have purported to qualify, and have assumed and exercised openly and without question the duties of their offices are *de facto* officers of the municipality.

3. Same—Resident not objecting to exercise of official functions by de facto officers for two years may not challenge their authority.

A resident of a municipality who has resided in the town for two years without objecting to the election of the municipal officers solely by owners of real estate therein, and has not objected to the open exercise of the duties of such offices by the officers so elected, it appearing that officers of the town had been so elected for seven years, may not challenge the authority of such *de facto* officers in issuing bonds for a necessary municipal expense upon the ground that the officers were not duly elected by the qualified voters of the town.

4. Same: Public Officers B a—

The right of municipal officers to exercise the respective duties of their offices can be challenged only by a direct proceeding to declare the offices vacant, and not by enjoining the exercise of their official functions.

5. Municipal Corporations K c—

Municipal bonds issued for a necessary expense by *de facto* officers of such duly constituted municipality are binding upon the public and third persons and constitute valid obligations of the municipality.

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

CIVIL ACTION, before *Harris, J.*, at 24 March Term, 1934, of NEW HANOVER.

The agreed facts necessary to present the question of law are as follows: The town of Carolina Beach was created as a municipal corporation by chapter 117, of the Private Laws of 1925, and amendment. This statute provided that the officers of the town should consist of a mayor and two commissioners, and that the mayor "shall sign all contracts on behalf of the town unless otherwise provided by law or ordinance or resolution with the board of commissioners." The statute further provided for commissioners of finance, public safety, and for the appointment of other officers of the municipality, declaring in section

10 that "the board of commissioners has and shall exercise all legislative powers, functions and duties conferred upon the town or its officers," etc. Section 15 of the act provided that candidates for the office of mayor and commissioners "shall be nominated at a primary election, which shall be held under such laws as are now in force or may hereafter be enacted, . . . but all candidates to be nominated or elected under this act shall be nominated and elected by the electors of said town at large." Regular elections for officers were prescribed in the act to be held "on the first Tuesday in May, 1927," and each officer was to hold office for a term of two years "and until his successor is elected and qualified."

The present officers of the town were duly elected in May, 1933, and immediately entered upon the discharge of their duties and "performed all the rights and duties of officers of municipalities, as prescribed by the laws of the State of North Carolina."

On 26 September, 1933, the board of commissioners of the town duly passed an ordinance authorizing the issuance of $50,000 of bonds for the "construction of a water supply system," etc. The bond ordinance provided for a tax levy sufficient to pay principal and interest. The foregoing ordinance was duly published on 27 September, 1933, but no petition was filed in accordance with the provisions of section 2947, of the North Carolina Code of 1921. It is admitted "that the issuance of the bonds for the construction of a waterworks system is a "necessary expense" under the laws of the State of North Carolina.

In 1929 the charter of the town was amended by chapter 78, of the Private Laws of 1929. Section 2 of said act provided "all persons owning property within the corporate limits of the town of Carolina Beach shall constitute the electors of the town of Carolina Beach and be entitled to vote in any election for the officers of said town."

W. J. Smith, the plaintiff, was born in the United States and is more than twenty-one years of age and has resided in the State of North Carolina for more than one year, and has lived within the corporate limits of the town of Carolina Beach for at least two years past, but does not own any real property within the corporate limits of said town, and while he is a duly qualified elector in accordance with the provisions of Article VI, sections 1 and 2, of the Constitution of North Carolina, has never participated in any election or primary held in the town for the nomination or election of the mayor or commissioners; and while he did not demand the right to vote and did not present himself for the purpose of casting his ballot in any election, yet no machinery was set up by the officers of said town or anyone else, which would enable him to participate in any election held for the election of the officers of said town.

On 21 March, 1934, Smith instituted this action for the purpose of restraining the issuing of said bonds and for declaring such bonds to be null and void, for the reason that the town has no duly elected and qualified officers.

The trial judge found as a fact that the town was duly constituted, "possessing the usual powers granted to cities and towns under the general laws of the State of North Carolina," and that the charter limiting the right to vote to owners of real estate in said town, was unconstitutional. It was further found that the commissioners elected in accordance with the provisions of the charter are not *de jure* officers but are *de facto* officers, and that such *de facto* officers "are without authority to issue said bonds and such issue would be invalid."

Thereupon the judgment restrained the issuing of the bonds and the defendant town appealed.

Kellum & Humphrey for plaintiff.
Emmett Bellamy and J. O. Carr for defendant.

BROGDEN, J. Are *de facto* officers of a duly constituted municipality authorized to issue and sign bonds for the necessary expenses of such municipality?

The provision of the town charter limiting the right of suffrage to real estate owners in the town is void by virtue of the provisions of Article VI of the Constitution of North Carolina. Notwithstanding, a mayor and commissioners have been elected in said town every two years since 1927, and said officers have purported to qualify, assuming and exercising openly and without question the duties not only imposed by the charter of the town, but by the general statutes of the state pertaining thereto.

What is a *de facto* municipal officer? A comprehensive definition of the term is found in *Waite v. Santa Cruz*, 184 U. S., 302, 46 L. Ed., 552, and is in the following language: "A *de facto* officer may be defined as one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper. When a person is found thus openly in the occupation of a public office, and discharging its duties, third persons having occasion to deal with him in his capacity as such officer are not required to investigate his title, but may safely act upon the assumption that he is a rightful officer." The same general idea has been expressed by this Court, speaking through *S. v. Lewis*, 107 N. C., 967, 12 S. E., 457, as follows: "An officer *de facto* is one whose acts, though not those of a lawful officer,

the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised . . . under color of an election or appointment, by or pursuant to a public unconstitutional law, before the same is adjudged to be such." See, also, *Van Amringe v. Taylor,* 108 N. C., 196, 12 S. E., 1005; *Hughes v. Long,* 119 N. C., 52, 25 S. E., 743; *Rodwell v. Rowland,* 137 N. C., 617, 50 S. E., 319; *Whitehead v. Pittman,* 165 N. C., 89, 80 S. E., 976; *Markham v. Simpson,* 175 N. C., 135, 95 S. E., 106.

The trial judge has found as a fact that said officers are *de facto* officers of the town and there is no exception to such finding.

Moreover, the plaintiff cannot question the authority of these officers in this proceeding for two reasons: First, for a period of more than seven years the officers of the town have been elected pursuant to the provisions of the charter. The plaintiff has resided in the town for more than two years and has permitted such elections to be held and such officers to openly exercise and discharge all the duties and functions of regular officers of the municipality. *Van Amringe v. Taylor, supra.* Second, the right of the mayor and commissioners to assume and exercise official function can only be questioned by direct proceeding to declare the offices vacant. *Markham v. Simpson, supra.*

Therefore, as the plaintiff cannot question the authority of the officers except in a direct proceeding, and as the official acts of such *de facto* officers are binding upon the public and third parties, it necessarily follows that the bonds will constitute valid obligations of the municipality. Indeed, the Supreme Court of the United States in the *Waite case, supra,* expressly held that bonds duly issued and signed by *de facto* officers of the municipality were valid obligations.

Reversed.

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

C. W. LAMB v. CITY OF RANDLEMAN.

(Filed 11 July, 1934.)

1. Taxation A a: A b—Municipality held authorized to issue bonds for water and sewer systems in excess of 8% of tax valuation.

A municipal corporation may issue bonds for a sewer system ordered by the State Board of Health and bonds for a water system even though the total indebtedness of the town exceeds eight per cent of its assessed valuation, such bonds being for necessary expenses not requiring a vote,

Art. VII, sec. 7, of the Constitution, and being authorized by the Municipal Finance Act, N. C. Code, 2636, *et seq.*, and the issuance of the bonds not coming within the inhibition of N. C. Code, 2943(2), against incurring debt in excess of eight per cent of the assessed valuation, the bonds coming within the exception provided in that section relating to bonds for water purposes, which includes sewer systems, and the exception relating to bonds for sewer systems ordered by the State Board of Health.

2. Taxation A b—Bonds for water and sewer systems should be deducted from gross debt in determining net debt of municipality.

Bonds issued by a municipality for water and sewer systems should be deducted from the gross debt in computing the net debt of the municipality in relation to the prohibition against incurring debt in excess of eight per cent of the assessed valuation of property for taxation, bonds for sewer systems being necessarily included in bonds for "water purposes" within the meaning of N. C. Code, 2943, subsection 1(5).

3. Municipal Corporations B a—

The State Board of Health is given authority by the Municipal Finance Act, N. C. Code, 2943(2), to order the construction of sewer systems by municipalities.

APPEAL by plaintiff from *Harding, J.*, at Chambers in Concord, 25 April, 1934. From RANDOLPH. Affirmed.

This is a civil action to restrain and enjoin the city of Randleman from issuing and selling bonds (1) in the sum of $79,293.01 for a water system and (2) in the sum of $89,706.99 for a sewer system, in pursuance of bond ordinances passed by the city on 23 February, 1934.

The plaintiff contends that the passage of these ordinances was not accomplished in accord with the Municipal Finance Act, more particularly in that it does not appear that the net debt of the city of Randleman is within eight (8) per centum of its assessed property valuation, and that therefore the passage of the ordinances authorizing the issuance of these bonds, totaling $169,000, was in contravention of subsection 2, of section 2943, Consolidated Statutes, being a part of said finance act, as follows:

"2. Limitation upon passage of ordinance. The ordinance shall not be passed unless it appears from said statement that the said net debt does not exceed eight (8) per cent of said assessed valuation, unless the bonds to be issued under the ordinance are to be funding or refunding bonds, or are bonds for water, gas, electric light or power purposes, or two or more of said purposes, or are bonds for sanitary sewers, sewage disposal or sewage purification plants, the construction of which shall have been ordered by the State Board of Health or by a court of competent jurisdiction."

J. A. Spence for appellant.

H. M. Robins for appellee.

SCHENCK, J. "It is well settled that under Article VII, section 7, of the Constitution, counties, cities and towns and other municipal corporations are given authority to contract debts for the necessary expenses thereof, without the sanction of a majority of the qualified voters. That section indirectly, but explicitly, permits the exercise by municipal corporations of the power of making provisions for necessary expenses, free from the restraint imposed in other cases." *Swindell v. Belhaven,* 173 N. C., 1, and statutory authority for the issuance of the bonds here involved is found in the Municipal Finance Act, Art. 26, being sections 2936 *et seq.,* Consolidated Statutes, as amended and brought forward in Michie's 1933 Supplement to N. C. Code.

Although the decision of this controversy does not turn upon whether the bonds under consideration should be included in the deductions to be made from the gross debt in computing the net debt of the municipality, as provided by subsection 1(b), of section 2943, Consolidated Statutes, since the question is debated in the briefs, we express the opinion that they should be so included in such deductions. Subsection 1(5), which enumerates a certain class of deductions to be made, reads: "The amount of bonded debt included in the gross debt and incurred, or to be incurred, for *water,* gas, electric light or power *purposes,* or two or more of said purposes." The words "for water . . . purposes," by natural and necessary implication, embrace sewer purposes or a sewer system. *McNeill v. Whiteville,* 186 N. C., 163.

As stated in the briefs of the parties, the determinative question involved in this case is whether the limitation of the net debt to eight (8) per centum of the assessed valuation as set forth in section 2943, subsection 2, is a bar to the passage of ordinances authorizing the issuance of bonds for the construction of a water system and of a sewer system, it being admitted that the net debt of the city of Randleman was at least nine and one-tenth (9.1) per centum of the assessed valuation of its property as last fixed for taxation. We are of the opinion that the limitation is not such a bar.

The bonds for "water system" come clearly within the letter of the exception to the eight (8) per centum limitation reading "unless the bonds to be issued under the ordinance . . . are for *water,* gas, electric light or power *purposes,* or two or more of said purposes."

We also think that "water purposes" include "sewer system," *McNeill v. Whiteville, supra,* and, therefore the bonds for the latter purpose are within the exception quoted. But however this may be, it is found as a fact that the State Board of Health ordered the construction of the sewer system for which the bonds are sought to be issued, and this manifestly brings the bonds for a "sewer system" within the last clause of the exception to the eight (8) per centum limitation, reading "or

are bonds for sanitary *sewers,* sewage disposal or sewage purification plants, the construction of which shall have been *ordered by the State Board of Health* or by a court of competent jurisdiction." We do not agree with counsel for appellant that the State Board of Health was without authority to order the construction of the sewer system. We think the act just quoted confers this authority.

All prerequisites to the passage of the bond ordinances in question (both water and sewer) are either admitted or found, if such passage is not inhibited by the statutory limitation of the net debt of a municipality to eight (8) per centum of the assessed valuation of its property as last fixed for taxation, and since we are of the opinion that their passage is not so inhibited, we conclude that his Honor committed no error in holding that the proposed bonds for $79,293.01 for a "water system" and for $89,706.99 for a "sewer system," when issued and sold, would constitute a valid and binding obligation of the city of Randleman, and in dissolving the restraining order for that reason.

Affirmed.

ALSTON BROOKS v. AVERY COUNTY, NORTH CAROLINA; J. F. HAMPTON, CHAIRMAN; HENRY BURLESON AND SMITH EGGERS, BEING AND CONSTITUTING THE BOARD OF COUNTY COMMISSIONERS THEREOF.

(Filed 11 July, 1934.)

Taxation A a—County may issue bonds to refund indebtedness incurred for necessary expenses without submitting the question to vote.

A county has authority to issue funding and refunding bonds with the approval of the local government commission to take up valid, outstanding indebtednesses of the county which were incurred for necessary county expenses. Art. V, sec. 6.

APPEAL by plaintiff from *Warlick, J.,* at 24 May Term, 1934, of AVERY. Affirmed.

The following judgment was rendered by the court below: "This cause coming on to be heard before his Honor, the Honorable Wilson Warlick, judge holding the courts of the 17th Judicial District upon case agreed, the plaintiff being represented by J. L. Moody of Siler City, North Carolina, and the defendant being represented by Charles Hughes of Newland, North Carolina, and Siler and Barber of Pittsboro, North Carolina; and it appearing to the court that the board of commissioners of Avery County, North Carolina, on 26 March, 1934, by an order and resolution duly adopted, are proposing to issue funding and refunding bonds in the sum of one hundred and ten thousand dollars (Nos. 1 to 110 of $1,000 each) by the county of Avery,

North Carolina, dated 1 June, 1934, payable on 1 June, 1944, and redeemable at the option of the county at par and accrued interest on any semiannual interest date before maturity, all bonds bearing interest at the rate of 3 per cent per annum up to 1 June, 1939, and thereafter at the following rates, namely: Bonds Nos. 1 to 91 at 6 per cent, Nos. 92 to 96 at 5½ per cent, Nos. 97 to 110 at 5 ¼ per cent per annum, and it further appearing that the issuance of the said bonds has been approved and authorized by the Local Government Commission of North Carolina, and it further appearing that the said resolution and all subsequent acts relative thereto have been done and performed as by law provided, and the court finding as a fact that each and every thing necessary to the validity of said issuance of such bonds has been duly done and performed, and the court further being of the opinion that the bonds to be executed and issued in the form prescribed by the said resolution will be a valid and binding obligation of the county of Avery, State of North Carolina; it is now, therefore, considered, ordered, adjudged and decreed that the bonds above described will be, when duly executed and issued a valid and binding obligation of Avery County, North Carolina, and that the commissioners of said county be and they are hereby authorized, empowered and directed to levy a sufficient tax to pay principal and interest upon said bonds when due.

"It is further ordered, adjudged and decreed that upon delivery by the defendant to the plaintiff of a sufficient number of its bonds to cover the sum due upon the note mentioned and described in the case agreed that plaintiff surrender said note and that the bonds so received by him in exchange therefor are and will be a valid and binding obligation of the county of Avery, and that the commissioners of said county be and they are hereby directed and authorized to levy a sufficient tax to pay principal and interest when due. The plaintiff will pay the costs of this action, to be taxed by the clerk of the Superior Court of Avery County, North Carolina. Done this 24 May, 1934. Wilson Warlick, judge holding court for 17th Judicial District of North Carolina."

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

J. Lee Moody for plaintiff.
Charles Hughes and Siler & Barber for defendant.

CLARKSON, J. The defendant, Avery County, owes $110,000 and is unable to pay same. In accordance with the statutes in such cases made and provided, it has done all things required by law to issue the funding and refunding bonds of Avery County, North Carolina, in the principal sum of $110,000. The issuance of the bonds has been approved by the Local Government Commission of North Carolina.

The following is the preamble to a resolution adopted by the board of county commissioners of Avery County, North Carolina, on 26 March, 1934: "Whereas, the county has outstanding the following described valid indebtedness, which was originally incurred for necessary expenses before 1 July, 1933, and which the county has no funds whatever to pay, and, the taxpayers being already overburdened in the present emergency caused by the extended depression, it is absolutely impossible to collect taxes with which to pay the same, and in order to maintain the credit and dignity of the county, it is necessary to provide for the extension of this its honest indebtedness."

In *Commissioners v. Assell,* 194 N. C., 412 (418), we said: "The record does show that the proposed bond issue was for necessary expenses of the county and a valid and legal obligation of the county. The subject or subjects of the necessary expense or expenses for special county purposes are not set forth, and nothing else appearing, it is taken for granted that they were for one or more special necessary purposes and funding permissible under Constitution, Art. V, sec. 6, and the County Finance Act. The special approval has been given by the general act." *S. c.,* 195 N. C., 719; *R. R. v. Cherokee County,* 195 N. C., 756; *Barbour v. Wake County,* 197 N. C., 314; *Bolich v. Winston-Salem,* 202 N. C., 786.

No new debt is created, an extension of time is being secured at a lower rate of interest so the defendant Avery County can meet its honest obligations. The defendant in its brief says: "The appellee respectfully submits that there is no principle of law, no rule of equity, and no constitutional inhibition against the validity of the bonds."

We think from the record as presented to this Court that the judgment of the court below should be

Affirmed.

W. N. NORTHCUTT v. PEOPLES BONDED WAREHOUSE COMPANY ET AL.

(Filed 11 July, 1934.)

1. Warehousemen C a—Recovery may not be had out of funds held by State Treasurer for failure of warehouseman to issue receipts as agreed.

A recovery may not be had against the State Treasurer out of the fund accumulated under chapter 168, Public Laws of 1919, for a loss resulting to plaintiff by failure of a warehouse to issue official receipts for cotton to plaintiff as agreed, the receipts having been issued to the holder of a lien against the cotton and the warehouse having refused delivery of the cotton to plaintiff upon his demand, since the purpose of the act is to make warehouse receipts acceptable as collateral (sec. 5), and plaintiff is not the holder of the receipts.

2. Warehousemen B a—Warehouseman may be held liable for failure to issue receipts as agreed even if receipts could not have been so issued.

Plaintiff stored cotton encumbered with a lien in defendant's warehouse, and defendant warehouse company issued official receipts therefor to the holder of the lien. The jury found from the evidence that the warehouse company had agreed to issue the official receipts to plaintiff and that plaintiff suffered loss resulting from breach of the agreement by the warehouse company. *Held*, plaintiff is entitled to recover upon the verdict the amount of the loss sustained, even if the receipts could not have been issued as agreed, chapter 168, Public Laws of 1919, sec. 12, and defendant warehouse company's demurrer to the evidence was properly overruled.

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

APPEAL by defendants from *Stack, J.*, at September Term, 1933, of ANSON.

Civil action tried upon the following issues:

"1. Did the plaintiff, W. N. Northcutt, on the 11th and 12th days of November, 1920, and on the 18th day of December, 1920, deliver to defendant, Peoples Bonded Warehouse Company, the 60 bales of cotton referred to and described in paragraphs 8, 9 and 12 of the complaint, and aggregating in weight 30,623 pounds, to be by said defendant kept for him, and did the defendant agree to store said cotton and to issue official State warehouse receipts for the same in the name of the plaintiff, W. N. Northcutt, and deposit said receipts so issued with J. E. Moore and Company for safe keeping, when official receipts were received from the office of the State Warehouse Superintendent? Answer: Yes.

"2. Were the said 48 bales of cotton delivered to and received by Peoples Bonded Warehouse Company on the 11th and 12th days of November, 1920, in said warehouse on 7 December, 1920? Answer: Yes (by consent).

"3. At the time of the delivering and storing of the cotton and the agreement to issue State Warehouse receipts for the same, was said cotton encumbered by a crop lien for a debt due J. E. Moore and Company specifying it not to exceed $5,500? Answer: Yes (by consent).

"4. At the time of the issuing of the receipts to J. E. Moore and Company, was said lien unsatisfied? Answer: Yes (by consent).

(5th and 6th issues omitted as immaterial.)

"7. Did the plaintiff, on the 5th and 10th of December, 1921, make demand on the defendant, Warehouse Company, for the delivery to him of the cotton so stored? Answer: Yes.

"8. If so, what was the market value of the said cotton, at that date? Answer: 15½ cents per pound, totaling $4,746.56 (by consent).

"9. If demanded by plaintiff, did defendant, Warehouse Company, fail and neglect to make delivery of said cotton after demand? Answer: Yes.

"10. What amount, if any, was credited by J. E. Moore and Company on the plaintiff's crop lien for the year 1920, from the proceeds of the sale of the 60 bales of cotton in question? Answer: $2,989.05 (by consent).

"11. Did the plaintiff agree to the crediting of that amount on his account from proceeds of the 60 bales of cotton? Answer: No.

"12. What damage, if any, is the plaintiff entitled to recover of the defendants? Answer: $1,757.52—with interest."

Plaintiff seeks to hold the State Treasurer, as well as the Warehouse Company, not upon the official receipts, which were issued in the name of J. E. Moore and Company, but upon the failure to issue said receipts in the name of the plaintiff as agreed.

Judgment on the verdict against both defendants, from which they appeal, each assigning errors.

M. T. Spears and T. D. Bryson for plaintiff.

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

Robinson, Pruette & Caudle for defendant Warehouse Company.

STACY, C. J. The plaintiff first sued for the breach of an alleged private contract between himself and the Peoples Bonded Warehouse Company. A new trial was granted for error in the exclusion of certain evidence. *Northcutt v. Warehouse Co.*, 202 N. C., 657, 163 S. E., 747. Thereafter, the plaintiff recast his complaint, declared upon a verbal agreement *dehors* the receipts, and now seeks to recover against the Warehouse Company as a part of the State Warehouse System and also against the "indemnifying or guarantee fund" in the hands of the State Treasurer accumulated under chap. 168, Public Laws, 1919. *Bickett v. Tax Com.*, 177 N. C., 433, 99 S. E., 415.

It will be observed that the action is not upon the official receipts, which carry "absolute title to the cotton" (sec. 12), but for failure to issue said receipts in the name of the plaintiff as agreed. It may be doubted whether official receipts could have been issued in the name of the plaintiff, with the cotton encumbered at the time. Sec. 12. But however this may be, it is clear from the provisions of the statute that the primary purpose of the indemnifying or guarantee fund accumulated in the hands of the State Treasurer is "to make the warehouse receipts universally acceptable as collateral" (sec. 5). *Lacy v. Indemnity Co.*, 189 N. C., 24, 126 S. E., 316. Therefore, as the plaintiff is not the holder of the receipts and the action is not to recover thereon, it would seem that plaintiff's claim against the fund in the hands of the State Treasurer is not well founded. The demurrer to the evidence, interposed by the State Treasurer, should have been allowed.

Nothing was said in *Lacy v. Indemnity Co.*, 193 N. C., 179, 136 S. E., 359 (suit upon warehouseman's bond for failure to deliver cotton upon tender of receipts), which militates against our present position.

But the same reasoning does not apply to the demurrer of the corporate defendant. Even if the receipts were not issuable in the name of the plaintiff, because title to the cotton was encumbered at the time, it does not follow that plaintiff is without remedy as against the Warehouse Company. *LeRoy v. Jacobosky,* 136 N. C., 443, 48 S. E., 796; 21 R. C. L., 914. It is established by the verdict that the plaintiff lost his cotton through the failure of the defendant to store it and issue receipts therefor as agreed. We have discovered no error in the trial of the cause so far as the corporate defendant is concerned.

The result, then, is that the judgment will be affirmed as to the Peoples Bonded Warehouse Company and reversed as to the State Treasurer.

On appeal of State Treasurer, Reversed.

On appeal of Warehouse Company, No error.

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

C. J. HEMRIC, SANT MAUDLIN, W. L. MACKIE, AND EVERETT HUNT, v. BOARD OF COMMISSIONERS OF YADKIN COUNTY.

(Filed 11 July, 1934.)

Taxation A a: Counties E b—Vote is necessary to issuance of bonds for necessary expense where proper petition therefor is aptly filed.

It is required by the County Finance Act that the question of the issuance of bonds for the purchase, construction, improvement and equipment of schools necessary for the maintenance of public schools in the county for the constitutional term, be submitted to the voters where a petition therefor signed by more than fifteen per cent of the voters of the county has been aptly filed, although in the absence of such petition, filed within the time prescribed by statute, a vote would not be necessary to the validity of such bonds, the bonds being for a necessary county expense.

APPEAL by defendant from *Finley, J.*, at Chambers, in North Wilkesboro, N. C., on 10 February, 1934. From YADKIN. Affirmed.

This is an action to compel the defendant, by a writ of *mandamus,* in accordance with the prayer of a petition filed with the defendant by voters of Yadkin County on 1 January, 1934, to submit to the

voters of said county, for their approval or disapproval, an order passed by the defendant on 20 December, 1933, authorizing and directing the issuance of bonds of Yadkin County, in the aggregate amount of $140,000 for the purpose of raising money to be expended in the purchase, construction, improvement, and equipment of schoolhouses in said county, and in the meantime to restrain the defendant from issuing the said bonds under and pursuant to said order.

The plaintiffs are citizens, residents and voters of Yadkin County, and instituted this action on behalf of themselves and all other citizens, residents and voters of said county, similarly situated.

On 20 December, 1933, the defendant, board of commissioners of Yadkin County, at the request of the board of education of said county, passed an order authorizing and directing the issuance of bonds of said county in the aggregate sum of $140,000, for the purpose of raising money to be expended in the purchase, construction, improvement and equipment of schoolhouses in said county. The order was passed by the defendant under and subject to the provisions of the County Finance Act, and was in all respects in full compliance with the provisions of said act. The defendant found as a fact that the purchase, construction, improvement and equipment of said schoolhouses was a necessary expense for the maintenance of public schools in the several school districts of said county, for a term of at least six months, each year, as required by the Constitution of North Carolina. The first publication of said order as required by the County Finance Act was on 28 December, 1933. This action was begun by summons dated 26 January, 1934.

On 1 January, 1934, a petition signed by more than 15 per cent of the voters of Yadkin County who voted in the last preceding election held in said county for the election of a Governor of this State, was filed with the defendant, praying that the bond order passed by the defendant on 20 December, 1933, be submitted to the voters of Yadkin County, for their approval or disapproval, at an election to be held in said county, in accordance with the provisions of the County Finance Act.

The defendant being advised that the petitioners were not entitled to the relief prayed for in their petition, for the reason that the bonds authorized and directed to be issued by said order were for a necessary expense, and therefore not subject to the approval of the voters of Yadkin County for their validity, denied the petition.

At the hearing of the action, the court found the facts to be as above stated, and being of opinion that on these facts the plaintiffs are entitled to the relief prayed in this action, rendered judgment accordingly.

The defendant excepted to the judgment and appealed to the Supreme Court.

A. T. Grant and D. L. Kelly for plaintiffs.

Attorney-General Brummitt and Assistant Attorney-General Seawell and Avalon E. Hall for defendant.

CONNOR, J. The only question presented by this appeal is whether a bond order passed by the board of commissioners of a county in this State, under the authority and subject to the provisions of the County Finance Act (Public Laws of North Carolina, 1927, chap. 81, North Carolina Code of 1931, chap. 24, Art. 7A) authorizing and directing the issuance of bonds of the county for the purpose of procuring money to be expended in the purchase, construction, improvement and equipment of schoolhouses in the several school districts of the county, which are necessary for the maintenance of public schools in said districts, for a term of at least six months, each year, as required by the Constitution of this State, is subject to the approval of the voters of the county, when a petition signed by the requisite number of voters of said county has been filed with the said board of commissioners, in accordance with the provisions of said act.

This question must be answered in the affirmative, and for that reason the judgment in the instant case is affirmed. See *Frazier v. Commissioners,* 194 N. C., 49, 138 S. E., 433.

Where no petition has been filed within the time prescribed by the act, praying that a bond order duly passed by the board of commissioners of a county, be submitted to the voters of the county, in accordance with the provisions of the act, the bond order is valid and effective, without the approval of the voters of the county. *Julian v. Ward,* 198 N. C., 480, 152 S. E., 401, *Hall v. Commissioners,* 195 N. C., 367, 142 S. E., 315, and 194 N. C., 768, 140 S. E., 139, and *Frazier v. Commissioners, supra.*

Where, however, a petition is filed in accordance with the provisions of the County Finance Act, praying that a bond order duly passed by the board of commissioners of a county in this State, authorizing and directing the issuance of bonds of the county for the purpose of procuring money for the purchase, construction, improvement or equipment of schoolhouses required for the maintenance of a school in each of the districts of the county as required by the Constitution of the State, be submitted to the voters of the county, such bond order is not valid or effective, until the same has been approved by the voters of the county as provided in the act. It is so provided in the County Finance Act, as we construe its terms and provisions. There is no error in the judgment. It is

Affirmed.

JAMES BOOZER, BY HIS NEXT FRIEND, ELOISE BOOZER, v. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Filed 11 July, 1934.)

1. Insurance F b—Insured under group policy must become totally and permanently disabled while insured to recover on disability clause.

An employee insured under a group policy, providing for disability benefits to employees becoming totally and permanently disabled, may not recover upon such disability clause unless he suffers disability which is total and permanent while insured by the policy.

2. Same—Recovery may not be had on disability clause of group policy where employee is not totally disabled at time of discharge.

A policy of group insurance provided that it should terminate as to any employee upon his discharge from the company. The policy also contained a clause providing for benefits to employees becoming totally and permanently disabled. While employed and covered by the insurance, plaintiff contracted a disease which affected his mind. He continued his employment and was thereafter discharged because of a violation of a rule of the employer and not because his work was unsatisfactory. After his discharge he unsuccessfully attempted to procure other work and about five months after his discharge he was adjudged insane. This action was instituted to recover disability benefits under the policy. *Held*, the evidence disclosed that at the time of his discharge, which terminated his insurance, plaintiff was not totally disabled, and insurer's motion as of nonsuit should have been allowed.

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

APPEAL by defendant from *Hill, Special Judge,* at February Term, 1934, of FORSYTH. Reversed.

This is an action to recover on a certificate of insurance which was issued on 3 December, 1929, by the defendant to the plaintiff as an employee of the R. J. Reynolds Tobacco Company of Winston-Salem, N. C., pursuant to the provisions of a policy of group life insurance, by which the defendant had insured certain employees of the said tobacco company.

It is provided in said policy of insurance that "in the event that any employee while insured under the aforesaid policy, and before attaining age 60 becomes totally and permanently disabled by bodily injury or disease, and will thereby presumably be continuously prevented for life from engaging in any occupation or performing any work for compensation of financial value, upon receipt of due proof of such disability before the expiration of one year from the date of its commencement, the society will, in termination of all insurance of any such employee under the policy, pay equal monthly disability installments,

the number and amount of which shall be determined by the table of installments below."

It is further provided in said policy of insurance that "the insurance of any employee under the above mentioned policy shall automatically cease upon his discontinuing his contributions toward the payment of premiums for insurance thereunder, or upon termination of his employment with the employer in the specified classes of employees, or in the event of his being pensioned, retired, granted leave of absence or laid off from full time employment."

The plaintiff was an employee of the R. J. Reynolds Tobacco Company from the date of the issuance of the certificate of insurance, to wit: 3 December, 1929, to 26 September, 1932, when his employment was terminated by his discharge for the violation on said day of a rule of said company. During this period he was insured under the policy of group life insurance issued by the defendant to the R. J. Reynolds Tobacco Company. His insurance, however, under the terms of the policy, ceased on 26 September, 1932.

The evidence at the trial showed that while the plaintiff was insured under said policy, he became disabled as the result of a disease which he had contracted while in the employment of the R. J. Reynolds Tobacco Company; that this disease by its very nature affected the mind of the plaintiff, and that it was progressive in its nature, and incurable. Prior to his discharge as an employee of the R. J. Reynolds Tobacco Company, and while he was insured by the defendant, he suffered a disability by disease, which was permanent.

The evidence showed further that notwithstanding his disability, the plaintiff continued to perform his work as an employee of the R. J. Reynolds Tobacco Company, up to and including the day of his discharge. He earned and was paid full wages for his work. His services were satisfactory to his employer. He was not discharged because of his disability, but because in violation of a rule of the company, he had whiskey in his possession on the premises of the tobacco company, while he was at work.

After his discharge on 26 September, 1932, the plaintiff endeavored to get other employment, but was unable to do so. Sometime in January, 1933, he was adjudged insane, as the result of the disease from which he was suffering prior to his discharge. He is now and has been since 13 January, 1933, a patient in the State Hospital for the colored insane at Goldsboro, N. C. He is now both totally and permanently disabled by disease, and thereby prevented from engaging in any occupation, or performing any work for compensation of financial value.

This action was begun on 23 February, 1933, and is prosecuted by the duly appointed next friend of the plaintiff.

The issue submitted to the jury was answered as follows:

"Was James Boozer on 26 September, 1932, totally and permanently disabled by bodily injury or disease, as alleged in the complaint? Answer: Yes."

From judgment that plaintiff recover of the defendant the sum of $500.00, and the costs of the action, the defendant appealed to the Supreme Court.

Williams & Bright for plaintiff.

Manly, Hendren & Womble for defendant.

CONNOR, J. The plaintiff is not entitled to recover in this action for a disability resulting from bodily injury or disease, suffered by him while insured by the defendant, unless such disability was both permanent and total.

Conceding that there was evidence at the trial tending to show that plaintiff suffered a permanent disability from disease, while he was insured by the defendant, and before he had attained the age of 60 years, we must hold that there was no evidence tending to show that the disability was total. All the evidence shows that plaintiff was able to perform and did perform the duties of his employment up to and including the day of his discharge, which terminated his insurance. For this reason there was error in the refusal of the court to allow defendant's motion, at the close of all the evidence, for judgment as of nonsuit. See *Thigpen v. Ins. Co.*, 204 N. C., 551, 168 S. E., 845. The judgment is

Reversed.

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

STATE v. CLARENCE ALRIDGE, LLOYD ALRIDGE, AND ED ALRIDGE.

(Filed 11 July, 1934.)

1. Jury A d—Defendant tried on consolidated bills of indictment is entitled to but four peremptory challenges.

Where several bills of indictment against a defendant are consolidated for trial, the defendant is entitled to but four peremptory challenges to the jury and not to four peremptory challenges for each bill, the consolidated bills being treated as separate counts of the same bill. N. C. Code, 4623.

STATE *v.* ALRIDGE.

2. Conspiracy B a—Death of one defendant prior to trial does not preclude conviction of the other defendant of conspiracy.

Four defendants were indicted for assault and conspiracy. One defendant was acquitted. A second defendant's plea of guilty to the charge of assault and not guilty to the charge of conspiracy was accepted by the State. The third defendant died prior to trial. The fourth defendant was convicted on both counts. *Held*, the contention of the fourth defendant that he alone could not be convicted of conspiracy cannot be sustained, since the subsequent death of the deceased defendant would not affect the charge of conspiring with such defendant prior to the commission of the crime while said defendant was yet alive.

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

CRIMINAL ACTION, before *Finley, J.*, at October Term, 1933, of AVERY.

At the October Term, 1933, of Avery Superior Court four bills of indictment were returned against Ed Alridge, Lloyd Alridge, Clarence Alridge and Wes Buchanan, charging that said defendants on 16 October, 1933, did conspire, confederate and agree among themselves" to assault, beat and wound Adam Wiseman, with a deadly weapon, and did, in a secret manner, feloniously assault said Wiseman with intent to kill. The second bill charged the same defendants with a like offense on the same date, against R. A. Shumaker. The third bill charged the same defendants with a like offense, on the same date against W. H. Hughes. The record shows the following: "The above named defendants were each indicted in separate cases as charged in the respective bills of indictment, and it was agreed between the solicitor for the State and the attorneys representing the defendants that the said three bills of indictments and causes of action might be consolidated for the purpose of trial. . . . Before the jury was impaneled, counsel for the defendants stated that the defendants did not oppose the consolidation of the cases for the purpose of trial, but moved the court to allow the defendants four peremptory challenges each in each of the three cases, or a total of 12 challenges each to each of said defendants. The court overruled the motion."

The defendant, Wes Buchanan, was dead at the time of the trial. The defendant, "Ed Alridge, tendered a plea of guilty of assault as charged in the bills of indictment, but not guilty of conspiracy, at the close of the State's evidence, which plea the State accepted." The jury found Lloyd Alridge guilty as charged in the bill of indictment and Clarence Alridge not guilty.

From judgment sentencing Ed Alridge to the State's prison for not less than four nor more than six years, and Lloyd Alridge for not less than three nor more than five years, the said Lloyd Alridge appealed.

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

J. W. Ragland and Byron E. Williams for defendant.

BROGDEN, J. 1. If separate indictments against a single defendant are consolidated for trial, is such defendant entitled to four peremptory challenges for each indictment?

2. If four defendants are charged in a consolidated bill of indictment with conspiracy and one is dead before the trial, another pleads guilty at the conclusion of State's evidence, and another is acquitted, may the remaining defendant be convicted of such conspiracy?

C. S., 4622, Michie's Code, 1931, authorizes a consolidation of several charges against any person "for the same act or transaction, or for two or more acts or transactions connected together." In the case at bar no exception is taken to the consolidation of the cases, but the appealing defendant has properly raised the legal question as to whether in such event he was entitled to four peremptory challenges in each of the three separate indictments which formed a consolidated bill. C. S., 4633, Michie's Code, 1931, provides: "And in all joint or several trials for crimes and misdemeanors, other than capital, every person on trial shall have the right of challenging peremptorily, and without showing cause, four jurors and no more." The theory of the law is that when two or more indictments for the same offense are consolidated, they are to be treated as separate counts of the same bill. *S. v. Stephens,* 170 N. C., 745, 87 S. E., 131; *S. v. Lewis,* 185 N. C., 640, 116 S. E., 259; *S. v. Malpass,* 189 N. C., 349, 127 S. E., 248; *S. v. Beal,* 199 N. C., 278, 154 S. E., 604. Consequently, if there is but one bill containing several counts, it would seem manifest that a defendant is not entitled to four peremptory challenges on separate counts in a bill, but that he should be allowed four challenges at the trial on the consolidated bill.

The defendant, however, relies upon the case of *S. v. McNeill,* 93 N. C., 553. This Court in its opinion quoted from *Withers v. Commonwealth,* a Pennsylvania case, holding that separate indictments for conspiracy would be consolidated in the discretion of the court. The quotation was concluded with this language: "He was allowed, however, the privilege of challenging four jurors on each indictment." The Supreme Court of North Carolina, commenting upon the *Withers case,* said: "That case was substantially like the present one, except that in the latter, no question was raised as to the right of challenge of jurors." The fourth head note of the *McNeill case* declares: "In such case, *it seems* that the defendant is allowed the same number of peremptory challenges to the jury as if he had been tried separately on each bill."

It is not thought that the *McNeill case, supra,* is authority for the position that the defendant was entitled to 12 peremptory challenges, because it appears that "no question was raised as to the right of challenge of jurors." Hence, the question remained open. Therefore, in the absence of interpretation to the contrary, it must be concluded that the express provision of C. S., 4633, authorizing four peremptory challenges in such cases, must be accepted as the law upon the subject. See *S. v. Burleson,* 203 N. C., 779.

The defendant, Lloyd Alridge, contends that he cannot be convicted of conspiracy because a defendant cannot conspire with himself, and as the State accepted Ed Alridge's plea of guilty of assault, but not guilty of conspiracy, and as the jury acquitted Clarence Alridge, and as Wes Buchanan was dead, there was no one left in the case for him to conspire with. However, the bill charges that Lloyd Alridge conspired with Wes Buchanan. The fact that Buchanan was dead at the time of the trial had no effect upon the unlawful conspiracy if such had been entered into between him and the defendant during his lifetime, and before the crime was committed. This point is decided against the contention of defendant in *S. v. Diggs,* 181 N. C., 550, 106 S. E., 834. See, also, *S. v. Turner,* 119 N. C., 841, 25 S. E., 810.

No error.

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

J. B. MANN v. NORTH CAROLINA STATE BOARD OF EXAMINERS IN OPTOMETRY ET AL.

(Filed 11 July, 1934.)

Optometrists A c—Optometrist held entitled to reissuance of license upon paying fees and penalties, license not having been revoked for nonpayment.

Plaintiff was a duly licensed optometrist. Several years after passing his examination and receiving his license plaintiff discontinued the practice of his profession, paid no license fees, and engaged in other work for a period of eighteen years. The Board of Optometry Examiners took no action to revoke his license for failure to pay annual license fees, C. S., 6696. Plaintiff, desiring to again enter his profession, tendered the annual fees and penalty and applied for license. His application was refused, defendant board contending that he had abandoned the practice of his profession, and that his reëntry into the profession would constitute a "beginning to practice optometry" and that license could not be again issued to him until he had again passed the statutory examination. *Held,*

the statutory method providing for revocation of the license is exclusive, and this method not having been followed, plaintiff is still an optometrist and has the right to receive his license upon the payment of the fees and penalty prescribed by the statute.

CIVIL ACTION, before *Barnhill, J.*, at 2 February Special Term, 1934, of WAKE.

The parties waived a jury trial and agreed that the judge should find the facts and declare the law arising thereon. The pertinent facts so found, are substantially as follows:

The North Carolina State Board of Examiners in Optometry was created and organized under the provisions of Public Laws of 1909, chapter 444, as amended from time to time. Said statutes now constitute C. S. section 6687 *et seq.* In June, 1909, plaintiff, after examination, was admitted to practice optometry and engaged in the practice until the year 1913, paying annual fees each of said years as provided by statute. "In the year 1913 the plaintiff discontinued the practice of optometry, engaged in other business, and since that time he has not engaged in such practice." On 22 July, 1931, plaintiff wrote a letter to the secretary of the examining board, as follows: "Will you please advise me what it will cost me to have my license restored. I was licensed in 1909 and later entered other work allowing my license to lapse." In reply to said letter the secretary of the board wrote: "It will be necessary for you to comply with our present requirements as it applies to new applicants. We have a ruling to the effect that one must apply for reinstatement within two years from the time of revocation."

2. The plaintiff made application to the board to issue to him an annual certificate for the practice of optometry, at the same time tendering to the board annual fees and penalty as prescribed in C. S., 6696. The board declined plaintiff's application unless and until plaintiff should comply with the provisions of C. S., 6691, as amended by Public Laws of 1915, and Public Laws of 1923.

3. No notice of revocation of his license was given to plaintiff by the board, and his license has never been legally revoked by action of defendant.

Upon the foregoing facts the court was of the opinion, and so found, "that the action of plaintiff in discontinuing the practice of optometry in 1913 and is engaging in other business for a period of eighteen years constituted an abandonment by him of his license to practice optometry, and that for him again to enter said profession as a practitioner constitutes a 'beginning to practice optometry.'"

From the foregoing judgment the plaintiff appealed.

S. Brown Shepherd and N. G. Fonville for plaintiff.
Ruark & Ruark for defendant.

BROGDEN, J. C. S., 6691, Michie's, provides that "every person, before beginning to practice optometry in this State after the passage of this article, shall pass an examination before the board of examiners," etc. The plaintiff from 1913 to 1931 discontinued the practice of optometry, engaged in other business, and failed and omitted to pay the fees required by law.

Did such conduct on his part amount to an abandonment of his license duly issued or of his right to reënter the profession without examination?

It has been generally held that mere lapse of time or other delay in asserting a claim unaccompanied by acts inconsistent with his rights, will not amount to a waiver or abandonment of such right or claim. *Faw v. Whittington,* 72 N. C., 321; *R. R. v. McGuire,* 171 N. C., 277, 88 S. E., 337; *Harper v. Battle,* 180 N. C., 375, 104 S. E., 658.

The facts found by the trial judge undoubtedly support the conclusion of abandonment except for other provisions of the statute. C. S., 6696, provides that if an optometrist fails to pay the annual tax "his certificate may be revoked by the examiners upon twenty days notice of the time and place of considering such revocation. But no license shall be revoked for nonpayment if the person so notified shall pay, before or at the time of consideration, his fee and such penalty imposed by the board." Consequently, it is obvious that the remedy prescribed by law for failure to pay the tax is "revocation" of the license or certificate. Moreover, such revocation of the certificate is the only method prescribed by statute for foreclosing the right to practice the profession after an optometrist has been admitted to such practice. This was never done. It was held in *Committee on Grievances of Bar Association v. Strickland,* 200 N. C., 630, 158 S. E., 110, that "the courts everywhere are in accord upon the proposition that if a valid statutory method of determining a disputed question has been established, such remedy so provided is exclusive and must be first resorted to and in the manner specified therein."

Therefore, as the exclusive statutory method has not been invoked, the plaintiff is still an optometrist and has the right to receive the certificate upon the payment of the fees and penalty prescribed by C. S., 6696. See *Vineberg v. Day,* 152 N. C., 355.

Reversed.

T. C. WILSON, ON BEHALF OF HIMSELF AND OTHER TAXPAYERS OF THE CITY OF CHARLOTTE, v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION.

(Filed 11 July, 1934.)

1. Appeal and Error J d—

The burden of showing error is on appellant.

2. Appeal and Error F a—

The Supreme Court can review only such questions as are presented by exceptions duly taken and assignments of error duly made.

3. Same—

Where the only exception on appeal is to the judgment, and the findings of fact, to which no exceptions are taken, support the judgment, the judgment must be affirmed.

4. Taxation A a—Judgment restraining issuance of bonds by city without vote held supported by findings of fact.

In a suit to enjoin the issuance of bonds by a city the trial court found, among other facts, that the city would issue the bonds unless restrained and that the issuance of the bonds had not been approved by the qualified voters and that the bonds would be issued to provide funds to build a drilling tower to train the city's firemen. Judgment was entered permanently enjoining the issuance of the bonds, the court being "of the opinion" that the bonds were not for a necessary municipal expense within the meaning of Article VII, section 7, of the Constitution. The only assignment of error on appeal was to the signing of the judgment. *Held*, even treating the assignment of error as one to the judgment as signed and treating the "opinion" that the bonds were not for a necessary expense as a finding of fact, the judgment is supported by the findings, to which no exception was taken, and the judgment must be affirmed on appeal.

CIVIL ACTION, before *Shaw, Emergency Judge,* at 19 March Special Term, 1934, of MECKLENBURG.

The plaintiff is a citizen and taxpayer of Charlotte. The city council for the city of Charlotte at a regular meeting on 4 February, 1934, adopted a resolution reciting that "the proper training and education of the personnel of the fire department in the use of all fire fighting appliances makes it essential that a drill tower be created." Thereupon it was resolved that the city make application to the Local Government Commission for authority to issue bonds of the city in the sum of $17,500, the proceeds thereof to be used for the construction and equipping of a modern drill tower. It was further resolved that if the proposal be approved by the Local Government Commission that application be made to the Federal Public Works Administration for a loan of $17,500, "including the grant, that the city issue its bonds therefor, and that the proceeds therefrom be used in the construction and equipment of a modern drill tower."

The evidence disclosed that the proposed drill tower would be a six-story building, "25 feet by 46 feet inside," etc.

The plaintiff secured a temporary restraining order prohibiting the issuance of the bonds, and at the hearing a jury trial was waived by the parties and it was stipulated that the court should find the facts and render judgment. The court found in substance that the plaintiff was a freeholder and the defendant a municipal corporation, operating under a form of government known as Plan D, with power to pass ordinances and "to provide for the payment of any existing indebtedness and of any obligation that may be made from time to time by the city," etc. The bond ordinance was recited together with the fact that the city of Charlotte had a population of eighty thousand people, maintaining a fire department "composed of members who devoted their full time to protecting the said city against fires," and that there are no funds available for the construction of such tower except such as were to be derived from the proposed bond issue. The court further found that the question of issuing said bonds had never been submitted to the qualified voters of Charlotte, and that unless restrained the city would proceed to issue said bonds.

It is further recited: "Upon the finding of the facts, the court is of the opinion and so holds that the construction of the fire drill tower is not a necessary expense for the city of Charlotte within the meaning of section 7 of Article VII of the Constitution of North Carolina, and that the defendant has no legal right and authority to issue and sell the said bonds as set out in the aforesaid resolution dated 14 February, 1934. Now, therefore, . . . it is considered, ordered, adjudged and decreed that the restraining order which was entered in this cause on 21 March, 1934, be and the same is hereby made permanent and perpetual, and the said defendant be taxed with the costs of this action."

The appeal entry is as follows: "To the judgment herein entered the defendant excepts and appeals therefrom to the Supreme Court of North Carolina."

The only assignment of error is as follows: "The defendant hereby assigns as error the signing of the judgment appearing in the record, having duly excepted to the signing of said judgment."

Charles W. Bundy for plaintiff.
Bridges & Orr and J. E. Stukes for defendant.

BROGDEN, J. It is elementary law that upon appeal to the Supreme Court the appellant must show error. Moreover, this Court can only review such questions as are presented by exceptions duly taken and assignments of error duly made. Thus, in *Bakery Co. v. Ins. Co.*, 201

N. C., 816, it was held that "this Court will consider and pass upon only exceptions duly noted by the appellant to decisions of the court below on matters of law or legal inference. . . . It has no jurisdiction except to review, upon appeal, decisions of the court below on matters of law or legal inference. It can exercise this jurisdiction only when the decisions of the court below are properly presented by assignments of error based upon exceptions duly taken."

The only assignment of error in the case at bar is to the "signing of the judgment, . . . having duly excepted to the signing of said judgment." If said assignment merely refers to the act of signing the judgment, it presents no question of law for review. But, upon the other hand, if it be treated "as an exception to the judgment, it presents the single question whether the facts found or admitted are sufficient to support the judgment." *Mfg. Co. v. Lumber Co.*, 178 N. C., 571, 101 S. E., 214. Manifestly, the facts found by the trial judge support the judgment. The resolution authorizing the bond issue does not recite that a drill tower is a "necessary expense" of the city of Charlotte, nor does the judge find such fact. Indeed, if it be contended that the words "the court is of opinion" . . . "that the construction of the fire drill tower is not a necessary expense for the city of Charlotte" is a finding of fact, then there is no exception to such finding and no assignment of error based thereon. Consequently, the judgment as written must stand. See *Smith v. Texas Co.*, 200 N. C., 39, 156 S. E., 160; *Messer v. Ins. Co.*, 205 N. C., 236.

Affirmed.

BESSIRE AND COMPANY, INCORPORATED, v. MRS. F. A. WARD, EXECUTRIX OF THE ESTATE OF F. A. WARD, DECEASED, AND MRS. F. A. WARD, INDIVIDUALLY.

(Filed 11 July, 1934.)

1. Pleadings I c—On plaintiff's motion for judgment on the pleadings, defendant's answer must be liberally construed.

Upon plaintiff's motion for judgment on the pleadings, which is in effect a demurrer to the answer, the answer must be liberally construed, and every reasonable intendment given defendant, and the motion should be denied if the answer alleges facts sufficient to constitute a defense.

2. Executors and Administrators C c—Answer held to raise issue of executrix's personal liability on contract executed for estate.

This action was instituted against defendant individually and in her representative capacity as executrix, the complaint charging that plaintiff sold and delivered certain goods to defendant at her request and that defendant promised and agreed to pay for same. Defendant filed answer alleging that the goods were bought in her representative capacity and

that the promise to pay for same was made in her representative capacity, and that the estate alone was liable therefor. *Held*, while, under certain conditions, an executrix may be held personally liable on a contract entered into for the benefit of the estate if there is no stipulation against personal liability, yet the answer is sufficient to raise an issue as to defendant's individual liability and plaintiff's motion for judgment on the pleadings should have been denied.

APPEAL by defendant, Mrs. F. A. Ward, individually, from *Sinclair, J.*, at March Term, 1934, of DURHAM. Reversed.

This is an action instituted by the plaintiff against the defendant in her official capacity as executrix of her husband, and against her individually, for a balance alleged to be due for goods, wares and merchandise sold and delivered. Upon motion of the plaintiff the court rendered judgment on the pleadings against Mrs. F. A. Ward, individually, from which judgment she appealed.

Bryant & Jones for appellant.
Forrest A. Pollard for appellee.

SCHENCK, J. "The plaintiff's motion for judgment upon the answer is, in effect, a demurrer to the answer, and can only prevail when the matters pleaded constitute an admission of plaintiff's cause of action or are insufficient as a defense or constitute new matter insufficient in law to defeat plaintiff's claim." *Pridgen v. Pridgen*, 190 N. C., 102.

The answer of the appealing defendant must be construed liberally, which means that every reasonable intendment must be taken in favor of her and if the answer contains facts sufficient to constitute a defense, it must be sustained. *Pridgen v. Pridgen, supra*, and cases there cited.

The third and fourth paragraphs of the complaint are as follows:

"3. That during the years 1929 and 1930 the plaintiff sold and delivered to the defendant at her request, certain goods, wares and merchandise amounting to $4,548.38, an itemized statement of which is attached hereto and marked Exhibit A, and asked to be made a part of this account.

"4. That the defendant promised and agreed to pay for the said goods, wares and merchandise so sold and delivered, and did pay the sum of $2,950.54 during the years 1929 and 1930, but has failed and refused to pay the balance of $1,597.74, although many demands have been made upon her for same, and that there is now due and owing by the defendant to plaintiff, the said sum of $1,597.74 and interest thereon from 17 September, 1929."

The third and fourth paragraphs of the answer are as follows:

"3. It is admitted that during the years 1929 and 1930, the defendant as executrix of the estate of F. A. Ward, purchased from the

plaintiff certain goods, but that she did this as executrix and not in her individual capacity. Except as herein and hereinafter admitted, paragraph 3 of the complaint is untrue and denied.

"4. It is admitted that the defendant, Mrs. F. A. Ward, as executrix of the estate of F. A. Ward, promised to pay for the goods purchased, and did make certain payments to the plaintiff. It is further admitted that the estate of F. A. Ward owes the plaintiff the sum of $1,597.74. Except as herein admitted, paragraph 4 of the complaint is untrue and denied."

While under certain conditions an executrix may be held personally liable if she enters into a contract for the benefit of the estate, without stipulating against personal liability, and while the plaintiff may be entitled to recover against the defendant in her individual capacity, if it can sustain the allegations in the complaint, still we think the denials in the answer raise an issue as to the defendant's individual liability, and that his Honor erred in awarding judgment against her upon the pleadings.

Reversed.

MRS. WARDY HEADEN v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 11 July, 1934.)

1. Insurance I b—Right to avoid policy for misrepresentations in application held determined adversely to insurer by jury's verdict.

The jury found from the evidence that insured had not been attended by a physician for serious disease within two years prior to making application for the policy, and that insured had not had any serious disease of heart or kidneys prior to such application. The only defense interposed by insurer was that insured had made misrepresentations in her application relating to the matters passed upon by the jury. *Held*, plaintiff was entitled to recover, the verdict of the jury being determinative of the rights of the parties.

2. Appeal and Error A a: J b—

The verdict of the jury upon conflicting, competent evidence, and the refusal of the trial court to set aside the verdict as being against the weight of the evidence are not subject to review upon appeal.

3. Appeal and Error K f—

Where judgment for plaintiff is affirmed on appeal under an erroneous belief that a verdict had been directed in plaintiff's favor, a petition to rehear will be granted for the purpose of affirming the judgment upon the verdict of the jury.

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

HEADEN *v.* INSURANCE CO.

PETITION to rehear this case, reported *ante*, 270.

The action is to recover on a policy of life insurance, issued 28 July, 1930, and providing that "if the insured is not in sound health on the date hereof," or if "within two years before the date hereof," the insured has "been attended by a physician for any serious disease or complaint," or before said date, has had any "disease of the heart, liver or kidneys," not specifically recited in the space for endorsements, "then, in any such case, the company may declare this policy void and the liability of the company in the case of any such declaration or in the case of any claim under this policy, shall be limited to the return of premiums paid on the policy, except in the case of fraud, in which case all premiums will be forfeited to the company."

The defendant offered evidence tending to show that the insured was not in sound health when the policy was issued; that within two years prior thereto she had been attended by physicians for serious diseases, and that before said date, she had had diseases of the heart, liver and kidneys.

The policy was issued without medical examination of the insured, and defendant's agent at the time of soliciting the applicant, on being invited to have a physician examine her, if he doubted the risk, stated he was "going to take a chance on the old lady." Premiums were paid during the life of the insured. No fraud is pleaded or suggested.

The case was tried upon the following issues:

"1. Was said Salem Knuckley attended by a physician or physicians for any serious disease or complaint within two years before 28 July, 1930? Answer: No.

"2. Had said Salem Knuckley had any disease of the heart or kidneys before 28 July, 1930? Answer: No.

"3. What amount, if any, is plaintiff entitled to recover of defendant? Answer: $320.00, with interest from November, 1931."

The court instructed the jury to answer the first two issues "Yes," if they found "the evidence as testified by the witnesses for the defendant and the record evidence"; and to answer them "No," if they did "not find the facts as testified by those witnesses."

Judgment on the verdict, from which the defendant appeals.

J. D. McCall for plaintiff.

Cansler & Cansler and R. M. Gray, Jr., for defendant.

STACY, C. J. The burden of the petition to rehear is, that the clause in the policy, "or in case of any claim under this policy," liability shall be limited, etc., is not affected by the provision, "nor shall payment be resisted on account of any misrepresentation as to the physical condition of the applicant, except in cases of fraud," C. S., 6460, and for this

position the cases of *Reinhardt v. Ins. Co.*, 201 N. C., 785, 161 S. E., 528, and *Gilmore v. Ins. Co.*, 199 N. C., 632, 155 S. E., 566, are cited as controlling authorities.

The plaintiff, on the other hand, contends that the case is governed by the decisions in *Potts v. Ins. Co., ante,* 257; *Holbrook v. Ins. Co.*, 196 N. C., 333, 145 S. E., 609, and *McNeal v. Ins. Co.*, 192 N. C., 450, 135 S. E., 300.

The record does not call for a determination of the point. The jury rejected the defendant's evidence, and, on the verdict, the plaintiff is entitled to recover. The questions debated on brief and in the certificate of counsel are not before us for decision. It is not a matter for review on appeal that the jury declined to believe the evidence of one of the parties, or that the trial court refused to set aside the verdict as against the weight of the evidence. *Goodman v. Goodman*, 201 N. C., 808, 161 S. E., 686.

We were originally in error in thinking that a verdict had been directed for the plaintiff. The inadvertence, however, was not against the appellant, but rather in its favor. The case was brought back in order that it might be permitted to go off on the jury's findings—the course it should have taken in the first instance. Thus, while the decision is placed upon other grounds, the result is the same. For this purpose only is the

Petition allowed.

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

B. E. JONES v. CAROLINA POWER AND LIGHT COMPANY.

(Filed 11 July, 1934.)

1. Master and Servant A a—Contract of employment held not void for indefiniteness.

A contract to employ a person for a period of at least ten years if such person would leave his present employment and work for the proposed employer in another city is not void for indefiniteness for failure of stipulation of the amount of compensation or character of services to be rendered, or because the employee might terminate the contract at any time.

2. Principal and Agent A a—

Proof of agency, as well as its nature and extent, may be made by the direct testimony of the alleged agent upon the trial, but not by his extra-judicial declarations of agency.

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

JONES *v.* LIGHT CO.

APPEAL by defendant from *McElroy, J.*, at September Term, 1933, of BUNCOMBE.

Civil action to recover damages for alleged breach of contract of employment.

There is allegation and evidence on the part of the plaintiff, tending to show that on 25 September, 1926, the plaintiff, an experienced street-car motorman or conductor, was induced by defendant's agent and superintendent to leave his employment and home in Spartanburg, S. C., and come to Asheville, N. C., to break a strike, "the operators of the street cars in the city of Asheville then being out on strike," under a promise of "permanent employment for the term of at least ten years"; that plaintiff remained in the employment of the defendant until 24 January, 1932, when he was discharged without cause; and that the defendant has refused to reëmploy him in any capacity whatever.

Defendant's superintendent of distribution and lighting, who was also assistant to the vice-president of the company, as a witness for the defendant, testified on cross-examination, *inter alia,* as follows: "Mr. Jones in this case was told by me that if he would accept this job and begin work and help break this strike, and, in the event later he did not get regular work on the cars, I would give him other work in other departments. . . . I will say positively there was no definite length of time specified. . . . When I went to South Carolina, I had authority not only to hire the men to operate the street cars, but offer and promise them work in other departments, if they were not used on the street cars in order that we might give them regular work, because I knew they were being put by me in a dangerous situation."

Upon denial of liability and issues joined, the jury returned a verdict in favor of the plaintiff and assessed the damages at $1,780. From the judgment entered thereon, the defendant appeals, assigning errors.

Weaver & Miller and J. Y. Jordan, Jr., for plaintiff.

A. Y. Arledge, R. F. Phillips and Harkins, Van Winkle & Walton for defendant.

STACY, C. J. The defendant assails the validity of the trial principally upon the ground: first, that the alleged contract of employment is too indefinite; and, second, that defendant's agent's authority to make such a contract, if made, is nonexistent and nonapparent.

The contract as established by the verdict is not void for indefiniteness. *Stevens v. R. R.,* 187 N. C., 528, 122 S. E., 295; *Fisher v. Lumber Co.,* 183 N. C., 485, 111 S. E., 857.

The law is stated in 39 C. J., 41, as follows: "It has been held further that the relinquishment of a present position in reliance on a promise

to give permanent employment is a sufficient consideration for such a contract, that such a contract is not void as indefinite, or as wanting in mutuality because the employee is not bound to continue in the employer's service, or because the employee might terminate the contract at will, although the employer is bound. And such a contract is not void for uncertainty, for lack of a stipulation as to the compensation, or character of the services to be rendered."

The authority of the defendant's agent to make the alleged contract was submitted in an issue to the jury and answered in the affirmative. Indeed, the agent's own testimony is to the same effect. Proof of agency, as well as of its nature and extent, may be made by the direct testimony, but not by the extra-judicial declarations, of the alleged agent. *Allen v. R. R.*, 171 N. C., 339, 88 S. E., 492; *Sutton v. Lyons*, 156 N. C., 3, 72 S. E., 4; *Hill v. Bean*, 150 N. C., 436; 64 S. E., 212; *Machine Co. v. Seago*, 128 N. C., 158, 38 S. E., 805; 1 R. C. L., 821.

The principle upon which *Stephens v. Lumber Co.*, 160 N. C., 107, 75 S. E., 933, was decided is not applicable to the facts of the present case.

The record is free from reversible error, hence the verdict and judgment will be upheld.

No error.

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

HAZEL GRAY OWENS v. RESERVE LOAN LIFE INSURANCE COMPANY.

(Filed 11 July, 1934.)

1. Insurance J b—Rights of parties under life insurance policy is to be determined as of date of death of insured.

The rights of the parties under a policy of life insurance are to be determined as of the date of the death of the insured, and where insured, a few days before his death, writes insurer requesting an extension of time for payment of premium, and insurer, without knowledge of insured's intervening death, writes insured, after his death, agreeing to grant the request upon insured's signing an extension agreement and the payment of a small interest charge, the rights of the beneficiary under the policy are not affected by the insurer's letter relating to an extension of time the terms of which were not complied with, and the beneficiary's rights under the policy will be determined according to its provisions for paid-up and extended insurance upon nonpayment of an annual premium.

2. Insurance L b—Held: under terms of policy extended term feature was eliminated by loan against policy in excess of extended term value.

The policy in suit contained an extension clause providing that upon nonpayment of an annual premium the policy should have a certain paid-up insurance value or extended insurance for a specified term, but that if insured had borrowed on the policy, the paid-up insurance should be reduced in the ratio of the indebtedness to the net value of such paid-up insurance, and that the extended insurance should be for as long a term as the balance, left after deducting the indebtedness from the net value of the extended insurance, would purchase as a net single premium. Upon competent evidence the trial court found that the "net value of the extended insurance" was in a sum less than the amount borrowed on the policy by insured during his lifetime. *Held*, by the terms of the policy there were no funds available for the purchase of paid-up or extended insurance, the loan against the policy being in excess of the net value of the extended insurance provided for in the policy, and the beneficiary was not entitled to recover on the policy under the extension feature thereof.

3. Evidence J a—

Parol evidence in explanation of the "net value of extended insurance" as used in a policy of life insurance involved in the case is held competent under the rule that parol evidence is competent to explain technical words as used in particular trades or vocations.

4. Insurance L c—Beneficiary may not recover cash surrender value of policy payable according to its terms to insured upon his request.

Where a policy of life insurance has, as of the date of insured's death, a certain cash or surrender value, which, according to the terms of the policy, is payable to insured upon his request and valid surrender of the policy, the beneficiary therein may not recover such cash or surrender value where it appears that insured, prior to his death, made no request therefor and did not surrender the policy, nor may a letter written by insured a few days before his death, requesting an extension of time for payment of a premium, be construed as a request for the cash or surrender value of the policy.

CLARKSON, J., dissenting.

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

CIVIL ACTION, before *Frizzelle, J.*, at February Term, 1933, of WILSON.

By agreement of the parties the trial judge heard the evidence, found the facts and rendered judgment thereon.

The facts so found pertinent to a decision of the questions of law involved, are as follows:

On 22 November, 1923, the defendant issued and delivered to John Elverson Owens a certain policy of life insurance by the terms of which it agreed to pay $1,000 to Hazel Gray Owens, the plaintiff in this action, upon receipt of due proof of the death of the insured; subject, however,

to the conditions set forth in the policy. The quarterly premium required by said policy was $7.71 and the annual premium was $23.63. The policy contained a table of certain guaranteed values. This table shows that if the policy had been in force eight years it had a cash or loan value of $93.00, a paid-up insurance value of $208.00, and an extended insurance feature of eight years and one month. The policy further provided: "In the event of no indebtedness hereon, the values in the above table would apply. Any indebtedness hereon may be paid in cash and the values in the table will then apply, or if not so paid, the cash loan values will be reduced by the amount of the indebtedness; the paid-up insurance will be reduced in the ratio of the indebtedness to the net value of such paid-up insurance; and the extended insurance shall be for as long a term as the balance, left after deducting the indebtedness from the net value of the extended insurance as shown in the table, will purchase as a net single premium," etc.

Another clause in the policy was as follows: "At the expiration of three years from the date hereof, if any subsequent premium be not paid when due, the company will, without action on the part of the insured, extend this policy as nonparticipating term insurance, without loan values, for the term provided on the table of guaranteed values opposite the number of years for which annual premiums have been paid."

Owens, the insured, paid the annual premiums for the years 1923 to 1930, both inclusive. The ninth annual premium fell due and payable on 22 November, 1931. The usual grace period was allowed by the policy and due notice was given by the company of the date when the premium was payable. . . . On 13 November, 1930, the said John Elverson Owens obtained a loan on said policy, pursuant to the provisions thereof from the defendant, in the sum of $85.32. The interest on said loan was paid to 22 November, 1931. Said loan was outstanding at the time of the death of the insured. On 21 December, 1931, and during the grace period the insured wrote a letter to the defendant stating: "It will be impossible to pay the amount due on my policy at present. Please make arrangements for me to have ninety more days in which to pay this." Seven days later, to wit, on 28 December, 1931, the insured died. On 29 December, 1931, and after the death of the insured, the defendant, not having heard of the death, wrote a letter to John Elverson Owens, stating: "We shall be glad to extend the time for payment of premium as you requested. In order to secure the extension you are required to sign the enclosed agreement and return promptly with cash of ten cents for interest. If the premium is settled according to these terms, your policy loan will be extended to 22 February, 1932, at which time it will be $5.26." The said letter

enclosed a premium extension agreement to be signed by the insured, but, of course, on account of the death, such agreement was never signed. On 21 January, 1932, the defendant wrote the clerk of the Superior Court of Wilson County, stating, among other things, "The cash value of the policy at the end of the eighth year is $93.00, and Mr. Owens' estate may surrender the policy for this amount, less the loan of $86.32, the surrender to net $6.68 in cash. Upon receipt of the enclosed release completed by the executor or administrator of the estate of John Elverson Owens, accompanied by the policy, we will cancel and return the loan agreement of $86.32 with check for $6.68 to balance." The said sum of $6.68, if available for the purchase of extended insurance, would have been sufficient to purchase extended insurance beyond the date of the death of John Elverson Owens.

The net "value of extended insurance" for the period of eight years and one month as set forth in the "table of guaranteed values," in the policy, for the eighth policy year, amounted to $82.27.

There was evidence that the net value or money value of a period of extended insurance of eight years and one month under the policy based upon the American Experience Table of Mortality at 3½ per cent interest, on the life of the insured, who was born on 12 September, 1887, and whose nearest birthday at the date of issue of said policy was 36 years, was $82.27. The policy provided that "all surrender values contained therein are based on the American Experience Table of Mortality with 3½ per cent interest," etc.

Upon the foregoing facts the trial judge was of the opinion that the plaintiff was not entitled to recover and she appealed.

Finch, Rand & Finch and W. A. Lucas for plaintiff.
Connor & Hill and Frank G. West for defendant.

BROGDEN, J. The insured failed to pay the ninth premium due on 22 November, 1931. On 21 December, 1931, he wrote a letter to the company, stating that it would be impossible to pay the premium at present and requesting an extension of time for ninety days in which to make the payment. One day after his death, the company, not knowing of the death, wrote a letter, agreeing to extend the time upon certain conditions. Manifestly, the rights of the parties are to be determined at the time of the death of the insured. What then, was the status of the parties at the time of the death of the insured? The insured had paid eight premiums on the policy and the ninth premium fell due on 22 November, 1931. Consequently, such premium was not paid either when due or within the grace period prescribed in the policy. The insured had borrowed the sum of $86.32 on the policy, and at the

end of the eighth policy year the loan value was $93.00, and at the end of such year there was an extension provision of eight years and one month. The policy provided that at any time "after three annual premiums have been paid hereon . . . the company will within ninety days after receipt of written request by the insured, with a full and valid surrender of this policy and all claims hereunder, pay a cash surrender value as indicated in the table of guaranteed values," etc. Hence, if the loan of $86.32 be subtracted from the cash of the loan value of the policy, to wit, the sum of $93.00, there would be a balance of $6.68. However, the policy provided that this cash surrender value was payable only "after receipt of written request by the insured, with a full and valid surrender of this policy and all claims hereunder." The letter written by the insured on 21 December, 1931, is in no sense a request for the payment of the cash value as contemplated by the plain terms of the contract. It was a request for time indulgence and no more.

The plaintiff, however, asserts that at the time of his death the insured had an extension contract extending the life of the policy for eight years and one month. The extension clause was as follows: "At the expiration of three years from the date hereof, if any subsequent premium be not paid when due, the company will, without action on the part of the insured, extend this policy . . . for the term provided in the table of guaranteed values opposite the number of years for which annual premiums have been paid." But the insured had borrowed $86.32 upon the policy, and it was provided in the contract that the "extended insurance shall be for as long a term as the balance left after deducting the indebtedness from the net value of the extended insurance as shown in the table, will purchase as a net single premium." The indebtedness is known. It is $86.32. But what is "the net value of the extended insurance" as shown in the table? There was evidence, and the judge so found, that the "net value of the extended insurance" was $82.27. Therefore, as the indebtedness was in excess of "the net value of the extended insurance," the extension feature disappears from the case.

The plaintiff excepted to the testimony upon which the finding as to the "net value of the extended insurance," was based, but it is generally accepted principle of law that parol evidence is admissible to explain technical terms. The principle was expressed in *Neal v. Ferry Co.*, 166 N. C., 563, 82 S. E., 878, as follows: "It is well settled that where words or expressions are used in a written contract, which have in particular trades or vocations a known technical meaning, parol evidence is competent to inform the court and jury as to the exact meaning of such expression in that particular trade or vocation, and

it is for the jury to hear the evidence and give effect to such expression as they may find their meaning to be."

The cash surrender value of the policy became effective only upon the "written request" of the insured and the "valid surrender of the policy." Hence, as this provision has never been complied with, the plaintiff as beneficiary, is not entitled to recover the cash or loan value of $6.68.

Affirmed.

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

CLARKSON, J., dissenting: This is a civil action brought by plaintiff against defendant to recover on a policy of life insurance for one thousand dollars, the judgment of nonsuit or dismissal being upon an agreed statement of facts by the court below. On 22 November, 1923, the Reserve Loan Life Insurance Company, defendant in this action, issued to John Elverson Owens a contract or policy of life insurance by the terms of which it agreed to pay Hazel Gray Owens, the insured's young daughter and the plaintiff in this action, one thousand dollars, upon receipt of due proof of the death of said John Elverson Owens, subject to the conditions set forth in said insurance policy. Said policy was issued in consideration of the payment in advance of $23.63 annually, or if paid quarterly the quarterly premium was $7.71. The premiums for the years 1923 to 1930, both inclusive, were paid to said company, but the premium due and payable on 22 November, 1931, being the ninth annual premium, was not paid either on its due date or within the days of grace allowed by the policy, *but on 21 December, 1931, within the period of the thirty-one days of grace, the said John Elverson Owens wrote a letter to the defendant wherein he stated:* "It will be impossible to pay amount due on my policy at present. Please make arrangements for me to have ninety more days in which to pay this."

In response to said letter from said Owens, the defendant, on 29 December, 1931, wrote a letter in which it stated that it would be glad to extend the time for the payment of the premium, upon his signing an extension agreement and enclosing ten cents cash for payment of interest. At the time of the writing of said letter by said defendant company, the said John Elverson Owens, unknown to the defendant, was dead and the form of the extension agreement was never executed, nor was the item of 10 cents for interest ever paid.

On 13 November, 1930, the said John Elverson Owens had obtained a loan on said policy, pursuant to the provisions thereof, from the defendant in the sum of $86.32, the interest on said loan being paid to

22 November, 1931, the said loan being unpaid at the time of the death of said John Elverson Owens. According to the terms of the policy, its cash or loan value at the time the loan was executed, was $93.00, the difference between the loan and its cash or loan value being $6.68. The defendant wrote the clerk of Wilson Superior Court, on 21 January, 1932, that this was the cash value due on the policy.

The said policy of insurance issued by said defendant to the said John Elverson Owens contained provisions by which at any time after two years from its date, while the policy was in force, the insured might upon written request borrow certain sums upon the sole security of the policy, the loan value of said policy according to the number of years as set forth in a table of guaranteed values contained therein, being $93.00 the policy also contained a provision by which at any time after three annual premiums had been paid the insured might request a full and valid surrender of the policy and in exchange therefor obtain cash in the amount set forth in said policy in table of guaranteed values, according to the number of years for which the policy had been carried, the cash value, as thus set forth, being $93.00 at the time the said loan was made. It was further provided that the said company, upon written request, after three annual premiums had been paid, might convert the said policy into paid-up nonparticipating insurance for the amount shown in the table of guaranteed values opposite the years for which annual premiums had been paid. It was further provided that at the expiration of three years, if any subsequent premium be not paid when due, the company would without action on the part of the insured, extend the policy as nonparticipating term insurance, without loan value, for the term provided in the table of guaranteed values opposite the number of years for which annual premiums had been paid.

From a judgment of nonsuit in the court below, the plaintiff through her general guardian, A. C. Owens, appealed to the Supreme Court.

I think there was error in the judgment of the court below, upon the findings of fact "that the plaintiff take nothing by her action and the defendant go without day and recover the cost."

Within the period of thirty-one days grace set forth in the policy of insurance during which it would remain in force, the insured wrote the defendant a letter in which he requested that arrangements be made for him to have ninety more days in which to pay the premium then due on said policy. At the time he wrote the letter, there was a cash or loan value of $6.68 to the credit of the policy in the hands of the defendant. This distinguishes the present case from that of *Sexton v. Insurance Co.*, 160 N. C., 597, as in that case the insured had borrowed the full amount. In the instant case, he lacked $6.68 of borrowing the full cash or loan value.

While the policy carried a provision for extending the policy as nonparticipating term insurance, in the event of failure to pay the premium when due, this was to be done "without action on the part of the insured." The other provisions as to the loan or cash value or paid-up insurance were optional with the insured, and were not to become effective without a written request from the insured. This written request was given. It is clear from the agreed statement of facts that the insured did not make a request to exercise any of these options nor was it his intention to permit the defendant to put into operation the provision relative to extended term insurance.

The defendant recognized the intention of the insured to continue his insurance by replying that it would be glad to extend the time for payment of premium, *"as you requested."* However, the insured had died in the meantime, and the defendant contends that the status of the parties was determined at that time. I think not.

It appears from the finding of facts in this case that the insured undertook in good faith to prevent a forfeiture of his policy. It is well said in *Lincoln National Life Insurance Co. v. Bastian,* 31 Fed. (2d), 859, at p. 861: "Courts never favor forfeitures. This rule applies in a case where the insurer attempts to escape liability upon the theory of a forfeiture for nonpayment of premium. So that very slight evidence will suffice to support a finding that a waiver of a right of forfeiture was made."

The fact that the insured had to his credit with the defendant a cash or loan value of $6.68, the further fact that within the thirty-one days of grace allowed by the policy of insurance he requested that arrangements be made to give ninety more days in which to pay his premium, and the further fact that, although the letter was written after the death of the deceased, the defendant acquiesced in the request that arrangements be made to extend the time for payment of the premium, all of these facts bring the instant fact situation within the principle stated in *Hollowell v. Insurance Co.,* 126 N. C., 398, and approved in *Coile v. Commercial Travelers,* 161 N. C., 104, 47 A. L. R., at p. 886.

In *Hollowell v. Insurance Co., supra,* the plaintiff (the insured) had been in the habit for several years of paying his premiums by mail, and the insurer had been in the habit of accepting payments so made, the deposit in the mail of a letter containing a check for the amount of a premium addressed to the insurer, in time to have reached the insurer by the date it was due, is a payment sufficient to prevent forfeiture, notwithstanding it was not received until the day after it was due, the Court saying: "By this it is not meant that if the money is lost in the mail, or if the drawee becomes insolvent before presentation of the check or draft, the insurer is discharged from making good

the loss on notice, but simply that it is so far a payment that it prevents a forfeiture." 47 A. L. R., at p. 888.

While in the instant case it does not appear that the custom of paying premiums by mail had extended over a period of years, it does appear that the defendant *acquiesced* in the request that arrangements be made for the insured to have ninety days in which to make payment. Therefore, the status between the insured and the insurer, at the time of the death of the former, was fixed by the submission of the request for extension of the time in which to make payments, and the subsequent acquiescence by the defendant, it being estopped by its dealings with the insured from insisting on a forfeiture of the policy. I think its course of dealings with the insured brings it within the principle approved in *Insurance Co. v. Eggleston,* 96 U. S., at p. 577, quoted with approval in *Hollowell v. Insurance Co., supra,* the quotation is as follows: "We have recently, in the case of *Insurance Co. v. Norton,* 96 U. S., 234, shown that forfeitures are not favored in law; and that courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so, on which the party has relied and acted. *Any agreement, declaration or course of action on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto, a forfeiture of his policy will not be incurred,* followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, *though it might be claimed under the express letter of the contract.* The company is thereby estopped from enforcing the forfeiture."

A court will not look with favor on the forfeiture of $1,000 when the defendant had $6.68 on hand sufficient to purchase extended insurance beyond the death of the policyholder who in accordance with the terms of the policy made the request for extension before his death. Although the letter from the company after his death says, "we shall be glad to extend the time for payment of your premium as you requested," etc., it is presumed that when the company received the letter of the policyholder it would extend the time and acquiesced in the extension and did subsequently grant the extension.

While, as we have said, the status between the insured and the insurer was fixed by the death of the former, the subsequent conduct of the defendant also estops it from denying that there was to the credit of the insured with the defendant, a cash or loan value, for the defendant, upon learning of his death, wrote the clerk of the Superior Court in Wilson County, offering to remit $6.68, which was said to be the cash surrender value. This, as we have said, would have been more than enough to pay the premium on the policy to extend its validity until 22 February, 1932, beyond the time of the death of the deceased.

This case is distinguishable from *Williams v. Union Central Life Ins. Co.*, U. S. Supreme Court Law Edition, Advance Opinions, Vol. 78, No. 6, published 5 February, 1934. In the present case, the insured made the request and the $6.68 loan value was applied by the insurer on the extension period and the insurer acquiesced in the request. This case is unlike *Sellars v. Insurance Co.*, 205 N. C., 355; *Harden v. Insurance Co., ante*, 230. Succinctly, the cash loan value of the policy was $93.00. The amount borrowed was $86.32, leaving the defendant owing John Elverson Owens $6.68 on the borrowing value sufficiently admitted by defendant to extend the insurance which it was requested to do and did do in its letter. $1,000 is forfeited with defendant having sufficient money in its pocket to pay the premium. Defendant says it has the money, but in the wrong pocket.

It is just such technical forfeitures as this that have enriched certain insurance companies and in many cases confiscated the earnings of the poor. The courts should sooner or later under the general welfare clause and its equitable jurisdiction wipe out such technical forfeitures as contrary to good morals.

"That for ways that are dark
And for tricks that are vain,
The heathen Chinee is peculiar."
—Bret Harte.

For the reasons given I think the judgment in the court below should be reversed.

J. L. McGRAW, ADMINISTRATOR OF THE ESTATE OF W. R. PENDRY, v. SOUTHERN RAILWAY COMPANY AND F. T. DUGGINS.

(Filed 11 July, 1934.)

1. Master and Servant E a—Federal Act applies to injuries to employees engaged in interstate commerce.

Where it is admitted that plaintiff's intestate was engaged in interstate commerce at the time of the injury causing death, the liability of defendant railroad company therefor must be determined solely by the Federal Employers' Liability Act as construed and applied by the courts of the United States.

2. Master and Servant E b—

The "scintilla rule" does not apply upon a motion as of nonsuit in an action governed by the Federal Employers' Liability Act.

3. Same: Negligence A c—Doctrine of res ipsa loquitur held not to apply to facts of this case.

The evidence was to the effect that plaintiff's intestate, engaged in interstate commerce, as a flagman on defendant's train, gave the signal for the backing of the train, that he was required and instructed to be at the rear of the caboose upon such backing operations, and that he was not seen upon the train after it had backed, and that he was thereafter found dead on the track with indications that he had been dragged and run over by the train while it was backing. There was no direct evidence that intestate was standing on the rear platform or that he was thrown therefrom to his death. *Held*, the doctrine of *res ipsa loquitur* does not apply to establish the contention of plaintiff that intestate was thrown from the rear of the train by some negligent operation thereof, the doctrine not being available to supply or create the necessary facts, but only to raise an inference of negligence in proper cases where the essential facts are established by evidence.

4. Master and Servant E b—Negligence may be imputed from unusual, sudden and unnecessary jerk or jolt in operation of freight train.

Railroad companies, in the operation of their freight trains, are held to a high standard of care commensurate with the attendant risks and dangers, and although negligence will not be inferred from ordinary jolts and jars, it may be imputed from an unusual, sudden and unnecessary jolt or jar.

5. Evidence K a—Expert Testimony as to effect of sudden reduction in speed of train held competent.

Where there is evidence that the thirty-nine-car freight train on which intestate was flagman was slowed while backing from five or six miles an hour to one mile an hour within a distance of two car lengths, testimony of experienced trainmen that such sudden slowing of the train would produce a violent and unusual jerk upon the caboose or rear of the train *is held* competent, the weight of the testimony being for the jury.

6. Master and Servant E b—

In order for a recovery under the Federal Employers' Liability Act, plaintiff must not only establish negligence, but also that the negligence complained of was the proximate cause of the injury in suit.

7. Same—Law will assume that train employee will be on part of train where he is required to be by rules and orders of his superiors.

The law will assume, nothing else appearing, that an employee on a train will be on that part of the train where he is required to be at the time by the rules of the company and the orders of his superiors, but such assumption is not binding on the jury, the ultimate fact being for their determination from all the testimony.

8. Master and Servant E c—

In the absence of proof to the contrary, the law will assume that a railroad employee exercised due care for his own safety.

9. Master and Servant E b—Evidence held sufficient for jury in this action against railroad to recover for employee's death.

In this action against a railroad company to recover for the death of an employee engaged in interstate commerce, plaintiff offered evidence

that in switching operations of defendant's thirty-nine-car freight train, plaintiff's intestate, an experienced trainman employed at the time as flagman, gave the signal for the train to back while standing on the rear of the train, that defendant's rules and the orders of intestate's superior required intestate to be on the rear platform in such backing operations, that the train was backing five or six miles an hour when it was slowed to one mile an hour within a distance of two car lengths, together with competent opinion evidence that such sudden reduction in the speed of the train would cause a sudden and violent jerk upon the caboose of the train. Plaintiff's intestate was not seen alive after he gave the backing signal, and he was thereafter found dead on the track with indications that he had been dragged and run over by the train when it was backing. The brass whistle from the back of the caboose was found near the body, with indications that it had been screwed partly out and then broken off suddenly. *Held*, the evidence was sufficient to be submitted to the jury, it being for the jury to determine from all the testimony whether intestate was standing upon the rear platform and was thrown therefrom to his death by an unusual, violent and unnecessary jerk of the train.

STACY, C. J., dissents.

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

CIVIL ACTION, tried before *Cowper, Special Judge,* at 20 November Term, 1933, of FORSYTH.

W. R. Pendry had been in the employ of the defendant for about twenty-two years. For several years he was a conductor and for sometime previous to his death, he was a flagman on a freight train. The deceased was killed on the night of 16 April, 1932. The facts surrounding his death were detailed by several witnesses. Daniels, the head brakeman, on the freight train, said: "The members of the crew . . . were Ramseur, conductor, Duggins, engineer, Armstrong, fireman, myself, and W. R. Pendry, flagman. The duties of the flagman are to assist the conductor and protect the rear of the train. No. 52 left Mooresville that night coming north at about 4:10 a.m. and reached Barber's Junction at about 4:40. About twenty or twenty-one cars made up the train from Mooresville to Barber's Junction. . . . When the train reached Barber's Junction I threw the west "Y" switch and we headed in the "Y." One car was set off on the storage track. . . . After switching that car the engine went up to what is known as the Park. When we went up to the Park we picked up some cars in the main leg, what is known as the main leg of the Park, and then came down and got some on the back track. . . . We picked up nineteen cars I believe. . . . We pulled them down here to this switch and we went up the main line and coupled on to the west end of it. I made that coupling. We then backed the cars and coupled up the cars we brought up from Mooresville. Pendry made that coupling. . . .

After Mr. Pendry made that coupling he went back to the rear of the train. I saw his light on the rear of the train. He was giving the back-up signal on the north end of the caboose. . . . At the time the engine passed the switch from the old pass track into the west "Y" I was standing at the switch. . . . At the time Pendry made the coupling on the west "Y" and after the train had come to a standstill the engine was standing up on the old pass track about six or seven, maybe eight, car lengths up on the old pass track west of the switch from the old pass track into the west "Y." I was then three or four cars from the engine, and after the signal was given and the engine started to pick up, I dropped off of that car when it passed the switch. At the time the engine passed me when I was standing there at the switch, in my opinion, I would imagine he was going around five or six miles an hour, and went about a couple of car lengths from the switch before I caught the engine. After the engine passed over the switch I had to turn the switch. After the engine passed the switch and went the two car lengths, I can't be positive whether it stopped or not. He got down slow for me to get on. I couldn't say for certain whether he got plumb still or not but he got down slow. I imagine he was down to about a mile an hour, something like that. . . . They never did shut that engine plumb off at no time except when they stop; they are super-heated and they don't shut them plumb off. They are working steam even when working against the brakes; working steam unless they come to an absolute standstill. . . . At the time the engine passed me there at the switch, it had about the same gait until it got past me and then he slowed down some for me to get on. When it passed me and went up two car lengths and I caught the engine, he just backed on out on to the main line. I didn't see any signal from the rear end for him to continue backing. I was on the front end and couldn't see. . . . The rules of the company are that when backing into the main line from any siding, there is supposed to be a man on the rear whose duties are to look out and don't run over anybody or run into something, just to look out for the rear end in general. There is an air whistle on the rear of the train for him to blow in backing up. . . . In my opinion there is fifteen or twenty feet, around fifteen feet, of slack in a train of forty box cars. . . . The rules of the Southern Railway with reference to backing out of this particular west "Y" on to the main line are that a man must be on the back end of the platform and a chain goes across the drawhead, from one frame of the cab to the other. . . . The pipe from the whistle down to the air line of the caboose is three or four feet long and the whistle is just screwed into the pipe. . . . Nothing unusual happened to call my attention to the fact that he was stopping to pick me

up. I didn't hear him apply his brakes; couldn't have heard that because of the exhaust and steam from the engine and things blowing. I reckon it was around five-thirty that we left Barber's Junction. . . . After a train leaves a station and is on the main line, the flagman is supposed to ride the caboose and the conductor rides about anywhere he wants to, but usually rides the caboose. . . . The first time I knew that Mr. Pendry was not on the train was when we got back to the roundhouse or the coal chute. The conductor asked me had I seen Pendry. I told him I hadn't. He said we left him at Barber's; that he wasn't on the cab and hadn't been on since we left Barber's."

When the train arrived at Winston-Salem and it was discovered that Pendry was missing a message was sent to Barber's Junction in order to locate him. Hill, a telegraph operator at Barber's Junction, stated that he received a message from Winston inquiring about Pendry, and that in response to such message he went around the west "Y" and found the body of the deceased. He said: "The body was about ten or twelve rail lengths from the point of switch of the Mooresville main line. . . . When we found the body he was lying on his back, face up. . . . The left leg was cut off with a bone sticking out several inches. . . . We didn't find anything lying around him, but as we went to the body we found things along the track. . . . I noticed signs of something having been dragged along the track like a bag of meal dragging along there. The dragging showed for a distance of about fifty or seventy-five yards. Further down we found his pistol. . . . I think we found the pistol first and then his pocketbook and his watch, and a shoe and a whistle off the back of the cab. . . . The pistol was lying between the rails with the hammer cocked. . . . The warning whistle is the very last thing on the rear of the cab, sticking out. . . . I didn't pay very much attention to the whistle we found there, but it appeared like it had been broken, like it had been screwed, part of it, out and then suddenly broken off."

Ramseur, the conductor, said: "When I left, Pendry was on the rear of the car to make the coupling. I didn't see him any more after he made that coupling. I instructed him to make the coupling and to go back and protect the rear of the train, and so far as I know he went on back there. I did not signal the engineer ahead after he got water. He did pull ahead and I caught the caboose along about the water tank. When I got in the cab I didn't see Mr. Pendry. . . . When I got on the caboose I saw Pendry's lantern and brake stick that he used up in the Park. . . . His lantern was sitting in a cane bottom chair that was in the caboose; it was an old chair that had been laying down in the caboose for some time and it was laying down when we pulled in there that morning. The lantern was sitting down in the

rounds of the chair. . . . There were no lanterns or chairs turned over in the caboose. The track stick was lying up on the end of the chair."

Plaintiff offered the testimony of Pugh, Morris, Surratt and Griffin, who testified that they were experienced in the operation and stopping of freight trains. In a general way these witnesses testified that if the engine of this particular train had slowed down from five or six miles to one mile an hour within a distance of two car lengths that in their opinion such operation would cause an unusual or violent jerk upon the rear of the train or the caboose where the deceased was supposed to be. These witnesses all said that the violence of the jerk upon the rear of a forty-car freight train would depend upon how the engineer undertook to make the stop or slowing down process; and furthermore, that the condition of the weather and of the track and various other elements would constitute factors in the operation.

At the conclusion of the evidence the trial judge struck out the opinion evidence and nonsuited the case, and the plaintiff appealed.

Elledge & Wells and Parrish & Deal for plaintiff.

Manly, Hendren & Womble and W. P. Sandridge, Jr., for defendant, Southern Railway.

DuBose & Weaver for defendant, F. T. Duggins.

BROGDEN, J. W. R. Pendry had been in the employ of the defendant for twenty-two years, serving as conductor and flagman for a freight train, and was an experienced trainman and thoroughly acquainted with switching operations at Barber's Junction and elsewhere along the line. On the night of 16 April he was a flagman on a freight train bound for Winston-Salem. The train crew consisted of Ramseur, conductor, Duggins, engineer, Armstrong, fireman, and Daniels, head brakeman. When the train arrived at Barber's Junction at about four-forty in the morning it became necessary to perform a switching operation. The engine was pulling twenty-one cars into Barber's Junction. One of these cars was set off on a storage track. Leaving the twenty cars, the engine moved to the Park and picked up nineteen cars. Then the engine backed into the "Y" and "coupled up" to the twenty cars originally in the train. Pendry made that coupling. About eight o'clock on the morning of 17 April, 1932, the mangled body of Pendry was found about ten or twelve rail lengths from the point of the switch of the Mooresville main line. The body was "face up." The left leg was cut off. "There were signs of something heavy having been dragged along the track a distance of fifty or seventy-five yards." A short distance from the body down the track was a pistol of the deceased "with the hammer cocked."

"His watch was between the body and the pistol." Farther on, the brass whistle on the back of the caboose was found. "It appeared like it had been broken, like it had screwed part of it out, and then suddenly broken off." Pendry was last seen alive when he made the coupling and went back to the rear of the train. "He was giving the back-up signal on the north end of the caboose." When the train pulled out on its journey the conductor went into the caboose and saw Pendry's lantern sitting in the rounds of an old chair that was lying down in the caboose. His brake stick was lying on the end of the chair. Nothing was disturbed or turned over in the caboose. After Pendry made the coupling the conductor had instructed him "to go back and protect the rear of the train." The rules of the defendant did not require the "flagman to use the whistle when the train is backing up, but it is there and can be used for such purpose." But the rules with reference to backing at the west "Y" were to the effect that a man "would ride the rear of the train backing out of the west 'Y' at Barber's."

There was opinion evidence from men experienced in the operation of freight trains to the effect that reducing the speed of the engine under the circumstances from five or six miles an hour to one mile within a distance of two car lengths would produce an unusual and violent jerk at the end of the train or caboose.

The foregoing word-picture produces the paramount question of law involved in the case, to wit: Was there evidence of negligence on the part of the defendant and that such negligence was the proximate cause of the death of Pendry?

In arriving at a solution of the legal problem presented three preliminary observations are pertinent:

1. "It having been admitted that plaintiff's intestate was engaged in interstate commerce at the time of his death, it necessarily follows that the liability of the defendant must be determined solely by the Federal Employers' Liability Act as construed and applied by the courts of the United States." *Wolfe v. R. R.*, 199 N. C., 613, 155 S. E., 459.

2. The scintilla rule has been definitely and repeatedly rejected so far as the Federal Courts are concerned. *Penn. R. R. Co. v. Chamberlain,* 288 U. S., 333.

3. The principle of *res ipsa loquitur* has no application. This doctrine permits and warrants an inference of negligence from facts. It has never been extended far enough to supply or create necessary facts, and, in addition, draw an inference from such vital facts so created. See *Springs v. Doll,* 197 N. C., 240, 148 S. E., 251.

The only evidence of negligence disclosed by the record consists of the opinion testimony of certain trainmen that the reduction of the speed of the train when it was backing from five or six miles an hour

to one mile an hour within a distance of two car lengths, would tend to produce an unusual and violent jerk of the rear of the train or caboose. The operation of a freight train is not a sight-seeing tour. It is a rough process, under most favorable conditions, and attended with many unavoidable perils which are well known to every experienced trainman. Notwithstanding, "it is recognized in both jurisdictions that railroad companies in the operation of their freight trains are held to a high standard of care reasonably commensurate with the risks and dangers usually attendant upon the work, and although negligence may not be inferred from the ordinary jolts and jars incident to their operation, it may be imputed where there has been a 'sudden, unusual, and unnecessary stopping of such trains, likely to and which do result in serious and substantial injuries to employees or passengers thereon.'" *Hamilton v. R. R.*, 200 N. C., 543, 158 S. E., 75.

The plaintiff contends that after making the coupling, Pendry walked back to the north end of the caboose and gave the backing-up signal to the engineer, and that he then went into the caboose, set down his lantern and brake stick, and went out on the rear platform of the caboose to blow the whistle while the train was backing, and that, while standing there in the line of his duty and in obedience to the rules of the defendant, a sudden, violent, unusual and unnecessary jerk was given the train and the deceased was thereby thrown off the rear of the platform beneath the wheels of the backing train, carrying the whistle with him as he fell to his death.

The defendant asserts that there was no unusual jerk or movement of the train, and that, while certain trainmen, who were not present and knew nothing about the actual facts and circumstances, testified that in their opinion there was an unusual jerk, nevertheless Daniels, the head brakeman, who was present and a witness for the plaintiff, said: "Nothing unusual happened to call my attention to the fact that he was stopping to pick me up."

The opinion testimony, stricken out by the trial judge, relating to the effect of an alleged sudden reduction of the speed of the train upon the rear end or caboose, was competent. It is the function of the jury to weigh it and say what it is worth. *Wilkinson v. Dunbar*, 149 N. C., 20, 62 S. E., 748; *Richardson v. Woodruff*, 178 N. C., 46, 100 S. E., 173. Assuming, however, that there was more than a scintilla of evidence of an unusual jerk of the train, was such jerk the proximate cause of the death of Pendry? Where was Pendry at the time the jerk came? His lantern and brake stick were in the caboose. No one saw him on the rear of the platform. Had he fallen from the train before the jerk?

The general rule of law in determining liability in the Federal Courts is stated in *Atchison, Topeka & Santa Fe Railway Company v. Toops, Admr.*, 281 U. S., 351, 74 L. Ed., 896, as follows: "But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause, and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer. . . . Even though we assume that in all the respects alleged the petitioner was negligent, the record does not disclose any facts tending to show that the negligence was the cause of the injury and death. . . . What actually took place can only be surmised. Whether he was run down on the track by the first car or he attempted unsuccessfully to board the train on one side or the other or succeeded and in either case finally came to his death by falling under or between the moving cars is a matter of guesswork." To like effect is the statement of law in *New York Central R. R. Co. v. Ambrose*, 280 U. S., 486, 74 L. Ed., 562, as follows: "The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employe to establish that the employer has been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

In the case at bar the conductor had directed the deceased to look after the rear of the train. The rules of the company required that he should be on the rear of the train in a "backing-up" operation. The law assumes that an employee will obey the rules, nothing else appearing, and that he will exercise in the absence of proof to the contrary, due care for his own safety. He was last seen alive on the caboose when he gave the signal. He had been inside the caboose to set down the lantern and brake stick, and, under the circumstances, it would seem more reasonable to infer that in executing the orders of his superior and in obedience to the rules of his employer, he proceeded

to the rear of the caboose. Such inference, however, is not binding upon a jury when the jurors are called upon to find the facts fairly and reasonably in the light of all the testimony. In other words, was Pendry on the rear of the train? Was there an "unusual, violent and unnecessary" jerk of the train that threw him off to his death? These are controverted questions.

However, the Court is of the opinion that there was sufficient evidence to be submitted to the jury within the contemplation of the Federal rule.

Reversed.

STACY, C. J., dissents.

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

FRED B. WILKERSON v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 11 July, 1934.)

1. Payment A a—

The possession of a receipt for the payment of money is prima facie evidence of payment.

2. Insurance E a—Evidence of payment of first premium upon application, resulting in putting insurance in force, held for jury.

Defendant insurer's form of application for insurance had attached at the bottom by a perforated line, a receipt form for the first full premium providing that if the first full premium were paid at the time of application the policy should be in force from date of application if the application were accepted by insurer and the policy issued according to its terms. Plaintiff testified that at the time of making application he paid the first full premium with the cash surrender value of a lapsed policy issued to him by insurer. At the time of making application, insurer's agent had in hand, without the knowledge of plaintiff, a check issued by insurer to plaintiff for the cash surrender value of the lapsed policy, the check being in a sum in excess of the amount of the first full premium on the policy applied for. Plaintiff further testified that insurer's agent detached the receipt from the application and delivered it to him, but that plaintiff had lost same. The original application produced in court had the receipt detached therefrom. The policy was thereafter issued by insurer in accordance with the application, but was never delivered to plaintiff. *Held*, evidence of payment by plaintiff at the time of applying for the policy was sufficient to be submitted to the jury upon plaintiff's contention that the policy was in force from that date, although there was evidence that insurer's agent thereafter delivered to plaintiff insurer's check for the cash surrender value of the lapsed policy and plaintiff at that time gave his check to insurer's agent in payment of the first full premium.

3. Same: Compromise and Settlement B b—Evidence of plaintiff's mental incapcity at time of alleged settlement held for jury.

In this action on a disability clause in a policy of life insurance defendant insurer contended that the policy was never issued and was never in force and introduced in evidence a receipt signed by plaintiff acknowledging the return to plaintiff of money advanced upon application for the policy, contending it was refunded because the policy was not issued. Plaintiff testified that he did not remember signing the receipt, and that at the time the alleged receipt was signed he did not have sufficient mental capacity to understand the nature of the transaction, and introduced other testimony of his mental incapacity at that time. *Held*, whether the receipt constituted a settlement between the parties should have been submitted to the jury under the evidence.

4. Appeal and Error J g—

Where a new trial is awarded upon certain exceptions, the Supreme Court will not consider other exceptions relating to matters which may not arise upon the subsequent hearing.

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

CIVIL ACTION, before *Barnhill, J.*, at October Term, 1933, of WILSON.

On 15 May, 1929, the plaintiff signed an application for a $5,000 life insurance policy, to be issued by the defendant company. The plaintiff said: "I was personally acquainted with Mr. Haskett and Mr. Massey. They were agents for the Metropolitan Life Insurance Company in Wilson. I lived in an adjoining apartment from Mr. Haskett in the same house. . . . Mr. Haskett solicited me for insurance on several different occasions. . . . I had occasion to see Mr. Haskett and Mr. Massey in their office on the night of 15 May, 1929. I was also to go to their office. After I got to their office I signed an application for a $5,000 life insurance policy with disability. . . . I paid the first premium when I signed the application. I paid it with the cash surrender value of the lapsed policy. The lapsed policy was with the Metropolitan Life Insurance Company and the cash surrender value of the lapsed policy was about $10.00 more than the first premium on the new policy, which was $35.25, and the cash surrender value was around $45.00. . . . I did not sign a paper releasing the cash surrender value of the old policy at the time I delivered the old policy to the agent, but I authorized them by word of mouth to use it. I was examined by Dr. Bell. I got home around midnight. I told my wife when I got home that I had been in the office with Mr. Haskett and Mr. Massey and had applied for a life insurance policy of $5,000 with disability benefits, double accident and waiver of premium, and that in case I became disabled I would draw $50.00 per month. I told her that I had paid the first premium. She asked me where I got the money with which to pay it, and I told her I turned in a lapsed policy that I

had allowed to lapse when I was in the army and that it had a cash surrender value. Mr. Haskett suggested that method of payment. He had seen the old policy. . . . After I had signed the application Mr. Massey gave me a receipt from the bottom of the application. I have lost the receipt. . . . I read the application before I signed it. At the time I signed the application there was a receipt at the bottom attached by a perforated line, which was torn off after I signed it. That was the receipt given me. . . . Sometime before I signed the application for my new policy I delivered the old policy that had a cash surrender value to the company. I delivered it to Mr. Haskett. It was delivered before I signed the application for the new policy." The copy of receipt form referred to by the witness, was offered in evidence and is as follows: "Received from ..... (the applicant), ... dollars on account of application made this date to the Metropolitan Life Insurance Company. If this sum is equal to the full first premium on the policy applied for and if such application is approved at the company's home office for the class, plan and amount of insurance therein applied for, then the insurance applied for shall be in force from this date, but otherwise no insurance shall be in force under said application unless and until a policy has been issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the company during the lifetime of the applicant. The above sum shall be refunded if the application is declined or if a policy is issued other than as applied for and not accepted by the applicant." The application signed by the plaintiff was produced in court and the receipt form at the bottom had been detached. Plaintiff testified: "I got a check for the cash surrender value of the old policy on 12 September, 1929, on the day I gave to the agents of the Metropolitan a check for $35.25. That was in payment of premium on the policy I am now suing on. . . . A check for $44.21 from the Metropolitan Life Insurance Company, dated 7 May, 1929, was delivered to me on 12 September, 1929. I had to give them my check before they delivered this. . . . I did not know that this check was in Wilson at any time before 12 September. . . . I had an operation for tonsilitis and I had an enlarged bone in my nose removed on 20 August, 1929. Both operations were successful. I reported back to work 6 September, 1929, fully recovered. . . . In August some agent of the company came to me and told me to go back to Dr. Bell to be examined. . . . I think it was about the 15th of August. . . . The insurance I applied for contained disability benefits of $50.00 per month as long as I was disabled. . . . Also waiver of premium and double accident."

There was also evidence that the defendant had promulgated certain rules to agents soliciting business in 1929 and that section 413 of these rules provided as follows: "The full first premium required by the policy applied for should be collected when the application is signed; this is, usually, the best time to make the collection. It will assure acceptance of the policy. As an inducement for the applicant to pay the full first premium in advance, the advance payment receipt automatically becomes a "binding receipt," so that if the application is officially approved for the class, plan and amount of insurance therein applied for, then the insurance applied for will be in force from the date of the application," etc. Section 424 of said instructions in force at the time provided among other things: "If the full first premium was received with the application and the insurance issued is exactly what was applied for, and no material facts were omitted from or misrepresented in the application, the policy may be delivered at once, regardless of any change that may have occurred in the health of the applicant since the application was written."

On 15 September, 1929, the plaintiff suffered a stroke of paralysis. He was operated on on 28 September, and there was testimony that during that period of time "he didn't have any mind at all." The wife of plaintiff said: "For a period of two weeks after 14 October, he was in a dazed condition all the time. He did not know anything. During that time in my opinion he did not know right from wrong, or anything." There was other testimony from neighbors to the same effect.

C. A. Massey, agent for the defendant, was examined by the plaintiff as an adverse witness and testified that he was detached assistant manager of the defendant. This witness said: "During the summer of 1929 I received from the Metropolitan office a policy of life insurance issued to Fred Wilkerson, the insured. . . . The policy was issued pursuant to the application and the policy was as applied for in the application. . . . I had a check in the amount of $44.21, payable to Fred Wilkerson, which came into this office. I had a conversation with Mr. Wilkerson about the check at the time application was completed. After the application was completed the matter of equity of the check was discussed. . . . I kept the policy in my possession from the time it arrived until 12 September because he had a siege of sickness. I held the policy from the time I received it until the time I took it up with him about an additional examination because he was sick. I received the policy in August. . . . I was ready to deliver it on 12 September subject to the home office instructions. On 12 September he had given me his check. On the date the original application was signed I had in my possession at that time a check from the company payable to Fred Wilkerson in an amount more than the

amount of the premium. Fred Wilkerson did not pay anything on 15 May, 1929, on account of premium. He did not give a check or a note or anything of value. I did not give him a receipt showing payment in advance. He said that something is torn off of the application, but I did not tear it off the application. It went to the home office. That was attached to it."

No policy was ever delivered to plaintiff. Moreover plaintiff testified: "I don't remember the agents of the Metropolitan giving me $35.25 on 17 October, 1929, or my giving them a receipt. I don't remember signing that paper. It looks like my signature. It looks kinder like my signature." The receipt was read to the plaintiff and was in the following language: "I acknowledge the return to me of the advance payment of $35.25 made to the Metropolitan Life Insurance Company on account of my application for insurance, upon which the policy applied for was not issued." Plaintiff further said: "I don't remember anybody giving me back any money as a refund of premium on or before 17 October, 1929. I don't remember seeing Mr. Haskett or anybody else during that time. Neither Mr. Haskett nor anybody else paid me any money back that I remember from the time I went to Richmond for Thanksgiving. Everything seemed to be a daze—almost like a dream. I got sick 15 September, 1929. I completely lost my memory about the time I went to the hospital and had an X-ray made of my head."

Upon the conclusion of plaintiff's evidence the trial judge sustained a motion of nonsuit and the plaintiff appealed.

Troy T. Barnes and Finch, Rand & Finch for plaintiff.
Smith, Wharton & Hudgins and Connor & Hill for defendant.

BROGDEN, J. The facts present two questions of law, to wit:

1. Was there any competent evidence of the prepayment of premium by the plaintiff upon signing the application on 15 May, 1929?

2. Is the right of plaintiff to maintain this action foreclosed by a receipt given the defendant on 17 October, 1929?

The plaintiff applied for a certain sort of policy providing disability benefits and waiver of premium. Such a policy was issued and forwarded to the agent at Wilson, North Carolina, but never delivered to the plaintiff. The defendant asserts that such delivery was not made because its agents had information that the plaintiff was not in good health and required a further physical examination. Hence the defendant maintains that, as no policy was delivered, the plaintiff cannot recover.

Upon the other hand, the plaintiff asserts that he paid the premium at the time of signing the application on 15 May, 1929, and that a receipt for such payment was detached from the application and delivered to him, which he had since lost or misplaced. This receipt provided that if the premium was paid at the time the application was signed, the insurance would be in full force and effect from the date thereof, if the application was approved, otherwise the insurance became effective upon delivery of the policy. What then, is the evidence tending to show payment of premium at the time the application was signed? The plaintiff said: (a) "I paid the first premium when I signed the application. I paid it with the cash surrender value of the lapsed policy." (b) At the time the application was signed on 15 May, 1929, the agent for the defendant, unknown to the plaintiff, actually had in hand a check issued by the defendant and payable to the plaintiff for $44.21, which was in excess of the premium on the new policy. (c) The plaintiff testified that the agent for the defendant detached from the application the receipt and delivered it to him. There was a perforated line separating the receipt from the application and when the original application was produced in court the receipt was detached therefrom.

The term payment was thus defined in *Moore v. Construction Co.*, 196 N. C., 142, 144 S. E., 692: "Payment is the discharge of a debt by the delivery of money or other thing of value; it is the fulfilment of a promise or the performance of an agreement. In a strict legal sense there must be a delivery by the debtor and an acceptance by the creditor of money or its equivalent with intent in whole or in part to pay a debt or to satisfy an obligation."

More than one hundred years ago this Court, speaking through *Reid v. Reid,* 13 N. C., 247, said: "I think the receipt prima facie evidence, that an account was stated between the parties, and the balance of seven dollars then paid. It certainly is not conclusive that full payment is made. It is not conclusive of anything, . . . not even that the seven dollars were paid." To like effect is the declaration in *Keaton v. Jones,* 119 N. C., 43, 25 S. E., 710, as follows: But when the writing is only an acknowledgment of payment or delivery, it is only prima facie conclusive, and the fact recited may be contradicted by oral testimony. See, also, *Harper v. Dale,* 92 N. C., 397; *Norwood v. Grand Lodge,* 179 N. C., 441, 102 S. E., 749. Consequently, the possession of a receipt for the first premium, nothing else appearing, is prima facie evidence of payment.

While the record discloses that the plaintiff gave to the agent of the defendant a check on 12 September for $35.25 to pay the premium and received a check from the defendant for $44.21; nevertheless, the Court is of the opinion that there was sufficient evidence of payment at the

time the application was signed to be submitted to a jury for its determination from all the facts and circumstances of the case.

The second question of law relates to a receipt which the plaintiff gave to the agents of defendant on 17 October, 1929, for the return of the premium amounting to $35.25. The testimony of plaintiff and of other witnesses tends to show that at said time the plaintiff did not have sufficient mental capacity to understand the nature of the transaction. Consequently, the question as to whether there was a settlement between the plaintiff and the defendant on 17 October, 1929, must also be submitted to a jury.

There are certain other exceptions in the record which are not discussed for the reason that as a new trial is awarded, it is deemed inadvisable to debate and decide questions which may never arise at a future hearing.

New trial.

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

MRS. EVA CARTER NISSEN, WIDOW OF HARRY E. NISSEN, DECEASED, EMPLOYEE, v. CITY OF WINSTON-SALEM, EMPLOYER, SELF-INSURER.

(Filed 11 July, 1934.)

1. Master and Servant F a—Nature of duties at time of injury determines whether injured person is employee or executive officer.

Whether an injured person is an executive officer or an employee within the meaning of the Compensation Act, N. C. Code, 8081(i), is to be determined by the nature of the act performed by him at the time of the injury, but mere desultory, disconnected, and infrequent acts of manual labor not reasonably required by the exigencies of the situation will not classify an executive officer as an employee in the performance of such acts.

2. Same—Dependents of fire chief, killed in collision on way to fire, held entitled to compensation under facts of this case.

In this hearing before the Industrial Commission there was evidence that the fire chief of defendant city was killed in a collision while on his way to a fire, that the fire chief in the course of his duties habitually did the work of a regular fireman in fighting fires, and that, although he was elected for a term of one year by the board of aldermen, he was not required to take oath of office or give bond, had no authority to employ or discharge firemen, and that at all times he was under the control, supervision and direction of the board of aldermen. *Held*, the evidence was sufficient to support a finding that the fire chief, at the time of his injury, was an employee of the city within the meaning of the

Compensation Act, it appearing that he did not act purely in an administrative capacity even if it be granted that he was an elected officer, N. C. Code, 8081(i).

3. Master and Servant F i—

The finding of the Industrial Commission that a fire chief of a city, at the time of his injury, was an employee of the city, and not an elected officer acting in a purely administrative capacity, is conclusive on appeal when supported by competent evidence.

CIVIL ACTION, before *Alley, J.*, at March Term, 1934, of FORSYTH.

On 9 September, 1932, the board of aldermen of the city of Winston-Salem elected Harry E. Nissen chief of the fire department of said city, to serve for one year, and fixed his salary at $2,892 per annum. The ordinance of Winston-Salem then in force provided in substance that the board of aldermen in September of each year should elect a chief of the fire department, who "shall hold office for one year or until his successor is elected and qualified and shall receive such salary as may be fixed by the board of aldermen." It was further provided that "the chief of the fire department shall be the commanding officer of the department under the supervision of the mayor and fire and building committee, and shall be responsible to the board of aldermen for its proper management. The property of the department shall be in his care and for its safety and proper assignment he shall be directly responsible to the board of aldermen. It shall be the duty of the chief to see that all rules, regulations and orders prescribed by the board of aldermen are promptly and faithfully respected and obeyed, and whenever any violation of the same is reported to him or comes under his personal observation, he shall promptly investigate the same and report the matter to the board." The chief had authority to suspend any member of the department from duty, "but shall immediately report such suspension, together with all the facts in the case to the board of aldermen for its consideration and action." It was the duty of the chief to respond to all fire alarms and "upon arrival at the scene of the fire at once assume command, taking every precaution for the protection of life and property. . . . He shall not absent himself from the city without the consent of the mayor or the fire and building committee." Certain other duties were imposed upon the chief of the fire department, such as making reports of all fires, furnishing certain information with respect thereto, and to inspect all buildings and premises in the city, to see that they are kept free from empty boxes, waste paper, ashes, and rubbish "which may be liable to cause or spread fire, and for the purpose of remedying any condition that may in his opinion be liable to cause or spread fire, and to enforce all the ordinances of the city relating to the prevention of fires."

On 28 November, 1932, there was a fire alarm in Winston-Salem and the deceased, together with various units of the fire department, responded to the call. While the first fire was in progress another alarm was turned in from another part of the city. Thereupon the chief in company with another fireman started to the second fire, and on the way at the corner of Sixth and Cherry streets there was a collision between the automobile driven by the deceased and a bus, and as a result of such collision the deceased was killed.

A claim was filed with the Industrial Commission and a hearing held on 16 June, 1933. Certain testimony was taken at the hearing, and this testimony tended to show that Nissen had been chief of the fire department for more than fourteen years. He stayed at home part of the time and at the station part of the time, but was on duty practically all the time. Jenkins, who had been a member of the fire department for fourteen years, said with reference to the duties of the chief: "He had to make out his fire reports and looked after buying stuff and writing orders and stuff like that, and write requisitions and emergency orders and things like that. . . . When we have a fire we would go around over the building and try to find the cause of the fire and if we couldn't find it that night we would go back the next day and several times we would have to make several trips back. He did not have a stenographer. He wrote out his own reports. He had an alarm system in the house same as at the station. He attended fires at all times and was a good hand. He wore the same outfit to the fires as the men wore. At night he would wear boots and rubber pants. . . . He would help just the same as the rest of the boys and give orders what to do. . . . Lots of times me and him would go in and rush the furniture to the middle of the room and take these top holders and cover them up and I couldn't do this by myself. . . . Sometimes we were short of men at meal hours and men would take the hose and run off with them and maybe leave one man at the truck, and the driver can't connect up by himself and me and him has went and connected up with the hydrant. . . . I have seen him take an axe and bust open some doors and an axesaw and saw off locks. . . . Lots of times I have seen him chop holes in floors. He was a fellow that could stand lots of smoke and could go in like that. He wasn't a fellow that would say go do something. He would say, let's go. . . . After the fire was over he would go around and hunt for kerosene rags or rags that would cause spontaneous combustion. . . . He was on duty all the time." Another fireman, testifying for claimant said: "I have seen him take hold of hose and help get him to knock down doors and do things like that. . . . I have seen him take hold of the hose and help the men when they were in a strain." Another fireman, witness for plaintiff,

said: "He was always there and looked the place over to see where he could locate his men at and then lots of times he would help the men. I have seen him saw off locks, tear down doors, chop holes in the floor, and anything that was to be done. I have seen him moving or carrying out furniture. I have seen him carry hose. . . . He would do anything that the men would do."

The hearing commissioner found as a fact "that the chief of the fire department was an employee as contemplated by the terms of the Workmen's Compensation Law, and that his dependents are entitled to recover." . . . Thereupon an award was made and the defendant appealed to the full Commission, which approved the findings of fact and award, and the defendant appealed to the Superior Court.

Certain findings of fact were made by the trial judge. The vital finding was as follows: "The court finds as a fact that the said Harry E. Nissen, although he was elected by the board of aldermen of the city of Winston-Salem as chief of the fire department to serve for a definite term and for a stated amount of salary, did not act in a purely administrative capacity, and when attending a fire customarily discharged the duties of an ordinary fireman."

From the judgment approving the award of the Industrial Commission the defendant appealed to the Supreme Court.

Manly, Hendren & Womble for claimant.
Parrish & Deal for defendant.

BROGDEN, J. Counsel for defendant state in their brief accurately and succinctly the questions of law involved, to wit:

(1) Was the chief of the fire department of the city of Winston-Salem, who was killed in a motor vehicle wreck while answering a fire call, an employee within the meaning of the Workmen's Compensation Law?

(2) Is the Supreme Court bound by the findings of the Industrial Commission and the Superior Court in this case?

C. S., 8081(i), Michie's Code, 1931, provides: "The term 'employee' means every person engaged in an employment under any appointment or contract of hire or apprenticeship . . . ; as relating to municipal corporations and political subdivisions of the State the term 'employee' shall include all officers and employees thereof, except such as are elected by the people or elected by the council, or other governing body of said municipal corporation or political subdivision, who act in purely administrative capacities, and to serve for a definite term of office." The deceased was elected or appointed by the board of aldermen as chief of the fire department for the defendant, to hold office for one year, or until his successor is elected and qualified.

The defendant asserts that the deceased was an executive officer of the city and that the duties prescribed by ordinance were purely administrative. The statute, *supra,* withdrew from the operation of the compensation law all officers of a municipality elected by the council or other governing body, . . . who "act in purely administrative capacities." Obviously the word "purely" in its ordinary sense means exclusively. No precise and invariable definition of the word "administrative" can be given. The meaning given by the appellate courts and textwriters depends upon the particular facts and circumstances under review. Black's Law Dictionary (3d ed.), p. 59, defines or rather describes the word "administrative" as "pertaining to administration. Particularly, having the character of executive or ministerial action. In this sense, administrative functions or acts are distinguished from such as are judicial," etc. The Michigan Court in *People v. Salsbury,* 96 N. W., 936, says: "The term 'administration' is also conventionally applied to the whole class of public functionaries, or those in charge of the management of the executive department. Mechem, in his work on Public Officers (section 655), makes the following statement: 'This class of officers is known by different names. They are sometimes called 'executive officers,' sometimes 'administrative,' sometimes 'ministerial,' and with slight shades of distinction; but for convenience sake, and as may properly be done, they will all be treated here under the general heading of 'ministerial' officers, and there will be included all officers whose duties are wholly or chiefly ministerial." See, also, *State v. Loechner,* 59 L. R. A., 915. McQuillin in his work on Municipal Corporations (2d ed.), Vol. 2, p. 38, quotes *Judge Cooley,* as follows: "The officer is distinguished from the employee in the greater importance, dignity and independence of his position; in being required to take an official oath, and perhaps give an official bond; in the liability to be called to account as a public offender for misfeasance or nonfeasance in office, and usually, though not necessarily in the tenure of his position."

So far as the record discloses the deceased took no oath of office, gave no bond, had no authority to employ or discharge firemen, and was apparently removable by action of the board of aldermen. Moreover, he was subject at all times to the control, supervision and direction of said board. Indeed, he could not go out of town without the "consent of the mayor or the fire and building committee." It would seem that the position of the deceased was in the nature of a foreman of the fire department or head fireman for the city of Winston-Salem.

Assuming, however, that Nissen was an officer, did he perform "purely administrative acts?"

The evidence discloses that the deceased customarily and habitually performed the duties of fireman, or as one witness declared, "he was a good hand. . . . He would help just the same as the rest of the boys."

The "dual-capacity" doctrine has been adopted in determining the rights of the parties in compensation cases: "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." *Hodges v. Mortgage Co.*, 201 N. C., 701. Of course, all of these principles must be construed and considered in the light of reason and common sense. Obviously the mayor of a city would not become an employee merely because he occasionally picked up a piece of hose or occasionally used a shovel or mattock when in the presence of a street force. Desultory, disconnected, infrequent acts of manual labor performed by an administrative officer and not reasonably required by the exigencies of the situation, would not classify such officer as a workman.

However, in the case at bar a consideration of the limited discretion and power of the chief of the fire department and the fact that he customarily and habitually performed the duties of ordinary firemen, and that the very nature of his employment apparently required such work upon his part, lead the court to the conclusion that the deceased did not "act in purely administrative capacities," and the award is approved.

In answer to the second question of law propounded, it is sufficient to observe that both the Supreme and the Superior courts are bound by the findings of the Industrial Commission where there is any competent evidence to support such findings. Of course, if the facts are admitted and only one inference could be reasonably drawn therefrom, such facts present a pure question of law; but in the case at bar the chief of the fire department acted in a supervisory capacity, and also as a workman. Both the Industrial Commission and the trial judge found, upon competent evidence, that the deceased was an employee within the meaning of the Compensation Act, and such finding so made is conclusive.

Affirmed.

VIRGINIA TRUST COMPANY, TRUSTEE, AND OTHERS, v. PHARR ESTATES, INCORPORATED, AND OTHERS.

(Filed 11 July, 1934.)

Pleadings D b—Complaint in this case held not subject to demurrer for misjoinder of parties and causes.

Plaintiffs, the trustee, and holders of bonds secured by a deed of trust, brought action against the corporate maker of the bonds to recover on the bonds and have the lands sold, alleging default in payment of principal and interest, and against the living individual guarantors of payment of the bonds and the executors of the deceased guarantors of payment, to recover on the contract of guaranty, alleging that the sale of the lands would not bring sufficient money to pay principal and interest on the bonds, and against a corporate guarantor of the interest on the bonds and taxes against the land, alleging interest due on the bonds and taxes due against the lands, and against the trustees and beneficiaries in certain deeds of trust executed by certain of the individual guarantors of the bonds, alleging that certain of the guarantors had executed the deeds of trust when insolvent to secure preëxisting debts, and that the property conveyed was practically all the property owned by said guarantors, and that the trustees in the deeds of trust had not complied with the provisions of C. S., 1610. *Held*, the complaint stated a cause of action against each of defendants, and the causes of action are so related that the complaint is not subject to demurrer for misjoinder of parties and causes.

CLARKSON, J., not sitting.

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

APPEAL by certain defendants from *Hill, Special Judge,* at October Term, 1933, and by other defendants from *Stack, J.,* at February Term, 1934, of MECKLENBURG. Affirmed in both appeals.

This is an action to recover judgment on 71 bonds, each for the sum of $1,000, which were executed by the defendant, Pharr Estates, Incorporated, and which are now held and owned by the plaintiffs other than the Virginia Trust Company, trustee; to foreclose the deed of trust which was executed by the defendant, Pharr Estates, Incorporated, to the plaintiff, Virginia Trust Company, trustee, and by which the said bonds are secured; and for other relief, on the facts alleged in the complaint, as against the defendants other than the Pharr Estates, Incorporated.

The action was first heard by Special Judge Hill, at October Term, 1933, of the Superior Court of Mecklenburg County on demurrers to the complaint filed by the original defendants. The demurrers were not sustained, and the demurring defendants excepted and appealed to the Supreme Court.

Pursuant to the order made by Judge Hill, summons was issued in the action, and duly served on the additional defendants.

The action was then heard by Judge Stack, at February Term, 1934, of the Superior Court of Mecklenburg County, on demurrers to the amended complaint filed by the additional defendants. The demurrers were not sustained and the demurring defendants excepted and appealed to the Supreme Court.

John M. Robinson and Hunter M. Jones for plaintiffs.

Whitlock, Dockery & Shaw for defendants, Pharr Estates, Incorporated, Edgar Pharr and W. H. Pharr, executors of W. S. Pharr, deceased, Edgar W. Pharr, W. H. Pharr, Julia Pharr, Mary E. Pharr, R. A. Dunn, Commercial National Bank of Charlotte, N. C., trustees of Ernest Spring Pharr, and American Trust Company.

Pharr & Bell for defendants, W. B. McClintock, trustee and Charlotte National Bank.

Stewart & Bobbitt for defendants, J. M. Trotter, trustee, Gurney P. Hood, Commissioner of Banks, ex rel. Independence Trust Company, and Zelda A. Hood, executrix of W. L. Hood, deceased.

CONNOR, J. The facts alleged in the complaint and admitted by the demurrers in this action are as follows:

On 1 October, 1927, the defendant, Pharr Estates, Incorporated, for value received, executed and delivered seventy-five bonds, each in the sum of $1,000, all bearing interest from date at the rate of six per cent per annum, payable semiannually. These bonds are payable to bearer, and were due on 1 October, 1932. Four of said bonds were paid at maturity; the remaining seventy-one bonds are now held and owned by the plaintiffs other than the Virginia Trust Company, trustee. There is due on each of said bonds the sum of one thousand dollars, with interest from 1 October, 1932.

For the purpose of securing the payment of said bonds, when they should become due, the defendant, Pharr Estates, Incorporated, on 1 October, 1927, executed a deed of trust by which it conveyed to the plaintiff, Virginia Trust Company, trustee, certain lots, parcels and tracts of land fully described in said deed of trust, and located in Mecklenburg County, North Carolina. This deed of trust was duly recorded in the office of the register of deeds of Mecklenburg County. The property conveyed by the said deed of trust is not sufficient in value to secure the payment in full of the bonds now held and owned by the plaintiffs, and if and when the same shall be sold under the power of sale contained in the deed of trust, or under a decree of foreclosure, the proceeds of the sale will not be sufficient to pay the said bonds and accrued interest.

Contemporaneously with the execution of the said bonds, to wit: on 1 October, 1927, and prior to their delivery, W. S. Pharr, now deceased, and the defendants, W. H. Pharr, Edgar W. Pharr, and Mary E. Pharr, jointly and severally, and in writing, guaranteed the payment of each of said bonds, both as to principal and interest, as the same should become due, and expressly waived demand for payment, protest for nonpayment, or notice of dishonor, agreeing to remain bound under their guarantee, notwithstanding any extension of time for payment, which might be granted by the holder or holders of any of said bonds. W. S. Pharr, one of the said guarantors, died on 11 November, 1932, having first made and published his last will and testament, which has been duly probated and recorded. The defendants, W. H. Pharr and Edgar W. Pharr, were duly appointed and have duly qualified as executors of the said W. S. Pharr, deceased. The defendants, Julia Pharr, his wife, and W. H. Pharr, Edgar W. Pharr, Ernest Springs Pharr and Mary E. Pharr, his children, are the devisees and legatees named in the last will and testament of W. S. Pharr. The defendants, R. A. Dunn and Commercial National Bank of Charlotte, N. C., are the trustees of Ernest Springs Pharr.

Also, contemporaneously with the execution of said bonds, to wit, on 1 October, 1927, and prior to their delivery, the defendant, Independence Trust Company of Charlotte, N. C., for value received, and in writing, guaranteed the prompt payment of the interest on each of said bonds, as the same should become due, and also the prompt payment of all taxes levied on the property conveyed by the said deed of trust, during the period from the date of said bonds until their maturity. There is now due not only the interest on said bonds from 1 October, 1932, but also as taxes levied on said property for the year 1932, the sum of $642.13.

On 1 August, 1931, the defendants, W. H. Pharr and Edgar W. Pharr, executed and delivered to the defendant, W. B. McClintock, trustee, a deed of trust, by which they conveyed to the said trustee, a certain tract of land fully described in said deed of trust, and located in Mecklenburg County. This deed of trust was duly recorded in the office of the register of deeds of Mecklenburg County, and purports to secure certain preëxisting indebtedness of the said W. H. Pharr and Edgar W. Pharr to the defendant, Charlotte National Bank. Both W. H. Pharr and Edgar W. Pharr were insolvent at the date of the execution of said deed of trust. The property conveyed by said deed of trust, was practically all the property then owned by the said W. H. Pharr and Edgar W. Pharr. The defendant, W. B. McClintock, trustee, in said deed of trust, has not complied with statutory provisions applicable to a trustee in a deed of assignment by a debtor for the benefit of creditors.

On 1 October, 1932, W. S. Pharr, one of the guarantors of the payment of the bonds now held and owned by the plaintiffs, executed and delivered to the defendant, J. M. Trotter, trustee, three deeds of trust, by which he conveyed to the said trustee certain tracts or parcels of land fully described in said deeds of trust and located in Mecklenburg County. These deeds of trust were duly recorded in the office of the register of deeds of Mecklenburg County, and purported to secure the payment of certain preëxisting debts of the said W. S. Pharr, to the defendants, Independence Trust Company of Charlotte, N. C., Commercial National Bank of Charlotte, N. C., American Trust Company of Charlotte, N. C., and Carmel Credit Union, and also to W. L. Hood, who has since died. The defendant, Zelda A. Hood, is the executrix of the said W. L. Hood, deceased. At the date of the execution of said deeds of trust, W. S. Pharr was insolvent. The property conveyed by said deeds of trust was practically all the property then owned by the said W. S. Pharr. The defendant, J. M. Trotter, trustee in said deeds of trust, has not complied with statutory provisions applicable to a trustee in a deed of assignment by a debtor for the benefit of his creditors.

Since the institution of this action, the Independence Trust Company of Charlotte, has closed its doors and ceased to do business, because of its insolvency. Its assets are now in the possession of the defendant, Gurney P. Hood, Commissioner of Banks, for liquidation as provided by statute.

These facts are sufficient to constitute a cause of action, certainly as against the defendant, Pharr Estates, Incorporated, on which the plaintiffs are entitled to the relief demanded in the complaint as against this defendant.

They are sufficient also to constitute a cause of action as against the defendants, W. H. Pharr and Edgar W. Pharr, executors of W. S. Pharr, deceased, and as against these defendants, individually, on their guarantee of prompt payment of said bonds, at maturity, both as to principal and interest.

They are sufficient also to constitute a cause of action as against the defendant, Independence Trust Company, on its guarantee of prompt payment of interest on said bonds, and of taxes levied on the property conveyed by the deed of trust, by which the said bonds were secured.

On these facts the deeds of trust which were executed by the defendants, W. H. Pharr and Edgar W. Pharr, to the defendant, W. B. McClintock, and by W. S. Pharr, to the defendant, J. M. Trotter, are assignments for the benefit of all the creditors of the grantors, and are void, because of the failure of the trustees in said deeds to comply with statutory provisions applicable to such assignments. C. S., 1610. *Odom v. Clark,* 146 N. C., 544, 60 S. E., 513. The facts alleged in the com-

plaint and admitted in the demurrers are sufficient to constitute causes of action against the trustees in said deeds of trust, and as against the defendants who are secured by the same.

These causes of action are so related to each other that the complaint is not subject to demurrer for improper joinder of either causes of action or parties.

The demurrers were properly overruled. The judgments to that effect are

Affirmed.

CLARKSON, J., not sitting.

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

GRAY B. SULLIVAN v. BARNWELL BROTHERS, INCORPORATED.

(Filed 11 July, 1934.)

IN THIS cause a motion was duly made in the Supreme Court for a new trial for newly discovered evidence.

Upon a careful examination of the record supporting said motion, the Court is of the opinion that a new trial should be granted in this cause, and it is so ordered.

BROGDEN, J., *for the Court.*

LAWRENCE REED v. LAVENDER BROTHERS ET AL.

(Filed 28 February, 1934.)

Master and Servant F i—

An award of the Industrial Commission is conclusive and binding as to all questions of fact when supported by sufficient, competent evidence, N. C. Code, 8081(ppp), and neither the Supreme Court nor the Superior Court can consider the evidence for the purpose of determining the facts on appeal.

APPEAL by defendants from *Sinclair, J.*, at September Term, 1933, of ROBESON.

Proceeding under Workmen's Compensation Act to determine liability of defendants to dependents or next of kin of Lawrence Reed, deceased employee.

From an award by the hearing commissioner, which was adopted and approved by the full Commission, and affirmed on appeal to the Superior Court, the defendants again appeal.

Johnson & Floyd for plaintiff.
Ralph V. Kidd for defendants.

PER CURIAM. The award was properly entered upon the facts found by the hearing commissioner, later adopted and approved by the full Commission, as they are amply supported by the evidence.

It is well settled that the award of the Industrial Commission is "conclusive and binding as to all questions of fact," if supported by sufficient competent evidence. N. C. Code, sec. 8081(ppp); *Clark v. Woolen Mills,* 204 N. C., 529, 168 S. E., 816; *Massey v. Board of Education,* 204 N. C., 193, 167 S. E., 695; *Kenan v. Motor Co.,* 203 N. C., 108, 164 S. E., 729. Indeed, neither this Court nor the Superior Court, on appeal from an award of the Industrial Commission, can consider the evidence and determine therefrom what the facts are. This is a matter exclusively for the Industrial Commission. *Ussery v. Cotton Mills,* 201 N. C., 688, 161 S. E., 307.

Affirmed.

JOSEPHINE McMILLAN, ADMINISTRATRIX, v. A. & H. FLYING SERVICE ET AL.

(Filed 28 February, 1934.)

APPEAL by plaintiff from *McElroy, J.,* at August Term, 1933, of BUNCOMBE.

Civil action to recover damages for death of plaintiff's intestate, alleged to have been caused by the negligence of the defendants.

The corporate defendant operates an airport near Fletcher, N. C. T. J. Roberts is president and acting manager of said corporation.

On 3 May, 1931, Graham Gardner, a licensed pilot, rented a plane from the corporate defendant, as he had previously done on a number of occasions, and started on a pleasure flight with plaintiff's intestate and another friend. They flew over the surrounding country, and during the trip fell near Fletcher, and all three were killed.

A separate issue of negligence was submitted to the jury with respect to each defendant and answered in the negative.

From the judgment entered on the verdict, the plaintiff appeals.

Claude L. Love, Oscar Stanton, A. Hall Johnston and Emmett T. Wilson for plaintiff.

Cathey & McKinney and R. R. Williams for defendants.

PER CURIAM. Conceding, without deciding, that the evidence was sufficient to carry the case to the jury, we have discovered no ruling or action of the trial court upon which the verdict can be disturbed on plaintiff's appeal. The judgment will be upheld.

No error.

D. B. ANDREWS v. NATIONAL OIL COMPANY.

(Filed 28 February, 1934.)

APPEAL by defendant from *Barnhill, J.*, at November Term, 1934, of EDGECOMBE. No error.

The action was instituted to recover damages suffered by plaintiff in the sale of gasoline by reason of a leak or concealed defect in the underground tanks.

The following is in substance the appellant's statement of the facts: The plaintiff was engaged from October, 1930, to March, 1932, as an operator of a filling station owned by the defendant and purchased gasoline from the defendant and stored it in underground tanks owned by the defendant. These tanks were connected by pipes with pumps above ground and from these pumps plaintiff sold gasoline at retail. About December, 1930, plaintiff discovered that he was losing money and attributed his loss to the possibility of a leak in the underground equipment. He mentioned this fact to an agent of the defendant named Blanton, and Blanton told him that the equipment was in good condition and there could not be a leak, and suggested that the apparent shortage of gasoline might be due to the plaintiff's faulty records. The plaintiff continued in possession of the filling station and subsequently made similar complaints to Blanton, receiving substantially the same answer, and finally Blanton told plaintiff that if he continued to complain, the station would be taken from him. Blanton left the employ of the company about March, 1931. Thereafter and until March, 1932, the plaintiff made no complaint to any agent of the defendant, although he saw them several times a week when deliveries of gasoline were made. In March, 1932, plaintiff mentioned the possibility of a leak to defendant's agent, Lee, and immediately an investigation was made by the defendant, a leak discovered and repaired. It was contended that the

plaintiff kept no record of his purchases and sales of gasoline in order to ascertain any shortage; that up to March, 1932, plaintiff made no check of the equipment and did nothing to ascertain whether a leak existed or not. In March, 1932, plaintiff kept an accurate check of the purchase and sales of gasoline, and discovered a loss of 349 gallons during said month.

The issues were answered as follows:

1. Did the defendant, without knowledge of the truth or falsity thereof, give plaintiff assurance that there was no latent defect in the gasoline storage tanks or pipes used in connection therewith furnished plaintiff for use in the sale of gasoline as alleged? Answer: Yes.

2. Was there a latent defect therein? Answer: Yes.

3. Did plaintiff in good faith under a mistake of fact induced by said assurance pay defendant for gasoline that was lost on account of said defect? Answer: Yes.

4. What amount, if any, is plaintiff entitled to recover for the gasoline so lost? Answer: $1,013.17, and interest from 6 July, 1931, at 6 per cent.

Judgment for plaintiff; appeal by defendant.

Gilliam & Bond for appellant.
Battle & Winslow for appellee.

PER CURIAM. This case was formerly before the Court on a demurrer to the complaint, 204 N. C., 268. The demurrer was overruled and it was held that the complaint states a good cause of action. The case was subsequently tried and judgment was awarded the plaintiff. The defendant now contends that it was entitled to a nonsuit on the ground that there was a variance between the allegations in the complaint and the evidence offered at the trial. We are of opinion that the evidence is sufficient to sustain the allegations and that the motion for nonsuit was properly denied.

The issues submitted to the jury sufficiently presented the merits of the controversy and in declining those tendered by the defendant the court made no error.

The defendant requested an instruction that there was no evidence of the plaintiff's loss prior to 1 March, 1932, or that the evidence to this effect was conjectural, but an inspection of the testimony reveals evidence which was properly left to the determination of the jury. We find

No error.

KELLEY E. BENNETT ET AL. v. MORTGAGE SERVICE CORPORATION ET AL.

(Filed 28 February, 1934.)

Mortgages H b—Foreclosure is properly restrained to hearing when bona fide controversy exists as to whether note is due and the amount thereof.

Where it appears from verified pleadings that there is a *bona fide* controversy between the parties as to whether the note secured by the mortgage is due, and if due by reason of default in the payment of installments thereon, as to the amount due, the mortgagor's order temporarily restraining the foreclosure of the mortgage is properly continued to the final hearing, without prejudice to the right of the mortgagees to move for the appointment of a receiver. C. S., 859.

APPEAL by defendants from *Alley, J.*, at Chambers, in Franklin, N. C., on 22 November, 1933. From SWAIN. Affirmed.

This action was begun in the Superior Court of Swain County to restrain the defendants from selling under the power of sale contained in a deed of trust executed by the plaintiffs the land described therein, for an accounting to determine the amount due on the notes secured by said deed of trust, and for other relief.

The action was heard on the motion of the defendants that the temporary restraining order issued in the action be dissolved. The motion was denied.

From judgment continuing the temporary restraining order to the final hearing, the defendants appealed to the Supreme Court.

Edwards & Leatherman for plaintiffs.

W. A. Devin, Jr., and Harkins, Van Winkle & Walton for defendants.

PER CURIAM. It appears from the verified pleadings in this action that there is a bona fide controversy between the parties (1) as to whether the notes executed by the plaintiffs and secured in the deed of trust containing the power of sale under which the defendants have advertised the land described therein for sale, are now due, and (2) if said notes are now due, because of default by plaintiffs in paying installments thereon, as to the amount now due on said note. For this reason, the temporary restraining order was properly continued to the hearing. *Parker Co. v. Bank,* 200 N. C., 441, 157 S. E., 419.

The validity of chapter 74, as amended by chapter 525, Public-Local Laws of North Carolina, 1933, is not presented by this appeal.

The judgment is affirmed without prejudice to the right of the defendants to move for the appointment of a receiver in this action, as provided by statute. C. S., 859.

Affirmed.

H. F. WALLS ET AL. V. MERCHANTS FIRE ASSURANCE CORPORATION OF NEW YORK AND ROYAL INSURANCE COMPANY OF LIVERPOOL.

(Filed 28 February, 1934.)

Reformation of Instruments A d: Insurance E c—Policy may not be reformed solely for mistake of draughtsman in omitting mortgagee clause.

A mortgagee is not entitled to a reformation of a policy of fire insurance after the happening of a fire covered thereby, merely upon the finding of the jury that the standard mortgagee clause was omitted therefrom by mistake of the draughtsman, where there is no allegation that the clause was fraudulently omitted from the policy, nor evidence of mutual mistake, or mistake on one side and fraud on the other.

APPEAL by Royal Insurance Company of Liverpool from *Barnhill, J.*, at October Term, 1933, of WILSON.

Civil actions to recover on two fire insurance policies, consolidated by consent and heard together as both policies cover the same property.

On 14 November, 1929, the Royal Insurance Company of Liverpool issued to the plaintiff, H. F. Walls, a fire insurance policy in the sum of $5,000 on a one-story frame building or dwelling in the town of Wilson, with the usual provisions of avoidance in case of ownership other than sole and unconditional, or commencement of foreclosure proceedings under any mortgage or deed of trust, or the existence of other insurance, etc. Said policy contains no New York Standard Mortgagee Clause, though W. A. Finch, trustee, held a deed of trust on the property at the time of the issuance of this policy. The life of the policy was three years.

On 15 April, 1932, the Merchants Fire Assurance Corporation of New York issued to the plaintiff, H. F. Walls, a fire insurance policy in the sum of $4,000 on the same dwelling, with the usual provisions of avoidance in case of ownership other than sole and unconditional, or commencement of foreclosure proceedings under any mortgage or deed of trust, or the existence of other insurance, etc. To this policy was attached as a rider the New York Standard Mortgagee Clause in favor of W. A. Finch, trustee, as his interest might appear.

The property was destroyed by fire 13 June, 1932.

On the hearing, it appearing that the owner, H. F. Walls, was not entitled to recover under either policy by reason of the avoidance clause contained therein, the cases were nonsuited as to him; liability under the New York Standard Mortgagee Clause to W. A. Finch, trustee, was not contested by the Merchants Fire Assurance Corporation, leaving the following as the only issue for the jury to determine:

"Was the New York Standard Mortgagee Clause omitted from policy Number 3171, issued by Royal Insurance Company of Liverpool, by mistake of the draftsman, as alleged?"

The jury answered the issue in the affirmative, and from the judgment rendered thereon, the Royal Insurance Company of Liverpool, appeals, assigning errors.

Finch, Rand & Finch for plaintiff W. A. Finch, trustee.

Manning & Manning for defendant Royal Insurance Company of Liverpool.

PER CURIAM. The case is controlled by the decision in *Welch v. Ins. Co.*, 196 N. C., 546, 146 S. E., 216. There is no allegation that the New York Standard Mortgagee Clause was fraudulently omitted from the policy issued by the Royal Insurance Company of Liverpool, nor is there any evidence of a mutual mistake, or mistake on one side and fraud on the other. The appellant's motion to nonsuit should have been allowed.

Reversed.

H. F. FLETCHER AND DOLLY F. FLETCHER v. GEORGE PARLIER, MRS. C. E. PARLIER, D. J. BROOKSHIRE, S. V. TOMLINSON, MRS. N. S. FORESTER AND BUSTER FORESTER, HEIRS AT LAW OF N. S. FORESTER.

(Filed 21 March, 1934.)

APPEAL by D. J. Brookshire and others from *Finley, J.*, at October Term, 1933, of WILKES. New trial.

On 2 May, 1928, George Parlier executed and delivered to the plaintiffs a promissory note in the sum of $2,000, which was endorsed by S. V. Tomlinson, C. E. Parlier, D. J. Brookshire, and N. S. Forester. The note was payable twelve months after date. It is alleged that before it became due N. S. Forester died; that at its maturity it was renewed for a period of twelve months, Buster Forester and Addie V. Forester, heirs of N. S. Forester, signing the renewal as endorsers; and that before the maturity of this note C. E. Parlier died, and his widow, Mrs. C. E. Parlier, paid $500, which was duly credited. The following is the note on which this suit was instituted:

"$1,500. North Wilkesboro, N. C., 2 June, 1930.

Twelve months after date I promise to pay to H. F. Fletcher and wife, Dollie F. Fletcher, or order, at the Bank of North Wilkesboro, North Wilkesboro, N. C., fifteen hundred and no/100 dollars from

date, for value received, with interest from date at six per cent per annum. Protest, presentment, notice of dishonor and extension of time of payment waived by all parties to this note.

(Signed.) Geo. S. Parlier."

The endorsers are S. V. Tomlinson, D. J. Brookshire, Buster Forester, Addie V. Forester, Mrs. C. E. Parlier, "Buster Forester and Addie V. Forester signing as heirs at law of N. S. Forester in renewal of this note and liable only to the extent that N. S. Forester would have been liable if living."

Buster Forester, Addie V. Forester, and D. J. Brookshire pleaded usury. The plaintiffs denied the allegation of usury and pleaded the two-year statute of limitations.

The jury returned a verdict against the defendants for $1,500 with interest and found that D. J. Brookshire, Buster Forester, and Mrs. Addie V. Forester were not entitled to recover anything on their counterclaim for usury.

Judgment for plaintiff; appeal by Mrs. C. E. Parlier, D. J. Brookshire, Buster Forester, and Mrs. Addie V. Forester.

J. H. Whicker for appellants.

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

PER CURIAM. Some of the appellants pleaded usury, insisting not only on a forfeiture of the interest but on the recovery of twice the amount of interest paid. C. S., 2306. The plaintiffs pleaded the statute of limitations. C. S., 442. The evidence is conflicting and the instructions given the jury, to which the appellants excepted, do not clearly explain the law applicable to the evidence in its relation to the counterclaim referred to in the fifth issue, as required by C. S., 564. For this reason the appellants are entitled to a new trial. See *Trust Co. v. Redwine,* 204 N. C., 125.

New trial.

J. T. LAMM v. ALBERT B. LAMM.

(Filed 21 March, 1934.)

APPEAL by plaintiff from *Barnhill, J.,* at November Term, 1933, of WILSON. Affirmed.

This is an action brought by plaintiff against defendant to recover the sum of $1,400 for breach of contract and also on *quantum meruit.* The plaintiff alleges that the defendant, his father-in-law, had about 56 acres of land in low state of cultivation and in the beginning of the

year 1918, he agreed with him that if he would build a house and improve the land, he would convey the land to him in fee simple. That he performed his part of the contract in about one year, and expended some $1,400. That the defendant breached his contract by deeding the land in fee simple on 18 December, 1931, to one Sid Page and he had to surrender the land to him. The defendant pleaded the three-year statute of limitation.

Finch, Rand & Finch and David W. Isear for plaintiff.
W. A. Lucas for defendant.

PER CURIAM. The court below at the close of plaintiff's evidence sustained a motion made by defendant for judgment as in case of nonsuit. C. S., 567. In this we can see no error. The defendant practically each year promised to make title to plaintiff, but never did so. Plaintiff testified: "After I built the buildings I asked him for a deed. At that time he was having a line dispute with an adjoining landowner and he told me there was a little corner and he did not know who would draw it. His sister might draw it. He said he might get it. That was the reason he put me off the first time and he kept putting me off each year. . . . He refused every time I made a demand on him. I was in possession of the place thirteen or fourteen years. I paid taxes on it. I had it cultivated."

The present case is distinguishable from *Vann v. Newsom,* 110 N. C., 122. The judgment below is

Affirmed.

TOM GOOR AND WIFE, AGATHIA GOOR, v. HOME MORTGAGE COMPANY, NORTH CAROLINA MORTGAGE COMPANY, JEFFERSON E. OWENS, SUBSTITUTED TRUSTEE; THE METROPOLITAN CASUALTY COMPANY OF NEW YORK, AND MORTGAGE SERVICE COMPANY.

(Filed 11 April, 1934.)

APPEAL by defendants from *Frizzelle, J.,* at Chambers in Snow Hill, N. C., 30 December, 1933. From PITT. Affirmed.

The following order was made by the court below: "This cause coming on to be heard before his Honor, J. Paul Frizzelle, resident judge of the Fifth Judicial District, upon return of a temporary restraining order, and counsel for both parties being present, and it being found from the pleadings that plaintiffs are the owners of land described; that they have secured certain indebtedness to the defendants, and that all payments have been made according to the terms of said security, except

the taxes, which are in arrears in the amount of about $400.00, the exact amount shown by the books of the tax collectors for the city of Greenville and county of Pitt. And it further being found that plaintiffs have applied to the Federal Land Bank for a loan, which has been approved, in the sum sufficient to liquidate the entire indebtedness of plaintiffs to the defendants, including taxes, and defendants refused to accept the bond for settlement as provided by the Federal Land Bank; and it being further found that plaintiffs will be able by an indulgence of ninety days to provide for the payment of taxes in arrears and comply with all other terms of contract, and it being further found that some bond or cash in lieu thereof should be provided by plaintiffs to protect the defendants from loss by reason of the granting and continuing of this restraining order. It is now, thereupon, ordered that the order heretofore made enjoining the sale by defendants be continued in force for ninety days, provided the plaintiffs make a deposit of $100.00 with the clerk of Superior Court, Pitt County, the said $100.00 to be applied as a credit upon the amount of taxes advanced by and due the defendants on the property if plaintiffs tender the balance of the taxes within the said ninety days or provide for the balance of taxes due; and provided further that, if plaintiffs are unable to pay the balance due on the taxes within ninety days, the said $100.00 shall be held by the court subject to final decree as to the amount of damage sustained by the defendants as the result and by reason of the granting and continuing of this order; provided further that, should plaintiffs pay or provide for the said taxes or make a tender of full settlement of the said indebtedness, in cash or government securities, as provided by the Home Loan Bank, within the said ninety days, as above set forth, then this order shall be made permanent, in event of or should plaintiffs fail within said ninety days to pay or provide for the said taxes or should fail to complete loan with the Home Loan Bank, so as to liquidate the entire indebtedness to defendants, then defendants may proceed to advertise said sale, with the right and privilege reserved to plaintiffs to redeem said property, at any time before the final approval of sale by the court, by complying with the provisions of this order. For the purpose of making said sale, in accordance with the orders of this court, Albion Dunn is hereby named commissioner who, after ninety days, shall advertise same according to law and the terms of said deed of trust, and make his report to this court for further orders.

"Done at Chambers, at Snow Hill, on 30 December, 1933.

J. PAUL FRIZZELLE, *Resident Judge Fifth Judicial District.*"

"Upon the signing of said judgment, exception was duly taken thereto and appeal entries entered upon said judgment as follows: To the foregoing order, in its entirety, the defendants except and particularly to

the findings of fact, for the reason that there is neither evidence nor allegations to support such findings and particularly to the refusal of the court to sustain defendant's plea of *res judicata* and in effect overruling same, and appeal to the Supreme Court."

The defendants' only assignment of error, embracing the one and single exception, is to the order of his Honor, Judge Frizzelle, continuing the restraining order to the hearing and refusing to sustain defendants' plea of *res judicata.*

S. J. Everett for plaintiff.
W. A. Devin, Jr., and Albion Dunn for defendants.

PER CURIAM. The plea of *res judicata* set up by defendants cannot be sustained. Certain matters and things have arisen since the prior order. See statutes and cases cited in *Woltz v. Safe Deposit Co., ante,* 239; *Whitaker v. Chase, ante,* 335. The judgment of the court below is

Affirmed.

THEOPHILUS A. ODOM v. THE EQUITABLE LIFE ASSURANCE SOCIETY.

(Filed 11 April, 1934.)

APPEAL by defendant from *Grady, J.,* at October Term, 1933, of SAMPSON.

Civil action to recover on total and presumably permanent disability clauses in a number of life insurance policies.

Upon denial of liability and issues joined, there was a verdict and judgment for plaintiff, from which the defendant appeals, assigning errors.

P. D. Herring and Butler & Butler for plaintiff.
Faircloth & Fisher and S. Brown Shepherd for defendant.

PER CURIAM. The record contains no exceptive assignment of error upon which a new trial could be ordered or a reversal based. It results, therefore, that the trial will remain undisturbed. *Mitchell v. Assurance Society,* 205 N. C., 721; *Short v. Ins. Co.,* 194 N. C., 649, 140 S. E., 302.

No error.

C. L. TROUTMAN AND WIFE, MYRTLE TROUTMAN, v. R. H. SHUFORD AND JOHN D. BROWN, TRUSTEES, AND THE MORTGAGE CORPORATION OF VIRGINIA.

(Filed 11 April, 1934.)

APPEAL by plaintiffs from *Warlick, J.*, at 25 November Term, 1933, of CATAWBA. Reversed.

Louis A. Whitener for plaintiffs.
M. H. Yount for defendants.

PER CURIAM. This is an action for injunctive relief brought by plaintiffs against defendants. A temporary restraining order was issued by the judge below and at the hearing, the court below dissolved the restraining order. In this, we think there was error.

In *Seip v. Wright,* 173 N. C., 14 (15-16), is the following: "Where it will not harm the defendant to continue the injunction, and may cause great injury to the plaintiff, if it is dissolved, the court generally will restrain the party until the hearing. *McCorkle v. Brem,* 76 N. C., 407; where serious questions were raised, *Harrington v. Rawls,* 131 N. C., 40; or where reasonably necessary to protect plaintiff's rights, *Heilig v. Stokes,* 63 N. C., 612. . . . 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.'"

We think on the whole record, the restraining order should not have been dissolved. *Woltz v. Safe Deposit Co., ante,* 239; *Whitaker v. Chase, ante,* 335. The judgment of the court below is

Reversed.

LUCAS AND LEWIS ET AL. v. NORTH CAROLINA BANK AND TRUST COMPANY ET AL.

(Filed 2 May, 1934.)

Pleadings D b—

Demurrer for misjoinder of parties and causes of action held properly sustained, the several causes of action alleged not affecting all the parties to the action. C. S., 507.

APPEAL by plaintiff from *Frizzelle, J.*, at Chambers in Snow Hill, 15 December, 1933. From CRAVEN.

Civil action to recover for (1) alleged contract breaches and (2) *torts* committed on the part of the corporate defendant, and (3) alleged neglect of official duties and (4) *torts* committed by the Commissioner of Banks, Gurney P. Hood.

Demurrer was interposed on the ground of misjoinder of parties and causes of action.

From a judgment sustaining the demurrer, the plaintiff appeals.

L. I. Moore, V. B. Derrickson, E. M. Green and R. E. Whitehurst for plaintiff.

Kenneth C. Royall and Brooks, Parker & Holderness for defendants.

PER CURIAM. The demurrer was properly sustained on the ground of a misjoinder of both parties and causes of action. *Williams v. Gooch, ante,* 330; *Carswell v. Whisenant,* 203 N. C., 674, 166 S. E., 793; *Grady v. Warren,* 201 N. C., 693, 161 S. E., 319; *Sasser v. Bullard,* 199 N. C., 562, 155 S. E., 248. The several causes of action, united in the same complaint, do not "affect all the parties to the action," as required by C. S., 507.

Where this dual misjoinder occurs, and a demurrer is accordingly interposed, the decisions are to the effect that the action should be dismissed. *Shuford v. Yarbrough,* 198 N. C., 5, 150 S. E., 618; *Roberts v. Mfg. Co.,* 181 N. C., 204, 106 S. E., 664.

Affirmed.

LOREN E. PEARSON v. J. W. WESTBROOK.

(Filed 2 May, 1934.)

APPEAL by defendant from *Daniels, J.*, at October Civil Term, 1933, of WAYNE. No error.

The plaintiff was a fire insurance agent. He sold the defendant a policy of insurance in the Great National Insurance Company of Newark, N. J., on certain tobacco barns. The plaintiff settled with the company for the premium and extended credit therefor personally to the defendant. There was a loss under the policy and the defendant made claim on the insurance company, which issued its draft covering the loss. The draft was given to the plaintiff by the company's claim agent and was delivered to the defendant on 20 November, 1931. In

the afternoon of the same day the defendant's wife paid the plaintiff $21.26 the amount of the premium. A few days afterwards for the purpose of identifying the defendant and at his request the plaintiff endorsed the draft in blank under the payee's endorsement and left it with the defendant. The plaintiff had no pecuniary interest in the draft. The defendant presented the draft endorsed by himself and the plaintiff to the Branch Banking and Trust Company in Goldsboro, who paid the draft upon the strength of the plaintiff's endorsement. The draft was sent by the bank of Goldsboro for collection in the usual course and was returned unpaid. The plaintiff immediately notified the defendant who refused to reimburse the plaintiff and the plaintiff brought suit against the defendant, as prior endorser, to recover the sum of $150.00, the amount of the draft which the plaintiff had paid for the benefit of the defendant.

The issue, "In what amount, if any, is the defendant indebted to the plaintiff?" was answered, "$150.00 with interest from 8 December, 1931." His Honor charged the jury as follows: "If you find the facts to be as testified to by all the witnesses you will answer this issue $150.00 with interest from 8 December, 1931." Judgment for plaintiff; exception and appeal by the defendant.

Hugh Brown Campbell and J. Faison Thomson for appellant.
Julian T. Gaskill and Dickinson & Bland for appellee.

PER CURIAM. The plaintiff's production of the draft in the trial was evidence of its nonpayment by the drawer. It contained a waiver of protest which was binding upon all parties—a waiver of formal protest, of presentment, and dishonor. *Shaw Bros. v. McNeill,* 95 N. C., 535; *Rasberry v. West,* 205 N. C., 406.

We are of opinion that none of the appellant's exceptions to the admission or rejection of evidence can be sustained. Upon examination of the whole record we find

No error.

EARL FERGUSON v. REX SPINNING COMPANY.

(Filed 2 May, 1934.)

Judgments L a—

In order to sustain a plea of estoppel by judgment in an action instituted after judgment of nonsuit the court must find that the allegations and evidence in the second action are substantially identical with the first.

APPEAL by plaintiff from *Stack, J.,* at January Term, 1934, of GASTON. Reversed.

J. L. Hamme for plaintiff.
J. Laurence Jones for defendant.

PER CURIAM. In *Batson v. Laundry Co., ante,* 371, is the following: "In the case at bar the trial judge heard no evidence and found no facts. Hence, it does not appear whether the merits of the present case are substantially identical to the former case or not. Therefore, the Court is of the opinion that the judgment dismissing the action upon the plea of estoppel, was prematurely and inadvertently made." For the reasons given, the judgment of the court below is

Reversed.

HENRY S. HANSON v. F. F. DICKSON, TRADING AND DOING BUSINESS AS DICKSON WOOD CARVING COMPANY.

(Filed 23 May, 1934.)

APPEAL by defendant from *Clement, J.,* at March Term, 1934, of GUILFORD. Affirmed.

This is a civil action tried at the December Term, 1933, of the municipal court of the city of High Point, North Carolina, before Honorable Lewis E. Teague, judge presiding, and a jury. Plaintiff, Henry S. Hanson, brought an action to recover damages of the defendant arising out of alleged breach of contract, the defendant filing answer admitting the contract, but alleging that it was dissolved by mutual consent. The jury answered the issue submitted to it to the effect that the defendant was indebted to the plaintiff in the sum of $278.30, and judgment was signed accordingly.

The defendant made the following material exceptions and assignments of error and appealed to the Superior Court: (1) The defendant, at the close of plaintiff's evidence, and at the close of all the evidence, made motions as in case of nonsuit. C. S., 567. (2) That his Honor failed to define a contract and explain the law with reference thereto in his charge to the jury.

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

The defendant assigned again the above exceptions and assignments of error made from the municipal court to the Superior Court and appealed to the Supreme Court.

Lovelace & Kirkman for plaintiff.
Gold, McAnally & Gold for defendant.

PER CURIAM. From a careful reading of the record, we think the municipal court of the city of High Point, N. C., and the court below, properly overruled the motions made by defendant for judgment as in case of nonsuit. C. S., 567. We think the evidence in regard to the contract and alleged new contract was sufficient to have been submitted to the jury.

The exceptions and assignments of error made to the charge of his Honor, Lewis E. Teague, in municipal court of the city of High Point, as to his failure to define a contract nowhere appears to any part of the charge as given. An "unpointed, broadside" exception to the "charge as given" will not be considered. *Rawls v. Lupton,* 193 N. C., 428. We may say, however, taking the charge as a whole, and not disconnectedly and giving it a liberal construction, we think the contentions of the litigants to the controversy, and the law applicable to the facts, were fairly and correctly given. The court below affirmed the judgment of the municipal court of the city of High Point and in this we see no error. The judgment of the court below is

Affirmed.

K. H. FREEMAN ET AL. V. CITY OF CHARLOTTE ET AL.

(Filed 23 May, 1934.)

APPEAL by defendants from *Stack, J.,* at April Term, 1934, of MECKLENBURG.

Civil action to restrain the defendants from holding a special election in the city of Charlotte on 19 May, 1934, the same having been called for the purpose of submitting to the qualified voters of the municipality the following questions:

"Shall an *ad valorem* tax not greater than ten (10) cents on the one hundred (100) dollar valuation of taxable property in the city of Charlotte be levied and collected annually, if found necessary, as a supplemental fund for school purposes from year to year?"

The court found, upon evidence submitted at the hearing, that the funds to be derived from the proposed levy were not limited to increas-

ing the standard of the State's eight-months school term, but, by specific resolution, the authorization is "to provide for a term of not more than 180 days, and/or, in the discretion of said board of school commissioners, to supplement any object or item of school expenditure." True, a separate resolution of the school commissioners proposes to restrict the use of said funds to an eight-months term for the year 1934-35. But this was not made a part of the petition requesting the election, and the resolution, in terms, limits such proposal to one year, while the tax, if approved, is to be levied from year to year.

It was further found, upon additional facts appearing in the judgment, and unchallenged by any exceptions, that the election could not properly be held, at the time designated, under section 17, chapter 562, Public Laws of 1933. Whereupon the prayer of the complaint was granted and the election enjoined.

Defendants appeal, assigning the judgment as error.

John M. Robinson and Hunter M. Jones for plaintiff Freeman.
William H. Abernathy and James O. Moore for plaintiff Ferguson.
Bridges & Orr for defendants.

PER CURIAM. A careful consideration of the record, and especially the unchallenged findings made by the trial court, leaves us with the impression that no exceptive assignment of error appears upon which the judgment can be reversed. It will, therefore, not be disturbed.

It is observed that the approval of the State School Commission, as provided by section 17, chapter 562, Public Laws of 1933, nowhere appears of record; and further that the use of the words "and/or" in said section adds nothing to its clarity if it does not create an ambiguity as to who shall request the tax-levying authorities to call the election.

Affirmed.

J. H. WILLIAMSON ET AL., ADMINISTRATORS C. T. A., OF IRA FREEMAN, DECEASED, v. TRACY R. FREEMAN.

(Filed 23 May, 1934.)

APPEAL by defendant from *Oglesby, J.*, at October Term, 1933, of MONTGOMERY. No error.

Ira Freeman died in Montgomery County on 11 March, 1928. His last will and testament was duly probated and recorded in the office of the clerk of the Superior Court of said county, prior to the commencement of this action. The plaintiffs have been duly appointed as ad-

ministrators *c. t. a.* of the said Ira Freeman, deceased. This action was begun on 11 May, 1933.

It is alleged in the complaint that at the date of his death, Ira Freeman was the owner and in the possession of a stock of goods, wares and merchandise, and that prior to the probate of his last will and testament, the defendant, his son, took the said stock of goods into his possession, and wrongfully converted the same to his own use. The plaintiffs prayed judgment that they recover of the defendant the value of the said stock of goods.

The defendant in his answer denied that his father, Ira Freeman, was the owner of the stock of goods described in the complaint, at the date of his death. He alleged that he was the owner of said stock of goods, and was in the lawful possession of the same. He prayed judgment that plaintiffs recover nothing by this action.

At the trial, in response to the issues, the jury found that Ira Freeman was the owner of the stock of goods described in the complaint at the date of his death, and that the net value of the same was $3,500.

From judgment that plaintiffs recover of him the sum of $3,500, together with the costs of the action, the defendant appealed to the Supreme Court.

B. S. Hurley and Brown & Brown for plaintiffs.
John T. Brittain and R. T. Poole for defendant.

PER CURIAM. The assignments of error relied on by the defendant on his appeal to this Court cannot be sustained. We find no error in the rulings of the court on defendant's objections to evidence offered by the plaintiffs, at the trial, or in the instructions of the court to the jury.

The evidence in support of the respective contentions of the parties was in sharp conflict, and was properly submitted to the jury. The judgment must be affirmed.

No error.

ROSA ALLEN v. TOWN OF BESSEMER CITY.

(Filed 20 June, 1934.)

CIVIL ACTION, before *Harding, J.*, at December Term, 1933, of GASTON.

Plaintiff alleged and offered evidence tending to show that the American Cotton Mills, Incorporated, owned a certain village for the use of its employees and had opened a street through the property, which was habitually used by employees in going to and from work in the

mill, and that the defendant town by virtue of an easement, had installed a manhole in one of said paths or streets; that the same was maintained in a negligent manner by virtue of the fact that an unguarded and unlighted manhole was situated near the edge of the pathway, and that in using the pathway to reach the mill she stumbled over said manhole, sustaining serious and permanent injuries.

Issues of negligence, contributory negligence and damages were submitted to the jury. The jury answered the issue of negligence "No," and from judgment upon the verdict the plaintiff appealed.

S. J. Durham and J. L. Hamme for plaintiff.
A. C. Jones and P. C. Froneberger for town of Bessemer City.

PER CURIAM. The facts in this case are the same as detailed in the case of *Allen v. Cotton Mills, ante,* 704. A perusal of the record and an examination of exceptions taken by the plaintiff fail to disclose reversible error. See *Atkinson v. Mills Co.,* 201 N. C., 5.

Affirmed.

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

DAVID JONES v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 20 June, 1934.)

APPEAL by defendant from *Alley, J.,* and a jury, at February Term, 1934, of ROCKINGHAM. No error.

This is an action brought by plaintiff against defendant to recover for permanent and total disability on a standard accident policy issued to plaintiff by defendant on which the premiums were paid. The issues submitted to the jury and their answers thereto indicate the controversy, and are as follows: "(1) Did the defendant execute and deliver to the plaintiff, through its duly constituted agent, J. W. Balser, the policy of insurance referred to in the complaint? Answer: Yes. (2) Did the plaintiff in his application for said policy falsely represent that he was not maimed, deformed or crippled in any manner or degree, or affected with any form of bodily or mental disease, disorder, infirmity or impairment, as alleged in the answer? Answer: No. (3) Did the plaintiff in his application for said policy falsely represent that his average weekly income from his then occupation as loom fixer exceed the aggregate amount of single weekly benefits provided for in said

policy, as alleged in the answer? Answer: No. (4) Was the plaintiff induced to surrender said policy, execute the release and accept the check for $217.86 by reason of fraud and undue influence of the defendant, as alleged in the complaint? Answer: Yes. (5) Did the injuries received by the plaintiff on 12 June, 1931, directly and independently of all other causes by violent and accidental means continuously and wholly from 12 June, 1931, to 12 June, 1932, a period of 52 weeks, disable and prevent him from performing any and every kind of duty pertaining to the occupation in which he was engaged at the time of the accident, as alleged in the complaint? Answer: Yes. (6) Did the injury sustained by the plaintiff on 12 June, 1931, directly and independently of all other causes by violent and accidental means from said date up until the commencement of this action on 15 November, 1932, continuously and wholly disable the plaintiff from engaging in any and every occupation or employment for wage or profit, as alleged in the complaint? Answer: Yes. (7) What sum, if any, is the plaintiff entitled to recover of the defendant? Answer: $1,151.84, less $217.86, total $933.98."

The court below rendered judgment for plaintiff on the verdict. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The necessary facts will be set forth in the opinion.

W. R. Dalton and Glidewell & Gwyn for plaintiff.
Smith, Wharton & Hudgins and Brown & Trotter for defendant.

PER CURIAM. The defendant issued to plaintiff on 6 March, 1931, a standard accident policy providing for total and permanent disability—the weekly indemnity being $15.00. Plaintiff's occupation was a loom fixer. The premiums were paid by plaintiff in accordance with the terms of the policy.

While working in a mill at Draper, North Carolina, on 12 June, 1931, plaintiff testified, in part, unobjected to: "I got hurt in this way. I stooped over the loom jacking up the harness, the hooking jack stopped under the harness, causing the harness to go up and down, one to go up and the other to come down, causing the warp to divide so the shuttle could go through and make the cloth, and while I was stooped over the reed, the cap fell and struck me on the back of the head at the base of the skull and knocked my face against the race plate of the loom and causing a bruise to this side of my face and left three cuts around my right eye and caused my face to be inflamed and swollen and caused a knot on the back of my head where it struck me, and also hurt my back and lower abdomen, which caused me a great deal of suffering and

pain. My spine was injured, caused a deformity of the spinal column, caused them to decay. The muscles also left my abdomen pendulous. The injury caused me to sway in my back; couldn't raise up in my back. It was 27 months before I could get any relief."

Dr. Wilson, a witness for plaintiff, testified in part, unobjected to: "I am a practicing physician and a graduate of Medical College of Virginia, Richmond, Va. I have been practicing since 1907. I have had occasion to attend plaintiff. I first saw him in February, 1932, at Draper, North Carolina. At that time I found him in a very critical condition, suffering very severe back strain and dislocation forward of the lumbar vertebra. The vertebra was overriding one another, instead of being a direct support of the body like that (witness illustrates the position). The vertebra had slid forward, dislocated forward, like that, so he gets no support from the spine, which is the main support of the body; had no support of the body by the spine at all. He was in a marked spasmodic condition and tension of the muscles and tendons. His support of the body was all muscles and tendons, like guy ropes inside the spine. He was suffering a great deal of the time, suffering all the time, and his condition is a condition known as spondylitis. That is a forward displacement of the vertebra in the lower back forward with consequent contraction of the pelvis. That has a tendency to push the bowels and stomach down causing the pendulous condition, commonly known as dropping down of the stomach and bowels, known as enteroptosis. I have seen him off and on ever since 1932. He has a permanent and total disability. He has been that way ever since I saw him the first time in February, 1932."

There was other evidence direct and circumstantial, corroborating the above witnesses. There was evidence on the part of defendant to the contrary. The plaintiff tendered back the $217.86. The defendant denied that plaintiff's injury on 12 June, 1931, brought on the trouble in his back and abdomen—his present total and permanent disability, as contended by him. There was no causal connection between the two. A release was set up by defendant, the plaintiff contended that it was procured by fraud and under influence. The defendant also set up that false statements as to material facts in the application, vitiated the policy. Defendant denied these allegations and also contended that they were waived. The defendant contended that the nonexpert witnesses were incompetent. This contention cannot be sustained. *S. v. Stefanoff, ante,* 443. That the court below violated C. S., 564 as to expressing an opinion. The defendant contended that there was not sufficient competent evidence to be submitted to the jury on any aspect of the case. Numerous exceptions and assignments were made by defendant to the admission and exclusion of evidence, the charge of the court below

and motions made to strike out answers of witnesses. Taken in the light most favorable to plaintiff, we think there was sufficient, competent evidence to be submitted to the jury on all the controverted issues. There was no contention by defendant that the issues submitted were not determinative of the controversy, nor did defendant submit any other issues. The court below in a logical, exhaustive charge, gave the contentions of the litigants fairly. The court below took the issues up *seriatim,* set forth the facts bearing on each issue and charged the law applicable to the facts and quoted frequently the decisions of this Court on the controverted legal questions involved. We have examined the record and the learned and exhaustive briefs of the litigants and we think none of the exceptions and assignments of error taken by defendant, constitute prejudicial or reversible error. The questions involved were mostly of fact, to be determined by a jury and not by us. The questions of law involved in this controversy are not new or novel, but well settled by this Court. In the judgment of the court below, we find

No error.

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

CHARLES T. LEVINESS v. WILLIAM S. MURCHISON.

(Filed 20 June, 1934.)

APPEAL by defendant from *Sink, J.,* at August Term, 1933, of GUILFORD.

Civil action to recover commissions, or brokerage fees, for effecting a lease of defendant's hotel.

Upon denial of liability and issue joined, there was a verdict and judgment for $200.00, from which the defendant appeals, assigning as error the refusal of the court to dismiss the action as in case of nonsuit.

F. F. Myrick for plaintiff.
J. S. Griffin for defendant.

PER CURIAM. A careful perusal of the record leaves us with the impression that the evidence is sufficient to carry the case to the jury, hence the verdict and judgment will be upheld.

No error.

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

MRS. BELLE Z. CLAYTON v. L. D. ADAMS, J. Q. ADAMS, DELLA C. ROBERSON AND H. B. ROBERSON.

(Filed 11 July, 1934.)

1. Appeal and Error J c—

Findings of fact by the trial court, supported by competent evidence, are conclusive on appeal.

2. Judgments K b—

The refusal of a motion to set aside a judgment for surprise and excusable neglect will be upheld where the trial court finds from competent evidence that notice of the time set for trial was duly sent movant's counsel through the mail, but was not received by him.

APPEAL by defendant, N. W. Phelps, from *Cowper, Special Judge,* at November Term, 1933, of FORSYTH.

R. L. Huffman for appellant.
No counsel for appellee.

PER CURIAM. At 25 September Term, 1933, of Forsyth County Superior Court, the plaintiff recovered judgment for the sum of $1,500 and interest from 15 February, 1932, against L. D. Adams, J. Q. Adams, Della C. Roberson, H. B. Roberson and N. W. Phelps. The judgment further recited that "N. W. Phelps is primarily responsible and liable to the plaintiff for the payment of the judgment," etc.

On 20 November, 1933, the defendant Phelps made a motion to set aside the judgment upon the ground of excusable neglect and surprise, C. S., 600, and alleged that he had a good, meritorious and complete defense to the action. The defendant Phelps, was made a party to the original action, employed attorneys and filed an answer. In the judgment of the court below in reference to Phelps' counsel being notified of the trial, is the following: "The court further finds as stated in the foregoing judgment that the letters were duly mailed, with the return cards; that neither has ever been returned to the writers and that all was done that could be done as referred to in the judgment to notify said attorney; that this case was set for trial as the first case for 4 October, 1933; that such notices were sent one week prior to the convening of the court, the court is of the opinion, and so finds, that the said letters did go in the mail box of said attorney, but for some reason, which is no fault of the plaintiffs in this case, he has not actually received them.

"Upon the foregoing and all of the findings of fact heretofore made, the judgment rendered heretofore denying defendant Phelps' motion to set aside the judgment signed in this cause at the 25 September Term,

1933, in the Superior Court of Forsyth County is approved and remains the judgment in reference to said motion."

The only exception and assignment of error made by defendant Phelps is the following: "To the findings of fact made by the court and to the judgment pronounced thereon for the reason that same is contrary to the weight of evidence as adduced by the moving party, N. W. Phelps."

The findings of fact in the court below supported by competent evidence are conclusive and not reversible on appeal. *Turner v. Grain Co.*, 190 N. C., 331; *Crye v. Stoltz*, 193 N. C., 802; *Bowie v. Tucker*, 197 N. C., 671 (672). In the present case, the court below found that notice was sent to Phelps' duly authorized counsel of record of the time set for the trial. The judgment of the court below is

Affirmed.

AMERICAN HARDWARE AND EQUIPMENT COMPANY, IN BEHALF OF SELF AND OTHER CREDITORS, v. MOUNT AIRY HARDWARE COMPANY.

(Filed 11 July, 1934.)

Fraudulent Conveyances A c—

An assignment, valid in form, executed for a valid consideration without evidence that the assignee had knowledge of assignor's insolvency at the time of the assignment *is held* valid and binding on other creditors of the assignor.

AN APPEAL by the receiver of the defendant from judgment declaring the claim of the Pittsburgh Plate Glass Company, intervenor, a preferential one. Before *Shaw, Emergency Judge,* at January Term, 1934, of SURRY. No error.

Folger & Folger for appellant.
J. Allen Austin for appellee.

PER CURIAM. The sole question presented in the case is whether the assignment of a part of funds, derived from certain fire insurance policies made to the intervenor by the defendant company through its president and general manager prior to the receivership, is valid and binding upon the receiver. The assignment was reduced to writing and appears in the record. It is valid in form. It was given for valid considerations. There is nothing to indicate that the intervenor had any knowledge of the insolvency of the defendant at the time of the assignment. We conclude that the assignment is valid and find in the trial below

No error.

FARMERS PEANUT COMPANY v. MRS. W. F. LUCAS, ADMINISTRATRIX, AND STANDARD FERTILIZER COMPANY.

(Filed 11 July, 1934.)

APPEAL by defendant, Standard Fertilizer Company, from *Small, J.*, at December Term, 1933, of CHOWAN. No error.

This is an action to recover the value of certain bags of peanuts sold and delivered to the defendant, Standard Fertilizer Company, by its codefendant. Prior to such sale and delivery, the defendant, Mrs. W. F. Lucas, administratrix, and her son, L. H. Lucas, had conveyed the said bags of peanuts to the plaintiff by a chattel mortgage which had been duly recorded. The debt secured by said mortgage had not been paid at the time of such sale and delivery.

The issues submitted to the jury were answered as follows:

"1. Is the plaintiff's cause of action barred by the statute of limitations? Answer: No.

2. In what amount, if any, is the defendant, Standard Fertilizer Company, indebted to the plaintiff? Answer: $240.00, with interest from 2 June, 1930."

From judgment in accordance with the verdict, the defendant, Standard Fertilizer Company, appealed to the Supreme Court.

Privott & Privott and W. D. Pruden for plaintiff.

Coburn & Coburn for defendant.

PER CURIAM. The admissions in the answer of the appellant and at the trial of this action are sufficient to support the verdict of the jury. In view of these admissions, it is needless to consider the assignments of error relied on by the appellant in this Court. There was no error at the trial. The judgment is affirmed.

No error.

APPENDIX

STATE OF NORTH CAROLINA UPON THE RELATION OF DENNIS G. BRUMMITT, ATTORNEY-GENERAL, v. HERMAN WOODWARD WINBURN, ATTORNEY AT LAW.

1. Attorney and Client E b—Courts have inherent power to disbar attorneys.

Our courts have the inherent power to hear and determine whether one who has received a license to practice law in the courts of this State should be disbarred from practice in our courts for moral or professional delinquency, or misconduct, malpractice, or deficiency of character.

2. Attorney and Client E a—Evidence held sufficient for order of disbarment on motion of Attorney-General.

Where a committee of impartial and competent men appointed by the Supreme Court has made an investigation of charges against an attorney licensed to practice law in our courts and, after investigation, has unanimously recommended that the attorney be disbarred for moral unfitness, and it appears that the attorney had been disbarred by another State prior to being licensed by this State, and that subsequent to the issuance of license by this State he made false statements in his applications for admission to practice in the Federal Courts relative to his disbarment by such other state, and that, after investigation and hearings, the Federal Courts disbarred him from practice in the Federal Courts, the evidence is sufficient to show a present unfitness of the attorney to practice law in the courts of this State, and the motion of the Attorney-General for an order of disbarment will be granted, and while the action of the Federal Courts is not controlling, it is evidence of such attorney's present unfitness to practice law.

MOTION and petition to disbar.

Herman Woodward Winburn was duly admitted to practice law in the State of Louisiana in 1922. Charges were preferred against him in that state on 26 August, 1925. On 23 November, 1925, the respondent admitted the truth of the charges and thereupon the Disbarment Committee of the Supreme Court of Louisiana adopted a resolution declaring that it had information that the respondent would "within 30 days from this date, . . . apply to the Supreme Court of Louisiana for permission to have his license to practice law canceled, because of his being guilty of moral terpitude and improper conduct in the practice of law; that it is the sense of this committee that if this is done and his license is canceled by the Supreme Court, within the time stated, that no further proceedings be had by this committee."

On 12 December, 1925, respondent filed a petition in the Supreme Court of Louisiana stating that "he wished to discontinue the practice of law, that the license granted him was no longer necessary and that he desired it be revoked . . . and his name stricken from the roll of attorneys."

APPENDIX.

In October, 1926, the respondent became a citizen of Greensboro, North Carolina, secured employment, and discharged the duties thereof with diligence and credit.

At the Fall Term of 1928 this Court, upon written examination, duly issued a license to practice law to respondent and thereafter he appeared in the State and Federal courts.

On 2 June, 1931, Winburn applied for admission to practice in the Supreme Court of the District of Columbia. In the application two questions, among others, were propounded, to wit: "(E) If admitted, have any charges ever been preferred against you as attorney and counsellor at law? (F) If so, with what results?"

The respondent answered the first question "Yes," and the second "Dismissed by committee after matter investigated."

Winburn filed an application for admission to practice in the Supreme Court of the United States on 14 October, 1931. Questions propounded in said application, among others, were as follows: "(7) State courts of last resort to which applicant has been admitted to practice." "(8) State places where applicant has been a practitioner."

The respondent answered the 7th question as follows: "Supreme Court of North Carolina, 20 August, 1928." In reply to the 8th query he stated: "Greensboro, North Carolina, and Washington, D. C."

The attention of the Supreme Court of the United States was directed to the career of Winburn in New Orleans, Louisiana, and thereupon said Court appointed a committee of three eminent and distinguished members of the bar to investigate the status of applicant and make recommendations. After respondent had been fully heard in his own defense the said committee, after reciting the pertinent facts, found "that the respondent is an unfit person to practice law at the bar of this Court." Thereafter on 9 October, 1933, the Supreme Court of the United States speaking through *Mr. Chief Justice Hughes,* said "Being of the opinion that the said Herman Woodward Winburn has been guilty of conduct unbecoming a member of the bar of this Court, and that he is an unfit person to practice at the bar of this Court;

Now, therefore, it is ordered that the said Herman Woodward Winburn be, and he is hereby, disbarred from the further practice of the law in this Court."

Subsequently, respondent has been disbarred by the District Court for the Middle District of North Carolina and the United States Circuit Court of Appeals for the Fourth Circuit.

In November, 1933, the Attorney-General of this State filed a motion and petition in the Supreme Court of North Carolina for the purpose of requiring Winburn to show cause why he should not be disbarred "from the practice of law in the State of North Carolina . . . and

his name stricken from the rolls of practicing attorneys in this Court and in the other courts of said State."

Thereupon this Court caused a citation to issue to respondent "to file an answer by 5 December, 1933, if so advised."

An answer was duly filed and the Court appointed Hon. Joseph B. Cheshire, Jr., Hon. L. T. Hartsell and Hon. R. W. Herring, eminent members of the bar of North Carolina and regularly practicing in this Court, to conduct a hearing or hearings, find the facts and report to this Court.

After hearing the respondent and his counsel, this committee filed a report in this Court on 18 May, 1934. This report states the facts substantially as hereinbefore mentioned, and upon such facts so found the committee unanimously recommended that the respondent "be disbarred from further practice before this Court."

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

James S. Manning and Robt. D. Douglass for respondent.

BROGDEN, J. The foregoing facts and procedures produce for consideration two questions of law, to wit:

(1) Has this Court, at this time, the power to revoke a law license and disbar an attorney?

(2) Do the facts warrant and justify such revocation and disbarment?

The weight of judicial authority in this country establishes the inherent power of the courts to revoke licenses granted to attorneys and to disbar them from the practice. The Supreme Court of the United States in *Ex Parte Garland,* 71 U. S., 379, 18 L. Ed., 366, declared. "The attorney and counselor being, by the solemn judicial act of the Court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the Court, for moral or professional delinquency." The Supreme Judicial Court of Massachusetts, in considering the question *In Re Opinion of Justices,* 180 N. E., 725, said: "The inherent jurisdiction of the judicial department of the government of attorneys at law is illustrated in several of our decisions to the effect that the power to remove an attorney for misconduct, malpractice, or deficiency in character, although recognized by statute, is nevertheless inherent and exists without a statute." See, also, *State v. Cannon,* 240 N. W., 877; *Byrdonjack v. State Bar of California,* 281 Pac., 1018, 66 A. L. R., 1507; *In re Information to*

Discipline Certain Attorneys of the Sanitary District of Chicago, 184 N. E., 332, 81 A. L. R., 1059. Moreover, the Supreme Court of North Carolina is committed to the same philosophy of law in *Committee of Grievances v. Strickland,* 200 N. C., 630, 158 S. E., 110.

Consequently, the first question of law propounded must be answered in the affirmative. Indeed, the correctness of the proposition is not controverted by the learned counsel for the respondent, who declare in their brief: "We heartily agree with the oft-repeated statement that, independent of any statute, the Court has the inherent power to disbar an attorney when such disbarment is in the opinion of the Court reasonably necessary for the preservation and defense of its dignity and purity and the continuation of its proper function."

The second question of law must be solved by reference to the pertinent facts. Much has been said and written in the various investigations of the status of respondent concerning his unfortunate professional lapse in his native State of Louisiana. This occurred approximately nine years ago and at a time when Winburn was a mere youth. It is not, and ought not to be, the policy of the law to require a person, who has incurred the condemnation of its mandates, to bear openly upon his bosom through the remaining years of his life the scarlet letter of the sins of his youth, if, in fact, he has been recast in the flaming foundry of experience; or to use the exalted language of the Baptist, "has brought forth therefore fruits meet for repentance." Of course, these facts should doubtless have a place in the frame-work of the ultimate solution of the problem.

Notwithstanding, there are two aspects of the question which challenge the right of the respondent to practice law in this State pursuant to the license granted in 1928 by the Supreme Court of North Carolina.

1. On 2 June, 1931, subsequent to the issuing of license by this Court, the respondent applied for admission to practice in the Supreme Court of the District of Columbia. In order to obtain such admission he represented to the Court that the charges preferred against him in Louisiana were "dismissed by committee after matter investigated." There was abundant evidence that such statement was not correct to the knowledge of said respondent. Subsequently he filed an application to practice in the Supreme Court of the United States and in response to a question in said application as to where he had practiced law, stated: "Greensboro, North Carolina, and Washington, D. C." This statement likewise was not a correct statement to the knowledge of said respondent, thus demonstrating that Winburn was detouring when the situation plainly demanded that he travel the straight road ahead.

After considering all the facts the Supreme Court of the United States has solemnly declared that respondent "is an unfit person to practice

at the bar of this Court." The District Court for the Middle District of North Carolina has said the same. The United States Circuit Court of Appeals for the Fourth Circuit has said the same. Manifestly, the action of the Federal courts in this matter does not control the Supreme Court of North Carolina. Nevertheless, the judgments of these courts establish beyond question, the fact of the present unfitness of the respondent.

2. When the Attorney-General lodged a motion in November, 1933, to revoke the license of the respondent, this Court appointed a committee of the bar of this State, learned in the law and having no interest in the result except to do even and exact justice. They heard the respondent and examined and considered with care all the evidence offered in his behalf. After patient and diligent consideration they unanimously recommended to this Court that the respondent be disbarred. It is manifest that the respondent has been fully heard, and his cause has been considered by a tribunal of fair and impartial men. Therefore, it is the opinion and judgment of this Court that the license heretofore issued by the Supreme Court of North Carolina to the respondent at the Fall Term, 1928, be, and the same is hereby revoked and respondent disbarred from the practice of law in the courts of North Carolina.

The rule heretofore issued will be made absolute and the petition of the Attorney-General granted.

Motion allowed.

AMENDMENTS TO ORGANIZATION OF THE NORTH CAROLINA STATE BAR

Be it Resolved, by the Council of The North Carolina State Bar, that the first paragraph of subsection c, section 5, Article VI, of the Certificate of Organization of The North Carolina State Bar be and the same is hereby amended to read as follows:

c. It shall be the duty of the Committee on Grievances to investigate and study all complaints which may be made against members of the State Bar. The committee may include in its investigations all matters which may come to its attention with reference to the member complained of. Its recommendation to the Council shall be in writing, and, if the action recommended be other than dismissal of the complaint, it shall state the facts and circumstances which have come to its attention in connection with the complaint, and shall state that a ten days' written notice by registered mail to his last known address has been given to the attorney, permitting him to be heard on affidavit, except in those cases where he has been convicted or confessed his guilt in open court, or the charges have been duly proven in a civil action. If the recommendation of the Grievance Committee is for dismissal of the charges, the report shall be private. It shall not be necessary to examine witnesses, but the committee shall have authority to require affidavits or other statements in sufficient form and substance to satisfy it as to the probable truth of the charges contained in the complaint.

Be it further Resolved, that this rule shall not be retroactive and shall not apply to any action for disbarment which has already been instituted.

Be it Resolved, by the Council of The North Carolina State Bar, that subsection a, of section 2, of Article IX, of the Certificate of Organization of The North Carolina State Bar be and the same is hereby amended to read as follows:

a. A written statement, in separate paragraphs, shall be formulated by the Council, or under its directions, showing the nature and substance of all the charges preferred against the party against whom the same have been filed, or lodged, or included in the report of the Committee on Grievances. Such statement shall also contain a notice of the time and place for a hearing thereon, in the county where the respondent resides, and the respondent shall be entitled to receive two copies of said statement and notice, at least thirty days prior to the time designated for such hearing. Service of said statement and notice shall be made by the sheriff of the county in which said respondent resides, by delivering to the said respondent two copies of said statement and notice, and the Secretary of the Council shall pay to such sheriff for such service such fees as are allowed such sheriff for service of summons in civil actions.

Be it further Resolved, that this rule shall not be retroactive and shall not apply to any action for disbarment which has already been instituted.

Be it Resolved, by the Council of The North Carolina State Bar, that Article X, of the Certificate of Organization of The North Carolina State Bar be and the same is hereby amended by adding thereto the following sections:

SECTION 33. It shall be deemed unethical and unprofessional for a member of The North Carolina State Bar, who is now or who may hereafter become a partner of any judge of any court inferior to the Superior Court, to practice his profession in the court of any such judge, during the existence of such copartnership.

SECTION 33½. It shall be deemed unethical and unprofessional for a member of The North Carolina State Bar, who is now or who may hereafter become a partner of a solicitor or prosecuting attorney of any court of the State of North Carolina, to practice his profession in any criminal court of such solicitor or prosecuting attorney.

SECTION 34. The foregoing canons, embodied in sections 33 and 33½, shall be in full force and effect on and after 1 July, 1934.

North Carolina—Wake County.

I, Henry M. London, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendments to the Certificate of Organization of The North Carolina State Bar were adopted at the regular meeting of the Council on the 13th day of April, 1934, by unanimous vote of the Council. Given under my hand and the seal of The North Carolina State Bar, this the 20th day of April, 1934.

HENRY M. LONDON,

(SEAL.) *Secretary-Treasurer, The North Carolina State Bar.*

After examining the foregoing amendments to the certificate of organization of The North Carolina State Bar, it is my opinion that the said amendments comply with a permissible interpretation of chapter 210, Public Laws, 1933. This the first day of May, 1934.

W. P. STACY, *Chief Justice.*

Upon the foregoing certificate of the *Chief Justice,* it is ordered that the foregoing amendments to the certificate of organization of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the act incorporating The North Carolina State Bar. This the first day of May, 1934.

W. J. BROGDEN, *For the Court.*

ADDRESS

BY HON. FRANK A. DANIELS

ON

PRESENTATION OF A PORTRAIT

OF THE LATE

GEORGE VAUGHAN STRONG

TO THE

SUPREME COURT OF NORTH CAROLINA

ON BEHALF OF HIS CHILDREN AND HIS NEPHEW, HENRY R. STRONG

28 MAY, 1934

At the invitation of his children I present the portrait of George Vaughan Strong.

I know of no reason why they should thus honor me unless it arises out of their knowledge of the long and affectionate friendship which, beginning in my boyhood and extending to his death, existed between us.

I should regard myself most happy if, in this address, I should be able to preserve in some measure the outlines of the life, character and attainments of this great lawyer of a former generation.

George Vaughan Strong, son of Dr. Salmon Strong and his wife Eliza Sampson Strong, was born at Clinton, Sampson County, North Carolina, May 7th, 1827.

The father of Dr. Strong came from Bolton, Connecticut, and was an early settler of Sampson County.

Eliza Sampson was a descendant of Michael Sampson who, with his brother John Sampson, came from England to the colony before the Revolution. They were sons of Samuel Sampson, a bishop of the Church of England, and the offspring of an old family long prominent in their native land.

Sampson County, formed in 1784, from Duplin, was named in honor of John Sampson who had served as a member of the Governor's Council under the Royal Governors Dobbs, Tryon and Martin, from 1761 to 1775.

As a boy young Strong lived for some time with his uncle, Dr. Fred Hill, who later became his guardian, on his estate at Orton, near Wilmington, from which he entered the school of Jefferson Lovejoy, a distinguished educator of that period.

Concluding his preparation for college, he became a student of the University of North Carolina from which he graduated at the age of eighteen with the highest honors.

After his graduation, his health being somewhat impaired, he worked for a year, as an ordinary farm hand, on his father's farm and achieved his early ambition of ploughing a straighter furrow than any other hand on the plantation.

It was about this time that he wrote and published a volume of poems, evidencing much poetical talent, with every indication that the young man's fancy had lightly turned to thoughts of love.

He dedicated this, the first fruit of his genius, to a Sampson County belle who shortly afterward married another suitor. In his later and more mature years he endeavored to collect and destroy these poems, which to my youthful way of thinking were well worthy of preservation.

He had even in his late years the temperament and intellectual qualities of a poet, and his shapely head bore striking resemblance to that of Shakespeare as seen in some of the great poet's portraits and especially in his bust in the chancel of Holy Trinity Church at Stratford.

For a brief period he taught school in Wilmington where he met and married Anna Eliza Cowan, daughter of a prominent Cape Fear family. There were born to them ten children: Carrie Cowan, Sallie Stone, Eliza Sampson, Anna Cowan, Virginia, George V., Jr., Mary Walker, Robert C., Grace Sampson and William Hunter, of whom the survivors are Virginia, widow of Norwood Giles, of Wilmington, Mary Calvert Wilson, Robert C. Strong and Grace Sampson, widow of John H. Kineoly, together with many grandchildren and great-grandchildren of Judge and Mrs. Strong.

Mr. and Mrs. Strong soon moved to Goldsboro where he taught school and became the owner and editor of the *Goldsboro Telegraph* which, under his management, gained much popularity and influence.

While so engaged he studied law without an instructor; and, securing his license, became the partner of William T. Dortch, under the partnership name of Dortch and Strong, which became one of the strongest legal firms in that section of the State and attained a large and successful practice.

He was for a number of years vestryman and senior warden of St. Stephen's Episcopal Church.

He served as a delegate from Wayne in the historic Constitutional Convention of 1861.

The Civil War impending, he raised a volunteer company of soldiers for service to the Confederacy of which he was Captain, but was soon

after appointed Confederate States District Attorney, and took no part in the actual hostilities which ensued.

As a result of his political activities and of his service as District Attorney, he was, after the close of the war, deprived of his license and debarred from the practice of his profession, but sometime later his disabilities were removed and he was permitted to resume his practice, the certificate permitting such resumption being now preserved in the Hall of History in Raleigh.

After practicing for years in Wayne and adjoining counties, Judge Strong, in 1871, came to Raleigh and formed a copartnership with Hon. Thomas Bragg, former Governor of the State, of which Hon. W. N. H. Smith, an able and learned lawyer who had represented the First Congressional District in the House of Representatives of the Thirty-sixth Congress, was later a member until he retired to become Chief Justice of the Supreme Court.

The Capital has not had an abler law firm than that of Bragg, Smith and Strong.

In days when it was a rare thing for a Democrat to be elected from Wake to the General Assembly, Judge Strong was, after a brilliant campaign, chosen to the House of Representatives where he rendered services that greatly enhanced his reputation.

Prominent among these was his advocacy of the bill introduced at the session of 1874-75 for the promotion of the interest of the University which had been defeated in the House where there seemed little hope that an Institution that had been the pride of the Commonwealth would again resume her career of usefulness and blessing to the State.

At this juncture and under these circumstances, dominated by his love for his Alma Mater, he made probably the greatest speech of his life and snatched victory from the jaws of defeat.

That accomplished writer, Col. John D. Cameron, wrote the following account of this event: "Mr. Strong's name hereafter, in the rising prosperity of the University must be inseparably connected with this happy time in the tide of its fortune, for to his determination, his unconquerable zeal, unanswerable argument, his hopefulness when others despaired and his impassioned eloquence are due much of that change of sentiment which at length aroused the House of Representatives to a generous emulation for the honor of the State and interest of education."

It was comparable to the speech made by James C. Dobbin, on the same arena, when the bill to establish the Insane Asylum trembled in the balance. It has been said that Mr. Dobbin was Judge Strong's ideal lawyer and that his powerful arguments which young Strong heard in the Superior Court of Sampson had much to do with kindling the ambition that made Judge Strong a great lawyer.

It need occasion no surprise that later he served as one of its trustees and that the struggling but grateful University conferred upon this beloved son its most honorable degree.

In 1876 he was elected Judge of the Criminal Court of Wake in which capacity he served with much reputation until he retired to reënter the general practice of his profession which was to him an engrossing passion. During this service his charges to grand juries were so admirable that the bar of Wake requested the publication of the ablest, delivered in June, 1877, because they were of opinion "That if it were printed and generally disseminated among the people, they would have a clearer idea of the criminal jurisprudence of the State," with which he gladly complied. It is with something of a feeling of sadness that I recall and write the names of these lawyers: W. N. H. Smith, Joseph B. Batchelor, George H. Snow, Thomas C. Fuller, R. C. Badger, John Gatling, William P. Batchelor, T. M. Argo, John W. Hinsdale, S. F. Mordecai, T. P. Devereux, Richard H. Battle, Jr., George M. Smedes, and C. M. Busbee, his friends and cotemporaries, who have all passed away and whose various talents and accomplishments gave distinction to the legal profession of the State.

For some years, in connection with his practice, he conducted a private law school largely patronized, whose students have gained eminence at the bar and upon the bench.

I recall the effort we made to nominate him to a place on the Supreme Court Bench, a position for which he was eminently qualified, and the grief that came to us when, for the lack of a few votes, he was defeated. Among those deeply depressed at the unexpected result I remember George H. Brown, Charles B. Aycock, Josephus and Charles C. Daniels.

Upon the death, in 1884, of my friend Abram K. Smedes, one of the best lawyers I have known and one of the finest gentlemen it has been given me to call by that sacred name, with whom Judge Strong was associated in the practice at Goldsboro, the admission of Judge Strong into the partnership of Aycock and Daniels was suggested. The young lawyers had known and admired him from their youth and warmly welcomed the formation of the new firm of Strong, Aycock and Daniels which for several years practiced in Wayne and the surrounding counties.

This intimate and delightful association transformed their regard for him into a deep and lasting affection which the lapse of years has not diminished. He was afterward associated with R. T. Grey and E. R. Stamps, of Raleigh, and later upon the entrance into the practice of his son Robert C. Strong, now for many years Supreme Court Reporter, he organized the law firm of Strong and Strong which continued until ill health forced his cessation from the labors of his profession.

PRESENTATION OF STRONG PORTRAIT.

In Judge Strong were combined the simplicity of greatness, the guilelessness of a child and the virility of a strong man. In the presentation of a cause to the court he preferred the gentle ways of persuasion, of which he was a master, and of quiet but often elaborate argument based upon the fundamental principles of the law and buttressed by all the pertinent authorities within his reach and an appeal to that "law whose seat is the bosom of God, whose voice the harmony of the world."

But when the occasion demanded he was bold, aggressive and pertinacious; and in the presence of injustice or oppression, his eloquence was a flaming sword. An occasion is recalled in which these qualities and their manly exercise created the risk of attachment for contempt from a Federal Judge who had, like some other judges, a fondness for that sort of procedure, but without effect upon the advocate who fearlessly defended his client against a false and malicious accusation.

His arguments abounded in analogies and illustrations drawn from the farm and the shop, from the thoughts and beliefs of the people, from nature and from the store of legal and literary riches his industry had acquired and assimilated and which his remarkably retentive memory held in reserve for instant and effective use.

He surpassed all his associates in literary acquirements and in beauty and felicity of speech. I recall, however, that on one occasion, in Wayne Superior Court, his use of a quotation from Shakespeare was not understood by a large portion of his audience. His great antagonist, William T. Dortch, in his address to the jury made a statement which Judge Strong regarded as a striking admission in his favor, and in his reply, he quoted it, and, turning to Mr. Dortch, he exclaimed in the language of Gratiano to Shylock: "I thank thee, Jew, for teaching me that word" to the amazement of the jury who had never heard of Shylock and who sat in open-mouthed wonder that Judge Strong should call his old and highly esteemed friend a Jew.

I recall another interesting incident which took place in the early '80's in Wilson Superior Court and illustrated an absence of mind that sometimes affected him and a tendency unconsciously to speak aloud occasionally his secret, innermost thoughts. He had filed twenty exceptions to the report of a referee and was arguing them before Judge McKoy.

The bar sat in silent admiration of the learning, ability and eloquence with which he discussed sixteen of his exceptions, and I thought he had surely won the decision of the court, when, pausing for a moment, he said: "And now, may it please your Honor, I come to the exceptions upon which I really rely," and never understood the quiet ripple of laughter that ran round the bar at this unusual and unexpected statement.

Twenty years ago I wrote of him this paragraph, which I quote: "He was a most industrious lawyer who never rested content until he had seen and examined every authority on every side of every proposition he considered." His acute and somewhat subtle mind enabled him to see a subject at so many angles that there resulted sometimes an uncertainty of conviction which, however, did not militate against his eloquent and persuasive presentation of his views to the court."

In the trial of causes there were no unseemly bickerings to which he was a party. He never thought that loyalty to his client made necessary or justified unkind or bitter comments upon his adversary. No stretch of imagination could conceive him engaged in verbal hostilities, utterly out of keeping with the respect due a court of justice, resulting in threats of personal violence and invitations to step outside the courtroom and settle controversies in brutal physical combat.

The soul of courtesy, he carried into his practice at the bar the gracious amenities of social life which won and held the respect and affection of his brethren. He was first a man, responsive to all that appeals to the highest manhood—family affection, devotion to friends, faithfulness to clients, loyalty to country, and the greatest of all loyalties, loyalty to truth and righteousness.

And then a lawyer whose career was adorned with the virtues of private life. He loved the law and was its tireless student. It was not dull or dry as dust to him, but full of interest, a living force in the lives of men. He knew by name and cited from memory the leading cases in our reports without referring to indexes or digests. I think Judge William R. Allen was the only lawyer I have known who equalled him in this valuable but unusual acquirement.

To Judge Strong no labor was too arduous that served to winnow the true principle from conflicting decisions and multiplied distinctions and refinements. He was temperate in all things except work. I saw him often perform this labor with signal success but too often at the expense of his physical well being.

In my recollection he was never robust in health, and this devotion to duty, this incessant, intense pursuit of "the true reason of the law" eventually impaired his strength and brought on the illness from which he long suffered and which, on October 10th, 1897, resulted in his death.

I became acquainted with Judge Strong when I was a boy in Wilson where he usually attended the Superior Court. I saw a good deal of him, and his charming manners, his amiability and his thoughtful consideration for those about him, and especially for an over-grown boy, drew me strongly to so attractive a personality. I had a propensity for looking in on the courts which were held in the block in which I

lived and heard him in debate with the able bar gathered there among whom were Connor & Woodard, William T. Dortch and Hugh F. Murray. I thought there were giants in those days, and during a life which has now passed the limit of three score years and ten and which has been mostly spent in and about the courts, I am not quite sure I have seen their equals, not to say their superiors.

From our first meeting I had a great admiration for this gentleman which, when I was privileged to associate with him as his junior and to experience his fatherly kindness and consideration, grew into an affectionate veneration.

I can now recall his benignant face as he addressed the court with the statement that he was presenting a suggestion of his Brother Aycock or his Brother Daniels and proceeded to argue it with such power as to make his young brethren believe there was much more in the suggestion than they had imagined.

It has been said that he was a gentleman of the old school, but I have always felt that he stood in the front rank of gentlemen of all the schools, old or young.

May I quote Thackeray's definition or description which years ago I applied to my friend Henry G. Connor and which I think describes Judge Strong who resembled Judge Connor in many respects: "What is it to be a gentleman? Is it to have lofty aims, to lead a pure life, to keep your honor virgin, to have the esteem of your fellow citizens, and the love of your fireside; to bear good fortune meekly, to suffer evil with constancy; and though evil or good to maintain truth always?"

Judge Strong was not exempt from the misfortunes and sorrows incident to our common humanity, and he bore them with the patience and fortitude inculcated by the teachings of the great church of which from his youth he was a communicant. When I last saw him shortly before his death, he had suffered from a long illness and was blind. A young lady, one of his daughters, I think, was reading to him one of his early favorites, a novel of Walter Scott. I spent an hour with him in pleasant conversation in which, among other things, he discussed most interestingly the merits of the great novelist.

My last impression of him was derived from the cheerfulness and serenity with which he awaited the end of a well-spent life, and I came away thinking of Milton's poem on his blindness:

"Doth God exact day labor, light denied?
I fondly ask. But patience to prevent
That murmur, soon replies, God doth not need
Either man's work or his own gifts. Who best
Bear his mild yoke, they serve him best.
. . . . . They also serve who only stand and wait."

REMARKS OF CHIEF JUSTICE STACY, UPON ACCEPTING PORTRAIT OF GEORGE VAUGHAN STRONG, IN THE SUPREME COURT ROOM, 28 MAY, 1934

It was the verdict of his contemporaries that George Vaughan Strong was a man of brilliant intellect, a lawyer of meticulous care, a citizen of unquestioned patriotism.

His loyalty to the University of North Carolina, his alma mater, was the deciding factor in saving that institution in the dark days of Reconstruction when its very existence hung in the balance. "As long as there is an appreciation of devotion and justice in North Carolina, so long must the name of George V. Strong be inseparably linked with our University" was the tribute paid him by Dr. Kemp Plummer Battle, President of the University at that time. As a reward for his matchless eloquence in behalf of the University, he has ever been held in grateful remembrance by the Alumni of that institution.

Judge Strong was regarded as a lawyer of unusual ability, and won high place at the bars of Goldsboro and Raleigh, where he practiced. Sincerely devoted to his State, he held numerous important public positions. He was a member of the Constitutional Convention of 1861, District Attorney under the Confederacy, member of the General Assembly, and Judge of the Criminal Court of Wake County. No man of mediocre ability could have attained or filled these positions.

It has been said of him that he was an exemplar of courtesy, and seemingly always bore in mind the precept:

"I expect to pass through this world but once. Any good therefore that I can do, or any kindness that I can show to any fellow creature, let me do it now. Let me not delay or neglect it, for I shall not pass this way again."

The Court is pleased to have this excellent portrait. The Marshal will hang it in its appropriate place. The splendid appraisal of his life and character by one who knew him well and who himself so worthily exemplifies the enduring virtues of right living, will be printed in the forthcoming volume of the Reports.

PORTRAITS PRESENTED TO THE SUPREME COURT OF NORTH CAROLINA WITH ADDRESSES AND CITATIONS TO THE REPORTS IN WHICH MEMOIRS ARE TO BE FOUND.

ALLEN, HON. W. R., *Associate Justice*—Resolutions and Remarks, 182—923-927. Presentation of Portrait and Further Memoir, Hon. F. A. Daniels, 184—799-813.

ASHE, HON. T. S., *Associate Justice*—Memoir Proceedings, Resolutions, and Remarks, 96—563-569.

AVERY, HON. A. C., *Associate Justice*—Presentation of Portrait and Memoir, Hon. Josephus Daniels, 204—818-829.

BAGLEY, HON. W. H., *Clerk of Supreme Court*—Portrait Presentation and Memoir, Hon. Chas. Whedbee, 197—797-809.

BATCHELOR, HON. J. B., *Attorney-General*—Memoir Proceedings and Resolutions, etc., 132—1152-1154.

BATTLE, HON. W. H., *Associate Justice*—Memoir, Court Proceedings and Remarks, 80—498-509. Presentation of Portrait and Further Memorial, by Hon. Jos. B. Batchelor, 110—619-636.

BENNETT, HON. R. T.—Presentation of Portrait and Memoir, by John A. Livingstone, 205—877-893.

BOYDEN, HON. NATHANIEL, *Associate Justice*—Memoir Proceedings in Supreme Court, 70—i-vi (Annotated, 70—590e-590j). Further Memoir by Dr. Archibald Henderson, 174—817-826.

BRAGAW, HON. S. C.—Presentation of Portrait and Memoir by Hon. A. D. McLean, 201—852-856.

BRAGG, HON. THOMAS, *Ex-Governor*—Memoir Proceedings before the Court, 66—660-662.

BROWN, HON. G. H., *Associate Justice*—Announcement of Death, 192—871. Presentation of Portrait and Memoir by Hon. R. W. Winston, 193—859-869.

BYNUM, HON. W. P., *Associate Justice*—Portrait Presentation, 122—1106-1108.

CALDWELL, HON. D. F. (*Superior Court*)—Portrait Presentation, Hon. Theo. F. Kluttz, 173—839-846.

CENTENNIAL CELEBRATION OF SUPREME COURT, 176—765-830.

CLARK, HON. WALTER, *Chief Justice*—Announcement of Death, 187—867. Presentation of Portrait, Hon. James A. Lockhart, 188—839-850.

PORTRAITS AND ADDRESSES.

CONNOR, HON. H. G., *U. S. Judge and Associate Justice*—Announcement of Death, 188—851. Presentation of Portrait and Long Memoir by Hon. Josephus Daniels, 196—830-877.

DANIELS, HON. J. J., *Associate Justice*—Portrait Presentation and Memorial by Wm. H. Day, 110—637-642.

DAVIS, MR. GEORGE—Portrait Presentation and Memoir by Capt. S. A. Ashe, 170—801-824.

DAVIS, HON. J. J., *Attorney-General of Confederacy*—Memoir, Resolutions and Remarks, 111—755-761.

DILLARD, HON. J. H., *Associate Justice*—Memoir, Resolutions and Remarks, 118—1274-1277.

DORTCH, W. T.—Portrait Presentation and Memoir by Hon. H. G. Connor, 171—841-856.

FULLER, T. C.—Portrait Presentation by Mr. Charles W. Broadfoot, 163—601-608.

FURCHES, HON. D. N., *Chief Justice*—Portrait Presentation, Hon. W. P. Bynum, Jr., 150—869-878.

GASTON, HON. WILLIAM, *Associate Justice*—Memoir, 26—i-iv. (Annotated—not given). Portrait Presentation and Memoir by Fabius H. Busbee, 113—737-745.

GRAHAM, W. A.—Memoir Proceedings of Court, 74—803-806.

HENDERSON, HON. LEONARD, *Chief Justice*—Portrait Presentation and Memoir by Hon. R. W. Winston, 149—595-616.

HISTORY OF SUPREME COURT, 103—441-516.

HISTORY OF NORTH CAROLINA SUPREME COURT, 177—615-635.

HOKE, HON. W. A., *Chief Justice*—Announcement of Death, 190—882. Presentation of Portrait by Hamilton C. Jones, 199—823-839.

HOWARD, HON. G., *Superior Court*—Portrait Presentation and Memoir by Hon. H. G. Connor, 173—819-838.

IREDELL, HON. JAMES, *U. S. Supreme Court*—Presentation of Portrait and Memoir by Hon. Junius Davis, 124—877-907.

KENAN, HON. T. S., *Clerk Supreme Court*—Presentation of Portrait and Memoir, Hon. Theo. F. Davidson, 168—671-676.

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PORTRAITS AND ADDRESSES.

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WILSON, J. H.—Presentation of Portrait, Hon. Frank I. Osborne, 169—755-765.

WINSTON, P. H.—Presentation of Portrait by Hon. Locke Craig, 166—665-676.

NOTE (unofficial): The above presentation addresses to and acceptance by the Court are so scattered in the various volumes of the Supreme Court reports, as to be practically lost to those who would find them of great interest. An examination will disclose that the addresses are made by men high in literary attainments and who were leaders of men. There were many of them who attained a high place as orators and scholars.

The late W. J. Peele printed a pamphlet, or book, of the addresses referred to, up to a certain date, which may suggest the idea that it would be a good thing to bring them up to the present time and make them available in our schools, as examples of fine oratory and literature. The idea has also occurred that these portraits, representing many thousands of dollars in original cost value should be placed in a separate gallery.

ROBERT C. STRONG.

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Acknowledgment see Mortgages A c.

Actions. (Joinder of parties and causes see Pleadings A a; D b.)

A Right to Institute Action and Conditions Precedent.

c Actions Arising from Criminal Acts in Which Parties are in Pari Delicto

1. Where the allegations of the complaint reveal that both parties were *in pari delicto* in respect to the matters out of which the cause of action arose, defendant's demurrer to the complaint is properly sustained, it being the policy of the law in such instances to remit the parties to their own folly. *Bean v. Detective Co.*, 125.

B Forms of Actions for Enforcement of Particular Rights or Redress of Particular Wrongs.

f Fraud or Inequitable Conduct

1. *Held:* action was for deceit and not for breach of warranty of title of property mortgaged. *Brooks v. Trust Co.*, 436.

g Declaratory Judgment Act

1. An action by the majority of the trustees of a charitable corporation against a minority of the trustees to determine a controversy between them as to the power of the corporation to mortgage its property for the purpose of obtaining funds necessary to the furtherance of the charity for which it was created, in which action the corporation is not made a party, *is held* not to come within the provisions of the Declaratory Judgment Act, chap. 102, Public Laws of 1931, it not appearing that any controversy exists between plaintiffs and defendants as to their respective rights, status, or legal relations with respect to the property of the corporation, and the action is dismissed on appeal to the Supreme Court. *Wright v. McGee*, 52.

Adverse Possession.

A Nature and Requisites.

c Adverse Possession by Trustees or Fiduciaries

1. Possession of trustee under constructive trust held adverse to *cestuis que trustents* under facts of this case, the trustee having held the land adversely to his children, the *cestuis que trust*, for twenty years after their majority and their leaving home. *Reid v. Reid*, 1.

C Pleadings and Trial.

b Evidence

1. Evidence of plaintiffs' testator's actual, open and notorious adverse possession of the land in question under known and visible metes and bounds, in the character of owner and adverse to the claims of all other persons held sufficient to be submitted to the jury. C. S., 430. *Reid v. Reid*, 1.

Agency see Principal and Agent.

Appeal and Error. (In criminal cases see Criminal Law.)

A Nature and Grounds of Appellate Jurisdiction.

d Judgments Appealable; Premature Appeals

1. The refusal of a motion for judgment upon the pleadings is not appealable, it being the duty of appellant to except to the refusal and present the question on appeal from final judgment. *Hafleigh v. Crossingham*, 333.

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2. An order in this case that the holders of a first lien upon the property of a debtor should be allowed to sell the property under their registered deed of trust although a creditors' bill had been filed and permanent receivers appointed for the property, and retaining the cause for further orders, *is held* to affect a substantial right and was appealable. *Kenny Co. v. Hotel Co.*, 591.

e Academic Questions

1. The Supreme Court will not consider the constitutionality of a statute where it has become academic in the case. *In re Trust Co.*, 12.

f Parties Who May Appeal

1. On plaintiff's appeal from a judgment as of nonsuit defendant, asking no affirmative relief, may not test the competency of a witness's testimony should the nonsuit be reversed, by also appealing from the judgment, defendant not being the "party aggrieved." C. S., 632. *Guy v. Ins. Co.*, 118.

2. The statutory receiver of an insolvent bank may appeal from an adverse judgment without approval of the court. *In re Trust Co.*, 251.

3. This action was instituted to avoid plaintiff's deed for fraud. The grantee in the deed did not plead the statute of limitations, but other defendants, the trustee and *cestui que trust* in the grantee's deed of trust did plead the statute of limitations, and as to them a nonsuit was entered, the cause of action being barred by C. S., 441(9). Thereafter, upon notice to the trustee and *cestui que trust*, judgment was entered in plaintiff's favor against the grantee in the deed declaring plaintiff the owner of the lands in fee. From this judgment the trustee and *cestui que trust* appealed to the Supreme Court: *Held*, the appealing defendants were not appealing from the judgment of nonsuit in their favor, but from the judgment upon the verdict which adversely affected their interest, and under the facts of the case they had the right to appeal, C. S., 632, and the judgment upon the verdict being in conflict with the judgment of nonsuit, the judgment upon the verdict to the prejudice of the appealing defendants *is held* erroneous. *Hargett v. Lee*, 536.

B Presentation and Preservation in Lower Court of Grounds of Review. (Exceptions see hereunder F.)

b Theory of Trial in Lower Court

1. Appellant's exceptions and assignments of error will be considered upon appeal in the light of the theory upon which the case was tried in the lower court. *Potts v. Ins. Co.*, 258; *Hargett v. Lee*, 536; *Holland v. Dulin*, 211; *Moore v. Shore*, 699.

C Requisites and Proceedings for Appeal.

b Exceptions to Case on Appeal, Countercase and Settlement

1. While it is provided by statute, C. S., 644, that if appellant delays longer than fifteen days after service of objections and exceptions by appellee to his statement of case on appeal, and there is no agreement for an extension of time, the exceptions filed by appellee shall be allowed, the clerk has no authority to find the fact of such delay, nor to settle the case upon the admission of such fact,

Appeal and Error C b—*continued.*

it being required that the case on appeal in such instance be settled in an approved manner by agreement of counsel or by the judge. *Weaver v. Hampton*, 741.

D Effect of Appeal.

a Jurisdiction of, and Proceedings in Lower Court after Appeal

1. While an appeal is pending in the Supreme Court the trial court has no jurisdiction to hear a motion for a new trial for newly discovered evidence. *Bonaparte v. Funeral Home*, 652.

E Record.

a Necessary Parts of Record

1. The failure to have a "case on appeal" will not ordinarily work a dismissal even in cases requiring it, even if no error appears on the face of the record. *Weaver v. Hampton*, 741.

2. Where nothing but a purported "case on appeal" is sent up, and the entire record proper is omitted, and it does not appear from the transcript that an action was instituted, proceedings had, and an appealable judgment rendered, and that an appeal therefrom was taken, the appeal will be dismissed. *Ibid.*

b Matters Not Set Out in Record Presumed Correct

1. Where the charge of the lower court is not in the record it is presumed that the court correctly charged the law applicable to the facts. *Lumber Co. v. Power Co.*, 516; *Highfill v. Mills Co.*, 582.

d Correction of Record or Case on Appeal

1. A motion for *certiorari* directing the trial court who settled the case on appeal to amend or correct the case on appeal will be dismissed where movant does not make it appear that the trial court is willing to make the requested changes. *Edwards and Leatherwood v. McCoy*, 205.

F Exceptions and Assignments of Error.

a Time at Which Exceptions and Objections Must be Entered

1. Where error in statement of contentions of party is not brought to the court's attention at the time, an exception to the charge on this point will not be sustained on appeal. *Winborne v. McMahon*, 30; *Hayes v. Ferguson*, 414; *Dail v. Heath*, 453.

2. Exceptions in the statement of the contentions of a party will not be considered on appeal when such exceptions were not taken at the trial. *Reese v. Clark*, 718.

b Form and Requisites

1. A general exception to the judgment will not be sustained when no irregularity appears upon the face of the record. *Hickory v. Catawba County*, 165.

2. An exception to the findings of fact of the trial court will not be sustained when the exception is too indefinite to bring up for review the court's findings. *Ibid.*

3. An exception to the admission of certain testimony in this case held waived by admission of other testimony by the witness on the same subject without objection. *Lambert v. Caronna*, 616.

Appeal and Error F b—*continued.*

4. Defendant's exception and assignment of error to the court's charge on the issue of damages held fatally defective as a "broadside" exception in failing to specifically point out the matter complained of. *Ibid.*

5. The Supreme Court can review only such questions as are presented by exceptions duly taken and assignments of error duly made. *Wilson v. Charlotte*, 856.

6. Where the only exception on appeal is to the judgment, and the findings of fact, to which no exceptions are taken, support the judgment, the judgment must be affirmed. *Wilson v. Charlotte*, 856.

G Briefs.

c Abandonment of Exceptions by Failure to File Briefs or Discuss Exceptions in Briefs

1. Where appellants file no brief in the Supreme Court and no error is made apparent, the judgment will be affirmed upon motion of appellee. *Colvard v. Bemis*, 199.

2. As a rule only propositions or exceptions pointed out in the briefs are considered by the Supreme Court upon appeal. *McNeely v. Anderson*, 481.

J Review.

a Questions and Matters Reviewable

1. On appeal in a civil action the Supreme Court is limited to matters of law or legal inference. Art. IV, sec. 8. *Lightner v. Raleigh*, 496.

2. The verdict of the jury upon conflicting, competent evidence, and the refusal of the trial court to set aside the verdict as being against the weight of the evidence are not subject to review upon appeal. *Headen v. Ins. Co.*, 860.

b *Of Matters Within Discretion of Court*

1. A motion to reinstate a case on the docket after judgment of nonsuit for failure to appear is addressed to the discretion of court, and the court's refusal of the motion is not reviewable on appeal. *Parham v. Hinnant*, 200; *Parham v. Hinnant*, 201.

c Of Findings of Fact

1. Where the trial court makes no specific findings in regard to a material fact in issue it will be presumed on appeal that the judgment is supported by findings of the essential facts. *Powell v. Bladen County*, 46.

2. An exception to the court's refusal to find certain additional facts will not be sustained where the requested findings embody conclusions of law or are adopted in substance by the court. *Hickory v. Catawba County*, 165.

3. The refusal of the trial court to find additional facts is equivalent to holding that such requested facts are not supported by the evidence, and the Supreme Court will be concluded by the facts found where the refusal to find the additional facts is correct. *Ibid.*

4. Where the court, upon exceptions to the findings of fact by the referee, hears evidence and makes a finding contrary to the referee's

Appeal and Error J c—*continued.*

finding, the court's finding is conclusive on appeal when supported by competent evidence. *Lockridge v. Smith*, 174.

5. Where the clerk of the Superior Court has found from sufficient evidence that the deceased was domiciled in the county of probate, and this finding is affirmed by the Superior Court, it is conclusive on appeal to the Supreme Court although the evidence is conflicting. *In re Estate of Finlayson*, 362.

6. The findings of fact by the lower court are presumed correct, with the burden on appellant to assign and show error. *Hopkins v. Swain*, 439.

7. Where the parties waive a jury trial, the findings of fact by the court are as conclusive as a verdict of the jury. *Marshall v. Bank*, 466.

8. Court's findings upon conflicting evidence are conclusive on appeal. *Tyner v. Tyner*, 776; *Clayton v. Adams*, 920.

d Presumption and Burden of Showing Error

1. Burden is on appellant to show prejudicial error. *Carlton v. Oil Co.*, 117; *Wilson v. Charlotte*, 856.

e Prejudicial and Harmless Error

1. The burden is on appellant to show error on his exception to the admission of parol evidence, and where he has failed to show that such evidence came within the general rule excluding such evidence, and it appears that the error, if any, was cured by an instruction to the jury not to consider the evidence, the judgment will not be disturbed. *Carlton v. Oil Co.*, 117.

2. An instruction in this case that if the husband bought the bonds in suit with money derived from crops grown on his wife's lands the bonds would belong to the wife in the absence of evidence that he had rented the lands from his wife *is held* not to contain reversible error because of the provisions of C. S., 2514, that the husband should be liable for rents only for one year prior to the institution of action, there being evidence that the wife had repeatedly claimed title to the bonds, and there being no evidence that the husband had bought the bonds except that they were thereafter in his possession, and the evidence tending with equal force to show that the bonds were in the possession of the wife. *Dail v. Heath*, 453.

3. The court's charge to the jury in this case held not to contain reversible or prejudicial error warranting a new trial, the charge being construed as a whole. *Lambert v. Caronna*, 616.

4. Exceptions to the court's charge in this case are not sustained, it appearing that appellant was not prejudiced by the instructions given. *Chamberlain v. Ins. Co.*, 622.

g Questions Necessary to Determination of Appeal

1. Where the answer to one of the issues determines the rights of the parties the Supreme Court will not consider exceptions and assignments of error relating to other issues. *Reid v. Reid*, 1.

2. Where a new trial must be awarded on appeal on one of appellant's exceptions and assignments of error, other exceptions and assignments of error need not be considered. *Lamont v. Hospital*, 111.

Appeal and Error J g—*continued.*

3. Question debated in briefs held immaterial in view of allegations, evidence and verdict. *Perry v. Assurance Society*, 122.

4. Where a new trial is awarded propounders upon appeal the question of the correctness of the taxing of the costs in the lower court becomes immaterial. *In re Will of Hargrove*, 307.

5. Where plaintiff alleges two causes of action, but apparently abandons the second and fails to tender an issue as to damages thereon and the court fails to submit such issue to the jury, the answer of the jury to a prior issue based exclusively on matters pertaining to the cause of action abandoned need not be considered in deciding the questions involved in the appeal. *Chamberlain v. Ins. Co.*, 622.

6. Where the answers of the jury to the first two issues determine the rights of the parties, discussion of the subsequent issues and the charge relative thereto becomes unnecessary. *Reese v. Clark*, 718.

7. Where a new trial is awarded upon certain exceptions, the Supreme Court will not consider other exceptions relating to matters which may not arise upon the subsequent hearing. *Wilkerson v. Ins. Co.*, 882.

K Determination and Disposition of Cause.

e New Trial for Newly Discovered Evidence. (Motion therefor in trial court see New Trial.)

1. Motion for new trial for newly discovered evidence, made in the Supreme Court, is allowed in this case. *Sullivan v. Barnwell Bros.*, 898.

f Petition to Rehear

1. The appellant will not be allowed to change the theory of trial upon appeal from that upon which the case was tried in the lower court, nor will such change be allowed upon a petition to rehear. *Holland v. Dulin*, 211.

2. Where judgment for plaintiff is affirmed on appeal under an erroneous belief that a verdict had been directed in plaintiff's favor, a petition to rehear will be granted for the purpose of affirming the judgment upon the verdict of the jury. *Headen v. Ins. Co.*, 860.

L Proceedings after Remand.

b Orders and Procedure in Lower Court

1. Where a judge of the Superior Court enters a temporary restraining order in a pending cause contrary to the decision of the Supreme Court on a prior appeal of the case from an interlocutory judgment, a later order entered upon the hearing of the temporary order that such temporary order was null and void *ab initio* is not erroneous. *Newberry v. Fertilizer Co.*, 182.

2. Plaintiff is entitled to notice of a motion by defendant for judgment on the certificate of the Supreme Court reversing judgment of the lower court refusing defendant's motion for change of venue as a matter of right. In this case plaintiff was seeking a voluntary nonsuit, and is held entitled to move therefor before the judge prior to judgment on the certificate. *Mortgage Co. v. Long*, 477.

Appearance.
A Distinction Between Special and General Appearance.
a In General
1. Whether an appearance is a general or special appearance is to be determined by the relief asked, and if the prayer affects the merits or the motion involves the merits the appearance is general. C. S., 401. *Buncombe County v. Penland*, 299.

2. In this action to recover for injuries sustained in an automobile collision one of the defendants was a nonresident and was served with summons under the provisions of N. C. Code, 491(a). The nonresident made a special appearance and moved to dismiss the action as to it for lack of jurisdiction on the ground that it was a nonresident, had no place of business in this State, and did not own or operate the automobile which caused the injury and that those in control of the car at the time of the injury were performing no duties connected with the interest or business of movant, and that the attempted service was void: *Held*, the appearance was special and not general, the movant not intending to go into the merits of the action, but merely into the facts necessary for service under the statute, and it being settled that a defendant may make a special appearance to move to dismiss for want of jurisdiction. *Smith v. Haughton*, 587.

B Effect of Appearance.
a Waiver of Process
1. An appearance to vacate a judgment entered by default and inquiry will not validate such default judgment when it is void because rendered without service of process returnable to the proper county, it appearing that no appearance of any kind was made by the defendant before judgment. *Harrell v. Welstead*, 817.

Army and Navy—War Risk Insurance see Insurance N a.

Assault.
A Civil Actions.
c Defenses
1. Employee may use force appearing reasonably necessary in self-defense against striker trespassing upon property. *Reese v. Clark*, 718.

B Criminal Prosecutions.
b Elements and Degrees of Assault
1. The evidence tended to show a simple assault by defendant on prosecuting witness and a later encounter between the parties in which defendant was armed with a deadly weapon. Defendant testified that in the second encounter he only defended himself when the prosecuting witness approached him in a threatening manner armed with an open knife. *Held*, the jury might have found from the evidence that defendant was without fault in the second encounter and convicted him of simple assault in the first, and it was error for the court to charge the jury that they could convict defendant of assault with intent to kill, or assault with a deadly weapon or not guilty, and refuse to charge the jury that they might convict defendant of simple assault. C. S., 4640, and upon appeal from a conviction of assault with a deadly weapon a new trial is awarded. *S. v. Lee*, 472.

Assignments.

D Actions.

a Parties Who May Sue

1. Where an option is assigned as collateral security for the assignor's note to the assignee, both the assignor and assignee have an interest therein, and if the contract is not assignable, the assignor has not relinquished his interest therein and may sue thereon, and where either party can maintain the suit the other is merely an unnecessary party, which is not a defect for which a demurrer will lie. *Trust Co. v. Webb*, 247.

Attachment. (Service by publication and attachment see Process B c; attachment in garnishment proceedings see Garnishment.)

E Levy, Lien and Custody.

b Priorities

1. Levy under attachment has priority over subsequent levy on personalty for payment of taxes. *Building and Loan Asso. v. Burwell*, 358.

Attorney and Client.

A Office of Attorney. (Privileged communications see Evidence D e; power to represent client see Judgments K a; attorney's neglect imputed to client see Judgments K b.)

a Representation by Attorney or in Propria Persona

1. A party has the alternative right to appear either *in propria persona* or by counsel. C. S., 401. *Abernethy v. Burns*, 370.

E Disbarment of Attorneys.

a Grounds for Disbarment

1. All prior statutes relating to the disbarment of attorneys were repealed and superseded by chap. 64, Public Laws of 1929. *S. v. Harwood*, 87.

2. A plea of guilty to an indictment charging defendant with wilfully, feloniously, secretly, and maliciously giving aid and assistance to his codefendant by manufacturing evidence, altering and destroying original records in the office of the Commissioner of Revenue, etc., C. S., 4255, is a confession of a felony, C. S., 4173, and is ground for disbarment if defendant is a practicing attorney. Chapter 64, Public Laws of 1929. *Ibid.*

3. Whether an offense confessed by an attorney shows him "unfit to be trusted in the duties of his profession" is not a fact to be found by the court, but is a conclusion of law to be deduced from the facts revealed to the court, and defendant's motive in the commission of the crime is not determinative. *Ibid.*

4. A judgment of disbarment entered at the instance of defendant upon his plea of *nolo contendere* to a charge of false pretense is not erroneous. *S. v. Hollingsworth*, 739.

5. Where a committee of impartial and competent men appointed by the Supreme Court has made an investigation of charges against an attorney licensed to practice law in our courts and, after investigation, has unanimously recommended that the attorney be disbarred for moral unfitness, and it appears that the attorney had been disbarred by another state prior to being licensed by this State, and that subsequent to the issuance of license by this State he made

Attorney and Client E a—*continued.*

false statements in his applications for admission to practice in the Federal Courts relative to his disbarment by such other state, and that, after investigation and hearings, the Federal Courts disbarred him from practice in the Federal Courts, the evidence is sufficient to show a present unfitness of the attorney to practice law in the courts of this State, and the motion of the Attorney-General for an order of disbarment will be granted, and while the action of the Federal Courts is not controlling, it is evidence of such attorney's present unfitness to practice law. *S. v. Winburn*, 923.

c Procedure

1. Where an attorney has confessed to the commission of a felony showing him to be unfit to be trusted in the duties of his profession, it is the imperative duty of the trial court to include in the judgment an order of disbarment, and no previous notice to defendant of such order is necessary, and a motion thereafter made to vacate the order on the ground that it was made without notice and was void and was entered through mistake and contrary to the course and practice of the court is properly refused. *S. v. Harwood*, 87.

2. A judgment of disbarment duly entered and certified to the Supreme Court upon defendant's plea of *nolo contendere* to a charge of false pretense and his agreement to surrender his law license, C. S., 205, as amended by chapter 134, Public Laws of 1927, upon which judgment the Supreme Court enters an order of disbarment, is not irregular, it having been entered according to the usual course and practice of the court at the instance of the defendant. *S. v. Hollingsworth*, 739.

3. Where a judgment of disbarment is entered according to the usual course and practice of the court upon defendant's plea of *nolo contendere* to a charge of false pretense and his agreement to surrender his license, the Superior Court is without jurisdiction to hear a motion thereafter made to modify the judgment and recommend to the Supreme Court that defendant be reinstated on the ground that a plea of *nolo contendere* is not a confession of crime in open court, the judgment not being irregular, and defendant's remedy if the judgment be conceded erroneous, being by appeal or *certiorari*. *Ibid.*

4. The North Carolina State Bar is given authority by chapter 210, Public Laws of 1933, to deal with the admission to practice, discipline and disbarment of attorneys. *Ibid.*

3. Our courts have the inherent power to hear and determine whether one who has received a license to practice law in the courts of this State should be disbarred from practice in our courts for moral or professional delinquency, or misconduct, malpractice, or deficiency of character. *S. v. Winburn*, 923.

Automobiles. (Busses and cabs see Busses and Cabs; service on nonresident auto owner see Process B e.)

C Operation and Law of the Road.

b Speed at Intersections and Residential Districts

1. Where there is no definite evidence as to the number of residences at the scene of the accident so as to bring the place within the statu-

Automobiles C b—*continued.*

tory definition of "residential section," C. S., 2618-A, or "residential district," C. S., 2621(43), and no evidence that the speed of the car was a proximate cause of the accident in suit, the evidence is insufficient to be submitted to the jury on the question of defendant's negligence in exceeding the speed limit prescribed in residential districts, there being no evidence that defendant exceeded the speed limit prescribed for highway travel generally. *Fox v. Barlow*, 66.

d Stopping, Starting, Turning and Backing

1. The driver of a truck backed same on a city street in violation of a municipal safety ordinance, and the driver of a car standing behind the truck backed his car, after sounding his horn, in order to keep from being hit by the truck, and his car struck and injured a pedestrian attempting to cross the street. *Held*, the question of whether the negligence of the truck driver was the proximate cause of the pedestrian's injuries was properly submitted to the jury, and where the jury finds that the driver of the car was not negligent and that plaintiff was injured by the negligence of the driver of the truck, the court's judgment thereon will be upheld on appeal. *Sherwood v. Express Co.*, 243.

2. Under circumstances of this case driver was under duty to warn approaching motorists that highway was blocked by his truck. *Pender v. Trucking Co.*, 266.

3. The charge of the court upon the law prohibiting the parking of cars upon the hard surface of a highway where the shoulders of the road are sufficiently wide, N. C. Code, 2621(66) (a), will not be held for error for the failure to instruct the jury upon the provision in subsection (c) of the act exempting from its operation cases where a car is disabled in such a manner as to make it impossible to avoid parking it temporarily on the hard surface, where the defendant's only evidence in excuse of such parking was that he had a flat tire, such evidence being insufficient to bring defendant within the exception. *Lambert v. Caronna*, 616.

4. The parking of a car on the hard surface of a highway at night without a tail light in violation of N. C. Code, 2621(66); (89) (a); (94), proximately causing personal injury to plaintiff and damage to his car when the car plaintiff was driving collided with the rear of defendant's parked car, is sufficient to sustain the jury's affirmative answer upon the issue of actionable negligence, and the question of defendant's contributory negligence in failing to see the parked car under the circumstances in time to have avoided the collision, was also properly submitted to the jury. *Ibid.*

5. The stopping of a truck on the hard-surface portion of a highway in order to more securely fasten a red light carried by the truck in addition to the regular tail lights upon its rear is not a stopping of the truck on the highway to repair such vehicle, and evidence disclosing such action by plaintiff does not warrant the granting of defendant's motion as of nonsuit for contributory negligence on the ground that the evidence showed a violation by plaintiff of section 10 of the ordinances of the State Highway Commission prohibiting the repairing of a motor vehicle upon the highway. *Babbs v. Eury*, 679.

Automobiles C d—*continued.*

6. Evidence disclosing that plaintiff stopped his truck upon a portion of the hard surface of the highway at a place where the highway was straight and where the lights of a filling station shone, that the lights on the truck, including the required tail lights, were burning, and that about fifteen feet of hard surface highway was open for the passage of cars to the left of the truck, and that the truck was not stopped for the purpose of repairing same *is held* not to show the violation by plaintiff of any statute designed for the preservation and protection of life or limb, sections 10 and 11 of the ordinances of the State Highway Commission, N. C. Code, 2621(72), and defendant's motion as of nonsuit on the ground that defendant's evidence disclosed contributory negligence as a matter of law was properly refused. *Ibid.*

f Ordinary Care in Driving; Pedestrians on Road

1. A driver of an automobile is required to observe a greater degree of care when approaching small children on the shoulders on a highway. *Fox v. Barlow*, 66.

2. Evidence tending to show that plaintiff, a five-year-old child, was walking on the shoulders on a highway with his mother and that she was holding his hand, and that he was under her immediate control, when suddenly the child broke away and ran across the road immediately in front of defendant's car, without evidence as to defendant's speed immediately prior to the accident or that he was driving at excessive speed upon approaching the scene of the accident, and that upon the child's running in front of the car, defendant swerved the car to the left in an attempt to avoid the injury and struck and injured the child on the left-hand side of the highway, *is held* insufficient to be submitted to the jury on the issue of negligence. *Ibid.*

g Safety Statutes in General

1. The violation of a city ordinance passed for the safety and protection of the traveling public is negligence *per se*, and the question of whether such violation is the proximate cause or one of the proximate causes of the injury in suit is ordinarily for the jury. *Sherwood v. Express Co.*, 243.

Banks and Banking.

B Banking Corporations.

b Existence and Attack Corporate Entity

1. Stockholders held estopped to deny existence of corporation as banking institution. *In re Trust Co.*, 12.

C Functions and Dealings. (Bonds of officers see Principal and Surety B d.)

c Deposits

1. Under a valid emergency statute a bank restricted withdrawals of deposits to five per cent of the depositors' balances on the preceding day and thereafter accepted deposits without restrictions as to withdrawals. On the day before the bank invoked the emergency statute a depositor deposited checks drawn on foreign banks, using the bank's deposit slip which expressly stipulated that the bank accepted the checks as collecting agent and that the checks were

Banks and Banking C c—*continued.*

credited to the depositor subject to final payment in cash or solvent credits. The bank had theretofore allowed the depositor to check against uncollected items, but the depositor was solvent and the bank had always charged returned checks to the depositor's account. *Held,* in respect to the checks drawn on foreign banks the bank of deposit was collecting agent only, and the relationship of debtor and creditor did not exist until the foreign checks had actually been collected and the deposit of such checks was not made until that time. *Textile Corp. v. Hood,* 782.

H Insolvency and Receivership.

a Statutory Liability of Stockholders

1. Statute providing procedure for levy of statutory liability on bank stock is constitutional. *In re Trust Co.,* 12.

2. Levy of statutory liability on bank stock may be made prior to showing of necessity therefor to pay creditors. *Ibid.*

3. Stockholders of a bank making no challenge of its charter as a banking corporation for the many years during which it carried on a general banking business are estopped from denying its existence as a banking corporation upon a levy of the statutory assessment against their stock upon its later insolvency. *Ibid.*

4. Commissioner of Banks may be restrained from taking over assets and levying upon stock of bank which has assigned assets sufficient to pay creditors to another bank for liquidation. *Trust Co. v. Hood,* 543.

5. Statutory liability on bank stock does not constitute a priority for payment out of assets of estate of deceased stockholder. *Hood v. Darden,* 566.

6. Fraudulent misrepresentations of president inducing purchase of stock from bank held defense to statutory liability. *Hood v. Paddison,* 631.

c Management and Control of Assets by Statutory Receiver

1. Objection that the statutory receiver of an insolvent State bank has no right of appeal to the Supreme Court from an adverse judgment of the Superior Court without the approval of the court is untenable when it appears that the Superior Court judge gave at least implied authority for appeal by approving the agreement of the parties as to what should constitute the case on appeal after notice of appeal by the receiver. C. S., 632. *In re Trust Co.,* 251.

2. The authority and duties of the statutory receiver of an insolvent State bank to defend and prosecute actions involving the management and distribution of the bank's assets in course of liquidation are derived under the statute itself, and it is devolved upon the receiver to take such action as will preserve the rights of those in interest as may be proper, by appeal from an adverse ruling of the Superior Court or otherwise. *Ibid.*

3. A bank transferred and assigned all its assets to another bank under an agreement, approved by the Commissioner of Banks, that the latter bank should pay all depositors and creditors of the former. C. S., 217(k). Before the assignee bank had fully discharged the

Banks and Banking H c—*continued.*

agreement it became insolvent and was taken over by the Commissioner of Banks: *Held*, upon a showing that the assets of the assignor bank are sufficient to pay in full all its depositors and creditors, the assignor bank, its depositors and creditors may restrain the Commissioner of Banks from taking possession of the assigned assets, and, pending the trial of the issue involving the value of the assigned assets, they may restrain the Commissioner of Banks from levying upon and collecting the statutory liability of the stockholders of the assignor bank, the Commissioner of Banks being subject to the equitable jurisdiction of the Superior courts, and the court's right to restrain him in proper cases not being affected by the provisions of C. S., 218. *Trust Co. v. Hood, Comr.*, 543.

d Collection of Notes, Off-sets and Counterclaims

1. Where a bank, the holder of a note in due course, endorses and assigns same before maturity to another bank, and thereafter the assignor bank becomes insolvent, the maker of the note, having a sum on deposit in the assignor bank sufficient to pay the note at the time it closed its doors, may not contend that the assignment was void in the absence of evidence that the assignor bank was insolvent at the time of its assignment or contemplated insolvency at that date, and the assignee bank may maintain an action on the note as a holder in due course. *Trust Co. v. Shaw*, 367.

e Claims, Priorities and Distribution

1. Insolvent bank mortgagor held liable for taxes as preferred claim, although mortgagee collected rents. *Hood v. McGill*, 82.

2. The evidence in this case tended to show that a bank was given certain drafts for collection under an agreement made at the time that when collected the funds were to be held by the bank separate and apart from other funds on deposit in the depositor's name, and that the funds were to be distributed among the interested parties in accordance with an agreement to be made by them as to the amount of their respective interests therein. *Held*, the evidence was sufficient to be submitted to the jury on the issue of whether the deposit was a special deposit in the nature of a trust fund, entitling plaintiffs to a preferred claim in the bank's assets upon its insolvency, and there being no material conflict in the evidence as to the facts and circumstances upon which the deposit was made, an instruction by the court that the jury should answer the issue in plaintiff's favor if they believed the evidence was not error. *Brunswick County v. Trust Co.*, 127.

3. The testimony of the vice-president of a bank that the deposit in question was a special account and not a special deposit does not create a conflict in the evidence as to whether it was a special deposit when the testimony of the vice-president as to the facts and circumstances under which the deposit was made is in accord with the other testimony, and such facts and circumstances are sufficient to constitute the deposit a special deposit and trust fund. *Ibid.*

4. Where there is a judgment that the statutory receiver of an insolvent bank allow plaintiff's claim as a preference with other preferred

Banks and Banking H e—*continued.*

claims against the insolvent bank, such claimant is entitled to dividends, when declared, calculated upon the principal sum due together with interest from the date of the bank's wrongful conversion of the fund to the date the receiver took possession of the bank's assets, but claimant is not entitled to have interest on the fund after the receiver's possession included in calculating the amount of his dividend. In this case claimant did not except to the provision of the judgment that the same rate of interest should be allowed on the claim as claimant was receiving on the bonds converted, and *semble* otherwise 6 per cent interest might have been allowed. *In re Trust Co.*, 251.

5. Funds deposited in bank acting as financial agent under chapter 299, Public-Local Laws of 1927, held not entitled to preference. *Trust Co. v. Hood*, 268.

6. Where a depositor makes his deposit in reliance on the published statement of the bank's financial condition, but without misrepresentation by an officer of the bank as to the bank's condition, the depositor is not entitled to a preference upon the bank's insolvency. *Mfg. Co. v. Hood*, 324.

7. The making of a deposit in a bank when same is insolvent to the knowledge of its officers does not entitle the depositor to a preference upon the bank's later receivership. *Palmer v. Hood*, 804.

8. Plaintiff wrote a check on his savings deposit in a bank and gave same to the bank cashier with instructions to purchase for him North Carolina bonds. The cashier wrote a receipt, which plaintiff accepted, stating that the check had been received and that the bonds were to be delivered to plaintiff upon demand and the surrender of the receipt and that the check was not to be entered on plaintiff's book until the bonds were delivered. Upon repeated demands for the delivery of the bonds, the cashier informed plaintiff that delivery was not convenient, and sometime after receipt of the check the bank became insolvent without ever charging plaintiff's savings account with the check or delivering the bonds: *Held*, under the terms of the receipt the parties contemplated no change in their relations until the delivery of the bonds, and as the simple relation of debtor and creditor existed between the parties at the time of the closing of the bank, plaintiff is not entitled to a preference in the bank's assets. *Marshall v. Bank*, 466.

9. A county's deposit in a bank was secured by State bonds and indemnity bonds written by plaintiff insurer. N. C. Code, 1334(70). After the bank became insolvent the State bonds were sold at the request of insurer, and the county received the proceeds thereof, and the insurer paid the county the balance due on its deposit, and the county assigned to the insurer its claim against the bank in the total amount of the deposit at the time of insolvency. Insurer brought this action to compel the liquidating agent to allow proof of its subrogated claim for the total county deposit at date of the bank's insolvency without deducting the amount received from the sale of the State bonds, claiming it was entitled to pro rata dividends on the total deposit until such dividends plus the amount received from the sale of the State bonds equaled the amount of

Banks and Banking H e—*continued.*

the county's deposit. *Held*, the insurer was entitled to prove its subrogated claim only for the amount of the deposit less the proceeds from the sale of the State bonds, the sum it actually paid the county. *Guaranty Co. v. Hood*, 639.

10. Under a valid emergency statute a bank restricted withdrawals of deposits to five per cent of the depositors' balances on the preceding day and accepted deposits thereafter without restrictions as to withdrawals. A depositor of checks drawn on foreign banks demanded the five per cent on the whole balance credited to him, although he knew that some of the checks had not been collected. Thereafter, the depositor tendered the bank the five per cent withdrawn by him on checks that were uncollected at the time the emergency statute was invoked, and claimed the total amount thereafter collected on such checks as a preference in the bank's assets upon its later receivership upon the ground that as to such checks the deposit was not made until the checks were collected, at which time the bank was operating on an unrestricted basis. *Held*, the depositor was not estopped by his withdrawal of the five per cent on the whole balance credited to him from asserting his claim for the full amount of the checks later collected, since his act in so withdrawing the five per cent resulted in no loss to the bank and did not prejudice the rights of general depositors and creditors of the bank. *Textile Corp. v. Hood*, 782.

11. Under a valid emergency statute a bank restricted withdrawals of deposits, and thereafter accepted deposits without restrictions as to withdrawals. After it had resumed business and was accepting deposits without restrictions it collected from foreign banks certain checks a depositor had previously deposited with it as collecting agent. Thereafter it was placed in the hands of the statutory receiver for liquidation. *Held*, the depositor was entitled to a preference in its assets for the amount so deposited by him while it was receiving deposits on an unrestricted basis, the emergency statute constituting such deposits deposits in the nature of a trust fund. *Ibid.*

g Liability of Receiver in Management of Property of Insolvent Bank

1. Tenant in bank building operated by bank receiver held entitled to recover out of assets of bank for injury resulting from fall down elevator shaft. *Hood v. Mitchell*, 156.

h Completing Liquidation and Final Account

1. An order of the Superior Court entered so that the Commissioner of Banks as statutory receiver for an insolvent bank might complete the liquidation of the bank and file his final account, all assets of the bank having been liquidated, which provides that the Commissioner of Banks should first pay all proper expenses of liquidation and then declare, out of the funds then remaining, a pro rata dividend among all depositors and creditors of the bank recognized by it at the time of its closing and that the dividends to creditors recognized by the bank but who had not filed claims, and dividends to creditors who had filed claims after expiration of the time be made to equal the dividends previously or subsequently declared on aptly proven claims, but that such dividends on unproven and

Banks and Banking H h—*continued.*

tardily proven claims should be paid to the clerk of the Superior Court who should hold same for three months, after advertisement, for hearing and decision of conflicting contentions of creditors and depositors, and so that the University's asserted right under chapter 546, Public Laws of 1933, to unclaimed dividends then remaining might be heard, *is held* without error. *In re Bank*, 821.

Bills and Notes.

C Rights and Liabilities of Parties.

a Definition of Respective Capacities of Parties to Notes

1. Pledgee of note after maturity held not a holder in due course. *Holland v. Dulin*, 211.

d Rights and Liabilities Upon Assignment

1. Maker may not set off deposit in assignor bank against assignee when assignment is made prior to assignor's insolvency. *Trust Co. v. Shaw*, 367.

D Checks and Drafts.

d Rights and Liabilities of Banks of Deposit

1. Bank of deposit held collecting agent for checks drawn on foreign banks, since bank of deposit reserved right to charge depositor's account with uncollected items. *Textile Corp. v. Hood*, 782.

f Criminal Responsibility for Issuing Worthless Check

1. It is necessary that an indictment for issuing a worthless check charge, in addition to charging that defendant knew at the time of issuing same that he did not have sufficient funds in the drawee bank for its payment, that he knew he did not have sufficient credits with the bank for its payment upon presentment, and that there be evidence at the trial of both "insufficient funds" and "insufficient credits." *S. v. Banks*, 479.

H Actions on Notes.

a Pleadings and Parties

1. In an action between the original parties on a negotiable note allegations that the payees, prior to the execution of the note sued on, held a note of third parties secured by deed of trust and upon default had the land conveyed to defendants as trustees for plaintiffs and that defendants executed the note sued on in like sum under an agreement that the payees would not enforce payment of the note but would look solely to the proceeds from the sale of the land when it could be sold, and that the makers received no consideration for the note, states a valid defense and judgment on the pleadings in favor of the payees is error. *Trust Co. v. Wilder*, 124.

2. Complaint alleging deficiency after foreclosure and interest held not demurrable for failure to allege maturity and demand. *Ins. Co. v. Dey*, 368.

Busses and Cabs.

A Liabilities to Passengers.

c Negligent Injury to Passengers

1. While bus companies are not insurers of the safety of their passengers, as common carriers they are held to high degree of care

Busses and Cabs A c—*continued.*

for their safety, and the court's instruction in this case is held without reversible error upon exception and appeal by defendant bus company. *Love v. Queen City Lines*, 575.

2. Evidence that defendant's bus was late on its fixed schedule and was traveling at an excessive rate of speed in order to make up time, N. C. Code, 2621(45) (a), 2621(46), with evidence permitting an inference that its brakes were defective and that otherwise it could have been stopped before it left the road, *is held* sufficient to be submitted to the jury on the issue of negligence in an action by a passenger to recover for injuries sustained by her when the bus left the hard surface, ran two hundred yards before it ran off the road and was wrecked. *Ibid.*

C Licenses and Franchises. (Ordinance requiring cab owners to procure liability insurance see Municipal Corporations H d.)

a Operations Requiring Franchise

1. A person transporting persons or property by motor vehicle for hire between cities and towns as a business, accepting all persons for transportation who properly present themselves, must obtain the franchise required by N. C. Code, 2613(k) (1), unless he comes within the exceptions specifically pointed out in the statute, regardless whether or not any other person or corporation holds a valid franchise covering that section of highway, while persons operating motor vehicles for hire without regard to fixed *termini* are required to obtain only the "for hire" license prescribed by N. C. Code, 7880(96). *Winborne v. Mackey*, 554.

2. A person transporting persons or property by motor vehicle for hire as a business between fixed *termini* which are cities or towns is required to obtain the franchise prescribed by N. C. Code, 2613(k) (1), regardless of whether any other persons or corporation has a valid franchise for carrying persons or property over the same section of highway, and such operation does not come within the exception relating to U. S. mail, N. C. Code, 2613(k), unless the motor vehicle is used exclusively for transporting mail. *Winborne v. Browning*, 557; *Winborne v. Sutton*, 559.

Cancellation and Rescission of Instruments.

A Right of Action and Defenses.

b For Fraud

1. Representations by the owner of property that it was leased under long term leases and that the income therefrom was more than sufficient to pay taxes and interest on the debt, and that the value of the property for lease purposes was greatly increasing *is held* to amount to more than mere promissory representations under the facts and circumstances of this case, and raised a question for the jury as to whether they were intended and received as statements of material fact, and testimony of an auditor as to the actual income from the property was competent. *Bolick v. Ins. Co.*, 144.

2. In an action to cancel an instrument for fraud the usual elements of fraud must be established. *Ibid.*

3. While it is the general rule that mere promissory representations will not support an action for cancellation of an instrument for fraud, where the promise is a device to accomplish the fraud

Cancellation and Rescission of Instruments A b—*continued.*

and is made by the promisor with the present intent of not complying therewith and the promisee rightfully relies thereon and is induced thereby to enter into the contract, it is a fraudulent misrepresentation sufficient to support an action for cancellation for fraud. In this case the demurrer admitted the allegations that the deed in question was executed in consideration of the grantee's promise to execute a lease for life to the grantor, and judgment sustaining the demurrer is reversed. *Mitchell v. Mitchell*, 546.

4. Statute of frauds will not prevent unwritten promises of grantee to lease premises from being basis of action by grantor to cancel deed to the premises for fraud. *Ibid.*

B Proceedings and Relief.

c Laches and Waiver of Right

1. A party seeking cancellation of an instrument for fraud must act within a reasonable time after the discovery of the fraud or after it should have been discovered by due diligence, and must seek to rescind the whole transaction, and must not have ratified the transaction by any voluntary act in recognition of its validity. *Bolich v. Ins. Co.*, 144.

d Evidence and Burden of Proof

1. In an action to set aside an instrument for fraud plaintiff must show by the greater weight of the evidence affirmative facts entitling him to the relief. *Bolich v. Ins. Co.*, 144.

2. Evidence that plaintiff was a close business associate of defendant's husband, that defendant's husband became seriously ill and in a greatly weakened condition, that defendant herself prior to the execution of the contract had been ill, and that she was extremely worried over her husband's illness, and that while defendant's husband was in such weakened condition and while plaintiff was attending to business for him, plaintiff got him to sign a contract obligating himself on a large part of plaintiff's indebtedness, and that defendant signed the contract under direction of her husband because of his precarious health, and that the consideration for the contract was worthless, *is held* competent and sufficient to be submitted to the jury on defendant's cross-action to have the contract canceled for fraud. *Ibid.*

Carriers see Busses and Cabs.

Charities.

B Control and Management of Property.

b Right to Mortgage Property

1. Act creating charitable corporation held to give court of equity power to authorize it to mortgage property to preserve its facilities. *Raleigh v. Trustees*, 485.

c Application of Funds and Revenue

1. Application and refusal is a prerequisite to the right to maintain an action against a trustee under a will to force the trustee to give plaintiff financial assistance upon allegations that plaintiff was in circumstances in which the will directed the trustee to give him such assistance. *Cecil v. Pleasant Grove Church*, 297.

Chattel Mortgages.

A Requisites and Validity.

b Form and Sufficiency

1. A chattel mortgage on "fifteen mules . . . all now in my possession" is held void for indefiniteness of description, it appearing that the mortgagee at the time of the execution of the mortgage had more than fifteen mules in his possession. *Forehand v. Farmers Co.*, 827.

Checks see Bills and Notes D.

Clerks of Court—Jurisdiction to probate wills see Wills D a 1.

Compensation Act see Master and Servant F.

Compromise and Settlement.

B Settlement and Discharge.

b Defenses: Mental Capacity

1. In this action on a disability clause in a policy of life insurance defendant insurer contended that the policy was never issued and was never in force and introduced in evidence a receipt signed by plaintiff acknowledging the return to plaintiff of money advanced upon application for the policy, contending it was refunded because the policy was not issued. Plaintiff testified that he did not remember signing the receipt, and that at the time the alleged receipt was signed he did not have sufficient mental capacity to understand the nature of the transaction, and introduced other testimony of his mental incapacity at that time. *Held*, whether the receipt constituted a settlement between the parties should have been submitted to the jury under the evidence. *Wilkerson v. Ins. Co.*, 882.

Conspiracy.

B Criminal Prosecutions.

a Elements and Essentials of the Crime

1. Four defendants were indicted for assault and conspiracy. One defendant was acquitted. A second defendant's plea of guilty to the charge of assault and not guilty to the charge of conspiracy was accepted by the State. The third defendant died prior to trial. The fourth defendant was convicted on both counts. *Held*, the contention of the fourth defendant that he alone could not be convicted of conspiracy cannot be sustained, since the subsequent death of the deceased defendant would not affect the charge of conspiring with such defendant prior to the commission of the crime while said defendant was yet alive. *S. v. Alridge*, 850.

Consolidated Statutes and Michie's Code Construed. (For convenience in annotating. General rules for construction of statutes see Statutes.)

SEC.

93, 219(a). Statutory liability on bank stock does not constitute priority for payment out of assets of estate of deceased stockholder. *Hood v. Darden*, 566.

137(6). Estates of parents of deceased soldier held entitled to share equally in proceeds of War Risk Insurance. *In re Estate of Reid*, 102.

Consolidated Statutes—*continued.*

SEC.

205. Judgment of disbarment entered according to usual practice of court upon plea of *nolo contendere* is not irregular. *S. v. Hollingsworth*, 739.

217(k), 218. Commissioner of Banks may be restrained from taking over assets and levying upon stock of bank which has assigned assets sufficient to pay creditors to another bank for liquidation, although assignee bank has since become insolvent. *Trust Co. v. Hood*, 543.

218(c). Statute providing procedure for levy of liability on bank stock held constitutional. *In re Trust Co.*, 13. Insolvent bank mortgagor held liable for taxes as preferred claim. *Hood v. McGill*, 83.

221(m). Each renewal of bank cashier's bond held to constitute separate contract under facts of this case. *Hood v. Simpson*, 748.

401. A party has alternative right to appear either *in propria persona* or by counsel. *Abernethy v. Burns*, 370. Whether appearance is general or special must be determined by relief demanded, and parties moving to set aside tax foreclosure sale make general appearance. *Buncombe County v. Penland*, 299.

405, 441(3). Damages for trespass to land from sewer system prior to three years before institution of action are barred. *Lightner v. Raleigh*, 496.

415. In order to sustain plea of estoppel in action after nonsuit court must find that allegations and evidence are substantially identical. *Batson v. Laundry*, 371.

430. Evidence of possession of trustee under constructive trust for twenty years adverse to *cestui que trust* held sufficient. *Reid v. Reid*, 1.

441(1). *Held:* Fiduciary relationship existed between parties, and statute did not begin to run until demand and refusal. *Efird v. Sikes*, 560.

441(6). Right of action against bondsman of former administrator by administrator *d. b. n.* is not barred until three years after appointment of administrator *d. b. n. Dunn v. Dunn*, 373.

441(9). Action for fraud accrues when facts are discovered or should have been discovered in exercise of due diligence, and action is barred after three years from accrual of cause of action. *Hargett v. Lee*, 536; *Hood v. Paddison*, 631.

444. Ignorance that defendants were authors of slander does not affect running of statute of limitations. *Gordon v. Fredle*, 734.

456. In action attacking validity of foreclosure on ground that property was bid in by agent of trustee, agent of trustee and junior lienors should be made parties. *Lockridge v. Smith*, 174. In action on note and to have judgment obtained by one of makers applied as credit on note, and to restrain execution on judgment obtained by such maker, makers of notes, sheriff, and assignees of judgment were properly joined as defendants. *Bank v. Kerr*, 610.

460. Upon motion of legal and equitable owners to set aside tax foreclosure sale all persons having legal or equitable interest in prop-

Consolidated Statutes—*continued.*

SEC.

erty should be made parties. *Buncombe County v. Penland*, 299. All parties necessary to complete determination may be joined. *Fry v. Pomona Mills*, 768.

463(1). Action on note secured by mortgage in which trustee was not party held not to involve realty and motion to remove under 913(a) held properly denied. *White v. Rankin*, 104.

469. Corporate plaintiff held entitled to bring action in county in which it maintained principal office, the action not involving realty. *Bank v. Kerr*, 610.

483. Nonresident plaintiff may serve process on foreign corporation in transitory action arising in another state by service on its local agent when such corporation does business here, and the provisions of the statute do not contravene Art. I, sec. 8, or the Fourteenth Amendment to the Federal Constitution. *Steele v. Tel. Co.*, 220.

484. Service by publication held valid in action to determine heirs and distribute estate. *Ferguson v. Price*, 37.

491(a). Evidence held insufficient to support finding that automobile was under direction or control of nonresident for purpose of service under the statute. *Smith v. Haughton*, 587.

492. Clerk's order allowing nonresident served by publication to file answer after time held without error. *Vann v. Coleman*, 451. "Representatives" of party served by publication entitled to come in and defend action after judgment will be liberally construed to include all persons succeeding to rights of such party, in this case mortgage creditor of heir. *Hood v. Freel*, 432. Heirs served by publication held barred from bringing subsequent action against administrator for share in estate. *Ferguson v. Price*, 37.

507(1). Causes of action which may be joined. *Fry v. Pomona Mills*, 768.

509. Default judgment upon process returnable to county other than one rendering judgment is void. *Harrell v. Welstead*, 817. Neglect to file answer is attributable to defendant where he employs counsel licensed to practice only in another state. *Ibid.*

533. Admission of evidence of pleadings in civil action against defendant in prosecution for embezzlement held error. *S. v. Ray*, 736.

536, 537. On appeal from clerk's order allowing extension of time for filing answer, trial court has discretionary power to allow extension of time. *Vann v. Coleman*, 451.

547. Motion to allow amendment of pleading is addressed to discretion of court, and no appeal lies from determination of motion. *Ins. Co. v. Edgerton*, 402.

567. On motion of nonsuit all evidence is to be considered in light most favorable to plaintiff. *Brunswick County v. Trust Co.*, 127; *Hood v. Mitchell*, 156; *Sherwood v. Express Co.*, 243; *Blackman v. Ins. Co.*, 429; *Lumber Co. v. Power Co.*, 515. Nonsuit is permissible only upon demurrer to evidence and not demurrer to complaint or motion for judgment on pleadings. *Dix-Downing v. White*, 567.

Consolidated Statutes—*continued.*

SEC.

573. Where issues tendered do not arise upon exceptions to referee's report refusal of trial by jury is not error although reference was compulsory. *Bank v. Fisher*, 412.

573(1). Where defendant sets up no plea in bar and pleadings indicate necessity of examining long account, an exception to order of compulsory reference will not be sustained. *Texas Co. v. Phillips*, 355. What constitutes "long account" must be determined upon facts of each case, and trial court may order compulsory reference upon finding that action involved long account. *Fry v. Pomona Mills*, 768. While splitting of causes for reference is not ordinarily permissible, it is upheld in this case. *Ibid.*

596. Upon execution of inquiry upon judgment by default and inquiry only the question of damages is open for consideration. *Bowie v. Tucker*, 56. Judgment by default and inquiry in auto-collision case does not preclude defendant from showing how accident took place on question of how much damages were the result of defendant's negligence. *DeHoff v. Black*, 687. But such judgment does preclude defendant from showing that he was not liable for damages as principal. *Ibid.*

632. On plaintiff's appeal from judgment of nonsuit, defendant asking no relief held not "party aggrieved" so as to be entitled to present question of competency of evidence. *Guy v. Ins. Co.*, 118. Statutory bank receiver may appeal from adverse judgment. *In re Trust Co.*, 251. Parties adversely affected by order entered in the cause after judgment of nonsuit in their favor held entitled to appeal. *Hargett v. Lee*, 536.

643. Service of objections and exceptions to defendant's statement of case must be made within time to be availing. *S. v. Ray*, 736. Assignments of error must be based upon exceptions duly taken and be discussed in briefs in order to present question on appeal. *S. v. Bittings*, 798.

644. Clerk has no authority to settle case on appeal, even though appellant fails to request settlement by judge within required time. *Weaver v. Hampton*, 741.

650. Trial court's order that appellant file supersedeas bond with another surety upon its finding that original surety was insufficient held without error. *Love v. Queen City Lines*, 575.

819. Statute is constitutional, and execution against garnishees may issue prior to final judgment against defendant without notice to garnishees, C. S., 397, 666, 798. *Newberry v. Fertilizer Co.*, 182.

988. Release of rights arising from restrictive covenants in deed is governed by statute of frauds, but rights under such covenants may be waived. *Moore v. Shore*, 699. Statute of frauds will not prevent unwritten promise from being basis for action for cancellation of instrument for fraud. *Mitchell v. Mitchell*, 546.

1137. *Held:* Defendant corporation was doing business in this State for purpose of service of process under the statute. *Ruark v. Trust Co.*, 564.

Consolidated Statutes—*continued.*

SEC.

1197. Statute applies only to employees of insolvent corporation and not to employees of individual. *In re Reade*, 331.

1244(6). Superior Court may tax costs of reference upon plaintiff upon appeal from judgment of justice of the peace. *Perry v. Pulley*, 701.

1275, 3893. Exception to order taxing fees of ten experts against defendant upon contention that party taxed with costs shall not be obligated to pay for more than two witnesses to prove single fact is not sustained, defendant's remedy being to move to have costs retaxed. *Connor v. Haywerth*, 721.

1290. County may issue bonds for necessary repairs to county jail and to repair and make necessary additions to public school buildings without submitting question to vote. *Harrell v. Comrs. of Wilson*, 226.

1291(a). Where bonded indebtedness of county after issuance of bonds will not exceed five per cent of tax valuation, it may issue bonds for sanitary improvements for schoolhouses. *Taylor v. Board of Education*, 263.

1334(70). Amount for which insurer may prove claim where other collateral is sold and proceeds paid county on its deposit. *Guaranty Co. v. Hood*, 639.

1475. Where party does not make remittitur in justice's court Superior Court cannot obtain jurisdiction by remittitur upon appeal. *Perry v. Pulley*, 701.

1659(a). As amended, cause of action need not have existed for six months in action for divorce by either party on ground of two years separation. *Smithdeal v. Smithdeal*, 397. Husband marrying defendant under threat of prosecution for seduction may bring action for divorce on ground of two years separation. *Long v. Long*, 706.

1664. In action for divorce the court has jurisdiction before or after final judgment to award custody of minor children. *Tyner v. Tyner*, 776.

1666. It is required by statute that upon application for alimony *pendente lite* the court must find facts in regard to wife's right to relief demanded. *Caudle v. Caudle*, 484.

1667, 1659(a). Decree of absolute divorce on ground of separation does not affect prior order for alimony without divorce. *Howell v. Howell*, 672.

1667. Guardian held entitled to authorization by Superior Court to attack consent judgment of ward entered in proceedings under the statute. *In re Reynolds*, 276.

1795. Disinterestedness of witness held established and his testimony of transaction with decedent held competent. *Winborne v. McMahan*, 30. Husband held competent to testify in interest of his wife as to transaction between wife and her deceased father. *Vannoy v. Green*, 80. One plaintiff held competent to testify in interest of other plaintiff as to transaction between such other plaintiff and decedent. *Vannoy v. Green*, 80.

Consolidated Statutes—*continued.*

SEC.

1799. Weight and credibility to be given testimony of defendant testifying in his own behalf. *S. v. Wilcox*, 691; *S. v. Wilcox*, 694.

1802. Wife held not competent to testify against husband in prosecution for felonious burning. *S. v. Kluttz*, 726.

2180. Proceeding under the statute held not to be action at law or suit in equity within meaning of Federal Act regulating removal of causes. *Ex Parte Quick*, 627.

2180. 766(b). Emergency judge not holding court may not approve clerk's order authorizing guardian to mortgage ward's lands. *Ipock v. Bank*, 791. Court's approval of such order *nunc pro tunc* upheld. *Ibid.*

2285. Statutory affidavit held to have conferred jurisdiction on clerk, and Superior Court acquired jurisdiction upon appeal although clerk's order of commitment was without warrant of law. *In re Dewey*, 714.

2334, 2314, 2333. Grand jury drawn under the act held properly constituted, the amendment to the act not being effective until after the date for selecting grand jury. *S. v. Dalton*, 507.

2514. Failure to instruct jury that husband would be liable for rents from wife's lands only for one year prior to institution of action held not prejudicial in view of evidence adduced at trial. *Dail v. Heath*, 453.

2581. Trustee may make sale by agent or attorney, and it is not required that trustee be present at the sale. *Hayes v. Ferguson*, 414.

2594(1). Power of trustee to cancel deed of trust without knowledge of *cestui que trust*. *Parham v. Hinnant*, 200.

2613(k) (1), 7880 (96). Factors determining whether operator of motor vehicle for hire must obtain franchise. *Winborne v. Mackey*, 554; *Winborne v. Browning*, 557; *Winborne v. Sutton*, 559.

2618(a), 2621(43). Evidence held insufficient to establish place of accident a "residential section" or "residential district." *Fox v. Barlow*, 66.

2621(72). Evidence held not to disclose violation, as matter of law, of regulations relating to parking vehicles on highway. *Babbs v. Eury*, 679.

2623(3). It would seem that municipality has power to purchase land at tax foreclosure sale. *Wake County v. Johnson*, 478.

2636, 2943(2). Municipality held authorized to issue bonds for water and sewer systems in excess of 8 per cent of tax valuation. *Lamb v. Randleman*, 837.

2712, 2713, 2714. Irregularities in paving assessments held waived by accepting benefits and paying installments without objection. *Wake County v. Holding*, 425.

2933. City had authority to borrow money to pay judgments obtained against it for salaries for school teachers in anticipation of collection of taxes levied for that purpose. *Hammond v. Charlotte*, 604.

Consolidated Statutes—*continued.*

SEC.

3226. 4105. Dower may be allotted widow and lands partitioned among heirs in one proceeding. *Vannoy v. Green*, 77.

3411(b). Actual or constructive possession of intoxicating liquor is sufficient for conviction. *S. v. Norris*, 191.

4099, 4100. Under facts of this case wife held not entitled to have value of inchoate dower computed and paid her in cash as against husband's creditors. *Higdon v. Higdon*, 62.

4100. Widow does not have right to select land to be allotted for her dower. *Vannoy v. Green*, 77.

4131. Implied request for attesting witness to sign will is sufficient. *In re Will of Kelly*, 551.

4173, 4255. Punishment determines whether unlawful act is a misdemeanor or felony, and destruction of public records is punishable by imprisonment in State penitentiary and is a felony. *S. v. Harwood*, 87.

4200. Where defendants conspire to rob, and murder is committed by one of them in the attempt to rob, each of the conspirators is guilty of murder in the first degree. *S. v. Stefanoff*, 443. Provisions of statute discussed. *S. v. Keaton*, 682.

4221. As amended, life sentence is not mandatory upon conviction of kidnapping. Ch. 542, Public Laws of 1933. *S. v. Kelly*, 660.

4268. Fraudulent intent is essential element of embezzlement. *S. v. Cohoon*, 388.

4606. Indictment held to charge embezzlement of certificates of deposit in county of prosecution, and not proceeds of deposit which were in another county. *S. v. Shore*, 743.

4620. Proof of embezzlement of sum less than amount charged in indictment does not constitute variance. *S. v. Dula*, 745.

4623. Defendant tried on consolidated bills of indictment is entitled to but four peremptory challenges. *S. v. Aldridge*, 850.

4640. Duty of court to submit question of guilt of less degree of crime charged. *S. v. Keaton*, 682. *Held:* There was no evidence that crime was manslaughter and refusal to submit question in prosecution for murder was not error. *Ibid.* Evidence held sufficient to support verdict of simple assault, and refusal to submit question to jury in prosecution for graver offense held error. *S. v. Lee*, 472.

4643. Motion for nonsuit must be made at close of State's evidence in order for motion at close of all evidence to be considered on appeal. *S. v. Norris*, 191.

5032. Act held to have no application in the action since evidence failed to show that 13-year-old boy was employee. *Reaves v. Power Co.*, 523.

5475, 5479. County held authorized to issue bonds for sanitary improvements for schoolhouses necessary to constitutional school term. *Taylor v. Board of Education*, 263.

Consolidated Statutes—*continued*.

SEC.

5599, 5419, 5490(1). County may assume debt of special charter districts incurred for necessary buildings without transfer of property by trustees of such districts and without release of their charters by such districts. *Hickory v. Catawba County*, 165.

6289. Misrepresentation in this case held not material and was not adequate cause for cancellation of policy. *Anthony v. Protective Union*, 7. Representation that insured had never consulted physician or been in hospital is material. *Potts v. Ins. Co.*, 257.

6460. Policy issued without medical examination may not be attacked for misrepresentations as to health except in cases of fraud. *Potts v. Ins. Co.*, 257; *Headen v. Ins. Co.*, 271.

6696. Where Board of Optometry Examiners takes no steps to revoke license for failure to pay annual license fees, optometrist is entitled to license upon tender of back fees with penalties. *Mann v. Board of Optometry Examiners*, 853.

7880(88), 633, 635, 637. Docketing fee of two dollars is not required in appeal from clerk to judge of Superior Court. *Windsor v. McVay*, 730.

7982. Contention that life tenant's estate is not forfeited for failure to pay taxes until tax sale certificate is foreclosed held untenable. *Sibley v. Townsend*, 648. Remainderman need not pay taxes before bringing action for forfeiture of life estate for nonpayment of taxes. *Bryan v. Bryan*, 464.

7983. Petitioners for partition held not entitled to object to allowance of taxes to tenant in common previously paying taxes against property. *Everton v. Rodgers*, 115.

7992. Sheriff holding sales held entitled to commissions on cash received by county on tax certificates purchased by county. *Braswell v. Richmond County*, 74.

8006, 8008. Levy under attachment has priority over subsequent levy on personalty for payment of taxes. *Building and Loan Asso. v. Burwell*, 358.

8037. Legal and equitable owners of lands, though not parties to suit to foreclose tax certificate, may appear and move to set aside foreclosure on grounds that land was not listed in name of true owner, N. C. Code, 7971(15), and that as listed owner was resident of county, service on him by publication was void. *Buncombe County v. Penland*, 299.

8081(i). Nature of duties at time of injury determines whether injured person is employee or executive officer. *Nissen v. Winston-Salem*, 888.

8081(i) (b). Relief worker held not "employee" of relief administrative agencies. *Bell v. Raleigh*, 275; *Jackson v. Relief Administration*, 274.

8081(r). *Held*, plaintiff's exclusive remedy was under Compensation Act, the injury having arisen from an accident arising out of and in course of employment, and nonsuit in action at common law was properly granted. *McNeely v. Asbestos Co.*, 568.

Consolidated Statutes—*continued*.

SEC.

8081(u). Exclusive jurisdiction of Industrial Commission must appear upon face of complaint to be available upon demurrer. *Allen v. Cotton Mills*, 704.

8081(rrr). Provision for taxing costs of appeal on insurer is constitutional and valid. *Russell v. Oil Co.*, 341.

Constitution, Sections of, Construed. (For convenience in annotating.)

ART.

I, sec. 11. Right to confront accusers includes right of cross-examination. *S. v. Breese*, 92. Right of confrontation includes right to fair opportunity to prepare case. *S. v. Whitfield*, 696. But refusal of motion for continuance held not to deny right under the facts. *S. v. Whitfield*, 696; *S. v. Jones*, 812.

I, sec. 13. Act providing for alternate juror where it seems likely that trial will be protracted does not impinge upon constitutional right to trial by jury. *S. v. Dalton*, 507.

I, secs. 7 and 31. Ordinance requiring operators of motor vehicles for hire to furnish policies of liability insurance or cash or securities held unconstitutional, since no provision is made for furnishing of security by solvent individuals. *S. v. Sasseen*, 644.

I, sec. 7. Statute authorizing injunction against consummation of sale under mortgage or deed of trust for inadequacy of bid does not violate this section. *Woltz v. Deposit Co.*, 239.

I, sec. 17. Statute authorizing injunction against consummation of sale under mortgage or deed of trust for inadequacy of bid does not violate this section. *Woltz v. Deposit Co.*, 239.

I, sec. 35. Statute authorizing injunction against consummation of sale under mortgage or deed of trust for inadequacy of bid does not violate this section. *Woltz v. Deposit Co.*, 239.

II, sec. 10. Act providing that either party may sue for divorce on ground of two years separation is within Legislative power. *Long v. Long*, 706.

IV, sec. 8. Supreme Court is limited to matters of law or legal inference upon appeal in civil actions. *Lightner v. Raleigh*, 496.

IV, sec. 11. Emergency judge not holding court has no authority to approve clerk's order authorizing guardian to mortgage ward's land. *Ipock v. Bank*, 791.

IV, sec. 27. Appeal may be taken directly from justice's court to Superior Court without being first taken to general county court. *McNeeley v. Anderson*, 481.

V, sec. 3. Statutory provision for assumption of debt of special charter school districts by county relates primarily to uniformity of taxation and not to title to school property. *Hickory v. Catawba County*, 165.

V, sec. 6. County may issue bonds to refund indebtedness incurred for necessary expense without a vote. *Brooks v. Avery County*, 840.

Constitution—*continued.*

ART.

VI. Provision in municipal charter limiting suffrage to owners of realty is void. *Smith v. Carolina Beach*, 834.

VII, sec. 7. Judgment restraining issuance of bonds by city without a vote held supported by findings of fact. *Wilson v. Charlotte*, 856. Municipal bonds for water and sewer system are for necessary expense, and vote is not necessary. *Lamb v. Randleman*, 837. City has authority to borrow money to pay judgments obtained against it for salaries of school teachers in anticipation of collection of taxes validly levied for that purpose. *Hammond v. Charlotte*, 604.

IX, sec. 3. Mode by which counties shall effectuate mandate for six months school is prescribed by statute. *Hickory v. Catawba County*, 165.

Constitutional Law.

B Governmental Branches and Powers.

a Legislative

1. Legislature is given power by Article II, section 10, to enact general laws relating to divorce, and statute enabling either party to sue for divorce on grounds of two years separation is constitutional. *Long v. Long*, 706.

c Judicial

1. The statute giving the Commissioner of Banks control of the assets of an insolvent banking corporation and providing the procedure for the levy of the statutory liability on its stock, C. S., 218(c) (13), is constitutional, the act not depriving the Superior Court of its constitutional jurisdiction in such matters. *In re Trust Co.*, 12.

D Personal and Political Rights.

a Right of Suffrage

1. Provision in municipal charter limiting electors to owners of real estate held void as offending Article VI, N. C. Constitution. *Smith v. Carolina Beach*, 834.

E Obligations of Contract and Vested Rights.

a Nature and Extent of Mandate

1. The obligations of a contract are not impaired by chap. 113, sec. 13, Public Laws of 1927, which provides for the levy of the statutory liability on bank stock prior to a showing of necessity for such levy to pay the claims of depositors and creditors of the bank. *In re Trust Co.*, 12.

2. Statute authorizing courts of equity to enjoin consummation of sales under deeds of trust held not to impair obligations of contract. *Woltz v. Deposit Co.*, 239.

3. The municipal court of the city of High Point is given jurisdiction of actions to enforce assessments for public improvements against property situated within the city by chapter 150, Public-Local Laws of 1933, and chapter 132, Public-Local Laws of 1933, repealing the provisions of chapter 131, Public-Local Laws of 1931, that such actions should be instituted in the Superior Court, and the change of

Constitutional Law E a—*continued.*

the procedure for enforcing the assessments is constitutional, there being no vested right in procedure for the enforcement or defense of rights. *High Point v. Brown*, 664.

F Constitutional Guarantees in Trial of Person Accused of Crime.

c Right of Confrontation.

1. Constitutional right of confrontation includes right to cross-examine adverse witnesses. *S. v. Breece*, 92.

2. The constitutional right of a defendant in a criminal prosecution to confront his accusers and adverse witnesses with other testimony, Const., Art. I, sec. 11, includes the right to a fair opportunity to prepare and present his defense, which right must be accorded him not only in form, but in substance as well. *S. v. Whitfield*, 696.

3. A defendant in a criminal prosecution is entitled to have the essential facts proved in his presence by witnesses duly sworn and qualified. *S. v. Klutz*, 726.

4. Defendant held not entitled to instructions relating to innocent by-stander under evidence in this case. *S. v. Jones*, 812; *S. v. Whitfield*, 696.

d Right to Trial by Jury

1. Statute providing for selection of alternate juror where it seems likely trial will be protracted does not deprive accused of right to trial by duly constituted jury. *S. v. Dalton*, 507.

G Privileges, Immunities and Class Legislation.

a In General

1. C. S., 819, providing that judgment may be entered and execution awarded plaintiff against garnishees applies alike to residents and nonresidents, persons and corporations, and it will not be declared unconstitutional in an action instituted long subsequent to its enactment. *Newberry v. Fertilizer Co.*, 182.

2. Statute authorizing courts of equity to enjoin consummation of sales under deeds of trust and mortgages for inadequacy of bid does not confer exclusive privileges upon mortgagors or trustors. *Woltz v. Deposit Co.*, 239.

3. The provisions of the Compensation Act, N. C. Code, 8081(rrr), that upon appeal from an award brought by the insurer the court or the Industrial Commission might tax the costs of the appeal, including reasonable attorney's fee for the claimant, against the insurer when it is determined that claimant is entitled to compensation, is valid and is not in contravention of the Fourteenth Amendment to the Federal Constitution. *Russell v. Oil Co.*, 341.

4. A municipal ordinance requiring all operators of passenger motor vehicles for hire within the city to deposit with the treasurer of the city policies of liability insurance in responsible companies authorized to do business in the State in a stipulated amount for each car operated, or cash or securities in the sum required, *is held* void as being in contravention of Const., Art. I, sec. 7, prohibiting separate or exclusive emoluments, but in consideration of public service, and Const., Art. I, sec. 31 interdicting perpetuities and

Constitutional Law G a—*continued.*

monopolies, in that the ordinance fails to provide that the security required might be furnished by one or more solvent individual sureties. Whether the ordinance is void as being in contravention of the general law or policy of the State as declared in chapter 116, Public Laws of 1931, *held* not necessary to a decision of the appeal. *S. v. Sasseen*, 644.

H Commerce Clause.

b Operation and Effect of Provision

1. Statute authorizing service of process on local agent of foreign corporation doing business in this State does not violate commerce clause of Federal Constitution. *Steele v. Tel. Co.*, 220.

I Due Process.

b Operation and Effect of Provision

1. Statute authorizing service of process on local agent of foreign corporation doing business in this State does not violate due process clause of Federal Constitution. *Steele v. Tel. Co.*, 220.

2. Statute authorizing courts of equity to enjoin consummation of sales under mortgages and deeds of trust does not deprive mortgagees of property without due process of law. *Woltz v. Trust Co.*, 239.

Contracts. (Cancellation and Rescission of, see Cancellation and Rescission of Instruments; specific performance of, see Specific Performance; impairment of obligations of, see Constitutional Law E; contracts of employment see Master and Servant A; of infants see Infants; debt assumption contracts see Mortgages F b.)

B Construction and Operation.

a General Rules of Construction

1. The construction given a contract by the parties thereto before differences arise as to its meaning will be considered by the courts in interpreting the contract. *Holland v. Dulin*, 211; *Hood v. Simpson*, 748.

2. General laws in force at the time of executing a contract become a part thereof. *Hood v. Simpson*, 748.

Corporations. (Service of Process on, see Process B; right to bring action in county of principal office see Venue A d; stockholders estopped to deny existence of, see Banks and Banking B d; receivership of, in creditors' bill see Creditors' Bill.)

K Dissolution and Forfeiture of Charter.

g Liability of Transferee of Corporate Property after Dissolution

1. Plaintiff's contention that defendant taking over the property of a corporation immediately prior to its dissolution is personally liable for a mortgage indebtedness existing against the corporate realty at the time the corporation deeded same to defendant is not sustained, it appearing that plaintiff does not seek to set aside the deed to defendant but attempts to hold defendant liable thereunder, and that the corporate property taken over by defendant was of little value. *Ins. Co. v. Edgerton*, 403.

Cosmetologists see Public Officers.

Costs.

A Persons Entitled to Recover Costs. (Upon appeal from Industrial Commission see Master and Servant F k.)

d Extent and Amount

1. In this action for malpractice defendant physicians subpœnaed ten physicians as witnesses. A nonsuit was correctly entered at the close of plaintiff's evidence and defendants' witnesses were not sworn or tendered. The court found that all the physicians were experts and allowed them a stipulated fee to be taxed as a part of the costs against plaintiff. Plaintiff excepted to the order on the ground that the party taxed with costs shall not be obligated to pay for more than two witnesses to prove a single fact, N. C. Code, 1275. *Held*, the exception cannot be sustained, the court having discretionary authority under N. C. Code, 3893, to allow expert witnesses compensation and mileage, and plaintiff's remedy being to move to retax the costs. *Connor v. Haywerth*, 721.

Counties.

E Fiscal Management, Debt and Bonds. (Constitutional requirements and restrictions in taxation see Taxation A. County not entitled to preference against insolvent bank's assets for funds deposited with it as financial agent see Banks and Banking H e 5.)

b County Expenses

1. County may assume debt of special charter districts incurred for necessary buildings without transfer of school property. *Hickory v. Catawba County*, 165.

2. County may issue bonds for necessary repairs to county jail. *Harrell v. Comrs. of Wilson*, 225.

3. County may issue bonds to repair and make additions to public schools of county necessary for constitutional school term. *Ibid.*

4. County held authorized to issue bonds for sanitary improvements for school houses necessary to constitutional school term. *Taylor v. Board of Education*, 263.

Courts. (Supreme Court see Appeal and Error; removal of causes to Federal courts see Removal of Causes.)

A Superior Courts.

a Original Jurisdiction

1. Plaintiff brought this action in the Superior Court, alleging that he had three policies of insurance issued by defendant insurer on different dates, that he tendered insurer's agent, while the policies were in force, the amount due on premiums in arrears, and that insurer refused to accept the sum tendered and canceled each of the policies because plaintiff refused to pay premiums in arrears due on a policy issued by the insurer to plaintiff's wife, and that such cancellation was wrongful, wilful, wanton and malicious. Plaintiff demanded damages in the sum of $168.20, the amount paid by him as premiums on the policies, together with $500.00 punitive damages. Plaintiff did not tender an issue as to punitive damages nor did the court submit such issue. Defendant insurer demurred to the complaint on the ground that the cause of action was within the exclusive jurisdiction of a justice of the peace.

Courts A a—*continued.*

Held, the demurrer was properly overruled, the simultaneous cancellation of the three policies constituting a single cause of action, and the sums demanded as actual and punitive damages being different elements of damage accruing from the single cause of action, and it being impossible to determine as a matter of law that the demand for punitive damages was not made in good faith. *Chamberlain v. Ins. Co.*, 622.

d Jurisdiction on Appeals from Clerk

1. Superior Court held to have acquired jurisdiction of lunacy proceedings by appeal from clerk's order of commitment although clerk's order was without warrant of law, the clerk having originally obtained jurisdiction by the filing of the statutory affidavit. *In re Dewey*, 714.

2. Where an appeal is taken from an order of the clerk of the Superior Court to the judge thereof, C. S., 633, 635, the judge has jurisdiction by mandate of C. S., 637, and no "docketing" in a technical sense is involved, and C. S., 7880(88), requiring a tax of two dollars for "docketing" an appeal from a lower court in the Superior Court does not apply, nor is the clerk a "lower court" to the Superior Court with respect to appeals, and the judge acquires jurisdiction without the payment of the tax. *Windsor v. McVay*, 730.

e Jurisdiction on Appeals from Justice's Court. (Right to appeal to Superior Court see Justices of the Peace E a.)

1. Upon appeal from a judgment of a justice of the peace the jurisdiction of the Superior Court is entirely derivative, and where the justice of the peace has no jurisdiction the Superior Court can acquire none by amendment or by *remittitur* for the excess over the jurisdiction of the justice of the peace. *Perry v. Pulley*, 701.

2. Plaintiff instituted action in claim and delivery on a chattel mortgage in a court of a justice of the peace. Judgment was rendered for plaintiff and defendant appealed to the Superior Court. The defendant set up a counterclaim for $924.34, claiming he had overpaid plaintiff in that sum, and the Superior Court, upon its finding that the action involved a long account between the parties, referred same to a referee. The referee found that defendant had overpaid plaintiff as contended by defendant, and that defendant was entitled to recover of plaintiff the sum of $472.15, and that judgment should be entered for defendant against plaintiff in the sum of $200.00. The trial court affirmed the referee's report and entered judgment in accordance therewith. *Held*, the justice of the peace had no jurisdiction of the counterclaim, defendant having failed to aptly make a *remittitur* in the justice's court of all in excess of $200.00 including the value of the property claimed by plaintiff, N. C. Code, 1475, and the Superior Court on appeal could obtain no jurisdiction over the counterclaim by *remittitur* or amendment, and judgment should have been entered that defendant go without day and recover his costs, including the referee's allowance and expenses taxed against plaintiff in the judgment of the Superior Court. C. S., 1244(6). *Ibid.*

Courts A—*continued.*

f Jurisdiction upon Hearings or Motions Affecting Orders or Judgments of Another Judge

1. A judge of the Superior Court may not strike out *ex mero motu* an order entered in the cause at a prior term by another Superior Court judge, or disregard such prior order. *Edwards v. Perry*, 474.

2. One Superior Court judge may not set aside as erroneous a judgment rendered by another judge at a former term. *Newton and Co. v. Mfg. Co.*, 533.

3. Superior Court has jurisdiction to hear motion attacking order of another judge for irregularity. *Coffin Co. v. Yopp*, 716.

B County and Municipal Courts.

b Jurisdiction

1. Municipal Court of City of High Point has jurisdiction of action to enforce street assessments. *High Point v. Brown*, 664.

Covenants see Deeds and Conveyances C g.

Creditors' Bill.

D Control and Distribution of Debtor's Property.

a Operation and Management of Property

1. Where in a creditors' bill the property of the debtor is ordered sold by the court and the sale is required to be reported to it for confirmation or rejection in accordance with whether the bid at the sale is adequate and equitable, the receivers appointed in the cause may, with the consent of the holders of a first lien upon the property, rent the same pending the sale and confirmation, and hold the rents therefrom to be distributed in accordance with the rights of the parties, it appearing that such action is urgent in view of the fact that the property is suitable solely as a summer resort and that the season in which it can be operated is near in point of time. *Kenny Co. v. Hotel Co.*, 591.

b Sale of Property

1. Certain creditors of a hotel company filed a creditors' bill against it, and in the proceedings temporary receivers were appointed who were later made permanent receivers. Thereafter the holders of a prior, registered deed of trust against the hotel property filed a petition to be allowed to sell the property under the terms of the deed of trust as though receivers had not been appointed. The court allowed the petition and ordered the property sold by petitioners under the deed of trust, and retained the cause for further orders: *Held*, the court's order should have required petitioners to report the sale to the court for confirmation or rejection in accordance with whether the price bid at the sale was adequate and equitable, and to this end the order is modified and affirmed, the court having the power in its equitable jurisdiction and under chapter 275, Public Laws of 1933, to reject the sale if the price bid should be inadequate or would result in irreparable damage to the creditors or stockholders, and it is immaterial whether the appearance of petitioners was general or special. *Kenny Co. v. Hotel Co.*, 591.

Criminal Law. (Particular crimes see Particular Titles of Crimes.)

C Parties and Offenses. (In homicides see Homicide A c.)

d Distinction Between Crimes and Misdemeanors.

1. The grade or class of a crime is determined by the punishment prescribed therefor and not the nomenclature of the statute, a felony being a crime punishable by death or imprisonment in the State prison, and while all misdemeanors for which no punishment is prescribed are punishable as misdemeanors at common law, where the offense is infamous, or done in secrecy or malice, or with deceit and intent to defraud, it is punishable by imprisonment in the county jail or State prison, C. S., 4173, and is a felony. *S. v. Harwood*, 87.

2. Wilful and secret destruction of public records in violation of C. S., 4255, *held* felony, although statute calls offense "misdemeanor." *S. v. Harwood*, 87.

D Jurisdiction and Venue.

a Place of Crime

1. An indictment charging that defendant did feloniously embezzle certain certificates of deposit in the county in which the prosecution is instituted *is held* not subject to defendant's plea in abatement on the ground that the certificates of deposit were issued by a bank in another county and that such other county was the proper venue of the prosecution, since the indictment charges the embezzlement of the certificates of deposit and not the proceeds of the certificate. C. S., 4606. *S. v. Shore*, 743.

E Arraignment and Pleas.

e Pleas in Abatement

1. Pleas in abatement, being dilatory pleas, are not favored. *S. v. Shore*, 743.

F Former Jeopardy.

e Termination of Former Prosecution

1. A *nolle prosequi* in a criminal action will not support a plea of former jeopardy upon a subsequent prosecution for the same offense. *S. v. Norris*, 191.

G Evidence. (Of particular crimes see Particular Titles of Crimes.)

a Presumptions and Burden of Proof. (From killing with deadly weapon see Homicide G b.)

1. Where an alibi is set up as a defense on the trial for a murder the burden of proof of establishing guilt beyond a reasonable doubt does not shift, and the evidence tending to establish the alibi is to be considered by the jury only in determining whether the State has proven guilt beyond a reasonable doubt. *S. v. Sheffield*, 374.

c Hearsay Testimony

1. Defendant was charged with having feloniously set fire to a dwelling-house. C. S., 4175. A deputy Insurance Commissioner testified that the sheriff said that defendant said he had set fire to the house, although the witness's written memorandum made at the time omitted any reference to the statement. This testimony was not in corroboration of the sheriff, who testified at the trial. *Held*, the

Criminal Law G e—*continued.*

testimony was incompetent as hearsay, it not being in corroboration of, or tending to impeach the testimony of the sheriff. *S. v. Kluttz*, 726.

i Expert and Opinion Evidence

1. A nonexpert witness is competent to testify from his observation of defendant, when he had reasonable opportunity to form an opinion based thereon, as to the sanity or insanity of defendant, and defendant's objections that such nonexpert testimony was admitted against him cannot be sustained. *S. v. Stefanoff*, 443.

j Testimony of Accused

1. A defendant in a criminal action was made competent to testify in his own behalf by chapter 110, Public Laws of 1881 (N. C. Code, 1799), and while the interpretations of the statute require his testimony to be scrutinized, it is the province of the jury to determine from his demeanor and the attending circumstances the weight which they will accord his testimony, and a charge of the court that "the law presumes" that he is naturally laboring under the temptation to testify to whatever he thinks may be necessary to clear himself and that the jury should take into consideration what a conviction would mean to defendant, etc., *is held* to impose a burden and cast a shadow upon his testimony greater than the law requires and to constitute reversible error. *S. v. Wilcox*, 691.

2. It is error for the trial court to instruct the jury to scrutinize the testimony of a defendant testifying in his own behalf in a criminal prosecution, without thereafter instructing them that if they find the witness worthy of belief they should give as full credit to his testimony as any other witness, notwithstanding his interest. *S. v. Wilcox*, 694.

l Confessions

1. A confession otherwise voluntary is not rendered involuntary and therefore incompetent merely by the fact that at the time the one making the confession was under arrest. *S. v. Stefanoff*, 443.

2. The competency of a confession is a matter for the court. *Ibid.*

m Evidence and Records at Former Hearings

1. The judgment of a recorder's court must be proven by the records of the court, and its record may not be impeached collaterally by parol evidence. *S. v. Norris*, 191.

2. In a criminal action the admission in evidence of pleadings in a civil action is error. *S. v. Ray*, 736.

r Impeaching, Contradicting or Corroborating Witness

1. Where defendant sets up an alibi that he was with another person at another place at the time the crime was committed, testimony that such other person was seen near the scene of the crime shortly thereafter is properly admitted for the purpose of contradicting defendant's testimony constituting the alibi if the jury should find that it did so. *S. v. Sheffield*, 374.

2. While a party will not be allowed to impeach the character of his own witness, he may show the facts to be otherwise than as testi-

Criminal Law G r—*continued.*

fied by his witness, and where in a prosecution in which intent is an essential element, the State introduces an affidavit of defendant showing an honest purpose and good faith, defendant's motion of nonsuit must be allowed if the State introduces no evidence of fraudulent intent at variance with the affidavit. *S. v. Cohoon*, 388.

s Documentary Evidence

1. In a prosecution for embezzlement, testimony of the prosecuting witness that he had examined account books in a foreign state and that the books showed that defendant was not entitled to the credits claimed, without identification of the books or the person making the entries thereon by the witness or the introduction of the books in evidence, or evidence that the entries had been made in due course of business, *is held* incompetent and its admission constituted reversible error and was in violation of defendant's constitutional right to confront his accusers, which includes the right of cross-examination. Art. I, sec. 11. *S. v. Breese*, 92.

H Time of Trial.

c Motions for Continuance

1. A motion for a continuance is addressed to the sound discretion of the trial court, and its ruling thereon is not subject to review on appeal, except in case of manifest abuse. *S. v. Whitfield*, 696.

2. Defendant in this prosecution for rape was assigned counsel by the court. Two days after counsel had been assigned the case was called for trial, and defendant's attorneys asked for a continuance in order to prepare his defense. The motion was refused and defendant excepted. The controversy reduced itself to a question of veracity between defendant and the prosecutrix, there being no other witnesses to the crime. *Held*, upon the facts, it is impossible to determine on appeal that the refusal of the motion for continuance denied defendant his constitutional right of confrontation, and his exception to the refusal of the motion is not sustained. *Ibid.*

3. Appealing defendant was charged in a recorder's warrant with being an accessory after the fact and the other defendants with murder. About a month later a bill was submitted to the grand jury charging the other defendants with murder, and during the jury's consideration of the bill the name of the appealing defendant was inserted therein, and the bill charging all the defendants with murder was returned "a true bill" on Tuesday and defendants placed on trial the following day. Appealing defendant made a motion for a continuance in order to prepare his case, and the motion was refused. *Held*, it cannot be determined as a matter of law from all the facts that the refusal of the motion for continuance deprived defendant of his constitutional right of confrontation, and defendant's exception is not sustained. *S. v. Jones*, 812.

I Trial. (Right to jury trial see Jury.)

g Instructions. (Relating to particular crimes see Particular Titles of Crimes. Duty to instruct as to less degree of crime charged see hereunder I e.)

Criminal Law J g—*continued.*

1. Defendant setting up an alibi is entitled to an instruction thereon without making a special request therefor. *S. v. Sheffield*, 374.

2. The correction by the court of an inadvertent statement of the testimoney in his charge to the jury with proper instructions will not be held for error. *S. v. Dalton*, 507.

3. Where there is evidence that immediately after the time the crime was committed the defendant fled to other states it is proper for the State to contend that such flight was a circumstance indicating guilt, and the court's statement of such contention will not be held for error, the statement of the contention not being an undertaking by the court to state the law of flight. *S. v. Bittings*, 798.

4. Defendant held not entitled to requested instructions relating to innocent by-stander under evidence in this case. *S. v. Jones*, 812.

5. While the trial court is not required to give in exact language a requested instruction, he is required to give in substance every material part of a requested instruction upon a material aspect of the case which is supported by the evidence and relied upon at the trial. *S. v. Henderson*, 830.

j Nonsuit and Directed Verdict

1. C. S., 4643, serves the same purpose in criminal prosecutions as C. S., 567, serves in civil actions, and a motion for judgment of nonsuit under C. S., 4643, must be made at the close of the State's evidence in order for a motion thereunder made at the close of all the evidence to be considered. *S. v. Norris*, 191.

2. Where the uncontradicted evidence, if accepted as true, establishes defendant's guilt, the court may instruct the jury to find the defendant guilty if they believe the evidence beyond a reasonable doubt, but in crimes in which intent is an ingredient the question of intent is ordinarily for the jury. *Ibid.*

l Conviction of Less Degree of Crime

1. Evidence held sufficient to support verdict of simple assault and refusal to submit question in prosecution for graver offense held error. *S. v. Lee*, 472.

2. Where it is permissible under the bill of indictment to convict a defendant of a less degree of the same crime, and there is evidence to support a milder verdict, defendant is entitled to have the different views arising on the evidence presented to the jury under a proper charge, and where there are three degrees of the crime, error in failing to submit the question of guilt of the smallest degree of the crime is not cured by a verdict convicting defendant of the greatest degree of the offense charged. C. S., 4640. *S. v. Keaton*, 682.

J Motion for New Trial.

b For Disqualification or Prejudice of Juror

1. After a jury has been regularly selected and empaneled in a case and has returned its verdict, a motion to set aside the verdict and for a new trial for later discovery that one of the jurors was prejudiced against defendant, is addressed to the sound discretion

Criminal Law J b—*continued.*

of the trial court, and the court's refusal to grant the motion is not appealable in the absence of abuse. *S. v. Sheffield*, 374.

K Judgment and Sentence.

g Arrest of Judgment

1. A judgment in a criminal prosecution may be arrested on motion duly made when, and only when, some fatal error or defect appears on the face of the record. *S. v. Bittings*, 798.

L Appeal in Criminal Cases.

a Prosecution of Appeals Under Rules of Court in General

1. Where defendant, convicted of a capital felony, fails to make out and serve his statement of case on appeal within the time allowed, his right to do so is lost, and the appeal will be dismissed upon motion of the Attorney-General where no error appears on the face of the record proper. *S. v. Brown*, 747.

b Appeals in Forma Pauperis

1. Application for order allowing defendant to appeal *in forma pauperis* held improvidently entered under authority of *Powell v. Moore*, 204 N. C., 654. *S. v. Ferrell*, 738.

d Record, Assignments of Error and Statement of Case

1. On appeal the indictment is a necessary part of the record proper in criminal cases, and a statement in the record signed by the solicitor and defendant's counsel that the indictment had disappeared from the papers but that a proper indictment was in the record at the time of trial cannot supply the deficiency, it being necessary that defendant apply to the Superior Court for an order that a copy be supplied if the indictment is lost. *S. v. Currie*, 598.

2. Assignments of error should include the exceptions on which they are founded, and it is not sufficient if they merely refer to the exceptions as they appear in the case on appeal. *Ibid.*

3. Where statement of case on appeal is not prepared in accordance with the rules, but the case is remanded for error of the judgment in imposing sentence, upon imposition of proper judgment by the trial court the defendants may again appeal, but a proper statement of case on appeal must then be prepared in accordance with the rules in order for their exceptions to be considered upon such subsequent appeal. *S. v. Kelly*, 660.

4. Where defendant duly serves his statement of case on appeal the service by the solicitor of exceptions and objections thereto after the expiration of ten days renders the service of such exceptions and objections nugatory in the absence of an extension of time or waiver. C. S., 643, and defendant's statement becomes the statement of case on appeal. *S. v. Ray*, 736.

5. Where there is a controversy as to whether exceptions to defendant's statement of case on appeal were served within the time fixed or allowed, or service within such time waived, it is the duty of the trial court to find the facts, hear motions and enter appropriate orders. *Ibid.*

Criminal Law I, d—*continued.*

6. Where defendant fails to make out and serve statement of case on appeal within the time allowed, his right to do so is lost and the appeal will be dismissed. *S. v. Brown*, 747.

7. Assignments of error must be based upon exceptions duly taken in apt time during the trial and be discussed in appellant's brief in order for them to be considered on appeal, and these requirements are statutory, C. S., 643, as well as mandatory under the decisions, and where the assignments of error are not properly based upon exceptions aptly entered the case may be dismissed upon motion of the Attorney-General, but in the present appeal the assignments of error, although not properly presented, are considered because the life of the appellant is involved, and are found to be without merit. *S. v. Bittings*, 798.

8. Exceptions to the trial court's statement of the contention of the State must be brought to the court's attention by defendant in apt time for correction or the exceptions will be deemed waived. *Ibid.*

e *Review*

1. Exclusion of testimony is not cured by admission of testimony of another witness to same act done on different occasion. *S. v. Dickey*, 417.

2. Where defendant on trial for homicide is guilty of manslaughter on his own statement, error, if any committed on the trial is cured or rendered harmless by the jury's verdict of guilty of manslaughter. *S. v. Keeter*, 482.

3. In absence of request for finding of facts it will be presumed that order is supported by proper findings. *S. v. Dalton*, 507.

4. Where defendant has testified to conversations he had with deceased some time prior to the fatal shooting, the admission of testimony of declarations made by deceased relating to the same conversations will not be held prejudicial. *Ibid.*

5. The inadvertent admission of incompetent evidence which does not in any view prejudice defendant will not be held sufficient ground for a new trial. *Ibid.*

6. Judgment entered under erroneous belief that court had no discretion to impose smaller sentence is set aside and the case remanded for imposition within sound discretion of court. *S. v. Kelly*, 660.

7. In the absence of a clear showing of error an exception must be overruled on appeal. *S. v. Whitfield*, 696.

8. The jury's verdict on controverted issues of fact in this prosecution for murder is upheld, there being no error in the trial of the cause or in the charge of the trial court to the jury. *S. v. Crockett*, 735.

9. No appeal lies from the discretionary ruling of the trial court denying a motion for a new trial for newly discovered evidence, and especially is this true of a motion therefor in a criminal action at the next succeeding term of the Superior Court after affirmance of the judgment by the Supreme Court, since motions for a new trial for newly discovered evidence in criminal cases may not be made in the Supreme Court. *S. v. Ferrell*, 738.

Damages.

F Measure of Damages.

a Injuries to the Person

1. An instruction on the question of future damages which plaintiff might recover for personal injury which fails to limit the recovery to the present cash value of such future losses *is held* for reversible error, a sum in cash being of greater value than the same sum payable in the future, and the instruction complained of being calculated to appreciably augment the recovery. *Lamont v. Hospital*, 111.

H Pleading, Evidence and Assessment.

b Evidence of Damage

1. On the issue of damages resulting to plaintiff from the temporary loss of its bridge as a result of defendant's wrongful destruction of the bridge, plaintiff introduced evidence that the bridge afforded the only means by which plaintiff could haul its lumber from the land and introduced testimony of the amount of lumber usually hauled per day, the number of days necessary to reconstruct the bridge, its profit per thousand feet, and that it could not get all the lumber out within the time limits set in its contracts. The court excluded evidence offered by defendant in rebuttal that after plaintiff reconstructed the bridge, it stopped cutting timber several months prior to taking up its tram road, and that plaintiff, therefore, had opportunity to haul all its lumber. *Held*, the exclusion of the evidence constituted prejudicial error, and defendant is given a new trial upon the issues involving the damage sustained by reason of the temporary loss of the means for transporting the lumber. *Lumber Co. v. Power Co.*, 515.

Dead Bodies.

A Rights and Duties of Relatives in Respect Thereto.

a Right to Possession

1. A wife has a right paramount to all other persons for the possession of her deceased husband's body, and where an undertaker, over the protest of the wife, holds the dead body of the husband and thereafter embalms the same without the consent or approval of the wife, and upon demand of the wife, refuses to deliver the body until fees for personal services and embalming are paid, the wife may recover punitive damages for such detention. *Bonaparte v. Funeral Home*, 652.

B Liabilities for Mutilation or Detention.

c Detention of Dead Bodies

1. The arbitrary withholding of the dead body of her husband from a widow, as security for charges for personal services rendered by an undertaker and fees for embalming the body, is an unlawful act. *Bonaparte v. Funeral Home*, 652.

Deceit see Fraud.

Declaratory Judgment Act see Actions B g.

Deeds and Conveyances.

A Requisites and Validity.

d Form and Contents

1. The failure to name the grantee in the granting clause in a deed and the reference to the *feme* grantee "to the said party of the second part, his heirs and assigns, to her only use and behoof forever" in the *habendum is held* not to invalidate the deed, the deed being regular in all other respects, and the grantee being properly identified in the premises. *Ins. Co. v. Hunt*, 724.

e Delivery

1. Delivery of a deed is essential to its validity, it being necessary that the grantor should part with possession and control of the instrument with the intent of giving effect to it. *Burton v. Peace*, 99.

2. Where in an action to set aside a deed registered after the grantor's death, the grantee introduces no evidence that it had ever been delivered to anyone by the grantor, and plaintiff seeking to set the deed aside, introduces same in evidence for the purpose of attacking its validity, the presumption of delivery from registration does not apply, the presumption being rebuttable as between the parties, and a directed verdict in plaintiff's favor is not error. *Ibid.*

3. Delivery of a deed is essential to its validity, and where the pleadings and evidence raise the question of delivery, the court's refusal to submit an issue thereon entitles appellant to a new trial. *Ferguson v. Ferguson*, 483.

C Construction and Operation.

g Restrictive Covenants

1. Rights created by restrictive covenants in deeds are in nature of easements. *Moore v. Shore*, 699.

2. Plaintiffs, the purchasers of lots in a development by deeds containing certain restrictions, brought action against defendant, an owner of another lot in the development, to enjoin defendant from violating the restrictive covenant in his deed by building a filling station on his lot. Defendant filed answer alleging that plaintiffs, prior to the time he purchased the lot, had agreed verbally to permit him to construct a filling station on the lot if he bought same, that in reliance on their agreement he had purchased the lot, and had paid the purchase price and had expended funds for the construction of the filling station, with knowledge of plaintiffs, and that plaintiffs were thereby estopped from maintaining their action to enforce the restrictions. *Held*, the issues relating to the estoppel pleaded should have been submitted to the jury, and judgment on the admissions in the pleadings permanently restraining defendant from erecting the filling station is held erroneous. *Ibid.*

F Timber Deeds.

b Renewal Provisions

1. The timber deed in this case provided that at the expiration of the time stipulated therein for the cutting of the timber the grantee might renew the right to cut timber for a stipulated renewal period by paying taxes from year to year within the renewal period on that portion of the land upon which he exercised the option. There-

Deeds and Conveyances F b—*continued.*

after the grantor in the timber deed conveyed the fee to another subject to the rights of the grantee in the timber deed: *Held*, under *Bateman v. Lumber Co.*, 154 N. C., 248, the right arising upon the exercise of the option inures to the benefit of the owner of the fee at the time the option is sought to be exercised, and the right under the option can be acquired only by notice and payment to the then owner of the fee. *Carr v. Parsons*, 448.

Demurerr see Pleadings D.

Descent and Distribution—Action to determine heirs and distribute estate see Executors and Administrators F d.

Divorce.

A Grounds for Divorce.

d Separation

1. Cause of action need not have existed for six months in action for divorce by either party on ground of two years separation. *Smithdeal v. Smithdeal*, 397.

2. Either party may bring action for divorce on grounds of two years separation, and judgment that plaintiff was not entitled to relief because he had married defendant under threat of prosecution for seduction and was thus attempting to defeat her rights in his estate *is held* erroneous. *Long v. Long*, 706.

E Alimony.

a Alimony Pendente Lite

1. In an application for alimony *pendente lite* under C. S., 1666, it is required by the statute that the court find the facts in determining whether the wife is entitled to alimony, her right thereto being a question of law, and it is error for the court to refuse applicant's request for a finding of facts upon which the court denies the application. *Caudle v. Caudle*, 484.

c Alimony Without Divorce

1. Decree of absolute divorce on ground of separation held not to affect prior order for alimony without divorce. *Howell v. Howell*, 672.

F Custody and Support of Minor Children.

a Jurisdiction

1. Upon the institution of an action for divorce from bed and board the court acquires jurisdiction of the minor children of the parties which is not divested by a consent judgment on the issue of divorce entered in the cause with the approval of the court, especially where such consent judgment expressly provides that either party might thereafter make a motion in the cause for the custody of the children, the court having the power in an action for divorce, either absolute or from bed and board, before or after final judgment, to enter orders respecting the care and custody of the children, C. S., 1664. *Tyner v. Tyner*, 776.

b Hearing and Findings

1. Upon the hearing of a motion for the custody of the minor children in an action for divorce from bed and board, exceptions to the court's holding that a consent judgment entered in the cause de-

Divorce F b—*continued.*

termined the claim of the wife against the husband for the maintenance of the children, and to the court's finding that the wife was able to provide for the children at such times as they might visit her, become immaterial where the court awards the custody of the children to the husband. *Tyner v. Tyner*, 776.

2. The court's findings upon a motion for the custody of the minor children in an action for divorce from bed and board that the husband was a fit, suitable and proper person for the care and custody of the children and his finding that it was to the best interest of the children that he be given their custody, and his failure to find that the wife was a fit, suitable and proper person for their custody, will not be disturbed on appeal where such findings are based upon conflicting evidence, the findings of the court, when supported by evidence, being conclusive. *Ibid.*

c Judgment

1. The father has a prior right to the custody of his minor children against his wife and third persons, which right is subject to the paramount consideration of the welfare of the children, and where upon a motion for the custody of the minor children in an action for divorce the court finds that the father is a proper person for their care and custody, and that it is to the best interest of the children that he be given their custody, and fails to find that the wife is a suitable person for their custody, the court's judgment that the husband be awarded their custody is proper, and further provision in the judgment that the wife should be allowed to visit and associate with the children, and have them visit her subject to the husband's right to their care and custody is approved upon the court's finding that the wife is a woman of good character, and a proper and suitable person for the children to know and associate with. *Tyner v. Tyner*, 776.

"Domicile" see Wills D a 1.

Dower.

B Inchoate Dower.

a Nature, Rights and Incidents

1. Plaintiff, alleging that she had been abandoned by her husband, brought suit to enjoin the sale of her husband's lands under a deed of trust and executions on judgments against him until her rights to inchoate dower in the lands could be determined, and to have the present value of her inchoate dower in the lands of her living husband fixed and paid to her in cash. *Held*, although inchoate dower has a present value, the enjoyment of the estate is expressly postponed by statute until after the husband's death, and is contingent upon the wife surviving her husband, and other provisos of the statute, C. S., 4099, 4100, and defendant's demurrer to the complaint was properly sustained. *Higdon v. Higdon*, 62.

C Dower Consummate.

a Respective Rights of Widow and Creditors

1. A widow's right of dower is superior to a junior lienor's equity to force a creditor having a first lien on several parcels of land

Dower C *a—continued.*

belonging to the estate to first exhaust the security upon property against which the junior lienor has no claim, the widow's dower having been allotted in the lands having a single encumbrance and she having enjoined the senior lienor from selling the property in which her dower was allotted except as a *dernier ressort. Stokes v. Stokes*, 108.

b Proceedings to Allot Dower

1. Dower may be allotted the widow and lands partitioned among the heirs in one proceeding. C. S., 3226, 4105. *Vannoy v. Green*, 77.

2. The widow has no right to select the lands to constitute her dower, the commissioners being required by statute to equally protect the interest of the heirs and widow, and the right of dower being statutory, and there being no statutory provision conferring such right on the widow, C. S., 4100, providing that the commissioners need not select the dwelling-house if the widow requests otherwise, being merely to afford relief from the otherwise mandatory duty of the commissioners to select the dwelling-house, and not conferring the right of selection on the widow. C. S., 4104, 4105. *Ibid.*

Easements—Arising out of restrictive covenants in deeds, see Deeds and Conveyances C *g*.

Ejectment.

C Pleadings and Evidence

a Complaint

1. Plaintiff brought action in ejectment alleging that he was one of a class for whose benefit an industrial school was created by the General Assembly, that certain lands were conveyed to the school in fee and used by it until it ceased to function when no trustees were elected to succeed the original trustees, that plaintiff was qualified to be a student at the school and desirous of obtaining the instruction formerly available at the school, and the defendants were in wrongful possession of the property. The school was not made a party to the action. *Held*, defendant's demurrer was properly sustained, it being necessary in ejectment for plaintiff to allege and prove title to the property, and he may not rely upon weakness of defendant's title. *Carson v. Jenkins*, 475.

Elections.

A Right of Suffrage in General.

b Property Qualifications

1. Municipal charter provision limiting suffrage to owners of real property held void as being in violation of Article VI, N. C. Constitution. *Smith v. Carolina Beach*, 834.

I Contested Elections.

d Appeal and Review

1. Irregularity in election held not prejudicial on whole record and result of election is not disturbed on appeal. *Forester v. North Wilkesboro*, 347.

Electricity.

A Duties and Liabilities in Respect Thereto.

a In General

1. The seller of an electric appliance may not be held liable for an injury caused by a short circuit in the appliance in its later use when the seller is not charged with the duty of inspecting and maintaining the equipment. *Brady v. Oil Co.*, 596.

Embezzlement.

A Elements of the Crime.

a Intent

1. The mere converting or appropriating the property of another to one's own use is not sufficient to constitute the crime of embezzlement, fraudulent intent in the act of such conversion or appropriation being an essential element of the offense. C. S., 4268. *S. v. Cohoon*, 388.

B Prosecution and Punishment.

a Indictment

1. In a prosecution for embezzlement the failure of proof of embezzlement of the whole sum charged in the bill of indictment does not constitute a fatal variance between allegation and proof where there is proof of embezzlement of a sum less than that charged in the indictment. C. S., 4620. *S. v. Dula*, 745.

c Evidence

1. Admission of testimony relating to unidentified records which were not introduced in evidence, nor person making entries identified, held error. *S. v. Breece*, 92.

2. In a prosecution for embezzlement the admission in evidence over defendant's objection of pleadings in civil actions against defendant, involving the funds he is alleged to have embezzled, is erroneous. C. S., 533. *S. v. Ray*, 736.

3. Held in this prosecution for embezzlement: nonsuit should have been granted, there being no evidence of fraudulent intent *S. v. Cohoon*, 388.

4. In a prosecution for embezzlement evidence that defendant had settled with the prosecuting witness by payment to another is properly excluded in the absence of evidence that such other person was the agent for the prosecuting witness, or that the prosecuting witness had authorized or ratified settlement in this manner, the excluded evidence being incompetent to show want of fraudulent intent, or for any other purpose. *S. v. Dula*, 745.

Equity—Marshalling assets see Marshalling; laches see Cancellation and Rescission of Instruments B c; mandamus see Mandamus.

Estoppel.

B By Record. (Operation of judgments as bar to subsequent action see Judgments L.)

a Creation and Operation in General

1. Caveators held estopped by inconsistent position formerly taken in their petition for partition. *In re Will of Averett*, 234.

Estoppel—*continued.*

C Equitable Estoppel. (Of insurer see Insurance K; stockholders estopped to deny existence of banking corporation see Banks and Banking H a 1.)

a In General

1. Owners of dominant tenements may be estopped from asserting easements over servient tenement where owner of servient tenement has expended money in reliance upon verbal release of easement. *Moore v. Shore*, 699.

2. Acts of plaintiff held not to have resulted in loss to adverse claimants, and plaintiff was not estopped. *Textile Corp. v. Hood*, 782.

Evidence. (In particular actions see Particular Titles of Actions.)

D Relevancy, Materiality and Competency in General.

b Transactions or Communications with Decedent

1. Defendant's intestate made two separate contracts with the holders of stock in a corporation to purchase their respective holdings. In an action by one of the stockholders to recover on the contract of sale the other testified that he had no claim against the estate on his contract. *Held*, the witness was not interested in the event, and his testimony as to transaction between decedent and plaintiff as to the contract of sale of plaintiff's stock was competent. C. S., 1795. *Winborne v. McMahan*, 30.

2. The issue involved in this action was whether intestate had made advancements to his daughters during his lifetime. A check made payable to one of the daughters and signed by intestate was introduced in evidence. The daughter's husband was permitted to testify over objection that the check was given his wife as a wedding present. The clerk had found that the personalty was sufficient to cover all alleged advancements. There was no evidence that there were any children of the marriage of intestate's daughter and the witness. *Held*, the husband's testimony was competent, he having no interest in the event of the action. C. S., 1795. *Vannoy v. Green*, 80.

3. The issue involved in this action was whether intestate had made advancements during his lifetime to his daughters. A check made paybale to one of the daughters and signed by intestate was introduced in evidence, and the other daughter was permitted to testify over objection that the check in question was given her sister as a wedding present. *Held*, the evidence was competent, the transaction testified to not being between the witness and the deceased, but between the witness's sister and deceased father. C. S., 1795. *Ibid.*

c Facts in Issue or Relevant to Issue

1. Testimony of a declaration of deceased against his interest in respect to the bonds in suit which were in the possession of one of the litigants was objected to on the ground that the bonds were not identified. It appeared that the only bonds in possession of the litigant were the bonds in suit, and the objection is not sustained. *Dail v. Heath*, 453.

Evidence D—*continued.*

c Privileged Communications

1. Where a communication is made by a client to an attorney under a sense of absolute privilege and on the faith of the relationship of attorney and client, such communication is absolutely privileged. *Guy v. Bank*, 322.

h Similar Facts and Transactions

1. Plaintiff employee was injured when a piece of rust flew in his eye while he was cleaning a bridge with a steel scraper preparatory to painting it. Over defendant's objection testimony of another employee was admitted to the effect that he was injured when hit by a steel scraper about a quarter of an inch thick while cleaning steel above his head preparatory to painting same. *Held*, the testimony objected to should have been excluded, the occurrence testified to by the witness not being related to the occurrence causing the injury in suit either by the required substantial identity of circumstance or proximity of time. *Ethridge v. R. R.*, 657.

E Admissions.

b By Parties

1. Testimony that the person under whom defendants claim stated in the presence and hearing of the person under whom plaintiff claims that the bonds in suit belonged to her, and that the statement was heard and understood by the party under whom plaintiff claims and that he had ample opportunity to deny or dissent and did not do so, *is held* competent as an admission by acquiescence. *Dail v. Heath*, 453.

d By Agents

1. The admissions in the pleadings and the evidence established that declarant was attorney for the estate and acted for it in certain matters, that he attended a conference with bank officials to obtain extensions of certain notes executed and indebtedness incurred by his intestate, and to this end furnished the bank officials with statement of liabilities of the estate, and that he told them the estate owed plaintiff the item sued on. *Held*, testimony of the admission of the attorney was competent in plaintiff's action against the estate on the item as an admission of an authorized agent acting within the scope of his authority. *Winborne v. McMahan*, 30.

2. A witness not a party to the action and having no pecuniary interest therein may testify as to admissions of defendant's authorized agent made in the scope of his authority. *Ibid.*

3. In an action to have plaintiffs' claim against a closed bank declared a preference, plaintiffs introduced a letter written at the request of the bank's vice-president by the cashier of the bank several weeks after the bank had been closed under the general bank moratorium: *Held*, the letter containing the admission was competent in evidence as constituting an admission by an agent acting within the scope of his authority, and though not made at the precise time of the act to which it referred, was made at a time at which it had present interest and weight and a subsisting importance, and was at least corroborative of other testimony adduced at the trial. *Brunswick County v. Trust Co.*, 127.

Evidence E—*continued.*

e Admissions in Pleadings

1. Defendant's admission of truth of material allegation in original complaint held competent in evidence although amendment to complaint was subsequently filed making immaterial change in paragraph admitted. *Winborne v. McMahan*, 30.

H Hearsay Evidence.

a General Rules

1. Hearsay evidence is evidence which depends for its probative force, in whole or in part, upon the competency and credibility of some person other than the witness, and is incompetent, except for well recognized exceptions to the rule, since the declarant does not speak under the sanction of an oath and is not subject to cross-examination. *S. v. Kluttz*, 726.

2. As a general rule statements alleged to have been made by a witness to which he does not testify, are incompetent as hearsay unless they tend to impeach or corroborate him, hearsay evidence being incompetent to establish any fact which is susceptible to proof by testimony of the witness speaking of his own knowledge. *Ibid.*

3. Plaintiff's testimony of fact of agency held incompetent as hearsay, it appearing that testimony was based on what plaintiff "was told." *Mason v. Texas Co.*, 805.

b Res Gestæ

1. Evidence in this case held *pars res gestæ* and competent as admission of agent acting within scope of authority. *Brunswick County v. Trust Co.*, 127.

f Declaration as to Bodily Feelings

1. In this hearing under the Compensation Act a physician testified that he had attended the injured employee immediately prior to his death and that the employee said he had first felt pain around his heart prior to the time of the injury made the basis of the claim. *Held*, the testimony of the declaration as to bodily feeling was competent, it being without the boundary of the hearsay rule. *Moore v. Drug Co.*, 711.

J Parol Evidence Affecting Writings.

a Admissibility in General

1. As a general rule all prior and contemporaneous negotiations of the parties are deemed to be merged in their written contract, and parol evidence of such negotiations is inadmissible to vary the terms of or contradict the written instrument. *Carlton v. Oil Co.*, 117.

2. Parol evidence in explanation of the "net value of extended insurance" as used in a policy of life insurance involved in the case is held competent under the rule that parol evidence is competent to explain technical words as used in particular trades or vocations. *Owens v. Ins. Co.*, 864.

d In Actions for Reformation of Instruments

1. On issue of reformation of deed for mistake of draughtsman, parol evidence tending to establish mistake is competent. *Ins. Co. v. Edgerton*, 402.

Evidence—*continued.*

K Expert and Opinion Evidence.

b Subjects of Expert and Opinion Testimony

1. Bank official's opinion testimony as to nature of deposit is not controlling. *Brunswick County v. Trust Co.*, 127.

2. Nonexpert may testify as to mental capacity of testator. *In re Will of Hargrove*, 307.

3. The admission of testimony of a witness in response to questions by the court to the effect that in witness's opinion the shoulders of the road at the scene of the accident were sufficiently wide to park a car on, and that the skid marks on the highway pointed towards defendant's car, and as to the position of the car when struck as indicated by the skid marks, is held not error, it being competent for a nonexpert witness to testify from observation as to facts observed and inferences therefrom which are so usual and natural, or instinctive as to accord with general experience. *Lambert v. Caronna*, 616.

4. Where there is evidence that the thirty-nine-car freight train on which intestate was flagman was slowed while backing from five or six miles an hour to one mile an hour within a distance of two car lengths, testimony of experienced trainmen that such sudden slowing of the train would produce a violent and unusual jerk upon the caboose or rear of the train *is held* competent, the weight of the testimony being for the jury. *McGraw v. R. R.*, 873.

Execution.

B Property Subject to Execution.

d Intervening Rights of Third Persons

1. The deed of the sheriff to a purchaser of land at an execution sale under judgment is void where the judgment debtor had only a life estate in the land which estate he had forfeited by failing to pay taxes and suffering the land to be sold therefor and failing to redeem same within one year after such sale, the fee-simple title to the land being in the remaindermen from that date. *Sibley v. Townsend*, 648.

E Stay of Execution.

a Right to Stay Proceedings

1. Judgment debtor held entitled to restrain execution upon allegations that judgment creditor is insolvent and is indebted to him in sum in excess of judgment, and that assignment of judgment was in bad faith and not for value. *Bank v. Kerr*, 610.

G Execution Sales.

a Manner, Conduct and Validity of Sale

1. Where upon a motion to confirm an execution sale the clerk finds that the announcement of the auctioneer at the sale that the sale would stand open for twenty days chilled the bidding and that the sale was not conducted in a prudent and just manner, and that the price bid was grossly inadequate, it is not error for the clerk to decline to confirm the sale and to order a resale. *Federated Textiles v. Shirt Co.*, 471.

Executors and Administrators.

C Control and Management of Estate.

b Business and Contracts of Deceased

1. Evidence that intestate had contracted to purchase certain stock held sufficient for jury, and estate was liable for purchase price upon jury's verdict. *Winborne v. McMahan*, 30.

c Control and Management by Executor or Administrator

1. Ordinarily it is the duty of an executor or administrator to collect the assets of the estate and disburse the funds promptly, and he makes loans or advances money of the estate at his peril and the peril of his bondsman, but where there is no fraudulent purpose or corrupt intent in making such advancements he may not be held criminally liable. *S. v. Cohoon*, 388.

D Allowance and Payment of Claims. (Right to recover on *quantum meruit* for personal services in action on alleged contract to convey see Wills B b.)

e Claim of Title by Third Person to Funds Passing into Executor's Hands

1. A widow, executrix of her husband's estate, instituted special proceedings against the other heirs and distributees of the estate to recover from the estate the proceeds of sale of lands formerly held by the widow and husband by entireties, the proceeds of sale being in the husband's possession at the date of his death, and the widow claiming that the right of survivorship attached to the funds. Judgment was entered in her favor upon a simple issue of indebtedness and the judgment stipulated that the sale of assets was not necessary to pay the claim. *Held*, the proceeds of the sale came into her hands as executrix as trustee for herself as the rightful beneficiary, and were sufficient to furnish the basis for a creditor's claim and an action in assumpsit, and submission of the issues in the action indicated that she had elected to bring her action in *indebitatus assumpsit* for money had and received, and the judgment constituted a general claim against the estate for payment of which she was entitled to institute the proceedings to sell land to make assets, a *cestui que trust* having the right, in his election, to proceed against the trustee personally rather than seek to trace the funds. *Place v. Place*, 676.

f Priorities and Liens

1. The statutory liability on bank stock does not constitute a priority for payment out of the assets of the estate of a deceased stockholder. C. S., 219(a), C. S., 93. *Hood v. Darden*, 566.

2. An executor may not restrain the foreclosure of a deed of trust executed by his testator prior to his death upon the executor's petition for sale of the lands to make assets, when by the terms of the deed of trust the trustee is authorized to advertise and sell the lands, the right of the trustee to sell the lands being contractual, and the sale by the trustee being subject to the provisions of chapter 275, Public Laws of 1933. *Miller v. Shore*, 732.

Executors and Administrators—*continued.*

E Sale of Land to Make Assets.

a Insufficiency of Personalty

1. Where in a proceeding for sale of land for partition the judgment provides that the claim of one of the parties for sums paid on indebtedness of the estate should not be paid out of the proceeds of sale unless the personal property of deceased devisor should be insufficient, an exception by petitioners on the ground that there had been no adjudication of the sufficiency of the personal property will not be sustained. *Everton v. Rodgers*, 115.

2. A judgment against an estate on a general claim is conclusive as to the amount of the claim, but the adjudication that the personalty is sufficient to pay same and that it is not necessary to sell land to make assets for its payment is an interlocutory judgment and will not bar a subsequent proceeding to sell lands to make assets for its payment where the personalty, by reason of subsequent losses, is insufficient to pay the judgment. *Place v. Place*, 676.

F Distribution of Estate.

d Actions to Determine Heirs and Distribute Estate

1. A judgment entered in an action to determine the heirs at law of intestate for the purpose of distributing funds in the hands of his administrator, in which the court has jurisdiction of the administrator and the funds in his hands, and some of the heirs appear in court and the other heirs are duly served by publication, is not void, the judgment being one *in rem*. C. S., 484. *Ferguson v. Price*, 37.

2. An action to determine the heirs at law of an intestate for the purpose of distributing funds in the hands of his administrator, the court having jurisdiction of the administrator and the funds in his hands and the heirs appearing in court, is an action *in rem*, and where service by publication is duly ordered on those heirs that cannot be found or are unknown, C. S., 484, and judgment entered directing the distribution of the fund, and the administrator has disbursed the fund in accordance with the judgment and filed his final account, the judgment will bar an action against the administrator by those heirs unknown at the time of the institution of the action and who did not see the notice by publication and did not appear in the action. C. S., 492. *Ibid.*

e Family Agreements

1. The rule that the law looks with favor upon family agreements affecting the distribution of an estate does not prevail where the rights of an infant are unfavorably affected. *In re Reynolds*, 276.

K Liabilities. (Limitation of actions on bonds of, see Limitation of Actions B a 1.)

b In General

1. Executors and administrators, as well as guardians, are not insurers of the assets of estates committed to their custody and care. *Stroud v. Stroud*, 668.

c Diligence in Collecting and Managing Assets

1. Administrators held not liable for failure to collect certificates of deposit before insolvency of bank. *Stroud v. Stroud*, 668.

Executors and Administrators K—*continued.*

d Personal Liability on Contracts Executed for Estate

1. This action was instituted against defendant individually and in her representative capacity as executrix, the complaint charging that plaintiff sold and delivered certain goods to defendant at her request and that defendant promised and agreed to pay for same. Defendant filed answer alleging that the goods were bought in her representative capacity and that the promise to pay for same was made in her representative capacity, and that the estate alone was liable therefor. *Held*, while, under certain conditions, an executrix may be held personally liable on a contract entered into for the benefit of the estate if there is no stipulation against personal liability, yet the answer is sufficient to raise an issue as to defendant's individual liability and plaintiff's motion for judgment on the pleadings should have been denied. *Bessire and Co. v. Ward*, 858.

Explosions see Negligence A e 2.

Extradition.

B Grounds for Extradition and Defenses.

a Charge of Crime and Fugitive from Justice

1. Where a person arrested upon the warrant of the Governor of this State for extradition, contests the validity of the extradition proceedings solely on the ground that on the date of his arrest he was not a fugitive from justice of the demanding State, and all the evidence is to the effect that he was in the demanding state on the date the crime is alleged to have been committed, and the court so finds, the trial court's finding that on the date of his arrest he was a fugitive from justice of the demanding state is correct, and the refusal of his petition for *habeas corpus* is upheld. In this case petitioner was charged with abandonment and nonsupport of his wife, and the crime was alleged to have been committed on the day petitioner left the demanding state and came to North Carolina. *In re Guerin*, 824.

False Pretense—Issuing worthless checks see Bills and Notes D f.

Federal Employers' Liability Act see Master and Servant E.

Fraud. (Cancellation of instruments for, see Cancellation and Rescission of Instruments.)

A Elements and Essentials of Right of Action.

a In General

1. The essential elements of fraud are a misrepresentation or concealment, intent to deceive or negligence in uttering falsehoods with intent to influence the action of others, actual deception, and reliance upon the misrepresentations by the complaining party *Bolich v. Ins. Co.*, 144.

2. The elements of an action for deceit are a misrepresentation with knowledge of its falsity or with culpable ignorance of its truth or falsity, with intent that the other party should act upon it, and reliance on the misstatement by the other party to his damage. *Brooks v. Trust Co.*, 436.

Fraud A—*continued.*

d Knowledge and Intent to Deceive

1. The evidence tended to show that the vice-president of the payee bank told plaintiff, a prospective endorser of a note, that he did not remember the amount of encumbrance against the property mortgaged by the maker of the note as security, but that the bank had investigated the title in making another loan and that there was but one encumbrance against the property, and referred the endorser to the attorney investigating the title. The attorney told plaintiff that he had found only one encumbrance against the property. After being forced to pay the note, plaintiff discovered that there was another encumbrance against the property. The attorney's investigation of the title was made about a year before the execution of the note: *Held*, even conceding the attorney was the bank's agent, the evidence was insufficient to show knowledge of the falsity of the statement on the part of the vice-president of the bank or culpable ignorance of its falsity sufficient to support an action for deceit. *Brooks v. Trust Co.*, 436.

B Contracts Affecting Realty.

a In General

1. Where land in a development is sold by deeds containing certain restrictive covenants, the rights of purchasers of lots therein in respect to the covenants contained in another purchaser's deed is in the nature of an easement, and their contracts and agreements in respect to such rights are subject to the provisions of the statute of frauds, C. S., 988, and it would seem that ordinarily their easement in such other purchaser's lot may not be released by them by parol agreement. *Moore v. Shore*, 699.

Frauds, Statute of.

E Application of Statute.

a In General

1. The grantor in a deed sought to set it aside for fraud on the ground that the consideration for the deed was grantee's promise to execute a lease to the premises to the grantor for life which the grantee had refused to do. The grantee set up the statute of frauds, and the grantor admitted the promise was not in writing. C. S., 988: *Held*, the relief sought was not to enforce the promise or to recover damages for its breach, and the mere fact that the promise to lease was not in writing is not a valid defense to the action for cancellation. *Mitchell v. Mitchell*, 546.

c Executed Contracts

1. Where owner of servient tenement has expended money in reliance upon verbal agreement of owner of dominant tenement to release easement, owner of dominant tenement may be estopped from denying validity of agreement. *Moore v. Shore*, 699.

Fraudulent Conveyances.

A Transfers Invalid.

c Knowledge and Intent of Grantee

1. An assignment, valid in form, executed for a valid consideration without evidence that the assignee had knowledge of assignor's

Fraudulent Conveyances A c—*continued.*

insolvency at the time of the assignment *is held* valid and binding on other creditors of the assignor. *Equipment Co. v. Hardware Co.*, 921.

Garnishment.

D Lien and Liability of Garnishee.

a Liability of Garnishee in General

1. Where the Superior Court has jurisdiction of both the cause of action and the principal defendant, the garnishees cannot attack the validity of the garnishment proceedings against them on other grounds. *Trust Co. v. McCain*, 272.

E Proceedings to Enforce.

a Attachment and Execution

1. Defendant's property or choses in action in the hands of third persons may be attached under C. S., 798, and execution against the garnishees issued prior to final judgment against defendant, and the property held subject to the orders of the court pending final judgment. C. S., 397, 819. *Newberry v. Fertilizer Co.*, 182.

2. Where judgment has been regularly entered against certain garnishees in proceedings under C. S., 798, the clerk of the Superior Court may issue execution on the judgment against the garnishees without notice or a hearing, C. S., 397, 666, 819, the statutes being construed *in pari materia. Ibid.*

b Plaintiff's Bond

1. Where garnishees several times move the court to increase the bond required of plaintiff before judgment against the garnishees should be rendered, and do not appeal from the court's refusal of their motions, they may not successfully contend upon a subsequent appeal from the issuance of execution on the judgments against them that the amount of the bond required of plaintiff rendered the issuance of execution oppressive and unlawful under the circumstances of the case, the amount of the bond being in the sound discretion of the trial court. *Newberry v. Fertilizer Co.*, 182.

Grand Jury see Indictment.

Guardian and Ward.

C Custody and Care of Ward's Person and Estate.

a In General

1. *Held:* court should have authorized guardians to institute proceedings challenging validity of consent judgment of ward. *In re Reynolds*, 276.

2. Instrument purporting to divest ward's contingent interest in trust estate held not to justify refusal of guardian's application to attack ward's consent judgment renouncing interest in the trust, it appearing that instrument purporting to divest ward's interest was void. *Ibid.*

D Sale or Encumbrancing Realty.

c Approval of Court

1. An emergency judge has no power to approve and confirm an order of the clerk for the sale or mortgage of lands by a guardian when

Guardian and Ward D c—*continued.*

such emergency judge is not holding court in the county, the statute, C. S., 2180, prescribing that the "judge of the court" shall approve such order, and Art. IV, sec. 11, of the Constitution prescribing that special and emergency judges shall have the power and authority of regular judges in the courts which they are appointed to hold, and this result is not affected by the provisions of N. C. Code of 1931, sec. 766(b). *Ipock v. Bank*, 792.

2. An executrix and guardian applied to the clerk for an order to mortgage lands of her wards in order to pay pressing debts of the estate and prevent imminent suit by creditors to sell the lands to make assets. The clerk, under statutory authority, found the essential facts and duly issued the order prayed for. Pursuant to the order, the guardian executed the mortgage, obtained the loan and used the proceeds to pay debts of the estate. Thereafter the mortgagee, upon default, foreclosed the mortgage, bid in the property, and the guardian instituted this action to restrain the mortgagee, as purchaser at the sale, from selling the lands, upon the ground that the clerk's order authorizing the guardian to mortgage the lands was void in that it had not been properly approved by a judge of the Superior Court, C. S., 2180. There was no suggestion of fraud, overreaching, undue advantage or other inequitable element, or that the wards' estates had not received the full benefit of the loan. *Held*, under the circumstances the order would doubtless have been approved by a regular judge had it been presented to him, and under the facts the trial court had the power to approve the order *nunc pro tunc*, although the order had been made approximately nine years before. *Ibid.*

Habeas Corpus see Extradition.

Health—Power of State Board to order municipality to construct sewer system see Municipal Corporations B a.

Highways. (Negligence in operating automobiles see Automobiles.)

E Neighborhood Roads.

b Abandonment

1. The question of the discontinuance of a road which is not taken over by the State as a part of the county road system, Public Laws of 1931, chap. 145, and which is not a cartway, church road, or mill road, but is a neighborhood public road within the meaning of Public Laws of 1933, chap. 302, must be determined by a special proceeding instituted before the clerk, and where the question has been presented by petition to the board of county commissioners the judgment of the Superior Court on appeal dismissing the petition is correct, but that part of the judgment providing that the road shall remain open is erroneous and will be stricken out on further appeal to the Supreme Court. *In re Petition of Edwards*, 549.

Homicide.

A Homicide in General.

a Elements and Distinctions Between Degrees of Homicide

1. Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation; murder in

Homicide A a—*continued.*

the second degree is the unlawful killing of a human being with malice, the distinguishing difference between this degree of the crime and murder in the first degree being the absence of premeditation and deliberation or of either one of these elements; and manslaughter is the unlawful killing of a human being, the distinguishing difference between this degree of the crime and murder in the second degree being the absence of malice. *S. v. Keaton*, 682.

b Homicide in Attempt to Kill or Injure Another

1. Where the evidence upon a trial for murder tends to show that the defendant fired several shots with the purpose of killing a certain person, that one of the shots hit and killed an innocent bystander, the degree of the crime will be governed by the same principles as if the one defendant actually killed was the one for whom the fatal shot was intended. *S. v. Sheffield*, 374.

c Parties and Offenses

1. Where defendants conspire to rob a certain place, and a murder is committed by one or more of them in the attempt to perpetrate the robbery, each of them is guilty of murder in the first degree. C. S., 4200. *S. v. Stefanoff*, 443.

2. The State's evidence, controverted by testimony of the appealing defendant, was to the effect that all three defendants, while hunting with guns, went upon deceased's lands, with animus, and that all three defendants actively engaged in an assault upon deceased, one or more of defendants retaining his gun, and that one of them fatally shot deceased. The appealing defendant requested instructions that his mere presence at the scene of the homicide would not make him guilty of aiding and abetting in the absence of conspiracy, if he gave no aid or encouragement at or before the commission of the crime, even though he knew the crime was to be committed and approved of its commission, if his approval was not communicated to the perpetrator, and that if three persons are charged with killing another, but not with conspiracy, the jury should acquit if they have a reasonable doubt as to which one inflicted the injury. The requested instructions were refused and defendant excepted and appealed. *Held*, the exception cannot be sustained, for, although the requested instructions are correct as abstract principles of law, the State's evidence disclosed that defendants were acting in unison, making it immaterial which defendant actually fired the fatal shot, even though the bill of indictment did not charge conspiracy. *S. v. Jones*, 812.

B Murder.

a Murder in the First Degree

1. It is provided by C. S., 4200, that a murder perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or any other kind of wilful, deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony shall be deemed murder in the first degree, punishable by death. *S. v. Keaton*, 682.

Homicide—*continued.*

E Justifiable or Excusable Homicide.

a Self-Defense

1. A person assaulted by an unarmed assailant, but who is never apprehensive of his life or great bodily harm, commits manslaughter at least in repelling the assault by killing his assailant with a pistol. *S. v. Keeter*, 482.

G Evidence.

b Presumptions and Burden of Proof

1. The intentional killing of a human being with a deadly weapon raises the presumptions that the killing was unlawful and was done with malice, constituting murder in the second degree, and since the elements of premeditation and deliberation are not presumed from such killing, the elements of premeditation and deliberation must be established by the State and found by the jury to constitute such killing murder in the first degree. *S. v. Keaton*, 682.

2. Where it is admitted or shown by the evidence that defendant intentionally killed another with a deadly weapon, the burden is upon defendant to rebut the presumptions arising therefrom by establishing to the satisfaction of the jury legal provocation which will rebut the presumption of malice and thus reduce the crime to manslaughter or excuse it altogether on the ground of self-defense, unavoidable accident or misadventure. *Ibid.*

c Dying Declarations

1. Testimony that deceased had been shot and was in imminent danger of death and had repeatedly stated that she thought she was going to die, and that she did die less than a week thereafter, is sufficient to support testimony of declarations made by her of circumstances directly attending the homicide and forming a part of the *res gestæ*, it not being necessary that declarant should die immediately after making such declarations, it being sufficient if declarant is in imminent danger of death, apprehends such danger, and that death ensue. *S. v. Dalton*, 507.

2. Testimony of dying declarations cannot be extended to declarations of acts antecedent and unrelated to the act causing death. *Ibid.*

G Evidence in Prosecutions for Homicide.

d Competency and Admissibility in General

1. Intended victim, hit by some of shots, may exhibit wounds to jury to show range of bullets and that fatal shot might have hit him. *S. v. Sheffield*, 374.

2. Where upon a trial for murder the evidence tends to show that the defendant intended to kill a person against whom he had malice, and that one of the shots hit and killed an innocent bystander, it is competent to show that the intended victim and the accused had a serious quarrel with each other of several years standing that continued up to the time of the fatal shooting, and as both parties gave their version of the quarrel, the admission of the intended victim's testimony thereof was not prejudicial. *Ibid.*

Homicide G d—*continued.*

3. Where defendant in a prosecution for homicide contends he killed deceased in self-defense, and introduces evidence in support of the contention, testimony that on the afternoon preceding the night on which the killing occurred deceased had threatened to kill defendant upon sight is competent in support of the contention of self-defense, although the threat was not communicated to defendant prior to the homicide, and the exclusion of such evidence will be held for reversible error. *S. v. Dickey*, 417.

e Weight and Sufficiency

1. Where in a prosecution for homicide there is sufficient evidence of defendant's guilt of murder in one of the degrees of the crime defendant's motion as of nonsuit is properly refused. *S. v. Brooks*, 113.

2. Evidence that defendant, while in the custody of officers of the law who had arrested him when they apprehended him in the commission of a robbery, drew his pistol in an attempt to escape, and with premeditation and deliberation shot one of the officers in his attempt to escape, *is held* sufficient to support an instruction to the jury on the question of murder in the first degree. *Ibid.*

3. Defendant admitted killing deceased intentionally with a deadly weapon, raising the presumption of an unlawful killing with malice, and the State's evidence of premeditation and deliberation, necessary to constitute murder in the first degree, is held sufficient to support the submission to the jury of the question of defendant's guilt of the capital felony. *S. v. Bittings*, 798.

H Trial.

e Instructions

1. In this prosecution for murder, defendant's exception to the charge of the court to the jury on the ground that it failed to instruct the jury that they must find that the element of malice existed in the mind of defendant at the time of the killing in order to convict him of murder in the first degree, is not sustained, it appearing from the record that the court fully and accurately charged the jury upon the element of malice immediately after instructing them upon the elements of premeditation and deliberation and charged them that it might be said to exist where there is an intentional and unlawful killing of a human being without lawful excuse or mitigating circumstances. *S. v. Dalton*, 507.

2. The evidence in this case tended to show that defendant intentionally shot and killed his sweetheart with a pistol, evidently as a result of a lovers' quarrel. Defendant interposed the defense of insanity resulting from syphilis, but introduced no evidence of legal provocation or matters in mitigation of the offense. *Held*, in the absence of evidence tending to rebut the presumptions arising from the intentional killing with a deadly weapon that the killing was unlawful, and done with malice, there was no evidence of defendant's guilt of manslaughter, and it was not error for the court to fail to submit the question of defendant's guilt of manslaughter to the jury. *S. v. Keaton*, 682.

Husband and Wife. (Divorce see Divorce.)

B Privileges and Disabilities of Coverture. (Dower see Dower.)

e Testimony by Wife Against Husband

1. One of defendants was charged with having feloniously set fire to a dwelling-house, C. S., 4245, and the other defendant with having feloniously procured the first defendant to commit the crime. C. S., 4175. The wife of the second defendant was permitted to testify in corroboration of another witness as to the origin of the fire and to further testify as to matters tending to incriminate her husband. *Held*, the wife was not competent to testify against her husband in the prosecution, and the admission of her testimony entitles him to a new trial. C. S., 1802. *S. v. Kluttz*, 726.

Indictment. (For embezzlement see Embezzlement B a.)

A Necessity for, and Formal Requisites.

b Finding by Duly Qualified Grand Jury

1. C. S., 2334, 2314, 2333, providing that grand juries for the counties affected should be chosen for six months at the first terms of court for the fall and spring terms, were made applicable to the county in question by Public Laws of 1931, chap. 131. Thereafter Public Laws of 1931, chap. 131, was repealed and C. S., 2334, was amended to provide that the grand juries for the county in question should be drawn at the spring term to serve for twelve months, Public Laws of 1933, chap. 92. The amendment went into effect in 1933 subsequent to the first spring term of the county in question and defendant was tried on an indictment returned by a grand jury chosen for the fall term under the act of 1931: *Held*, the indictment was returned by a duly constituted grand jury, and defendant's exception relating thereto cannot be sustained, the "spring term" referred to in the act of 1933 meaning the first spring term, and the amendment, therefore, not being effective for the year 1933. *S. v. Dalton*, 507.

Industrial Commission see Master and Servant F.

Infants.

B Contracts and Conveyances of Infants.

a Validity in General

1. Courts of equity look with a jealous eye on contracts that materially affect the rights of an infant. *In re Reynolds*, 276.

Insane Persons.

A Commitment.

c Appeals to Judge

1. Judge held to have jurisdiction to remand cause to clerk for hearing required by law, although clerk's order of commitment appealed from was without warrant of law because entered without notice and hearing, the clerk having originally acquired jurisdiction by filing of statutory affidavit, C. S., 2285. *In re Dewey*, 714.

Insurance. (Surety Bonds see Principal and Surety.)

C Insurance Agents.

b Authority

1. Under terms of policy local agent held without authority to extend credit for payment of first annual premium. *Trust Co. v. Ins. Co.*, 460.

Insurance C—*continued.*

c Compensation and Commissions

1. *Held:* under terms of special agent's contract with general agent, special agent could not hold insurer liable for commissions. *Wood v. Ins. Co.*, 70.

D Insurable Interest.

b In Life of Another

1. The beneficiary named in a policy of life insurance who pays the premiums thereon will not be allowed to recover on the policy upon the death of the insured where the beneficiary had no insurable interest in the life of the insured, such policies being void as gaming contracts contrary to our public policy. *Wharton v. Ins. Co.*, 254.

2. Nephews and nieces have no insurable interest in the life of their aunt merely by virtue of the relationship. *Ibid.*

E The Contract in General.

a Execution of Policy and Effective Date Thereof

1. The application and the policy of insurance sued on in this case expressly provided that the policy would not be in force until after the first annual premium had been actually paid in cash and the company's receipt therefor delivered to insured, and that the provisions in respect thereto could be waived only by certain executive officers of the company in writing. The policy was issued and sent to insurer's local agent, who allowed insured to take possession thereof without paying the first annual premium and without delivery of the company's receipt. Insured became totally disabled under the terms of the policy, and suit on the disability clause was instituted prior to the payment of the premium: *Held*, the local agent was without authority to bind insurer to an extension of credit for the payment of the first annual premium, and in the absence of waiver by insurer, a nonsuit should have been entered. *Trust Co. v. Ins. Co.*, 460.

2. Evidence of payment of first premium upon application, resulting in putting insurance in force, held for jury. *Wilkerson v. Ins. Co.*, 882.

b Validity and Construction in General

1. A clause in a policy of fire insurance providing that insurer should not be liable if other insurance is taken out on the property without notice is valid, but will be construed in connection with a New York Standard Mortgagee Clause attached to the policy. *Ins. Co. v. Ins. Asso.*, 95.

2. An incontestable clause in a policy of life insurance cannot deprive our courts of the power to declare the policy void as being in contravention of well settled public policy. *Wharton v. Ins. Co.*, 254.

3. Clauses in insurance policies providing for forfeiture of all or part of the benefits provided therein will be construed favorably to assured. *Womack v. Ins. Co.*, 445.

c Reformation of Policy

1. A mortgagee is not entitled to a reformation of a policy of fire insurance after the happening of a fire covered thereby, merely

Insurance E c—*continued.*

upon the finding of the jury that the standard mortgagee clause was omitted therefrom by mistake of the draughtsman, where there is no allegation that the clause was fraudulently omitted from the policy, nor evidence of mutual mistake, or mistake on one side and fraud on the other. *Walls v. Assurance Corp.*, 903.

F Group Insurance.

b Termination of Employee's Certificate by Termination of Employment

1. An employee insured under a group policy, providing for disability benefits to employees becoming totally and permanently disabled, may not recover upon such disability clause unless he suffers disability which is total and permanent while insured by the policy, and where he suffers disability which is not permanent at the time he is fired, not for disability but for breaking employer's rules, he may not recover disability benefits upon the disability later becoming total. *Boozer v. Assurance Society*, 848.

d Expiration, Renewal or Modification of Master Policy

1. Where the allegations, evidence and verdict establishes the fact that insured under a group policy became totally and permanently disabled while the policy was in force and prior to the modification of the master policy by striking out the disability provisions therein, the question of whether insurer and employer had the right to change the master policy and the certificates issued thereunder by striking out the disability provisions becomes immaterial, and the jury's verdict in insured's favor on the controverted issues of fact will be upheld. *Perry v. Assurance Society*, 122.

H Cancellation of Policy.

a Cancellation by Insurer

1. Defendant insurer sent written notice of the cancellation of a policy of fire insurance containing the standard mortgagee clause to the mortgagee covered thereby, the insurer having the right to cancel the policy at its option according to the terms of the policy by giving insured five days written notice of cancellation. All the evidence showed that insurer desired to cancel the policy and proceeded to do so under its terms without the consent of plaintiff mortgagee, and there was evidence that loss covered by the policy occurred within five days from the date plaintiff received defendant's written notice of cancellation, and that plaintiff, in compliance with insurer's request in the notice of cancellation, mailed the policy to insurer during the five-day period, but before he had knowledge of the occurrence of the fire. *Held*, the provision for five days notice before cancellation was for the protection of plaintiff, and insurer could not effect cancellation until the expiration of five days from the receipt of the written notice by plaintiff, and whether plaintiff intended to waive this provision and did waive it by returning the policy as requested was for the determination of the jury, and insurer's motion as of nonsuit was properly denied. *Wilson v. Ins. Co.*, 635.

d Measure of Damages for Wrongful Cancellation

1. In an action to recover against insurer for its wrongful cancellation of a policy of insurance plaintiff may recover the sums paid by him

Insurance H d—*continued.*

as premiums on the policy if he so elects, or in proper cases he may recover the value of the policy at the date of cancellation, or the sum presently required to obtain like protection for plaintiff. *Chamberlain v. Ins. Co.*, 622.

I Avoidance or Cancellation of Policy for Misrepresentation or Fraud.

b Matters Relating to Insured

1. Plaintiff, in her application for the policy in suit, failed to disclose in her written answer to a written question, that she had been treated within five years *prior to* the application by a physician, and the policy provided that insurer might cancel same for misleading statements in the application. The verdict of the jury, supported by evidence, established that the treatment which plaintiff did not reveal in her application was for an illness other than the cholecystitis causing the disability sued on, that prior to the application for the policy plaintiff had not suffered from cholecystitis, and that for five years prior to the application for the policy plaintiff had had no departure from good health other than that disclosed on the application. *Held*, the failure of plaintiff to disclose the treatment by the physician on the application was not a suppression of a material fact and was not adequate cause for cancellation of the policy. C. S., 6289. *Anthony v. Protective Union*, 7.

2. N. C. Code, 6460, expressly provides that policies issued without a medical examination may not be declared forfeited by insurer for misrepresentations by insured as to health except in cases of fraud, and where fraud in the procurement of the policy is alleged and proved the beneficiary named in the policy may not recover, and a representation by insured that he had never consulted a physician or been in a hospital is material, C. S., 6289, and testimony of physicians that insured was not in sound health at the date of the delivery of the policy is competent on the issue of fraud. *Potts v. Ins. Co.*, 257.

3. Where insurer does not tender an issue of fraud in the procurement of a policy issued without medical examination, but tries its case solely on the theory that insured was not in sound health at the date the policy was issued, and does not except to the issue submitted by the court based on this theory, testimony of physicians that insured was not in sound health at the date of the delivery of the policy is incompetent as being testimony of the very question to be decided by the jury, and the exclusion from the evidence of insured's application containing the alleged misrepresentations will not be held for error, since, upon the theory of trial, insured's unsound health at the date the policy was issued would not preclude recovery, N. C. Code, 6460. *Ibid.*

4. The provisions of N. C. Code, 6460, that where a policy of life insurance in a sum less than $5,000 is issued without a medical examination, insurer may not avoid same for insured's misrepresentations as to health except in cases of fraud, enter into and become a part of all such policies written in this State after the enactment of the statute, and, except in cases of fraud, insurer may not declare a forfeiture under the provisions of the policy

Insurance I b—*continued.*

that insurer should not be liable if insured was not in sound health at the time of the delivery of the policy, or had not been in good health for two years prior thereto, etc., since the provisions of the policy in conflict with the statute are void. *Headen v. Ins. Co.*, 270.

5. The jury found from the evidence that insured had not been attended by a physician for serious disease within two years prior to making application for the policy, and that insured had not had any serious disease of heart or kidneys prior to such application. The only defense interposed by insurer was that insured had made misrepresentations in her application relating to the matters passed upon by the jury. *Held*, plaintiff was entitled to recover, the verdict of the jury being determinative of the rights of the parties. *Headen v. Ins. Co.*, 860.

J Avoidance or Forfeiture of Policy for Breach of Warranties or Conditions.

b Nonpayment of Premiums. (Ineffectiveness of policy for failure to pay first annual premium see hereunder E a.)

1. Under terms of policy insurer could not have applied dividend to payment of premium in absence of election by insured, the policy providing that dividends should be paid in cash in absence of election by insured, and policy was forfeited for nonpayment of premiums. *Harden v. Ins. Co.*, 230.

2. Where an insured signs a statement for reinstatement of a policy containing material misrepresentations as to his health, cashes checks from the insured in payment of his dividend on the policy and waits over three years before bringing action to have the policy declared to be in force, he is estopped from asserting that he had paid the premiums on the policy within the grace period, and insured is entitled to a judgment as of nonsuit. *Hutson v. Ins. Co.*, 326.

3. Under facts of this case policy was not forfeited for failure to pay balance of premium due under extension agreement, insured having become totally and permanently disabled within terms of policy and thereby rendered incapable of making payment. *Rand v. Ins. Co.*, 760.

4. The rights of the parties under a policy of life insurance are to be determined as of the date of the death of the insured, and where insured, a few days before his death, writes insurer requesting an extension of time for payment of premium, and insurer, without knowledge of insured's intervening death, writes insured, after his death, agreeing to grant the request upon insured's signing an extension agreement and the payment of a small interest charge, the rights of the beneficiary under the policy are not affected by the insurer's letter relating to an extension of time the terms of which were not complied with, and the beneficiary's rights under the policy will be determined according to its provisions for paid-up and extended insurance upon nonpayment of an annual premium. *Owens v. Ins. Co.*, 864.

Insurance J—*continued.*

d Failure to Give Notice of Accident

1. Plaintiff brought action on a policy of automobile liability insurance which provided that insured should give immediate written notice of the occurrence of an accident covered by the policy. A guest riding in insured's car was injured in an accident but the injuries seemed slight and insured had no reasonable apprehension of a claim for damages therefor until approximately four months thereafter when it was discovered that the injuries were more serious than at first thought and the guest claimed damages of insured. Insured then immediately gave written notice of the accident to insurer. *Held*, whether the notice was given insured within a reasonable time under the facts and circumstances was properly submitted to the jury. *Ball v. Assurance Corp.*, 90.

e Additional Insurance and Encumbrancing Property

1. The beneficiary named in a New York Standard Mortgagee Clause attached to a policy of fire insurance returned the policy to the insured on the ground the insurer was not acceptable to the beneficiary, and the insured in compliance with the request of the beneficiary obtained insurance in another company with similar loss payable clause, but gave no notice to the first insurer of the second policy. The first policy contained a provision that it should be void if other insurance was taken out on the property without notice to insured. *Held*, neither the beneficiary repudiating the first policy nor the insured taking out other insurance in violation of its provisions can assert any right against the first insurer for loss by fire, nor may their assignee, the insurer in the second policy, acquire any right by subrogation. *Ins. Co. v. Ins. Asso.*, 95.

K Estoppel, Waiver, or Agreements Affecting Right to Avoid or Declare Forfeiture.

a Knowledge and Intent of Insurer

1. All the evidence was to the effect that insurer had no knowledge that its local agent had delivered the policy in suit without receiving payment of the first annual premium and without delivering the company's receipt therefor. The policy provided that it should not be effective until these acts had been done, and that its local agent should have no authority to waive the provisions of the policy in this respect: *Held*, a letter written insured by insurer's president thanking insured for the business and stating that the policy had been delivered, and a notice mailed by the company of the due date of a subsequent premium is insufficient to constitute a waiver by insurer of the provisions of the policy relating to payment of the first annual premium, knowledge and intention being the basis of waiver in such cases. *Trust Co. v. Ins. Co.*, 460.

L Extent of Liability of Insurer.

b Paid-up and Extended Insurance

1. The policy in suit contained an extension clause providing that upon nonpayment of an annual premium the policy should have a certain paid-up insurance value or extended insurance for a specified term, but that if insured had borrowed on the policy, the paid-up insurance should be reduced in the ratio of the indebtedness to the net value of such paid-up insurance, and that the extended insur-

Insurance L b—*continued.*

ance should be for as long a term as the balance, left after deducting the indebtedness from the net value of the extended insurance, would purchase as a net single premium. Upon competent evidence the trial court found that the "net value of the extended insurance" was in a sum less than the amount borrowed on the policy by insured during his lifetime. *Held*, by the terms of the policy there were no funds available for the purchase of paid-up or extended insurance, the loan against the policy being in excess of the net value of the extended insurance provided for in the policy, and the beneficiary was not entitled to recover on the policy under the extension feature thereof. *Owens v. Ins. Co.*, 864.

c Cash Surrender Values

1. Where a policy of life insurance has, as of the date of insured's death, a certain cash or surrender value, which, according to the terms of the policy, is payable to insured upon his request and valid surrender of the policy, the beneficiary therein may not recover such cash or surrender value where it appears that insured, prior to his death, made no request therefor and did not surrender the policy, nor may a letter written by insured a few days before his death, requesting an extension of time for payment of a premium, be construed as a request for the cash or surrender value of the policy. *Owens v. Ins. Co.*, 864.

N Persons Entitled to Proceeds.

a War Risk Insurance

1. A soldier, having a policy of War Risk Insurance in which his mother and father were jointly named beneficiaries, died intestate leaving his mother and father him surviving as his sole heirs at law. No installments were paid either the mother or father prior to their respective deaths. *Held*, the whole sum is now assets of the estate of the deceased soldier and should be paid equally to the respective administrators of his father's and mother's estates, and the fact that one parent lived longer than the other and was therefore entitled to receive more money in installments does not affect their rights as distributees. C. S., 137(6). *In re Estate of Reid*, 102.

c Loss Payable Clauses

1. A New York Standard Mortgagee Clause attached to a policy of fire insurance constitutes a separate contract between the insurer and the trustee, mortgagee or beneficiary. *Ins. Co. v. Ins. Asso.*, 95.

2. Mortgagee returning policy and requiring mortgagor to obtain other insurance *held* not entitled to recover under loss payable clause in first policy. *Ibid.*

P Actions on Policies.

b Evidence

1. In this action on a disability clause in a policy of life insurance, the admission in evidence of another policy issued by insurer upon the same insured, which contained provisions in all respects similar to the policy in suit, and upon which insurer was paying benefits, *is held* to show a circumstance in the nature of an admission and not to constitute prejudicial error. *Rand v. Ins. Co.*, 760.

Insurance—*continued.*

R Accident and Health Insurance.

a Accident Insurance

1. Where a policy of life insurance contains a provision for additional benefit if insured should be killed by accidental means as defined by the policy, and the policy expressly provides that the provision should not cover death while insured was riding in an aeroplane otherwise than as a fare-paying passenger: *Held*, an action on the accidental death provision is properly nonsuited where all the evidence tends to show that insured was killed while riding as a guest in an aeroplane piloted by his employer who had a private pilot's license expressly providing that the holder thereof was not authorized to carry passengers for hire, and that no fare was paid or contemplated by either. *Padgett v. Ins. Co.*, 364.

2. Insured brought suit on a policy of accident insurance providing for a diminishing schedule of liability if the insured should change his occupation to one classified in the policy as more hazardous. When the policy was issued plaintiff was employed as warehouse foreman, and as a part of his duties he was sometimes required to run the machinery in the plant. Thereafter, plaintiff was discharged, and while unemployed, returned to the plant to cut dewberry stakes for his garden, and while using a circular saw for this purpose, accidentally cut his hand off. Defendant contended that plaintiff was injured while engaged in the more hazardous occupation of "sawyer not using automatic guard": *Held*, the change of occupation referred to in the policy did not relate to mere temporary acts generally performed by those in other occupations, and as the act causing the injury in suit could have been done while insured was engaged in the occupation of warehouse foreman, the jury's finding from the evidence was that the insured had not changed his occupation to one classified by the policy as more hazardous will not be disturbed on appeal. *Womack v. Ins. Co.*, 445.

c Disability Insurance

1. Insured brought suit on a policy providing for certain benefits if insured should become permanently and totally disabled. The policy provided that in the event total disability existed for a period of ninety days it should be presumed permanent. Insured furnished insurer proof of disability signed by a physician stating that insured had been disabled for a period of over 71 days, and that such disability would probably last for two or three weeks longer. On the trial insured offered evidence from which the jury found that he was totally and permanently disabled. *Held*, insured furnished evidence of total and presumably permanent disability, which the jury later found to be total and permanent, and such evidence was sufficient for a recovery under the terms of the policy. *Baker v. Ins. Co.*, 106.

2. Evidence of totality and permanency of disability held sufficient to be submitted to jury in this case. *Ibid.*

3. Where plaintiff's examination in chief and the testimony of other witnesses is sufficient to be submitted to the jury on the question of plaintiff's total and permanent disability under the provisions of the policy in suit, testimony elicited from plaintiff on cross-

Insurance R c—*continued.*

examination that he was able to direct his business for compensation and profit during the alleged disability does not justify a judgment as of nonsuit. *Guy v. Ins. Co.*, 118.

4. Evidence of total and permanent disability within provisions of policy held sufficient to be submitted to the jury. *Blackman v. Ins. Co.*, 429.

5. Plaintiff brought suit on a clause in an insurance policy providing certain benefits if plaintiff should furnish due proof of total and permanent disability and that such disability had existed for three months. It was admitted at the trial that at the time of instituting the action plaintiff was toally disabled and had been so disabled for more than three months, but the only evidence as to the permanency of the disability was the certificate of plaintiff's physician that the disability was probably temporary and would be removed by operations on plaintiff's eyes for cataracts. *Held*, in the absence of evidence that such disability was at least probably permanent at the time of instituting the action, defendant's motion as of nonsuit should have been allowed. *Read v. Ins. Co.*, 458.

6. Evidence held to disclose disability which was not total at time of termination of insurance, and insurer could not recover on disability clause. *Boozer v. Assurance Society*, 848.

Interveners.

A Right to Intervene.

b Time of Intervention; Final Judgment

1. Creditor of heir held entitled to intervene in proceeding to sell intestate's lands to make assets, the judgment for the sale of the land retaining the cause for further orders not being a final judgment. *Hood v. Freel*, 432.

Intoxicating Liquor.

B Possession.

a In General

1. Actual or constructive possession of intoxicating liquor is sufficient for a conviction under C. S., 3411(b). *S. v. Norris*, 191.

G Prosecution and Punishment.

c Evidence

1. Evidence of defendant's guilt in this prosecution for possession of intoxicating liquor and implements for its manufacture, C. S., 3411(b), (d), *is held* sufficient, and defendant's motion as of nonsuit was correctly refused. *S. v. Norris*, 191.

d Instructions and Directed Verdict

1. Uncontradicted evidence that upon the officers' showing of a search warrant to defendant, the defendant went out to feed his hogs and that other members of his family tried to dispose of or conceal intoxicating liquor and implements for its manufacture which were in the house, and that the officers found liquor and implements in the house and a rig lately fired near the house is held sufficient to support an instruction by the trial court that the jury should find defendant guilty if they believed the testimony beyond a reasonable doubt. *S. v. Norris*, 191.

Judges.

A Rights, Powers and Duties. (Jurisdiction affecting orders and judgments of another judge see Courts A f.)

b Special and Emergency Judges

1. Emergency judge not holding court may not approve clerk's order authorizing guardian to mortgage land. *Ipock v. Bank*, 791.

Judgments.

A Nature and Essentials. (Of judgments on pleadings see Pleadings I c.)

b Judgments in Rem

1. A judgment in an action to determine the heirs of a deceased and to distribute the estate is a judgment *in rem*. *Ferguson v. Price*, 37.

D Judgments by Default.

a Grounds and Requisites

1. Summons was served on the corporate defendant requiring it to appear and answer in a county other than the county in which the action was instituted. Defendant mailed answer to the clerk of the county of trial, but it was received after expiration of time for filing. N. C. Code, 509. Judgment by default and inquiry was entered which was later executed, resulting in a verdict in plaintiff's favor. *Held*, the summons was fatally defective, and as the judgment was entered for want of an answer, defendant had made no appearance and the court had no jurisdiction of defendant, and the judgment is void, and should have been set aside on defendant's motion thereafter made to vacate same. *Harrell v. Welstead*, 817.

b By Default and Inquiry

1. Upon judgment by default and inquiry only question of damages is open for determination. *Bowie v. Tucker*, 56.

2. A judgment by default and inquiry establishes a right of action of the kind properly pleaded in the complaint, and determines the right of plaintiff to recover at least nominal damages and costs, and precludes defendant from offering evidence on the execution of the inquiry to show that plaintiff has no right of action. C. S., 596. *DeHoff v. Black*, 687.

3. A judgment by default and inquiry in an action to recover damages sustained by plaintiff resulting from the collision of two trucks on a public highway, one of which trucks was owned by plaintiff, will not preclude defendants from introducing evidence on the execution of the inquiry tending to show how the collision occurred and that the accident was the result of the negligence of plaintiff's driver, the evidence not being related to the issue of contributory negligence, but being competent on the question of the amount of damages sustained by plaintiff as a proximate result of defendants' negligence, plaintiff being entitled to recover over and above nominal damages only damages sustained as a proximate result of defendants' negligence. *Ibid.*

4. Plaintiff obtained a judgment by default and inquiry against defendants in his action against them to recover damages resulting from a collision between two trucks, one of which was owned by plaintiff. Plaintiff alleged that the other truck was driven by one of defendants, operated by another, and owned by the third defendant. *Held*, upon the execution of the inquiry, the alleged op-

Judgments D b—*continued.*

erator or lessee of the truck was precluded by the judgment by default and inquiry from introducing evidence that he was in no way connected with truck causing plaintiff's damage, either as lessee or otherwise, such evidence relating only to the question of liability which was conclusively established by the judgment by default and inquiry. *Ibid.*

F On Trial of Issues.

f Protection of Respective Rights of Parties

1. Where judgment as of nonsuit is entered in favor of defendants pleading the statute of limitations applicable, a judgment later entered against the defendants failing to plead the statute, which judgment adversely affects the rights of the defendants obtaining the judgment of nonsuit, is erroneous. *Hargett v. Lee*, 536.

G Entry, Recording and Docketing.

b Time and Place of Rendition

1. Court's approval *nunc pro tunc* of clerk's order authorizing guardian to mortgage lands is upheld. *Ipock v. Bank*, 791.

K Attack and Setting Aside.

a Consent Judgments

1. While the authority of an attorney is presumed when he professes to represent a client, where the alleged client has assumed the burden of proof and satisfied the court that an attorney signing a consent judgment in her behalf was without authority and that she was not present at the hearing and had not agreed to the judgment or authorized anyone to agree thereto, the court's judgment setting aside the consent judgment will be upheld on appeal. *Bank v. Penland*, 323.

b For Surprise and Excusable Neglect

1. A joint answer by the individual and corporate defendant was prepared by an attorney of another State and mailed to the clerk of the trial court, but was not received by him until time for filing answer had expired, N. C. Code, 509. Judgment by default and inquiry was entered, and the individual defendant who had been duly serviced with process, moved to vacate same for surprise and excusable neglect. *Held*, the individual defendant had entrusted his case to one not licensed to practice in this State, and employed no attorney regularly practicing in the courts of the county or the district, and his failure to answer is attributable to his own negligence, and his motion to vacate was properly refused. *Harrell v. Welstead*, 817.

2. The refusal of a motion to set aside a judgment for surprise and excusable neglect will be upheld where the trial court finds from competent evidence that notice of the time set for trial was duly sent movant's counsel through the mail, but was not received by him. *Clayton v. Adams*, 920.

f Procedure

1. Action to have judgment applied to debt due plaintiff judgment debtor held not attack of judgment and defendant judgment creditor's contention that plaintiff's remedy was by motion in the cause *is held* untenable. *Bank v. Kerr*, 610.

Judgments K f—*continued.*

2. Procedure to set aside order for irregularity is by motion in the cause within a reasonable time, and refusal to hear motion on ground that one Superior Court judge is without jurisdiction to set aside order of another Superior Court judge is error. *Coffin Co. v. Yopp*, 716.

3. Remedy to correct judgment is by motion in the cause if irregular and by appeal if erroneous. *S. v. Hollingsworth*, 739.

4. A void judgment is a nullity and may be set aside on motion. *Harrell v. Welstead*, 817.

L Operation of Judgments as Bar to Subsequent Action.

a Judgments as of Nonsuit

1. In order for a judgment of nonsuit to operate as *res adjudicata* in a subsequent action brought under the provisions of C. S., 415, it is required that the trial court find as a fact that the second suit is based upon substantially identical allegations and evidence as the first, and where the trial court hears no evidence and finds no facts his judgment dismissing the action upon the plea of estoppel by the former judgment is prematurely and inadvertently made. *Batson v. Laundry*, 371; *Ferguson v. Ferguson*, 911.

b Final and Interlocutory Judgments

1. Judgment that lands need not be sold to make assets held interlocutory and not to bar proceeding for sale of lands upon insufficiency of personalty. *Place v. Place*, 676.

c Persons Concluded

1. Heirs served by publication held barred from bringing subsequent action against administrator for share in estate. *Ferguson v. Price*, 37.

2. An unappealed from judgment sustaining a demurrer of the chief State bank examiner for failure of the complaint to state a cause of action against him for an injury received by a tenant when the tenant fell down an elevator shaft in a building operated by the bank examiner in the interest of the creditors of the bank will not support a plea of *res judicata* as to the Commissioner of Banks in a subsequent action brought by the same plaintiff against the former defendant and the Commissioner of Banks later succeeding the bank examiner in the liquidation of the bank, the recovery being payable out of assets in the hands of the Commissioner of Banks, the bank examiner being an unnecessary party, and his joinder resulting in no injustice, and the Commissioner of Banks being the real party in interest, and *res judicata* applying only to parties to the action. *Hood v. Mitchell*, 156.

f Plea and Procedure

1. Upon a plea of estoppel by judgment, it is error for the court, simply upon the reading of the pleadings, to dismiss the action. *Dix-Downing v. White*, 567.

M Conclusiveness of Adjudication.

a Matters Concluded

1. A widow, executrix of her husband's estate, instituted proceedings to recover from the estate the proceeds of sale of land formerly held

Judgments M a—*continued.*

by her and her husband by entireties, which sale was made by her husband and the proceeds thereof in his possession at the time of his death, the widow claiming that the right of survivorship attached to the funds. Judgment was entered that she recover the sum demanded. Thereafter the widow instituted a proceeding to have lands sold to make assets to pay the judgment. *Held*, the real question litigated and not the issues upon which the judgment was entered is determinative of whether the judgment was solely against the proceeds of sale or a general claim against the estate to satisfy which lands of the estate may be sold. *Place v. Place*, 676.

b Persons Concluded

1. C. S., 492, giving a party served by substitution or his representatives the right to appear and defend the action within a prescribed time after judgment will be broadly construed to include within the term "representatives" all persons succeeding the rights of such party, in this case a mortgage creditor. *Hood v. Freel*, 432.

Jury.

A Competency of Jurors, Challenges and Objections.

d Peremptory Challenges

1. Where several bills of indictment against a defendant are consolidated for trial, the defendant is entitled to but four peremptory challenges to the jury and not to four peremptory challenges for each bill, the consolidated bills being treated as separate counts of the same bill. N. C. Code, 4623. *S. v. Aldridge*, 850.

B Jury Boxes and Special Venires.

d Alternate Jurors

1. Where defendant makes no request for a finding that the trial would likely be protracted, it will be presumed on appeal that the court's order for an alternate juror is supported by sufficient findings of fact. *S. v. Dalton*, 507.

2. Act providing for alternate juror where it seems likely that trial will be protracted is constitutional. *Ibid.*

3. Where the court finds that one of the regular jurors was sick and incapacitated it is sufficient to support his order that the alternate juror selected in the case should serve as a juror. *Ibid.*

C Right to Trial by Jury. (Upon report of referee see Reference D b.)

b In General

1. The essential attributes of trial by jury guaranteed by Art. I, sec. 13, are the number of jurors, their impartiality and a unanimous verdict, and chap. 103, Public Laws of 1931, providing that the court may order the selection of an alternate juror in those cases which seem likely to be protracted, does not infringe upon the constitutional provisions, the alternate not being technically a juror until a member of the jury has died or been discharged and the alternate is made a juror by order of the court, and the alternate being selected in like manner with the regular jurors and having the same safeguards thrown around him and being given equal opportunities with them of hearing the case, and his presence not being prejudicial, and the verdict being finally returned by unanimous verdict of twelve good and lawful men. *S. v. Dalton*, 507.

Justices of the Peace.

E Review of Proceedings.

a Appeal. (Jurisdiction of Superior Court upon appeal see Courts A e.)

1. It is not required that an appeal from a judgment of the justice of the peace be first taken to the general county court of the county, but the appeal may be taken directly to the Superior Court. Art. IV, sec. 27. *McNeely v. Anderson*, 481.

Kidnapping.

C Judgment and Sentence.

b Sentence

1. Life sentence is not mandatory upon conviction of kidnapping under chapter 542, Laws of 1933. *S. v. Kelly*, 660.

Laches see Cancellation and Rescission of Instruments B c.

Landlord and Tenant. (Landlord's liability to tenant for injuries from condition of premises see Negligence A c.)

D Terms for Years.

h Condition of Premises Upon Surrender and Landlord's Rights upon Termination of Lease

1. Plaintiff leased certain lands together with eleven mules used in cultivating same, the contract providing that at the expiration of the term the lessee should return the "personal property in as good condition as it now is, or its equivalent in kind." Five mules died or were disposed of by the lessee, but the lessee bought five other mules prior to the termination of the lease. The five mules subsequently purchased by the lessee were sold and the proceeds of sale were in the hands of a creditor of the lessee at the time of the submission of this controversy without action. *Held*, in the absence of an agreed fact that the lessee had purchased the five mules as agent of the lessor, or had purchased them with the intention of replacing the lessor's mules with them, the lessor had no title to the five mules so as to be able to maintain a suit for the proceeds of the sale of the mules. *Forehand v. Farmers Co.*, 827.

Libel and Slander—Limitation of actions for, see Limitation of Actions B b 3.)

Life Estates.

D Forfeiture of Estate to Remainderman.

a Nonpayment of Taxes

1. It is not required that a remainderman should settle for the taxes against the property before bringing action against the life tenant under C. S., 7982, to have her estate forfeited for allowing the property to be sold for taxes and failing to redeem same within time prescribed by law. *Bryan v. Bryan*, 464.

2. By the express terms of the statute, C. S., 7982, a life tenant forfeits his interest in lands to the remaindermen when he fails and refuses to pay taxes thereon and suffers the lands to be sold for taxes and fails to redeem same within one year from such sale, and plaintiff's contention that the estate of the life tenant is not forfeited until the tax-sale certificate is foreclosed and the land sold by a commissioner is untenable. *Sibley v. Townsend*, 648.

Limitation of Actions.

A Statutes of Limitation.

c Actions Barred in Three Years

1. An action to avoid an instrument on the ground of fraud is barred after the elapse of three years from the accrual of the cause of action. *Hargett v. Lee*, 536.

B Computation of Period of Limitation.

a Accrual of Right of Action

1. An administrator *d. b. n.* appointed after the removal or death of the former administrator has a right to sue the bondsman and the former administrator or his personal representative for breach of the statutory bond, and since the cause of action by the administrator *d. b. n.* does not accrue until his appointment, the action by such administrator is not barred as against the bondsman until three years subsequent to his appointment. C. S., 441(6). *Dunn v. Dunn*, 373.

2. Where a municipal corporation constructs a sewer system which empties quantities of raw sewage and other obnoxious matter in a stream, which matter is periodically washed upon contiguous lands by freshets, the trespass is a continuing one, and in an action against the city by the owner of the land, all damages to the land based on trespass occurring prior to three years before the institution of the action are barred by the three-year statute of limitation, N. C. Code, 405, 441(3), and an instruction to the jury to this effect is not erroneous. *Lightner v. Raleigh*, 496.

b Fraud or Ignorance of Cause of Action

1. An action to avoid an instrument for fraud accrues from the date the facts constituting the fraud are discovered, or the date they should have been discovered by due diligence, and after notice sufficient to put a reasonable man upon inquiry, plaintiff is chargeable with knowledge of all facts which a reasonable inquiry would have discovered, and where the evidence clearly shows that plaintiff, more than three years prior to instituting the action, had information of the facts constituting the fraud or notice sufficient to put him upon inquiry which would have discovered the facts, the motion of nonsuit of defendants pleading the statute is properly allowed. *Hargett v. Lee*, 536.

2. In this proceeding against defendant to enforce the statutory liability on bank stock owned by him, defendant alleged that he purchased the stock from the bank and was induced to make the purchase by the false and fraudulent misrepresentations of the bank's president. *Held*, whether the defense was barred by the statute of limitations under the facts of the case, N. C. Code, 441(9) is held for the jury, the statute beginning to run only from the discovery of the fraud or when it should have been discovered in the exercise of ordinary care. *Hood v. Paddison*, 631.

3. An action for slander begun more than six months after the publication of the alleged defamatory words is barred by the statute of limitations, C. S., 444, the right of action accruing from the date of publication, regardless of the fact that it is begun within six months from the discovery by plaintiff that defendants were the authors thereof. *Gordon v. Fredle*, 734.

Limitations of Actions B—*continued.*

c Fiduciary Relationships

1. Defendants, as plaintiffs' attorneys, negotiated certain notes executed by plaintiffs to a bank, received the proceeds and disbursed a part thereof in payment of plaintiff's debts as directed by plaintiffs, but failed to account to plaintiffs for the balance. Plaintiffs instituted this action to recover the balance due more than three years after defendants had obtained the funds, and defendants pleaded the three-year statute of limitation, C. S., 441(1). It appeared that the action was instituted within three years from the date plaintiffs demanded settlement: *Held*, the action was not barred, there being a fiduciary relationship between the parties, and the statute not beginning to run until after demand and refusal. *Efird v. Sikes*, 560.

Logs and Logging—Timber deeds see Deeds and Conveyances F b.

Malicious Prosecution.

A Right of Action and Defenses.

a In General

1. Search warrant obtained maliciously and without probable cause will support action for malicious prosecution. *Pressly v. Audette*, 352.

Mandamus.

A Nature and Grounds of Remedy.

b Performance of Legal or Ministerial Duty

1. Mandamus will lie to compel a county accountant to sign vouchers which he is required to sign by law, since under such circumstances the signing of the vouchers is a purely ministerial duty. *Board of Education v. Burgin*, 421.

2. *Held*, mandamus will lie in a suit by teachers and others employed in the city school system to compel a city to borrow money to pay valid subsisting judgments obtained by plaintiffs for their salaries, it being admitted that the city had sufficient credit to borrow the sums necessary, and that sufficient sums were collectible and would be collected from the taxes levied for that purpose, and it being determined as a matter of law that the city had authority to borrow sums for the purpose of paying the judgments. *Hammond v. Charlotte*, 604.

c Absence of Legal Remedy

1. Mandamus will lie in favor of special charter districts of a county against the county commissioners and county board of education to compel the assumption by the county of indebtedness incurred by the districts for the erection and equipment of school buildings necessary to the constitutional school term, the defendants being public agencies charged by statute with the performance of the act, and the fact that the Constitution provides that county commissioners failing to perform their duties in regard to the maintenance of the required school term should be guilty of misdemeanor, Art. IX, sec. 3, does not preclude the writ, since the punishment of defendants would not provide plaintiffs the relief to which they are entitled. *Hickory v. Catawba County*, 165.

Marshaling.

A Nature and Scope of Remedy.

a In General

1. The doctrine of marshaling rests on equitable principles only, and will not be invoked against a superior equity, or to the injury of the creditor having the double security. *Stokes v. Stokes*, 108.

2. Right of dower is superior to creditor's equity of marshaling. *Ibid.*

Master and Servant.

A The Relation.

a Creation and Existence

1. Evidence held not to disclose emergency empowering employee to hire another for employer. *Reaves v. Power Co.*, 523.

2. A contract to employ a person for a period of at least ten years if such person would leave his present employment and work for the proposed employer in another city is not void for indefiniteness for failure of stipulation of the amount of compensation or character of services to be rendered, or because the employee might terminate the contract at any time. *Jones v. Light Co.*, 862.

B Wages and Compensation.

d Remedies of Employees

1. Claim for services rendered is not entitled to preference upon insolvency and receivership of individual employer. *In re Reade*, 331.

C Master's Liability for Injuries to Servant.

a In General

1. The evidence disclosed that plaintiff, when a boy of thirteen years of age, took dinner to his brother who was working for defendant in the construction of a house, that one of the carpenters dropped his hammer from the second floor and defendant's foreman asked plaintiff to hand the hammer back to the carpenter, that no ladder was built for access to the second floor, but that braces were nailed at the corners by which the carpenters climbed up and down, that plaintiff chose to climb up by a window, and in attempting to reach a joist over his head, slipped and fell to his injury. *Held*, no emergency existed sufficient to constitute plaintiff an employee and create the relation of master and servant, and plaintiff was a mere volunteer injured in the performance of a simple and ordinary task, and N. C. Code, 5032, has no application to the action. *Reaves v. Power Co.*, 523.

2. Where an employee uses a certain appliance in direct disobedience of positive instruction by the employer, the employer may not be held liable for injury to the employee resulting from the use of the appliance. *Brady v. Oil Co.*, 596.

b Tools, Machinery and Appliances and Safe Place to Work

1. Evidence that an employee was injured when struck by a plank which flew up when struck by the wheels of employer's truck when the truck crossed a bridge, and that the employee was injured when wire which he was carrying caught in his sleeve and jerked his hand against a piece of steel, *is held* to show that the injuries were

Master and Servant C b—*continued.*

caused by accidents which could not have been reasonably foreseen, and not by employer's failure to exercise due care for employee's safety. *Thomas v. Light Co.*, 332.

2. Plaintiff's evidence was to the effect that as a "doffer boy" in defendant's mill he was required to push a box on rollers filled with spindles rapidly along an aisle between rows of machines, there being a clearance of about six inches on either side of the box, that it was necessary for him to bend over to push the box and that the box obstructed his vision near the floor, and that while pushing the box he is hit by a lever of one of the machines which was allowed to protrude into the aisle near the floor for an inch and a half, which resulted in the injury in suit, and that if the lever had been in its proper place it would not have so obstructed the aisle: *Held*, the evidence was properly submitted to the jury on the question of the master's failure to use due diligence to provide a safe place to work, the rule of law being that although the employer is not an insurer of the safety of his employees he is required to exercise due care to provide a safe place to work, which duty includes reasonable inspection, and whether a defect would have been discovered by reasonable inspection is ordinarily a question for the jury. *Highfill v. Mills Co.*, 582.

3. The evidence tended to show that plaintiff was employed to scrape a bridge preparatory to painting it, that he was given a steel scraper, that he had asked for goggles to protect his eyes and was promised same, but that they were never furnished, that goggles were furnished by another employer for employees doing similar work, and that while scraping the bridge the employee was injured by a piece of rust which flew in his eye. *Held*, the evidence was sufficient to be submitted to the jury under the principle that in case of simple tools the employer may be held liable if the injury is caused by a lack of such tools, and injury could have been reasonably foreseen from the failure to furnish same. *Etheridge v. R. R.*, 657.

g Contributory Negligence of Servant

1. The evidence in this case was to the effect that plaintiff employee was required to push a box on rollers rapidly along an aisle between two rows of machines and was injured when the box struck a lever of a machine which protruded into the aisle near the floor for an inch and a half, and that in pushing the box it was necessary for plaintiff to bend over, and the box obstructed his vision near the floor: *Held*, the question of whether plaintiff employee was guilty of contributory negligence in failing to see the obstruction was properly submitted to the jury. *Highfill v. Mills Co.*, 582.

D Master's Liability for Injuries to Third Persons.

a In General

1. In this action by third person against master, evidence of relationship of master and servant held insufficient. *Lore v. Queen City Lines*, 575.

2. Burden is on injured third person to establish relationship of master and servant. *Mason v. Texas Co.*, 805.

Master and Servant D—*continued.*

b Scope of Employment

1. *Held:* complaint failed to show that wrongful act of agent was done in scope of authority or was ratified. *Hoover v. Indemnity Co.*, 468.

E Federal Employers Liability Act.

a To What Actions Applicable

1. Where it is admitted that plaintiff's intestate was engaged in interstate commerce at the time of the injury causing death, the liability of defendant railroad company therefor must be determined solely by the Federal Employers' Liability Act as construed and applied by the courts of the United States. *McGraw v. R. R.*, 873.

b Nature and Extent of Liability

1. Where an engineer testifies that he could not have done anything to avoid the injury to the brakeman on his freight train after the discovery of the brakeman's peril from trespassers on the train, and there is no evidence to the contrary, the railroad company may not be held liable for the injury on the contention that the engineer should have jolted the cars, stopped the train, or blowed the whistle upon the discovery of the trespassers. *Ward v. R. R.*, 530.

2. *Held:* no injury to employees could have been anticipated from employer's alleged negligent custom and nonsuit was proper. *Ibid.*

3. The "scintilla rule" does not apply upon a motion as of nonsuit in an action governed by the Federal Employers' Liability Act. *McGraw v. R. R.*, 873.

4. In order for a recovery under the Federal Employers' Liability Act, plaintiff must not only establish negligence, but also that the negligence complained of was the proximate cause of the injury in suit. *Ibid.*

5. The law will assume, nothing else appearing, that an employee on a train will be on that part of the train where he is required to be at the time by the rules of the company and the orders of his superiors, but such assumption is not binding on the jury, the ultimate fact being for their determination from all the testimony. *Ibid.*

6. In the absence of proof to the contrary, the law will assume that a railroad employee exercised due care for his own safety. *Ibid.*

7. Railroad companies, in the operation of their freight trains, are held to a high standard of care commensurate with the attendant risks and dangers, and although negligence will not be inferred from ordinary jolts and jars, it may be imputed from an unusual, sudden and unnecessary jolt or jar. *Ibid.*

8. The evidence was to the effect that plaintiff's intestate, engaged in interstate commerce, as a flagman on defendant's train, gave the signal for the backing of the train, that he was required and instructed to be at the rear of the caboose upon such backing operations, and that he was not seen upon the train after it had backed, and that he was thereafter found dead on the track with indications that he had been dragged and run over by the train while it

Master and Servant E b—*continued.*

was backing. There was no direct evidence that intestate was standing on the rear platform or that he was thrown therefrom to his death. *Held*, the doctrine of *res ipsa loquitur* does not apply to establish the contention of plaintiff that intestate was thrown from the rear of the train by some negligent operation thereof, the doctrine not being available to supply or create the necessary facts, but only to raise an inference of negligence in proper cases where the essential facts are established by evidence. *McGraw v. R. R.*, 873.

9. Evidence held sufficient for jury in this action against railroad to recover for employee's death. *Ibid.*

F North Carolina Workmen's Compensation Act.

a Nature, Construction and Application

1. A prerequisite to the right of a claimant to compensation under the Workmen's Compensation Act is some appointment or the existence of the relation of master and servant, which latter is contractual in its nature and is to be determined by the rules governing the establishment of contracts, express or implied. *Hollowell v. Department of Conservation*, 206.

2. A deputy forest warden employed by the Department of Conservation and Development, who is an *ex officio* game warden and paid a commission for reporting violations of the game laws, is not an employee of the Department of Conservation and Development in testifying at the trial of persons reported by him for violation of the game laws, his compensation as a witness being payable according to law as a part of the costs of the action, and where the game warden is killed by those against whom he testified as a result of his testimony his dependents are not entitled to compensation for his death under the Workmen's Compensation Act. *Ibid.*

3. Evidence that a bank cashier was required to do detailed and even manual labor as would be required of any other bank employee, and that his name was on the bank pay roll submitted to insurer upon which premiums were based, and that the insurer was thereby estopped to deny that he was an employee *is held* sufficient to sustain the finding of the Industrial Commission that the cashier was an employee within the meaning of the Compensation Act. *Jones v. Trust Co.*, 214.

4. A person furnished work for the relief of himself and family and paid with funds provided by the Federal Emergency Relief Administration is not an "employee" of the relief administrative agencies within the meaning of the Compensation Act. N. C. Code, 8081(i), (b). *Jackson v. Relief Administration*, 274; *Bell v. Raleigh*, 275.

5. Evidence held sufficient to support finding that deceased was an employee and not an independent contractor. *Russell v. Oil Co.*, 341.

6. Plaintiff brought suit for the wrongful act of insurer's agent in preventing plaintiff's intestate from obtaining medical attention for ailments not connected with intestate's injury covered by the Compensation Act. Insurer's agent was employed to procure medical

Master and Servant F a—*continued.*

attention only for injuries to employees covered by insurer's policy. *Semble*, the Industrial Commission had exclusive jurisdiction of the action. *Hoover v. Indemnity Co.*, 468.

7. The allegations and evidence in this action for damages at common law are held to show that the injury in suit was caused by an accident arising out of and in the course of plaintiff's employment, and plaintiff and defendant employer being bound by the provisions of the Workmen's Compensation Act, defendant's motion as of nonsuit was properly granted, plaintiff's remedy under the Compensation Act being exclusive of all other remedies. N. C. Code, 8081(r). *McNeely v. Asbestos Co.*, 568.

8. Where in an action at common law by an employee against an employer it does not appear from the face of the complaint that defendant employed more than five employees in its business, a demurrer upon the ground that the plaintiff's exclusive remedy was under the Compensation Act is properly overruled. N. C. Code, 8081(u). *Allen v. Cotton Mills*, 704.

9. Whether an injured person is an executive officer or an employee within the meaning of the Compensation Act, N. C. Code, 8081(i), is to be determined by the nature of the act performed by him at the time of the injury, but mere desultory, disconnected, and infrequent acts of manual labor not reasonably required by the exigencies of the situation will not classify an executive officer as an employee in the performance of such acts. *Nissen v. Winston-Salem*, 888.

10. In this hearing before the Industrial Commission there was evidence that the fire chief of defendant city was killed in a collision while on his way to a fire, that the fire chief in the course of his duties habitually did the work of a regular fireman in fighting fires, and that, although he was elected for a term of one year by the board of aldermen, he was not required to take oath of office or give bond, had no authority to employ or discharge firemen, and that at all times he was under the control, supervision and direction of the board of aldermen. *Held*, the evidence was sufficient to support a finding that the fire chief, at the time of his injury, was an employee of the city within the meaning of the Compensation Act, it appearing that he did not act purely in an administrative capacity even if it be granted that he was an elected officer, N. C. Code, 8081(i). *Ibid.*

b Injuries Compensable

1. Although the courts adopt a liberal interpretation of the law in awarding compensation to night watchmen because of the special hazards attached to their work, evidence tending to show that a night watchman went to a store on the premises leased by the employer and run by the lessee, and that he was killed in a fight precipitated when strangers entered the store and attempted to rob the owner of the store after he had waited on them, and that the night watchman often went to the store to procure matches or drinks for himself, and was not required to go to the store in the performance of his duties, *is held* sufficient to sustain a finding by the Industrial Commission that the accident did not arise out of and in the course of the employment. *Smith v. Machine Co.*, 97.

Master and Servant F b—*continued.*

2. A game warden reported certain persons for a violation of the fishing laws and testified against them at the trial for such violation. He was killed by them as a result of his testimony at the trial: *Held*, his death did not result from an injury by accident arising out of and in the course of his employment. *Hollowell v. Department of Conservation*, 206.

3. Evidence that the cashier of a bank was injured in an automobile collision while on his way to another city under orders of his superior officer to obtain information in regard to the financing of the cotton crop for the use of the bank in its dealing with its customers in connection with their cotton, *is held* sufficient to support the finding of the Industrial Commission that claimant was injured by the accident arising out of and in the course of his employment. *Jones v. Trust Co.*, 214.

4. An occupational disease, which is outside the scope of the Workmen's Compensation Act, is a disease which is incidental to the employment and foreseeable as an ordinary and natural result thereof, and pulmonary asbestosis caused by the inhalation of dust for a period of five months by an employee of an asbestos factory, which is directly attributable to the active negligence of the employer in failing to provide a dusting or suction system such as is ordinarily provided in such factories for the safety of employees, *is held* not an occupational disease, the disease being attributable to the active negligence of the employer in failing to provide a reasonably safe place to work, and not being a usual incident of the employment since it does not result to employees in such occupation when due care for their safety is exercised by their employers. *McNeely v. Asbestos Co.*, 568.

5. While the Compensation Act covers only injuries to employees by accident arising out of and in the course of their employment, the word "accident" will be construed in its wide and practical sense to give effect to the intent of the act, and an injury produced by inhaling asbestos dust for a period of five months is an accidental injury within the terms of the Compensation Act when such injury is not foreseen or expected and is attributable to the active negligence of the employer in failing to provide proper dusting or suction systems ordinarily provided in such work, the test being not the amount of time taken to produce the injury but whether it was produced by unexpected and unforeseen, and therefore, accidental means. *McNeely v. Asbestos Co.*, 568.

6. In a hearing under the Compensation Act claimant, suffering from hernia, testified that he was pulling back a warp, or large spool of thread, when he felt a burning sensation in his side, that he had been doing this work for seventeen years, but that at the time his position might have caused an unusual strain. A physician testified that the hernia was recent, and that it was possible that it was caused by the strain testified to by the claimant, but that he could not testify that the particular strain testified to caused the hernia. *Held*, there was sufficient competent evidence to support the finding of the Industrial Commission that the injury was not caused by accident in the course of claimant's employment, although there was evidence to the contrary. *Leggett v. Cramerton Mills*, 708.

Master and Servant F b—*continued.*

7. In this hearing under the Compensation Act there was evidence that deceased died from heart trouble, that immediately prior to the time he was stricken, deceased had helped move a trunk from one bus to another and that he was stricken with heart trouble while carrying a heavy box of medicine from the bus to his employer's drug store, with testimony of a physician who had attended deceased prior to his death that such exertion could have been a factor in causing the heart trouble, but that deceased had told him upon his examination of deceased prior to his death that he had first felt pain around his heart when he had come from the post office prior to moving the boxes. *Held*, there was sufficient, competent evidence to support the finding of the Industrial Commission that deceased's death was not caused by accident in the course of his employment, although the evidence would permit an inference to the contrary. *Moore v. Drug Co.*, 711.

d Proceedings and Hearings Before Commission

1. A report filed by the president of a company on blanks furnished by the Industrial Commission stating that the company was the employer and the deceased was its employee *is held* competent evidence before the Industrial Commission on the question of whether the deceased was an employee or an independent contractor. *Russell v. Oil Co.*, 341.

2. Upon finding that award was entered contrary to law, Industrial Commission may set it aside and order hearing *de novo*. *Ruth v. Carolina Cleaners*, 540.

e Persons and Risks Covered by Policy

1. Evidence held to support finding that deceased was in employ of company obtaining insurance and was covered by policy as against insurer receiving premium based upon deceased's employment by insured. *Greenway v. Mfg. Co.*, 599.

i Appeal and Review of Award

1. The finding of the Industrial Commission that claimant, at the time of his injury, was an employee is binding upon the courts when supported by competent evidence. *Jones v. Trust Co.*, 214; *Nissen v. Winston-Salem*, 888.

2. The recitation of the award of the Industrial Commission in the judgment of the Superior Court affirming the award upon appeal will not be held for prejudicial error where the award is for a death claim and the amount is definitely fixed. *Russell v. Oil Co.*, 341.

3. In this case the full Commission on appeal reversed the award of the hearing commissioner allowing compensation, and found, upon supporting evidence, that the accident resulting in the death of the employee did not arise out of and in the course of his employment. On appeal to the Superior Court, judgment was entered reversing the award of the full Commission and reinstating the award of the hearing commissioner: *Held*, the findings of fact by the full Commission were binding on the Superior Court, and the award of the full Commission denying compensation should have been sustained. *Smith v. Hauser and Co.*, 562.

Master and Servant F i—*continued.*

4. The findings of fact of the Industrial Commission upon conflicting, competent evidence are conclusive upon appeal. *Leggett v. Cramerton Mills*, 708; *Moore v. Drug Co.*, 711.

5. An award of the Industrial Commission is conclusive and binding as to all questions of fact when supported by sufficient, competent evidence, N. C. Code, 8081(ppp), and neither the Supreme Court nor the Superior Court can consider the evidence for the purpose of determining the facts on appeal. *Reed v. Lavender Bros.*, 898.

k Costs and Attorneys' Fees

1. Provision for taxing cost of appeal on insurer is constitutional and valid. *Russell v. Oil Co.*, 341.

Mortgages. (Liability of parties for taxes see Taxation B h.)

A Requisites and Validity.

c Acknowledgment

1. The presumption is in favor of the legality of an acknowledgment to a deed, and where a trustee's deed is signed by the *feme* trustee as trustee, and the notary knew her as the person who executed the deed "for the purposes therein expressed" the acknowledgment is sufficient and will not be declared void for a typographical error on the contention that it was executed by the *feme* trustee, prior owner of the land, in her individual instead of her representative capacity. *Hayes v. Ferguson*, 414.

F Transfer of Mortgaged Property.

b Liability of Purchaser of Equity

1. Where a mortgagor personally liable for the mortgage debt transfers his equity of redemption by deed in which the grantee by valid contract assumes the payment of the debt, and the mortgagee accepts or relies upon the debt assumption contract, as between the parties the grantee becomes the principal debtor and the mortgagor a surety, and the mortgagee may enforce the grantee's liability by suit in equity under the doctrine of subrogation, or by action at law as upon a contract made for the benefit of a third party. Whether the mortgagee may enforce such liability where the grantee's transferror is not personally liable for the mortgage debt, *quære? Bank v. Page*, 18.

2. While a grantee's contract assuming the mortgage debt upon the land may not be rescinded without the consent of the mortgagee after his acceptance of same, the contract inures to the benefit of the mortgagee as it exists, and, in the mortgagee's action thereon against the grantee, the grantee may set up the defense that the assumption contract was conditional, voidable or unenforceable at the time of its execution, or that the mortgagor had breached a condition subsequent, and although the mortgage notes may be negotiable, the law governing negotiable instruments does not extend to the assumption contract. *Ibid.*

3. The respective owners of two tracts of land executed a contract, in consideration of mutual promises, etc., to convey each to the other their respective lands, the contract stipulating that each was to assume and pay the mortgage debt on the land to be transferred to him, and in accordance with the contract deeds were executed in

Mortgages F b—*continued.*

which each grantee assumed and agreed to pay the mortgage debt on the land conveyed. Thereafter the mortgagee of one of the tracts of land sued the grantee thereof on the debt assumption contract in his deed, and the grantee set up the defense that his grantor had abandoned the contract and failed to pay the mortgage debt assumed by him in the exchange of deeds. *Held*, the defense was valid, and upon its establishment, the mortgagee was not entitled to recover. *Ibid.*

G Satisfaction and Cancellation.

c Methods, Form and Validity of Cancellation

1. The trustor paid trustee the amount of the mortgage debt and the trustee entered a cancellation of the deed of trust on the records. C. S., 2594(1), without the knowledge of the *cestui que trust*. Thereafter trustor sold the property to a bona fide purchaser for value. The *cestui que trust* brought action to have the cancellation declared null and void. *Held*, upon the facts found by the trial court, unexcepted to by plaintiff, the court's conclusion upon a motion to reinstate the case after nonsuit by default, that plaintiff's cause of action was without merit *is held* in accord with the decisions. *Parham v. Hinnant*, 200; *Parham v. Hinnant*, 201.

H Foreclosure.

b Right to Foreclose and Defenses. (Enjoining consummation of sale see hereunder H o.)

1. A junior mortgagee may maintain an action to restrain the foreclosure of a first mortgage or deed of trust on the lands upon allegations of serious dispute between the parties as to the amount due on the first encumbrance. *Whitaker v. Chase*, 335.

2. Executor may not restrain foreclosure of mortgage on testator's land pending sale of land to make assets. *Miller v. Shore*, 732.

3. Where it appears from verified pleadings that there is a *bona fide* controversy between the parties as to whether the note secured by the mortgage is due, and if due by reason of default in the payment of installments thereon, as to the amount due, the mortgagor's order temporarily restraining the foreclosure of the mortgage is properly continued to the final hearing, without prejudice to the right of the mortgagees to move for the appointment of a receiver. C. S., 859. *Bennett v. Service Corp.*, 902.

h Execution of Power of Sale

1. The courts look with jealousy on the power of sale contained in mortgages and deeds of trust and the provisions are strictly construed. *Lockridge v. Smith*, 174.

2. Recitals in a trustee's deed that the trustee made the sale in pursuance of the power contained in the deed of trust are taken as prima facie correct, and under the statute, C. S., 2581, the sale may be made by an agent or attorney of the trustee appointed for that purpose, and it is not necessary that the trustee be present at the sale. *Hayes v. Ferguson*, 414.

3. Recitations in trustee's deed are prima facie evidence of the execution of the power of sale in accordance with the deed of trust. *Ibid.*

Mortgages H—*continued.*

j Right of Mortgagee or Trustee to Bid in Property

1. Where the trustee or his agent purchases the property at a foreclosure sale under the terms of a deed of trust the trustor may elect to treat the sale as a nullity and demand a resale as against the trustee or his agent or purchasers from them with notice, even though competitive bidding at the sale was not discouraged and the purchase price represented the fair market value of the property at the time of the sale, and the trustor was present at the sale and made no objection thereto. *Lockridge v. Smith*, 174.

2. Bona fide purchaser without notice from trustee bidding in property at sale obtains good title. *Ibid.*

m Title and Rights of Purchasers

1. A bona fide purchaser for value without notice that his grantor was an agent of the trustee and bought in the property at the foreclosure sale conducted by himself, obtains good title free from the equitable right of the trustor to treat the sale as a nullity and demand a resale, and the purchaser's testimony that the purchaser at the sale was not his agent in bidding in the property, that he knew of no irrgularity in the sale, and that he paid the purchase price, and that the purchase price represented the fair market value of the property at the time of the sale is sufficient evidence to support a finding by the trial court upon exceptions to the report of the referee that the purchaser was a bona fide purchaser for value. *Lockridge v. Smith*, 174.

o Enjoining Consummation of Sale

1. Chapter 275, Public Laws of 1933, authorizing courts of equity to enjoin the consummation of sales under power of sale contained in deeds of trust and mortgages solely on the ground that the highest bid at the sales does not represent the reasonable value of the property, applies to sales made subsequent to its enactment under mortgages or deeds of trust executed prior to its enactment, and the statute is constitutional and valid, it being remedial only, and does not impair the obligations of contracts nor deprive the parties of property without due process of law, nor confer upon mortgagors or trustors exclusive privileges. *Woltz v. Deposit Co.*, 239; *Hopkins v. Swain*, 439.

2. Where the mortgagee or *cestui que trust* is not satisfied with the bond given by the mortgagor or trustor in proceedings to enjoin the consummation of a sale under a mortgage or deed of trust for inadequacy of the bid at the sale, chapter 275, Public Laws of 1933, his remedy is by motion that plaintiffs be required to increase the penal sum of the bond and give additional sureties, and he may not attack the validity of the order restraining the consummation of the sale upon the ground that the bond is inadequate. *Woltz v. Deposit Co.*, 239.

3. The holder of a junior mortgage on lands obtained a temporary order restraining the consummation of the foreclosure sale under the first mortgage on the lands. Upon order to show cause the court found as a fact that serious dispute existed between the parties as to the adequacy of the bid at the sale and the amount due the senior mortgagee upon the debt and that delay was necessary to the pro-

Mortgages H o—*continued.*

tection of the rights of plaintiff. *Held*, the court's order continuing the temporary injunction to the hearing upon condition that plaintiff file bond to indemnify defendant against any loss by reason of the delay was within its discretionary equitable power, the provisions of chapter 275, Public Laws of 1933, being constitutional and valid. *Whitaker v. Chase*, 335.

4. Under sec. 1, chap. 275, Public Laws of 1933, providing that the procedure for enjoining the consummation of a sale under a mortgage or deed of trust should be the same as in cases of injunction and receivership, *it is held*, that where the last and highest bidder at the sale institutes action for specific performance, and the personal representative of the deceased mortgagee gives notice in apt time that she would make application to the resident judge of the district out of term and out of the county for an order restraining the consummation of the sale made by her under the mortgage on the grounds of inadequacy of the bid, and for an order for a resale, the court has authority to hear the motion, and his judgment setting aside the sale and ordering a resale upon his finding that the bid offered at the sale was inadequate, etc., is affirmed on appeal. In this case the notice of sale stipulated that the mortgagee reserved the right to reject all bids, and the court also found as a fact that the bid in question had been rejected. *Hopkins v. Swain*, 439.

p Attack of Validity of Foreclosure

1. In an action by a trustor to treat a foreclosure sale as a nullity and obtain an order for resale on the grounds that the property was bid in at the sale by an agent of the trustee, the agent of the trustee and the holders of junior liens against the property should be made parties. *Lockridge v. Smith*, 174.

Municipal Corporations.

C Legislative Control.

b Health and Sanitation

1. The State Board of Health is given authority by the Municipal Finance Act, N. C. Code, 2943(2), to order the construction of sewer systems by municipalities. *Lamb v. Randleman*, 837.

D Officers, Agents and Employees.

a Election, Appointment and Tenure

1. A provision in the charter of a municipality limiting the right of suffrage in municipal elections to owners of real property within the town is unconstitutional. Art. VI of the Constitution of North Carolina. *Smith v. Carolina Beach*, 834.

b De Facto Officers

1. Municipal officers elected under an unconstitutional charter provision restricting electors to owners of real property, but who have purported to qualify, and have assumed and exercised openly and without question the duties of their officers are *de facto* officers of the municipality. *Smith v. Carolina Beach*, 834.

2. A resident of a municipality who has resided in the town for two years without objecting to the election of the municipal officers solely by owners of real estate therein, and has not objected to

Municipal Corporations D b—*continued.*

the open exercise of the duties of such offices by the officers so elected it appearing that officers of the town had been so elected for seven years, may not challenge the authority of such *de facto* officers in issuing bonds for a necessary municipal expense upon the ground that the officers were not duly elected by the qualified voters of the town. *Ibid.*

E Torts of Municipal Corporations.

f Injuries to Lands by Sewer Systems

1. A municipal corporation can acquire no easement in lands by the continual discharge of raw sewage in a stream running through the lands when such acts constitute a public nuisance. *Lightner v. Raleigh*, 496.

2. Where trespass to land by sewer system is continuing and has existed for more than three years plaintiff may recover only increased damage resulting since three years prior to institution of action. *Ibid.*

3. Plaintiff desiring more particular instructions on question of permanent damages should tender request therefor. *Ibid.*

G Public Improvements.

d Objections and Appeals and Attack of Assessments

1. A property owner signed a petition for public improvements adjacent to his property, and paid two installments of the assessments levied against his property by the town. Upon his death his administrator resisted payment of further installments on the ground that the assessments were void for the reason that the town failed to give notice and hold the hearing required by N. C. Code, 2712, 2713: *Held*, the property owner signed the petition and had notice that the improvements were to be made, and had notice that the assessment roll giving the amount of the assessment against his property, was filed in the office of the city clerk, it being required by statute that it be so filed, N. C. Code, 2713, and by accepting the benefits and paying installments of the assessment without objection, N. C. Code, 2714, he ratified same, the assessment as to him being voidable and not void, and his administrator in his fiduciary capacity is estopped to deny the validity of the assessments. *Wake Forest v. Holding*, 425.

2. The presumption is in favor of the validity of proceedings under which assessments against property for public improvements are made. *High Point v. Brown*, 664.

3. A levy of assessments against the land in question was made after notice to the owner as required by statute, and the owner took no appeal therefrom. Thereafter the owner sold the land to defendant who seeks to attack the validity of the assessment in an action by the city to enforce same. *Held*, the assessments constituted a lien against the land itself, and the purchaser took the land *cum onere*, and the assessments not being void, the purchaser has no legal status to attack the assessments for irregularities. *Ibid.*

4. Where a party has no legal status to attack the validity of assessments for public improvements against property purchased by him, the exclusion of testimony offered by him to attack the validity of the petition and assessment roll is proper. *Ibid.*

Municipal Corporations—*continued.*

H Police Powers and Regulations.

d Public Safety and Health

1. Ordinance requiring operators of motor vehicles for hire to furnish policies of liability insurance or cash or securities held unconstitutional. *S. v. Sasseen*, 644.

J Actions Against Municipalities.

b Conditions Precedent Prescribed by Charter

1. Compliance with the requirements of the charter of a city that notice be given the board of aldermen within a specified time of the infliction of injury of any claim for damages for such injury is a condition precedent to bringing action against the city to recover such damages with the burden on plaintiff to allege and prove that the required notice had been given, and though incapacity, mental or physical, will excuse failure to give such notice, such failure will not be excused if plaintiff has reasonable opportunity to give such notice within the prescribed time. *Foster v. Charlotte*, 528.

K Fiscal Management and Debt. (Constitutional requirements and restrictions on taxation see Taxation A.)

c Bonds

1. Municipal bonds issued for a necessary expense by *de facto* officers of such duly constituted municipality are binding upon the public and third persons and constitute valid obligations of the municipality. *Smith v. Carolina Beach*, 834.

Negligence. (Of persons in particular relationships see Master and Servant C; Railroads D; Busses; Automobiles C, etc.)

A Acts and Omissions Constituting Negligence.

c Condition and Use of Land and Buildings

1. Evidence held sufficient to be submitted to jury in tenant's action to recover for injuries from fall in elevator shaft. *Hood v. Mitchell*, 156.

2. At the request of defendant's foreman, plaintiff, when a boy thirteen years of age, volunteered to hand a hammer to a carpenter working on the second floor of defendant's building. The evidence tended to show that there was no ladder between the first and second floors, but that the carpenters climbed on braces at the corners of the building, and that plaintiff chose to climb up at a window, and in attempting to catch a joist above his head, slipped and fell to his injury. *Held*, plaintiff occupied the position of volunteer or trespasser, and the evidence failed to show any defective condition or circumstances in which defendant was required to warn or instruct the plaintiff, and defendant cannot be held liable in damages for the injury, there being no legal basis for recovery. *Reaves v. Power Co.*, 523.

c Presumptions of Negligence and Res Ipsa Loquitur

1. Actionable negligence is not presumed from the mere fact of injury, however unfortunate or severe the injury may be. *Fox v. Barlow*, 66.

2. Plaintiff attempted to light the oil in an oil stove in his own way and according to his own judgment and was injured by an explosion

Negligence A e—*continued.*

of the oil. Immediately after the injury and for the rest of the winter the stove was lit, without repair or change of oil, and burned in the ordinary way without accident or injury. *Held*, more than one inference can be drawn from the evidence as to the cause of plaintiff's injury, and the doctrine of *res ipsa loquitur* does not apply. *Jennings v. Oil Co.*, 261.

3. Doctrine of *res ipsa loquitur* held not to apply to facts of this case. *McGraw v. R. R.*, 873.

D Actions. (Measure of Damages see Damages F.)

c Nonsuit

1. Evidence that 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 plaintiff was given a key to unlock the elevator doors so that he could use the elevator at night when no one was on duty, that 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 whether the elevator cage was in place at the floor because of poor lighting, stepped into the empty shaft to his injury *is held* not to show contributory negligence as a matter of law, and defendant's motion for nonsuit on the grounds of contributory negligence was properly refused. *Hood v. Mitchell*, 156.

2. Where in an action to recover for injuries received when oil in an oil stove exploded when plaintiff attempted to light the oil, there is no evidence of defect in the stove or in the quality or adaptability of the oil furnished therefor, a nonsuit is proper unless the doctrine of *res ipsa loquitur* applies. *Jennings v. Oil Co.*, 261.

New Trial.

B Grounds.

g Newly Discovered Evidence. (In criminal cases see Criminal Law J d.)

1. The trial court's refusal of defendant's motion for a new trial for newly discovered evidence *is held* within its sound discretion under the facts of this case, it appearing that defendant had not exercised due diligence to obtain the evidence relied upon on the motion in time to present same at the trial. The grounds for a new trial for newly discovered evidence are discussed by *Mr. Justice Clarkson*. *Love v. Queen City Lines*, 575.

2. While an appeal to the Supreme Court is pending the trial court is without jurisdiction to hear a motion for a new trial for newly discovered evidence. *Bonaparte v. Funeral Home*, 652.

Nonsuit see Trial D a.

Officers see Public Officers.

Optometrists.

A Licensing and Control.

c Reissuance of License

1. Optometrist held entitled to reissuance of license upon paying fees and penalties, license not having been revoked for nonpayment. *Mann v. Board of Optometry Examiners*, 853.

Owelty—Action for barred by statute of limitations see Limitation of Actions B a 4.

Parent and Child—Right to custody of children upon divorce see Divorce F.

Parties—Misjoinder of parties and causes see Pleadings D b; Intervenors see Intervenors.

Partition.

A Action for Partition.

a Parties and Procedure

1. Dower may be allotted the widow and the lands partitioned among the heirs in one proceeding, C. S., 3226, 4105. *Vannoy v. Green*, 77.

d Distribution of Funds and Claims of Third Persons

1. A claim for services rendered a deceased widow may not be set up in a proceeding for sale of land for partition which was owned by the deceased husband of the widow and devised by him to the widow for life and then to the petitioners in fee. *Everton v. Rodgers*, 115.

2. Judgment that claim for payment of estate's debt should not attach to funds from partition unless personalty is insufficient is affirmed. *Ibid.*

3. Petitioners in a proceeding for sale of land for partition may not object to the allowance of a sum advanced by one of the parties to pay taxes on the property, C. S., 7983, when there is no exception or appeal entered of record by the testator's administrator. *Ibid.*

Payment.

A Proof of Payment.

a Receipts

1. The possession of a receipt for the payment of money is prima facie evidence of payment. *Wilkerson v. Ins. Co.*, 882.

Physicians and Surgeons.

C Rights, Duties and Liabilities to Patients.

b Malpractice

1. Plaintiff's evidence was to the effect that his leg was broken both below and above the knee, the bone protruding from the flesh at the break below the knee, that he was attended by defendant physicians, who treated him for the break below the knee, but who failed to treat the break above the knee, that he suffered a great amount of pain, and that he did not recover so that he could put any weight on the leg. *Held*, defendants' motions as of nonsuit were properly allowed, injury and suffering alone being insufficient to warrant a recovery in the absence of evidence that defendants did not possess the requisite degree of skill or that they failed to use such skill in the treatment of plaintiff. *Connor v. Haywerth*, 721.

Pleadings.

A Complaint.

a Joinder of Actions. (See, also, hereunder D b.)

1. Legal and equitable causes of action, arising out of *tort* and *ex contractu*, may be united in the same complaint where they arise

Pleadings A *a—continued.*

out of the same transaction or series of transactions forming a connected whole, N. C. Code, 507(1), and to the end that the controversy may be determined in one action, the court may order the joinder of necessary parties, N. C. Code, 460. *Fry v. Pomona Mills*, 768.

f Prayer for Relief

1. Plaintiff's prayer for relief does not determine his right to relief. *Lipe v. Trust Co.*, 24; *Bolich v. Ins. Co.*, 144; *Trust Co. v. Webb*, 247.

D Demurrer.

a For Failure of Complaint to State Cause of Action

1. A demurrer on the grounds that the complaint fails to state a cause of action admits the allegations and presents the single question of the sufficiency of the complaint. *Trust Co. v. Webb*, 247; *Bryan v. Bryan*, 464.

2. Where the allegations of a complaint are broad enough to state a cause of action for specific performance and for breach of contract the prayer for relief does not limit the scope of the right to relief, and a demurrer on the ground that the contract is not specifically enforceable cannot be sustained, since if either cause of action can be maintained the demurrer should be overruled. *Trust Co. v. Webb*, 247.

b For Misjoinder of Parties and Causes

1. A demurrer will not lie for joinder of an unnecessary party, it being necessary to sustain the demurrer that there be misjoinder of parties and causes of action. *Trust Co. v. Webb*, 247.

2. Where only two of five defendants are liable on the cause of action alleged for breach of contract and two other defendants are liable on the cause of action alleged in tort, and all the defendants are liable on the cause alleged for wrongful conspiracy, defendant's demurrer for misjoinder of parties and causes should be sustained. *Williams v. Gooch*, 330.

3. An action against the makers of notes for judgment in the amount thereof and to have a judgment obtained by one of the makers against the payee credited on the amount due on the notes, and against the assignees of the judgment and the sheriff to set aside the assignment and restrain execution on the judgment is not subject to demurrer for misjoinder of parties and causes, the principal relief sought being against the makers and the relief sought against the other defendants being incidental thereto, and all defendants being necessary parties, C. S., 456. *Bank v. Kerr*, 610.

4. Complaint in this case held not subject to demurrer for misjoinder of parties and causes. *Trust Co. v. Pharr Estates*, 894.

5. Demurrer for misjoinder of parties and causes of action held properly sustained, the several causes of action alleged not affecting all the parties to the action. C. S., 507. *Lucas and Lewis v. Bank*, 909.

c Defects Appearing on Face of Complaint; Speaking Demurrers

1. Jurisdiction of Industrial Commission must appear from complaint to be available on demurrer. *Allen v. Cotton Mills*, 704.

Pleadings D—*continued.*

d Waiver of Defects by Failure to Demur in Apt Time

1. The failure of defendant to demur to the complaint in an action does not confer jurisdiction on the trial court or upon the Supreme Court and where the courts have no jurisdiction of the action it will be dismissed in the Supreme Court on appeal from judgment rendered therein. *Wright v. McGee*, 52.

E Amendments to Pleadings.

a Power to Allow Amendment in General

1. A motion to allow an amendment of a pleading after it is filed is addressed to the sound discretion of the trial court, and no appeal lies from the court's refusal of the motion. C. S., 547. *Ins. Co. v. Edgerton*, 402.

H Filing and Service.

a Time for Filing Pleadings and Extensions

1. A nonresident defendant served by publication, and failing to file answer within the time prescribed by law, may make application to the clerk before judgment for good cause shown to be allowed to file pleadings and defend the action, C. S., 492, and where upon such application and affidavits filed by him setting forth facts showing prima facie good cause and a meritorious defense, the clerk finds as a fact that he has a meritorious defense and has shown good cause, the clerk's order allowing him to file answer and defend the action will not be held for error for the clerk's failure to more specifically find the facts constituting such meritorious defense, and it is within the discretion of the judge of the Superior Court on appeal to enter an order allowing an extension of time for filing answer. C. S., 536, 637. *Vann v. Coleman*, 451.

I Motions.

a Motions to Strike Out

1. In this civil action for wrongful conversion, the refusal of a motion to strike out certain paragraphs of the complaint tending to show the course of dealings between defendant and his agent is not held for error, since the allegations are not wholly irrelevant and it is assumed on appeal that the trial court will not allow such allegations to be made the basis for the introduction of evidence irrelevant to the cause of action stated. *McDonald v. Zimmerman*, 746.

c Motions for Judgment on the Pleadings

1. Plaintiffs held not entitled to judgment on pleadings in action on note, defendant's answer alleging a valid defense. *Trust Co. v. Wilder*, 124.

2. Appeal from refusal of motion for judgment on the pleadings is premature. *Hafleigh v. Crossingham*, 333.

3. Upon plaintiff's motion for judgment on the pleadings, which is in effect a demurrer to the answer, the answer must be liberally construed, and every reasonable intendment given defendant, and the motion should be denied if the answer alleges facts sufficient to constitute a defense. *Bessire and Co. v. Ward*, 858.

Principal and Agent. (Insurance agents see Insurance C.)

C Rights and Liabilities as to Third Persons.

a Proof of Agency

1. Where plaintiff seeks to hold defendant liable under the doctrine of *respondeat superior*, the burden is on plaintiff to establish, among other things, the existence of the relation of master and servant or of principal and agent between the defendant and the alleged wrongdoer, and where plaintiff introduces no competent evidence of such relationship plaintiff is not entitled to recover. *Mason v. Texas Co.*, 805.

2. Plaintiff, seeking to hold defendant liable under the doctrine of *respondeat superior*, testified that the alleged wrongdoer was working for defendant, but testified on cross-examination that he had been told that the alleged wrongdoer had a contract with defendant and was doing the work in question under such contract. *Held*, plaintiff's testimony of agency was incompetent as hearsay. *Ibid.*

3. Proof of agency, as well as its nature and extent, may be made by the direct testimony of the alleged agent upon the trial, but not by his extra-judicial declarations of agency. *Jones v. Light Co.*, 862.

d Wrongful Acts of Agent

1. Plaintiff's intestate was injured by an accident covered by the Workmen's Compensation Act. Plaintiff brought action against the insurer liable for the injury and alleged that the intestate procured medical services for the injury and also for other ailments not covered by the Compensation Act, that defendant's agent, employed to provide medical attention only for injuries to employees for which defendant was liable, took charge of intestate and prevented him from obtaining medical attention for the ailments not covered by Compensation Act, and that as a result of not getting medical attention for such ailments, intestate died. *Held*, defendant's demurrer to the complaint should have been sustained, it not appearing upon the face of the complaint by a most liberal construction that the acts of defendant's agent complained of were done in the course of his employment, or that such acts were authorized or ratified by defendant. *Hoover v. Indemnity Co.*, 468.

Principal and Surety.

A Requisites, Validity and Construction of Surety Bonds.

b Statutory Provisions

1. General laws in force at the time of the execution of a contract become a part thereof as though expressly incorporated in its terms, and a surety bond may not limit the surety's liability contrary to statutory provisions relating thereto. *Hood v. Simpson*, 748.

B Nature and Extent of Surety's Liability.

d Bonds of Private or Corporate Officers

1. Each renewal of bank cashier's bond held to constitute separate contract under facts of this case. *Hood v. Simpson*, 748.

Process.

B Service of Process. (Waiver of service by appearance see Appearance B.)

c Service by Publication and Attachment

1. Evidence that a resident of this State had left this State and gone to another state, and that since said date his whereabouts had remained unknown to his business associates, relatives and friends in this State, without evidence that he had ever returned to this State, or intended to do so, or that he is dead, *is held* sufficient to support a finding that he is a nonresident for the purpose of service of summons and warrant of attachment against him by publication. *Trust Co. v. McCoin*, 272.

d Service on Foreign Corporations

1. Jurisdiction over the person of a foreign corporation may be obtained by our courts by service of process on its local agent in this State in an action brought by a nonresident plaintiff on a transitory cause of action arising in another state when the defendant corporation has property and is doing business in this State, and the cause of action is not contrary to our public policy, C. S., 483, the statute authorizing this method of service in such instances not being in contravention of either Art. I, sec. 8, or the Fourteenth Amendment of the Federal Constitution. *Steele v. Tel. Co.*, 220.

2. A foreign corporation is doing business in this State so as to render it amenable to service of process by service on its local agents when it engages in transactions and carries on its corporate business here to such an extent as to manifest its presence within the State. *Ibid.*

3. A foreign banking corporation without process agent in this State, which is named as trustee in a number of deeds of trust on properties in this State, forecloses them upon default, and sends its agents here for the purpose of investigating and looking after the properties in its capacity as trustee, does business in the State for the purpose of service of process on it under C. S., 1137, by service on the Secretary of State, "doing business in this State" as used in the statute meaning engaging in, carrying on, or exercising in this State some of the functions for which it was created. *Ruark v. Trust Co.*, 564.

e On Nonresident Auto Owners

1. In this action to recover damages sustained in an automobile collision, it appeared from the answers of the resident defendants that the automobile was owned by one of them and driven by the other, and that the owner was an agent of the nonresident defendant, but it nowhere appeared that the stranger was operating the car upon the nonresident's business, and the admissions in the resident defendants' answer were the only evidence in the record on the question: *Held*, the evidence was insufficient to support a finding that the automobile was operated under the "control or direction, express or implied" of the nonresident defendant, and attempted service upon the nonresident under N. C. Code, 491(a), was void, and its motion to dismiss for want of jurisdiction should have been allowed. *Smith v. Haughton*, 587.

Prohibition see Intoxicating Liquor.

Public Officers.

D Contest of Right to Hold Office.

a In General

1. The right of municipal officers to exercise the respective duties of their offices can be challenged only by a direct proceeding to declare the offices vacant, and not by enjoining the exercise of their official functions. *Smith v. Carolina Beach*, 834.

b Persons Who May Sue

1. Relator, the Associated Cosmetologists of North Carolina, Incorporated, brought this action with the permission of the Attorney-General attacking defendants' rights to hold office on the Board of Cosmetic Art Examiners to which they were appointed by the Governor under the provisions of chapter 179, Public Laws of 1933, relator contending that defendants were not qualified to hold the office because they did not possess the express qualifications prescribed by the statute. The complaint did not allege that relator is a taxpayer of Wake County, or even of North Carolina, nor a voter of the State, nor that relator is affected by or interested in the Board of Cosmetic Art Examiners. *Held*, defendants' demurrers to the complaint were properly sustained, it being required that the relator in an action to vacate a public office have some interest in the action, though it is not required that he be a contestant for the office. *Associated Cosmetologists v. Ritchie*, 808.

Railroads. (Liability to employees see Master and Servant E.)

D Operation.

c Injuries to Persons on or Near Track

1. Judgment of nonsuit entered in an action by an administrator of a 13-year-old boy of normal intelligence to recover for the boy's death, resulting from an injury received when the boy fell between moving cars of a freight train on which he was riding, is affirmed on authority of *Tart v. R. R.*, 202 N. C., 52. *Haynie v. R. R.*, 203.

Receivers. (Right of bank receiver to appeal without approval of court see Appeal and Error A f 2; Receiver appointed in creditors' bill see Creditors' Bill.)

E Allowance and Payment of Claims.

b Priorities

1. The claim for services rendered an individual is not entitled to a preference upon the individual's insolvency and receivership, C. S., 1197, applying only to employees of an insolvent corporation. *In re Reade*, 331.

Receiving Stolen Goods.

B Prosecution and Punishment.

b Evidence and Presumptions

1. Evidence from which the jury might infer that stolen goods were thereafter in the constructive possession of defendant will not justify an inference that at such time defendant knew the goods to have been stolen, and where the evidence is sufficient to support only the first inference the defendant's motion as of nonsuit should be allowed. *S. v. Anthony*, 120.

Reference.

A Nature of Remedy and Proceedings Before Referee.

a Order of Reference and Power to Refer

1. Where defendant sets up no plea in bar, and the pleadings indicate the necessity of examining a long account between the parties, defendant's exception to an order for compulsory reference will not be sustained. N. C. Code, 573(1). *Texas Co. v. Phillips*, 355.

2. Where the trial court finds that the action involves a long account between the parties he may order a compulsory reference, N. C. Code, 573(1), and what constitutes a "long account" must be determined upon the facts of each particular case, it not being necessary that the action be for an accounting, it being sufficient if a long account is directly and not merely collaterally involved in the action. *Frey v. Pomona Mills*, 768.

3. Where several causes of action arising out of the same transaction or series of transactions are properly joined in the complaint, the court may not ordinarily order that one of them be referred to a referee, but under the facts and circumstances of this case the court's order of compulsory reference of one of the causes of action is upheld, it appearing that the action involves a long account and that the controversy is so involved that it could not be readily presented to a jury, and that the action referred involved only the parties named in the order, and the statute, N. C. Code, 573(1), being liberally construed to afford the salutary procedure therein provided. *Ibid.*

C Report and Findings.

a Power of Court to Modify, Affirm, Set Aside, etc.

1. Where exceptions and assignments of error are aptly taken to a finding of fact by a referee the trial court has the power to reverse such finding, review evidence, and make a contrary finding of fact on the point, and this right applies both to compulsory and consent references. *Lockridge v. Smith*, 174.

D Hearings and Trial Upon Exceptions.

b Right to Jury Trial

1. Where a party excepts to an order of reference, and files exceptions to the report of the referee, and tenders issues thereon, but fails to demand a jury trial thereon in apt time as required by statute, he waives his right to trial by jury. *Texas Co. v. Phillips*, 355.

2. Where a case is one properly subject to a compulsory reference, C. S., 573, a party excepting to the order of reference is not entitled to have issues tendered upon the hearing of exceptions to the referee's report submitted to the jury when the issues do not arise upon the exceptions. *Bank v. Fisher*, 412.

3. An order entered by consent of the parties upon a hearing of exceptions to a referee's report that issues raised by the exceptions should be submitted to the jury is valid although the original reference was by consent. *Edwards v. Perry*, 474.

Reformation of Instruments.

A Grounds for Reformation.

d Mistake of Draughtsman and Parties

1. Where a clause in which the grantee in a deed personally assumes payment of a prior mortgage on the lands is inserted in the deed by the mistake of the draughtsman or mutual mistake of the parties, and the mistake is not ratified by the parties and is not discovered by them until just prior to demand for payment by the mortgagee upon his discovery of the clause in the deed, equity may relieve the grantee of personal liability for the mortgage debt by reformation of the deed to make it express the true intent of the parties. *Ins. Co. v. Edgerton*, 402.

2. Policy may not be reformed solely for mistake of draughtsman in omitting mortgagee clause. *Walls v. Assurance Corp.*, 903.

C Actions.

d Evidence and Burden of Proof

1. Parol evidence of the grantor and grantee in a deed to the effect that the parties did not contemplate that the grantee should assume personal liability in his deed for a prior mortgage on the lands, and testimony of the draughtsman that he was given no specific instruction to insert the debt assumption clause in the deed *is held* competent upon the issue of reformation of the deed for the mistake of the draughtsman or the mutual mistake of the parties. *Ins. Co. v. Edgerton*, 402.

2. The degree of proof required for the reformation of a deed for mistake of the draughtsman or the mutual mistake of the parties is clear, strong and convincing evidence. *Ibid.*

3. In a suit by a mortgagee against the mortgagor's grantee upon the debt assumption contract in the grantee's deed, the grantee set up the defense that the debt assumption clause was inserted in the deed through the mistake of the draughtsman or the mutual mistake of the parties, and introduced testimony of the grantor and grantee that they did not contemplate that the grantee should assume personal liability for the mortgage debt but that the grantee was to take the property subject to the encumbrance, and testimony of the draughtsman that he had no specific instructions to insert the debt assumption clause in the deed. On cross-examination of the grantee the mortgagee elicited testimony from the grantee that he had deducted the amount of the mortgage debt in listing his solvent credits for taxation. *Held*, the conflict in the testimony does not justify the withdrawal of the issue from the jury, the credibility of the evidence being for it to determine, and the court properly submitted the issue to the jury under instructions that the defense must be established by clear, strong and convincing evidence. *Ibid.*

Removal of Causes.

A Right to Removal in General.

b Actions and Proceedings Removable

1. A guardian filed petition with the clerk of the Superior Court to be allowed to mortgage lands of her wards to obtain money to improve

Removal of Causes A b—*continued.*

the estate under the provisions of N. C. Code, 2180. The clerk entered an order allowing the petition, which was approved by the judge of the court, and the guardian borrowed the money and executed the mortgage to secure the notes given therefor. Upon becoming of age the wards filed a petition to set aside the order and cancel the mortgage solely on the grounds that the order was not made in strict compliance with the provisions of the statute. The respondent mortgagee filed a petition to remove the proceeding to the United States District Court upon allegations of diversity of citizenship and that more than $3,000 is involved in the proceeding. *Held*, the motion for removal was properly overruled, the proceeding not being a suit of a civil nature, at law or equity, within the meaning of the Federal Act regulating removal of causes. *Ex Parte Quick*, 627.

Res Gestæ see Evidence H b.

Sales.

A Nature and Requisites of Contracts of Sale.

a In General

1. Evidence that a party agreed to purchase certain specific stock at a designated price and that the seller agreed to sell at the price named, and that the parties agreed that the purchase price should be paid to a bank in which the seller had hypothecated the stock as security for a loan, and that the seller had directed the bank to release the stock upon the payment of the purchase price *is held* sufficient to establish a contract of sale. *Winborne v. McMahan*, 30.

F Warranties.

c Sales by Sample

1. In the sale of goods by sample the seller must deliver goods of the same kind, condition, quality, design and color as the sample where any or all of these elements are of the essence of the contract, and an instruction by the court that the goods must be "reasonably similar," "substantial duplication," etc., is too broad, and upon exception thereto the purchaser will be awarded a new trial. *Anderson Co. v. Mfg. Co.*, 42.

f Waiver of Breach of Warranty

1. The execution of renewal notes for a note given for the purchase price of merchandise, with knowledge at the time of such renewals of breach of warranty, waives the maker's right to set up a counterclaim for breach of warranty in an action on the last renewal note. *Sales Co. v. Meyer*, 198.

Schools and School Districts.

B Fiscal Management and Debt. (Constitutional requirements and restrictions on taxation see Taxation A.)

a Determination of Which School Agency May or Must Assume Debt or Issue Bonds

1. Under the provisions of C. S., 5599, a county may include in its debt service fund in its budget the indebtedness lawfully incurred by any of its school districts, including special charter districts, in the erection and equipment of necessary school buildings, and it

Schools and School Districts B a—*continued.*

is *not* prerequisite to the assumption of such debt of special charter districts that the districts should release their charters or that the trustees of such districts should convey the school property of such district to the county board of education, the title to property in special charter districts being in the trustees of such districts, C. S., 5419, 5490(1), and Public Laws of 1933, chap. 562, sec. 4, not altering this policy, and the act of 1933 relating primarily to uniformity of taxation, Art. V, sec. 3, and not to title to the property. *Hickory v. Catawba County*, 165.

2. Whether a county shall assume indebtedness incurred by its special charter school district in the erection and equipment of school buildings necessary to the constitutional six months term is not a matter of discretion with the counties, and the courts have jurisdiction and may hear evidence as to whether the buildings in question are necessary to the constitutional term, and testimony of qualified witnesses on the question is competent. *Ibid.*

3. County may issue bonds to repair and make additions to school houses necessary to constitutional school term. *Hurrell v. Comrs. of Wilson*, 225.

4. The mode by which the counties of the State shall effectuate the constitutional mandate to provide for the constitutional six months term of school, Art. IX, sec. 3, is prescribed by statute. *Hickory v. Catawba County*, 165.

5. County held authorized to issue bonds for sanitary improvements for school houses necessary to constitutional school term. *Taylor v. Board of Education*, 263.

c *Elections on Supplementary Levies*

1. Request for special election by school administrative unit held made in reasonable time under facts. *Forester v. North Wilkesboro*, 347.

2. The registration books for an election to vote on a special supplementary tax in a city school administrative unit were kept open for registration for four consecutive Saturdays prior to the election, but through inadvertence of the officials were closed the third Saturday before the election instead of the second Saturday prior thereto. Notice of the registration and election were duly published and the question was widely discussed in the locality for over a month before the election, and it appeared that the result of the election was not affected by the inadvertence in failing to keep the registration books open the second Saturday before the election. *Held*, although election officials should be careful to conduct elections in substantial compliance with law, the levy of the special tax approved at the election will not be enjoined upon suit of some of the taxpayers, it appearing that the inadvertence complained of was not prejudicial upon the entire record. *Ibid.*

C Operation of Schools, Contracts and Expenditures.

b *Allocation of Funds and Budgets*

1. A local-tax school district voted to levy a special tax to furnish funds to supplement the six months school term in the district. The district was abolished pursuant to chap. 562, Public Laws of 1933,

Schools and School Districts C b—*continued.*

and a new district comprising the same territory was established by the board of education and State School Commission as an administrative unit in the State-wide system of public schools. At the time of the abolition of the old district and the creation of the new, there was an unexpended sum in the fund created by the tax to supplement the school term: *Held*, the new district, as successor to the old, has authority to expend the fund for the purpose of supplementing the six-months school term of the district, that being the purpose for which the tax providing the fund was levied, and this result is not affected by the provisions of chap. 562, sec. 4, which requires certain funds to be placed in the debt service fund, section 4 applying only to funds collected from designated sources subsequent to the effective date of the statute, and not to funds on hand at the time of the creation of the new district. *Board of Education v. Burgin*, 421.

2. Objection that funds were not properly budgeted and appropriated to supplement school term, held untenable in this case. *Ibid.*

Seduction.

B Prosecution and Punishment.

c Instructions

1. In this prosecution for seduction defendant contended, supported by evidence, that prosecutrix knew he was married and that he had not obtained a divorce, and that she knew he could not marry her until he had obtained a divorce. Defendant requested an instruction that the burden was on the State to prove beyond a reasonable doubt that the promise of marriage was absolute and not conditional upon defendant's securing a divorce or any other condition. The trial court instructed the jury that the promise of marriage would have to be absolute and unconditional, and that a promise of marriage "if anything happened" was a conditional promise and would not support an indictment. *Held*, defendant was entitled to have the particular aspect of the case presented by the evidence submitted to the jury in every material part upon his request, and the charge as given failed to do so, and the refusal of the requested instructions entitles defendant to a new trial. *S. v. Henderson*, 830.

Sheriffs.

B Compensation and Commissions.

c Commissions on Tax Collections

1. Sheriff holding sales held entitled to commissions on cash received by county on tax certificates purchased by it. *Braswell v. Richmond County*, 74.

Specific Performance.

B Contracts Specifically Enforceable.

a In General

1. While as a general rule contracts relating to personalty are not specifically enforceable, the ground for the relief of specific performance is the inadequacy of damages at law, and on this principle there are exceptions to the general rule. *Trust Co. v. Webb*, 247.

States.

A Relation Between States and Between State and Federal Government.

c Respective Jurisdictions of State and Federal Courts

1. A Federal Court subsequently appointing a receiver for the property may not interfere by injunction with the processes of our courts against the property to enforce a judgment obtained against the possessors of the property in proceedings in garnishment. *Newberry v. Fertilizer Co.*, 182.

B Government and Officers.

b State Governmental Agencies in General. (Division of governmental powers see Constitutional Law B; particular State agencies see particular titles of such agencies.)

1. The doctrine that where a new governmental instrumentality is established it takes control of the territory and affairs over which it is given authority to the exclusion of other governmental instrumentalities does not prevail where it is inconsistent with the organic law or with statutes subsequently enacted. *Hickory v. Catawba County*, 165.

Statute of Frauds see Frauds, Statute of.

Statute of Limitations see Limitation of Actions.

Statutes. (Statutes construed see Consolidated Statutes.)

B Construction and Operation.

a General Rules of Construction

1. The legislative intent is controlling in the construction of statutes. *Trust Co. v. Hood*, 268.

Subrogation—Amount for which surety of bank deposit paying depositor may prove subrogated claim against the bank see Banks and Banking H c 9.

Summons see Process.

Supersedeas and Stay Bonds.

A Requisites and Necessity.

d Requirement of Additional Bond or Surety Upon Finding of Insufficiency of Original Bond

1. The trial court's order that appellant file supersedeas bond with another surety upon its finding that the surety upon the first bond was not sufficient *is held* without error. N. C. Code, 650. *Love v. Queen City Lines*, 575.

Taxation. (Right of *de facto* officers to issue municipal bonds see Municipal Corporations K c.)

A Constitutional and Statutory Requirements and Restrictions in Taxation and Issuance of Bonds.

a Right to Issue Bonds or Incur Debt Without Vote

1. The county commissioners of a county are given power to erect and purchase a jail and to levy taxes necessary to pay the same, and if the power to make needed and necessary repairs is not expressly given by the County Finance Act, chap. 81, sec. 8, Public Laws of 1927, it is necessarily implied from the larger powers therein enumerated, C. S., 1290, and taxpayers of the county cannot successfully maintain a suit to restrain the issuance of bonds for neces-

Taxation A a—*continued.*

sary repairs to the county jail and to enjoin the levy of taxes necessary to pay the principal and interest on such bonds. C. S., 1297(9), 1317. *Harrell v. Comrs. of Wilson*, 226.

2. Counties are given authority, as administrative agencies of the State, in the maintenance of the constitutional school term, to erect and purchase school houses and the land necessary therefor, chap. 81, sec. 8, Public Laws of 1927, and the power to make repairs and additions to school buildings is necessarily implied from the powers granted, and the county may issue its bonds necessary for such repairs and additions and levy taxes to pay principal and interest on the bonds. *Ibid.*

3. A county is authorized by specific or special legislation to issue without a vote bonds for sanitary improvements for its schoolhouses necessary for it to maintain, as an administrative unit of the State, the constitutional school term in the county, when the maturity dates of the bonds are within the limits fixed by the County Finance Act, and the bonded indebtedness of the county after issuance of the bonds will not exceed five per cent of the assessed valuation of the taxable property therein, 3 C. S., 1291(a). Chapter 81, sec. 8, Public Laws of 1927, as amended by chapter 60, Public Laws of 1931, 3 C. S., 5475, 5479. *Taylor v. Board of Education*, 263.

4. A city, under Legislative authority, voted to establish and maintain by taxation a system of public schools in the city. A number of years after the city school system had been in operation the city failed to pay in full the salaries due teachers, janitors and others employed in the city schools, and the teachers and other employees obtained valid judgments against the city for the amounts due them on salaries for the year in question. The city had validly levied for that purpose taxes sufficient to pay the salaries in full, and it admitted sufficient sums were collectible and would be collected from the levy to pay the salaries, but contended that it was without power to borrow money to pay the judgments for the salaries on the ground that such payment was not for a necessary purpose. Const., Art. VII, sec. 7. *Held*, the levy of the taxes had been approved by the qualified voters of the city, and the city had the authority to borrow money to pay the judgments in anticipation of the collection of the taxes validly levied for that purpose, N. C. Code, 2933. *Hammond v. Charlotte*, 604.

5. A municipal corporation may issue bonds for a sewer system ordered by the State Board of Health and bonds for a water system even though the total indebtedness of the town exceeds eight per cent of its assessed valuation, such bonds being for necessary expenses not requiring a vote, Art. VII, sec. 7, of the Constitution, and being authorized by the Municipal Finance Act, N. C. Code, 2636, *et seq.*, and the issuance of the bonds not coming within the inhibition of N. C. Code, 2943(2), against incurring debt in excess of eight per cent of the assessed valuation, the bonds coming within the exception provided in that section relating to bonds for water purposes, which includes sewer systems, and the exception relating to bonds for sewer systems ordered by the State Board of Health. *Lamb v. Randleman*, 837.

Taxation A a—*continued.*

6. A county has authority to issue funding and refunding bonds with the approval of the local government commission to take up valid, outstanding indebtedness of the county which were incurred for necessary county expenses. Art. V, sec. 6. *Brooks v. Avery County*, 840.

7. It is required by the County Finance Act that the question of the issuance of bonds for the purchase, construction, improvement and equipment of schools necessary for the maintenance of public schools in the county for the constitutional term, be submitted to the voters where a petition therefor signed by more than fifteen per cent of the voters of the county has been aptly filed, although in the absence of such petition, filed within the time prescribed by statute, a vote would not be necessary to the validity of such bonds, the bonds being for a necessary county expense. *Hemric v. Comrs. of Yadkin*, 845.

8. In a suit to enjoin the issuance of bonds by a city the trial court found, among other facts, that the city would issue the bonds unless restrained and that the issuance of the bonds had not been approved by the qualified voters and that the bonds would be issued to provide funds to build a drilling tower to train the city's firemen. Judgment was entered permanently enjoining the issuance of the bonds, the court being "of the opinion" that the bonds were not for a necessary municipal expense within the meaning of Article VII, section 7, of the Constitution. The only assignment of error on appeal was to the signing of the judgment. *Held*, even treating the assignment of error as one to the judgment as signed and treating the "opinion" that the bonds were not for a necessary expense as a finding of fact, the judgment is supported by the findings, to which no exception was taken, and the judgment must be affirmed on appeal. *Wilson v. Charlotte*, 856.

b Limitation on Tax Rate

1. A county tax rate of 16½ cents for the support of the constitutional school term and a rate of 8 cents to supplement the State school fund and to provide for a deficiency in the previous year *held* valid. *Powell v. Bladen County*, 46.

2. Municipality held authorized to issue bonds for water and sewer systems in excess of 8 per cent of tax valuation. *Lamb v. Randleman*, 837.

3. Bonds issued by a municipality for water and sewer systems should be deducted from the gross debt in computing the net debt of the municipality in relation to the prohibition against incurring debt in excess of eight per cent of the assessed valuation of property for taxation, bonds for sewer systems being necessarily included in bonds for "water purposes" within the meaning of N. C. Code, 2943, subsection 1(5). *Ibid.*

B Persons Liable.

h Mortgagors and Mortgagees

1. The mortgagor, the owner of the equitable title to the mortgaged property, is the real owner of the land and is liable for taxes thereon, which liability is unaffected by the mortgagee's taking

Taxation B h—*continued.*

peaceable possession after default and collecting the rents and profits therefrom, and where the mortgagor is a bank, and upon its insolvency, the Commissioner of Banks taking over its assets lists the property for taxes, and the mortgagee takes possession of the mortgaged building and collects the rents therefrom, and thereafter forecloses its mortgage and bids in the property at the sale, it may hold the bank liable for the taxes unpaid at the time of the sale, which is made a preferred claim in the bank's assets. C. S., 218(c). *Hood v. McGill*, 83.

D Lien and Priority.

b Levy and Lien Against Personalty

1. Where personal property is seized under valid writ of attachment prior to the time it is pointed out by a mortgagee or purchaser of real property from the owner of the personalty for the collection of taxes levied against the realty, N. C. Code, 8006, the levy on the personalty for taxes is subject to the prior levy under attachment, and the attaching creditors are entitled to a prior claim on the proceeds of sale of the personalty. N. C. Code, 8008. *Building and Loan Asso. v. Burwell*, 358.

H Tax Sales and Foreclosures. (Forfeiture of life estate for nonpayment of taxes see Life Estates D a; sheriff's right to commissions on tax sales see Sheriffs B c.)

c Attack and Setting Aside Tax Foreclosures

1. The legal and equitable owners of land, although not parties to the suit to foreclose a tax certificate on the land, N. C. Code, 8037, may appear and make a motion to cancel the deed to the purchaser at the sale, and to make the purchaser at the sale a party to the action, on the grounds that the land was not listed in the name of the true owner, N. C. Code, 7971(15), (36), and that the service by publication obtained in the action was void because the listed owner was a resident of the county. *Buncombe County v. Penland*, 299.

2. Where the legal and equitable owners of land appear in a suit in which a tax sale certificate had been foreclosed and the land sold under the provisions of N. C. Code, 8037, and move that the deed to the purchaser at the sale be set aside and that the purchaser be made a party for the purpose of the motion, the appearance of the movants is a general and not a special appearance although they term their appearance a special appearance in their motion. C. S., 401. *Ibid.*

3. The procedure to set aside a deed to the purchaser at a foreclosure of a tax sale certificate on the grounds that the property had not been correctly listed and that the service by publication was void, is by motion in the cause. *Ibid.*

4. On a motion to set aside a deed to the purchaser at a foreclosure of a tax sale certificate, the listed owners of the property, the purchaser at the sale, the mortgagor, and all persons having a legal or equitable interest in the property should be made parties to the proceeding for a complete determination of the controversy. C. S., 460. *Ibid.*

Taxation H c—*continued.*

5. The title of the purchaser at a tax foreclosure sale may not be challenged by the listed owner upon the purchaser's motion for a writ of assistance. In the instant case the land was bought by a municipality and it does not appear of record that the purchase of the land was *ultra vires*, a municipality having the power to purchase land for certain purposes. C. S., 2623(3). *Wake County v. Johnson*, 478.

Telegraph Companies.

A Liability for Delay in Transmitting or Delivering Messages.

b Duty to Advise Sender that Message Cannot be Delivered

1. Where the address given on a telegram shows that the sendee and the person in whose care the message is sent lives on a rural free delivery mail route from the terminal office beyond the free delivery limits of the telegraph company and probably beyond the limits of the city, the company may assume that the sender knew the facts and had given the best address known, and it is not under duty to send a service message to sender giving notice that the telegram could not be delivered by messenger without the payment of an additional charge, and having failed, after due diligence, to locate the sendee or the person in whose care the message was sent by telephone, it is justified in delivering the message by posting it at the terminal office. *Hobbs v. Tel. Co.*, 313.

c Evidence and Burden of Proof

1. Where it has been shown that a telegraph company failed to deliver a death message between its offices within the State in twenty-four hours a prima facie case of negligence is made out, placing the burden on defendant to rebut the prima facie case, if it chooses to do so, the burden remaining on plaintiff on the issue of defendant's negligence. *Hobbs v. Tel. Co.*, 313.

2. Where all the evidence introduced by defendant telegraph company tends to rebut a prima facie case of negligence on its part in delivering a telegram, and there is no conflict in the evidence as to the facts constituting such rebuttal, the company is entitled to an instruction that if the jury finds the facts to be as testified by the witnesses to answer the issue of negligence in defendant company's favor. *Ibid.*

Trespass.

A Acts Constituting Trespass and Liability Therefor.

d Forceable Trespass

1. Forceable trespass is a high-handed invasion of the actual possession of another, he being present and forbidding, and although actual force need not be used, it is necessary that the trespasser by acts or threats plainly imply the purpose to use force against resistance, and create the reasonable apprehension that the party in possession must yield to avoid a breach of the peace, and even if the party's entry is peaceable he may become guilty of forceable trespass if he thereafter puts himself in open opposition to the occupant. *Anthony v. Protective Union*, 7.

Trespass A d—*continued.*

2. Evidence tending merely to show that plaintiff was nervous and that defendant talked to her in a loud voice and accused her of having made false statements in her application to defendant's insurance company and that both parties became angry, and that thereafter plaintiff's brother put defendant out without the slightest opposition on his part *is held* insufficient to be submitted to the jury on the issue of forceable trespass, the evidence failing to disclose any offer of violence or the use of profane or indecent language, or threats, or any force or assault. *Ibid.*

Trial. (Of particular actions see particular titles of actions.)

A Time of Trial, Notice and Preliminary Proceedings.

a Calendar and Docket

1. It is within the discretion of the court, for cause shown, to place a case at the end of the trial docket, but a provision in the order that the case thus remain until plaintiff, appearing *in propria persona*, should employ counsel is erroneous. *Abernethy v. Burns*, 370.

c Motion to Reinstate Case on Docket After Nonsuit for Failure to Appear

1. After judgment of nonsuit has been entered for plaintiff's failure to appear when the action is called for trial, a motion to reinstate the action on the docket, made by plaintiff later on the same day the case was called for trial, is addressed to the discretion of the court, and the court's order denying the motion is not appealable. *Parham v. Hinnant*, 200; *Parham v. Hinnant*, 201.

D Taking Case or Question from Jury.

a Nonsuit. (In criminal actions see Criminal Law I j; in particular actions see particular titles of actions.)

1. On a motion as of nonsuit all the evidence, whether offered by plaintiff or elicited from defendant's witnesses is to be considered in the light most favorable to plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567. *Brunswick County v. Trust Co.*, 127; *Hood v. Mitchell*, 156; *Sherwood v. Express Co.*, 243; *Blackman v. Ins. Co.*, 429; *Lumber Co. v. Power Co.*, 515.

2. In an action by a mortgagor to prevent foreclosure and to obtain judgment on a contract of a third person to pay principal and interest on the debt satisfactorily to the mortgagee, the allegations and evidence of such third person that the alleged contract was obtained by fraud and misrepresentations entitles her to the affirmative relief of having the contract canceled upon a favorable verdict of the jury, and the mortgagor and mortgagee may not take a voluntary nonsuit against her, the contract entailing liability on her part in the event of deficiency after foreclosure. *Bolich v. Ins. Co.*, 144.

3. Nonsuit under C. S., 567, is permissible only on demurrer to the evidence, and not on demurrer to the complaint or motion for judgment on the pleadings. *Dix-Downing v. White*, 567.

Trial D—*continued.*

b Directed Verdict

1. Where the only inference that can be drawn from the evidence is in plaintiffs' favor, the court may instruct the jury to answer the issue acccordingly if they believe the evidence. *Brunswick County v. Trust Co.*, 127.

2. Where there is no conflict in telegraph company's evidence in rebuttal of prima facie case, directed verdict in its favor is not error. *Hobbs v. Tel. Co.*, 313.

E Instructions.

e Requests for Instructions

1. Where plaintiff, in an action to recover damages to lands from a municipal sewer system, desires more specific and detailed instructions on the issue of permanent damage he should present prayers for special instructions. *Lightner v. Raleigh*, 496.

f Exceptions and Objections

1. Error in statement of contentions of party must be brought to court's attention in time for correction. *Winborne v. McMahan*, 30; *Dail v. Heath*, 453.

2. Where the court states to the jury in its charge that there was no issue of fraud and that this feature of the case had been abandoned, appellant's contention that the question of fraud should have been considered by the jury under one of the issues submitted will not be sustained where the matter was not brought to the trial court's attention in time for correction at the trial. *Hayes v. Ferguson*, 414.

h Additional Instructions and Redeliberation by Jury

1. Where defendants in an action to recover land have no counterclaim because of the elimination of fraud from the case or the abandonment of that element alleged in the answer, it is not error for the court upon the return of a verdict assessing damages on the issue of defendants' counterclaim to give additional instructions that defendants were not entitled to recover damages if the jury should find that plaintiffs were entitled to the land. *Hayes v. Ferguson*, 414.

F Issues.

a Form and Sufficiency in General

1. Where the issues submitted arise upon the pleadings and are determinative of the facts in dispute they will not be held for error on appeal. *Lightner v. Raleigh*, 496.

2. The refusal to submit issues tendered by a party will not be held for error when the issues submitted present for the determination of the jury the law arising upon the facts in accordance with the decisions of the Supreme Court. *Rand v. Ins. Co.*, 760.

G Verdict.

d Impeaching Verdict

1. An affidavit in regard to what a juror said in the jury room while discussing the case is held incompetent to impeach the verdict under the rule that jurors may not impeach their own verdict. *Lambert v. Caronna*, 616.

Trial—*continued.*

H Trial by Court by Agreement.

b Findings of Fact

1. The refusal of the trial court to find that defendants contemplated a merger of banking corporations is equivalent to a finding that no such purpose was contemplated by them. *In re Trust Co.*, 12.

2. The refusal of the trial court to find certain requested facts is equivalent to a holding that such requested facts are not supported by the evidence. *Hickory v. Catawba County*, 165.

Trusts—Management of charitable trusts see Charities.

Venue.

A Nature and Subject of Action.

a Interest in Realty

1. An action against the endorser of a negotiable note secured by a deed of trust and against the transferee of the equity of redemption on his debt assumption contract in his deed, to recover from each of the parties on their liability on the note is not an action involving an interest in real estate, plaintiff not being entitled to a decree of foreclosure on the facts alleged, neither the trustee nor the trustor being parties to the action, and defendants' motion aptly made, C. S., 913(a), for removal of the action as a matter of right to the county in which the land is situate was properly refused. C. S., 463(1). *White v. Rankin*, 104.

2. An action in the nature of an accounting by a corporate plaintiff against individual defendants residing in another county in this State, in which plaintiff seeks judgment on certain notes secured by a deed of trust executed by two of the defendants, and to have the indebtedness thus alleged credited with the amount of a judgment against plaintiff obtained by the makers of the notes, and to restrain execution on the judgment and to set aside the assignment of the judgment by the makers of the notes to the other defendants, is properly brought in the county in which the corporate plaintiff maintains its principal office. C. S., 469. *Bank v. Kerr*, 610.

d Residence of Parties

1. Action held not to involve realty and was properly brought in county in which corporate plaintiff maintained principal office. *Bank v. Kerr*, 610.

e Actions Affecting Judgments of Another County

1. Action to have judgment credited on debt due by defendant to plaintiff judgment debtor, and to restrain issuance of execution need not be brought in county in which judgment was rendered. *Bank v. Kerr*, 610.

Warehousemen.

B Duties and Liabilities.

a Issuance of Receipt

1. Plaintiff stored cotton encumbered with a lien in defendant's warehouse, and defendant warehouse company issued official receipts therefor to the holder of the lien. The jury found from the evi-

Warehousemen B a—*continued.*

dence that the warehouse company had agreed to issue the official receipts to plaintiff and that plaintiff suffered loss resulting from breach of the agreement by the warehouse company. *Held*, plaintiff is entitled to recover upon the verdict the amount of the loss sustained, even if the receipts could not have been issued as agreed, chapter 168, Public Laws of 1919, sec. 12, and defendant warehouse company's demurrer to the evidence was properly overruled. *Northcutt v. Warehouse Co.*, 842.

C Funds Held by State Treasurer to Guarantee Official Receipts.

c Claims Against Fund

1. A recovery may not be had against the State Treasurer out of the fund accumulated under chapter 168, Public Laws of 1919, for a loss resulting to plaintiff by failure of a warehouse to issue official receipts for cotton to plaintiff as agreed, the receipts having been issued to the holder of a lien against the cotton and the warehouse having refused delivery of the cotton to plaintiff upon his demand, since the purpose of the act is to make warehouse receipts acceptable as collateral (sec. 5), and plaintiff is not the holder of the receipts. *Northcutt v. Warehouse Co.*, 842.

Waters and Water Courses.

C Surface Waters, Dams, Ponds and Streams.

d Sudden Increase in Flow of Streams

1. Evidence that defendant suddenly increased the flow of surface water to plaintiff's damage held sufficient. *Lumber Co. v. Power Co.*, 515.

2. The evidence in this case that defendant's bridge had been built a little above high water mark, and that defendant had left no more logs and slabs along the stream bed than was customary in lumbering operations *is held* sufficient to justify the submission of the question of contributory negligence to the jury in plaintiff's action to recover for the destruction of its bridge which was washed out when a greatly increased flow of water along the stream piled up such debris against the bridge, overflowed it, and washed it out, and defendant's motion for judgment as of nonsuit on the ground of contributory negligence was properly refused. *Ibid.*

Wills.

B Contracts to Convey.

b Actions Upon Contracts to Convey

1. The prayer for relief does not determine the scope of plaintiff's right to relief, and where the plaintiff prays for recovery only on the alleged contract to devise, and the allegations and evidence are sufficient to warrant a recovery on *quantum meruit* for services rendered testatrix, it is not error for the court to submit issues as to both the alleged express contract and the implied contract to pay for the services. *Lipe v. Trust Co.*, 24.

2. In this action to recover for services rendered testatrix issues were submitted to the jury as to both an alleged contract to devise and plaintiff's right to recover upon *quantum meruit*, the jury found that there was an express contract to devise in consideration of personal services to be rendered and that plaintiff breached the contract.

Wills B b—*continued.*

Held, the jury's finding on a subsequent issue that plaintiff rendered personal services upon an implied agreement to pay for same is rendered inoperative, and on appeal from judgment thereon defendant is held entitled to a new trial. *Ibid.*

C Requisites and Validity.

a Animus Testandi

1. Where propounders introduce ample evidence that the paper-writing was in the handwriting of deceased and there is no evidence to the contrary, and the paper-writing is dispositive on its face and unequivocally shows the intention of deceased that it should operate as his will, the *animus testandi* is conclusively presumed, and it is error for the court to submit the question of such intention to the jury over the objection of propounders. *In re Will of Rowland*, 456.

c Attestation

1. The evidence in this caveat proceeding was to the effect that the subscribing witnesses, at the request of the chief beneficiary under the will, took the paper to the testatrix at her home where she was confined to her bed by sickness, that the will was read to her, and that in response to a question as to whether she understood it she nodded her head affirmatively, and that she touched the pen, making her mark, after being shown the line for her name, and that she could see the blank lines for the names of the attesting witnesses, and that thereafter the attesting witnesses signed the attesting clause in her presence: *Held*, the evidence was sufficient to be submitted to the jury on the issue of due attestation, it being for the jury to determine whether the testatrix impliedly requested the attesting witnesses to attest the will, an implied request being sufficient. C. S., 4131. *In re Will of Kelly*, 551.

D Probate and Caveat. (Caveators held estopped by record from attacking validity of will see Estoppel B a.)

a Probate, Jurisdiction and Proceedings

1. The last actual place of residence of the deceased is not determinative of his domicile in regard to the jurisdiction of the clerk in probating his will, but change of domicile is to be determined by his intent to abandon his first domicile and acquire another elsewhere, and where there is evidence that he was born in the county in which his will was offered for probate and continued to live there except for temporary residence for business purposes in other states at various times, and that he intended to return here and regarded this State as his domicile, *is held* sufficient to base a finding that his domicile was the county of probate, although there was some conflict in the evidence. *In re Estate of Finlayson*, 362.

b Evidence in Caveat Proceedings

1. Upon the issue of mental capacity of a testator to make a will at the time of its execution evidence of incapacity within a reasonable time before and after its execution is competent, and what is a reasonable time cannot be definitely limited, but must be determined in accordance with the facts and circumstances of each particular case. *In re Will of Hargrove*, 307.

Wills D h—*continued.*

2. Nonexperts are competent to give opinions as to the mental capacity of a testator at the time of the execution of the will, but such opinions must be based on the witnesses' acquaintance with, observation of or experience with the testator. *Ibid.*

3. Testimony of a witness that the testatrix did not have sufficient mental capacity to execute a will when he talked with her some nineteen years after the execution of the will caveated *is held* too remote to be competent on the issue of the testatrix's mental capacity at the time of the execution of the will. *Ibid.*

4. In this caveat proceeding the sole issue was the mental capacity of the testatrix at the time of the execution of the will. A witness was asked his opinion as to testatrix's mental capacity and answered that he thought she knew she was making a will but did not know the purport of it because of undue influence exerted upon her: *Held*, the answer was not responsive to the question, and was not relevant to the issue of mental capacity, and propounders' motion to strike out the answer should have been allowed. *Ibid.*

F Rights and Liabilities of Devisees and Legatees. (Action to force trustee to pay plaintiff moneys for his support under terms of charitable trust created by will see Charities B.)

d Election

1. Plaintiff claimed an unliquidated amount for services rendered testatrix, and in her will testatrix bequeathed plaintiff a certain sum. The will directed the executor to pay all testatrix's just debts. *Held*, under the facts of this case plaintiff was not required to elect between the legacy and his claim for services rendered. *Lipe v. Trust Co.*, 24.

2. In this action to recover for services rendered testatrix issues were submitted both as to an express contract to devise and an implied contract for *quantum meruit*. The testatrix bequeathed a certain sum to plaintiff, and on the issue of an express contract the court charged the jury that if plaintiff should be allowed a recovery by the jury the court would subtract such recovery from the specific bequest to plaintiff. *Held*, the charge was prejudicial to plaintiff and a new trial is awarded on appeal. *Ibid.*

Witnesses—Testimony of transactions with decedent see Evidence D b; Privileged communications see Evidence D e; impeaching witness see Criminal Law G r; testimony of wife against husband see Husband and Wife B e; allowance of fees to experts see Costs.

Workmen's Compensation Act see Master and Servant F.